

**Employment and
Discrimination
Tribunal**

Form ET3

Case No ED017/18

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: **Mr Ian Shade**
Represented by: Advocate Mark Priaulx

Respondent: **Jacksons (C.I.) Limited**
Represented by: Mrs Sharon Peacock

Tribunal Members: Ms Christine Le Lievre
Mr Roger Brookfield
Mrs Joanne de Garis

Hearing Date: 5 September 2018

Decision of the Tribunal

Having considered all the evidence presented, the representations of both parties, and with due regard to all the circumstances, whether referred to in this judgment or not, the Tribunal determines the Applicant does not meet the required qualifying period to bring a claim, that is not less than one year of continuous employment under Section 15 of the 1998 Law, and the case is dismissed.

Ms Christine Le Lievre
.....
Signature of the Chairman

26 September 2018
.....
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 1998 Law')

The authorities referred to in this document are as follows:

Harvey on Industrial Relations and Employment Law Chapter 5

Lees v Arthur Greaves (Lees) Ltd [1974] 2 All ER 393

Halsbury's Laws of England

Hamsard 3147 Ltd and another v Boots UK Ltd

Conflict

Prior to the Hearing, it was agreed by all parties that business dealings between Mr Brookfield, side member, and Mr Termeulen, on behalf of Jacksons (C.I.) Limited, more than one year previously would not present a conflict for the Hearing.

Extended Reasons**1.0 Introduction**

- 1.1 The Applicant, Mr Ian Shade, was represented by Advocate Mark Priaulx. The Respondent, Jacksons (C.I.) Limited, was represented by Mrs Sharon Peacock.
- 1.2 A joint bundle, agreed by the parties, with pages numbered 1 – 176 was submitted.
- 1.3 The Applicant was employed by Jacksons (C.I.) Limited, in the position of Sales Executive beginning Tuesday 7 February 2017.
- 1.4 The Applicant, in an ET1 Application form, dated 25 April 2018 claims unfair constructive dismissal under The Employment Protection (Guernsey) Law, 1998, as amended (the 1998 Law), by virtue of the Respondent's conduct.
- 1.5 The Respondent resists the claim.
- 1.6 The Effective Date of Termination (the EDT) is not agreed by the parties. At a CMM held on 23 July 2018, it was agreed to hold a preliminary hearing to determine jurisdiction with respect to the required qualifying period of not less than one year of continuous employment under Section 15 of the 1998 Law.
- 1.7 The Tribunal, consisting of three members, met on Wednesday 5 September 2018 to hear and determine the Applicant's EDT based upon the documents, witness evidence and authorities before it. All of the evidence presented and the representations of both parties have been considered, whether referred to in this judgment or not.
- 1.8 The Respondent submits the Applicant submitted his ET1 claim as his former employer found it necessary to pursue him for monies owed in respect of rental

subsidy repayment which was due in the event employment was terminated within 18 months from 1 March 2017.

- 1.9 The Applicant contends the Respondent unilaterally varied his notice period from four weeks to one week.
- 1.10 The burden of proof rested with the Applicant to show he had not intended to vary his contractual notice period and had intended to work his 4 week notice period to 26 February 2018.
- 1.11 There were no witnesses called by the Applicant.
- 1.12 The Respondent called the following witnesses who gave evidence under oath or affirmation:

Mr Jonathan Nixon, General Sales Manager, Jacksons
Mr Onno Termeulen, Head of Business, Jacksons.

2.0 Legal submissions of the parties

- 2.1 The Applicant's position is that the Effective Date of Termination is the date upon which his contractual notice period of 4 weeks expired, 27 February 2018, in accordance with Section 5(4)(a) of the **1998 Law**, with such notice not having been varied by agreement as is submitted by the Respondent.
- 2.2 The Applicant submitted that the general principles of varying or shortening the notice period in such situations is provided in **Chapter 5 of Harvey on Industrial Relations and Employment Law** (beginning page 99) and in **Lees v Arthur Greaves (Lees) Ltd [1974] 2 All ER 393**.
- 2.3 The Applicant proposed that a reference from **Halsbury's Laws of England** (page 6) is persuasive and quoted Contra Proferentem which refers to any ambiguity in the wording of a contract should be construed against a party who seeks to rely on it.
- 2.4 The Respondent, in its closing statement, referred to **Hamsard 3147 Ltd and another v Boots UK Ltd** (inserted following page 11 of the bundle paragraphs 64 to 68) which refers to five applicable principles as a guide; three of which should be applied in this case. In summary:
 - 2.4.1 A reasonable length of notice must always depend on the particular facts of the particular case.
 - 2.4.2 The particular facts might well involve consideration of the general circumstances and practices of the trade involved.

2.4.3 What is “reasonable notice” is to be judged at the time and in the circumstances when notice is given.

The Tribunal noted these and found them to be a useful guide in this case.

