

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: **Ms Lynne Pellegrini**
Represented by: Advocate Simon Geall, AFR

RESPONDENT: **Barings Asset Management (CI) Limited**
Represented by: Advocate Jessica Roland, Ozannes

Decision of the Tribunal Hearing held on 16 July 2009

Tribunal Members: Ms Georgette Scott, Chairman
Mr Andrew Vernon
Mr Richard Hamilton

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, the Applicant had not achieved the qualifying period for this alleged case of unfair dismissal.

The Tribunal found that the date that the Applicant commenced employment as 25 February 2008.

The Tribunal found that the date the Applicant's employment was terminated as 23 December 2008.

Given the above the Applicant had not achieved the one year qualifying period applicable under the Employment Protection (Guernsey) Law, 1998, as amended, the complaint is dismissed.

Ms Georgette Scott	14 August 2009
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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 Advocate Simon Geall, and, in addition to the ET1, provided documentary evidence in the form of the joint document ER3.
- 1.2 Advocate Geall called the Applicant, Ms Lynne Pellegrini, as a witness.
- 1.3 The Respondent was represented by Advocate Jessica Roland, and in addition to the ET2, provided documentary evidence in the form of ER1, ER2 and the joint document ER3.
- 1.4 Advocate Roland called Ms Margaret Labram-Oddy, Head of HR at Barings as a witness.
- 1.5 The Applicant alleged unfair dismissal in relation to unfair process leading to redundancy.
- 1.6 The Respondent denied unfair dismissal and also claimed that the Applicant did not have the necessary qualifying period to bring a case of unfair dismissal.
- 1.7 A Preliminary Hearing was therefore convened to hear submissions relating to the qualifying period only before turning, if necessary, to the substantive matter.

2.0 Facts Found by the Tribunal

- 2.1 The following agreed facts were presented by both parties as document ER3.
- 2.2 The Applicant met with Mr John Maitland, a representative of the Respondent in London on 12 September 2007, who discussed the Applicant's possible employment with the Respondent.
- 2.3 The Respondent wrote to the Applicant on 19 October 2007, enclosing an offer letter for her signature (ER1 refers).
- 2.4 The Applicant signed and returned the offer letter on 26 October 2007 (ER1 refers).
- 2.5 The Applicant was working at Legg Mason in the USA until 6 February 2008.
- 2.6 The Applicant began working at the Respondent's Guernsey offices on 25 February 2008.
- 2.7 Mr Richard Bellis of Barings Asset Management met with the Applicant on 15 December 2008 to discuss redundancy.
- 2.8 The Respondent terminated the Applicant's employment due to redundancy by letter on 23 December 2008 (ER1 refers).

3.0 Summary of Parties' Main Submissions

The Respondent's case

- 3.1 Advocate Roland referred the Tribunal to the Schedule of the Employment Protection Law and to Section 34 (2) headed Period of Continuous Service which states "An employee's period of continuous employment for the purposes of any provision of this Law – (a) begins, subject to subparagraph (2) with the day on which the employee starts work."
- 3.2 The Tribunal was then referred by Advocate Roland to Section 5 (4) (b) of the Law which states "In this Law "the effective date of termination" in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect;"
- 3.3 Having defined the beginning and end of the employment Advocate Roland referred the Tribunal to various precedents and authorities beginning with **Salvation Army v Dewsbury** (ER2 refers).
- 3.4 The Applicant in this case, a teacher had accepted a full time teaching post starting on 1 May 1982, a Saturday. Because the following Monday was a Bank holiday she did not actually start teaching until Tuesday 4 May 1982. In an unfair dismissal tribunal which had to look at her qualifying period before proceeding to the substantive case, the tribunal found that the phrase "starts work" referred to her date of appointment and continued to hear the case.
- 3.5 However, the employer's appeal, which was dismissed, concluded that the phrase "starts work" was not intended to refer to the undertaking of her duties under the contract but to the date upon which she actually started teaching, i.e. in this case 4 May 1982.
- 3.6 In another authority, **Convergent Telecom Limited v Swann** (ER2 refers), in which the Salvation Army v Dewsbury case and others are referred to defining the phrase "starts work" Judge Pugsley states "...we can see no basis for overriding the clear statutory and common sense position that continuous employment begins with the date on which the employee starts work. The "starts work" under the terms of the contract can be, as was the position with the **Salvation Army** case, a day or two before the actual commencement of work if the start date is a bank holiday or weekend."
- 3.7 **In Sarker v South Tees Acute Hospitals NHS Trust** (ER2 refers) Advocate Roland advised that the Applicant in this case was ruled not to have continuity of employment as she was dismissed before she started work.
- 3.8 Referring to a local case **Bougourd v Close Fund Services Limited** (ER2 refers), Advocate Roland stated that the two cases were similar with a contract of employment in this case dated 12 December with a commencement date of 15 January. In this case the Tribunal held that the start date was 15 January the date upon which the Applicant started working for Close Fund Services.
- 3.9 Turning to the matter of the effective date of termination, Advocate Roland said there was no question that a dismissal took place and that the reason for this was redundancy.
- 3.10 In relation to the fact that the Applicant was paid in lieu of notice Advocate Roland referred the panel to Section 5 (5) and 5 (6) of the Law which states "Where the contract of employment is terminated by the employer and the notice required by section 1 to be given by an employer would, if given on the material date, expire on a date later than the effective

date of termination (as defined in subsection (4) then, for the purposes of section 15 (1), the later date shall be treated as the effective date of termination in relation to the dismissal.” And “In subsection (5) “**material date**” means the date when notice of termination was given by the employer or (where no notice was given) the date when the contract of employment was terminated by the employer.”

