

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr Michael Hurwitz
Represented by: In person

Respondent: The House of Green Limited
Represented by: Ms C. Parrott

Tribunal Member: Crown Advocate J. Hill (sitting alone)

Hearing date: 10 October & 25 November 2022

Decision of the Tribunal

Having considered all the evidence and arguments presented, whether recorded in this judgment or not, the Tribunal concludes that the Applicant does not have the necessary qualifying period of continuous employment under s.15 of The Employment Protection (Guernsey) Law, 1998 ("the Law"). In those circumstances the Tribunal considers that the Applicant's claim has no prospects of success and is therefore frivolous and/or vexatious. Accordingly, the Tribunal exercises its discretion to grant the Respondent's application under s.19 of the Law not to hear the Applicant's complaint. The Tribunal therefore dismisses the Applicant's claim and makes no award.

Furthermore, the Tribunal has decided not to award costs to either party.

.....
Signature of the Chair

.....
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, The Secretary to the Tribunal, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.

(Telephone: 01481 220025)

Email: Employmentrelations@gov.gg.

The legislation referred to in this document is as follows:

The Employment Protection (Guernsey) Law, 1998, as amended ('the Law')
The Conditions of Employment (Guernsey) Law, 1985
The Employment Protection (Recoverable Costs) Order, 2006

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)
General of the Salvation Army v Dewsbury [1984] ICR 498
Koenig v Mind Gym Ltd. [2013] 3 WLUK 221
O'Sullivan v DSM Demolition Ltd. [2020] IRLR 840
Pellegrini v Barings Asset Management (CI) Ltd. (Guernsey E&DT 2019)
Bougourd v Close Fund Services (Guernsey E&DT 2018)
Societe Generale, London Branche v Geys [2012] UKSC 62
Gisda Cyf v Barratt [2010] UKSC 41

Extended Reasons**1.0 Introduction**

- 1.1 Throughout these extended reasons documents within the hearing bundle shall be referred to like this: "[x]", which means "divider x". Unfortunately, page numbers were not available due to document production difficulties.
- 1.2 The Applicant, who it was agreed was employed by the Respondent as Head of Extraction, complains that he was unfairly dismissed. The Respondent admits that the Applicant was dismissed, but allege that this was as a result of poor performance; they also allege that he does not have the necessary qualifying period of continuous employment to enable him to bring a claim for unfair dismissal before the Tribunal. Accordingly, the Respondent made an application, dated 1 July 2022 and then amended on 27 September 2022 for the Tribunal to refuse to hear the Applicant's complaint pursuant to s.19 of the Law. The Tribunal, consisting of the Chairman sitting alone, sat on Monday, 10 October and Friday, 25 November 2022 to hear and determine the Respondent's application. All of the material submitted by the parties in the joint bundle and the additional material submitted by the parties for the hearing on 25 November 2022 has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.

- 1.3 The Tribunal was conscious that the Applicant was not legally represented and was anxious that all necessary steps were taken to ensure that he had a fair hearing. The Tribunal took account of the then 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 took care to explain the Tribunal's procedure to the Applicant throughout the proceedings and to explore potential arguments and lines of questioning that he could have advanced. 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, 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 Background

- 2.1 In his ET1 the Applicant alleged that he started working for the Respondent on 18 September 2020 (the date upon which the Respondent's representative countersigned the contract of employment — see [B1; exh. GT3]) and that his effective date of termination was 27 November 2021 (the end of his 3 months' notice period). During the course of the hearing he changed his position slightly in that he alleged that his employment started on 2 November 2021 (being the date specified in clause 1.1 of his contract of employment — see [B1; exh. GT3]).
- 2.2 The Respondent, on the other hand, alleged in their application and during the hearing that the Applicant's employment started on 1 December 2021 (being the date upon which they maintain that he started work within the meaning of paragraph 2(1)(a) of the Schedule to the Law). In the Respondent's ET2, however, the Applicant's starting date is admitted to be 2 November 2021. The Respondent also alleged that by virtue of making a payment in lieu of notice to the Applicant, as permitted under clause 19.4 of the contract of employment (see [B1; exh. GT3]) and page 24 of the Employee Handbook (see [B1; exh. GT5]), the effective date of termination was the date that the dismissal took effect, namely 27 August 2021, alternatively on 28 August 2021 (the date upon which the dismissal was communicated to the Applicant; see [B2; exhs. RT6 and RT7]). In the yet further alternative, they argue that the effective date of termination was 1 October 2021 (the date of the payment in lieu of notice).
- 2.3 The Applicant agreed that he had received the letter of dismissal dated 27 August

