

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Peter Kirby
Represented by: Himself

RESPONDENT: Fusion Systems Limited
Represented by: Advocate Jessica Roland

Decision of the Tribunal Hearing held on 30 June 2009 and 5 August 2009

Tribunal Members: Ms Helen Martin, Chairman
Mr Richard Hamilton
Ms Georgette Scott

UNANIMOUS DECISION

Based on the evidence presented, the Tribunal found:

The Applicant to be an employee of Fusion Systems Limited

The Applicant's effective date of termination to be 31 July, 2008

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 Peter Kirby was not, as alleged, constructively dismissed.

Award: None

In view of the above finding, the Tribunal makes no award.

Ms H Martin
.....
Signature of Chairperson

3 September 2009
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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, who represented himself, gave witness testimony, which was also supported by documentary evidence (EE1 refers)

1.2 The Applicant called the following witnesses:

Mr Bryan Marsh
Mr Peter Kirby
Mr John Merrien (by statement only)

1.3 The Respondent was represented by Advocate Jessica Roland.

1.4 Advocate Roland called the following witnesses:

Mr Andrew Lanoe
Mr Mike Parks
Mr Alan Rowe
Mr Paul Briggs

These were supported by documentary evidence (ER1 refers)

1.5 At the outset of the hearing it was confirmed that:

The effective date of termination was 31 July 2008.
The salary figures as detailed in the Applicant's ETI (Application) were agreed by the Respondent.

1.6 The Applicant claimed he had been constructively dismissed. He stated that Mr Briggs, the Managing Director of Fusion Systems Limited had refused to comply with the Guernsey Company Law requirements to have its company accounts audited. The Applicant alleged that the absence of audited accounts had hampered business acquisition. Mr Kirby claimed that this disagreement led to him being excluded from Board decisions and kept uninformed about general operational matters. He stated that he had struggled to maintain the morale of his team, deliver on production deadlines and hit revenue targets due to staff leaving and not being replaced. The Applicant claimed that frequent failures in the company's infrastructure systems, controlled by Mr Briggs, further undermined morale. The Applicant claimed that Mr Briggs had told him privately that the bonus paid to Directors was made as a "loan" in December 2007 and that the money would be reclaimed when Mr Kirby left the business. The Applicant viewed this as a clear indication that Mr Briggs intended to force him out of the company. The Applicant stated that Mr Briggs engaged Hassell Blampied to conduct a review of the roles, responsibilities and remuneration of the Directors of the Company and that there was a clear intent to reduce his salary as a result of doing so. The Applicant claimed that this would represent a repudiative breach of his contract with the company.

1.7 The Respondent denied any breach of Mr Kirby's contract of employment and claimed that Mr Kirby had tendered his resignation of his own volition on 30 April 2008. The Respondent

claimed that the Applicant was not treated in a manner sufficient to justify him resigning within the meaning of section 5(2) (c) of the 1998 Law, as amended or otherwise.

- 1.8 Mr Kirby did not lodge any formal grievance in relation to any of the above issues.

2.0 Facts Found

- 2.1 The Applicant was employed by the Respondent for 13 years from 01 September 1995 to 31 July 2009 as the Director in charge of the software design team which primarily dealt with the design, development, testing and support of software for the finance sector. The company's leading software product is called 'Flying Boat.'
- 2.2 The Applicant did not have a written contract of employment.
- 2.3 The Applicant held an essential 15 year housing licence that depended on his employment with the Respondent.
- 2.4 In April 2006, the company Accountant, Sarah Hancock confirmed that there was a legal requirement by the company to have audited accounts. Previously the company had produced certified accounts (ER 1, pge 98)
- 2.5 On 4 February 2008, audited accounts for 2006 and 2007 were finally approved and signed (EE 3, P 11).
- 2.6 There were problems with the IT infrastructure at Fusion Systems Limited during the course of 2006, 2007 and early 2008, when there were company-wide failures associated with the upgrade of the e-mail server and the client support system, "support works." (EE 2/ET 1 refers).
- 2.7 The company sought to recruit additional staff as evidenced by the generic recruitment advertisement in the Guernsey Press, in March 2008 (ER 1, Pg 264 refers)
- 2.8 There was a large disparity in the remuneration of Directors at Fusion Systems Limited. Hassell Blampied HR consultants were engaged by Fusion Systems Limited in January 2008 to undertake a review of roles, responsibilities and remuneration of Directors. The Applicant agreed to this review. The report was received from Hassell Blampied on 6 May 2008, after the Applicant had tendered his resignation.
- 2.9 Bonuses were paid to all Directors as loans in December 2007. The loans were made pending the outcome of the Hassell Blampied review.
- 2.10 Mr Kirby resigned on 30 April 2008, a week before the Hassell Blampied report was received, the resignation taking effect from 31 July 2008. Mr Kirby worked his full notice period of three months.