- 3.11 In this case the date of termination was the date upon which the dismissal was effective and payment was made in lieu of notice. Advocate Roland stated that should any notice be added to the date of termination, in this case 23 December 2008, it would be one week’s statutory notice as defined in section 1 (1) (a) of the Law.
- 3.12 In support of this position Advocate Roland cited **Harper v Virgin Net Limited**.
- 3.13 The Applicant’s offer of employment letter (ER1 refers) stated that there were four conditions that had to be met before work could commence these were references, confirmation of qualifications, a police clearance certificate and visa and Right to Work documents, the last of these being particularly relevant, as the Applicant was living and working in the USA until 6 February 2008, and could not take up work in Guernsey without them.
- 3.14 In the same letter under the heading of Continuous Service, the sentence states “The date of your continuous service shall commence from the Commencement Date”.
- 3.15 Advocate Roland stated that the commencement date was the date the Applicant started work for Barings Asset Management, she could not have started on the date she signed her contract as she was still resident in the USA and working for her former employer until 6 February 2008.
- 3.16 With reference to the end of the employment relationship the Applicant was sent a letter dated 23 December 2008 which confirmed that the Respondent had decided to terminate her employment by reason of redundancy. It states “Your employment with Baring Asset Management (CI) Limited will terminate on 23 December 2008”

Evidence of Margaret Labram-Oddy

- 3.17 Ms Labram-Oddy confirmed that it was normal practice to recruit employees over a long period with various stages in the recruitment process and it was regular practice to agree terms sometimes months ahead of actually starting work.
- 3.18 Ms Labram-Oddy advised that the Applicant had not given in her notice at the time of the offer as she was waiting to become eligible for an end of year bonus with her former employer.
- 3.19 With regard to the Applicant’s start date Ms Labram-Oddy advised that 11 February had been the Applicant’s intended start date but due to problems with producing the correct immigration documents there was a delay in her starting work.
- 3.20 With reference to the letter dated 20 February from the Immigration and Nationality Department, provided at ER1, Ms Labram-Oddy confirmed that this letter released the Applicant for work and before that date she did not have the required clearance to start work.
- 3.21 It was confirmed that the Applicant’s hours of work, salary and benefits all began from 25 February 2008. In addition, with reference to the Applicant’s payslip dated 16 January 2009 Ms Labram-Oddy advised that the payroll run had already been completed in December 2008

when the Applicant's termination letter was sent on 23 December and therefore all additional monies due were paid in the January payroll.

- 3.22 Ms Labram-Oddy confirmed that the Applicant's last day of employment was 23 December 2008.

Cross Examination of Mrs Labram-Oddy

- 3.23 Mrs Labram-Oddy confirmed that the contract of employment was signed on 26 October 2007 by the Applicant.
- 3.24 Advocate Geall argued that the contract of employment was therefore valid from the date of the signature on 26 October.
- 3.25 Mrs Labram-Oddy stated she knew nothing of the strategy meeting which the Applicant had attended in London in December 2007.
- 3.26 With reference to the notice period applying to the contract of employment Mrs Labram-Oddy confirmed that twelve weeks notice was due under the contract.

Re-examination of Mrs Labram-Oddy

- 3.27 Under re-examination Mrs Labram-Oddy stated that to her knowledge the Applicant did not receive any payment for the meeting in London in December 2007 and that her first payslip confirmed her start date of 25 February 2008.

The Applicant's case

- 3.28 The Applicant's case began with the witness evidence of the Applicant, Ms Lynn Pellegrini.

Evidence of Ms Lynne Pellegrini

- 3.29 The Tribunal heard that Ms Pellegrini had been recruited through the recruitment agency Martel Dunn and had first met with Mr John Maitland of Barings Asset Management on 12 September 2007 to discuss her possible employment.
- 3.30 She was sent an offer of employment/contract with the terms of employment detailed within it on 19 September and signed and dated it together with a Personal Details Form on 26 October 2007.
- 3.31 Asked when she considered that she was bound by the contract, she stated that she was bound by the contract from the date she signed it.
- 3.32 The Tribunal heard that Ms Pellegrini was invited to attend a strategy briefing meeting in London in December 2007. The purpose of the meeting was to look at ways the company could kick-start growth and to elicit ideas and solutions to make the company more profitable.
- 3.33 Ms Pellegrini stated that she was not required to sign a confidentiality form in order to attend the meeting and the only document she had signed prior to the meeting was the employment contract.
- 3.34 Due to immigration issues Ms Pellegrini did not attend the office until 25 February 2008. She passed her probationary period.

