

**States of Guernsey**



**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

**APPLICANT:** *Ms Lucy Campbell*

Represented by: Advocate Simon Geall

**RESPONDENT:** *Augentius Fund Administration (Guernsey) Limited*

Represented by: *Mr Ian Randall*

**Witnesses:**

Called by the Respondent: Ms Rhea Gordon, Ms Suzanne Meecham

**Decision of the Tribunal Hearing held on 1 & 2 October 2009.**

**Tribunal Members:** Ms Caroline Latham (Chairman)  
Mr Peter Woodward  
Mr Andrew Vernon

**DECISION**

Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of Section 9 of The Employment Protection (Guernsey) Law, 1998, as amended that the Applicant was dismissed for reasons of her pregnancy.

The Applicant is not required to have one year's qualifying period in accordance with 3.15 of "the Law". This claim falls into the exception set out at Section 15(2) of "the Law".

The dismissal was contrary to Section 1(1)(a) of The Sex Discrimination (Employment) (Guernsey) Ordinance 2005.

Under Section 22(1)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, the Respondent shall pay to the Applicant an award of £12,500.00, having been determined by reference to the Applicant's final six months employment with the Respondent.

In relation to the claim that the written reasons for the dismissal were untrue, the Tribunal awards a further payment of £1,041.67, being half of one month's pay.

**Amount of Award (if applicable): £13,541.67**

Caroline Latham

20 November 2009

.....

Signature of the Chairman

.....

Date

NOTE: Any award made by a Tribunal may be liable to Income Tax

Any costs relating to the recovery of this award are to be borne by the Employer

**The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended and The Sex Discrimination (Employment) (Guernsey) Ordinance 2005**

### **Extended Reasons**

#### **1.0 Introduction**

1.1 The Applicant, Ms Campbell, was represented by Advocate Geall and gave evidence to the Tribunal.

1.2 The Respondent, Augentius Fund Administration (Guernsey) Limited, was represented by Mr Randall.

1.3 The Respondent called the following witnesses to give evidence: -

Ms Rhea Gordon  
Ms Suzanne Meecham

1.4 The witnesses were supported by documentary evidence (EE1 and ER1, ER2, ER3 and ER4 Refers).

1.5 At the outset of the hearing the Chairman clarified with the parties that the primary issues to be addressed were as follows:-

Was this dismissal fair or unfair within the provisions of The Employment Protection (Guernsey) Law, 1998 (as amended)?

Were the written reasons for the dismissal correct reasons for the purposes of Section 2(5) of The Employment Protection (Guernsey) Law, 1998 (as amended)?

Was there discrimination on grounds of sex pursuant to Section 1(1)(a) of The Sex Discrimination (Employment) (Guernsey) Ordinance 2005?

#### **2.0 Facts Found by the Tribunal**

2.1 The Applicant, Ms Lucy Campbell commenced employment with the Respondent on 28 July 2008 as a client services administrator. On accepting the offer of employment from Augentius Fund Administration (Guernsey) Limited, (Augentius), she was sent an Offer Letter which was accompanied, amongst other items, by two copies of a Contract of Employment and a copy of the staff handbook ("The London Staff Handbook"), (EE1 tab 1 pages 2 - 45 refers).

