

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: **Matthew Garlick, Acting as Executor of Paul Garlick (Deceased)**

Represented by: Mr Stephen Garlick

Respondent: **The Isle of Sark Shipping Company Limited**

Represented by: Advocate Louise Hall

Tribunal Members: Mr Peter Woodward (Chairman)

Mr Roger Brookfield

Mrs Joanne de Garis

Hearing date: 18 June 2018

Decision of the Tribunal

On behalf of the Applicant, Mr Matthew Garlick it was claimed that he had been unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended.

The Respondent did not contest this claim. Having reviewed and duly considered all the evidence submitted and the representations of all parties to the Hearing, whether specifically recorded in this judgment or not, the Tribunal finds that the Applicant was unfairly dismissed under the provisions of Section 5 (2)(a) of the Employment Protection(Guernsey) Law, 1998, as amended. The unfair dismissal claim is upheld and an award of £20,180 is made.

Mr Peter Woodward

11 July 2018

.....

.....

Signature of the Chairman

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

Extended Reasons

1.0 Introduction

1.1 The Applicant :- Matthew Garlick acting as executor of Paul Garlick (Deceased), was represented by Mr Stephen Garlick.

1.2 The Respondent :- The Isle of Sark Shipping Company Limited, was represented by Advocate Louise Hall.

1.3 At the outset of the Hearing it was confirmed that:-

The agreed Effective Date of Termination (EDT) was 17/08/2017.

Mr Garlick's gross earnings were £20,180 for the six months prior to the Effective Date of Termination.

1.4 The complaint was an alleged unfair dismissal.

1.5 The Respondent, in its ET2, admitted the dismissal and had stated prior to the Hearing that the claim would not be resisted.

2.0 Proposed procedure for Hearing communicated in advance of the Hearing

2.1 Both parties had been advised that that the complaint would be heard on 18 June 2018.

2.2 As the Applicant had very sadly passed away before his complaint could be heard and as the Respondent had formally withdrawn any contest to the complaint, the issue of following a correct and lawful procedure was paramount in the mind of the Chairman.

2.3 He had advised the parties that he believed, given these circumstances, and with a detailed ET1 having already been submitted that no witnesses would need to be called. This should however be determined at a public Hearing in the presence of a fully constituted Tribunal. He allowed that he might have erred in law and advised both parties that they could make submissions on the issue of procedure at least three weeks prior to the scheduled Hearing.

2.4 In the event Advocate Hall submitted a pleading on behalf of the Respondent and Advocate Crawford provided a pleading on behalf of the Applicant.

2.5 The Chairman requested the early appointment of the two side members and these members were provided with copies of the submissions and the Chairman's responses on these procedural issues for their review prior to the Hearing on 18 June 2018.

2.6 The Chairman decided In accordance with the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 section 4 that the Hearing would be held in public.

2.7 The Chairman informed the parties that he would formally open the proceedings and then provide an opportunity for parties to address the Tribunal on procedural issues, if they so wished.

2.8 After hearing submissions from the parties, if the Tribunal decided on the day there was sufficient evidence in the ET1 and the further details submitted by Advocate Crawford to move directly to a finding of Unfair Dismissal then this would be communicated at the Hearing and the award of £20,180 would be confirmed.

2.9 The Chairman informed the parties that after considering submissions, if the other members of the Tribunal believed a different procedure should be adopted they had the freedom to make such a decision.

The Hearing

3.0 Facts Found

3.1 The Applicant was employed in the role of Managing Director.

3.2 The Tribunal noted that there was agreement between the parties that the late Mr Paul Garlick was dismissed. It follows that if the Respondent had maintained resistance to the complaint then there would have been a burden of proof on the Respondent to prove a fair dismissal, but the plea of "no contest" negated the need for this.

3.3 If the claim was not to be contested that the logical conclusion was that the Applicant's claim would succeed and the dismissal would be found to be unfair. Advocate Hall accepted in the Hearing that that would be a lawful conclusion.

