

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Ms Victoria Cottrill
Represented by: Self represented

RESPONDENT: Babbe Advocates
Represented by: Advocate Jon Barclay

Witnesses

For the Respondent: Advocate Ian Swan
Advocate Robert Fullman
Advocate Andrew Laws
Advocate Martyn Baudains
Mrs Rhiannon Chivers
Mrs Rachel McLoughlin
Mr Russell Caldwell

Decision of the Tribunal Hearing held on 25 September and 14 October 2008.

Tribunal Members: Mr Peter Woodward
Mr John Guilbert
Ms Helen Martin

UNANIMOUS 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 Sex Discrimination (Employment) (Guernsey), Ordinance 2005, and The Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not directly; or indirectly discriminated against, neither within the meaning of the Ordinance has victimisation been proven and that there are no grounds to justify that dismissal occurred due to sexual discrimination. The case is dismissed.

Mr Peter Woodward
Signature of the Chairman

10 November 2008
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 and the Sex Discrimination (Employment) (Guernsey), Ordinance 2005.

Extended Reasons

1.0 Introduction

- 1.1 The Chairman notes that, prior to the Hearing, the Applicant and Respondent had been issued guidelines on the tribunal process and the Applicant subsequently indicated, by email of 13 September 2008, that it was not her intention to bring any witnesses. As the Applicant was unrepresented and the Chairman desired to achieve as best as possible “equality of arms”, additional clarifying advice on Tribunal process was sent to the Applicant by letter dated 15 September 2008. The Chairman also held a “Directions” meeting on 18 September 2008, with both parties, to clarify the potential exchange of documents, the witnesses desired by both parties and other procedural matters.
- 1.2 The Applicant, who represented herself, gave witness testimony, which was also supported by documentary evidence. (EE1-EE3 refers).
- 1.3 The Respondent was represented by Advocate Barclay.
- 1.4 Advocate Barclay called the following witnesses to give testimony:-

Advocate Andrew Laws
Advocate Ian Swan
Advocate Robert Fullman
Advocate Martyn Baudains
Mrs Rhiannon Chivers
Mrs Rachel McLoughlin
Mr Russell Caldwell

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

- 1.5 At the outset of the hearing the Chairman clarified with the parties that there were three primary issues to be addressed as follows:-
 - 1.5.1 The allegation of less favourable treatment on grounds of gender either on grounds of direct or indirect discrimination as defined in Part 1 of the Sex Discrimination (Employment) (Guernsey), Ordinance 2005.
 - 1.5.2 The Applicant alleges victimisation as defined in Part 5 (1) (a) & (d).
 - 1.5.3 That this allegedly less favourable treatment culminated in an unfair dismissal and that in accordance with Section 70 of the Sex Discrimination (Employment) (Guernsey), Ordinance 2005 these allegations might result in a finding of unfair dismissal as defined in the Employment Protection (Guernsey) Law, 1998, as amended.

- 1.6 It was noted that the Applicant had chosen an ex-employee of the Babbe Partnership as a “male comparator” to illustrate the alleged discriminatory practices by the Respondent. As this individual was no longer in the employment of the Respondent, and as he had not been called as a witness by either party, it was agreed that he should retain anonymity in any oral testimony. Throughout this judgement he is referred to as Mr A.
- 1.7 Mr John Guilbert, a member of the Tribunal, stated that whilst in employment with the TGWU he had occasion to consult a member of the Babbe partnership. It was also stated that since his retirement some 7 years ago there had been no further contact with the Babbe partnership, and that the particular Advocate he had liaised with had since left the partnership. Both parties were content that this did not constitute a conflict of interest for Mr Guilbert in these proceedings.

2.0 Facts Found

- 2.1 The Tribunal determined the following in relation to the disputed issues:-
- 2.2 The Applicant commenced employment with the Respondent as a legal secretary on 15 October 2007 and was dismissed on 24 January 2008.
- 2.3. During a period of circa some 7 to 10 days following the commencement of employment an email directed to the Applicant was sent to the Babbe server on at least sixty thousand occasions; and possibly the total traffic for this email exceeded eighty thousand “hits” prior to the Respondent’s IT department being able to eliminate this activity. (ER1 Tab 37 refers).
- 2.4 On 7 November 2007 the Applicant’s immediate supervisor, Rachel McLoughlin”, sent an email to Advocate Ian Swan reporting that her performance to date had been excellent. (ER1 Tab 4 refers).
- 2.5 Email exchanges between the Applicant and IT Manager Russell Caldwell in mid November 2007 indicated that the Applicant was experiencing problems with her word processing software. (EE1 Page 17 refers).
- 2.6 On 3 December 2007 there was a “face to face” altercation between the Applicant and Russell Caldwell over the software problems being experienced by the Applicant. Subsequently on that same date Rachel McLoughlin sent an email to Russell Caldwell summarising the software problems currently being experienced by the Applicant. (ER1 Tab 5 refers). In addition Rachel McLoughlin sent an email to Advocate Swan advising him of the altercation and noting that the Applicant had stated she would “not tolerate being shouted at” by Russell Caldwell. (ER1 Tab 6 refers).
- 2.7 On 4 December 2007 Russell Caldwell sent an email to Advocate Ian Swan complaining that during his conversation with the Applicant on 3 December 2007 she had been allegedly “very aggressive in her attitude”; and such was the manner of this alleged aggression that he wished to make a formal complaint. (ER1 Tab 7 refers).
- 2.8 The Applicant was notified on 5 December 2007 by the Respondent of an increase of salary to £32,000 per annum, to take effect from 1 January 2008. (EE1 Page 18 refers).
- 2.9 A few days after the pay increase notification, on 12 December 2007, the Applicant met formally with HR Manager Rhiannon Chivers for an initial probationary review. A file

note was issued by Rhiannon Chivers recording this event on 14 December 2007 in which there was reference to an agreement between herself and the Applicant that probationary reviews would now be placed on a monthly footing. (ER1 Tab 9 refers).

