

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Leslie Frederick Coates
Represented by: Ms Tracey Powell, Solicitor

RESPONDENT: CRE8 Limited
Represented by:

Decision of the Tribunal Hearing held on Thursday 2 July 2009

Tribunal Members: Ms Georgette Scott (Chairman)
Ms Helen Martin
Mr Norson Harris

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 the Employment Protection (Guernsey) Law, 1998 as amended, Mr Coates was unfairly dismissed from his employment with CRE8 Limited.

Amount of Award (if applicable): £64,310.00

Ms Georgette Scott	5 August 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

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 are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

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

Extended Reasons

1.0 Introduction

1.1 The Applicant was represented by Miss Tracey Powell, Solicitor, and provided documentary evidence (EE1 – EE7 refers).

1.2 The Applicant called the following witness:

Ms Gail Batiste

1.3 The Respondent was unable to attend the hearing but provided a response through documentation and written witness testimony, (ER 1 refers).

1.4 At the outset of the hearing the Tribunal asked for confirmation that Mr Coates, who was a stated resident of the Isle of Man throughout his employment with CRE8 Limited, was, for the purposes of the Employment Protection (Guernsey) Law, 1998, as amended, “ordinarily working in Guernsey”.

1.5 Following an adjournment to source evidence it was clear that documentary evidence in the form of hotel receipts and records would be sparse and more would be difficult to source, it was therefore agreed to call witness testimony from Ms Gail Batiste, former Office Manager and Director of CRE8 Limited, to provide testimony of the Applicant’s working and travel arrangements during his employment with CRE8 Limited.

1.6 Evidence of Ms Gail Batiste

1.6.1 Mr Harris and Ms Scott, members of the Tribunal Panel, declared that they both knew Ms Batiste from previous employment contact. Ms Powell and Mr Coates raised no objections.

1.6.2 Ms Gail Batiste confirmed that she had worked as Office Manager and Director for CR8 Limited before, during and after the period of Mr Coates’ employment as Chief Financial Officer.

1.6.3 Ms Batiste stated that the Applicant worked throughout the period of his employment in Guernsey spending Monday through to Thursday of each week in Guernsey, except when travelling. Mr Coates would spend around one week every month travelling for the company.

1.6.4 Asked what had occurred in 2008, Ms Batiste said that the early part of the year the Applicant had spent much time working from home or travelling and in June 2008, her home became the local company office as the headquarters of the company relocated to Austin, Texas.

1.6.5 Ms Batiste stated that when the offices had been in Guernsey the company office was located at Elizabeth House and then the Mallard, before finally being located at her home.

- 1.6.6 During her employment Ms Batiste had been responsible for arranging the Applicant's travel and could confirm that he had stayed at various hotels whilst in Guernsey, mainly at Les Rocquettes, La Trelade and the Mallard.
- 1.6.7 Ms Batiste confirmed that she had ceased employment herself, with CRE8 Limited, in January 2009.
- 1.7 The Tribunal Panel decided to accept Ms Batiste's testimony as sufficient evidence of the Applicant being "ordinarily working in Guernsey" to proceed with the main body of the Applicant's case, subject to further documentary evidence of the Applicant having been regularly working in Guernsey particularly during 2008, the year of his claim for unfair dismissal.
- 1.8 Given that the Respondent had stated on the ET2 Response form that they had no way of confirming the gross salary figure claimed by Mr Coates in his ET1 application, as they alleged the Applicant still had access to all the company files, the Tribunal also asked for documentary evidence to support his stated salary during his last six months of employment. The Tribunal was told that evidence of the Applicant's pay would be sought and provided later during the Hearing.
- 1.9 The Applicant claimed unfair dismissal. He alleged that he was unfairly dismissed on 10 October 2008 during his own notice period after resigning from the company. He claimed that his employment had been terminated without any previous formal warnings and without following any procedure.
- 1.10 The Respondent alleged that the Applicant was in material breach of the terms of his employment contract and that as a consequence the Respondent was entitled to terminate the employment without notice and without payment in lieu of notice.
- 1.11 The Respondent also claimed that the Applicant was not "ordinarily working in Guernsey" for the purposes of the Employment Protection (Guernsey) Law, 1998, as amended, and therefore could not claim unfair dismissal under the Law.

