

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Miss Rebecca Chandler
 Represented by: (Miss Chandler represented herself)

RESPONDENT: Mrs Karen Michel
 Represented by: (Mrs Michel represented herself)

Tribunal Members: Mrs C Latham (Chairman)
 Mr N Harris
 Mr G Jennings

Hearing date(s): 16 September 2014

Decision of the Tribunal

Having considered all the evidence presented, whether recorded in this judgment or not, and the representations of both parties, and having due regard to all the circumstances, the Tribunal found that, under the provisions of The Employment Protection (Guernsey) Law, 1998, as amended that the Applicant was unfairly dismissed.

The Tribunal was offered no evidence of a reason to reduce the amount of the Award under section 23(2) and did not consider that there was any circumstance to do so. When calculating the Award under Section 22(1)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, the Tribunal determined that the Applicant's pay during the six months prior to the termination of her employment was £11,154.00.

Amount of Award: £11,154.00

Ms Caroline Latham

 Signature of the Chairman

22 October 2014

 Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal's Decision (Form ET3A) are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

The Legislation referred to in this document is as follows:

The Employment Protection (Guernsey) Law 1998, as amended ('the Law')

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Miss Rebecca Chandler, appeared in person and gave evidence under oath.
- 1.2 The Respondent, Mrs Karen Michel, appeared in person and gave evidence under oath.
- 1.3 The Applicant claimed that she was unfairly dismissed on 4 November 2013.
- 1.4 The Respondent admitted the dismissal but denied that it was unfair because:
 - a) the Applicant had less than the 12 months employment ordinarily required in order to qualify under the Law; and
 - b) if the Tribunal found that the Applicant qualified under the Law, the dismissal was for reasons of redundancy.
- 1.6 Miss Chandler claimed that she had been employed since November 2010.
- 1.7 The parties agreed that it was appropriate for the Tribunal to determine whether the Applicant had more than 12 months service and was therefore qualified to make a claim under the Law by virtue of the fact that her employment should be treated as continuous in accordance with Clause 7 of the Schedule to the Law.
- 1.8 If the Tribunal found that the Applicant's period of employment did qualify under the Law the complaint would be heard.

2.0 Facts Found by the Tribunal

- 2.1 The following facts have been derived from the evidence presented by both parties, form ET1 and ET2 and attachments thereto, document bundles ER1 and EE1 and document EE2.

3.0 The Qualifying Period and Continuous Employment

- 3.1 The business is operated as a physical fitness and training centre operating under the name of 'Curves'. Curves is a trading style of the Curves Europe Franchise. Curves as Franchisor has no financial interest or direct control over the business.
- 3.2 The Applicant commenced employment as a circuit trainer with Curves in July 2010. In October 2010 Miss Chandler was promoted to Assistant Manager.
- 3.3 The business is not and never has been a Limited Company.

- 3.4 On 1 June 2013 the Respondent purchased the business from the previous owner and became the owner/operator. At the same time she also entered into an agreement to continue the relationship as Franchisee with Curves Europe.
- 3.5 The business had four employees at the date of purchase by the Respondent, including Miss Chandler.
- 3.6 The business continued to operate after the date of the sale and the Applicant continued in her role as Assistant Manager.
- 3.7 In early June 2013, the Respondent issued a new contract of employment to the Applicant to take effect on 1 June 2013, to reflect the change of ownership.
- 3.8 The Tribunal determined that the Applicant's employment was continuous for the period July 2010 to 4 November 2013 in accordance with Section 34 of the Law and Section 7(2) of the Schedule relating to Continuous Employment.

4.0 Unfair Dismissal Claim

- 4.1 In 2012 the then owner of the business, decided to sell the fitness club.
- 4.2 In February 2013, the Respondent joined the fitness club as a member and the Applicant approached her to determine whether the Respondent would consider purchasing the business which she did on 1 June 2013.
- 4.3 The Respondent entered into a new franchise agreement with Curves Europe on 8 August 2013.
- 4.4 The business employed four staff and was unprofitable at the date of purchase.
- 4.5 In June 2014 the Respondent decided that there was an overlap of staff hours that was unnecessary and discovered that all four staff members were paid to work every Saturday when, in fact, they actually only worked alternate Saturdays.
- 4.6 The Respondent held a staff meeting on 8 June 2013. Many subjects were discussed including the need to improve the performance of the business, staff rotas, holiday cover etc. The agenda and notes of the meeting makes no specific mention of the possibility of staff redundancy although there is some mention of staffing levels in connection with the subject of holiday cover.
- 4.7 Following the meeting, the working hours of each staff member were discussed on an individual basis and this resulted in one staff member reducing their working hours.
- 4.8 The Respondent held meetings and discussions with Miss Chandler to discuss both the financial performance and staffing levels of the business.
- 4.9 Whilst there had been an increase in membership during the summer, the business was still making a financial loss.