- 2.10 On 13 December 2007 Rachel McLoughlin passed on a request by the Applicant to HR Manager Rhiannon Chivers that certain media software be removed from the personal drive on her computer. (ER1 Tab 8 refers).
- 2.11 Early on 14 December 2007 the Applicant was requested by email to attend a meeting with her direct supervisor, Rachel McLoughlin. This meeting subsequently took place at approximately 10.00 a.m. in "Boardroom 2". The discussion in the meeting focussed on two primary issues; the Applicant's ongoing requests for changes in her software setup and her dissatisfaction with the way in which she claimed Rhiannon Chivers had conducted her interim probationary review. A record of this meeting was compiled later that morning by Rachel McLoughlin and was sent to Ian Swan and Rhiannon Chivers. (ER1 Tab 11 refers).
- 2.12 Prior to close of business on 14 December 2007 Rachel McLoughlin sent an email to Ian Swan and Rhiannon Chivers expressing her irritation with the alleged behaviour of the Applicant and a work colleague. (ER1 Tab12 refers).
- 2.13 On 4 January 2008 Rhiannon Chivers sent an email to the Applicant and a work colleague, thanking them for the "extra efforts" they had made in the preceding days to deal with a heavy work flow. (EE1 Page 20 refers).
- 2.14 On 4 January 2008 the Applicant emailed a newly employed male employee, Mr A. in the conveyancing department, enquiring as to whether he had had any "review meetings" with the HR Department since joining the partnership. (EE1 Page 21 refers).
- 2.15 On 17 January 2008 the Applicant attended a meeting with Rachel McLoughlin and Advocate Laws where the primary topic of discussion was the formal complaint submitted by Russell Caldwell in December.
- 2.16 On 18 January 2008 Rhiannon Chivers emailed the Applicant indicating that a monthly probationary review was scheduled for 23 January 2008, and in a subsequent email response to queries from the Applicant stated that "all aspects of formal meetings were work related". (EE1 Pages 23 and 24 refer). This review was then rescheduled to 24 January 2008 and the Applicant was advised by Email. (EE2 Paragraph 28 refers).
- 2.17 On the same day the Applicant spoke to Advocate Fullman, the primary user of her secretarial duties, and informed him that she did not understand why these monthly probationary reviews with Rhiannon Chivers needed to take place. She claimed there had been no complaints as to the quality of her work. She alleged that she was being bullied and victimised by having to attend these meetings. The Applicant noted her recollection of this meeting with Advocate Fullman on an internal email. (EE1 Page 28 refers).
- 2.18 The Applicant was requested to attend a meeting 23 January 2008 together with her work colleague Sharon Rowe. This meeting being conducted by Rachel McLoughlin and Rhiannon Chivers with the objective of reviewing allegedly unacceptable whispering by the Applicant and Sharon Rowe. Both parties agree that the meeting did not go well and that it was terminated when the Applicant was requested to leave the

meeting by Rhiannon Chivers. (EE1 Pages 28 to 31; EE2 Paragraph 29; and ER1 Tabs 33/34 refer).

- 2.19 The following day, 24 January 2008, the Applicant emailed Rhiannon Chivers with copies to Advocate Fullman and Swan stating that she did not wish to attend the scheduled probationary review meeting with Rhiannon Chivers. She stated this decision was due to “unacceptable aggressive bullying, intimidating and hostile conditions”. (EE1 Page 34 refers).
- 2.20 Later that morning the Applicant was requested to attend a meeting with Advocate Swan together with Advocate Fullman. At this meeting Advocate Swan communicated his decision that the Applicant would be dismissed on ground of “personality differences”. This decision was confirmed in writing and the Applicant was advised that she would not need to work her one week’s paid notice. Her departure from the workplace was overseen by Rhiannon Chivers. (EE2 Paragraphs 34 to 37 and EE1 Page 36 refer).