3.0 Mr Bryan Marsh

- 3.1 The witness represented St Peter's Trust one of the oldest clients of Fusion Systems Limited.
- 3.2 Mr Marsh told the Tribunal that Fusion Systems Limited was a good software provider. Mr Marsh gave evidence that the requirements for regular billing and annual billing of St Peter's Trust were multi jurisdictional and therefore complex and difficult. He stated that the system that the Applicant and the Applicant's team had developed was flexible with regard to the complexity required and that St Peter's Trust had purchased various enhancements over the years.

4.0 Mr Peter Kirby

- 4.1 The Applicant confirmed that all of the Directors of Fusion Systems Limited were also shareholders. Mr Kirby confirmed that all of the Directors were also employees of the company as well as managers of employees in the company.
- 4.2 In response to a question by Advocate Roland, Mr Kirby stated that his new and current role started immediately after leaving Fusion Systems Limited. Mr Kirby told the Tribunal that he submitted his curriculum vitae to one recruitment agency before his resignation in mid-April 2008 and the formal job offer was finalised after his resignation from Fusion Systems Limited.
- 4.3 The Applicant told the Tribunal that his decision to resign had not been one that had been taken lightly. The Applicant stated that there had been a robust exchange in the December 2007 Board meeting, concerning the remuneration of Directors of the company. During this Board meeting, Mr Kirby told the Tribunal that concern had been expressed that certain of his colleagues should receive higher remuneration. The Applicant had spoken to Hassell Blampied in mid-February 2008 and had awaited the outcome of the review.
- 4.4 The Applicant stated that the company's ability to bid for business was hampered by not having audited accounts. Audited accounts were eventually obtained in April 2008, prior to the Applicant's resignation.
- 4.5 In response to a question by Advocate Roland concerning his allegation of 'bullying' in broad terms, Mr Kirby told the Tribunal that most evidence was verbal and that there was no point in illustrating this, as it would be denied.
- 4.6 The Applicant stated that the recruitment of additional resources was discussed in the 14 December, 2007 Board meeting and alleged that this was discussed in the context that the Applicant's salary should be reduced to pay for these new hires.
- 4.7 Regarding the problem with the e-mail servers, the Applicant told the Tribunal that the problems with the development service main support mechanism were very frustrating and made working life difficult. The Applicant told the Tribunal that this severely affected the morale of the team and that it was very demoralising when problems went on month after month. It also led to the Applicant having to apologise to clients for incidents or technical problems that he had no control over. Mr Kirby told the Tribunal that his level of confidence in colleagues diminished and that the IT infrastructure problems started after the Applicant challenged the issue of audited accounts.
- 4.8 The Applicant told the Tribunal that he was able to continue to work for a further three months after tendering his resignation as it was "impossible" to drop everything and just leave. Mr Kirby told the Tribunal that he still had great loyalty to the team that he had built up and that he had no wish to cause the company embarrassment.
- 4.9 The Applicant stated that his health and outlook had been impacted significantly by events at Fusion Systems Limited and that he had been very fortunate to secure a position elsewhere.

5.0 Mr Andrew Lanoe

- 5.1 The witness confirmed that he was the Software Support Manager for the Respondent and therefore was responsible for the team directly supporting the clients of Fusions Systems Limited.
- 5.2 Mr Lanoe confirmed that he had been employed by Fusions Systems Limited for 12 years and had worked closely with Mr Kirby for the last 10 years.