- 2.2 Ms Campbell's salary for the six months prior to her dismissal was agreed between the parties at £12,500.
- 2.3 On 30 September 2008 she attended her first probationary meeting with Ms Gordon. Her performance record had a score of 62/100.
- 2.4 On or about 25 November 2008 the Applicant informed Ms Gordon that she was five weeks pregnant.
- 2.5 On 6 January 2009 a meeting was requested by the Applicant to discuss maternity options.
- 2.6 On 21 January 2009 Ms Campbell was informed that she was not entitled to maternity pay.
- 2.7 On 28 January 2009 Ms Campbell had her second probationary meeting with Ms Gordon and Simon Sharrott. The Applicant was informed she had scored a rating of 58.5/100 for her six months probation period. At that meeting the Applicant requested that her notice period under her permanent contract remain as one month.
- 2.8 On 11 February 2009 Ms Campbell and Ms Meecham held an informal and confidential meeting when Ms Campbell's future plans, the situation regarding maternity leave and pay were discussed.
- 2.9 On 12 February 2009 Ms Campbell received a telephone call from Ms Meecham requesting her to speak with her line manager regarding her future plans.
- 2.10 On 18 February 2009 Ms Campbell was informed orally that her employment was to be terminated with one month's notice. Ms Campbell requested a written statement giving reasons for her termination.
- 2.11 On 19 February 2009 Ms Campbell received a letter from her employer stating that the reason for her dismissal was performance related and there was no date given for her last day of employment.
- 2.12 On 20 February 2009 Ms Campbell gave a letter to Ms Morley, the Managing Director of Argentius in Guernsey, stating that she thought the reasons for her dismissal was due to her pregnancy and requested that she be given the last date of her employment.
- 2.13 Ms Campbell visited her Doctor on 24 February 2009 and was given a certificate stating she was unfit to work due to stress.
- 2.14 On 28 February 2009 Ms Campbell wrote again to her employer requesting a response to her previous correspondence.
- 2.15 On 2 March 2009 Ms Meecham wrote to the Applicant stating that a) there had been confusion over her probationary period and that it was not appropriate to use this as a

- tool for dealing with notice periods b) Augentius would be treating her as having passed her probationary period and c) Augentius had rescinded her notice period and wanted her to return to work.
- 2.16 Ms Campbell wrote to her employer on 8 March 2009 stating that she believed that her relationship with them had become untenable because of the way in which she had been dismissed and that she was in no doubt that the reason was due to her pregnancy. Ms Gordon's attitude had changed towards her and the atmosphere in the office was very tense. She requested the date of her termination and clear reasons for her dismissal.
- 2.17 The Applicant received a letter dated 11 March from Ms S Meecham asking her to return to Augentius. Ms Campbell responded on 15 March stating she could not return as she believed that her relationship with Augentius was untenable and as she had not received a date of termination she would assume that it was 17 March 2009.
- 2.18 On 17 March the Applicant received a letter from Ms Morley stating that the Company had reviewed her e-mail and it had concluded that her refusal to accept reinstatement was nothing to do with the way she had been treated.

### **3.0 Summary of Parties' Evidence**

- 3.1 Although all submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgment or not, the Tribunal had regard to the following key points.

### **4.0 Evidence of Lucy Jane Campbell**

- 4.1 The Applicant read from a prepared statement, (ER 1.1 refers). Ms Campbell confirmed her employment details, the commencement date of her employment and the length of the probationary period. She had signed a contract of employment and was provided with a copy of a staff handbook "The London Staff Handbook" (EE1 tab 1 pages 2 – 45 refers).
- 4.2 At the first probationary meeting on 30 September 2008 with Ms Gordon she achieved a performance rating of 62/100 which was classed as "exceeds expectations". She received positive feedback and was told that she had achieved what was expected of her. She continued to work hard and was often required to work extra hours to meet deadlines.
- 4.3 On 25 November 2008 she informed Ms Gordon, in confidence, that she was nine weeks pregnant. She also told her colleague Michelle Brookfield.
- 4.4 After this, she stated that her role began to change. She was taken away from client work and given less responsibility. She felt that her skills were being underused and that although there was some on the job training from her supervisor, not everything was explained to her. Under cross examination the Applicant stated that the team atmosphere was hostile and that team members did not speak to each other.