3.0 Testimony from Victoria Cottrill

- 3.1 The Applicant read from a prepared statement. (EE2 refers). In her statement the Applicant expressed her frustration that, whilst the Respondent had taken action to stop the mass external email onslaught which occurred in the first week of her employment, they would not divulge the nature of the email message. When she spoke to HR Manager Rhiannon Chivers she was allegedly told by Mrs Chivers that despite the scale of the email issue that “her job was safe for the moment”; the Applicant thought this strange for her to say. The Applicant claimed that her trust and confidence in her employer had been “dented” by this comment.
- 3.2 In response to a question from Advocate Barclay the Applicant denied that she had become paranoid over the issue of the email. She was distressed that Mrs Chivers and others had not taken the issue seriously enough.
- 3.3 In response to another question, and again under cross examination, the Applicant denied allegations that she had shouted at the IT Manager, Russell Caldwell, on 3 December 2008, nor she claimed had she been aggressive. She also stated that Mr Caldwell did not shout at her; however he had been “direct” in his conversation with her. She was not aware at the time that Mr Caldwell had lodged a formal complaint and was not informed of this until her review meeting with Rhiannon Chivers a few days later.
- 3.4 The Applicant was very critical of the way in which the December probationary review was conducted by Rhiannon Chivers. It was without any agenda and the Applicant claimed that Mrs Chivers asked personal and intrusive questions as to her personal life, including enquiries as to when she would be meeting her boyfriend over the Christmas period.
- 3.5 The Applicant dismissed as “pathetic lies” the assertions made by Rachel McLoughlin to Advocate Swan on 14 December 2007 as to her behaviour and that any “chat” between her and work colleague Sharon Rowe was work related.
- 3.6 The Applicant emailed Mr A. on 4 January 2008 as to his probationary review process and he responded via email on 7 January 2008 that he did not have formal meetings with Rhiannon Chivers as part of his probationary process; and that he thought this

would remain so. (EE1 Page 21 refers). Under cross examination the Applicant stated that given this response she then formed the view that she had been discriminated against by Rhiannon Chivers.

- 3.7 With reference to the meeting called by Advocate Laws on 17 January 2008 the Applicant expressed surprise that her employer raised the issue of Russell Caldwell's complaint so long after the alleged dispute took place. Advocate Laws recorded a file note of this meeting in which he claimed that he agreed with the Applicant that he would not adjudicate between the two versions of the meeting. The Applicant did not contest the accuracy of this file note in her testimony. (ER1 Page 14 refers).
- 3.8 The Applicant claims that she and her colleague were summoned by Mrs Chivers to the meeting on the 23 January 2008 without notice; and that Mrs Chivers was allegedly very abrupt in requiring their immediate attendance. Once the meeting was convened, with Rachel McLoughlin in attendance, both employees were accused of whispering, however they were told that this was not a disciplinary meeting. It was alleged that Mrs Chivers had screamed and shouted at them and the Applicant decided to take contemporaneous notes of the proceedings. When asked by the Applicant as to the details and timing of these alleged events Mrs Chivers allegedly shouted at the Applicant to "get out" of the room. (EE2 Paragraph 29 and ER1 Tab 19 / 20 refer). Under cross examination the Applicant denied she had been confrontational or sarcastic during this meeting
- 3.9 Subsequent to this meeting, on 24 January 2008 the Applicant emailed Rhiannon Chivers, with copies to Advocates Swan and Fullman, stating that she did not wish to attend her probationary review meeting due to "unacceptable aggressive bullying, intimidating and hostile conditions". (ER1 Tab 22 refers). Advocate Swan replied requesting that the Applicant attend a meeting with him, together with Advocate Fullman. The Applicant attended the meeting hoping that Advocate Swan would apologise for any alleged bullying and that he would agree to run the probationary process in the place of Mrs Chivers. In the event he told her that he had decided to dismiss her and that he would not initiate any grievance proceedings on her behalf. The Applicant was told that there was no criticism of the quality of her work; the issue was one of "personality difference". Under cross examination the Applicant confirmed that she did not raise any allegations of discrimination at this meeting, rather that she complained that she had been bullied and harassed.
- 3.10 A letter of dismissal was handed to the Applicant by Advocate Swan and she was informed that she would not be required to work her notice. (ER1 Tab 24 refers).

4.0 Testimony from Advocate Ian Swan

- 4.1 The witness read a prepared witness statement. (ER1 Tab 31 refers). Advocate Swan was the line Manager for Rachel McLoughlin and as such had senior management responsibility for the Applicant.
- 4.2 In response to questioning Advocate Swan informed the Hearing that the complaints as to the whispering by the Applicant and Sharon Rowe had originated from the Accounts department who were located close to the Applicant's workplace.
- 4.3 In his testimony Advocate Swan stated he had overheard an altercation between the Applicant and Mr Russell Caldwell on 3 December 2007. He did not hear shouting but

their voices were “elevated”. He saw Mr Caldwell walk away and thought it not at all characteristic of Mr Caldwell who over his years of employment was seen as a “fantastic team player”.

- 4.4 Advocate Swan testified that having received an email from Rachel McLoughlin on 14 December 2007 he was concerned as to the working relationships in the secretarial team, and from his own observations the atmosphere in that team had become “frosty”. He chose not to intervene at that point; rather he decided to keep a watching brief. He added that he had no input into the probationary review meeting conducted by Rhiannon Chivers on 14 December 2007.
- 4.5 The witness stated that the probationary review process for alleged “comparator”, Mr A. in the Conveyancing Department, would have been handled by lawyers with experience of conveyancing; whereas support staff such as the Applicant would have been assessed by the HR Manager, as she possessed the “skill set” to undertake such assessments.
- 4.6 In response to questioning the witness stated that at no time during her period of employment did the Applicant allege gender discrimination, neither did the Applicant enter a formal complaint of bullying or discrimination.
- 4.7 The witness recalled that during his meeting with the Applicant on 24 January she claimed that a secretary from another practice had told her a few days previously that “knives are out for you at Babbe, they are out to get you”. The witness rejected this sentiment and stated that there was no conspiracy by him and other colleagues to have the Applicant’s employment terminated. The sole reason for her dismissal was that she had “fallen out” with a number of her work colleagues and such was the extent of the schism between herself and others that her employment could not be maintained. Advocate Swan stated that there was no issue with her technical capabilities as a legal secretary.
- 4.8 Advocate Swan believed that his decision to dismiss was regardless of gender, and given similar personality issues with a male employee, he would take the same action.
- 4.9 In regard to the issues of alleged bullying raised by the Applicant in the meeting of 24 January 2008 Advocate Swan told the Applicant, during that meeting, that he could not “pre-judge the issue of her complaints”; He stated that he had already made the decision to terminate her employment in the probationary period for “personality differences” and he was not in the position to explore her grievance. In addition the issue of alleged sex discrimination was not raised by the Applicant on that day, or in her subsequent letter of 27 January 2008 to Advocate Laws.
- 4.10 The witness stated that it was standard procedure for employees to be accompanied whilst they collect personal belongings on the day of dismissal and to be escorted from the building.

