

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Alexander John Duncombe

RESPONDENT: Faulkner Fisheries Export Ltd

Decision of the Tribunal Hearing held on 4 February 2010

Tribunal Members: Mrs Tina Le Poidevin
Mr Andrew Vernon
Ms Alison Girollet

UNANIMOUS DECISION

1. Having considered all the evidence presented, the Tribunal found, under the provisions of The Employment Protection (Guernsey) Law 1998, as amended, that there was insufficient evidence to prove that a dismissal had actually taken place.
2. The claim of unfair dismissal is, therefore, dismissed and no award is made.

Mrs Tina Le Poidevin

4 March 2010

.....
Signature of the Chairperson

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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 claimed that:

- He had been unfairly dismissed when he advised the Respondent that he had received a medical certificate confirming that he would be absent from work for a period of one month due to illness.

1.2 The Respondent disputed the claim on the grounds that:

- The Applicant had not been dismissed but rather he left without notice due to the nature of his sudden illness.

1.3 The Applicant appeared in person and gave witness testimony under oath on his own behalf.

1.4 Form ET1 was presented in evidence.

1.5 One witness, Mr Sonny Duncombe (Mr Duncombe's son), was called for the Applicant and gave evidence under affirmation.

1.6 The Respondent was represented by Advocate Mark Ferbrache.

1.7 In addition to form ET2, a document bundle marked ER1 (containing a letter from Mr A J B Pattimore to Advocate Ferbrache dated 6 January 2010), witness statement from Mr Willie Falla marked ER2, the Applicant's Statement of Main Terms of Employment marked ER3 and a faxed document from the Respondent to Guernsey Social Security marked ER4, were presented in evidence.

1.8 Two witnesses were called for the Respondent, namely Mr Sean Faulkner (Owner of Faulkner Fisheries Export Ltd) and Mr Anthony John Blampied Pattimore (Deputy Harbour Master). Mr Faulkner gave evidence under oath and Mr Pattimore under affirmation.

2.0 Facts Found by the Tribunal

2.1 As the Applicant's gross earnings during the last six months of employment differed between the ET1 and ET2, the figure of £11,700 was agreed by both parties.

2.2 As the Applicant's commencement date differed between the ET1 and ET2, 1 July 2004 was agreed by both parties.

2.3 Mr Faulkner was the owner of Faulkner Fisheries Export Ltd and was based in Jersey. He had been running the company for 30 years and had had the MFV Corentine for 21 years.

2.4 The Respondent employed between 12 and 15 employees, the administration of the company being largely undertaken by Mr Faulkner with the assistance of one or two employees.

- 2.5 The Applicant initially commenced employment with the Respondent as 'Part-time Crew' on MFV Corentine. His duties involved loading and unloading the boat as well as navigating.
- 2.6 On 9 June 2007, the Applicant's position changed to that of Skipper of the MFV Corentine on a full-time basis, as noted within his Written Statement of the Main Terms of Employment.
- 2.7 The MFV Corentine is a fish carrier which transports fish from local boats to France. Without the Corentine available on a daily basis local fishermen would be unable to export their catches from the island to the markets in Europe.
- 2.8 On 12 October 2009, the Applicant faxed Mr Faulkner advising him that he was going to visit his doctor.
- 2.9 On 12 October 2009, following his doctor's appointment, the Applicant advised Mr Faulkner by telephone, that he had been diagnosed with prostate cancer and arthritis of the spine and could not work any more in view of his health.
- 2.10 The MFV Corentine was due to sail that week. The Applicant was the only Skipper of that vessel and no-one else who worked on board had that capability.
- 2.11 Both Mr Faulkner and the Applicant had strong feelings for the boat which the Applicant had always run well and the conversation moved on to what was going to happen that week with the vessel.
- 2.12 The Respondent asked the Applicant if he knew of anybody who could skipper it as the Applicant had finished.
- 2.13 During the conversation the Applicant did not express any personal concerns in relation to this question.
- 2.14 The Applicant was aware that the MFV Corentine was not only important for Faulkner Fisheries but to the local fishing industry.
- 2.15 The Applicant thought of one person, his predecessor Mr Gillman, to undertake this role and stated that the Tribunal should not think ill of Mr Faulkner for getting in another Skipper.
- 2.16 The Applicant did not return to work, therefore, his last day of employment was 12 October 2009.
- 2.17 There was no discussion about keeping the Applicant's job open for him.

