

Responding to a Complaint to the Employment & Discrimination Tribunal

Note: This publication is intended to provide general guidance only. It does not constitute legal advice and should not be relied upon as doing so.

Overview

Introduction

This publication explains what you, as the Respondent, should do when you receive a copy of an Applicant's Application form, making a complaint to the Employment & Discrimination Tribunal (the Tribunal) under:

1. **The Employment Protection (Guernsey) Law, 1998, as amended;**
2. **The Employment Protection (Sunday Shop Working) (Guernsey) Law, 2001;**
3. **The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005; and**
4. **The Minimum Wage (Guernsey) Law, 2009.**

Any individual who thinks they have:

- been unfairly dismissed;
- not received a written statement of the reason(s) for their dismissal;
- not received adequate or true reason(s) for their dismissal;
- suffered a detriment as a result of refusing, or proposing to refuse, to work in a shop on a Sunday; or
- suffered a detriment/less favourable treatment which they believe was based on their gender, married status or because they intend to undergo, are undergoing or have undergone gender reassignment

or who thinks they:

- are a worker who has been paid at less than the prescribed minimum wage;

- are a worker who has been refused proper access, by their employer, to relevant records in order to establish whether or not they have been remunerated at a rate that is less than the minimum wage; or
- have suffered a detriment which they believe resulted from exercising their rights under the Minimum Wage Law;

may apply for their complaint to be heard by a Tribunal, appointed under the Law to hear complaints.

Are there any restrictions on making a complaint?

If an Applicant thinks they are entitled to make a complaint under the Law, they may apply to have the case heard at a Tribunal Hearing.

Unfair Dismissal

In most cases an Applicant may only make a complaint if they have been in the same employment for a period of **one year or more**. However, if an employee has been dismissed:

- because they are pregnant or for any reason connected with their pregnancy;
- because they were involved in legitimate trade union activities, or in relation to trade union membership;
- for a reason connected to Health and Safety e.g. they were dismissed because they were asked to perform an unsafe or unlawful task, and refused;
- because they asserted a relevant statutory right (examples include: they asked for a written contract of employment or payslip or properly requested access to relevant records in order to establish whether or not they have been remunerated at a rate that is less than the minimum wage);
- because they refused or proposed to refuse to work in a shop on a Sunday;
- because the employee's dismissal constituted an act of discrimination prohibited by the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005;
- or has suffered a detriment/less favourable treatment for a reason which they believe was a result of exercising their rights under the Minimum Wage Law

they may be able to make a complaint even if they have been employed for less than one year.

Failure to be provided with a written statement of reason(s) for dismissal

The one-year qualifying period also applies to the right to be provided with a written reason for dismissal. The only exception is when the dismissal occurred while the employee was

pregnant or on maternity leave. In such cases, the woman is entitled to a written reason for her dismissal, without requesting it, regardless of the length of time she has been employed.

The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005

Under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, an applicant may be able to bring certain types of complaint whilst still in employment (for example, discrimination on the grounds of gender, married status, gender reassignment etc. or for victimisation).

However, please note that rights, under the Sex Discrimination Ordinance, are not limited to existing or ex-employees but are also available in other areas of the 'employment field' for example, to job applicants, contract workers, trade unions and partnerships.

For further information, please see publication 'Sex Discrimination at Work – Your Responsibilities', which also is available on the website, and for more comprehensive advice, speak to an Employment Relations Officer.

The Minimum Wage (Guernsey) Law, 2009

Under the Minimum Wage Law, Applicants may be able to bring complaints whilst still working for the employer if:

- they believe they been paid less than the prescribed minimum wage;
- they have been refused proper access, by their employer, to relevant records in order to establish whether or not they have been paid at less than the minimum wage; or
- they have suffered a detriment which they believe was as a result of exercising their rights under the Minimum Wage Law.

Please see the Employment Guide 'Statutory Minimum Wage', or speak to an Employment Relations Officer, for advice and for more comprehensive details of the complaints that can be brought under the Minimum Wage legislation.

Time Limits for Complaints

In the case of:

Unfair dismissal; and/or Failure to be provided with a written statement of reason(s) for dismissal or, where provided, the Applicant considers the reason(s) to be inadequate or untrue

A complaint made under the Law **must** be submitted to the Secretary to the Tribunal within **three months** of the '**effective date of termination**'.

