Employment and Discrimination Tribunal

Form ET3

Case No ED043/17

THE EMPLOYMENT & DISCRIMINATION TRIBUNAL

Applicant: Mrs Chloe Nash
Represented by: Self represented, but did not attend

Respondent: Mr Stephen and Mrs Michelle Ozanne
Represented by: Self represented, but did not attend

Tribunal Members: Mr Jason Hill (Chairman)
Ms Georgette Scott
Mr Darren Etasse

Pre Hearing Review date: 14 September 2018

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 issues of *res judicata* and abuse of process had been considered. These preliminary issues were addressed at a Pre-Hearing Review, with 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 claim is frivolous and vexatious. The Tribunal therefore refuses to hear the complaint and makes no order as to costs.

Mr Jason Hill — 17 September 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 Legislation referred to in this document is as follows:
The Employment Protection (Guernsey) Law, 1998, as amended ('the Law')
The Human Rights (Bailiwick of Guernsey) Law, 2000
The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005

The authorities referred to in this document are as follows:
Cotterill v States of Guernsey (Guernsey Royal Court, Judgment 58/2017)
Reynard v Fox [2018] EWHC 443 (Ch)
Arnold v National Westminster Bank plc [1991] 2 AC 93
Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] AC 853
Ladbrokes plc v Galaxy International Ltd [2007-08] GLR 101
Fraser v HLMAD Ltd [2006] EWCA 738
Henderson v Henderson (1843) 67 ER 313
Divine-Bortey v Brent LBC [1998] ICR 886

Extended Reasons

1.0 Introduction

1.1 The Applicant, in an ET1 Application form dated and received by the Employment and Discrimination Tribunal on 11 December 2017, asserts that she was employed by the Respondents on 27 September 2016 and complains that she was unfairly dismissed with an effective date of termination of 6 November 2017. The Respondents, in an ET2 Response form dated and received by the Employment and Discrimination Tribunal on 4 January 2018, admit the dates of the Applicant's employment and that the Applicant was dismissed, but resist the complaint of unfair dismissal on the grounds that the dismissal was as a result of the Applicant's capability and gross misconduct.

1.2 During a Case Management Meeting held on 8 August 2018 by telephone conference call, the parties agreed to the determination of preliminary issues at a Pre-Hearing Review based upon written submissions only. In accordance with the letter dated 16 August 2018 from the Acting Secretary to the Tribunal to the parties and containing the directions made, the preliminary issues to be determined are:

(1) whether the principles of *res judicata* apply to the complaint and so should be dismissed (paragraph (b) of the directions); and

(2) whether the complaint is an abuse of process (paragraph (e) of the directions).

The directions also required the parties to exchange bundles of documents to be relied on at the Pre-Hearing Review on or before 7 September 2018 and for four copies to be provided to the Secretary to the Tribunal by 12 noon on the

same day. The Tribunal received submissions from the Respondents (who act in person) before the deadline. The Applicant (who had been represented by Advocate Ayres) did not provide any submissions to the Tribunal, but an email from Advocate Ayres was received by the Secretary at 14:08hrs on Thursday 13 September 2018. The Respondents replied by email at 21:53hrs on 13 September 2018.

1.3 The Tribunal, consisting of three members, met on Friday 14 September 2018 and conducted a Pre-Hearing Review based upon the ET1 Application, the ET2 Response, the Respondent's submissions, the email on behalf of the Applicant and the Respondents' reply. All of that material has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.

1.4 The Tribunal was conscious that the Respondents were not legally represented and was anxious to make sure that all necessary steps were taken to ensure that they 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. Accordingly, the Tribunal was prepared to consider the whole of the Respondents' case and to 'look behind' the language used to articulate arguments where that was appropriate so that the merits of the case could be explored without pedantic insistence upon the use of correct terminology. That being said, the Tribunal was also mindful of the commentary in paragraph 44 of ***Reynard v Fox*** [2018] EWHC 443 (Ch) that the fact that a litigant was acting in person was not in itself a reason to disapply procedural rules or orders or directions, or excuse non-compliance with them. The exception to that principle being that a special indulgence to a litigant in person might be justified where a rule was hard to find, difficult to understand, or it was ambiguous.