- 4.10 During the period 22 August – 4 October further discussions regarding staffing levels took place between the parties.
- 4.11 During the same period, one staff member agreed to reduce her working hours, and another staff member informed Mrs Michel that she was leaving. The parties also discussed the possibility of the Applicant reducing her working hours.
- 4.12 Ms Michel increased her involvement with the business. At first she had intended to work 15 – 20 hours per week and rely on an assistant manager. Over the summer months she increased her involvement and took over the management responsibilities previously assigned to Miss Chandler. By the end of the summer Mrs Michel was working full time in the business.
- 4.13 On 4 October 2013 a new part time member of staff commenced work and on 25 October 2013 the Respondent sent an email message to Miss Chandler stating “... *perhaps another part timer could be the trick*”.
- 4.14 On 15 October 2013 Miss Chandler dealt with a request from her employer to deal with an advert in a local magazine.
- 4.15 At approximately 9.30 am on 4 November 2013 the Respondent posted a message on the Club’s ‘Facebook’ page stating that she would arrive at work at 11.00 am. She also made enquiries regarding an advert that was due to be published in a local magazine. There was an exchange of messages in which Mrs Michel expressed her displeasure at Miss Chandler’s handling of the proposed advert.
- 4.16 At approximately 12.00 noon Mrs Michel met with three members of staff. On leaving that meeting one of them informed Miss Chandler that she (Mrs Michel) was annoyed and angry with her (Miss Chandler).
- 4.17 At 12.17 pm on the same day Miss Chandler sent a text message to the Respondent stating how badly she felt after receiving the earlier email message and how it was an unfair reaction by the Respondent.
- 4.18 Within an hour, Ms Chandler was called to an immediate meeting with the Respondent.
- 4.19 The Applicant was informed that she was to be made redundant. The reason given was that the owner was taking a managerial role in the business which would duplicate Miss Chandler’s role as Assistant Manager. Miss Chandler was handed a letter informing her that her role was redundant, asked to hand over her keys and leave immediately.
- 4.20 On hearing the news of her redundancy, Miss Chandler offered to take a demotion in her job role but this was rejected by her employer.
- 4.21 The Respondent did not give advance notice of the meeting on 4 November 2013.

5.0 The Law

The Law referred to in this section is The Employment Protection (Guernsey) Law, 1998, as amended.

- 5.1 In determining whether the dismissal of an employee was fair or unfair, Section 6(1) of the Law notes that *“it shall be for the employer to show (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and (b) that it was a reason falling within subsection (2)”* and Section 6(2) notes *“For the purposes of subsection (1)(b), a reason falling within this subsection is a reason which (c) was that the employee was redundant”*.
- 5.2 Section 6(3) of the Law notes *“Where the employer has fulfilled the requirements of subsection (1), then, subject to the provisions of sections 8 to 14 and (15I), the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.”*
- 5.3 Section 22(1) of the Law notes *“Subject to the provisions of section 23, the amount of an award of compensation for unfair dismissal is a sum equal to – (a) six months’ pay, ...”* and Section 23(2) of the Law notes *“Where in relation to such a complaint the Tribunal considers that, by reason of any circumstances other than those mentioned in subsection (1), it would be just and equitable to reduce the amount of the award of compensation for unfair dismissal to any extent, the Tribunal shall, subject to subsection (3) and subsection (4), reduce that amount accordingly.”*
- 5.4 Section 31(9) of the Law notes *“A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Law before the Tribunal any code of practice issued under this section shall be admissible in evidence, and if any provision of the code appears to the Tribunal to be relevant to any question arising in the proceedings (including, without limitation, any question as to whether an employer has acted reasonably or unreasonably for the purposes of section 6(3)) that provision shall be taken into account in determining that question.”*
- 5.5 Section 7(2) of the Schedule relating to Continuous Employment in accordance with Section 34 of the Law states *“If a trade or business, or an undertaking (whether or not established by or under an enactment), is transferred from one person to another – (a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and (b) the transfer does not break the continuity of employment.”*

