

Channel Islands Employment Law Update - November 2020

Insights - 29/10/2020

| Jersey

Employee's workplace exclusion 'frustrates' contract

The Jersey Employment and Discrimination Tribunal (the Jersey Tribunal) in *Butel v Gerard Williams*^[1] was asked to consider whether the employer (consultant vascular surgeon) had unfairly dismissed the employee (his secretary) or whether the contract had, instead, been frustrated.

The Jersey Tribunal noted that in order to determine whether, on the balance of probabilities, the contract had been frustrated it must consider if a 'supervening event' had occurred. If there was such an event, it must then consider whether that event made the performance of the contract between the parties totally impossible or radically different from what they had agreed.

In reaching the conclusion that there had been no dismissal and the contract had been frustrated, the Jersey Tribunal found that the employee's total exclusion from entering the Castle Quay practice (further to a breakdown in relations between the employee and Castle Quay personnel) which was her 'place of work' under the contract and the base for her employer's practice, was not in the parties' reasonable contemplation when they entered into the contract. Further, the exclusion would have required the employer to move the entire administration of his practice to the Lido (the location of another consulting room operated by him). The Jersey Tribunal commented, "...the Respondent would have to change how his entire practice was run". It went on to observe that the employee was "clearly excellent at her job" but that her exclusion made it impossible for her to carry out her role, such that there was no feasible way in which the employee's employment could continue.

Training costs deduction: the importance of good drafting and practice

The case of *Dr. Natalie Kemp v Jersey Hospice Care*^[2] reminds employers of the value of a clear suite of contractual provisions that accord, and the need to ensure that key terms are agreed between the parties at the relevant time.

The Jersey Tribunal found that the employer breached the contract of employment when it deducted £9,675 training costs from the employee's salary upon the termination of her employment. (The context in which the employment relationship ended is not covered in this summary. However, the case is also a noteworthy example of the legal pitfalls that can arise during discussions about the employment relationship and its continuation.)

Upon joining the employer in August 2017, the employee later entered into a contract of employment that contained a provision stating that deductions would not be applied without express written consent. Various, subsequent observations were made by the Jersey Tribunal concerning the paperwork relied upon by the employer, which it described as "...[in] a very unsatisfactory state", "contradictory", and "[containing] substantial gaps". Observations contributing to that view included: terms outside of the employment contract (such as the contractual section of a staff handbook pre-dating the contract) had not been incorporated into it by reference; the handbook did not purport to incorporate into the contract (nor was it drawn to the employee's attention); and no 'training cost agreement' had been agreed (despite the relevant policy). Noting that, per the contract, the employer required the employee's express written consent to apply a specific deduction from wages, the Jersey Tribunal held that the employer did not have the requisite power. The employer was ordered to repay £9,675 to the employee by way of recompense for the contractual breach.

How did the employment end?

In *Jamie Price v Faulkner Fisheries*^[3] the Jersey Tribunal held that the employer had unfairly dismissed the employee. The decision was based upon the employer's failure to follow any formal dismissal procedure, which meant that the decision to dismiss fell outside the range of reasonable responses of an employer in these circumstances.

Before deciding the unfair dismissal claim, the Jersey Tribunal had to navigate the evidence regarding the termination of the contract. Did the employee resign? Was he 'actually' dismissed? Was he 'constructively' dismissed? Alternatively, did the Jersey law of *résolution* apply, perhaps?

The Jersey Tribunal determined that the employee had resigned. Whilst it '*shocked*' the employer - and the employee later contested his own resignation - the Jersey Tribunal found no evidence that it was 'in the heat of the moment' ("*it was a normal telephone conversation*") and there were no 'special circumstances' (eg pressure applied to the employee). The employer was entitled to accept the employee's resignation and was not obliged to make further enquiries of his intentions. A subsequent meeting between the parties at the employer's place of business during the notice period became fractious. The employer gave evidence that the employee's

behaviour was such that he could no longer trust him to be his manager. The Jersey Tribunal also noted that the employer did not return the shop keys to the employee and later failed to engage with him regarding his employment status. Accordingly, the employee had been dismissed on conduct grounds. The absence of a fair process in connection with that event was pivotal in the unfair dismissal finding.