The Tribunal considered, in these circumstances, if the Applicant intended to work his notice period the question arises as to why, having given his notice, he did not attend on his next scheduled work day, 29 January 2018, with no mitigating circumstances mentioned. In addition he stated he had voluntarily handed over the keys to the company car he was using; and was able to begin new employment within the week. This would imply, by the Applicant’s actions, the variation to the notice period was consensual; and that he benefitted from the variation (Harvey’s page 104 in the bundle). The Applicant provided no evidence that the employer insisted upon a shortened notice period; a fact which may easily have been achieved by him early on if he had questioned or challenged the Respondent by email or more formally.

3.0 Findings

3.1 Tuesday 7 February 2017

The Applicant took up employment with the Respondent under a contract of employment signed by Paul Kell, Operations Director. A copy of the Contract of Employment contained in the bundle (pages 50 – 54), is undated and is not signed by the Applicant. The Tribunal confirmed with both parties that they had agreed the copy was valid. Whilst the Applicant recalled signing and returning the original contract, and stated he had a copy, it was not available for the bundle. This Contract states “Where the contents of the Handbook and the Contract are in conflict, your Contract will take precedence.”

The Contract is silent on the Notice Period (page 53) required by the employee once the probationary period has passed. The Staff Handbook dated May 2017 is also silent on notice period.

3.2 Saturday 27 January 2018, 09:00

The Applicant resigned by letter dated 26 January 2018 (page 63). The parties agreed this letter was handed to Mr Nixon at approximately 9.00 a.m. on Saturday 27 January 2018. The Applicant’s letter of resignation was silent on his expected notice period and likewise on his expected last day of working. The witnesses both agree they had a conversation about the notice period but do not agree on what was said.

In his witness statement the Applicant stated *“I recall that I said something to the effect of ‘what is my notice, is it a week or is it a month?’”*

Mr Nixon stated the Applicant said *“I believe my notice period is a week but I’m not sure.”* Mr Nixon replied *“Are you saying you want to work for a week?”* and the Applicant’s reply was *“Yes.”*

Mr Nixon's evidence continued with *"If it is a week, are you intending to come in for the week?"* and the Applicant replied *"Probably not. I won't come in. Probably best I don't come back in."* Both parties agreed Mr Nixon said he would get back to the Applicant about his notice period.

The Applicant's witness statement (page 27 paragraph 9) goes on to say "I had given Jonathan the car keys to the VW Golf which I was at the time driving."

3.3 Saturday 27 January 2018, 11:01

Mr Nixon sent an email (page 64) to Mr Termeulen advising the Applicant had resigned, was unsure of his notice period and stated "he seems to think a week?." Mr Nixon went on to suggest "Perhaps speak later as to whether we get him to work it?"

In evidence (page 32) Mr Nixon states he subsequently spoke with Mr Termeulen and they agreed they would not make the Applicant work his notice period but that it would be paid. The period of notice remained unconfirmed at the time.

3.4 Saturday 27 January 2018, 12:33

Mr Termeulen responded (page 65) to Mr Nixon's email with a cc to Human Resources requesting they advise on the Applicant's notice period.

3.5 Monday 29 January 2018, 08:17

Human Resources sent an email (page 66) to both Mr Nixon and Mr Termeulen stating the notice period *"is 4 weeks, however should he choose to only work a week, we can't stop him."*

3.6 Monday 29 January 2018, 12:58

The Applicant did not report for work at 8.30 a.m.

Evidence was provided to show Mr Nixon phoned the Applicant at approximately 1pm. Mr Nixon told the hearing it was to advise the Applicant of his notice period (page 32, paragraphs 23 – 28) and stated during his evidence that he told the Applicant his notice period was four weeks *"but if it's a week you want, I'd accept it. Is that what you want to do?"* Mr Nixon says the Applicant replied "Yes". Mr Nixon stated he could recall telling the Applicant he was not required to work but would be paid, and asked him to confirm he was OK with that arrangement to which the Applicant replied he was.

In reading from his witness statement (page 27 paragraph 12) the Applicant noted Mr Nixon told him *"they had decided to give me a week's notice (to be used as garden leave)."* And that he responded saying *"if that is what it is, then that is what it is."* The Applicant stated he had no intention of varying his contract and had intended to work his notice period (page 27 paragraph 15).

Further he understood that this was the notice period he was 'given' (page 29 paragraph 16).

The current, May 2017 copy of the Staff Handbook (page 47 of the bundle), confirms that when an employee is on Garden Leave *"For the avoidance of doubt you may not work for any other employer and/or your own behalf during this time without the prior written agreement of the Company."* There was no evidence given to show this was specifically discussed in the conversation between the parties on 29 January 2018; nor raised in the letter, dated 16 February 2018 (page 77) acknowledging the Applicant's resignation.

3.7 Monday 29 January 2018, 13:08

Mr Nixon sent an email (page 69) to Human Resources and Mr Termeulen which states "I have spoken to Ian and accepted his one week notice period from Saturday 27 January 2018".

3.8 Friday 2 February 2018

The Applicant said he began employment with another motor trader on the Island.

3.9 (Emails in the period from 3 February to 11 February 2018 are not relevant to the Applicant's notice period.)

3.10 Monday 12 February 2018, 15:16

Somewhat belatedly, in an email (page 76), Mr Nixon provided Human Resources with a copy of the Applicant's resignation letter confirming it was presented to him on 27 January 2018. Mr Nixon ended the email saying "I then acknowledged his request for 7 days' notice on Monday 29 January."

