

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Steven Bougourd
Represented by: Unrepresented

RESPONDENT: Close Fund Services Limited
Represented by: Advocate Paul Richardson

Decision of the Tribunal Hearing held on 25 September 2008.

Tribunal Members: Mr Peter Woodward
Ms Alison Anderson
Mrs Tina Le Poidevin

UNANIMOUS DECISION

Based on the evidence presented the Tribunal found:

- The Applicant commenced employment on 15 January 2007
- The Applicant's effective date of termination to be 5 December 2007
- The Applicant had not achieved the qualifying period for his alleged case of unfair dismissal to be heard as specified in section 15 (1) of the Employment Protection (Guernsey) Law, 1998 as amended.

Mr Peter Woodward

15 October 2008

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, who represented himself, gave witness testimony, which was also supported by documentary evidence. (EE1 Refers).
- 1.2 The Respondent was represented by Advocate Paul Richardson.
- 1.3 Advocate Richardson called the following witnesses to give testimony:

Mr Rupert Hague Holmes
Ms Michelle Arundale

These witnesses were supported by documentary evidence (ER1-3 Refers).

- 1.4 At the outset of the hearing the Respondent confirmed that they were disputing the commencement date of employment of the 12 December 2006, as alleged by the Applicant and would argue that the correct date, in law, should be 15 January 2007. Further, the Respondent would resist any argument by the Applicant that the Effective Date of Termination could be construed to be later than 5 December 2007.

If the Tribunal were to rule in favour of the Applicant on either of these issues then the Tribunal might proceed to hear the alleged complaint of an unfair dismissal. If the Tribunal was to rule in favour of the Respondent on both these disputed dates then the Applicant would have insufficient continuous employment to meet the qualifying period of one year and the alleged complaint could not be heard.

The Chairman indicated to the Parties that these would be heard as preliminary issues.

- 1.5 Mrs Tina Le Poidevin, a member of the Tribunal, stated that Sue Attewell, Personnel Manager for the Respondent at the time of Mr Bougourd's appointment was known to her as a past student in a course run by her at the College of Further Education some four to five years previously, but was not known to her socially. Both parties were content that this did not constitute a conflict of interest for Mrs Poidevin in these proceedings.

2.0 Facts Found

The Tribunal determined the following in relation to the disputed date of commencement of employment:

- 2.1 A Service Agreement was issued to the Applicant by Close Fund Services Ltd. (CFSL) on 12 December 2006 which made reference to the "Term" of this agreement and defined it as follows" *means the period commencing on the date of this Agreement (or if earlier the date the Executive commenced employment with the Company)*" In addition this service Agreement states that the "*Executive shall be employed for a*

probationary period of six months commencing on the date of this agreement or if earlier, the date the executive commenced employment with the Company” (ER1 Tab 1 refers).

- 2.2 At no time subsequent to the signing of the Service Agreement was any written confirmation of an employment start date issued to the Applicant by CFSL.
- 2.3 A conditional offer letter issued by the Respondent, (CFSL) on 12 December 2006 referred to a future “joining date” which was to be mutually agreed (ER2 refers).
- 2.4 Email correspondence from Personnel Manager Ms Attewell to work colleagues on the 13 December 2006 and 21 December 2006 confirmed a start date of 15 January 2007 for the Applicant (ER 1 Tabs 3 & 4 refer).
- 2.5 The Application/Personal Details form completed and signed by the Applicant stated a start date of 15 January 2007 (ER1 Tab2 refers).
- 2.6 A “New Staff Data” form which confirmed a joining date of 15 January 2007 (ER1 Tab 5 refers).
- 2.7 The Applicant received a salary confirmation dated 16 January 2007 which detailed a pro rata payment for that month which was consistent with a start date of 15 January. (ER1 Tab 5 refers).
- 2.8 The Applicant signed a “Close Private Bank Confidentiality Agreement” on 15 January 2007 committing him to a number of obligations (ER1 Tab 6 refers).
- 2.9 The previous employer of the Applicant, Credit Suisse Fund Administration Limited (CSFAL), provided a personal reference for the Applicant dated 16 January 2007, noting his termination of employment date as 12 January 2007. The Applicant agreed that he continued to perform his employment with CSFAL until that date. (ER1 Tab 7 refers).
- 2.10 A letter issued to Pentagon Insurance Brokers Ltd. by the Respondent on 22 January 2007 confirmed the Applicant had joined the “Close International 2002 Pension Scheme” with effect from 15 January 2007. (ER1 Tab 8 refers).
- 2.11 Applicant testimony confirmed that he did not perform any duties or undertake any responsibilities for the Respondent prior to 15 January 2007.