- 4.5 In early January 2009, Ms Campbell agreed that her pregnancy should be announced to her colleagues. She worked contractual hours, usually leaving at 5 pm each day. Under cross examination she stated that she felt that she was taken off client based work and that she had become unhappy at work.
- 4.6 On 6 January 2009 she asked Ms Gordon if her maternity terms could be discussed and a meeting took place for this purpose on 21 January 2009. The Applicant's understanding was that she was entitled to paid maternity leave in accordance with the terms set out at Section 3.9 of "The London Staff Handbook" (EE1 Tab 1 page 19 refers). She was informed that she was only entitled to unpaid maternity leave as shown in an updated staff handbook "The Amended Handbook" (EE1 Tab 1, page 66 refers). Ms Campbell was unaware of this handbook and it had not been drawn to her attention by her employer. She stated that she was upset and confused because this was different to the policy shown in "The London Staff Handbook".
- 4.7 After the meeting, she accessed a copy of "The Amended Handbook" on the Company's computer system. This document was different from "The London Staff Handbook" issued to her at the commencement of her employment.
- 4.8 On 28 January 2009 her six month probation meeting took place with Ms Gordon and Simon Sharrott. She received a rating of 58.5/100 which met the requirements on the Company's Performance Development Review Form (ER2 refers). Under cross examination she confirmed that at no time had her reviewers referred to her performance as a "marginal pass".
- 4.9 At the same meeting, her contractual terms were discussed and she expressed her desire to retain a one month notice period as defined under the probationary period and not a three month notice period as defined in the permanent contract of employment. Ms Gordon informed her that the only way to achieve this was to extend the period of probation and that she agreed to this because it was the only option available to her. At no time during the meeting was there any discussion that the extension of the probationary period related to performance issues.
- 4.10 On 11 February 2009, an informal and confidential meeting was held with Suzanne Meecham, the Head of HR and Legal Director of the Company to clarify the entitlement to paid maternity leave. She was told that "The London Staff Handbook" given to her at her commencement of employment was wrong. The subject of her future plans was discussed and she informed them that she needed time to make these decisions. Ms Meecham told her that she should discuss her plans with her manager in her own time.
- 4.11 The following day, 12 February 2009, Ms Meecham telephoned stating that she should have her discussion about her future plans with her manager sooner rather than later, which was contrary to the discussion on the previous day. At about the same time she said that she discovered that Ms Gordon was making investigations with work colleagues about her future plans.

- 4.12 On 18 February 2009 she was called to a meeting with Ms Gordon without prior warning and was informed orally that her employment was being terminated. She stated she was shocked by this as she had only been given positive feedback at the probation meeting. As no explanation for her dismissal was given at the meeting she requested a written explanation.
- 4.13 She received a letter dated 19 February 2009 stating that her dismissal was performance related (ER1 page 178 refers). The letter did not provide the last date of employment.
- 4.14 Ms Campbell responded on 20 February 2009 stating that the real reason for her dismissal was based on her pregnancy and requesting that she be given clear reasons for her dismissal (ER1, page 179 - 181 refers).
- 4.15 Ms Campbell stated that the situation caused her stress and she visited her doctor. The situation at work was difficult and in particular Ms Gordon's attitude was at times aggressive towards her.
- 4.16 On 28 February 2009 she requested, in writing, a response to her earlier letter of 20 February 2009. The response was given in a letter received on 2 March 2009 from Ms Meecham (ER1 page 193 refers) stating:-
1. There had been confusion over her probationary period and that it was not appropriate to use this as a tool for dealing with notice periods.
  2. Augentius would be treating her as having passed her probationary period.
  3. Augentius had rescinded her notice and wanted her to return to work.
- 4.17 On 8 March 2009 she wrote to her employer stating that she believed that her relationship with them had become untenable because of the way in which she had been dismissed and that she was in no doubt that the reason was due to her pregnancy (ER1 page 194 refers). Also Ms Gordon's attitude had changed towards her and the atmosphere in the office was very tense. She requested a final date of her termination and clear reasons for her dismissal.
- 4.18 She received a letter from Ms Morley dated 11 March 2009 asking her to reconsider returning to Augentius (ER1 page 195 refers). She responded in a letter dated 15 March 2009 (ER1 page 196 refers). She believed that her relationship with Augentius was untenable and as she had not received a date of termination she would assume that it was 17 March 2009.
- 4.19 She received a letter from Ms Meecham, dated 17 March 2009 stating her email had been reviewed and as a result Augentius had concluded that her refusal to accept reinstatement was nothing to do with the way she had been treated (ER1 page 199 refers).

