

# Channel Islands Employment Law Update - March 2021

Insights - 15/03/2021

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## | Jersey

### First COVID-19 related Employment Tribunal judgment in Jersey

In November 2020, we saw the first Jersey Employment and Discrimination Tribunal (the Jersey Tribunal) decision relating to the restrictions imposed on businesses in Jersey due to COVID-19.

In *William Hague-Holmes v Pg Plumbing (2014) Limited* [1], the employer closed for a period during the lockdown and staff were temporarily laid off.

The claimant employee, William Hague-Holmes, was not paid his wages during that period. The employer said that it would have paid the employee if the business had received a government wage subsidy. However, the employer had misunderstood the Government of Jersey's COVID-19 payroll co-funding scheme and having realised the error too late, the wage subsidy application by the employer was rejected.

The Jersey Tribunal found that it could not intervene in a failure to claim under the co-funding scheme; it had to consider the terms of the contract and whether there had been a breach of contract by the employer. This case is therefore a reminder about the importance of clear and unambiguous contracts and the incorporation of policies and other terms into the contract. The Jersey Tribunal Chairman considered that the usual contractual principles apply: what was the term, was it incorporated into the contract and, if so, was it apt to be a contractual term?

The Chairman found the short-term lay-off provision in the staff handbook to be incorporated and apt to be of contractual effect ("*it established rights and duties on the parties and did not*

*"merely" set out aspirational or discretionary matters")*. In addition, the Chairman found that the contract covered the circumstances in this case – that the employer was unable to offer the claimant work owing to the lockdown (a temporary cessation of work).

Although the employee was unsuccessful in his claim, the Chairman expressed sympathy, saying that the employee was *"the victim of an unreasonable and unsustainable interpretation by the Respondent of a clear and plain term in the Scheme."*

A detailed article on the case can be found on Ogier's website[2].

### **COVID-19 lockdown and contractual variation to pay**

In *Carlos Fernandes v Adelino Fernandes Limited*[3], the Jersey Tribunal dealt with a second claim associated with the Jersey Government's COVID-19 Payroll Co-funding Scheme and the restrictions imposed on businesses in Jersey.

The claimant employee terminated his contract of employment on 15 May 2020. He alleged that he was constructively dismissed on the basis that the employer had not paid his wages from the end of March 2020 and until a one-off payment of £1,600 on 15 May 2020, which he claimed was a fundamental breach of his contract in regard to the implied terms relating to mutual trust and confidence.

The employer instead contended that the employee had resigned without notice and that he had agreed to take a reduction in pay during the lockdown period as a result of the closure of their work site due to COVID-19 restrictions. After being advised that he could not make a claim under the payroll co-funding scheme for April wages until May, the employer told the employee that he would have to wait for that funding before paying wages or he would be forced to close the business and make the employee redundant.

Having applied for the co-funding payment, the employer received £1,600 on 15 May 2020 which was paid to the employee that day. (Under the rules of the scheme at that time, the employer should have paid the claimant £2,000 at the end of April and claimed the £1,600 wage subsidy in May. The employer indicated that he had relied upon the advice of his accountant in relation to the scheme).

The Jersey Tribunal found that there was an agreed variation to the contract that the employee would be paid £1,600 per month during the lockdown period after the employer had received payment from the Government. The employer transferred the £1,600 payment to the employee on the day that he received it, but the employee resigned without notice the following day. The Jersey Tribunal concluded that there was no constructive unfair dismissal – having found that there was no breach of contract, repudiatory or otherwise, on the part of the employer.

The Jersey Tribunal did award the employee his wages for two days' work in April 2020 and

compensation for failure to provide written terms of employment. The employer said that he had offered to prepare an employment contract but that the claimant indicated he did not require one. As this was a breach of a fundamental employment right, the Jersey Tribunal ordered the employer to pay the claimant one week's pay as compensation for that failure.

### **Failure to disclose second job: dismissal reasonable**

In *Angelina De Sousa v Caring Homes Healthcare Group*<sup>[4]</sup>, the Jersey Tribunal considered an unfair dismissal claim from a care assistant.

Following the release of Government of Jersey COVID-19 guidance for the Community Residential and Nursing Home Sector on 31 March 2020, the employer required all staff to choose one site to work at and to self-isolate when not at work. These control measures were considered essential to protect the care home residents and staff from COVID-19.

The Jersey Tribunal also considered a requirement (set out in a Jersey Care Commission Document dated 2019) that care workers who also work in other settings do not work more than 48 hours per week combined. The employee worked for the employer 48 hours per week on a waking night shift and also worked at a supermarket for 25 hours a week (a total of 73 hours).