The '**effective date of termination**' is:

- the date on which the notice period ends
- the last day at work (if the dismissal was without notice or with pay in lieu of notice) or

- if the employee is employed on a fixed term contract, which is not going to be renewed under the same contract, the 'effective date of termination' would be the day the contract expires.

This means for example, that if the employment ends on the 30th March, the complaint must be received by the 29th June; if the employment ended on the 5th April the complaint must be received by the 4th July.

Sunday Shop Workers' Protection

In the case of shop workers who have been dismissed for refusing or proposing to refuse to do shop work on Sundays, a complaint must be submitted within **three months** of the 'effective date of termination'.

In the case of shop workers who wish to complain that they have suffered or are suffering a detriment for refusing, or proposing to refuse to work in a shop on a Sunday, complaints must be submitted within three months of (or becoming aware of) the act, or failure to act, which caused the detriment.

Sex Discrimination Ordinance

A complaint must be submitted within a period of **three months** beginning on the day the discriminatory act complained of was done. An act extending over a period is treated as having been done at the end of the period and the three-months time limit starts from the end of that period.

Minimum Wage Law

A complaint must be submitted within a period of **three months**, subject to the provisions in Sections 8 and 9 of the Law relating to the time limits for the production of relevant records.

How Will The Application Be Dealt With?

The Respondent will be sent a copy of the originating Application form (ET1) by the Secretary to the Tribunal and will be asked to respond by completing the Response form (ET2), confirming whether or not the Respondent intends to resist the complaint.

The Respondent should return the completed form within two weeks. Failure to respond may result in the claim being heard by a Tribunal and a decision made in the Respondent's absence.

A copy of the response form is always sent to the Applicant.

Conciliation

A copy of the Application and Response form is then passed to a conciliation officer at the Commerce and Employment Department, with a view to reaching a conciliated settlement without the need for a Hearing. Conciliation is voluntary and either side may refuse (see publication 'Conciliation' for further information).

If a settlement is reached, an agreement will be signed by the parties, countersigned by the conciliation officer, and no further action may be taken in respect of the complaint.

Should conciliation fail to reach a settlement, or one or both of the parties not wish to make use of the service, the complaint will then be referred to a Tribunal.

What Happens Next?

A Hearing before a Tribunal will be arranged (normally within six weeks of the complaint being registered, unless conciliation is still in progress with a view to a settlement) and a Tribunal will be appointed to hear the complaint. After the Hearing, the Tribunal will either make an award or dismiss the complaint.

Attendance At The Hearing

The parties, where possible, will be advised of the date, time and venue at least twenty-one days before the Hearing.

The Hearing will be held in public. In very exceptional circumstances, if there is a valid and pressing reason, the Tribunal may decide to hold some, or all, of the Hearing in private.

What If The Parties or Witnesses Cannot Attend The Hearing?

If either party or their witness cannot attend the Hearing on the notified date, they should write to the Secretary to the Tribunal explaining that they cannot attend. **There will need to be a significant reason why the party cannot attend, supported by evidence, otherwise the Tribunal will not consider changing the Hearing date.** It should also be made clear if there are any alternative dates that would not be suitable during the following six weeks. The Tribunal will then decide whether the Hearing should be postponed and the parties will be notified.

Can Witness Statements Be Used Instead Of The Witness Attending?

Written statements of witness evidence may be used, however, evidence from a witness in person usually carries more weight. If the evidence of the witness is not likely to be disputed by the other party then this will not matter, otherwise it is always better to have your witness at the Hearing.

Preparation For The Hearing

If you are calling witnesses, make sure that they know about the time, date and venue of the hearing. Unless summonsed by the Tribunal, **it is your responsibility to ensure your witnesses attend on the day of the Hearing.**

Both parties should send each other copies of any relevant documents to which they intend to refer at the Hearing.

If the parties can agree beforehand to which documents they wish to refer, then it may be simpler for them to agree a 'bundle' and for one party to provide a full set of documents to the other.