6.0 Conclusions

- 6.1 The Tribunal heard oral evidence and representation from both parties. It also considered all the written evidence before it whether specifically mentioned in this judgment or not.
- 6.2 In any claim for dismissal where a dismissal that is proven takes place, the burden of proof lies with the Respondent to show the reason for the dismissal and that the dismissal was fair. The Tribunal must decide whether the dismissal was within the band of reasonable responses open to the employer.
- 6.3 In this case the Respondent admitted the dismissal, it being for reason of redundancy. The burden of proof, therefore, lies with the Respondent to show that the dismissal was fair.
- 6.4 Whilst there are no statutory provisions in Guernsey that deal specifically with redundancy, an employee may make a claim for unfair dismissal under the Law. Redundancy is recognised as a valid reason for dismissal, but redundancies can be unfair. The Tribunal must be satisfied that:
- The redundancy itself is genuine and the real reason for the dismissal.
 - The employer's procedure is fair and reasonable including staff consultation.
 - The redundancy applied equally to one or more employees who hold similar positions and that the selection for redundancy is made in a fair way.
 - The employer has given adequate consideration to offering alternative employment.
- 6.5 The Respondent's business is small and the Tribunal accepts that the detailed redundancy procedures expected of larger organisations described above may not be practical. However, fair principles of procedure should still be applied. These principles include:
- Consultation with staff before final decisions are reached.
 - Ensuring that there is a fair and objective process for selection.
 - Taking all reasonable steps to avoid or minimise redundancy.
- 6.6 In reaching its conclusions the tribunal had to analyse each part of the claim. The dismissal was admitted, but was the reason fair? If the evidence did not support the Respondent's assertion that the dismissal was for redundancy, then the Tribunal must move to determine whether it was fair or unfair.
- 6.7 In its deliberations, the Tribunal has placed significant weight upon the Commerce and Employment Code of Practice 'Handling Redundancy' ('the Code '). Whilst failure by an employer to observe any of the Code does not of itself render him or her liable to any legal proceedings, if a complaint of unfair dismissal is brought before a Tribunal, the

Tribunal may consider the relevance of the Code of Practice, including whether or not a genuine redundancy situation exists, whether or not any redundancy procedure was followed prior to dismissal and whether or not, in all the circumstances, an employer acted reasonably and fairly. The Tribunal considered each aspect of the Code and applied the evidence against the criteria described for a small business. In evidence the Respondent acknowledged being aware of the Code,

- 6.8 The Tribunal considered whether there was a genuine reason for dismissal on grounds of redundancy. In this case the Respondent argued that the reason for redundancy was economic. Mrs Michel had purchased the business in June 2013 and gave evidence that the business was not profitable. Income had reduced by 40% compared with the previous 12 months. She concluded that the business was overstaffed and despite an increase in membership since 1 June 2013, the business was making a financial loss. She produced management accounts and gave oral evidence regarding the state of the business including the financial losses and the projected future financial position for the period 1 June 2013 onwards. On the basis of this evidence there were clearly grounds for the Respondent to consider making significant reductions in the overhead of the business. The Tribunal accepts that at the outset of the process, dismissal of staff on the grounds of redundancy was a justifiable option for genuine economic reasons after the Respondent's review of the business.
- 6.9 The process of consultation was considered by the Tribunal and whether the employees were consulted about the redundancy situation well before the final decision was made as required by the Code. Evidence was given that on 8 June 2013 Mrs Michel held a staff meeting with all employees and explained the need to reduce costs. The minutes of the meeting alluded to 'overstaffing' when discussions took place during an agenda item regarding holiday cover. However, there is no mention of the possibility that redundancy was specifically being considered. This meeting was followed by discussions with individual staff members. As a result, it was agreed with one staff member that she would reduce her working hours. The Tribunal accepts that meetings took place with each member of staff following the meeting on 8 June and that there may have been concerns amongst the staff about the possibility of redundancy.
- 6.10 During the summer months Mrs Michel increased her involvement with the business. In effect, she had increased the staffing levels of the business by working full time herself.
- 6.11 The Tribunal accepts that Mrs Michel reviewed staffing levels, hours of work and staff performance with the Applicant during the period June – October 2013. The review usually took the form of informal discussions together with exchanges of emails and text messages.
- 6.12 By 22 August 2013 Mrs Michel remained of the opinion that there was a need for staff reductions by way of redundancy. This is supported by a series of messages and

meetings from that date onwards where she sought Miss Chandler's views as to which staff member should be made redundant and the reasons for her opinion.