- 4.20 Ms Campbell stated that the emails referred to were only discovered after 15 March 2009 and any conclusions that had been drawn could not have been the reasons for her dismissal.

## **5.0 Evidence of Rhea Gordon**

- 5.1 The witness read a prepared witness statement (EE1 tab 2 refers). She informed the Tribunal that she was the Client Services Associate Director of Augentius and her role included overseeing the Client Services Administration team which is one of three teams in the Guernsey office.
- 5.2 She explained how new staff members are inducted into the team during their probationary period. Greater responsibility is given gradually once sufficient knowledge, aptitude and commitment is demonstrated. Ms Campbell was given on the job training on the systems, clients and procedures. She was provided with literature to read, in house training and offered mentoring/coaching on an informal basis.
- 5.3 At the Applicant's first probationary meeting she suggested to the Applicant that she take on a small portfolio of less complex clients with a high level of supervision from her direct line manager. Although the Applicant did not feel ready for this, Ms Gordon advised that it would be necessary for her to do so over the coming months otherwise she would be performing below expectations.
- 5.4 Ms Gordon stated that initially the Applicant had performed her duties as expected and settled into the team well. She was eager to learn and got on well with her peers. However towards the end of November 2008, the Applicant had become more complacent and her productivity was below expectations.
- 5.5 On 25 November 2008 when she was informed by the Applicant that she was pregnant she stated that the Company would be flexible, provide time off for medical appointments as required and accommodate any adverse effects of the pregnancy. The Applicant told her that she was only going to tell one other staff member and it was agreed that the conversation would remain confidential. In early 2009 it was agreed that the pregnancy would be announced to all staff.
- 5.6 The witness gave details of the times and dates of time off afforded to the Applicant to attend medical appointments and also details of paid sick leave (EE1 Tab 2 page 5 refers).
- 5.7 The witness gave an account of exchanges of emails and informal discussions that took place with Ms Campbell with regard to maternity leave entitlement in early January 2009. The witness explained that in accordance with "The Amended Handbook" (EE1 Tab 1 pages 46 – 88 refers) that no paid maternity leave was available. Ms Gordon stated that the Applicant had responded that this was contrary to her understanding of

- the entitlements set out in the “The London Staff Handbook” (EE1 Tab 1 pages 2 – 45 refers).
- 5.8 At the Applicant’s Probationary meeting on 28 January 2009 she raised concerns regarding Ms Campbell’s performance including her professional competence, execution, productivity and problem solving. She expected these areas to be addressed immediately. She stated that the Applicant’s overall performance score was a “marginal pass”. When cross examined, she confirmed that Ms Campbell had either “met” or “exceeded expectations” in 75% of the areas assessed and that she was entitled to pass her probation. The findings of the meeting were documented on a draft appraisal form (ER2 refers) which also noted suggestions made to the Applicant for ways in which performance could be improved.
- 5.9 She confirmed the discussions regarding Ms Campbell’s desire to remain on a contract with a one month notice period on successful completion of her probation. The witness said the only solution she could think of would be to extend the probationary period and that she would discuss this option with the HR Manager. The request was documented on the appraisal form.
- 5.10 After the meeting she stated that Ms Campbell’s attitude became increasingly harder to deal with and although her time keeping was always precise she was unwilling to put extra time in to help her team, she was not working at an acceptable level, that she was uncooperative, disruptive and that her performance had deteriorated rather than improved since 28 January 2009.
- 5.11 For these reasons it was decided to terminate Ms Campbell’s employment. She met with Ms Campbell on 18 February and informed her of the decision to terminate her employment. Under cross examination she confirmed that no notice had been given to the Applicant of the meeting and that during the period since 28 January 2009 that issues relating to Ms Campbell’s performance were not raised formally. The following day she sent a letter to Ms Campbell dated 19 February 2009 (ER1 page 178 refers). She received a written response dated 20 February 2009 (ER1 page 179 refers) which was passed to the HR Department and that she had no further involvement.
- 5.12 On 28 February 2009 she advised Ms S Meecham and Ms K Morley that she had been told that Ms Campbell had stated on ‘Facebook’ that she had been sacked from her job and had also sent a colleague an email saying that she had been dismissed and that she intended to sue the Company for unfair dismissal.
- 5.13 Ms Gordon confirmed that she was aware that on dates after 18 February 2009 searches of Ms Campbell’s emails were made (ER1 pages 111 – 177 refers).
- 6.0 Evidence of Ms Suzanne Meecham**
- 6.1 The witness read from a prepared statement, (EE1, tab 3 refers). She stated she was the Legal Director and Human Resources Manager for the Respondent. She explained the work of the Respondent Company together with her role. She stated she was based in the London office of the Company.



