

FORM: ET3

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Ms Susan Cotterill
Represented by: Ms Cotterill represented herself

RESPONDENT: Archer Divers Builders Limited (in liquidation)
Represented by: The Respondent was not represented

WITNESSES: Called by the Tribunal:
Mr Richard Mourant

**Decision of the Tribunal Hearing held on 26 April, 2013
Amended on 12 February 2014**

Tribunal Members: Ms H Martin (Chairman)
Mr G Jennings
Mr R Brookfield

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 Section 5(2)(a) of The Employment Protection (Guernsey) Law, 1998 as amended, the Applicant was unfairly dismissed.

When calculating the award under Section 22(1)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, the Tribunal determined that the Applicant's pay during the six months prior to the termination of her employment was £10,140.00

However, the Tribunal further concluded that it would be just and equitable to use its discretion under Section 23(2) of The Employment Protection (Guernsey) Law 1998, as amended, to reduce the six month award of compensation by 85%.

Amount of Award: £1,521.00

Ms Helen Martin
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Signature of the Chairman

3 June 2013
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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 (Form ET3A) 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, Ms Susan Cotterill represented herself and gave oral evidence in addition to her submission on form ET1.
- 1.2 The Respondent, David Rubin and Partners Limited, (Liquidator of Archer Divers Builders Limited) did not attend the Hearing.
- 1.3 The Tribunal called Mr Richard Mourant as a witness and former Director of Archer Divers Builders Limited. Mr Mourant gave witness testimony under oath and submitted a witness statement (ER1).
- 1.4 The Tribunal took into account documentation submitted in support of the Respondent's ET2, Response form dated August, 2012.
- 1.5 The Applicant, Ms Cotterill, provided a copy of her contract of employment (EE1), in addition to her ET1 application form.
- 1.6 The Applicant declared on her ET1 Application form that she earned £390.00 per week. The Applicant's salary was undisputed by the Respondent on the ET2, Response form.
- 1.7 The Applicant, Ms Susan Cotterill claimed that she was unfairly dismissed on 31 May, 2012.

2.0 Facts Found

- 2.1 The Applicant was employed by the former Archer Divers Builders Limited as a book keeper and a typist.
- 2.2 The former Archer Divers Builders Limited was a small limited liability partnership in the building trade with two Directors: Mr Richard Mourant and Mr David Archer.
- 2.3 The office of Archer Divers Builders Limited was run by Mr David Archer with book keeping and secretarial support provided by Ms Susan Cotterill.
- 2.4 In early 2012, several building employees were made redundant due to the decrease in contracts and a number of non-paying clients.
- 2.5 Archer Divers Builders Limited was entirely independent of and separate to the businesses of Archer Divers Limited (a diving company) and Lynx (a transport company) for which Ms Cotterill provided occasional book keeping and secretarial support.
- 2.6 At the time of Ms Cotterill's dismissal, Ms Cotterill was the only remaining employee of Archer Divers Builders Limited. All the other employees had already been made redundant.

2.7 The Applicant, Ms Susan Cotterill was provided with a reference by Archer Divers Builders Limited on 1 June, 2012, to assist her with her search for alternative employment (ET1 refers).

3.0 The Law

3.1 The Applicant claimed she had been unfairly dismissed within the meaning of paragraph 5(2)(a) of the Employment Protection (Guernsey) Law, 1998 as amended; “the contract under which he/she is employed is terminated by the employer, whether it is so terminated by notice or without notice”.

3.2 The Tribunal took into account paragraph 6(3) which states “the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the circumstances (including size and administrative resources of an employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case”.

3.3 The Tribunal also took into account paragraph 23(2) of the Employment Protection (Guernsey) Law, 1998, as amended which allows the provision for Tribunal to consider a possible reduction of award.

4.0 The Respondent’s submission

4.1 The Respondent’s only submission was by ET2 form dated August 2012, it was claimed, in the first instance, that Ms Cotterill’s employment was terminated by mutual agreement or in the alternative that if Archer Divers Builders Limited did dismiss the Applicant it was on the basis of redundancy.