The Tribunal determined the following in relation to the disputed Effective Date of Termination (EDT):

- 2.12 At the time of their submission both the ET1 application from the Applicant and the ET2 response from the Respondent were agreed that the EDT was 5 December 2007.
- 2.13 The Applicant was given a letter on 5 December 2007 stating that the Applicant’s employment was terminated as of that date and enclosed a cheque to the value of £30,000. This sum was described in the letter as being in lieu of notice and amounting to six months contractual notice, less all applicable deductions including income tax

and social security. The letter also stated that all benefits relating to the Applicant's employment would cease with effect from 5 December 2007.

- 2.14 Payslips were issued to the Applicant in both December 2007 and January 2008 but each with nil net value to the Applicant.
- 2.15 The Applicant disputed with the Respondent as to the correct amount of payment in lieu of notice and further payments of circa £1,120 in total were paid in the period to 1 July 2008.
- 2.16 The Applicant testified that he had ceased all duties with the Respondent on 5 December 2007, and confirmed that he had subsequently sought and gained alternative employment prior to the end of March 2008.

3.0 Testimony from Mr Steven Bougourd

- 3.1 In relation to the commencement of employment the Applicant argued that the wording of the Service Agreement (ER1 Tab 1 refers) was such that he was bound by its terms from 12 December 2007, the date he had signed it; and therefore his contract of employment should count as starting on that date.
- 3.2 In relation to the EDT the Applicant asserted that the payment of £30,000 on 5 December 2007 should be considered as a cash advance rather than a full and final settlement of all monies owed under his contract of employment. It was his contention that subsequent payments from the Respondent totalling circa £1,120 in the period ending June 2008 were evidence that his contract of employment remained in force until 1 July 2008.
- 3.3 The Applicant also stated that he had been advised by the Income Tax office that tax deductions were paid to their office by the Respondent on his behalf in the first quarter of 2008 and that only a "normal" monthly payment had been declared to the authority in December 2007. It was his opinion that this further evidenced the existence of a contractual relationship still existed in early 2008.
- 3.4 It was also argued that the non payment of Holiday pay for the notice period had the effect of continuing the contract of employment beyond 5 December 2007.

4.0 Testimony Mr Rupert Hague-Holmes

- 4.1 The witness did not dispute that subsequent payments were made to the Applicant after 5 December 2007; however he stated CFSL had acted on verbal advice from the Income Tax and Social Security authorities which led CFSL to believe that they would not accept lump sum payments in relation to the payment in lieu of notice. CFSL was advised to stagger company payments through early 2008. The effect of this had been to delay a final settlement of all amounts owing to the Applicant until 1 July 2008.
- 4.2 In response to questions from the Tribunal the witness admitted he had no prior experience of how such payments should be made in respect of a settlement in lieu of notice regarding the Tax and Social Security treatment. He confirmed that CFSL had not requested advice from the relevant authorities in writing.

5.0 Testimony from Michelle Arundale

- 5.1 Ms Arundale, currently the HR Manager for CFSL, stated that the issuance of a January 2008 payslip to the Applicant was an error on her part.
- 5.2 The witness confirmed that she took no active role in determining what payment would be made to the Applicant at the time of his dismissal.
- 5.3 The witness confirmed that she shared the view held by Mr Hague-Holmes that it was a requirement of the Tax and Social Security authorities to stagger payments related to the lump sum into 2008.