- 3.35 She first became aware of the issue of potential redundancy on 15 December 2008 when she attended a meeting with Mr Bellis, Managing Director. This was confirmed in a letter of the same date (ER1 refers).
- 3.36 She was subsequently made redundant by a letter dated 23 December 2008 (ER1 refers) which did not reach her until sometime later due to the Christmas holiday.

Cross Examination of Ms Pellegrini

- 3.37 Ms Pellegrini stated that she first undertook work that she expected payment for in December 2007 when she attended the strategy meeting. Although she was not paid for this she had received travel expenses for the trip and had taken holiday from her former employers in order to attend.
- 3.38 It was confirmed that due to immigration problems she did not start work until 25 February 2008 when the necessary documents were in place.
- 3.39 The Tribunal heard that Ms Pellegrini had worked for her former employers Legg Mason in the USA until 6 February 2008, and that this was the date she gave in her notice but was not required to work it.
- 3.40 Ms Pellegrini confirmed that she was not in a position to start work or fulfil various obligations detailed within the contract until she had left her former employers and overcome various conditions of the contract such as her Right to Work documents, and that she did not do this until 25 February 2008.
- 3.41 Advocate Geall referred the Tribunal to section 34 (1) (3) (1) of the Law which states:
- “Any week during the whole or part of which an employee’s relations with his employer are governed by a contract counts in computing the employee’s period of employment”
- 3.42 The Tribunal heard that though the Applicant did not start work until 25 February she was under a contract of employment from 26 October 2007 and that contract was binding from that date.
- 3.43 As to the effective date of termination Advocate Geall referred the Tribunal to Section 1 (8) of the Law which states:
- “The provisions of this section are without prejudice to any provision in a contract of employment requiring longer notice to be given”
- 3.44 Advocate Geall argued that this section clearly required that the contractual twelve weeks notice of the Applicant should be added to the termination date making the effective date of termination 17 March 2009; however, he accepted that applying this section of the Law to every case of unfair dismissal would result in some strange outcomes.

4.0 The Law

4.1 In relation to the Qualifying Period the Law states in Section 3 and 15 (1)

“In every employment to which this Part of this Law applies every employee shall, subject to the provisions of section 15 (which specifies the qualifying period), have the right not to be unfairly dismissed by his employer.”

“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 ending with the effective date of termination.”

4.2 In relation to Continuous Employment the Law states in Section 34 2 (1) of the Schedule to the Law

“An employee’s period of continuous employment for the purposes of any provision of this Law -

(a) begins, subject to paragraph (2), with the day on which the employee starts work, and

(b) ends with the day by reference to which the length of the employee’s period of continuous employment is to be ascertained for the purposes of the provision.

Section 34 3 (1) of the Schedule to the Law
Weeks counting in computing period

“Any week during the whole or part of which an employee’s relations with his employer are governed by a contract of employment counts in computing the employee’s period of employment”

4.3 With regard to the Effective Date of Termination:

Section 5 (4)

“(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which that notice expires.

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect; and

(c) in relation to an employee who is employed under a fixed term, where that term expires without being renewed under the same contract, means the date on which that term expires.” and

Section 5 (5)

“Where the contract of employment is terminated by the employer and the notice required by section 1 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (4) then, for the purposes of section 15 (1), the later date shall be treated as the effective date of termination in relation to the dismissal.”

5.0 Conclusions/ Decision

- 5.1 The Tribunal considered the two issues of Commencement Date and Effective Date of Termination (EDT) as follows:-
- 5.2 Section 2 (1) (a) of the Schedule to the Law appears quite clear in that the continuous period of employment commences on the day on which the employee starts work.
- 5.3 Further, the Tribunal takes the view that section 3 “Weeks counting in computing period” can only logically come into force after the employee has started work.
- 5.4 The Tribunal found that there were ample documentary records, many of them signed by the Applicant herself, together with testimony from the Applicant, confirming 25 February as her first working day.
- 5.5 The issue of the strategy meeting in December 2007 is mostly irrelevant in defining the period of employment since the Applicant was still working for her former employer and had not yet met the conditions attached to her contract of employment.
- 5.6 The Tribunal therefore concluded that the Applicant’s employment commenced on 25 February 2008.
- 5.7 With regard to the Effective Date of Termination (EDT) the Tribunal regards the letter of 23 December 2008, to be very clear in identifying that date as the termination date.
- 5.8 The letter of the 23 December, together with payment in lieu of notice and all the outstanding benefits were a clear indication that her employment had ceased on that date - even though the actual payments were made through the January payroll.
- 5.9 Testimony from both parties confirmed that the Applicant performed no further duties for the Respondent after 23 December 2008, and therefore the Tribunal regards this as the Applicant’s Effective date of Termination.
- 5.10 The Tribunal concludes that the Applicant fails to achieve the minimum qualifying period as specified in The Employment Protection (Guernsey) Law, 1998, as amended; the complaint is therefore dismissed.

Ms Georgette Scott

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Signature of the Chairman

14 August 2009

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Date