- 5.3 The witness advised that it had been a collective decision not to replace Kay de la Rue in early 2006 and that he could not recall the Applicant taking issue with this at the time.
- 5.4 Mr Lanoe confirmed that he had no recollection of requests by Mr Kirby to recruit more staff being turned down.
- 5.5 The witness stated that he did not hear Mr Briggs communicate in a way that could be described as “bullying”.
- 5.6 Mr Lanoe referred to a time when relations were clearly strained between three Directors and said that the “tension was palpable”. The witness confirmed that there were no “blazing rows” in front of staff and that care was taken not to create a situation that could “flare out of control easily”. The witness told the Tribunal that this occurred approximately eighteen months before Mr Kirby resigned.
- 5.7 Mr Lanoe confirmed that the staff turnover in the software development team had been low and that there had been a higher turnover in the support functions.
- 5.8 Mr Lanoe described how the Applicant had appeared to lose interest in the months leading up to his resignation and appeared to have “low/medium” morale during this period. After submitting his resignation, Mr Lanoe observed Mr Kirby to be re-energised.
- 5.9 Mr Lanoe stated that he did not regard the problems with e-mails to be directed at Mr Kirby or his team and that the issue had been company wide.
- 5.10 In response to a question concerning whether there were resource constraints, the witness told the Tribunal that there had been an issue concerning the lack of client support during the late afternoon when it was necessary for Mr Kirby or one of the Development team to step in to assist, if required.
- 5.11 Mr Lanoe referred to an email on Pg 25, EE1, referencing the problems with the IT-Infrastructure and told the Tribunal that the company had worked through the problems and that morale had strengthened as a result.
- 5.12 The witness said that he could not recall any one occasion when he had overheard a “robust” discussion in one of the meeting rooms.

6.0 Mr Mike Parks

- 6.1 Mr Parks confirmed that he was the Technical Director and shareholder of Fusions Systems Limited.
- 6.2 Mr Parks confirmed that there had been a technical problem resulting from the upgrade of the email server.
- 6.3 The witness told the Tribunal that he could not recall the Applicant being excluded from Board decisions and that communication between Directors often took place informally by e-mails.
- 6.4 Mr Parks stated that he could not recall Mr Briggs bullying anyone in the company.
- 6.5 Concerning the auditing of the company accounts, Mr Parks’ understanding was that it was not necessary to have audited accounts and that certified accounts would suffice.

- 6.6 Mr Parks stated that he was not aware of any suggestion that Mr Kirby would have a reduction in salary as a result of the Hassell Blampied review.
- 6.7 Mr Parks told the Tribunal that Mr Briggs and Mr Lanoe were the main people involved in recruitment, and office management generally, and that for less important decisions the Directors used e-mail to communicate with each other. The witness stated that the perceived lack of communication regarding the recruitment of Helen Tucker's (Office Manager) replacement had not been aimed at Mr Kirby in any way and that the replacement had not been appointed to the role of Company Secretary (refer P.140, ER I) until she had been employed for 6 months.

7.0 Mr Alan Rowe

- 7.1 Mr Rowe confirmed that he had been Director of Sales and Marketing at Fusion Systems Limited since 1993.
- 7.2 Mr Rowe told the Tribunal that his understanding was that the issuance of certified accounts was normal practice within small trading companies in Guernsey.
- 7.3 The witness confirmed that the decision to issue certified accounts was reversed because of Mr Kirby researching company law and that the subsequent delay in producing audited accounts was not caused by any intent to delay.
- 7.4 Mr Rowe stated that no clients had refused to deal with Fusion Systems because of the lack of audited accounts and therefore the progress of the business was not hampered as a result.
- 7.5 Mr Rowe told the Tribunal that there had not been any bullying of Mr Kirby by Mr Briggs and no attempt to isolate him from Board decisions.
- 7.6 The witness told the Tribunal that he had always respected Mr Kirby's technical and creative abilities and that it would be advantageous to release him from developing/coding software into an increased revenue generating consultancy role. Mr Rowe told the Tribunal that there would have been a need to consider the structure of the company going forward as a result.
- 7.7 Mr Rowe stated that there had been no attempt or future reference made to the need to reduce Mr Kirby's salary.
- 7.8 The witness stated that he did not have any examples of the ability to recruit being constrained and that a generic recruitment advert had been placed in the Guernsey Press in March 2008, demonstrating the company's commitment to recruitment. In addition, Mr Rowe told the Tribunal that he was not aware of any specific requests from Mr Kirby for additional resources.
- 7.9 Mr Rowe stated that frustrations had been evident between Directors, concerning the strategic direction of the company and the production of a strategic 'roadmap' but that this fundamentally, had no impact on day-to-day working.