4.2 Archer Divers Builders Limited claimed that if the Tribunal found that the Respondent did dismiss the Applicant then it was by reason of redundancy and that, in the circumstances, a fair and reasonable process had been followed.

4.3 Archer Divers Builders Limited alleged that they had regularly consulted with the Applicant over the effect the lack of work and cash flow were having on the business generally and claimed that Ms Cotterill was aware that if additional clients could not be secured and client invoices paid, the business would ultimately have to be shut down. Mr David Archer had numerous conversations with the Applicant advising her that she would lose her job if business did not improve and that it looked likely that he would have to close the business.

4.4 Archer Divers Builders Limited claimed that Mr Archer spoke with the Applicant and informed her that although he would like to continue to employ her due to the financial state of the business and the lack of work, her position would be made redundant.

4.5 On the ET2 form it is alleged that Mr Archer had agreed with the Applicant that it would be ‘a good idea’ for her to seek alternative employment. The ET2 form claimed that Mr Archer provided a reference to Ms Cotterill dated 1 June, 2012, so that she could seek alternative employment.

- 4.6 Archer Divers Builders Limited claimed that the Applicant, Ms Cotterill secured alternative employment later on 1 June, 2012 and that she had subsequently advised Mr Archer that she had secured another job.
- 4.7 Archer Divers Builders Limited alleged that the Applicant commenced new employment on Monday 4 June, 2012 and that this prevented the Company completing its consultation process which it would have undertaken to “finalise” the termination of the employment of the Applicant.

5.0 Witness Testimony : Mr Richard Mourant

- 5.1 Mr Mourant was called by the Tribunal to give evidence on behalf of the former Archer Divers Builders Limited.
- 5.2 Mr Mourant told the Tribunal (ER1 refers) that his duties for the Company were to act as Contracts Manager and Quantity Surveyor. Mr Mourant told the Tribunal that he was engaged on a day to day basis in supervising the workforce, ordering materials and running the site.
- 5.3 Mr Mourant told the Tribunal that the remaining employees were given one month’s notice at the end of April, 2012 with the opportunity to take up other employment offered without the need to work out their notice period. Mr Mourant stated that the communication to the employees was verbal and not confirmed in writing.
- 5.4 Mr Mourant told the Tribunal that the Company ceased trading on 31 May, 2012 and that the last pay day was 1 June 2012.
- 5.5 Under cross examination, Mr Mourant told the Tribunal that the Applicant, Ms Cotterill had taken the opportunity to leave and work for an office cleaning company without working out her notice period, as agreed.

6.0 The Applicant’s submission

- 6.1 Ms Cotterill told the Tribunal that Archer Divers Builders Limited was part of a group of companies including Archer Divers Limited and Lynx Truck hire and that these businesses continued to trade after 31 May, 2012. Ms Cotterill told the Tribunal that she provided secretarial and accounting services for Archer Divers Builders Limited, Archer Divers Limited and Lynx Truck hire.
- 6.2 Ms Cotterill told the Tribunal that Mr Archer had informed her that the Company would cease trading at the end of May and that Ms Cotterill should begin to look for a job.
- 6.3 Ms Cotterill told the Tribunal that she commenced a new job on 4 June, 2012 and that Mr Archer had told her that if she found another job that it may be possible for her to return to work for him for a couple of days a week on a part time basis.
- 6.4 As a result of the Company going into liquidation, Ms Cotterill told the Tribunal that Mr Archer told her that there was no money for her to return for extra days and that she had suffered hardship as a result. Ms Cotterill told the Tribunal that she was unemployed for three months after her new job did not work out.
- 6.5 A copy of Ms Cotterill’s contract of employment (EE1 refers) was submitted to the Tribunal. It was confirmed that Ms Cotterill was employed by Archer Divers Builders

Limited. Ms Cotterill informed the Tribunal that she was paid up until 31 May, 2012 by the Respondent. Ms Cotterill contended that there was more work and that she could have continued to work until at least the 19 July, 2012 when the Company went into liquidation. Ms Cotterill alleged that she was lied to by both Directors and that she should have been treated differently from her male colleagues on the site because she worked in the office in an administration role.