The Hearing will need a total of seven copies, preferably each copy will be fixed together and pages numbered. A list of contents at the front may also be helpful. If the parties cannot agree, bring seven copies of your own documents to the Hearing. This should include relevant documents such as contracts of employment, letters of appointment, pay slips or wage records, your diary, medical certificates, staff handbook and any other documents you consider relevant to the case.

You may find it useful if you and your witnesses write or type what you intend to say, to ensure you include everything. Again, seven copies of each statement should be produced.

Summoning Witnesses and Documents

The Tribunal, following a request from you, may summons a witness or relevant document to the Hearing.

If, following a request from you, a witness is reluctant, or refuses to attend the hearing to give evidence, or refuses to produce a document as evidence, you may apply to the Tribunal, constituted as a single member, to issue a summons on your behalf.

The Tribunal will require brief details of the evidence the witness will be asked to give, and the relevance of this evidence, before it will consider issuing a summons.

It is for the Tribunal to decide whether or not it agrees to issue a summons.

Applications for a summons will normally be accepted up until two weeks prior to the hearing date.

Applications for the issue of a summons and any matters brought to the attention of the Tribunal by either party will, in the interest of openness, be disclosed to the other party.

The Hearing

Although the Hearing is formal, and you may present your own case, the parties may be represented should they so wish. Each party will be given an opportunity to put its own case, call witnesses or produce written evidence as necessary. Both parties, with the Tribunal's permission, may also ask questions of the other party's witnesses.

When the Tribunal has heard the full case put forward by each party, and is satisfied that its questions have been fully answered, the Hearing will be closed in order for the Tribunal to consider the evidence.

Can an Application Be Withdrawn Before the Hearing?

Yes. If the Applicant wants to withdraw their Application, they should notify the Secretary to the Tribunal, in writing, as soon as possible. The Secretary to the Tribunal will inform you in due course if an Application is withdrawn.

Can a Settlement Be Agreed Before or During the Hearing?

Yes. If the parties think they can agree a settlement, either before or during the Hearing, they should request an adjournment from the Tribunal to see if this is possible.

If the parties settle before the Hearing, they should notify the Tribunal as soon as possible, in writing, that a settlement has been reached.

Compromise Agreements

Ordinarily, people cannot 'contract out' of the rights to claim unfair dismissal/sex discrimination etc.

An exception to the above rule is where settlement is reached through the conciliation process as referred to earlier in this publication.

Another exception is where the parties reach what is called a compromise agreement, making it possible for parties to reach an agreement without reference to the Tribunal or conciliation processes.

However, for a compromise agreement to be legally binding, it must meet certain prescribed conditions as follows:

- a) the agreement must be in writing;
- b) the agreement must relate to the particular complaint;
- c) the Applicant must have received advice from a fully insured independent adviser as to the terms and effect of the proposed agreement, in particular, its effect on his/her ability to pursue their rights before the Tribunal;
- d) the agreement must identify the adviser;
- e) the agreement must state that the conditions regulating compromise agreements under the SDO* or the Employment Protection (Guernsey) Law, 1998, as amended are satisfied.

A person is an independent adviser if he is a lawyer, or an officer, official, employee or member of an independent trade union (certified in writing by the union as competent to give advice and authorised to do so). A person is not an independent adviser if he/she is employed by, or is acting in the matter for the other party or a person connected with the other party.

*SDO: Sex Discrimination (Employment) (Guernsey) Ordinance, 2005.

The Award

Unfair Dismissal

When the Tribunal is satisfied that it has heard and seen all the relevant evidence submitted by the parties, it will consider the facts and the parties will be notified of the Tribunal's decision/award, in writing, usually within a few weeks of the Hearing.

When a complaint is upheld, an award will be made. Awards made by a Tribunal for unfair dismissal will be equal to six months' pay, or for weekly paid staff, one week's pay multiplied by 26.

Reduction of award in certain cases

Before making an award for unfair dismissal, the Tribunal will take into account whether or not reinstatement was offered. If an offer was made and was unreasonably refused, the Tribunal may reduce the award.

Further, if a Tribunal considers that, by reason of any other circumstance, it would be just and equitable to reduce the amount of the award of compensation for unfair dismissal, then it may reduce the award to whatever extent it sees fit.