3.4 The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, is silent on the procedure required to deal with the issue of an uncontested claim. Thus it was for the Tribunal to determine how it should proceed.

3.5 The Chairman stated that given the extensive supplement to the ET1 prepared by Advocate Crawford the Tribunal was minded to rule that no further evidence was required, given the complaint was not contested.

In submitting the 17 page document document Advocate Crawford stated:-

“Whilst every effort has been made to ensure the completeness and accuracy of the information presented herein, it relies substantially on emails and documents recovered from Mr Garlick’s possessions following his untimely death, in addition to other evidence. Any other documentation, and information material to the complaint has been withheld from the Applicant by the Respondent.”

Mr Stephen Garlick expressed great dissatisfaction with this ruling. He believed the Respondent acted unfairly towards his brother and that the Tribunal should allow some formal statement, or summary of the Applicant’s evidence, to be given during these public proceedings. He could not accept that the Tribunal had formed the view that no further particulars were required for a lawful decision to be made.

The Respondent argued that the Chairman’s proposed procedure was appropriate and in accordance with the statement and application of “The Overriding Objective, Royal Court Civil Rules, 2007”.

4.0 Rationale for the procedure adopted

Past Precedent

To demonstrate past practice in Guernsey where no contest was offered the Tribunal drew the attention of the parties to the following non-contested judgments where oral evidence was not required:

- Mr Malcolm Campbell v Generali Limited 12 December 2008
- Mrs Anne Deane v Blanchelande College 17 May 2012

The Tribunal agreed with the Applicant that these judgements were not binding on these present proceedings, however they were persuasive. The Tribunal agrees that it would have assisted parties if an appeal had been made to the Royal Court to provide direction to this Tribunal. However it should also be noted that in neither of these past cases did any party seek to appeal these decisions and some weight may be placed on this.

The Royal Courts Civil Rules, 2007

Part I is The Overriding Objective.

Statement and application of overriding objective.

1 (1) *The overriding objective of these Rules is to enable the Court to deal with cases justly.*

(2) *Dealing with cases justly includes as far as is practicable -*

(a) *ensuring that the parties are on an equal footing,*

- (b) saving expense,*
- (c) dealing with the case in ways which are proportionate –*
 - (i) to the amount of money involved,*
 - (ii) to the importance of the case*
 - (iii) to the complexity of the issues, and*
 - (iv) to the financial position of each party,*
- (d) ensuring that it is dealt with fairly and expeditiously and*
- (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.*
- (3) The Court must seek to give effect to the overriding objective when it –*
 - (a) exercises any power given to it by these Rules, or*
 - (b) interprets any rule*
- (4) The parties are required to help the Court to further the overriding objective*

The Tribunal believes that in 2007 the Royal Court set down these Rules to enable cases to be dealt with justly. This is the Court that either party may appeal to if they believe that in delivering its judgment an Employment and Discrimination Tribunal has erred in law. It would seem to the Tribunal that these Rules should guide it at all stages of its process and in particular guide the Tribunal's decision.

5.0 Employment Tribunal Rules and Procedures England and Wales

The intention to be guided by the Guernsey Royal Court rules is further influenced by reference to the Employment Tribunal Rules of Procedure, 2013 England and Wales. Rule 2 states:-

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable-

- (a) ensuring the parties are on an equal footing*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings*
- (d) avoiding delay, so far as is compatible with proper consideration of the issues: and*
- (e) saving expense*

These Tribunal Rules are of course not binding on this Tribunal, however they are additionally persuasive in guiding the Tribunal to propose a fair and just process for the determination of this complaint.

6.0 The Tribunal “determines its own procedures”

As the parties are now well aware the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, provides for the Tribunal to determine its own procedures. Section 5 permits the Tribunal to give such directions as it thinks fit for the purpose of the Hearing and determination of the complaint.

The Tribunal notes that the 2005 Ordinance does not offer a procedure when the Respondent offers no contest.