- 6.13 By early September the Respondent knew that one staff member was leaving voluntarily, but in spite of this, the Respondent maintained that there was still the need for a further reduction in staffing levels. During these discussions Miss Chandler's opinions were sought again as to which member of staff should be made redundant and it appears that during this time the Respondent changed her mind from one staff member to another. The discussions and exchanges of messages continued between the parties throughout this period until 4 October 2013. The Code of Practice states that *"The aim of consultation is to enable all those concerned in the redundancy to understand and share the problems they are facing. Consultation also enables suggestions and alternative options to be explored at the earliest opportunity, reduces uncertainty and promotes more positive dialogue between an employer and employee"*. Even in a small business, the employer has a duty to consult with employees and whilst in this case there was discussion about other staff, the Tribunal accepts Miss Chandler's evidence that at no time during these exchanges was there any suggestion that her own position was being considered for redundancy and concluded they did not constitute a process of consultation with her.
- 6.14 The Tribunal considered the events on 4 November 2013. Miss Chandler described that there had been an exchange of messages about an advert due to appear in a local magazine. Although she could not recall the exact words used by the Respondent, she described it as a "rant". Miss Chandler stated *"I was very taken aback by her reply but also not completely shocked as Karen has a tendency for fairly impulsive behaviour in my opinion"*. As a result, the Applicant was upset and sent a message to the Respondent to say that she thought that the comments had been unfair. When the Respondent arrived at work at 11.00 am she ignored Miss Chandler, which was unusual as she would normally say "hello" or acknowledge her. At about 12.00 pm the Respondent met with other staff members and as they came out of the meeting one of them mentioned to Miss Chandler that *"Karen was annoyed and angry about the advert"*.
- 6.15 About half an hour later and, significantly, with no prior notice, the Respondent called Miss Chandler to a meeting and she was informed that her position was redundant. The Respondent acknowledged under examination that the Claimant would have had no suspicion that she was to be made redundant. The reason given for the redundancy was that her role duplicated the Manager's role. In response, Miss Chandler offered to take a demotion but this was rejected. There was no discussion regarding suitable alternative employment or ways to *"minimise redundancy e.g. offering alternative work if it exists"* in accordance with the Code
- 6.16 The Respondent described her reasons for selecting Miss Chandler for dismissal on the grounds of redundancy. She stated that she had taken the following reasons into account:

- i) As the Respondent was taking over the full time management of the gym and there was a duplication of roles, there would be no need for an assistant manager.
- ii) The most savings would be made from Miss Chandler's rather than anyone else's redundancy
- iii) Of the two employees she considered for redundancy, the other more junior circuit coach did have administrative skills that would be useful in the future.

6.17 The Tribunal considered whether the dismissal, on grounds of redundancy, was fair in accordance with the Law. The Tribunal analysed the reasons for the dismissal and accepts that in June 2013 there was a need to reduce the overheads of the business by making one employee redundant. It also accepts that there was dialogue with Miss Chandler regarding the selection of candidates for redundancy but the Applicant was never informed that her own role was to be included in the pool for selection. However, by September the resignation of a staff member appears to have fulfilled the requirement to make one staff member redundant. The Tribunal concluded that this turn of events fulfilled Mrs Michel's contention that it was necessary to reduce the staff complement by one person. The Tribunal's conclusion was further supported by the fact that by early October 2013 a new part time staff member was recruited by the Respondent and by the end of that month Mrs Michel sent a message saying "... perhaps another part timer could be the trick", suggesting that further recruitment should take place.

6.18 Mrs Michel had assumed greater involvement in the business and, by the admission of both parties, took over and replaced the Applicant's role. The Tribunal concluded that by the date of the dismissal, the Respondent had taken over Ms Chandler's position herself. In Mrs Michel's own words "there was a duplication of role" and at the time of dismissal cited this fact as a reason for the dismissal. In fact, she had created a position for herself in place Miss Chandler's position.

6.19 The Tribunal noted that, having dismissed the Applicant on 4 November, further recruitment took place and, on 19 November, the Respondent advertised the position of a coach for 25 hours per week.

6.20 The Tribunal considered whether the redundancy was genuine. To be a fair dismissal for reasons of redundancy, Mrs Michel had to satisfy the Tribunal that the job undertaken by Miss Chandler no longer existed and that she could not have reasonably, in the circumstances, given the Applicant another job in the business. As a result of the evidence presented, the Tribunal concluded that the duties undertaken by the Applicant were still required and that Mrs Michel had, by her own actions, taken over the role fulfilled by Miss Chandler. Furthermore, Mrs Michel made no attempt to offer alternative employment to Miss Chandler in spite of the fact that during October 2013 she recruited a new staff member and that it is clear from the evidence that further recruitment was being considered by her immediately before and after Miss Chandler's dismissal. In summary and for the reasons described above, the Tribunal considers that

on the balance of probabilities, this dismissal was unfair and was for a reason other than redundancy because the role undertaken by Miss Chandler did not cease.

7.0 Decision

7.1 Having considered all the evidence presented, whether recorded in this judgment or not, and the representations of both parties, and having due regard to all the circumstances, the Tribunal found that, under the provisions of the Employment Protection (Guernsey) Law, 1998 as amended, the Applicant was unfairly dismissed for a reason other than redundancy.

8.0 Award

8.1 An award of £11,154.00 is made having been determined by reference to the Applicant's final six months employment with the Respondent.

Ms Caroline Latham
.....

Signature of the Chairman

22 October 2014
.....

Date