5.0 Testimony from Rachel McLoughlin

- 5.1 The witness read a prepared witness statement. (ER1 Tab 33 refers). Rachel McLoughlin was the immediate supervisor of the Applicant whilst employed by the Respondent.

- 5.2 Mrs McLoughlin held the view, expressed in her email of 7 November 2007, that the Applicant was a very competent legal secretary and her initial period of employment went well. (ER1 Tab 4 refers).
- 5.3 The witness agreed with the Applicant that she experienced some IT problems from the outset. The mass email addressed to the Applicant as she commenced employment needed significant IT effort to stop this abuse to the system; and she experienced “run time” problems which occasioned unnecessary re-working of documents. However it was her view that the Applicant did not cooperate with IT Manager Russell Caldwell in the resolution of the problems. An example of this non co-operation was the failure to retain error messages as requested by Mr Caldwell.
- 5.4 The issues with software culminated in the altercation between the Applicant and Mr Caldwell on 3 December 2007, and it was the opinion of the witness that it was from this date that inappropriate behaviour commenced which resulted in the eventual termination of the Applicant’s employment.
- 5.5 The witness stated that her meeting with the Applicant on 14 December 2007 focussed initially on IT issues; with Mrs McLoughlin advising how the Applicant should liaise with Mr Caldwell in the future. Subsequently discussion moved on to the probationary review attended by the Applicant with Mrs Chivers. In the opinion of the witness the Applicant had over reacted to what she perceived as a genuine attempt by Mrs Chivers to relate to the Applicant personally. She recalled advising the Applicant that she should “chill out” and relax a little more as the Applicant had already demonstrated her capabilities and that the partnership was very pleased to have her in their employment.
- 5.6 Later on the same day Mrs McLoughlin sent an email to Advocate Swan and Mrs Chivers expressing her frustration that during the afternoon there was much “pathetic chat” between the Applicant and Sharon Rowe.
- 5.7 The next significant event was the meeting between herself, the Applicant and Advocate Laws on 17 January 2008. The Applicant was openly critical in front of work colleagues that Mrs McLoughlin did not know why Advocate Laws had called the meeting.
- 5.8 Subsequent to the meeting the Applicant again chose to openly criticise Mrs McLoughlin in front of work colleagues that she had not known the purpose of the meeting beforehand. Mrs McLoughlin stated she felt demeaned by such inappropriate behaviour.
- 5.9 By 23 January 2006 Mrs McLoughlin had become so concerned by the tensions within her team and the continued whispering between the Applicant and Sharon Rowe that she decided to hold an informal meeting with them in an attempt to resolve whatever issues were causing this behaviour.
- 5.10 The meeting commenced with Mrs Chivers in attendance but it quickly became apparent that it would not go well. The Applicant became hostile and sarcastic toward the witness and Mrs Chivers, she also insisted on writing down everything that was being said. Mrs Chivers brought the meeting to an end by insisting that the Applicant left the room. Subsequently Mrs McLoughlin wrote in her file note of the meeting that she had come to the belief that “Vicky Cottrill is now nothing but mischief and trouble and will cause us many more hurdles and problems. She is a very bright and extremely

efficient individual but will be causing as many problems as she possibly can". (ER1 Tab 20 refers).

- 5.11 The witness stated that she had never been accused by the Applicant of bullying nor of sexual discrimination.

THE HEARING WAS ADJOURNED UNTIL 14 OCTOBER 2008

At the opening of the reconvened Hearing on 14 October 2008, the Chairman took the opportunity to confirm, to both parties, that, if there was any significant fresh material or testimony to be introduced, they should make it known to the Tribunal; it was the earnest hope of the Tribunal Panel that any such evidence should be made available prior to the close of proceedings.