- 6.2 She confirmed the evidence given by Ms Campbell that she had met with her on an informal basis on 11 February 2009 to discuss maternity pay. She confirmed that Ms Campbell was informed that she was not entitled to paid maternity leave to which the Applicant responded that in those circumstances she would leave to look after the baby.
- 6.3 Ms Meecham confirmed that she had spoken with Ms Campbell on 12 February 2009 suggesting that she should discuss her plans with Ms Gordon. She had also contacted Ms Gordon requesting her to speak to Ms Campbell regarding her intentions.
- 6.4 Shortly after 12 February 2009 she discussed Ms Campbell's performance with Ms Gordon and a decision was made by the partners to terminate Ms Campbell's contract of employment.
- 6.5 Once the letter dated 19 February 2009 giving notice of termination of Ms Campbell's employment had been issued, she had concerns regarding the way the probation meeting had been conducted with regard to Ms Campbell's notice period. For this reason, she considered that it was appropriate to reinstate the Applicant and proceed with the Company's formal capability procedure and also give her the option to continue on a notice period of one month. She sent a letter to this effect dated 2 March 2009 (ER1 page 193 refers).
- 6.6 She agreed under cross examination that letters dated 11 and 17 March 2009 had not addressed Ms Campbell's requests for written reasons for the dismissal and as far as she was concerned, she had hoped Ms Campbell would return to work. She accepted that the situation had not been handled as well as it could have been.
- 6.7 Once she had received Ms Campbell's letter dated 15 March 2009 she stated that she thought it was clear that the Applicant's intention was to achieve a financial settlement because she was not entitled to paid maternity leave.
- 6.8 Ms Meecham confirmed that the Company had monitored the Applicant's email after the date on which her employment was terminated.

## **7.0 The Law**

- 7.1 The Applicant alleged that she was dismissed contrary to Section 9 of The Employment Protection (Guernsey) Law 1998, "Section 9 reason" which states:

*9. The dismissal of an employee by an employer shall be regarded for the purposes of this Part of this Law as having been unfair if the reason for it (or, if more than one, the principle reason) –*

- (a) was that the employee was pregnant or,*
- (b) was any other reason connected with her pregnancy except one of the following reasons-*

- (i) *that at the effective date of termination she was or would have become, because of her pregnancy, incapable of adequately doing the work which she was employed to do;*
- (ii) *that because of her pregnancy, she could not do or would not have been able to continue after that date to do the work without contravention (either by her or her employer) of a duty or restriction imposed by or under the law of Guernsey.*

7.2 The Applicant did not have one year's qualifying period in accordance with Section 3.15 of "the Law". This claim falls into the exception set out at Section 15(2)(b) which states:

- 15 (1) *Subject to subsection (2), section 3 does not apply to the dismissal of an employee from any employment unless the employee was continuously employed for a period of not less than one year [(or such other period as the States may by Ordinance Specify)] ending with the effective date of termination.*
- (2) *Subsection (1) does not apply to the dismissal of an employee if it is shown that*
- (a) .....
  - (b) *the dismissal constituted an act of discrimination against the employee prohibited by provision of Part II of the Sex Discrimination (Employment) (Guernsey) Ordinance 2005*

7.3 The Applicant further alleged that there was a failure to provide her with written reasons for her dismissal as required under Section 2(5) of The Employment Protection (Guernsey) Law 1998 and Section 16(1)(b) The Employment Protection (Guernsey) (Amendment) Law, 2005.