However, the facility to reduce the award, as described above, **does not apply** if it is shown that the reason for the dismissal, or in a redundancy case – the reason for selecting the Applicant for dismissal, was one of the following automatically unfair reasons:

- because the Applicant is pregnant, or for any reason connected with her pregnancy;
- because the Applicant was involved in legitimate trade union activities, or in relation to trade union membership;
- for a reason connected to Health & Safety, e.g. the Applicant was dismissed because he/she was asked to perform an unsafe or unlawful task, and refused;
- because the Applicant asserted a relevant statutory right (examples include: he/she asked for a written contract of employment or payslip or properly requested access to relevant records in order to establish whether or not he/she has been remunerated at a rate that is less than the minimum wage);
- because the Applicant refused or proposed to refuse to work in a shop on a Sunday (or if he/she has suffered a detriment for refusing or proposing to refuse to work in a shop on a Sunday); or
- because the Applicant's dismissal constituted an act of discrimination prohibited by the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005.

Complaints other than unfair dismissal

The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005

Where the Tribunal finds that a complaint under the Sex Discrimination Ordinance is founded, it will make an award of three months' pay, or where the applicant is weekly paid, one week's pay multiplied by 13.

Employment Protection (Guernsey) Law, 1998, as amended

An award made for failure to provide a written statement of reason(s) for dismissal (or, where reasons are provided, these are found to be inadequate or untrue) will be equal to half a month's pay or, for weekly paid staff, one week's pay multiplied by two.

The Employment Protection (Sunday Shop Working) (Guernsey) Law, 2001

An award made by a Tribunal for suffering a detriment for refusing, or proposing to refuse, to work in a shop on Sundays, or on a particular Sunday, will be equal to one month's pay or for weekly paid staff, one week's pay multiplied by four.

The Minimum Wage (Guernsey) Law, 2009

- 1) In a complaint of 'failure to allow access to records' - the Tribunal can award 80 times the minimum wage per offence;
- 2) In a complaint of failure to be paid the Minimum Wage - the Tribunal can award the difference between the Minimum Wage and what has been paid to the worker during the period of underpayment;
- 3) In complaints brought under the Employment Protection Law, involving the minimum wage regulations - the Tribunal can award one month's pay in 'suffering a detriment' claims and six months' pay in 'unfair dismissal' claims.

The Tribunal's decision will be posted for seven days in the Royal Court and a copy of the full, reasoned decision may be obtained, on request, from the Secretary to the Tribunal.

NB. It is also worth noting that under the minimum wage legislation, employers could also face criminal prosecution for certain offences - for further information please contact the Employment Relations Service.

Appeals

The decision reached by the Tribunal will be final and legally binding upon both parties. An appeal may be made to the Royal Court only on a point of law and within one month from the date of the decision/award of the Tribunal.

What Costs are Involved?

The confidential advisory and conciliation service is **free** to **both** parties.

Each party will normally be responsible for any costs involved in preparing and presenting its own case.

A Tribunal may, in certain circumstances, award costs to either party; however, this will not include costs for legal representation. **Legal fees are not recoverable, win or lose.**

Note:

In a complaint or an appeal brought before the Magistrates/Royal Court, the parties may be subject to any costs incurred under the Royal Court procedures.

Before you respond to a complaint, please:

- read the relevant publication, copies of which can be downloaded from the Employment Relations website; and
- seek advice, if required, from an Officer at the Employment Relations Service – contact details can be found at the end of this publication.

Advice and Conciliation

The Employment Relations Service at the Commerce and Employment Department also provides a free and confidential advisory service to both employers and employees on any employment-related matter.

Where appropriate a confidential conciliation service may also be provided, free of charge, and is a positive means of resolving disputes between employers and employees. The service is provided by trained staff who are impartial and able to assist in resolving disputes at all levels.

Other publications

Publications can be downloaded from the website on a wide range of employment relations matters including local employment legislation and best practice guidance on other employment related matters.

Anyone without internet access can obtain copies of the publications by contacting the Department at the address or telephone number below.

Contact Information

For further advice

- Check www.gov.gg
- Email employmentrelations@commerce.gov.gg
- Contact the **Employment Relations Service**, Commerce & Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF
- Telephone number: **01481 234567**