

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr Lee Help
Represented by: Self Represented

Respondent: Guernsey Trade Windows Limited
Represented by: Advocate Simon Geall

Tribunal Members: Mr Jason Hill (Chairman)
Ms Helen Martin
Mr George Jennings

Hearing date(s): 9 March 2018

Decision of the Tribunal

The Applicant made a claim of unfair dismissal based upon his having alleged that the Respondent had infringed a right of his which is a relevant statutory right, contrary to sections 3 and 12 of *The Employment Protection (Guernsey) Law, 1998*.

Having considered all of the evidence submitted by and the representations of the parties, whether specifically recorded in this judgment or not, the claim of unfair dismissal under the provisions of *The Employment Protection (Guernsey) Law, 1998* is dismissed and the Tribunal makes no award.

Mr Jason Hill
.....
Signature of the Chairman

14 March 2018
.....
Date

The Legislation referred to in this document is as follows:

FORM: ET3A (05/16)

The Conditions of Employment (Guernsey) Law, 1985, as amended
(the 1985 Law)

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

The authorities referred to in this document are as follows:

Smith v Hayle Town Council (CA) [1978] ICR 996

Mennell v Newell & Wright (Transport Contractors) Ltd. (CA) [1997] ICR 1039

Lange v Waters (Guernsey Royal Court) Judgment 4/2016

Cotterill v States of Guernsey (Guernsey Royal Court) Judgment 58/2017

Extended Reasons

1.0 Introduction

- 1.1 In an ET1 Application form dated 11 October 2017 the Applicant complains that he was unfairly dismissed and that the reason (or principal reason if more than one) for his dismissal was that he had alleged that the Respondent had infringed a relevant statutory right of his, namely to be provided with a written statement of the terms of his employment as required by section 1 of the 1985 Law. The Applicant's reliance upon an alleged infringement of a relevant statutory right is important because he does not have the minimum period of continuous employment of not less than one year that would otherwise apply.
- 1.2 In an ET2 Response form dated 3 November 2017 the Respondent resists the complaint of unfair dismissal and asserts that the Applicant was dismissed for reasons relating to competency, misconduct and a failure to complete the express contractual probationary period satisfactorily. The Respondent specifically denies that the Applicant had alleged an infringement of a relevant statutory right and that this was the reason (or principal reason) for the dismissal. Consequently, the Respondent alleges that the Applicant does not have the minimum period of continuous employment of not less than one year necessary to have the right not to be unfairly dismissed.
- 1.3 The Applicant represented himself with the benefit of a "McKenzie friend" and gave evidence on his own behalf; he called no other witnesses. The Respondent was represented by Advocate Simon Geall and called Mr Ben Sparrow (managing director) and Mr Andy Gilbert (installer) to give live evidence. The parties relied upon a joint hearing bundle, marked EE/ER1.
- 1.4 The Tribunal, consisting of three members, met on Friday, 9 March 2018 to hear and determine the Applicant's claim based upon the documents, witness evidence 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.

- 1.5 The Tribunal was conscious that the Applicant was not legally represented during the hearing and was anxious to make sure that all necessary steps were taken to ensure that he had a fair hearing. The Tribunal took account of the Deputy Bailiff's general comments in '*Cotterill v States of Guernsey*' (Guernsey Royal Court, Judgment 58/2017) and in particular those at paragraph 45 concerning the need to give appropriate help to unrepresented parties regarding procedure and possibly also with the case that they wish to present. During the course of the hearing the Tribunal gave to the Applicant explanations of legal, procedural and other technical terms and he was afforded time by way of short adjournments to consider the meaning of legal authorities (particularly '*Lange v Waters*' that was produced by Advocate Geall during the course of the hearing). In addition, the Tribunal asked questions of witnesses to make sure that relevant evidence was brought out and the legal submissions of Advocate Geall were challenged to test their accuracy.

2.0 Summary

- 2.1 The parties agree that the Applicant started his employment with the Respondent on 5 June 2017 following an interview with Mr Sparrow and a subsequent telephone conversation about one month later during which Mr Sparrow offered the Applicant a job as a conservatory/roof installer (according to the Applicant) or a window fitter (according to the Respondent). In the ET1 Application form the Applicant alleges that his employment ended on 7th September 2017; in the ET2 Response form the Respondent alleges that it ended on 8th September 2017. In any event, the evidence of both parties is that the Applicant's employment was terminated during a meeting that happened in the morning of 8th September 2017.

- 2.2 The parties also agree that:

- (1) the Applicant's employment was subject to a three month probationary period;
- (2) contrary to the requirement of section 1 of the 1985 Law, the Applicant was not provided with a written statement of the terms of his employment not later than four weeks after the beginning of his employment; and
- (3) the Applicant's working hours were to be 8am until 4pm, Monday to Friday.