6.0 The Law

6.1 The Qualifying Period

Section 3

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.

Section 15 (1)

Subject to subsection (2), section 3 does not apply to the dismissal of an employment unless the employee was continuously employed for a period of not less than one year ending with the effective date of termination.

6.2 Continuous Employment

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

(1) 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

6.3 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.*

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.

7.0 Conclusions

The Tribunal considered the two issues as follows:-

- 7.1 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. Further, the Tribunal takes the view that section 3 “*Weeks in computing period*” can only logically come into force after the employee has started work.

The Tribunal has formed the view that the Service Agreement was intended to ensure mutual commitment by the parties that employment would commence, on agreed terms, on 15 January 2007. It is regrettable that the employer did not issue a letter with a definitive start date but testimony led the Tribunal to believe that this was the verbally agreed start of employment date.

Finally, whilst the Tribunal could imagine circumstances in which an initial period of employment could occur prior to an employee arriving at his normal place of work, this clearly was not the case for the Applicant. The Tribunal found that there were ample documentary records, some of them signed by the Applicant himself, confirming 15 January 2007 as his first working day. In addition the Applicant testified that he did not undertake any duties for the Respondent prior to this date.

The Tribunal concluded that the Applicant’s employment commenced on 15 January 2007.

- 7.2 With regard to the Effective Date of Termination (EDT) the Tribunal noted that:

Both the ET1 and the ET2, which were submitted in the February/March 2008 timeframe, stated that the EDT was 5 December 2007, only later did the Applicant seek to argue a later EDT.

The letter of 5 December 2007 was most explicit, stating that termination was effective as of that date and advised a payment of £30,000, this being an estimate of the net salary after anticipated Tax and Social Security deductions. In this same letter it was stated that all employment related benefits would cease. The Tribunal formed the view that this constituted a clear intention that the employment contract would cease on that day.

Testimony from both parties confirmed that the Applicant performed no further duties for the Respondent after 5 December 2007; and the Applicant informed the Tribunal he had commenced his new employment in March 2008, before the expiry of any notional six month notice period.

The Tribunal attaches little weight to the issuance of a payslip in January 2008, it had no cash value to the Applicant and the Tribunal accepts the testimony of Ms Arundale that it was issued in error.

However both parties agreed that further payments totalling circa £1,120 were made to the Applicant in respect of his payment in lieu of notice during the first six months of 2008. The Respondent had received verbal advice from the Tax and Social Security authorities that the amounts due to these authorities arising from the payment of a lump sum in lieu of notice should be phased across the first few months of 2008 and the Tribunal is persuaded that the Respondent could not make an exact calculation of monies owed on 5 December 2007.

Whilst the Tribunal would have preferred that the Respondent had sought written clarification of this ruling it accepts that the Respondent believed they were complying with the rules.

The Tribunal has also taken a view as to the proportionality of the £30,000 payment in relation to the subsequent payments totalling £1,120, less than 4% of the initial payment. Whilst these subsequent payments might have been paid more promptly the Tribunal has formed the view that they were not evidence of a continuing contract of employment, nor was the alleged lack of provision of holiday pay within the payment in lieu of notice.

In summary the Tribunal concluded that none of the above factors extended the EDT to a later date. The Tribunal found that the Applicant was employed by the Respondent from 15 January 2007 to 5 December 2007. The Tribunal also notes that even if section 5(5) of the Law in relation to minimum periods of notice was applied, i.e. the addition of one week, it would only prolong the period of continuous employment to 12 December 2007.

The Tribunal concludes that the Applicant fails to achieve the minimum qualifying period as specified in The Employment Protection (Guernsey) Law, 1998, as amended.

8.0 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 his alleged case of unfair dismissal to be heard.

Signature of the Chairman:

Mr Peter Woodward

Date: **15 October 2008**