6.0 Testimony from Rhiannon Chivers

- 6.1 The witness read a prepared witness statement. (ER1 Tab 34 refers). She has held the role of HR Manager since 2003.
- 6.2 The witness confirmed that a six month probationary period on commencement of employment was standard practice for all employees, regardless of function. However, how the probationary period is monitored differs, dependent on role. Lawyers were monitored differently from conveyancing clerks and legal secretaries also had their own process; and in each case it was dependent on who had the expertise to monitor effectively.
- 6.3 In relation to legal secretaries it was normally her responsibility to monitor their progress and the frequency of this monitoring during the six month period would depend on the level of skill and experience of each individual. An experienced secretary can expect to have a formal probation meeting at 2 months whereas a secretary new to the law has a formal probation meeting at 1 month with perhaps informal weekly meetings. In contrast Human Resources would not normally conduct probationary reviews for Conveyancing staff as they need technical input from staff experienced in this field.
- 6.4 The witness expressed surprise at the reaction of the Applicant to the mass email attack on her company account; she told the Applicant that they had formed the view that a virus had attached itself to a single email and that the Applicant was not to blame. However the Applicant began to demand more information on almost a daily basis. Mrs Chivers told her that she thought she was getting paranoid about this issue. In response the Applicant denied this; however she stated that there were people in Guernsey "out to get her". Mrs Chivers told her that if she needed help that an appropriate lawyer within Babbe could be contacted to assist in the resolution of the problem. (ER1 Tab 34 Paragraphs 16 / 19 refer).
- 6.5 It was her recollection of 14 December 2007 that she addressed the IT issue by advising the Applicant to shake hands with Mr Caldwell and "move on". She also stated to the Applicant that she would be conducting probationary reviews on a monthly basis. This frequency of meetings being justified by her concerns over the Applicant's behaviour. The witness wrote a file note of this meeting. (ER1 Tab 9 refers).
- 6.6 The witness rebutted the allegation that she had pried into the private life of the Applicant. She agreed that she had asked about the upcoming Christmas period and the

Applicant had stated she and her boyfriend would be spending Christmas with their respective families. Mrs Chivers claimed that at no time did she ask about the relationship of the Applicant with her boyfriend or their marital intentions. It was her belief the Applicant left the meeting in a relatively happy mood.

- 6.7 By the 23 January 2008 it had become clear from email interchanges that the Applicant was taking exception to the witness conducting any further probationary reviews. However events overtook this issue when Rachel McLoughlin indicated that behaviour of the Applicant, the continued whispering with Sharon Rowe, was now causing her serious concern the witness suggested an informal meeting to be conducted by Rachel with her in attendance. In the words of the witness “the meeting got out of hand”. The Applicant insisted that she write down everything that was being said and Sharon Rowe became distressed. The meeting came to an end with the Applicant being asked to leave the room.
- 6.8 On 24 January 2008 the witness was informed by email that the Applicant did not wish to attend any further probationary meetings with her. The Applicant stated that it was “against her health and human existence” to continue these meetings. Advocate Swan discussed the email with the witness and informed her that he would meet the Applicant together with Advocate Fullman later in the morning.
- 6.9 Following the meeting Advocate Swan informed the witness that the behaviour of the Applicant had been bizarre and he had decided to dismiss her from employment and had done so. The witness supervised the Applicant’s departure from the building.
- 6.10 The witness was asked several questions as to employee benefit programmes and her responses indicated there was no difference in the treatment of the genders.

7.0 Testimony from Advocate Fullman

- 7.1 The witness read a prepared witness statement. (ER1 Tab 36 refers). The Applicant was the primary user of secretarial services provided by the Applicant.
- 7.2 Advocate Fullman testified that the Applicant was very conscientious to the point that she would become stressed or vexed if she had dictation left at the end of the day. He testified that he tried to reassure her that her work output was quick and accurate.
- 7.3 The witness agreed with the Applicant that she had experienced some frustrating software issues in the first period of her employment
- 7.4 Advocate Fullman confirmed that he had given input to Mrs Chivers ahead of the December probationary review confirming his satisfaction with her work; however he did not participate in the review meeting.
- 7.5 Subsequent to the review meeting the Applicant spoke with him and told him she thought that Mrs Chivers had asked inappropriate questions as to her relationship with her boyfriend. Advocate Fullman sought to reassure her by stating that such questions might be simply down to Mrs Chivers trying to get to know her.
- 7.6 Advocate Fullman could not recall the Applicant stating that she had been bullied and victimised until the meeting with Advocate Swan 24 January 2008. And even then she stated that she did not want to make her complaint formal.

- 7.7 The witness corroborated the testimony given by Advocate Swan as to how the 24 January 2008 meeting was conducted and in particular the point that there was no criticism of the quality of work; the issue was that she did not fit into the team due to personality differences.

8.0 Testimony from Mr Russell Caldwell

- 8.1 The witness read a prepared witness statement. (ER1 Tab 37 refers). Mr Caldwell has been in post as IT Manager for seven years.
- 8.2 The witness stated that the Applicant had apparently made a good start to her employment however she then had some software problems with her computer and in early December as he was walking through her office area she allegedly shouted across the room that she wanted the same system as everyone else and allegedly continued to shout at him. Mr Caldwell returned to his office and subsequently lodged a formal complaint to his manager, Advocate Laws.
- 8.3 Although the witness acknowledged that the Applicant had IT issues she made these very difficult for him to resolve by refusing access to her computer and then ignoring him when he went to her work area to resolve these issues.
- 8.4 Mr Caldwell confirmed that on 24 January 2008 he followed standard procedure by shutting down her access to the computer system on the same day; in this respect the Applicant was treated no differently than any other departing employee.
- 8.5 In response to questions the witness confirmed that he had undergone his probationary review process with an advocate, however he stated this was because there was no HR Manager in post at that time.

