

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: **Mr Peter Phillips**
Represented by: Advocate Andrew Ayres and Mr Andrew Castle

RESPONDENT: **Medical Specialist Group Guernsey**
Represented by: Advocate Jessica Roland

Decision of the Tribunal Hearing held on 30 July 2010

Tribunal Members: Ms Helen Martin (Chairperson)
Mr Andrew Vernon
Mr George Jennings

Following the death of the Applicant, the Tribunal determined that they would hear submissions from the parties concerning whether the Applicant's estate could continue to pursue the claim.

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 and in light of 'The Loi Relative a la Reforme de Diverses Dispositions de la Roi, 1936,' the claim for Unfair dismissal survives the death of the Applicant and can be pursued by the Applicant's estate.

Ms Helen Martin
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Signature of the Chairman

20 August 2010
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Date

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 Following the untimely death of the Applicant, Mrs Heather Phillips, on behalf of the Applicant's estate, was represented by Advocate Andrew Ayres and Mr Andrew Castle who gave both oral and documentary evidence (EE2 refers).
- 1.2 The Respondent, the Medical Specialist Group, Guernsey was represented by Advocate Jessica Roland who gave oral evidence.
- 1.3 The Applicant's estate asserted that Mr Peter Phillips had been unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998 as amended.
- 1.4 The Applicant's estate claimed that the Tribunal hearing should be allowed to continue in the circumstances of the Applicant's death.
- 1.5 The Respondent resisted the assertion that the Tribunal should continue, stating that it would be unfair to continue with the hearing given the time delay in the proceedings and the absence of the Applicant.
- 1.6 The Tribunal established that they would hear arguments from the parties concerning whether the hearing should continue. If the Tribunal found that the proceedings could continue the hearing would be reconvened to consider the substantive issues in Mr Phillip's complaint and whether he had been unfairly dismissed.

2.0 Facts Found

- 2.1 The Medical Specialist Group (MSG) provides specialist health care services to the population of Guernsey.
- 2.2 Mr Peter Phillips was employed as the IT manager at the Medical Specialist Group.
- 2.3 Mr Peter Phillips was summarily dismissed from his role as IT manager on 28 October, 2008.
- 2.4 A two day Tribunal to hear Mr Peter Phillip's claim for Unfair Dismissal was held on 28 and 29 July, 2009. The Tribunal did not conclude and a further two day hearing was arranged.
- 2.5 The Applicant died before the Unfair Dismissal hearing could reconvene in November 2009.

3.0 The Respondent represented by Advocate Jessica Roland

- 3.1 Advocate Roland stated that the death of an applicant had not been considered in the drafting of the Employment Protection (Guernsey) Law in 1985 and that the principles behind the drafting of the law had been to introduce a swift, efficient, inexpensive and non-legalistic method to resolve claims of Unfair Dismissal. Advocate Roland asserted that the Law was designed to involve the minimum of paperwork and to be a reasonable solution for employers and employees. In addition, the Respondent's representative stated that the Law was intended to have a limited effect on employers in general; at the same time providing for

some form of redress for employees in a “typical Guernsey fashion.” Advocate Roland stated that as a result of these principles the Guernsey Tribunal model is different to the UK model. Advocate Roland told the Tribunal that these principles were reiterated when the law was redrafted in 2004. As a result, Advocate Roland stated that it would be unfair to continue with the Applicant’s claim for Unfair Dismissal given the extraordinary delay in the proceedings arising from the death of the Applicant.