- 2.3 Mr Sparrow also outlined in paragraph six of his witness statement other key terms of the Applicant's employment which were not articulated by the Applicant in his evidence. It does not appear, however, that the Applicant takes issue with any of these terms and nothing turns on them for the purposes of this claim.

2.4 During the probationary period the Respondent identified aspects of the Applicant's conduct or behaviour that it alleges gave cause for concern, namely:

- (1) leaving work before 4pm;
- (2) a reluctance or refusal to work late to finish an installation;
- (3) being argumentative;
- (4) taking holidays at short notice;
- (5) at times he displayed poor standards of work and a reluctance to accept criticism or instruction; and
- (6) a threat of physical violence to a co-worker, Mr Gilbert.

2.5 The Applicant accepts that:

- (1) as a result of being a single parent he needs account to be taken of his childcare requirements;
- (2) once, when his son was ill, he left work at about 3.30pm;
- (3) working after 4pm is only possible on a Tuesday (he had worked, for example, until 7.30pm on Tuesday, 5 September 2017);
- (4) on one occasion his son had a day patient appointment for which the Applicant needed time off work at short notice;
- (5) on one occasion, having told Mr Gilbert with whom he was working that he was unable to work late, a disagreement followed during which he said to Mr Gilbert *"Carry on talking like that and you will end up with a smack in the mouth"* (or words to that effect); and
- (6) any suggestion that he has been argumentative, particularly with Mr Gilbert, must have come from occasions when he tried to be helpful by making suggestions about how a particular job could or should have been performed.

2.6 The Respondent's evidence, given by Mr Sparrow in paragraphs 11 and 12 of his statement and in answers to further questions, is that by the middle of August 2017 the decision had been taken to dismiss the Applicant as a result of conduct and capability issues. It was decided not to dismiss the Applicant at that stage, but to wait until the end of the probationary period when the Applicant would be told that he had not passed the probationary period. Mr Sparrow explained in his evidence that because of the Applicant's aggressive

and confrontational nature he was “dreading” having to dismiss the Applicant and that he thought that the least confrontational way to do it was at the end of the probationary period. The Respondent accepts that no verbal or written warnings were given to the Applicant about any conduct or capability issues.

- 2.7 The Applicant described how he came to allege that the Respondent had infringed his right to a written statement of his terms of employment to which he was entitled pursuant to section 1 of the 1985 Law. Matters started on Tuesday, 5 September 1997 when the Applicant spoke to Mr Sparrow about the three month probationary period being at an end and to which Mr Sparrow replied *“Jesus that’s gone quick, we will need to sit down”*. The Applicant spoke to Mr Sparrow again the following day, 6 September 2017, during which he said to Mr Sparrow that they needed to talk about *“contracts”*. This time Mr Sparrow replied *“Yes I am really busy, we will try to do it this week, or we will do it when I return from holiday in ten days”*.
- 2.8 During the course of the working day on 7 September 2017 the Applicant spoke to Mr Gilbert with whom he was working as usual and learned that Mr Gilbert had worked for the Respondent for approximately 10 months and *“did not have a contract”*. The Applicant also told us that Mr Gilbert said that another colleague had worked for the Respondent for over 18 months *“without a contract”* and that the Applicant had replied *“I will not be working without a contract”*.
- 2.9 The Applicant sent a text to Mr Sparrow about his need to finish early on 7 September 2017 and included the sentence *“We still need to talk about Work/Contracts and stuff also”*. Mr Sparrow’s reply gave the Applicant permission to finish early, but expressed dissatisfaction with the way in which the Applicant had arranged it and explained that in future more notice would be needed. No specific response was made to the Applicant’s comment about *“Work/Contract and stuff”*. The full text of the exchange is admitted by the Respondent and is included at page 13 of the bundle “EE/ER1”.
- 2.10 The following morning, 8 September 2017, at about 8am, Mr Sparrow met the Applicant. Mr Sparrow explained that the Applicant had not passed the probationary period and that his employment was being terminated as a result of the conduct and capability issues already identified; the Applicant would be paid two weeks’ pay in lieu of notice. At 8.16am the Applicant forwarded to Mr Sparrow via his mobile telephone an email from an Employment Relations Officer that explained the effect of section 1 of the 1985 Law. Mr Sparrow maintains that the first time that the Applicant mentioned anything to do with not having written terms of employment was at the end of that meeting and after he had informed the Applicant of the termination of his employment. The Applicant maintains that the discussions with Mr Sparrow on 6 September 2017 and the discussion with Mr Gilbert and text message exchange with Mr Sparrow on 7 September 2017 amounted to an allegation that the Respondent had infringed his statutory right to a written statement of the terms of his

employment. The Applicant also maintains that the reason for his dismissal (or principal reason if more than one) was his allegation of this infringement.