- 2.18 Around 14/15 October 2009, the Applicant telephoned the Respondent's witness, Mr Pattimore, to tell him that he had resigned and was not now working on the MFV Corentine and asked him to keep an eye on it because he was unable to. During the conversation, the Applicant told him about his prostate cancer and arthritis of the spine.
- 2.19 Mr Faulkner received a telephone call from the Applicant during the week of 12 October 2009, asking him if he would write to the Social Security department, attaching a copy of his final salary slip, to advise them that he was no longer employed by the Respondent so that he could receive his benefit. This communication was produced in evidence.
- 2.20 Mr Faulkner ensured that departing employees were paid up to date and this was the case in the Applicant's situation. In fact the Applicant had had a holiday a few weeks before his diagnosis and was paid for that holiday which he had not yet earned. He had, therefore, been overpaid.
- 2.21 Mr Faulkner was aware that the Applicant had a back problem but was not aware that he had prostate cancer until his telephone conversation with the Applicant on 12 October 2009.
- 2.22 The Applicant and his son, Mr Sonny Duncombe, had a very good relationship and were good friends. They spoke practically every day.
- 2.23 When the Applicant first introduced his son as possible crew, Mr Faulkner asked if he was sure that he wanted to work with his son and the Applicant gave him a firm assurance that he had no problem with this.
- 2.24 The Applicant agreed to help as much as he could with the new Skipper taking over and his son working on board with him.
- 2.25 Mr Sonny Duncombe continued working for the Respondent after 12 October 2009 and did not express any form of indignation or annoyance at his father's alleged dismissal.
- 2.26 Mr Faulkner confirmed that the Applicant had been a faithful and true employee and they had had a good working relationship.
- 2.27 The Applicant confirmed his understanding of the term resign as being "when an employee signed a document saying that he did not want to work any more". He had never resigned from a job and only knew now what resigning meant.
- 2.28 Mr Willie Falla's statement noted Mr Sonny Duncombe as telling him that his father was "finished" due to ill health as he had prostate cancer.
- 2.29 The Applicant knew that the Respondent would have to advertise for a replacement and the Applicant himself put forward the previous Skipper as a replacement.
- 2.30 The Applicant's ET1 form was completed on 1 November 2009.
- 2.31 The manner in which Mr Faulkner and the Applicant conducted themselves throughout was one of civility and respect. There was no animosity between them.

- 2.32 Whilst the Applicant did not know at the time of the doctor's appointment on 12 October 2009, he had since been advised that his condition was terminal.
- 2.33 The Applicant's Statement of Main Terms and Conditions of Employment noted the Period of Notice of Termination to be given by the Employee as "Work until a suitable replacement found and trained."
- 2.34 Sickness or Injury terms within the Applicant's Statement of Main Terms and Conditions of Employment were noted as "Social Security".

3.0 The Law

- 3.1 Section 5(2) (a) of the Law notes 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 without notice;"

4.0 Summary of Parties' Main Submissions

Applicant

- 4.1 The Applicant, Mr Alexander John Duncombe, and witness, Mr Sonny Duncombe, gave evidence and were cross-examined by the Respondent's representative. The Tribunal also asked questions of clarification.
- 4.2 The Applicant stated that he commenced employment with the Respondent as 'Part-time Crew'. His duties involved loading and unloading the MFV Corentine and navigating.
- 4.3 He was subsequently taken on full-time as Skipper of the MFV Corentine when the previous Skipper left.
- 4.4 On the few occasions that he had been ill, he had worked, and on 12 October 2009 he went to work as usual.
- 4.5 As he had been experiencing back problems, on 12 October 2009 he faxed Mr Faulkner to tell him he was going to the doctor.
- 4.6 The doctor told him that he had prostate cancer and arthritis of the spine. He also told the Applicant that he could not work at all, not even light work and issued him with an initial medical certificate for one month.
- 4.7 Whilst the Applicant had recently had some blood tests, he had not been expecting this news.
- 4.8 The Applicant then telephoned Mr Faulkner that day to tell him what the doctor had said.
- 4.9 Mr Faulkner told the Applicant that he would not then be able to take the boat out (MFV Corentine), to which the Applicant agreed.
- 4.10 Mr Faulkner told the Applicant that he would have to terminate his employment and asked the Applicant to find him another Skipper to take his place.