8.0 Mr Paul Briggs

- 8.1 Mr Briggs confirmed that he had been Managing Director of Fusion Systems since 1992.
- 8.2 Mr Briggs stated that he had less technical knowledge than the other Directors. The witness told the Tribunal that, as the Managing Director, he was focused on the achievement of business objectives. Mr Briggs said that his relationship with the Applicant was "business-like".

- 8.3 Concerning the issue of audited accounts, Mr Briggs stated that, once it was understood that audited accounts were a requirement under the law in Guernsey, he did not delay the production of these.
- 8.4 With reference to the problems with the IT infrastructure, Mr Briggs explained that Fusion Systems Limited operated in a complex environment and that the systems were generally reliable and that any problems that arose were always dealt with. Mr Briggs told the Tribunal that he would not delay the repairing of technical equipment that could impact business development of "Flying Boat", as this was the leading product of Fusion Systems Limited.
- 8.5 Mr Briggs stated that he involved the Applicant and Mr Lanoe in the distribution of bonuses (P 233, ER1), and that when Mr Kirby had proposed a small change to bonuses this had been accepted.
- 8.6 The witness confirmed that he had not refused any request by the Applicant for additional resources since 2000. Mr Briggs told the Tribunal that he did not deliberately exclude the Applicant concerning the recruitment of the new office manager.
- 8.7 Mr Briggs stated that he did not go out of the way to include or exclude the Applicant in decisions concerning the general management of the company.
- 8.8 The witness stated that the development of the software was core to the business and that as a result, there was no logical justification for 'spiking' Mr Kirby's work.
- 8.9 Mr Briggs described being frustrated by the issue concerning the Mr Kirby's focus on the requirement for audited accounts but stated that he did not hold a 'grudge' against Mr Kirby in this regard.
- 8.10 The witness told the Tribunal that the staff turnover in the company was very low and that there had not been any resignations arising directly from frustrations with problems with the IT infrastructure (refer ER 9).
- 8.11 Mr Briggs told the Tribunal that he engaged Hassell Blampied to undertake a review of roles, responsibilities and remuneration of the Directors' because particularly in one instance, the individual's salary no longer reflected his role and value in the business. However, Mr Briggs stated that at no time did he indicate that this would lead to a reduction in the Applicant's salary.
- 8.12 Mr Briggs strongly denied having a private conversation with Mr Kirby in which he told him he would reclaim his bonus when he left the company.
- 8.13 The witness stated that he did not seek to undermine the Applicant and that all the Directors were unhappy that historical issues could not be resolved.
- 8.14 Following the Applicant's resignations on 30 April 2008, Mr Briggs confirmed that Mr Kirby worked his full notice period.

9.0 Conclusions

- 9.1 On the witness stand, Mr Kirby detailed a number of issues which he believed, in summary, justified his resignation and was of such a nature that he could persuade the Tribunal that, on the balance of probabilities, they constituted a fundamental breach of contract.

- 9.2 In Section 5 (c) of the Employment Protection (Guernsey) Law, 1998, an employee is entitled to claim constructive dismissal if: the employee terminates the contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.

The test is whether or not the conduct of the employer is sufficiently serious to repudiate the contract of employment. There is a need to prove that the employer's conduct is sufficiently serious that the employee is entitled to regard himself as entitled to resign. The Tribunal's function therefore is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

The question of whether a breach is fundamental or not, is always a matter for the Tribunal to decide, based on the evidence provided. Importantly, it is only behaviour wholly inappropriate to the situation and the employee's position within the company that can form the basis of a fundamental breach of contract.