3.0 Legal principles

- 3.1 Section 3 of the 1998 Law grants, subject to certain express qualifications, the right to an employee not to be unfairly dismissed by his employer. Section 6 of the 1998 Law provides that, in general, the employer has the burden of proving the reason (or principal reason if more than one) for the dismissal and that it was 'fair' within the meaning of section 6(2).
- 3.2 Pursuant to section 15(1) of the 1998 Law, the right not to be unfairly dismissed granted by section 3 does not apply unless the employee was continuously employed for a period of not less than one year ending with the effective date of termination. That qualifying period does not apply, however, to the dismissal of an employee if it is shown that the reason (or principal reason if more than one) was, amongst others, one of those specified in section 12(1) (read with sections 12(2) and (3)) of the 1998 Law.
- 3.3 Section 12 of the 1998 Law sets out a number of 'automatically unfair' reasons for a dismissal. In particular, section 12(1)(a) identifies as an automatically unfair reason a situation where an employee has alleged that the employer has infringed a right of his which is a relevant statutory right; the right to a written statement of the terms of employment pursuant to section 1 of the 1985 Law is specified in section 12(4) of the 1998 Law to be a 'relevant statutory right'. Section 12(2) of the 1998 Law provides that it is immaterial for the purposes of section 12(1) whether the employee has the right or not and whether it has been infringed or not, but the claim to the right and that it has been infringed must be made in good faith. Section 12(3) makes it clear that it shall be sufficient that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
- 3.4 In the light of that background, Advocate Geall took the Tribunal through the decision in '**Smith v Hays Town Council**' [1978] ICR 996. In particular, the Tribunal's attention was drawn to the judgments of Eveleigh LJ (at 1001G to 1002H) and Sir David Cairns (at 1003E - G). The Tribunal are satisfied that the wording of the relevant parts of the Trade Union and Labour Relations Act 1974 are sufficiently similar to the relevant provisions of the 1998 Law so that the case of '**Smith**' is of particular help in determining who has the burden of proof in this case.
- 3.5 The Tribunal adopts the approach of the Court of Appeal in '**Smith**' and rules that once an employer has established that the employee has not been continuously employed for a period of not less than one year, the employer has put up an obstacle to the employee obtaining advantage under section 3 of the 1998 Law (*i.e.* the right not to be unfairly dismissed). Section 15(2)(a) of the 1998 Law (*i.e.* the exception to the general requirement for a minimum

qualifying period of continuous employment) is worded to the intent that, and by the nature of its being an exceptions paragraph, the burden of proof must be upon the employee. This is particularly so given the explicit difference in language used between section 6 of the 1998 Law (i.e. *"In determining for the purposes of this Part of this Law whether the dismissal of an employee was fair or unfair, it shall be for the employer to show ..."*) and section 15(2) (i.e. *"Subsection (1) does not apply to the dismissal of an employee if it is shown that ..."*) (our emphasis).

3.6 Advocate Geall also relied upon the decision of **'Mennell v Newell & Wright Ltd'** [1997] ICR 1039. In particular, Mummery LJ said (reflected in some of the provisions of sections 12(2) and (3) of the 1998 Law):

- (1) *"It is sufficient if the employee has alleged that his employer has infringed his statutory right and that the making of that allegation was the reason or the principal reason for his dismissal. The allegation need not be specific, provided that it has been made reasonably clear to the employer what right was claimed to have been infringed. The allegation need not be correct, either as to the entitlement of the right or as to its infringement, provided that the claim was made in good faith."* (at 1048H to 1049A).
- (2) *"[The employee] was unable, as accepted by his own representative in correspondence, to identify when, where, to whom or in what terms he had alleged that the employers had infringed his relevant statutory right."* (at 1049B - C).
- (3) *"The most [the employee] was able to say was that he had had conversations with Mr Ridley in which he informed management that he would sign the agreement with some amendments and that earlier letters made it clear that those amendments related to the proposed provision for deductions from wages in clause 11.3."* (at 1049C - D).

3.7 Finally, Advocate Geall also relied upon the Guernsey Royal Court decision of **'Lange v Waters'** (Judgment 4/2016) - an appeal from the Employment and Discrimination Tribunal. In that case the Deputy Bailiff observed that:

- (1) *"The Tribunal found, as I consider it was entitled to, that the first occasion on which the Appellant raised the question of the failure to provide a payslip was in her resignation letter on 18 March 2015. Accordingly, the Tribunal referred to the terms of section 12(3) ... and concluded that the right in section 12 required the employee to have actually asserted the right in question prior to the termination of employment rather than only at the same time."* (paragraph 80).

