



THE EMPLOYMENT & DISCRIMINATION TRIBUNAL

Applicant: Miss Jacqueline Troughton
Represented by: Mr Andrew Castle

Respondent: CT Plus Guernsey Limited
Represented by: Mrs Nicki Withe

Tribunal Members: Mr Jason Hill (Chairman)
Mrs Tina Le Poidevin
Ms Helen Martin

Pre-Hearing Review date: 10 July 2017

Decision of the Tribunal

The Applicant made a complaint of unfair dismissal.
The Chairman of the Tribunal appointed to hear the claim, determined that the claim should not proceed to a full hearing until the issue of the date of termination of the Applicant’s employment had been considered and a decision made as to whether or not the Applicant was qualified, under The Employment Protection (Guernsey) Law, 1998, as amended, to make a complaint. This preliminary issue was addressed at a Pre-Hearing Review when a full Tribunal considered written submissions from both parties.

Having considered all the evidence presented, whether referred to in this judgment or not, the representations of both parties and with due regard to all the circumstances, the Tribunal finds that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended the Applicant’s effective date of termination is 17 February 2017 and that her complaint of unfair dismissal was presented to the Secretary of the Tribunal within the period of three months beginning on the effective date of termination. The complaint will be scheduled for a full hearing.

Mr Jason Hill
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Signature of the Chairman

19 July 2017
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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, 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)

The authorities referred to in this document are as follows:

Kwik-Fit (GB) Ltd v Lineham (EAT) [1992] ICR 183
 Tippet v Stewart Asset Management (Guernsey) Ltd ED037/12
 Chapman v Letheby & Christopher Ltd (EAT) [1981] IRLR 440
 Ward v Brecqhou Development Ltd ED007/16
 Ogier v MVS Ltd and Monarch Vulcanising Systems Ltd ED006/10
 James Harvey ED002/15
 GISDA Cyf v Barratt (SC) [2010] IRLR 1073
 McMaster v Manchester Airport plc (EAT) [1998] IRLR 112
 Brown v Southall & Knight (EAT) [1980] IRLR 130

Extended Reasons**1.0 Introduction**

- 1.1 The Applicant, in an ET1 Application form dated and received by the Employment and Discrimination Tribunal on 13 March 2017, complains that she was unfairly dismissed with an effective date of termination of 13 February 2017 (as set out in the email of 13 March 2017 at 1419hrs from the Applicant's representative) that was later amended to either 17 February 2017 or 18 December 2016 (as set out in paragraph 7.1 of the Applicant's submissions dated 9 June 2017). The Respondent, in an ET2 Response form dated 27 March 2017 and received by the Employment and Discrimination Tribunal on 28 March 2017, resists the complaint of unfair dismissal and asserts that the Applicant was not dismissed but resigned from her job on 4 December 2016. The significance of the Respondent's assertion is that, if correct, the Applicant's complaint of unfair dismissal was presented to the Secretary to the Tribunal after the period of three months beginning on the effective date of termination (see Section 17(1) of the Law).
- 1.2 Following a review of the forms ET1 and ET2 and the request made in writing dated 5 May 2017 by the Applicant's Representative, the parties were invited to agree to the holding of a Pre-Hearing Review, based upon written submissions only, to resolve the single issue of the date of termination of the Applicant's employment. That agreement having been given, the parties were notified on 1 June 2017 of the various dates by which their written submissions were to be filed and exchanged. The Tribunal has received and considered submissions dated 9 and 25 June 2017 (with attachments) on behalf of the Applicant; and dated 15 June 2017 (with attachments) on behalf of the Respondent.
- 1.3 The Tribunal, consisting of three members, met on Monday, 10 July 2017 and conducted a Pre-Hearing Review based upon the documents and authorities before it. All of that material has been taken into account by the Tribunal,

whether specifically referred to in this judgment or not. The only issue to be determined was the date of termination of the Applicant's employment.