2.0 Facts Found by the Tribunal

- 2.1 The Applicant was employed by CRE8 Limited (formally SMS Guernsey Limited) from 12 April 2006 to 10 October 2008 as the company's Chief Financial Officer (CFO).
- 2.2 The Applicant became a Director of the company on 4 October 2006 and around the same time also became Company Secretary of Plus SMS Holdings Limited, hereafter referred to as PLS, of which CRE8 Limited was a wholly owned subsidiary.
- 2.3 Throughout the period of his employment contract the Applicant was resident in the Isle of Man.
- 2.4 In January 2007, CRE8 Limited had embarked upon an acquisition strategy in Latin America and acquired three mobile services companies between December 2006 and March 2007.
- 2.5 In response to this the PLS Board of Directors decided the company's management team needed to be closer to the Latin American market and, as a result, a corporate subsidiary office was established in Austin, Texas and two members of staff relocated there. The Office Manager, Gail Batiste did not relocate nor did the Applicant, Mr Coates. Mr Coates claimed this was for personal reasons.

- 2.6 In May 2008, PLS Limited was in need of funds to commercialise its operations and a Mr Robert Hunter was introduced as an investor to the PLS Board by one of its members, Clive Thomas.
- 2.7 On 11 September 2008, after a period of professional conflict with Mr Hunter and Mr Thomas, Mr Coates tendered his resignation in a letter to Mr Christopher Tiensch, the Chief Executive of CRE8 Limited and a member PLS, (EE1, document 9 refers). The termination date after a notice period of six months was to be 10 March 2009.
- 2.8 After his resignation Mr Coates received requests for financial information from Mr Hunter, who claimed he had been appointed as a Company Director. Mr Coates did not provide the information and was supported by his Chief Executive, Mr Tiensch as neither had received information to prove Mr Hunter's appointment.
- 2.9 Following Mr Coates resignation the entire PLS management team also resigned.
- 2.10 A stand-off followed between the PLS Board and the management team before dialogue began to take place. Following a conference call it was agreed that each member of the management team would be contacted individually by the PLS Board to talk about their future with the company. Mr Coates was never contacted.
- 2.11 Around 3 October 2008 Mr Coates discovered that monies had been transferred from PLS's bank accounts without his or his CEO's knowledge. Believing that a fraud had taken place Mr Coates alerted the ASB Bank (PSL's bank in New Zealand). Mr Coates subsequently discovered from the bank that Mr Hunter had somehow changed the PLS bank mandate without the existing bank signatories' knowledge and had transferred almost all of the monies out of the PLS bank accounts. This left no funds to settle creditors' accounts.
- 2.12 On 9 October 2008, with no prior warning from the company or the PLS Board, Mr Coates received a letter dated 8 October (attached to an email) from the Chairman of the PLS Board, informing him that as a result of alleged actions (or inactions) following his resignation he had fundamentally and materially breached his contract so much as to undermine the contract and remove any trust and confidence in his continuing his duties as Chief Financial Officer (EE1, document 15 refers).
- 2.13 Item four of the letter stated, "In the absence of any justifiable and/or reasonable explanation in relation to the above matters the Board considers the relationship of employment so undermined by you and your actions as to completely remove any trust and confidence in your continuing role as its Chief Financial Officer."
- 2.14 Less than five hours after receiving the 8 October letter Mr Coates received another letter dated 10 October (attached to another email) which stated that "For and on behalf of the Board I hereby notify you that your employment contract with the company has been terminated forthwith". Both documents were signed by Mr Hunter (EE1, document 16 refers).
- 2.15 On 11 October 2008 Mr Coates sent an email in response to the letters dated 8 and 10 October, refuting the allegations. He received no reply from the company or PLS.

3.0 The Law

- 3.1 The Employment Protection (Guernsey) Law, 1998, as amended, in Section 5 (2) (a) states that an employee shall be treated as dismissed by his employer if “the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or no notice.