The Jersey Tribunal said that it found little evidence as to how the employer dealt with second jobs and working more than 48 hours per week prior to the pandemic. However, the employer had made it very clear in a letter to all staff on 1 April 2020 that all second jobs must be disclosed in writing to the employer. The employee accepted that she had lied on that disclosure form.

The Jersey Tribunal sympathised with the financial hardship that might result from giving up a second job. However, having reminded itself that it must not substitute its own opinion for that of the employer, the Jersey Tribunal had no doubt that the decision to summarily dismiss for misconduct was within the band of reasonable responses.

### **Principles for admission of new evidence on appeal to the Royal Court**

In *Raducan v Pizza Express Limited*<sup>[5]</sup>, Jersey's Royal Court considered for the first time the principles for the admission of new evidence on an appeal (which must be on a point of law) from the Jersey Tribunal.

The appellant employee, Mr Christian Raducan, lost his case before the Jersey Tribunal and appealed to the Royal Court. In the course of the appeal proceedings, he requested that evidence not put before the Jersey Tribunal be admitted before the Royal Court. The additional evidence concerned certain photos that he had taken of the employer's till equipment prior to the workplace events for which he was investigated and eventually dismissed for gross misconduct. He also sought to rely upon copies of certain email exchanges between members of staff involved with the disciplinary proceedings, which were provided to him after the Jersey

Tribunal hearing and which he had obtained via a data subject access request.

The Royal Court dismissed the application having been guided by the principles for the admission of new evidence on appeals to the Court of Appeal from decisions of the Royal Court.

The Royal Court found that there was no authority – with reference to the relevant Jersey legislation – on the principles to be applied on applications to present new evidence on an appeal from a decision of the Jersey Tribunal. Guidance was found in the context of appeals to the Court of Appeal from decisions of the Royal Court. In the case of *Hacon v Godel & Another* [1989] JCA 181, the Court of Appeal applied the principles set out in *Halsbury* as follows:

*"The Court of Appeal has power to receive further evidence on questions of fact. Before further evidence will be admitted, (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) the evidence must be apparently credible, although it need not be incontrovertible."*

The judgment in *Hacon* also stated that the Courts have been sparing in the exercise of the power because they have had regard to the well-known maxim that there should be a finish to litigation.

The Royal Court found that photographs were in the employee's possession (and so could have been obtained by him and presented to the Jersey Tribunal as part of his evidence with reasonable diligence). While the photographs were credible, they would not have had an important, if any, influence on the result of the case. It was also found that the emails which the employee also sought to present would add nothing to the evidence before the Jersey Tribunal. The Royal Court therefore refused the application to adduce the new evidence.

## **JACS Annual Report**

The Jersey Advisory and Conciliation Service (JACS) has published its annual report<sup>[6]</sup> for 2020, which highlights the impact of the COVID-19 pandemic on the service. JACS reports having received the highest number of queries that it has ever received in a 12-month period. The report states that the employment effects of the virus, "*increased [JACS] direct contacts to 12,669 a year of which 1,780 contacts were COVID-19 specific*". JACS' Director, Patricia Rowan, considers the increase unsurprising given the global events of 2020 and the specific impact of lockdown and the pandemic on businesses and employment.

Regarding the 135 pre-claim matters that JACS participated in during 2020, the Annual Report commented, "*this is an increase of 60% from 2019, the majority of which would likely have resulted in claims being lodged with the tribunal service had JACS not helped with the*

*achievement of a resolution.* "In addition, JACS received 41 conciliation claims relating to discrimination in employment, the majority of which related to disability. The Report notes in relation to employment-related discrimination claims that *"very few reach a full Tribunal Hearing as such claims are resolved using JACS conciliation service."*

## **New parental benefit[7]**

A new parental benefit system has been introduced in Jersey; recognising the role of all parents in the birth and care of young children.

Following States approval of the legislation in November last year, the new Parental Allowance and Parental Grant will be available to eligible parents (including adoptive and surrogate parents) where the child is expected to be born or placed for adoption on or after 1 January 2021.

Parents can claim up to 32 weeks of benefit - choosing how they divide the 32 weeks – which can be taken over a two-year period.

## **| Guernsey**

### **Law firm criticised for unfair process and sex discrimination**

After hearing from eight witnesses during the course of a six-day tribunal[8], the Guernsey Employment and Discrimination Tribunal (the Guernsey Tribunal) held that Katherine Hitchins was unfairly dismissed by Babbé LLP, and subject to sex discrimination.

#### Unfair constructive dismissal

Mrs Hitchins had accepted the role of head of Babbé's corporate department. Shortly after her promotion, a former colleague made an allegation against Mrs Hitchins of sexual assault. Following an internal investigation by Babbé, this allegation was found to be false.