When confronted by a challenge to its proposed procedure a Tribunal may then turn to a number of sources to guide it toward a just decision founded in law; these include:-

7.0 Appeals to the Royal Court

The Chairman drew the attention of both parties to the observations contained in a judgment by Richard James McMahon Esquire, Deputy Bailiff on 28 March 2014. This being an appeal hearing re Mrs Susan Cotterill v The Caring Companions Nursing Agency:

“Whilst it is no doubt frustrating to the Appellant that she regards what has happened as her being denied the opportunity to argue her complaints at a Tribunal hearing it is important for everyone concerned to appreciate that the Tribunal does not exist to give parties the opportunity to ventilate the grievances at how they feel they have been treated. The Tribunal exists to determine complaints properly made in accordance with the legislation under which it operates”

The Tribunal believes that whilst the issue here was in relation to a claim that a Tribunal had rejected as Vexatious and Frivolous, that the principle applies more broadly to Tribunal proceedings.

8.0 Obligation to hear and determine a complaint

The Chairman notes that the Applicant asserts that Mr Paul Garlick was dismissed summarily and without warning or disciplinary process. On Mr Paul Garlick’s behalf the Applicant believes that the Tribunal would allow redress for this alleged injustice by permitting his allegations to be made by “sworn evidence” at the public Hearing.

The Applicant has reminded the Tribunal that in section 5 of The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, in the ‘The Tribunal: Procedure and Powers Paragraph 2A’ that “the parties shall afford a reasonable opportunity of appearing and being heard or if all parties so elect of submitting a statement in writing to the Tribunal.”

To be heard of course, within the meaning of this requirement, includes the information already provided in the ET1 and other supplementary information provided to the Tribunal prior to the Hearing. For this specific complaint the Applicant has provided a 17-page document entitled "Further particulars of the facts". It would seem to the Tribunal there is ample information in this document to find in full for the Applicant, particularly given none of the events or assertions made in this document are being contested.

9.0 Natural Justice and the right to a fair hearing

The Applicant argued that the Tribunal's intention not to hear evidence under oath went against natural justice and might breach the Human Rights (Bailiwick of Guernsey) Law, 2000 by preventing a fair and public hearing.

However it seemed to the Tribunal that to proceed to hear further evidence in this case it would require both parties to continue to be in dispute. As one party no longer wishes to resist the complaint the Tribunal has concluded that there is no longer a dispute to be resolved within the meaning of The Employment Protection (Guernsey) Law 1998, as amended. Indeed it may not be in the interests of natural justice and fairness to permit further evidence from the Applicant, which may or may not be relevant to the claim, given the stated lack of resistance to the claim from the Respondent.

10.0 Human Rights Compliance

The Tribunal is further persuaded that this ruling on procedure is compliant with the Tribunal's Human Rights obligations. Here an appropriate reference is "Rule 21" of the Presidential Guidance for English and Welsh Tribunals issued on 4 December 2013 as to how Tribunals should act if the Respondent has stated that no part of the claim is contested. The relevant section is as follows:-

"Action by the Employment Judge:

1 The Employment Judge will review all the material that is then available. This will normally consist of the claim form and any response form that has been validly submitted and any other supplementary documents

2 They will consider whether the matter requires more information. If so they will cause a letter to be written to the party/ parties specifying the further information that is required

3) If no such information is required or once such information has been received then the Employment Judge will consider whether it is appropriate to:-

(a) Issue a judgement in full for all claims and remedy....."

The Tribunal finds itself in agreement with the Respondent that such guidance would not have been issued if it was unjust and not in compliance with Human Rights legislation.

In Guernsey it would not be the prerogative of a single Chairman to adopt this process, however the Tribunal is of the opinion that a properly constituted Tribunal during its public proceedings may conclude this is an appropriate and just way to proceed.

11.0 Disproportionate expenditure re a remedy of £20,180

The Tribunal is in agreement with the Applicant that complaints are not always limited to the seeking of a monetary award, however in relation to this complaint the following should be noted.