2.0 Summary

- 2.1 The parties agree that the Applicant started work on 1 April 2015 as a bus driver; they do not agree upon the date or manner of the termination of the Applicant's employment. The relevant events, culminating in that termination, began in the summer of 2016 when the Applicant discovered that her cousin, who lived in Australia, was seriously ill and wished to be with her to give her support. It is agreed that the Applicant worked up to and including 4 December 2016 and then left to travel to Australia on 5 December 2016; she reported again for work on 13 February 2017. It is important to understand what happened between the summer of 2016 and February 2017.
- 2.2 The Applicant says that she explained the situation verbally to Kevin Jackman (described by the Applicant as Resource Allocator and by the Respondent as Assistant Operations manager) in May 2016 and again the following month. The Respondent accepts that there was some mention by the Applicant at the end of May or beginning of June of a trip to Australia and maintains that a leave request was submitted by the Applicant on 3 August 2016 for the period 30 August to 10 September 2016. The Applicant makes no reference to this leave request and, instead, only describes a request made on 30 August 2016 for unpaid leave for the period 28 December 2016 to 4 February 2017. The Respondent accepts that this leave request was made and that it was refused with the endorsed reason, *"Only 2 weeks unpaid leave allowed. Please resubmit."*
- 2.3 The Applicant describes telephoning Kevin Jackman and asking him to reconsider the refusal. She also asked one of her Supervisors, Rob Macfarlane, to copy and email her tickets to Kevin Jackman in support of her request for a reconsideration. The Applicant says that Rob Macfarlane reported that Kevin Jackman had raised no objection to her going to Australia. The Respondent maintains that the Applicant spoke to Kevin Jackman in person, that Rob Macfarlane did not speak to Kevin Jackman about the issue and that Kevin Jackman did not grant the Applicant's leave request. A particular reason cited by the Respondent for Kevin Jackman's continued refusal to grant the leave request is that the tickets had been booked on 20 August 2016, *i.e.* 10 days before the leave request was submitted and contrary to the Staff Handbook.
- 2.4 Another leave request was submitted by the Applicant on 29 November 2016 for the period 19 to 30 December 2016. This was refused by the Respondent with the endorsed reason, *"No holiday allowance left."* The Respondent draws attention to the fact that this new request included two days of the earlier, refused, unpaid leave request, *i.e.* 28 and 29 December 2016 (it might be that this is, in fact, a three-day overlap since 30 December would appear to be included).

- 2.5 At the end of November 2016 the Applicant became aware that her cousin's condition had worsened and was advised to bring forward her trip to Australia. Having failed to make personal contact with Kevin Jackman, the Applicant asked another of her Supervisors, Philip Le Prevost, to help. The Applicant says that Philip Le Prevost contacted Kevin Jackman on 2 December 2016. The Respondent's recollection is that no permission was given to the Applicant and that on 2 December 2016 Philip Le Prevost explained that the Applicant was now leaving on 4 December 2016 as a family member's illness had become worse. Kevin Jackman did not contact the Applicant as a result of this news. More detail of the conversation between Philip Le Prevost and Kevin Jackman is given in Kevin Jackman's witness statement dated 15 June 2017. It describes Kevin Jackman asking Philip Le Prevost if the Applicant meant "*leave, as in totally leave?*" and that the reply was that the Applicant meant "*totally leave*".
- 2.6 The Applicant says that Rob Macfarlane told Kevin Jackman that she would be working until 4 December 2016; this is consistent with the Respondent's account of Rob Macfarlane's telling Kevin Jackman that the Applicant would be travelling on 5 December 2016. This prompted Kevin Jackman to arrange for cover for the Applicant's work, but he did not contact the Applicant.
- 2.7 Unfortunately, shortly after the Applicant arrived in Australia, another of her cousins (and sister to the cousin she had gone to support) died suddenly and unexpectedly. The Applicant describes trying to contact Kevin Jackman several times, including leaving messages and a contact landline number, but to no avail. The Respondent says that no messages were received by Kevin Jackman "*direct from the Applicant*" until January 2017 and that, in any event, Kevin Jackman did not respond.
- 2.8 Kevin Jackman's statement also describes the letter dated 7 December 2016 addressed to the Applicant, a copy of which was included with the Respondent's submissions dated 15 June 2017. The Respondent accepts that due to not having a forwarding address for the Applicant the letter dated 7 December 2016 was not sent and was, instead, held on file. That letter includes the following request of the Applicant, "*You must contact the Company by 1200 hours on Monday 12 December 2016 to discuss the current situation, if no further communication in relation to your employment has been received from yourself, the Company will accept the lack of communication and your intentional failure to report as your resignation.*"
- 2.9 On either 22 or 23 December 2016 the Applicant says that she received a call on her landline number in Australia from another of her Supervisors, Terry King, who asked '*what the situation was*'. The Applicant explained that she would be staying in Australia until the beginning of March 2017 and says that Terry King told her '*just to let him know when she would be back*'. The Applicant responded by saying "*I assume that there will be a job for me when I get back*", to which Terry King replied '*that it was up to management and not him*' and that he would find out and let the Applicant know. The Respondent

alleges that this telephone conversation took place on 9 or 10 January 2017 and agrees that the Applicant asked if she still had a job although no return date was mentioned.