2021 ([B2;exh. RT6]), but argued that no notice pay was received by him until about 11 October 2021 and even then there was a deficit of £677.54 (see [B2;exh. RT11]). As a result of this alleged failure to pay within a reasonable time, the Applicant argued that the dismissal with pay in lieu of notice was revoked (or otherwise rendered null and void) and that his effective date of termination was the end of his contractual notice period (*i.e.* 3 months after the notification of his dismissal). The Applicant also maintained that there was a wrongful deduction from his payment in lieu of notice of £3,439.48 representing an over-payment of his contractual relocation allowance.

- 2.4 At the start of the hearing the Applicant raised a preliminary objection to the contents of the joint bundle. In particular, he objected to the Respondent's inclusion of legal authorities not previously seen by him and that the Respondent's witness evidence had been tailored to meet the documentation submitted by him. Those objections were dealt with by means of an extempore oral ruling and are not addressed further in this judgment.

3.0 Evidence Summary

- 3.1 The first witness called by the Respondent was Gary Tucker (the Respondent's Group Chief Operations Officer); he made the affirmation and read out his witness statement ([B1]). He described the Applicant's recruitment and explained how the Applicant came to be granted a long term employment permit on 11 December 2020 that commenced on 25 November 2020 ([B1;exh. GT8]). He explained that he emailed the Applicant on 2 November 2020 and suggested that he would include the Applicant in operational emails so that the Applicant could "get a feel for the business" and be involved remotely in weekly operational meetings. On 9 November Mr. Tucker emailed the Applicant details of the Applicant's work email address, temporary password and how to set up Teams (a video conferencing platform). Mr. Tucker denied that the Applicant's involvement in acquiring an HPLC machine constituted work done under the contract of employment; he said that the idea had come from the Applicant and that the Applicant was, if anything, acting as the Respondent's agent rather than an employee. Emails sent to the Applicant from 2 November 2020 were for "information only" and did not require the Applicant to deliver anything. The reference to the start date of 2 November 2020 in the last sentence of the letter of dismissal dated 27 August 2021 ([B1;exh. GT20]) was an error and because that letter had been drafted by the Respondent's HR consultant it had probably just been lifted from the contract of employment. He explained that he thought that there was no ambiguity in the dismissal letter of 27 August 2021 ([B1;exh. GT20]).