7.4 The Applicant further alleged sexual discrimination as defined at Section 1(1)(a) of The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 which states:

- 1 (1) *In any circumstances relevant for the purposes of any provision of Part 11 of this Ordinance, a person discriminates against a woman if:*
- (a) *On the grounds of her sex he treats her less favourably than he treats a man*

7.5 The Sex Discrimination Ordinance includes a requirement with regard to the burden of proof under Section 44 which states:

- 44 (1) *This section applies to any complaint made to the Tribunal under section 38*
- (2) *Where, on the hearing of the complaint the complainant proves facts from which the Tribunal could, apart from this section*

*conclude in the absence of any adequate explanation that the Respondent –*

- (a) has committed an act of discrimination against the complainant which is prohibited by any provision of part 11*
- (b) is by virtue of section 25 or 26, to be treated as having committed such an act of discrimination against the complainant*

*The Tribunal shall uphold the complaint unless the Respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed that act.*

## **8.0 Conclusions**

- 8.1 Although all arguments put forward have been considered by the Tribunal, whether they are mentioned specifically in this judgment or not, the submissions and arguments made by both parties have been taken into account.
- 8.2 The Tribunal considered the issues that were identified at the outset of the hearing in the light of the evidence presented and the legal submissions, including reference to UK case law referred to by the Respondent, made on behalf of the parties.

The dismissal and the reasons for it

- 8.3 The Applicant alleged that she was unfairly dismissed for reasons of her pregnancy and contrary to Section 9 of The Employment Protection (Guernsey) Law, 1998 (as amended). This section has the effect that a dismissal on grounds of pregnancy or any other reason connected with pregnancy (“section 9 reason”) shall be regarded as being unfair. In accordance with Section 15 (2) of “the Law” an employee does not need the requisite qualifying period to bring an action for unfair dismissal if it is for a “section 9 reason”.
- 8.4 The Tribunal considered the events that led up to the dismissal on 18 February 2009. The Applicant had successfully completed her first probation period in September 2008. The Applicant had announced her pregnancy informally to her manager in November 2008 and formally to all her colleagues in early January 2009. During the period 5 January – 11 February 2009 Ms Campbell discussed her entitlement to paid maternity leave with Ms Gordon and subsequently again in February with Ms Meecham. The Respondent’s version of the Applicant’s entitlement was confusing and contradictory.
- 8.5 Evidence was given regarding the existence of several different versions of the Company Staff Handbook. The Tribunal concluded that the Applicant’s contract of employment included the terms set out in “The London Staff Handbook”. Clause 3.9 of that handbook set out the Applicant’s rights which in summary included 52 weeks maternity leave, all contractual pay during the first 26 weeks and statutory maternity pay. On the other hand, the Respondent relied on an updated and amended version of the handbook “The Amended Handbook” which was significantly less favourable to the Applicant in that whilst maternity leave would be granted, it was unpaid.