2.0 Factual Summary

2.1 The parties agree that the Applicant started work for the Respondents on 27 September 2016 as a nanny and that she was dismissed with an effective date of termination of 6 November 2017; they do not agree upon the reasons for the termination of her employment. The Applicant believes that she was dismissed so that the Respondents could avoid paying her for the full 12 weeks' notice period to which she claims to be entitled; the Respondents say, in summary, that they dismissed the Applicant because of her admitted difficulties with caring for the children and/or her behaviour in front of them.

2.2 The Applicant was initially employed under the terms of a written contract dated 8 July 2016. Following a period of maternity absence she was re-employed under another written contract dated 24 October 2017 which contained the following, new, clause:

'1.5 If at any time during the Term your Own Child Care, in our sole and absolute opinion, affects your ability to perform, or the actual performance of, your duties, you agree that upon being given notice in writing ("Early Notice") the Term shall be reduced to a date that is 2 weeks immediately following the date on which the Early Notice is delivered.'

2.3 Clause 6.1 of the new contract re-stated the right of either party to terminate by giving not less than 12 weeks written notice. Clause 6.2 gave the Respondents the power to terminate without notice in the event of gross misconduct. Clause 6.3 gave examples of what might constitute gross misconduct.

2.4 On 27 October 2017, just three days after the new contract had been signed, the Applicant prepared a letter of resignation in which she gave 12 weeks' notice and delivered it to the Respondents on 31 October 2017. The reason given verbally at 4.15pm on 27 October 2017 by the Applicant for her resignation was that she could not easily provide for the different care requirements of the children arising from their different ages; in her letter of resignation she said, "*However I feel that under my change in circumstances I cannot give you my all at present*".

2.5 There appear to have been a number of meetings and discussions between the Applicant and the Respondents (or one of them) in the day following the delivery of the Applicant's resignation. The result of those meetings was that on 1 November 2017 the Respondents delivered to the Applicant a letter purporting to terminate the contract of employment under clause 1.5 and giving the Applicant two weeks' notice.

2.6 On 11 December 2017 (the same day upon which the ET1 Applicant form was signed and delivered) the Applicant issued a Summons against the Respondents in the Petty Debts Court seeking £4,150.62 damages for breach of contract, being the outstanding balance of the 12 weeks' unpaid notice. That claim was heard before Judge Thornton on 19 February 2018 with judgment being given in the Applicant's favour, but for only one week's wages *i.e.* £357.78 plus costs.

3.0 Legal submissions of the parties

3.1 The Respondents rely upon the principles set out in ***Arnold v National Westminster Bank plc*** [1991] 2 AC 93 at105E and ***Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*** [1967] AC 853 at 965B in relation to the definition of and what could amount to issue estoppel. They rely upon ***Ladbrokes plc v Galaxy International Ltd*** [2007-08] GLR 101 at paragraphs 28 to 31 for the principle that issue estoppel is applicable in the Guernsey courts. They also argue that ***Fraser v HLMAD Ltd*** [2006] EWCA 738 at paragraph 28 provides authority for

the application of issue estoppel in a case where issues of fact or law are determined before an employment tribunal with separate proceedings before the High Court.

3.2 The Respondents rely upon ***Henderson v Henderson*** (1843) 67 ER 313 at 319[115] and ***Divine-Bortey v Brent LBC*** [1998] ICR 886 at 898G for the principles relating to abuse of process. They point out that in ***Ladbrokes plc*** *ibid* the principle has been found to apply in Guernsey courts.

3.3 The Respondents draw careful attention to the parts of the judgment of Judge Thornton upon which they seek to rely and which, they say, amount to findings of fact binding upon the Tribunal by virtue of the principles of issue estoppel and abuse of process. They conclude by arguing that these findings give a complete answer to the allegations made by the Applicant in her claim for unfair dismissal.

3.4 In an email submitted on the Applicant's behalf her position is, "that whilst she wishes to pursue her complaint, she will not submit any documentation for the CMC [*sic*] but, rather, would respectfully ask that the Tribunal consider the matter on the basis of the material before it and do justice to the parties".