- 3.2 Under cross-examination Mr. Tucker said that the Employee Handbook had been sent by email to the Applicant on 11 November 2020, but that the Applicant was not expected to check his emails as he had not started work yet. He accepted that the contract of employment specified the start date as 2 November 2020 and that the recitals to the contract provided that it superseded all previous agreements. He also agreed that clause 22.1 of the contract explained the provisions of *The Conditions of Employment (Guernsey) Law, 1985* and that if there were any change to the terms of employment the Applicant would receive a written notice.
- 3.3 In relation to paragraph 23 of his statement, Mr. Tucker explained that the board agreed that the Applicant's start date would be 1 December 2020, but that he had no recollection of whether the Applicant was told of that decision. He accepted that there was no written notice of any such change. He also said that the Applicant had not raised any objection or concern about only being paid from 1 December 2020 onward.
- 3.4 Rebecca Tucker was the next witness called by the Respondent. She made the affirmation and read out her witness statement ([B2]). She exhibited an email from Sarah Leadbeater (the Respondent's office administrator) suggesting that the Applicant had indicated an intention to start work on 23 November 2020 ([B2;exh. RT2]). This then changed to a start date of 24 November as reflected by a diary entry of Paul Smith ([B2;exh. RT3]). Her evidence then suggests that as a result of discussions with Mr. Tucker and the celebration of the American tradition of Thanksgiving on 26 November 2020, the Applicant did not start work until 1 December 2020. She then described the decision to terminate the Applicant's employment, the delivery of the dismissal letter dated 27 August 2021 and the administrative oversight that caused the Applicant's payment in lieu of notice not to be made in the next payroll run as had been intended.
- 3.5 Under cross-examination she explained that she thought that her email concerning the signing of the Employee Handbook ([B2;exh. RT1]) had been friendly and relaxed; she did not think that it was a work instruction. She explained that although she was not a director she was involved regularly with employment issues.
- 3.6 The Applicant gave evidence even though he had not submitted a witness statement. This was allowed subject to necessary safeguards to protect the Respondent's interests. He explained how he had been recruited and that following his appointment he regarded his contractual start date of 2 November 2020 as "serious" and started looking for ways to serve the Respondent. He said that Mr. Tucker had asked him about testing equipment and that he told Mr. Tucker that his current employer was closing down and had some suitable equipment that he might

be able to obtain at a good price. He described how on 4 and 5 November 2020 he had dismantled, packed and shipped a valuable instrument to the Respondent; all this was in the service of the Respondent.

- 3.7 The Applicant described he arrived in Guernsey on 9 November 2020 and received work emails and the Employee Handbook. All communications with the Respondent now took place through company channels. As a result of the Covid quarantine period, he was not free to leave home until 23 November 2020 and he attended work on 24 November when he received a security fob and key. He attended a company party and “formally started work” on Monday, 30 November 2020. He also described a meeting with Mr. Tucker, probably in early January 2021, in the upstairs corridor at work during which he asked why he had not been paid for November 2020. This allegation had not been put to Mr. Tucker when cross-examined by the Applicant. Nobody else was present, but Mr. Tucker had said words to the effect of “if you don’t make a fuss about that you can keep the over-payment of relocation expenses”. The Applicant said that his calculations suggested that there was only a “couple of hundred pounds in it” so he was content.
- 3.8 The Applicant described the events surrounding the decision to dismiss him and the Respondent’s failure to pay him his payment in lieu of notice in the next payroll cycle. He regarded this as a repudiation of the election made under clause 19.4 of the contract meaning that he was entitled to a three month notice period, which would expire on 28 November 2021. The Applicant expressed his conviction that payment within a reasonable time was necessary for dismissal with payment in lieu of notice to be effective and that, in any event, withholding the over-payment of relocation expenses was improper and invalidated the payment in lieu of notice.
- 3.9 As a result of the new allegation concerning a meeting with Mr. Tucker in early January 2021, Mr. Tucker was recalled to deal with that issue. Mr. Tucker said that he did not think that discussion happened and he certainly did not remember it.
- 3.10 The hearing was then adjourned part-heard to another date so that closing submissions by both parties could be made. The matter came back before the Tribunal on Friday, 25 November 2022.

4.0 Closing submissions

- 4.1 The Applicant produced and relied upon written submissions dated 28 October 2022 that were amended on 3 November 2022 to include specific references to various authorities, but which were otherwise identical to the earlier version. He amplified those written submissions orally during the hearing. The Respondent relied upon its

written opening submissions, and closing submissions dated 18 November 2022 made in response to the Applicant's amended submissions of 3 November amplified during the hearing. All of that material, both written and oral, submitted on behalf of both parties has been taken into account.