4.0 Summary of Parties’ Main Submissions

The Respondent’s case

- 4.1 In the absence of the Respondent’s presence at the Hearing documents were provided by the Respondent (based in New Zealand) to support the ET2 Response form. Within those documents was the sworn statement of Murray George Allot, a Director of PLS Limited, whose testimony provides the main elements of the Respondent’s case.
- 4.2 As previously noted the Respondent disputed the jurisdiction of the Tribunal in hearing Mr Coates’ case given that they believed he could not prove he had been ordinarily working in Guernsey.
- 4.3 Mr Allot stated that the company office for CRE8 Limited had shifted from Guernsey to Austin, Texas during the latter stages of 2007 and early 2008. The Board was of the view and understanding that all senior personnel had transferred to Austin, Texas. When he and Mr Robert Hunter travelled to Texas in October 2008, they were surprised and disappointed to find that Mr Coates was not there and had only visited on two occasions according to statements made by the staff there.
- 4.4 The Board were of the view that Mr Coates had put his own personal interests ahead of the duty he owed to the company in not relocating to Texas.
- 4.5 Mr Allot stated that Mr Coates’ production of the Group’s 2008 Annual Financial Statements had been deficient in its failure to disclose the issue of \$2.5 million of Convertible notes which represented the future issue of 31 million shares in the company.
- 4.6 It was also alleged that Mr Coates presented fabricated and fictitious financial data in order to entice investors to the company and that he did not provide sufficient financial information on a monthly basis of the company’s position to enable the Board to be clear about the company’s trading performance and to have a true and fair picture of the group’s finances.
- 4.7 As a result of this lack of information it was alleged that this was a major contributing factor to the resignation of Mr Ken Millar as a Director of PLS Limited in July 2008.
- 4.8 Mr Coates and Mr Tiensch were responsible for the statutory preparations of the Notice of the Annual General Meeting to be held in New Zealand on 4th September 2008. The Directors, together with various shareholders, expressed their concern at the legality of the proposed issue of 13,481,838 new ordinary shares to Mr Tiensch, CEO.
- 4.9 At the meeting Mr Coates had claimed that the issue of the shares was legal and had been checked with the NZAX. As Mr Tiensch declared his intention to pursue the issue of the shares the following day the Board advised shareholders at the AGM that they were seeking independent legal advice regarding the matter and the AGM was adjourned until 25 September 2008.

- 4.10 Subsequent enquiries determined that the NZAX could not provide the required assurance or advice to individual boards or companies. The Board also instructed its solicitors and then engaged Mr Nicholas Till QC to provide an opinion on the issue of the shares. The opinion confirmed that the shares should not be issued to the CEO in accordance with the proposed resolution and such shares were not an entitlement in terms of Mr Tiensch's employment contract with PLS Limited.
- 4.11 Also discussed at the Board Meeting attended by both Mr Coates and Mr Tiensch on 3 September 2008 was the matter of the Chairmanship of the Board with concern being expressed that the Chairmanship of the Board should not be provided by the CEO of the company. Mr Tiensch was advised of this at the meeting and the following week Mr Robert Hunter was approached and accepted the nomination as Director of PLS.
- 4.12 One week after the Board Meeting on 3 September Mr Coates, Mr Tiensch and other senior management all resigned their positions from the company; each of the resignations would take effect on 10 March 2009. In breach of Board instructions Messrs Coates and Tiensch notified NZAX of their resignations.
- 4.13 On the evening of 13 September Mr Hunter was confirmed as a Director and accepted the appointment of Chairman during a telephone conference Board Meeting. Mr Hunter's appointment was recorded with the New Zealand Companies' Office on 15 September and the NZAX was also notified.
- 4.14 Immediately following his appointment, Mr Hunter sought to be advised of the financial standing and operational status of the company and emailed Mr Coates as Chief Financial Officer (EE1 Document 12 refers). Mr Allot claimed that Mr Coates ignored the requests from Mr Hunter and failed to check the New Zealand Companies' Office website and/or NZAX announcements which would have confirmed Mr Hunter's appointment and status.
- 4.15 The Board became extremely concerned by Mr Coates' failure to respond to Mr Hunter's request and by his continued access as CFO to the company's assets. The Board then took what it believed to be the only practical steps available to it to protect the company assets and removed all funds from the ASB Bank in Auckland, New Zealand and placed them in a trust account.
- 4.16 When Mr Coates responded to these actions by alleging the Directors had committed fraud by removing the funds it was decided to send representatives of the Board to Austin, Texas to meet with Mr Tiensch and Mr Coates to resolve matters.
- 4.17 On travelling to Texas the Board representative, Mr Allot, Mr Hunter and a financial consultant engaged by the Board discovered, as previously noted, that Mr Coates was not present at the offices. On trying to contact Mr Coates by email and by telephone they had no success, although they did ascertain from a computer consultant engaged to monitor the sending and receipt of the emails that Mr Coates had received the emails. Mr Coates' mobile phone was switched off. Having received no response during the course of the day Mr Coates' company email and company mobile phone were disconnected.
- 4.18 As a result of their visit to the offices in Texas it became immediately apparent to the Directors present that the continuing employment of Mr Coates as Chief Financial Officer was completely untenable. All trust and confidence had gone and the failure of Mr Coates to respond requests for financial information simply aggravated those concerns and they resolved to terminate his employment.