4.0 The legal principles to be applied

4.1 The Tribunal has jurisdiction to hear claims of unfair dismissal; it has no jurisdiction to hear claims of wrongful dismissal (*i.e.* claims relating to breach of contract). Claims of unfair dismissal are governed by section 6 of the Law:

> **General provisions relating to fairness of dismissal.**
>
> 6. (1) 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 –
>
> (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).
>
> (2) For the purposes of subsection (1)(b), a reason falling within this subsection is a reason which –
>
> (a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) related to the conduct of the employee,
>
> (c) was that the employee was redundant,
>
> (d) was that the employee could not continue to work in the position which he held

without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under the law of Guernsey, or

(e) was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3) 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.

4.2 It is unfortunate that the Respondents refer to their application to "strike out" the Applicant's complaint. The Tribunal has no power to strike out a claim or part of a claim within the generally accepted meaning of that phrase as used by lawyers, whether for an abuse of process or on the basis of issue estoppel. What the Tribunal can do, by virtue of section 19 of the Law, is to refuse to hear a complaint under section 16(1) if, amongst other things, the complaint appears to the Tribunal to be frivolous or vexatious – section 19(3)(b). In accordance with the principles set out in paragraph 1.4 above, the Tribunal treats the Respondent's application as one to refuse to hear the complaint by reason of its being frivolous or vexatious.

4.3 The Tribunal accepts the reasoning set out by LB Southwell QC in ***Ladbrokes plc*** at paragraph 29. In particular, where issues have been fully argued when an application is made and a court has reached a decision based on such full arguments, it would be a waste of the Tribunal's time and the parties' money for the same arguments to be rehearsed and for the Tribunal to reconsider the effect of those arguments.

4.4 Judge Thornton gave a reasoned judgment on the facts after hearing evidence and full argument when he determined the Applicant's claim for breach of contract against the Respondents. Where any of those facts form part of the facts to be determined by the Tribunal, they will be adopted because, in the words of LB Southwell QC, of the inappropriateness of allowing a repetition of what has been fully argued and decided already by the courts. It does not matter that Judge Thornton was concerned with the question of damages for breach of contract and the Tribunal is ultimately concerned with statutory

compensation for unfair dismissal; questions of fact that are common to both actions fall within the ambit of LB Southwell QC's conclusions in ***Ladbrokes plc***.

4.5 According, therefore, to section 6(3) of the Law, once the Respondents have fulfilled requirements of section 6(1) the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the Respondents, shall depend on whether in the circumstances (including the size and administrative resources of the Respondents' undertaking) the Respondents acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Applicant; and that question shall be determined in accordance with equity and the substantial merits of the case.

5.0 Facts Found

5.1 The Tribunal adopts the following findings made by Judge Thornton:

(1) The Applicant gave as a reason for her resignation the fact that she could not easily provide for the different ages between the Respondents' children and her own baby and that she needed to put her family first (paragraph 8).

(2) Clause 1.5 of the new contract gave the Respondents the ability to terminate the employment if, in their absolute sole opinion, the Applicant's own childcare affected her ability to perform her duties (paragraph 15).

(3) As a result of the wording of the Applicant's resignation and her verbal explanation, the Respondents held a reasonable opinion that the Applicant's capability to perform her duties was compromised (paragraphs 16 and 17).

(4) The Respondents did not dismiss the Applicant for gross misconduct (paragraphs 12 and 13).

(5) The Respondents dismissed the Applicant pursuant to the provisions of clause 1.5 of the new contract (paragraph 17).

5.2 By virtue of the award of £357.78 made in the Petty Debts Court, the Applicant has received her wages for two weeks' notice to which she was entitled under the provisions of clause 1.5 of the new contract.

5.3 So far, those findings relate to the question of wrongful dismissal or breach of contract. This Tribunal is concerned with the question of unfair dismissal. In particular, at any final hearing of the Applicant's complaint the Tribunal will need to consider whether the dismissal was fair or unfair, having regard to the reason shown by the Respondents. In turn that shall depend on whether in the

circumstances (including the size and administrative resources of the Respondents' undertaking) the Respondents acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Applicant; and that question shall be determined in accordance with equity and the substantial merits of the case.

5.4 Judge Thornton has already found that the Respondents held a reasonable opinion that the Applicant's capability to perform her duties was compromised. It seems to the Tribunal, therefore, that the test in section 6(3) of the Law is satisfied and would be satisfied at a final hearing. The Tribunal does not think that the final clause in section 6(3) (*i.e.* "and that question shall be determined in accordance with equity and the substantial merits of the case") disapplies the principles discussed and set out above or adds any further obligation on the Tribunal to reconsider matters that have already been fully argued before another court.