- 8.6 The Tribunal concludes that it was reasonable for the Applicant to be confused and concerned about these contradictions and that the Respondent had taken a cavalier approach to the terms of Ms Campbell's contract of employment. Evidence was given by Ms Meecham that the Respondent had sent out the incorrect handbook, "The London Staff Handbook" at the commencement of Ms Campbell's employment. This error was made and admitted by the employer. The Applicant's contractual terms as defined in "The London Staff Handbook" included certain benefits including paid maternity leave. The employer stated that she was not entitled to these benefits, however confusion arose due to their failure to include the correct contractual terms. Their contention that the policies were being reviewed and rewritten, without any staff consultation and in particular without consulting the Applicant, did not allow them to unilaterally make changes to her contract of employment once she made enquiries with regard to her entitlement to paid maternity leave.
- 8.7 Evidence was given by both parties with regard to the Probation Review that took place on 28 January 2009. Ms Campbell had met the performance standards set out by her employer and this was supported by the performance rating of 58.5/100. She was given no indication that she had failed to fulfil the requirements of her probation.
- 8.8 The Respondent refuted this and Ms Gordon gave evidence to the effect that Ms Campbell had shortcomings in spite of performing well against 75% of the performance criteria defined by the employer. Evidence with regard to the validity of the performance review system presented by Ms Meecham is considered to be inappropriate. The review system had been designed, on the admission of the Respondent, by HR professionals. If the system existed and was used in practice the Tribunal is not persuaded that claims as to its validity by the Respondent can or should be made at times to suit the employer. The simple fact is that the system existed and was applied to new members of staff in Guernsey. It is not for the employer to arbitrarily vary the conclusions it draws from its own performance system.
- 8.9 The Tribunal is persuaded by Ms Campbell's evidence that she was given no indication that she had not successfully completed her probationary period either at the meeting on 28 January or at any time between that date and the date of her dismissal. Ms Gordon confirmed in her evidence that no actions were taken by the Respondent formally with regard to Ms Campbell's performance. The Tribunal was not given any evidence by the Respondent to show that there was any documentary evidence, file notes or email traffic between senior managers relating to the alleged performance/capability issues.
- 8.10 The Tribunal considers that the Respondent's inability to cope with the situation regarding the Applicant's notice period at the meeting on 28 January was at the least confused and unprofessional. The solution proposed at the time i.e. to extend the probationary period in order to accommodate a one month notice period, lacked clarity of thought on the part of the employer and added to confusion in the employment relationship. Evidence was given by Ms Meecham that the Respondent had access to expert legal advice and as a result the Tribunal concluded that there were sufficient resources available to the Respondent to act appropriately in response to the Applicant's various requests regarding her contractual terms.

- 8.11 Evidence was given by the Applicant that no clear reason was given when she was orally dismissed at the meeting on 18 February. On 19 February 2009 a letter was sent by the Respondent giving the reason for the dismissal as capability and performance related.
- 8.12 The Tribunal concludes that in the absence of appropriate evidence with regard to poor performance then there must have been some other substantive reason for the dismissal. Rarely would an employer dismiss an employee expressly on the basis of the “section 9 reason”. Therefore the Tribunal considered all the surrounding evidence and inferences. All the events leading up to the dismissal were considered and it concluded that the relationships became seriously compromised once the issue relating to paid maternity leave was raised by Ms Campbell. The paid maternity leave was only made the subject of discussion between the Applicant and the Respondent because as an employee who was pregnant, Ms Campbell wanted to clarify her position once her baby was born. This was a reasonable request by her. The Respondent clearly handled the whole situation badly and the fact that the dismissal was rescinded adds further inference also to the real reason.
- 8.13 The Tribunal considered a situation where the same actions had been taken by an employer in circumstances where the employee was not pregnant. The discussions regarding paid maternity leave would have been unlikely and a breakdown in the relationship would, in all probability not have occurred. Therefore, in the absence of credible and documented actions with regard to the Applicant’s capability and performance, it concludes that the dismissal can only have been for the “section 9 reason”.

#### The qualifying period

- 8.14 The Tribunal must conclude that if the Applicant was dismissed for a “section 9 reason” then under Section 15(2) of the Law there is no need for the Applicant to comply with the qualifying period.

#### The Claim for Sex Discrimination

- 8.15 In relation to the claim that the dismissal was contrary to Section 1(1)(a) of The Sex Discrimination (Employment) (Guernsey) Ordinance 2005 the Tribunal considered whether the Applicant has suffered a detriment and had been treated less favourably and this was on grounds of her sex. In this case the Tribunal considered that the appropriate comparator for the purposes of discrimination due to pregnancy was a woman who was not pregnant.
- 8.16 The Applicant argued that if the Tribunal finds that as a fact that she was dismissed for the “section 9 reason”, then it followed that she was also discriminated against on the grounds of her sex and that the written reasons for her dismissal were at best inadequate or untrue. In other words, finding in favour of the “section 9 reason” automatically leads to the conclusion that the Applicant was discriminated against under “The Sex Discrimination Law”.