- 9.3 The Tribunal considered the evidence and issues presented to determine whether there had been a breach of the Applicant's contract:
- 9.4 Concerning the issue of the audited accounts, the Tribunal heard considerable evidence that revealed that the Directors of Fusion systems Limited did not initially agree that it was necessary to produce audited accounts under Guernsey Company Law. However, the Tribunal was persuaded that this disagreement, although serious, did not constitute a fundamental breach of the Applicant's contract of employment. In addition and importantly, by the time Mr Kirby resigned in April 2008, the issue with regard to audited accounts was resolved and therefore even if there had been a breach it was remedied prior to resignation.
- 9.5 With regard to allegations of bullying, the Tribunal was persuaded that there was evidence of strained working relationships concerning "historical" issues between the Applicant and other Directors at Fusion Systems Limited. Evidence presented at the Tribunal indicated that the Applicant had become increasingly isolated as a Director of Fusion Systems Limited and that this had significantly impacted on his morale. Also, it was noted by the Tribunal that the obligation of the implied term of trust and confidence in a contract is a mutual one. However, viewed objectively, the Tribunal did not conclude that the impact of the Respondent's conduct towards the Applicant in this regard constituted a repudiation of the contract of employment that was sufficient for the Applicant to claim he had been constructively dismissed. In consideration of this issue, the Tribunal took into account that no examples of verbal bullying were provided.
- 9.6 With regard to constraints in staff resourcing, there was no clear evidence that additional resources had been requested by the Applicant although it appeared that resources had been generally tight during the period leading up to Mr Kirby's resignation. The Tribunal gave weight to the evidence of a generic recruitment advertisement in the Guernsey Press in March 2008 (ER 1 P.264), that indicated that the company was active in recruitment during the period immediately leading up to the Applicant's resignation.
- 9.7 Regarding allegations made that the Applicant was set up to fail in his role as Director in charge of Software Development, from the evidence presented in this regard, the Tribunal did not view this allegation as proven. In consideration of this issue the Tribunal gave weight to the fact that it was unlikely that the Managing Director, Mr Briggs together with any of the other Directors would actively, with intent, seek to delay or damage the development or support of the company's leading financial services software product "Flying Boat" by their individual or collective actions directed at Mr Kirby. It appeared to the Tribunal that Mr Kirby had been unhappy in his employment at Fusion Systems Limited for a considerable time leading up to his

resignation on 30 April, 2008. However, the Tribunal has taken the view that the Applicant could not rely on his discontent or unhappiness to justify a fundamental breach of his contract of employment.

- 9.8 Regarding the problems with the IT infrastructure, the Tribunal viewed the repeated technical problems described as frustrating and not conducive to an ideal working environment. However, the Tribunal took the view that these problems were in many respects an unfortunate outcome of operating in a complex technical environment and that pertinently, according to the evidence presented; the issues were company-wide and not directed at the Applicant personally.
- 9.9 The Applicant's allegation concerning the proposed reduction in his salary following the Hassell Blampied review was considered carefully by the Tribunal, to determine whether there had been a fundamental breach of contract. Importantly, there was no evidence presented that the Applicant's salary would have been reduced. Also, the Applicant resigned one week before the Hassell Blampied report was received. It was accepted by the Tribunal that the Applicant believed that a reduction in his salary was the likely outcome of the Hassell Blampied review. However, in the absence of a clear and unequivocal statement of intention to fundamentally breach the contract by reducing the Applicant's salary, this allegation could not be relied on to justify a claim for constructive dismissal. In this regard and by his own admission, the Applicant resigned too early.
- 9.10 In giving evidence, the Applicant told the Tribunal that there had been no one "trigger" or 'last straw' leading to his resignation. It was clear that the Applicant had felt worn down over a considerable period by events and 'historical' issues associated with his ongoing employment at Fusion Systems Limited. The test in a constructive dismissal claim is not whether or not the employer has acted reasonably or unreasonably and in light of this, and all other evidence presented, the Tribunal concluded that the reasons behind Mr Kirby's resignation did not individually or cumulatively constitute a fundamental breach of any express or implied contractual term to justify a claim for constructive dismissal.

10.0 Decision

- 10.1 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 the Employment Protection (Guernsey) Law, 1998 as amended, that the Applicant was not constructively dismissed.

Ms H Martin

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Signature of Chairperson

3 September 2009

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Date