- (2) *“In my judgment, this is the correct approach in law. The reason (or, if there is more than one reason, the principal reason) for a dismissal must be operative at the time of the dismissal. For the purposes of this appeal, the reason must have been operative prior to the termination of employment. The wording of section 12 clarifies that the dismissal flows whether from the bringing of proceedings of the making of the allegation of a breach of a relevant statutory right to the employer. The reason for the dismissal cannot be something about which the employer is unaware. Section 12(3) enables this automatically unfair reason to apply where the employee does not articulate his or her right explicitly in terms of the provision being relied upon, but with sufficient clarity that the employer knows what is being alleged. However, it does not go so far as to provide that the employer must take into account something that has not been drawn to his attention.”* (paragraph 81).

3.8 Consequently, the Applicant in this case has the burden of proving, on the balance of probabilities, that:

- (1) he claimed or asserted a relevant statutory right;
- (2) he alleged that the relevant statutory right had been infringed by the Respondent;
- (3) the claim to and the allegation of infringement of the relevant statutory right must have been made in good faith; and
- (4) the allegation of the infringement of the relevant statutory right was the reason or the principal reason for the dismissal.

3.9 The Respondent accepted during the course of the hearing that the Applicant acted in good faith, but takes issue with items (1), (2) and (4) in paragraph 3.8 above.

4.0 Findings

4.1 The Tribunal finds that, based upon the evidence of the parties, the Applicant was employed from 5 June 2017 to 8 September 2017. The Applicant's effective date of termination was, by virtue of section 5(4)(b) of the 1998 Law, 8 September 2017.

4.2 The Respondent admits, and the Tribunal finds, that contrary to section 1 of the 1985 Law, the Applicant was not given a written statement of the terms of his employment not later than four weeks after the beginning of that employment. Furthermore, the Tribunal finds that, subject to the Applicant proving on the balance of probabilities the other matters set out in paragraph

3.8 above, for the purposes of sections 12 and 15 of the 1998 Law such a failure by the Respondent could amount to a reason to disapply the requirement that the Applicant was continuously employed by the Respondent for a period of not less than one year. The Tribunal finds that based upon the Respondent's admission, everything done by the Applicant was done in good faith.

- 4.3 The Tribunal members were particularly struck by the way in which Mr Sparrow and Mr Gilbert gave their evidence and in the way in which they both clearly viewed the Applicant as someone who was confrontational at best and aggressive at worst. Particular weight was attached to the evidence of Mr Sparrow that he was "dreading" dismissing the Applicant.
- 4.4 The evidence of Mr Sparrow points to a firm decision to dismiss the Applicant having been made in mid-August 2017 based upon issues of conduct and capability and, on the balance of probabilities, the Tribunal finds that to be the case. Specifically, the Tribunal accepts the evidence of Mr Sparrow that the Applicant's threat to Mr Gilbert, his leaving work early and his general argumentativeness meant that the Applicant would be dismissed. The Tribunal accepts the evidence of Mr Sparrow that he was not aware of any comment by the Applicant to Mr Gilbert or anyone else to the effect that there was a right to a written statement of terms after four weeks. It is unfortunate that Mr Sparrow appears to have been unable to summon up the courage to tell the Applicant in August and decided to wait until the end of the probationary period. For that reason alone, the Tribunal takes the view that any allegation of an infringement of a relevant statutory right played no part in the dismissal of the Applicant.
- 4.5 In any event, the Tribunal finds that the language used by the Applicant in his discussions with Mr Sparrow on 5, 6 and 7 September 2017 (including the exchange of text messages) is insufficient to amount to either a claim that the Applicant was entitled to a written statement of the terms of his employment or an allegation that the Respondent had infringed such a statutory right. The closest that the Applicant came to asserting the right and alleging a breach of it was after he had been told by Mr Sparrow on 8 September 2017 that he had failed his probationary period and was being dismissed. The forwarding at 8.16am on 8 September 2017 to Mr Sparrow of the email from the Employment Relations Officer came, the Tribunal finds, after the dismissal of the Applicant.
- 4.6 The Tribunal finds, therefore, that the Applicant has failed to prove on the balance of probabilities the necessary elements of his claim as set out in paragraph 3.8(1), (2) and (4) above.

5.0 Conclusion

- 5.1 The Applicant has failed to prove on the balance of probabilities that the reason (or the principal reason if more than one) for his dismissal was his allegation that the Respondent had infringed a right of his which is a statutory right. The Applicant is therefore unable to take advantage of section 15(2)(a) of the 1998 Law to disapply the requirement that he has a minimum qualifying period of not less than one year of continuous employment to claim the right not to be unfairly dismissed. The Applicant had less than one year of continuous employment at the effective date of termination of his employment and so, in the circumstances, the Applicant's claim is dismissed.

Mr Jason Hill

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Signature of the Chairman

14 March 2018

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Date