4.2 The Applicant's written argument relies upon the following points, which are a summary of the points raised in his document dated 3 November 2022:

- (1) He had a start date of 2 November 2020 because:
 - (i) That was the date specified in his contract of employment.
 - (ii) It was consistent with procuring and shipping equipment.
 - (iii) His work email and Handbook were issued.
 - (iv) He performed work by checking emails and attending meetings scheduled by work email.
 - (v) The contract of employment covers working off-site as a result of travel.
 - (vi) There was no notice given of a change of commencement date and there is no evidence to support such a change.
 - (vii) The termination letter refers to the start date as 2 November 2020.
- (2) There was an initial notice of an intention to terminate his employment at a future date because:
 - (i) Events on 23 August 2021 indicated this to be so.
 - (ii) His access to work facilities and email were revoked.
 - (iii) He was sent home and told not to come to work any more.
 - (iv) The Respondent "sealed" all further discussions with confidentiality provisions.
- (3) There was a "material date of termination of 27 August 2021" because:
 - (i) This was in line with the date on the letter stating that his contract of employment was being terminated.
 - (ii) The letter of termination was clear that the Respondent was choosing to terminate his contract of employment.
- (4) The effective date of termination was 27 November 2021 because:
 - (i) There was a three month notice period following the Respondent's notice to terminate the contract of employment.
 - (ii) The termination letter failed to clarify the Respondent's position on payment in lieu of notice.
 - (iii) The Respondent made no attempts to clarify the position on payment in lieu of notice.
 - (iv) The Respondent failed to make the payment in lieu of notice within a reasonable time and made confusing statements about the payment.
 - (v) The Respondent failed to clarify its position after receiving

correspondence from the Applicant.

4.3 During the course of oral argument the Applicant relied upon the Respondent's duty to appreciate that he did not understand what technical terms such as "payment in lieu of notice" meant and should have made allowances for that. He also drew attention to the fact that the Respondent did not challenge the commencement date of his employment until Tribunal proceedings had started and the absence of any explanation of why the over-payment had been allowed to exist for so long. He also argued that the Respondent should not be allowed to take advantage of being a "small company" because they had the resources to retain consultants to deal with employment law matters, and that the Respondent had fundamentally "messed up" the communication of the termination of his contract of employment.

4.4 The Respondent argues, in summary, that:

- (1) The Applicant's commencement date is to be interpreted in accordance with paragraph 2(1)(a) of the Schedule to the Law, namely that for the purposes of any provision of the Law the Applicant's period of continuous employment begins with the day on which he starts work.
- (2) The expression "starts work" means:
 - (i) the beginning of the Applicant's employment under the relevant contract of employment (*General of the Salvation Army v. Dewsbury* [1984] ICR 498);
 - (ii) that the work referred to must necessarily be work in respect of which the Applicant is an employee and is work under and not collateral to the contract of employment (*Koenig v. Mind Gym Ltd.* [2013] 3 WLUK 221); and
 - (iii) that the parties may agree on a start date but then later agree to vary it orally, in writing, by conduct or some mixture thereof (*O'Sullivan v. DSM Demolition Ltd.* [2020] IRLR 840).
- (3) The effective date of termination of the Applicant's employment is defined by s.5(4) of the Law and in this case means the date on which the termination takes effect (as illustrated by *Pellegrini v. Barings Asset Management (CI) Ltd.* Guernsey E&DT 2019 and *Bougourd v. Close Fund Services* Guernsey E&DT 2018).
- (4) Alternatively, the Tribunal should analyse the effective date of termination in accordance with the "what", "how" and "when" test set out in *Societe Generale, London Branche v. Geys* [2012] UKSC 62.
- (5) In the further alternative, the effective date of termination is the date of notification of termination to the Applicant (see *Gisda Cyf v. Barratt* [2010] UKSC 41).

5.0 Legal Framework

- 5.1 Pursuant to paragraph 2(1)(a) of the Schedule to the Law, for the purposes of the Law the Applicant's period of continuous employment starts with the day upon which he started work. I prefer the Respondent's line of authorities and find that this date refers to starting work under, but not collateral to, the contract of employment and may be varied by agreement made orally, in writing, by conduct or by a mixture thereof.
- 5.2 I also find that the effective date of termination, in a case where the Applicant is not informed immediately of the dismissal, occurs when the Applicant is actually informed of the dismissal or has a reasonable opportunity of discovering the dismissal.
- 5.3 So far as the quality of the communication between the Applicant and the Respondent is concerned, I find that the Respondent is only required to take objectively reasonable steps to use the appropriate language. I also find that the Respondent is not required to make sure that the Applicant actually understands the effect of any communication provided that it is objectively clear.