9.0 Testimony from Advocate Laws

- 9.1 Advocate Laws read a prepared witness statement. (ER1 Tab 37 refers).
- 9.2 Advocate Laws stated that, as Head of Chambers, he should have dealt with the complaint from Mr Caldwell earlier, however the Christmas period had intervened and he did not conduct the meeting until 17 January 2008.
- 9.3 On 17 January 2008 he met with the Applicant together with Rachel McLoughlin and was told by the Applicant that Mr Caldwell had conducted himself badly and that she had not. Advocate Laws decided he did not want to judge the rival claims of aggressive behaviour and informed the Applicant that he would rather both parties put the matter behind them. It was his opinion that the Applicant had agreed to set the incident aside and she left the meeting in a seemingly positive frame of mind.
- 9.4 The witness was not involved in the subsequent decision of Advocate Swan to dismiss the Applicant; however he did write to the Applicant on 31 January 2008 stating that he could add nothing further to the letter of dismissal written by Advocate Swan.
- 9.5 The witness stated that he was not aware of any suggestion of sex discrimination toward the Applicant until he received the form ET1 from Commerce and Employment.

10.0 Testimony from Advocate Baudains

- 10.1 Advocate Baudains read a prepared witness statement. (ER1 Tab 35 refers). He was the Line Manager of the ex-employee chosen by the Applicant as a “male comparator”, a conveyancing clerk to illustrate the alleged discriminatory practices by the Respondent.
- 10.2 Advocate Baudains described a company wide policy of a six month probationary period which was applied to all new employees regardless of function and regardless of gender.
- 10.3 He stated that this company policy is carried out by the person most likely to understand the issues involved. In the case of Mr A., as he was a senior member of the conveyancing team, he was the most appropriate individual to conduct the probationary review process. Other senior members of the department assisted him in this task.
- 10.4 In response to a question from the Tribunal the witness stated that there were also female conveyancing clerks and they underwent the same process as Mr A.
- 10.5 Mr A. failed to complete his probationary process and subsequently left his employment by mutual agreement.

11.0 The Law

- 11.1 The Applicant alleged discrimination, victimisation and unfair dismissal as defined in the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 as follows:-

Direct and indirect discrimination against women

- 1 (1) *In any circumstances relevant for the purposes of any provision of Part 11 of this Ordinance, a person discriminates against a woman if-*
 - (a) *on the grounds of her sex he treats her less favourably than he treats a man, or*
 - (b) *he applies to her a provision , criterion or practice which he applies or would apply equally to a man but*
 - (i) *which is such that it would be to the detriment of a considerably larger proportion of women than of men*
 - (ii) *which he cannot show to be justifiable irrespective of the sex of the person to whom it applied, and*
 - (iii) *which is to her detriment*

Discrimination by way of victimisation

- 5 (1) *A person (“the discriminator”) discriminates against another person (“the person victimised” in any circumstances relevant for the purposes of this Ordinance if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that person victimised has -*
 - (a) *brought proceedings against the discriminator or any other person under this ordinance*

- (b) *given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Ordinance*
- (c) *otherwise done anything under or by reference to this Ordinance in relation to the discriminator or any other person, or*
- (d) *alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Ordinance*

Discrimination against Applicants and employees

- 6 (2) *Subject to the provisions of subsection (3) a person shall not , in the case of a woman employed by him at an establishment on Guernsey, discriminate against her-*
- (a) *in the way he affords her access to opportunities for promotion, transfer or training or to any other benefits (including without limitation, benefits consisting of the payment of money), facilities or services, or by refusing or deliberately omitting to afford access to them or*
 - (b) *by dismissing her, or subjecting her to any other detriment...*

Burden of Proof before Tribunal

- 44 (1) *This section applies to any complaint made to the Tribunal under section 38*
- (2) *Where, on the hearing of the complaint the complainant proves facts from which the Tribunal could, apart from this section conclude in the absence of any adequate explanation that the Respondent –*
- (a) *...has committed an act of discrimination against the complainant which is prohibited by any provision of part 11*

the Tribunal shall uphold the complaint unless the Respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act.

12.0 Closing statements

Ms Cottrill

- 12.1 Ms Cottrill read from a prepared statement (EE3 refers) and in summary stated that:-
- 12.2 She alleges that she was subjected to bullying and victimisation by Mrs Chivers in her December probationary two month review and she mentioned the nature of this meeting to Advocate Fullman on the same day; however the file note prepared by Mrs Chivers did not reflect the Applicant's concerns.
- 12.3 In comparison it was her belief that Mr A. was not bullied in his probationary review process and it was not conducted by the HR Manager.
- 12.4 When a second probationary review meeting was scheduled in January by Mrs Chivers despite her email and a conversation with Advocate Fullman she was given no choice but to attend the meeting.

- 12.5 Ms Cottrill also claimed victimisation when she was allegedly shouted at by Mrs Chivers during the meeting on 23 January 2008.
- 12.6 She alleged further victimisation in the denial of the formal grievance procedure by Advocate Laws on 17 January 2008.
- 12.7 Ms Cottrill claimed that, as the Respondent had not called Sharon Rowe as a witness, she had been disadvantaged in presenting her case.
- 12.8 The dismissal on grounds of “personality differences” was a fabrication and was not specific in terms of the actual allegations made against her.