- 2.10 It then appears that the Applicant asked Lawrence Hlapane and Jenny Down to make contact with Kevin Jackman on her behalf. The Respondent accepts that messages were passed to Kevin Jackman by Hlapane and Down, but Kevin Jackman decided not to make contact with the Applicant.
- 2.11 The Applicant also tried using the 'WhatsApp' messaging service to contact Kevin Jackman on 19 December 2016 and 26 January 2017. The Respondent maintains that Kevin Jackman does not use WhatsApp for business purposes, but does not deny that the messages were, in fact, sent by the Applicant as she describes.
- 2.12 As a result of the death of the Applicant's cousin on 1 February 2017, the Applicant did not travel back to Guernsey on 2 February 2017 as she had planned, but arrived in Guernsey instead on 13 February 2017. The Applicant attended the Respondent's offices upon her return on 13 February 2017 and describes the meeting with Lee Murphy (Kevin Jackman being unavailable) as a "*tirade*" during which Lee Murphy told the Applicant that she no longer worked for the Respondent and never would again. The Respondent, on the other hand, says that there were no raised voices during the meeting and the office door remained open throughout.
- 2.13 On 17 February 2017 the Applicant received a hand delivered letter at home from Lee Murphy on behalf of the Respondent. That letter contained, amongst other things, an assertion that the Respondent considered the Applicant's "*unannounced departure, prolonged failure to report for work as rostered and wilful disregard of the obligations outlined with [her] Staff Handbook*" as the Applicant's intention to resign. The letter explained that "*As of 12 December 2016, when no further communication in relation to [the Applicant's] employment had been received from [the Applicant], [the Respondent] terminated [the Applicant's] employment as a result of [the Applicant's] actions (i.e. failure to report for duty as reasonably expected)*". The Respondent backdated the Applicant's final day of working to 4 December 2016.
- 2.14 The facts so far recited are sufficient for the purposes of determining the issue with which this Pre-Hearing Review is concerned.

3.0 Legal submissions of the parties

- 3.1 Where, as with this Pre-Hearing Review, a party seeks to rely upon case law as authority for some proposition of law, it is of great assistance to the Tribunal for copies to be provided by that party. The authorities provided should, where possible, be from a recognised series of law reports; these usually come with headnotes and, in some cases, a summary of the arguments of counsel.

Parties should also identify the page number or paragraph when quoting parts of the judgment.

- 3.2 The Applicant relies upon Section 5(4)(b) of the Law that provides that the effective date of termination “*in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect*”. As is apparent from the arguments deployed on behalf of the Applicant, it is suggested on her behalf that termination by the employer can only take effect following notification of the termination.
- 3.3 The Applicant submits that, in general, the effective date of termination is the date upon which the employer first notifies the employee of it and relies upon the comments of Mrs J de Garis in paragraph 4.7 of **James Harvey** ED002/15. It is further submitted that these comments reference the decision in **Brown v Southall & Knight** (EAT) [1980] IRLR 130 (see, for example, paragraph 21) and are supported by the decisions in **McMaster v Manchester Airport plc** (EAT) [1998] IRLR 112 (paragraph 9) and **GISDA Cyf Barratt** (SC) [2010] IRLR 1073 (paragraph 41).
- 3.4 Developing these arguments further, the Applicant also relies upon certain comments contained in **Tippett v Stewart Asset Management (Guernsey) Ltd** ED037/12 (for example, paragraph 4.2); **Ogier v MVS Ltd and Monarch Vulcanising Systems Ltd** ED006/10 (for example, paragraphs 10.4 and 11.2); and **Ward v Breccqhou Development Ltd** ED007/16 (see paragraph 10.6 quoting **Chapman v Letheby & Christopher Ltd** (EAT) [1981] IRLR 440 at paragraph 16).
- 3.5 The Respondent seeks to distinguish the case of **James Harvey** on the basis that the case concerned someone who was dismissed for gross misconduct and was not a case of resignation. Similarly, the Respondent distinguishes the case of **Brown v Southall & Knight** as being concerned with dismissal and not resignation.

4.0 The Law

- 4.1 In **Kwik-Fit (GB) Ltd v Lineham** (EAT) [1992] ICR 183 (at 191G) a resignation by an employee was described as a repudiation of the contract of employment, *i.e.* a fundamental breach. Furthermore, a distinction must be drawn between cases where the wording of a resignation is held to be ambiguous and those where it is held to be unambiguous (see 189A-D). In the case of ambiguous words, the test to be applied is objective – in all the surrounding circumstances. In other words, it is insufficient for the employer merely to believe (however honestly or vehemently) that the words amounted to a resignation. Instead, it must be that a reasonable person considering all of the relevant surrounding circumstances would conclude that the employee had resigned.