6.0 Facts Found

- 6.1 The written contract of employment, as well as other documents, stated that the Applicant started work on 2 November 2020. For the purposes of the Law, however, the Applicant's period of continuous employment starts with the day upon which he in fact started work. I find that the activities performed by the Applicant prior to 1 December 2020 were at most collateral to the contract of employment and were not performed under it. Accessing emails, being invited to attend meetings effectively as an observer and receiving the Handbook were merely activities that could be described as "settling in" and did not amount to work under the contract of employment. Similarly, the purchase and shipping of the machine were not part of the Applicant's job under the contract of employment; they were entirely voluntary.
- 6.2 So far as the disputed meeting sometime in January 2021 during which the Applicant alleged that he and Mr. Tucker discussed the non-payment of wages for November 2020 is concerned, the details remembered by the Applicant are vague and were never reduced to writing after the meeting for Mr. Tucker to confirm. On

that basis I find, on balance, that the Applicant's recollection is faulty on this occasion and that it did not happen.

- 6.3 On balance, therefore, I find that the Applicant's period of continuous employment started on 1 December 2020. As I explained during the hearing (and with which the Applicant agreed), for the Applicant to have the necessary period of continuous employment I must find against the Respondent on both the start and end dates of the Applicant's period of continuous employment. My finding in relation to the start of the period of continuous employment means that even if I agreed with the Applicant's calculation of the effective date of termination (*i.e.* 27 November 2021) he will not have the necessary continuous employment. In case I am wrong about the start date of the period of continuous employment, however, I shall go on to consider the effective date of termination even though it is not strictly necessary given my finding in relation to the commencement date.
- 6.4 I find that the language used in the notice of termination was perfectly clear and unambiguous. I reject the Applicant's submission that there was something special about his situation that meant that the Respondent was under a duty to take additional steps to satisfy itself that the Applicant understood the terms of the dismissal. The dismissal was communicated to and received by the Applicant in an email dated 28 August 2021 and amounted to a valid election by the Respondent to make a payment in lieu of notice. This means that the dismissal was effective upon notification to the Applicant.
- 6.5 I reject the Applicant's submission that for the payment in lieu of notice to be effective the payment must have either been made or must have been made within a reasonable time for the election to be valid and operative. As I explained during the hearing, once the Respondent has elected to terminate the Applicant's employment immediately and make a payment in lieu of notice (and communicated that to the Applicant) all that the Applicant has is the right to claim a breach of contract if no payment (or an insufficient payment) is ultimately made by the Respondent. It is not necessary, in my judgment, for there to be a full or partial payment within a reasonable time to bring about the immediate termination of the Applicant's employment; the Respondent's election and communication is sufficient.
- 6.6 I find, therefore, that the effective date of termination was 28 August 2021.

7.0 Conclusion

7.1 For the reasons set out above, the Tribunal concludes that the Applicant does not have the necessary qualifying period of continuous employment under s.15 of the Law. In those circumstances the Tribunal considers that the Applicant's claim has no prospects of success and is therefore frivolous and/or vexatious. Accordingly, the Tribunal exercises its discretion to grant the Respondent's application under s.19 of the Law not to hear the Applicant's complaint. The Tribunal dismisses the Applicant's claim and makes no award.

8.0 Costs

8.1 The Tribunal's power to awards costs is discretionary and governed by paragraph 6 of the Schedule to The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 and The Employment Protection (Recoverable Costs) Order, 2006.

8.2 Having taken into account all of the material before it, the Tribunal has decided not to award costs to either party.

.....
Signature of the Chair

.....
Date