The Jersey Tribunal awarded the employee the sum of £3,068.52 by way of compensation for unfair dismissal, having applied an eighty percent (80%) deduction with reference to the likelihood that the employer would have dismissed the employee even if it had followed a fair procedure and the fact that the employee was already working his notice period.

Litigation Privilege

In the case of *Christine Priaux v Valla Limited*^[4], the Jersey Tribunal considered whether certain correspondence passed between Valla Limited and their one-time advisors, HR Now, is covered by litigation privilege and whether Valla Limited complied with its obligations of disclosure generally. Separately, the Jersey Tribunal was asked to consider claims of discrimination on grounds of disability, unfair dismissal and unpaid wages.

During litigation proceedings, all relevant material in the possession or control of one party should be shared with the other party or parties; there are certain exceptions to this principle, including material covered by 'litigation privilege'. Litigation privilege includes communications with consultants who are not legally trained, as long as the information provided is for the sole purpose of litigation.

It was noted that litigation privilege is likely to be established where: litigation is in progress/is in contemplation; the communications have been made for the sole or dominant purpose of conducting that litigation and the litigation is adversarial rather than investigative. On review of the documents the Jersey Tribunal did not see anything that demonstrated a purpose to conduct litigation.

The Jersey Tribunal confirmed that litigation privilege did not apply to the documents contained within the bundles provided by Valla.

Guernsey

Guernsey Employment and Discrimination Tribunal powers: added protections for employers

Coming into operation on 1 November 2020, the Employment and Tribunal (Guernsey) Order, 2020 enhances the powers of the Guernsey Employment and Discrimination Tribunal (the Guernsey Tribunal) to dismiss or strike out complaints without merit.

Previously, the Guernsey Tribunal was only able to refuse to hear a complaint (filed on time and where the parties had jurisdiction) under section 19 of the Employment Protection (Guernsey) Law, 1998, if the complainant failed to provide documentation requested by the Guernsey Tribunal, if the parties had entered into a valid settlement agreement, or if the application appeared frivolous or vexatious.

Under the new law the Guernsey Tribunal has the power to dismiss a complaint or response at the outset if it considers that there is no reasonable prospect of success. In practice the Guernsey Tribunal will send a notice to the parties, ordering that the complaint or response be dismissed by a specified date (at least one month from the date of the notice) unless the complainant or respondent presents written representations to the Guernsey Tribunal explaining why the complaint or response should not be dismissed. This will allow both the Guernsey Tribunal and affected parties to save time and costs in relation to applications that were never likely to succeed.

The new law further allows the Guernsey Tribunal, either on its own initiative or on application of either party, to strike out a complaint or response, at any stage of the proceedings, on the grounds that: it is scandalous, vexatious, or has no reasonable prospect of success; the conduct of either party throughout proceedings has been scandalous, unreasonable or vexatious; non-compliance with any provision of the Order or an Order of the Guernsey Tribunal; the proceedings are not being actively pursued; or the Guernsey Tribunal considers that it is no longer possible to have a fair hearing.

This is fantastic news for both employers and employees with valid defences or claims facing unnecessarily difficult opponents. The Guernsey Tribunal's powers are now significantly increased to be able to dismiss unmeritorious claims at the outset and bring cases to an end at any stage of proceedings where the conduct of either side becomes unacceptable.

[1] *Lynn Butel v Gerard Williams* [2020] TRE 048

[2] *Dr. Natalie Kemp v Jersey Hospice Care* [2019] TRE 212

[3] *Jamie Price v Faulkner Fisheries (Markets) Limited* [2019] TRE214

[4] *Christine Priaulx v Valla Limited* [2019] TRE 201

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