The Applicant's case

- 4.19 Mr Coates was employed by CRE8 Limited from 12 April 2006 to 10 October 2008 as the company's Chief Financial Officer and was responsible for all the financial functions of the company.
- 4.20 Mr Coates became a Director of the company on 4 October 2006, and around the same time also became Company Secretary of PLS Limited.
- 4.21 Throughout the period of his employment contract Mr Coates was resident in the Isle of Man but made sufficient regular travel to Guernsey as to claim he was ordinarily employed in Guernsey.
- 4.22 The company had only secured two housing licences upon setting up the company in Guernsey and these were provided to Mr Tiensch as CEO and one to the Chief Technical Officer. Mr Coates could have occupied Open Market accommodation and relocated to Guernsey but it was a management decision that this was too costly and an agreement was reached for him to remain resident in the Isle of Man and to travel to Guernsey for business.
- 4.23 Mr Coates explained that he reported to Mr Tiensch, CEO and had no reporting line to PLS Limited, however he did take PLS Board Minutes and provide financial information to the PLS Board from time to time.
- 4.24 In January 2007, CRE8 Limited had embarked upon an acquisition strategy in Latin America and acquired three mobile services companies between December 2006 and March 2007.
- 4.25 In response to this the PLS Board of Directors decided the company's management team needed to be closer to the Latin American market and as a result a corporate subsidiary office was established in Austin, Texas and two members of staff relocated there. The Office Manager, Gail Batiste did not relocate nor did the Applicant, Mr Coates. Mr Coates claimed this was for personal reasons. Mr Coates also claimed that Mr Tiensch, his immediate superior and CEO of the company was well aware of his residency.
- 4.26 Mr Coates accepted that he needed to be in Austin Texas after the headquarters relocated and agreed to relocate and the necessary visa was sought, but this was initially refused as he did not have the necessary mobile telephony background. By early 2008 he had decided for family and personal reasons not to relocate and offered to resign.
- 4.27 Mr Tiensch did not want to accept his resignation but the company started to look for a suitable recruit to replace him. In the event however they could not recruit a suitable replacement and Mr Tiensch agreed to allow Mr Coates to remain an employee but based for residency in the Isle of Man.
- 4.28 No formal agreement was drafted to cover this arrangement but the PLS Board knew that visa applications had been made and refused and did not raise this as a matter of breach of contract. At the end of June 2008 he was regularly spending two weeks in the USA and two weeks in the Isle of Man working from home.
- 4.29 In May 2008, PLS Limited was in need of funds to commercialise its operations and a Mr Robert Hunter was introduced as an investor to the PLS Board by one its members, Clive Thomas.

- 4.30 On 11 September 2008, after a period of personal and professional conflict with Mr Hunter and Mr Thomas, Mr Coates tendered his resignation in a letter to Mr Christopher Tiensch, the Chief Executive of CRE8 Limited and a member PLS, (EE1, document 9 refers). The termination date after a notice period of six months was to be 10 March 2009.
- 4.31 The professional conflict centred around the issuing of shares to Mr Tiensch to which Mr Coates remained adamant that Mr Tiensch was entitled.
- 4.32 Mr Coates refuted Mr Allot's allegations that he abandoned his position or in any way failed in his duties as CFO. In relation to allegations by Mr Allot that the company financial accounts were inaccurate, Mr Coates pointed out that the accounts remained a matter of public record and had never been withdrawn by the company.
- 4.33 With regard to Mr Allot's allegations that Mr Coates had provided false information to potential investors he advised that this information was always provided as a projection of potential income and it was therefore provided with the usual caveats about accuracy.
- 4.34 Asked by the Panel about whether performance targets had been set for staff, he advised that the company was in the process of introducing these but Mr Tiensch would have raised any issues with him directly if he had had any concerns, and he did not.
- 4.35 Mr Coates stated that the AGM notice had been prepared with advice from the company lawyer. In addition, the NZAX had to approve the AGM notice as shares were involved, so he had liaised with them.
- 4.36 Mr Coates' employment contract provided a large section on dispute resolution allowing for both grievances and disciplinary disputes to be resolved. Mr Coates stated that the company had an Employee Handbook covering both these areas but that they were never set in motion in relation to his employment.
- 4.37 Following questioning from the Panel regarding confirmation of his pay Mr Coates admitted that his pay had been reduced for six months of 2008 as the management team had agreed to take a twenty per cent pay cut as a loan to the company. No loan agreement could be produced although Mr Coates stated that the loan had been repaid prior to his leaving the company in October 2008.
- 4.38 After his resignation Mr Coates received requests for financial information from Mr Hunter, who claimed he had been appointed as a Company Director. Mr Coates did not provide the information and was supported by his Chief Executive, Mr Tiensch, as neither had received information to prove Mr Hunter's appointment.
- 4.39 With regard to Mr Allot's allegation that Mr Coates contacted the NZAX about his and the management team's resignations, he denied this.
- 4.40 Mr Coates stated that he received no correspondence regarding the planned visit of Mr Hunter and Mr Allot to Austin, Texas and as a result was not present when they visited the offices.
- 4.41 Mr Coates further explained that he had replied to Mr Hunter's email request for financial information, asking him for confirmation of his appointment on 15 September. No reply was received (EE1, document 12 refers).