5.5 The Tribunal considers that 'in accordance with equity' means that they should apply the principles of fairness and natural justice to the case. In particular, in these circumstances natural justice includes the obligations to act fairly, reasonably, rationally, in good faith, without bias, in a judicial manner and to give each party the opportunity of adequately stating his or her case following proper disclosure. Furthermore, the Tribunal considers that 'in accordance with the substantial merits of the case' means that they should have regard to the strengths and weaknesses of each party's case.

5.6 The Tribunal has already decided that it would be a waste of time and resources to revisit questions of fact that have already been determined by a court of competent jurisdiction, namely Judge Thornton's findings when sitting in the Petty Debts Court. The parties called evidence and had the opportunity to argue their cases before him; in all fairness the Tribunal do not consider that anything was defective with that procedure and that it complied with the principles of natural justice. The parties have also had the opportunity to argue their cases in relation to previous findings of fact before the Tribunal.

5.7 The findings of fact that the Tribunal now adopts mean that the Applicant's case boils down to whether allowing the Respondents to rely upon the powers given to them under clause 1.5 of the new contract is fair or unfair. The Tribunal reminds itself that this was a clause that was not included in the original contract, but that the parties agreed to its inclusion in the new contract. The clause is undoubtedly very favourable to the Respondents and, on reflection, it is one whose importance and implication was almost certainly not foremost in the Applicant's mind when she explained the reasons for her resignation. Had the Applicant received proper advice at the time she might very well have declined to give reasons, but that is no reason for not giving the Respondents the benefit of the clause that they introduced into the new contract however one-sided the benefit.

5.8 Consequently, the Applicant's claim is considered to be one that, if it were to be considered at a final hearing, has little or no merit or basis in law and the effect of which (whatever the Applicant's intention) would be to subject the Respondents to inconvenience and expense out of all proportion to any likely gain to the Applicant. In other words, the Applicant's claim is frivolous and vexatious.

5.9 The Tribunal observes that it has come to the decision that the Applicant's claim is frivolous and vexatious using the principles in ***Ladbrokes plc*** and has not found it necessary to resolve either of the preliminary issues identified during the Case Management Meeting on 8 August 2018. That being said, the Tribunal sees no reason why, in general, the principles of *res judicata* should not apply to decisions of the Employment and Discrimination Tribunal. Furthermore, since the Tribunal has found that the effect of the Applicant's claim (whatever the Applicant's intention) would be to subject the Respondents to inconvenience and expense out of all proportion to any likely gain to the Applicant, this could amount to an abuse of process because the effect is not a legitimate aim.

5.10 For the avoidance of doubt, although not specifically addressed by the parties, the Tribunal has taken into account Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life) of Schedule 1 of *The Human Rights (Bailiwick of Guernsey) Law, 2000*. The Tribunal considers that in determining the parties' civil rights and obligations the procedure adopted in the Pre-Hearing Review generally, and the principles of law identified and applied in particular, gave both parties a fair hearing within the meaning of Article 6. So far as the pronouncement of a judgment publicly is concerned, the Tribunal are conscious that Articles 6 and 8 arguably require steps to be taken to protect the identity of the Respondents' children. It is noted, however, that Judge Thornton has already given judgment publicly and identified the parties by name; to that extent the genie is already out of the bottle and the matter is in the public domain. The children are not identified by name in this judgment and, consequently, the Tribunal considers that no further steps are required.

5.11 In their email dated 13 September 2018 the Respondents applied for costs in the total sum of £90.57. The Tribunal considered whether to exercise its discretion under paragraph 6 of the Schedule to *The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005* in favour of the Respondents. Taking into account the very one-sided benefit that the Respondents managed to arrange for themselves under clause 1.5 of the new contract and the very modest level of costs claimed, the Tribunal considers that it would not be in the interests of justice to award costs in this case and declines to make an order.

6.0 Conclusions

6.1 The Applicant's claim is frivolous and vexatious and the Tribunal decides, pursuant to section 19(3)(b) of the Law, to refuse to hear the Applicant's complaint of unfair dismissal. The Tribunal declines to make an order for costs.

Mr Jason Hill	17 September 2018
……..	……..
Signature of the Chairman	Date