- 8.17 The Respondent argued that it is for the Applicant to prove on the balance of probabilities facts from which the Tribunal could conclude that the Respondent has committed an act of discrimination against the Applicant. The Tribunal considered Legal submissions made on behalf of the Respondent regarding the burden of proof in accordance with Section 44 of “The Sex Discrimination Law”.
- 8.18 Taking the evidence and facts of the dismissal the Tribunal has concluded that it was for reasons of pregnancy. It also considered the Applicant’s argument that this automatically constitutes a breach under “The Sex Discrimination Law”. There was enough evidence before the Tribunal to apply the Section 44 provisions of “The Sex Discrimination Law” requiring the Respondent to provide evidence that it had not discriminated against the Applicant.
- 8.19 The Respondent presented evidence of emails between Ms Campbell and a number of her colleagues (ER1 pages 111 – 177 and 182 – 190 refers). By their own admission these had been acquired after the dismissal. The Tribunal heard arguments from the Applicant that they were not admissible on the grounds of the date of their discovery by the Respondent. On the other hand, Mr Randall argued that the existence of the emails from the Applicant provide evidence that the Applicant had no interest in her job and had an intention to leave as a result of not being entitled to maternity pay. Furthermore he argued that they provided evidence of “the surrounding circumstances”. In other words the Respondent was entitled to draw inferences from them.
- 8.20 The Tribunal has sympathy with the Applicant’s argument. She was dismissed on grounds relating to her pregnancy; had she not been pregnant the dismissal would not have taken place. The Tribunal then considered whether by virtue of her dismissal she had suffered a detriment by virtue of her sex. The conclusion was that the Applicant had suffered a detriment in this respect because it was for reason of the pregnancy that the dismissal occurred. Had she not been pregnant she would not have been dismissed and would not have suffered a detriment under “The Sex Discrimination Law”.

#### The Written reasons for dismissal

- 8.21 The Tribunal was given evidence of written reasons for dismissal by the Respondent (ER2 page 178).
- 8.22 The Tribunal finds that the written reasons for dismissal were untrue within the meaning of Section 16(1)(b) of The Employment Protection (Guernsey) (Amendment) Law, 2005.

### **9.0 Decision**

- 9.1 Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of Section 9 of The Employment Protection (Guernsey) Law, 1998 as amended that the Applicant was dismissed for reasons of her pregnancy.

- 9.2 The applicant is not required to have one year's qualifying period in accordance with Section 3.15 of "the Law". This claim falls into the exception set out at Section 15(2) of "the Law".
- 9.3 The dismissal was contrary to Section 1(1) (a) of The Sex Discrimination (Employment) (Guernsey) Ordinance 2005.
- 9.4 The Tribunal considered the award. The issue was whether an award should be made in respect of each of the successful claims. The Tribunal applied the principle that for more than one award to be made there should be at least two separate breaches and that these should have been found to have occurred on separate occasions. It is the finding of this Tribunal that there was one single act that resulted in both the unfair dismissal and the sex discrimination. Therefore, one award is appropriate in these circumstances. The Tribunal further considered whether any reduction in the award should be made as provided for under section 23(2) in The Employment Protection (Guernsey) (Amendment) Law, 2005. It concluded that in cases where dismissal was for "section 9" reasons that there can be no reduction.
- 9.5 Under Section 22(1)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, the Respondent shall pay to the Applicant an award of £12,500.00, having been determined by reference to the Applicant's final six months employment with the Respondent.
- 9.6 In relation to the claim that the written reasons for the dismissal were untrue, the Tribunal awards a further payment of £1,041.67, being half of one month's pay.

**Caroline Latham**

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Signature of the Chairman

20 November 2009

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Date