Advocate Barclay

- 12.9 Advocate Barclay referred to a skeleton argument contained in ER1 (Tab 38 refers) and in summary stated that:-
- 12.10 The “comparator”, Mr A., chosen by the Applicant undertook a probationary period of the same length as the Applicant, in compliance with a gender free HR policy, and the reviewer in each case was selected on the basis of the skill, knowledge and aptitudes of the reviewer. The different treatment of the Applicant in relation to Mr A. had nothing to do with gender and was justified.
- 12.11 The Respondent’s probationary policies would apply to a male legal secretary just the same as they would do to a female legal secretary. A hypothetical male comparator would have been required to attend regular review meetings with HR.
- 12.12 As the purpose of holding probationary reviews was to provide support, encouragement and advice to newly hired employees, as well as to assess suitability for continued employment, such a process could not reasonably be considered a “detriment”.
- 12.13 There was no demonstrable proportionate disadvantage to women as a group as compared with men as a group resulting from the requirement of holding probationary meetings. The requirement to hold such periodic reviews was to assess progress and suitability of new employees regardless of gender.
- 12.14 The reduction from two monthly reviews to a one monthly review in the case of the Applicant was justified on the grounds of her behaviour in her employment to date. It was not oppressive to conduct such reviews on a monthly basis if judged necessary, even if the new employee was technically skilled and competent.
- 12.15 The allegedly “intrusive questioning” by Mrs Chivers in December 2007 is denied. As Mrs Chivers testified her questions were not beyond the bounds of what is reasonably acceptable. The Respondent took the view that the Applicant over reacted to reasonable questions put to her with the best of intentions. Although she might have been distressed by these questions, and this was disputed by the Respondent, it was due to “hypersensitivity”, on her part and went beyond the reasonable range of responses in such circumstances.
- 12.16 At no time during her employment did the Applicant allege sex discrimination, and even when she had her final meeting with Advocates Swan and Fullman she did not refer to alleged sex discrimination; rather her issue was allegedly unacceptable questions put to her by Mrs Chivers, i.e. alleged bullying.

- 12.17 Even though the Applicant could have requested to enter a formal grievance procedure, which was detailed in the company handbook, she declined to do so. The argument that legal secretaries were denied access to the company grievance procedure and therefore disadvantaged as a group had no justification in fact and therefore did not prove indirect discrimination.
- 12.18 The Applicant was not dismissed on the grounds that she might take proceedings; she was dismissed because of personality differences that impaired the effectiveness of the team. Had the complaint of unfair dismissal been made with the requisite 12 months qualifying period this would have been a valid “substantial” reason for terminating her employment under the ‘Employment protection Law’.
- 12.19 The allegation that the reason for dismissal was untrue was rebutted. There were evident relationship difficulties with a number of fellow employees prior to her dismissal.

13.0 Conclusions

- 13.1 The Tribunal considered each element of the allegations and commenced with the allegation of Direct or Indirect Discrimination

In the case of direct discrimination the primary tests are:

- (1) Was Ms Cottrill treated less favourably than a man, and
- (2) The treatment to her was to her detriment.

- 13.2 From the evidence of both parties, the Tribunal concluded that the chosen comparator, Mr A., was subject to the same policy relating to the probationary review period. That is, a six month period during which periodic formal and informal meetings would be held, dependent on how well the employee was progressing and what level of support and guidance was required.
- 13.3 Further, it was the policy of the Respondent to appoint as the reviewing Manager or Supervisor an individual who had the skill set, technical knowledge and expertise to discharge this duty. In the event Mrs Chivers would appear to have the appropriate competencies for legal secretaries, whereas for conveyancing Advocate Fullman and other senior members of the Conveyancing Team would seem to have the competencies to discharge this duty for newly hired conveyancing clerks such as Mr A.
- 13.4 The Tribunal noted that a number of the conveyancing clerks were female and had been subject to the same probationary process as Mr A. and succeeded in being appointed to long term employment, whereas Mr A. failed his probationary period and left the company. Equally, the Tribunal notes that another legal secretary was subject to the same process conducted by Mrs Chivers and was appointed to long term employment.
- 13.5 The Tribunal also explored the issue of an alternative hypothetical comparator and noted the Respondent’s claim that if a male legal secretary was appointed they would be subject to the same process as the Applicant and it would be Mrs Chivers’ role to undertake this. In relation to other disciplines within the workforce the Tribunal heard consistent testimony that all employees, regardless of discipline were subject to a six month probationary process conducted by a senior employee competent in their field.