- 4.11 On 13 October 2009, Mr Faulkner telephoned the Applicant to ask if he would take the boat, boarding as an unpaid passenger. He said he could not because he was signed off sick by the States of Guernsey and could not work any way. Mr Faulkner told the Applicant that he might as well terminate his contract.
- 4.12 The Applicant had not received any communication from Mr Faulkner since their telephone conversation that day.
- 4.13 Mr Sonny Duncombe spoke with the Applicant practically every day but he did not recall him saying anything about his employment when they spoke about the doctor's diagnosis on 12 October 2009; their conversation that day focussed on his father's illness as they were both shocked at the news.
- 4.14 Mr Sonny Duncombe said he was first aware that his father's employment had been terminated when he received a telephone call from Mr Faulkner, on 15 October 2009, in connection with a fishing trip the following day. During the conversation Mr Faulkner said that the Applicant would not be working on the boat any more as his contract had been terminated. At that time Mr Sonny Duncombe had regular contact with Mr Faulkner as he was in charge of the admin work on the boat.
- 4.15 The Applicant would not have expected his son to give up his job with the Respondent as a result of his own employment situation as he knew his son loved his job.
- 4.16 The Applicant's telephone had rung twice since 13 October 2009 and, on noting that it was Mr Faulkner, the Applicant telephoned to see what he wanted only to be told by Mr Faulkner that he must have misdialled.
- 4.17 Following receipt of a letter signed by Mr Pattimore in January 2010 (ER 1), the Applicant telephoned Mr Pattimore to discuss the conversation that had taken place around 14/15 October 2009. During the conversation, the Applicant said to Mr Pattimore that he did not tell Mr Pattimore that he had resigned. Mr Pattimore told the Applicant that he was quite clear as to what the Applicant had told him.
- 4.18 The Applicant considered that the Respondent's witness, Mr Pattimore, must have been mistaken as he did not tell him that he had resigned during their telephone conversation in October 2009. In fact resignation had never come into his head and in his mind he had wanted to work.
- 4.19 The Applicant thought that to resign he would have had to provide a written letter. He had never resigned from a job and only knew now what resigning meant.
- 4.20 The Applicant had a telephone call, on 16 October 2009, from the Skipper who had taken over his job asking how to work the new auto pilot which had been installed prior to the Applicant ceasing employment.
- 4.21 The Applicant reminded the Respondent that there had been occasions when he had been ill on the boat but still had to work. Once he fell on the boat and could not walk but he still had to work. In the 5 years he had worked for the Respondent he had only missed one trip because of a kidney problem.

Respondent

- 4.22 The two witnesses for the Respondent, named above, all gave evidence and were cross-examined by the Applicant. The Tribunal also asked questions of clarification.
- 4.23 At approximately 9 am on 12 October 2009, Mr Faulkner received a fax message from the Applicant advising him that he had gone to the doctor.
- 4.24 At around 11.30 am that morning Mr Faulkner telephoned the Applicant to find out how he was as he had not heard from him since receiving the fax message.
- 4.25 The Applicant told Mr Faulkner that he had finished with immediate effect as his doctor had advised him not to do this kind of work due to him having advanced prostate cancer which had spread to his spine, hence his problems with walking and heavy work.
- 4.26 Mr Faulkner was very shocked at the news of the Applicant's diagnosis and was compassionate towards the Applicant who he had known for many years.
- 4.27 Mr Faulkner understood from the information given to him by the Applicant that the Applicant had finished working for him with immediate effect, without notice.
- 4.28 Mr Faulkner's primary concern was in relation to the Applicant's health thus Mr Faulkner felt very awkward when he broached the subject of finding a replacement Skipper for the MFV Corentine as he did not know whether it was the right time to discuss work with someone who had just had such a shock.
- 4.29 Mr Faulkner asked the Applicant whether he knew if Mr Andy Gillman, the previous Skipper, would be available and said he would give him a call to see if he could take over.
- 4.30 Mr Faulkner also said that if Mr Gillman was unable to take over, he would advertise the post in the Job Centre/Guernsey Press, to which the Applicant raised no objection at all.
- 4.31 Mr Faulkner was not the sort of person to dismiss an employee because they were unable to work due to ill health and certainly not if they had something as serious as cancer.
- 4.32 It was possible that the Applicant, who had just been given such shocking news, was not thinking straight.
- 4.33 The Applicant told him that the doctor said he could not work at all, not even light duties so there was no question that he could work from that moment on, thus, the issue of one month's sickness absence was completely irrelevant .
- 4.34 The Respondent had numbers stored in his telephone and it was highly likely that he may have pressed the wrong button and accidentally dialled the Applicant after 12 October 2009 but he did not recall doing so.
- 4.35 Mr Faulkner was in communication with the Applicant during the week as his health was his primary concern. He knew he had finished working for him but he maintained contact with him as a friend. He recalled during one conversation that the Applicant was quite upset that his test results might show that he had the worst form of prostate cancer and he had

reassured him by saying that he should not dwell on the worst scenario but keep an open mind hoping that the worst would not happen.