The Tribunal would observe that both parties have probably expended significant sums of money in relation to the proceedings to date and in the preparation of the submissions of 3 April and 18 April 2018.

The Tribunal also believes that given the extensive summary submitted by the Applicant and the evident intent of the Respondent not to resist the allegation of an unfair dismissal, that it does not need to request any further particulars from either party and thus avoiding further expenditure by either party. The Tribunal is also sympathetic to the expressed view of the Respondent that given the decision not to resist the complaint why should the Tribunal require that it spends further monies on the process.

Given these circumstances it does not seem that the Tribunal should expend further time to hear further evidence and then spend public money on preparing an extensive and detailed judgement.

This expenditure should not be incurred, if, in the opinion of the Tribunal, the requirements of the Overriding Objective have been met and the rules of natural justice observed.

Finally in his submissions in support of the Applicant, Advocate Crawford observed that the Applicant might have to prepare to counter a decision for a reduced award by the Tribunal as provided for in section 23 of The Employment Protection (Guernsey) Law, 1998. However the Tribunal considered there could be no grounds for such a reduction.

12.0 Summary given at Hearing

1. The Chairman reminded the parties that under the "Employment Protection (Guernsey) Law, 1998, as amended" the Tribunal has the function to decide, on the balance of probabilities, if a dismissal is fair or unfair. It decides its own procedure without fear or favour to either party.
2. The Respondent originally sought to resist the claim, however latterly the tribunal had been informed that it would no longer be resisted. At the outset of the Hearing the Chairman stated that in such circumstances a finding of unfair dismissal would follow and the Respondent agreed that that would be the lawful outcome.

3. From time to time the Tribunal will be guided by Royal Court appeals that indicate how it should dispense with a variety of employment issues and how it should conduct itself. The Tribunal has drawn the attention of the parties to a ruling by Richard James McMahon Esquire, Deputy Bailiff on 28 March 2014; this being an appeal hearing re Mrs Susan Cotterill v The Caring Companions Nursing Agency.
4. The Tribunal reminded the parties that given the legal test is the balance of probabilities for determination of a complaint under the Law, it is not required to prove the issue beyond all reasonable doubt, thus the evidential requirements are less onerous than in a criminal court.
5. The evidence received prior to this Hearing was a 17 page document meticulously prepared by an Advocate of the Royal Court who has significant experience of Employment Law. The Tribunal has concluded that it has sufficient evidence to make a determination without requiring further particulars or evidence. Further, the Tribunal would remind the parties that much of the written evidence contained in “bundles” is not given orally under oath.
6. It is common practice for Advocates of the Royal Court and other representatives who appear before this Tribunal to provide copies of UK Employment Law rulings and guidelines to assist the determination of a complaint. Whilst none of these judgments or guidelines are binding on this jurisdiction, it is evident from Royal Court appeals heard over the last 19 years that this is an acceptable practice. Thus the reference to the “Rule 21” for English and Welsh Tribunals is of assistance in determining a just and appropriate procedure.
7. It was very evident that the Applicant believed there was a continuing dispute between the parties. This may be so, but, for the purposes of this Hearing, the withdrawal by the Respondent led to the finding that there was no longer a dispute within the meaning of the Law. Given the extensive evidence prepared by Advocate Crawford all that remained for the Tribunal was to formally find for an “Unfair Dismissal” and apply the remedy.
8. Finally this Tribunal has been guided by giving consideration to the Royal Court’s Civil Rules, 2007; whilst not binding on the Tribunal these Rules provide direction as to how a Tribunal should proceed. This Tribunal has made strenuous efforts to comply with the objectives set out in this document.

Case No ED038/17

Decision

The Tribunal concludes that Mr. Paul Garlick was unfairly dismissed and an award of £20,180 is confirmed.

Mr Peter Woodward

11 July 2018

.....

.....

Signature of the Chairman

Date