- 13.6 The Tribunal could not identify any detriment in the Applicant being subject to a review process conducted by Mrs Chivers. The Tribunal was persuaded that the purpose of such reviews is to provide support, encouragement and assess suitability for continued employment and as such, if conducted appropriately, could not be construed as a detriment.
- 13.7 The Applicant alleged that on 24 January 2008 she was given no opportunity to resolve the alleged sex discrimination. The Tribunal was persuaded by the testimony of Advocate Fullman and Advocate Swan that no such allegation was mounted. Further the Tribunal could find no evidence that Ms Cottrill had raised this issue with any other member of staff other than alleged intrusive remarks by Mrs Chivers during the formal review meetings. In fact at no time did the Respondent raise a formal grievance under the company policy.
- 13.8 Having carefully considered the evidence of both parties the Tribunal prefers the evidence of the Respondent in that the Applicant over-reacted to innocent questions as to the Christmas period. The Tribunal was persuaded that Mrs Chivers, in her role as Reviewing Manager and HR Manager, was asking questions which would normally help to build rapport between herself and the reviewee. The Tribunal prefers the Respondent's view that the Applicant's reaction to these questions was not within any range of reasonableness and could not constitute a detriment. The Tribunal was also persuaded that Mrs Chivers would have in all probability made similar enquiries to the hypothetical comparator of a male employee in relation to his Christmas break.
- 13.9 The Tribunal was also persuaded by Advocate Swan that a hypothetical male employee evidencing the same behaviour as the Applicant; for example refusing to continue with a properly constituted probationary review process and declining to raise a formal grievance and who had also had been subject of criticism by colleagues, would be treated no differently than the Applicant.
- 13.10 In summary the Tribunal could find no substantive grounds to support an allegation of direct discrimination.
- 13.11 Turning to allegations of Indirect Discrimination the primary tests are:
- (1) can the Applicant demonstrate that the application of any provision, criterion or practice was such that it would be to the detriment of a considerably larger proportion of women than men
 - (2) which cannot be shown to be justifiable irrespective of the sex of the person to whom it was applied
 - (3) which is to her detriment
- 13.12 The Tribunal was persuaded that within the Respondent's organisation there was no demonstrable disadvantage to women as compared with men resulting from the requirement to hold probationary meetings. Also, the practice of probationary reviews was justifiable in that a mechanism needs to be in place to give guidance and support with newly hired employees. The Tribunal noted that Mr A. as well as the Applicant failed to meet the employer's requirements in approximately the same time period.
- 13.13 The Applicant's allegation that her complaints were not investigated as she was a single female secretary in a low skilled role and further that as the role of secretary is predominantly performed by females it would to the detriment of a large portion of female staff if this procedure and attitude was adopted with female staff in non

professional roles. The Tribunal was persuaded by testimony from both parties that this allegation was not founded on fact. Rather the evidence suggests that the Applicant had declined to raise a formal grievance; and indeed the logic of such a claim is questionable as in the case of indirect discrimination it would need to be a provision, criteria or practice that must be applied equally to men and women.

- 13.14 The Tribunal enquired as to other policies of the employer, such as the entitlement to benefits and could find no evidence that female employees were disadvantaged in relation to their male colleagues

13.15 Allegations of victimisation

- 13.16 The Tribunal considered the four categories of potential discrimination and discounted sections b and c. The issues as defined in the Hearing were:

- (1) Did the employer dismiss the Applicant as they thought the Applicant had brought, or indicated they would bring proceedings under the Sex Discrimination (Employment) (Guernsey), Ordinance 2005?
- (2) Had the Applicant alleged that the discriminator had committed an act which would amount to a contravention of the Ordinance?

- 13.17 The Tribunal could find no testimony from either party that the employee had been dismissed after communicating to her employer that she intended to bring proceedings under the Ordinance.

- 13.18 The Tribunal concluded from the testimony that the alleged bullying and insults from Mrs Chivers were not as perceived by the Applicant and did not amount to victimisation within the meaning of the Ordinance.

- 13.19 The Tribunal also concluded that given the testimony of both parties, it would not be reasonable, to accept the Applicant's view that she was denied the grievance procedure and thus victimised. The company had a written grievance procedure and the Tribunal is persuaded that if the Applicant had chosen to make her grievances formal then the process would have been followed.

- 13.20 The Tribunal also accepts that given the decision to bring the probationary period to an early end on 24 January 2008, and on the basis of testimony from Mr Caldwell, Mrs McLoughlin, Mrs Chivers and Advocate Swan on "personality differences" it was within a range of reasonable responses that the employer chose to terminate employment on that date and not pursue a grievance process.

- 13.21 The Tribunal could find no evidence from the testimony given by Mr Caldwell and the Applicant that he discriminated against the Applicant on grounds of gender.

- 13.22 The Tribunal was persuaded by testimony that a "hypothetical male employee comparator" in the same circumstances would also have had his contract terminated.

13.23 Alleged Unfair Dismissal

- 13.24 The Sex Discrimination (Employment) (Guernsey), Ordinance 2005 amended the Employment Protection (Guernsey) Law, 1998, as amended by including a provision that if a dismissal could be ascribed to sexual discrimination then it would be automatically unfair and not subject to a 12 month qualifying period.

13.25 The Tribunal was persuaded that the Respondent terminated the Applicant's employment for the sole reason of personality difference. It could find no evidence, either from the Applicant's or the Respondent's testimony, that the termination was grounded on or influenced by sexual discrimination against the Applicant.

13.26 Procedural Issue

With reference to the element of Ms Cottrill's closing statement, as detailed at 12.7 of this decision; the Tribunal is satisfied that the Applicant was given ample opportunity, both prior to the commencement - by Guidelines and Directions Hearing, and during the full Hearing of this complaint, to call any witness or document that she felt would provide evidence in support of her case.

14.0 Decision

14.1 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 Sex Discrimination (Employment) (Guernsey), Ordinance 2005, and The Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not directly; or indirectly discriminated against, neither within the meaning of the Ordinance has victimisation been proven and that there are no grounds to justify that dismissal occurred due to sexual discrimination. The case is dismissed.

Signature of the Chairman: Mr Peter Woodward

Date: 10 November 2008