- 4.42 Asked about the manner of his reply to Mr Hunter in relation to his request for financial information and whether this was appropriate, "I do not take instruction from any Tom, Dick or Robert claiming to be Chairman of PLS, I would be derelict of my duties if I did" Mr Coates said that in the context of the bombardment of emails he had received and the nature of the demands made, he felt it was appropriate. He added that he felt the demands were designed to push him out of the company.
- 4.43 Mr Coates became aware of Mr Hunter's appointment the following day through an announcement to the market on 16 September 2008.
- 4.44 Following Mr Coates' resignation the entire PLS management team also resigned. A stand-off followed between the PLS Board and the management team before dialogue began to take place. Following a conference call it was agreed that each member of the management team would be contacted individually by the PLS Board to talk about their future with the company. Mr Coates was never contacted.
- 4.45 Around the 3 October 2008 Mr Coates discovered that monies had been transferred from PLS's bank accounts without his or his CEO's knowledge. Believing that a fraud had taken place Mr Coates alerted the ASB Bank. Mr Coates subsequently discovered from the bank that Mr Hunter had somehow changed the PLS bank mandate without the existing bank signatories' knowledge and had transferred almost all of the monies out of the PLS's bank accounts. This left no funds to settle creditors' accounts.
- 4.46 On 9 October 2008, with no prior warning from the company or the PLS Board, Mr Coates received a letter dated 8 October (attached to an email) from the Chairman of the PLS Board informing him that as a result of alleged actions (or inactions) following his resignation he had fundamentally and materially breached his contract so much as to undermine the contract and remove any trust and confidence in his continuing his duties as Chief Financial Officer (EE1, document 15 refers).
- 4.47 Item four of the letter states, "In the absence of any justifiable and/or reasonable explanation in relation to the above matters the Board considers the relationship of employment so undermined by you and your actions as to completely remove any trust and confidence in your continuing role as its Chief Financial Officer".
- 4.48 Fewer than five hours after receiving the 8 October letter Mr Coates received another letter dated 10 October (attached to another email) which stated that "For and on behalf of the Board I hereby notify you that your employment contract with the company has been terminated forthwith". Both documents were signed by Mr Hunter (EE1, document 16 refers).
- 4.49 On 11 October 2008 Mr Coates sent an email in response to the letters dated 8 and 10 October, refuting the allegations. He received no reply from the company or PLS.

5.0 Conclusions/Decision

- 5.1 Mr Coates' employment in Guernsey was established from testimony from Gail Batiste and a reasonable amount of documentary evidence produced during the course of the Tribunal Hearing from hotels Mr Coates had stayed at during the course of his employment.
- 5.2 Mr Allot stated that the Board had no option but to terminate Mr Coates' employment when they believed that trust and confidence had been eroded in their employment relationship. However, no reasonable procedure was followed in relation to the Board's concerns regarding

Mr Coates' performance, and the procedure detailed in Mr Coates' contract for dispute resolution was not followed.

- 5.3 As a result Mr Coates was not afforded the opportunity to respond to the allegations made and no appeal was provided against the Board's decision to terminate his employment.
- 5.4 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 the Employment Protection (Guernsey) Law, 1998, as amended, Mr Coates was unfairly dismissed from his employment with CRE8 Limited.
- 5.5 In making the award to Mr Coates, the Panel considered the testimony made by Mr Coates in relation to his salary during 2008. Since no evidence in the way of payslips, or a copy of the twenty per cent salary loan agreement could be provided to the Panel for the hearing, the Panel decided to award Mr Coates his last six months salary less twenty per cent, but added the remainder of his holiday entitlement for the period. An Award of £64,310.00 is therefore made.
- 5.6

Signature of the Chairman: **Ms Georgette Scott**

Date: **5 August 2009**