3.11 Friday 16 February 2018

The Respondent wrote a formal acknowledgement of resignation addressed to the Applicant, which was posted on the basis of requiring a signed receipt.

3.12 Monday 19 February 2018

Evidence was submitted to show the Applicant signed a receipt (page 86) for the formal letter (page 77) from the Respondent as noted above.

The third paragraph refers to the Notice Period and states: *'You have stated that you wished to reduce your notice period from 4 weeks to 7 days and the Company was in agreement with your proposal. As such your last working day was 3 February 2018 (the "Termination Date")'*.

3.13 Friday 23 February 2018, 10:49

The Applicant emailed Mr Termeulen noting that he was available to talk to him. There is no mention in the email of the Applicant's notice period. During evidence given it was apparent the call was to discuss a matter unrelated to the notice period or termination date.

3.14 Monday 26 February 2018

A copy of the Applicant's payslip, dated 26 February 2018 (page 87), shows he was paid for three days in February, up to and including 3 February 2018 (with an additional two days representing unused holiday).

3.15 Tuesday 27 March 2018, 08:19

The Applicant emailed Mr Termeulen (page 81). The email reads, in the second paragraph, *"We haven't had the opportunity to discuss why I left Jackson's and the reason why I wasn't given my full month's period of notice as was the contractual agreement."* The email then goes on to refer to the provision of commission statements.

There was no evidence produced to show that the notice period was discussed subsequently.

Subsequent emails between the parties refer to other matters.

4.0 Summary

4.1 The Applicant and Mr Nixon neither agreed what was said about the Applicant's notice period during their face to face conversation at 9.00 a.m. on Saturday 27 January 2018, when the Applicant handed over his letter of resignation, nor with regard to the phone call between them on Monday 29 January 2018.

4.2 It is however agreed that, at the time of his resignation, the Applicant stated he was unaware of the notice period he was required to give and Mr Nixon confirmed he would clarify this.

4.3 The Applicant did not return to work following his resignation on 27 January 2018.

4.4 The Tribunal noted, in respect of the three-month period between 30 January and 26 March 2018, the Applicant did not produce any written evidence, or state he had contacted the Respondent to inform it he preferred to work and/or be paid four week's notice.

4.5 The Applicant, for the first time raised the question of the length of his notice period (as well as his reasons for leaving and his commission statements), in an email to Mr Termeulen dated 27 March 2018 (page 81).

4.6 In particular, as recorded above, and with additional emails about other matters, the Tribunal noted there were several occasions when the Respondent wrote to the Applicant, primarily by email and, on one occasion, by formal letter, about his notice period. It would seem reasonable in the circumstances for any of this correspondence to have prompted the Applicant to question,

challenge, or object to, the Respondent's understanding that the Applicant had requested a variation to his notice period reducing it to one week.

- 4.7 In response to questioning the Applicant stated he had begun employment with his new employer on Friday 2 February 2018.
- 4.8 Whilst giving evidence, there were two or three occasions when the Applicant stated "I don't bother too much with paperwork, what I do is sell cars."
- 4.9 When giving evidence, the Applicant and both of the Respondent's witnesses all confirmed that it was quite usual for an employee, in the motor trade industry, to leave an employer at the time of his resignation or soon after, especially when taking up employment with an on Island competitor.

5.0 Conclusion

- 5.1 The key facts of what was said or not said between the Applicant and Mr Nixon cannot be absolutely determined. Had the Applicant not requested one week notice and the Respondent had therefore misunderstood him entirely, the Tribunal finds that the Applicant took no early opportunity to formally or informally confirm or challenge the outcome of his face to face meeting on 27 January or the phone call on 29 January 2018. The Applicant offered no mitigating circumstances to explain his delay. It was not until 27 March 2018 that he first mentioned he had wished to work four week's notice. By his own admission, the Applicant confirmed he had handed over the keys to the company car he was driving at the time of his resignation on 27 January 2018 and had begun employment with a competitor on Friday 2 February 2018.
- 5.2 The Tribunal finds the oral and documented evidence of the Respondent to be persuasive and, in considering all the circumstances, it is apparent the Applicant did intend to request a variation to what he considered was his contractual notice period and reduce that period to one week.

The Tribunal finds the effective date of termination may be regarded as either of 2 dates:

- (a) The end of the working day on Friday 2 February 2018 which is seven days after the Applicant's resignation, or
- (b) Sunday 4 February 2018 which is seven days after the Respondent confirmed one week's notice was acceptable; and

by his action of taking up new employment within the week, whilst on 'garden leave', together with failing to object or even question the one week discussed within a reasonable period the Applicant implied agreement.

6.0 Decision

Having considered all the evidence presented, the representations of both parties, and with due regard to all the circumstances, whether referred to in this judgment or not, the Tribunal determines the Applicant does not meet the required qualifying period of not less than one year of continuous employment under Section 15 of the 1998 Law, to bring a claim, and the case is dismissed.

Ms Christine Le Lievre

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Signature of the Chairman

26 September 2018

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Date