However, there were a number of critical flaws in the investigation process conducted by senior management. Babbé failed to adequately communicate the former colleague's allegation to Mrs Hitchins and it appeared to support a number of requests made by the former colleague to block HR from the investigation; effectively barring Mrs Hitchins from seeking HR support. The effect of the stress caused by the unequal investigation, combined with the lack of HR support, caused Mrs Hitchins to take a number of weeks off with anxiety and depression. The Guernsey Tribunal held that Babbé ignored and downplayed the effect of the stress on Mrs Hitchins. The results of the investigation were communicated by Babbé to the former colleague first, more than 5 days' earlier than Mrs Hitchins.

Overall, the Guernsey Tribunal found serious procedural issues and concluded that the overall approach by Babbé lacked integrity and was significantly flawed; this combined with what the judgment described as the firm's "*dereliction of responsibility in their duty of care towards [Mrs Hitchins]*" eventually resulted in her resignation. The Guernsey Tribunal therefore found that Mrs Hitchins was constructively dismissed, awarding £76,068.

### Sex discrimination

Difference in pay and enforcement of penalties between employees were the basis for the Guernsey Tribunal's finding that Mrs Hitchins was the subject of indirect sex discrimination.

Babbé concede that in respect of their policy, it was left to partners to increase salaries in their departments as they thought fit with no moderation between the departments or between genders. Mrs Hitchins did not receive a monetary increase when promoted to 'Head of the Corporate Department', despite the significant increase in responsibility. When compared to a male head of department, the Guernsey Tribunal found a percentage difference in pay of 57%.

The Guernsey Tribunal also noted that Mrs Hitchins was not awarded a pay increase in 2018 because of her alleged breach of a clause of her employment contract which prohibited discussing pay and bonuses. Pay increases were awarded to two other employees at Babbé despite the fact that one of the other employees admitted to breaching the same contractual clause.

The Guernsey Tribunal concluded that Babbé had adopted a different pay regime towards Mrs Hitchins in comparison with her male colleagues and awarded her £38,038.

### **The importance of good disciplinary procedure**

In *Joao Bruno Gomes v G4S (Guernsey) Limited*<sup>[9]</sup>, the Guernsey Tribunal held that the employee was fairly dismissed for conduct which could bring the employer into disrepute.

The employee, who had been employed as a cleaner, had been the subject of criminal investigations arising from allegations of indecent assault of a female minor, sending an indecent video to a female minor, kidnap, false imprisonment, and indecent assault of a male. Mr Gomes was convicted for the first two allegations (the police investigation in respect of the last allegation was discontinued). The employer had initiated its own, internal investigations into the allegations. Further to a review of investigation reports prepared in advance, and submissions made at a disciplinary hearing, the employee was summarily dismissed without notice for gross misconduct.

The Guernsey Tribunal held that whether the employee was guilty of the allegations was "*somewhat immaterial*". The fact that the offences took place when the employee was not working and therefore "*in his own time*" was also considered immaterial. The consequences of

the employee's actions – including police attendance on the G4S site and confiscation of his work telephone – directly affected the employer.

The way in which the employer had investigated and conducted its disciplinary process was important. The relevant employee handbook outlined the employer's disciplinary procedure, which provided for criminal proceedings and convictions. The employer allowed the employee to state his case and explain what had happened, to include affording him the usual protections and translating minutes of some of the meetings into his first language. The employee's claim that the inclusion of an extra allegation in the investigatory report impugned the fairness of the procedure was rejected by the Guernsey Tribunal; it did not materially affect it. In that regard, the Guernsey Tribunal noted that disciplinary investigations, hearings and appeals are not subject to the same very strict rules of procedure and evidence as Court proceedings.

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[1] [William Hague-Holmes v Pg Plumbing \(20214\) Limited \[2020\] TRE106](#)

[2] <https://www.ogier.com/publications/first-covid-19-related-employment-tribunal-judgment-in-jersey>

[3] [Carlos Fernandes v Adelino Fernandes Limited \[2020\] TRE093](#)

[4] [Angelina De Sousa v Caring Homes Healthcare Group Limited \[2020\] TRE127](#)

[5] [Raducan v Pizza Express Limited \[2020\] JRC253](#)

[6] <https://statesassembly.gov.je/assemblyreports/2021/r.14-2021.pdf>

[7] <https://www.gov.je/Benefits/MaternityFamilySupport/Pages/ParentalAllowance.aspx>

[8] <https://www.gov.gg/CHttpHandler.ashx?id=136781&p=0>

[9] <https://www.gov.gg/CHttpHandler.ashx?id=134132&p=0>

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