- 4.36 As well as asking after the Applicant's health during their telephone conversations, Mr Faulkner recalled asking the Applicant such things as the whereabouts of the weighing in books and how much fuel was left.
- 4.37 There was never any mention about termination of employment during that time and there was no written communication between them since 12 October 2009.
- 4.38 In Mr Faulkner's experience resigning employees usually handed in their notice either verbally or in the form of a letter. They then usually asked for a reference which he provided.
- 4.39 Mr Faulkner did not usually write to employees to acknowledge their resignation or confirm their leaving arrangements.
- 4.40 Mr Faulkner recalled the Applicant undertaking light duties or taking extra time off when he experienced back problems.
- 4.41 There had been instances over the years where boat crew had let Mr Faulkner down but he had managed to work his way through the problem despite the employment market. The Respondent considered it important to look after his employees and foster good working relationships with them.
- 4.42 Mr Faulkner spoke with Mr Sonny Duncombe shortly after it had been established that the Applicant would no longer be able to work. As Mr Sonny Duncombe had been working with his father, he had a very good working knowledge of the boat and Mr Faulkner felt that Sonny would be able to telephone his father if he wanted to know anything.
- 4.43 When speaking with Mr Sonny Duncombe on 15 October 2009, Mr Faulkner felt sure he said he was very sorry to hear that his father was unwell and told him Mr Andy Gillman was taking over until such time as he had found a suitable replacement.
- 4.44 Mr Sonny Duncombe seemed to be happy that he was able to continue doing his job so Mr Faulkner, therefore, deduced that he must have known that the Applicant was no longer working on the vessel.
- 4.45 There was absolutely no reaction from Mr Sonny Duncombe on the point that Mr Andy Gillman was to skipper the vessel until a new permanent person could be found.
- 4.46 Mr Faulkner did not think there was any possibility that his conversation with the Applicant could have been interpreted as him being dismissed.
- 4.47 Mr Faulkner had never sacked anyone before on the grounds of ill health.
- 4.48 Mr Pattimore clearly remembered the word 'resigned' because it was unusual to get a call that was not a complaint and the fact that the Applicant had said that he was no longer the Skipper of the MFV Corentine stuck in his mind. Mr Pattimore said that he was also 90% sure that "having recently been diagnosed with cancer" was added to the statement that he had resigned and the Applicant definitely did not say that he had been dismissed. This was the first Mr Pattimore had heard about the Applicant's situation.

- 4.49 Mr Pattimore understood the significance of the term ‘resigned’ before putting pen to paper.
- 4.50 The fact that the Applicant telephoned Mr Pattimore after he had ceased employment to assist with operational matters relating to MFV Corentine does not appear to be the action of a person who had just been dismissed by his employer.
- 4.51 The Respondent did not say that he had terminated the Applicant’s contract.
- 4.52 The Respondent did not ask the Applicant to take the boat on 13 October 2009 as an unpaid passenger and that this would have been in breach of the Guernsey Merchant Shipping Law as he would not have been able to take a Skipper and two crew as the third person would not have been insured.
- 4.53 It was remarkable to believe that the first Mr Sonny Duncombe knew about his father’s alleged dismissal was during a telephone conversation with Mr Faulkner on 15 October 2009, particularly as he is very close to his father and they are in regular communication.
- 4.54 Mr Willie Falla’s statement noted Mr Sonny Duncombe as telling him that his father was “finished” due to ill health as he had prostate cancer, not that he had been dismissed.

5.0 Conclusion

- 5.1 A resignation is the termination of a contract of employment by an employee. It need not be expressed in a formal way and may be inferred from the employee’s conduct and the surrounding circumstances.
- 5.2 The burden of proof rests with the Applicant to establish whether or not there has been a dismissal.
- 5.3 The standard of proof is that of the balance of probabilities and, in reaching its decision, the Tribunal has considered whether it was more likely than not that the contract was terminated by dismissal rather than resignation.
- 5.4 In this particular case, there appears to be much that was left unsaid, with the strength of this silence being more supportive of the Respondent’s evidence.
- 5.5 Based on all the evidence presented, the Tribunal found, under the provisions of The Employment Protection (Guernsey) Law 1998, as amended, that there was insufficient evidence to prove that a dismissal had actually taken place.

Mrs Tina Le Poidevin

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Signature of the Chairperson

4 March 2010

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Date