- 4.2 Subject to one slight modification, the Tribunal accepts the submission on behalf of the Applicant made in paragraphs 5.3 and 5.4 of the Additional Information to the ET1 that termination of the contract of employment by the employer occurs when the employer first notifies the employee of that termination. The modification that the Tribunal adopts is that set out by Lord Kerr when sitting in the Supreme Court in the case of ***GISDA Cyf v Barratt*** (SC) [2010] IRLR 1073 at paragraph 41, namely that the employee is entitled either to be informed or at least to have the reasonable chance of finding out that he has been dismissed before time begins to run against him.
- 4.3 The Tribunal accepts the Applicant's submission made in paragraph 4.3 of the submissions dated 9 June 2017 that in relation to an employee whose contract of employment is terminated without notice, the effective date of termination means the date on which the termination takes effect (see Section 5(4)(b) of the Law).
- 4.4 Finally, the Tribunal respectfully agrees with the finding of the EAT in ***Chapman v Letheby & Christopher Ltd*** (EAT) [1981] IRLR 440 at paragraph 16 (and adopted in ***Ward v Brecqhou Development Ltd*** ED007/16 at paragraph 10.6): *"... there is a principle of construction that words are interpreted most strongly against the person who uses them. We think this principle is peculiarly applicable to cases such as the present where an employer, by an ambiguous notice, may mislead the employee as to the effect of the document the responsibility for the wording of which lies entirely in the hands of the employer. It seems to us right that an employer who relies on a notice served by him as having a particular meaning should be required to demonstrate that it unambiguously has that meaning. If the employer can rely on ambiguities being resolved in his favour, the employee may be left in doubt as to where he stands and may lose his statutory rights"*.

5.0 Facts Found

- 5.1 In about May or June 2016 the Applicant made it known to the Respondent that she wished to travel to Australia. By virtue of the unpaid leave request submitted sometime in August 2016, the Applicant's request that the refusal to grant her request be reconsidered and her discussions with Kevin Jackman in about May or June 2016, the Respondent knew or ought to have known that the Applicant was anxious to secure a significant period of absence from work to support a very ill family member.
- 5.2 In the context of these discussions between the Applicant and the Respondent, the language used by the Applicant to Philip Le Prevost in December 2016 and described in Kevin Jackman's witness statement is ambiguous and could not, objectively, be interpreted as the Applicant's resignation.
- 5.3 The letter dated 7 December 2016 written by Kevin Jackman was never sent to or received by the Applicant. The language used in that letter is not consistent

with the Respondent's assertion that the Applicant had resigned; it is, in fact, consistent with the position that the contract of employment subsisted.

- 5.4 During December 2016 and January 2017 the Applicant made several attempts by various methods to contact Kevin Jackman and, for whatever reason, Kevin Jackman refused to respond to those approaches. The only contact made with the Applicant on behalf of the Respondent during the Applicant's time in Australia was by Terry King who used language consistent with the belief that the Applicant had not resigned.
- 5.5 The Applicant returned to and attended at the Respondent's premises on 13 February 2017; she met and had discussions with Lee Murphy. That meeting was likely to have been a difficult one and its purpose unclear. The letter dated 17 February 2017 and written by Lee Murphy was hand delivered to the Applicant on that day.

6.0 Conclusion

- 6.1 The Applicant's language and behaviour in December 2016 was ambiguous and could not, objectively, be interpreted as a resignation. The Tribunal concludes, therefore, that the Applicant has been dismissed; the question is when. The letter dated 7 December 2016 does not amount to a dismissal because the Applicant was neither informed of the purported dismissal nor given a reasonable chance of discovering that she had been dismissed.
- 6.2 The effective date of termination is the date upon which the termination without notice of the Applicant's employment took effect. The Tribunal must consider, therefore, whether the Applicant was dismissed on 13 February 2017 (during the meeting at the Respondent's offices) or on 17 February 2017 (when the Applicant received the hand delivered letter). For the purposes of this Pre-Hearing Review, whether the dismissal took place on 13 or 17 February 2017 does not have much, if any, practical effect; in either case the submission of the complaint to the Secretary to the Tribunal would have been within the prescribed period of three months as set out in Section 17(1) of the Law. That being said, the Tribunal takes the view that the meeting on 13 February 2017 was likely to have been an unclear, difficult and confusing event and that, on balance, the true notification of the dismissal was contained in the letter dated 17 February 2017. The Tribunal finds, therefore, that termination took effect on 17 February 2017 when the Applicant was given the letter of the same date.

7.0 Decision

- 7.1 Consequently, the Applicant's effective date of termination is 17 February 2017 and her complaint of unfair dismissal was presented to the Secretary of the Tribunal within the period of three months beginning on the effective date of termination. The complaint will be scheduled for a full hearing.

Mr Jason Hill

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Signature of the Chairman

19 July 2017

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Date