- 3.2 On behalf of the Respondent, Advocate Roland re-stated the importance of matters being set down expeditiously and that swiftness and efficiency underpin the Tribunal proceedings. Advocate Roland stated that any claim must be made within three months of the dismissal compared to the six year time limit of a civil claim in the Royal Court.
- 3.3 Referring to the chronology of the case, Advocate Roland stated that Mr Peter Phillips had been suspended on 01 October, 2008 and dismissed on 28 October, 2008. The two day hearing of his claim for Unfair Dismissal had taken place on 28 and 29 July, 2009 and therefore another year had lapsed before the hearing had reconvened to determine whether the claim could continue to be heard. Advocate Roland argued that it was likely that there were five or six slightly different versions of handwritten notes of what had been said over a year previously in the first part of the hearing. Advocate Roland stated that the notes had not been taken in the first part of the Tribunal in July 2009 to rely on one year later and that this represented an intrinsic unfairness that was prejudicial to the Respondent.
- 3.4 Advocate Roland asserted that since the death of the Claimant, the Respondent had sought for the matter to be heard as soon as possible and that the resulting delay would lead to any witnesses dealing with some issues that occurred two years previously. Advocate Roland questioned who could recall with accuracy what had occurred in October 2008.
- 3.5 Referring to the last witness on the stand in July 2009, Advocate Roland stated that Ms Carol Harvey the CEO of the Medical Specialist Group had not completed her evidence and was still under oath. Advocate Roland stated that there were no written statements for the witnesses that were called. Advocate Roland asserted that all these issues were prejudicial to the Respondent.
- 3.6 Advocate Roland stated that Mr Peter Phillips had prepared a brief written statement but that this was not signed and not given under oath. Advocate Roland asserted that as Mr Peter Phillips was now not available for cross examination that it was prejudicial to continue the hearing in his absence. Advocate Roland stated that this represented procedural unfairness and it was against natural justice for the Respondent not to have the opportunity to cross examine Mr Phillips.
- 3.7 Advocate Roland stated that the allegations against the Applicant were extremely serious and sensitive, particularly for a medical practice and that this was reason not to continue with the hearing. Advocate Roland stated that comments in Mr Peter Phillips’ written statement were disputed by the Respondent. Advocate Roland asserted that the allegations by Mr Phillips about the Respondent in his statement could not be put to the test in his absence.
- 3.8 Advocate Roland concluded that the Tribunal should not be permitted to proceed because of the significant, substantive injustice and prejudice against the Respondent arising from the absence of the Applicant and the delay in the proceedings.

4.0 The Applicant represented by Advocate Andrew Ayres

- 4.1 Advocate Ayres stated that the question whether the Tribunal should continue was entirely a legal question.
- 4.2 Advocate Ayres stated that Section 206 of the Employment Rights Act, 1996 expressly provides that in the event of the death of the Applicant the claim must proceed nonetheless. Advocate Ayres stated that there was no equivalent to Section 206 in Guernsey Employment legislation.
- 4.3 Referring to Para 2. Project de Loi, Effect of Death on Certain Causes in Action 1936, (EE2 refers), Advocate Ayres stated that death does not cause proceedings to cease.
- 4.4 Advocate Ayres asserted that it was more difficult for the Applicant's estate to prove the claim because of the Applicant's death and therefore if there was any prejudice it was against the Applicant's estate and not the Respondent.
- 4.5 Referring to the Respondent's assertion that it would be unfair to continue the Tribunal, Advocate Ayres argued that the Tribunal should hear the remaining evidence and then decide if the 'burden of proof' had been met.
- 4.6 Advocate Ayres stated the requirement to bring the claim within three months had been complied with and that the ensuing delays following the death of the Applicant had been unavoidable.
- 4.7 Advocate Ayres informed the Tribunal that delays were commonplace and that the recollections and comprehensive notes taken by the Tribunal were a valid record of the proceedings to date. Advocate Ayres asserted that until the Tribunal had heard all of the facts, further evidence and legal arguments, the panel was not in a position to assess the strengths of the evidence and weight that could be placed upon such evidence.
- 4.8 Advocate Ayres reminded the Tribunal that they were masters of their own procedure and that as such they had flexibility and options open to decide their practice and procedure unlike any other court in Guernsey. Referring to ET 1 and Mr Peter Phillips written statement, Advocate Ayres informed the Tribunal that these documents could be considered as "hearsay" and that as such this did not render them as inadmissible in the Tribunal in the same way as a civil claim in the Royal Court.
- 4.9 Referring to the inability to cross examine Mr Phillips, Advocate Ayres informed the Tribunal that this would have to be treated with 'caution' and that a 'reasonable' Tribunal applies what weight it sees fit to evidence that is presented within the hearing. It remained entirely within the right of the Tribunal to ascribe no weight to evidence presented. Advocate Ayres asserted that this decision could only be made once all the evidence has been heard. Advocate Ayres informed the Tribunal that the 'burden of proof' was on the estate of the Applicant to prove that the dismissal had been unfair and that it was a significant disadvantage to the estate that the Applicant could not be present. Advocate Ayres stated that the question of whether the estate could prove the claim could only be determined in the fullness of time.