7.0 Conclusions

- 7.1 In deciding whether the words and actions of the Respondent constituted a dismissal in law, the Tribunal considered all the circumstances of the case in order to determine whether the employers' words were intended to bring the contract to an end. The Tribunal took into account events following the utterance of the words communicating the end of employment and preceding the actual departure of the Applicant in so far as they threw light on the Respondent's intention at the time of the alleged dismissal. The Tribunal concluded that a reasonable employee would have understood that their employment contract was to end due to the verbal communication by the Respondent and the Company ceasing to trade. As a result, the Tribunal concluded that the implications of the Respondent's words were clear and that there was an actual dismissal by the Respondent and therefore did not accept the Respondent's first assertion on the ET2 form that the Applicant's employment had ended by mutual agreement.
- 7.2 The Tribunal gave careful consideration to the evidence presented by both the Applicant and Respondent and concluded that there was cogent evidence that the dismissal was for a fair reason and that the Applicant's employment with Archer Divers Builders Limited had ended by reason of redundancy due to the Company becoming insolvent and ceasing to trade.
- 7.3 The Tribunal did not give weight to the assertion by the Respondent on the ET2 form that the consultation process had not been completed or finalised because the Applicant had commenced alternative employment. In this regard, the Tribunal was persuaded by the evidence given by the Applicant that she had commenced a new job on 4 June, 2012 after her employment had ended with the Respondent on 31 May, 2012.
- 7.4 The Tribunal took the view that in the light of the circumstances known to the Respondent at the time of the dismissal further consultation or warning would have been futile and would not have altered the decision to dismiss.
- 7.5 In determining the decision, the Tribunal took into account that the Respondent went into liquidation on 19 July, 2012. The Tribunal was persuaded that the communication to the Applicant concerning the end of her employment had been well intentioned and that there had been a genuine intention to offer the Applicant continuing part time employment which had not proved possible due to the financial state of the Company. In addition, the Tribunal took the view that the Applicant, as the Company bookkeeper, would have been fully aware of the financial position of the Company and the likelihood that the Company may have to cease trading.
- 7.6 In summary, the Tribunal concluded that there had been a fair reason for the dismissal due to the Company ceasing to trade but that there was evidence of procedural unfairness that the Tribunal did not regard as within the band of reasonable responses in the circumstances, including consideration of the size and administrative resources of the Respondent's undertaking. In consideration of the

procedural elements of the dismissal, the Tribunal determined that there had not been a conscious or deliberate decision by the Respondent not to consult or to follow procedural steps.

7.7 The Tribunal concluded that taking the appropriate steps, which the Respondent failed to take, would not have affected the outcome for the Applicant and that it was important to take this into account in determining any award for compensation in accordance with equity based on the substantial merits of the case.

8.0 Decision

8.1 Having considered all the evidence presented and the representations of both parties (and ET1 and ET2 forms) and having due regard to all the circumstances, the Tribunal found that, under the provisions of The Employment Protection (Guernsey) Law, 1998, the Applicant was unfairly dismissed.

8.2 In accordance with Section 22(2)(b) of The Employment Protection (Guernsey) Law, as amended, and Section 23(2) of the Law, the Tribunal orders that the Respondent shall pay the Applicant a reduced award of £1521.00. The Tribunal regards there to be sufficient reason to reduce the award based on the cogent evidence presented that the dismissal was for a substantive fair reason and that taking further and appropriate procedural steps would not have altered the outcome.

8.3 As a result, although deemed to have been unfairly dismissed the Applicant is awarded reduced compensation.

Ms Helen Martin
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3 June 2013
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Signature of the Chairman

Date