5.0 The Law

- 5.1 The Tribunal considered the complaint under The Employment Protection (Guernsey) Law, 1998, as amended.

- 5.2 The Tribunal referred to The Loi Relative a La Reforme de Diverses Dispositions de la Loi, 1936 (“the Reform Law”). (None of the provisions specified in Section 1 of the Reform Law apply in this case).
- 5.3 The Tribunal may exercise discretion following any delay in the proceedings as to whether it remains reasonably practicable that the complaint should continue to be heard.
- 5.4 The Employment Protection (Guernsey) Law, 1998, as amended does not expressly provide for what should happen in circumstances of the death of the Applicant.

6.0 Conclusions

- 6.1 The Tribunal noted that it is a fundamental principle of the concept of natural justice that trials must be fair, and that fairness requires the absence of excessive or unreasonable delay. The Tribunal noted that there had been an unavoidable delay in the hearing of this claim for unfair dismissal due to the untimely death of the Applicant. However, there had been no delay in the face of the orders of the Tribunal and there had been no failure by the Applicant to obey any orders of the Tribunal. Although the intent in setting up Employment Tribunals had been that all proceedings should be heard and determined as quickly as possible, the delay in this case was not deemed inordinate when compared with proceedings in other courts. Indeed the Tribunal was persuaded that it was not appropriate to deal any more strictly with delay in this case than any other court of law for that reason.
- 6.2 The Tribunal accepted that any delay could be prejudicial to one or both parties in any type of litigation but no more so in a Tribunal. The Tribunal placed additional weight on the fact that ‘hearsay’ is admissible in a Tribunal and that as a result it is entirely possible that any delay in a Tribunal could in certain circumstances be less prejudicial than it would be in other courts. The Tribunal was not persuaded that the argument of prejudice by the Respondent in this case could be applied when what is required by the Tribunal is evidence of such issues as disciplinary warnings and ‘reasonableness’ by the Respondent. Furthermore, the Tribunal acknowledged that it was likely to be more difficult for the Applicant’s Estate to prove the claim for Unfair Dismissal in the absence of the Applicant. The Tribunal concluded that it was important to hear the evidence in full in order to decide what weight should be applied to such evidence.
- 6.3 The Tribunal was not persuaded by the Respondent’s argument that the serious and sensitive nature of the matters involved; the more so for a case involving a medical practice, were reason not to continue with the proceedings.
- 6.4 The Tribunal concluded that the death of the Applicant may add to the problems for the Applicant’s estate of proving an unfair dismissal claim. However, the Tribunal was persuaded that the claim survives the death of the Applicant and therefore could be pursued by the Applicant’s estate. The Tribunal placed additional weight on Guernsey legislation ‘The Loi Relative a la Reforme de Diverses Dispositions de la Loi, 1936’ in making this decision:

1....Effect of Death on Certain Causes of Action refers:

- 1) *Subject to the provisions of this section, on the death of any person after the commencement of this Law all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate.*

7.0 Decision

- 7.1 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 and in light of 'The Loi Relative a la Reforme de Diverses Dispositions de la Roi, 1936,' the claim for Unfair dismissal survives the death of the Applicant and can be pursued by the Applicant's estate.

Ms Helen Martin

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Signature of the Chairman

20 August 2010

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Date