

JERSEY / JUDGMENT

Ms Chloe Gray v Bon Air Nursing Home (2019) Limited

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IN THE JERSEY EMPLOYMENT AND DISCRIMINATION TRIBUNAL BETWEEN MS CHLOE GRAY CLAIMANT AND BON AIR NURSING HOME

(2019) LIMITED RESPONDENT TRIBUNAL JUDGMENT Reference: [2023] TRE 38 Date of hearing: 2 October 2023 Before: Advocate Ian C Jones Appearance: For the Claimant: In person For the Respondent: Mr Nigel Brockley

1. On 21 August 2023 the Tribunal ordered that an interim hearing should take place for the purposes of considering whether or not to strike out Ms Gray's claim for unfair dismissal (the "Order").
2. At a previous hearing, the Claimant had been ordered expressly to consider on what basis she considered that she was entitled to terminate her contract without notice by reason of the conduct of the Respondent's employees. In the course of this hearing I requested that the Claimant explain in further detail why, what the Respondent's employee and the Claimant's manager (referred to simply as Agi in the claim form) said to her in the course of the discussion on 19.01.23 represented a sufficiently serious breach of her contract such as to justify her resignation.
3. The Claimant duly explained that her reason for resigning was the way in which she had been spoken to (by Agi) on 19 January 2023. This in turn led to the order requiring that: "...the Claimant shall file with the Tribunal and provide to the Respondent a document setting out the further information required in relation to the claim for unfair dismissal "the "Further Information")..". As the Respondent was entitled to, the Respondent elected to provide a response to such Further Information.
4. As per the submissions made on behalf of the Respondent that Further Information reveals as follows: (i) the Claimant had expressed concerns to Agi about the return of a staff member to the Respondent's employment at the setting known as "Highlands"; this followed concerns which had been raised with the Claimant, directly, by other employees of the Respondent; (ii) in the course of this discussion, Agi became "heightened" and raised her voice and stated (to the Claimant) "I need staff, it's none of your business, this is my home"; (iii) the Claimant asked Agi not to raise her voice to her, yet despite this, Agi persisted in doing so and stated to the Claimant "what issues? What divide?"; and (iv) the Claimant, after these comments were made, advised Agi that she would be ending the discussion and that

she would not permit Agi to speak to her in such a manor (sic) and ruin the Claimant's birthday.

5. On behalf of the Respondent Mr Brockley conceded (rightly in my view) that there was / would be a dispute on the facts as presented by the Claimant in the Further Information, but that taking those facts as being true, a large part of the complaint was based on Agi raising her voice and potentially ruining the Claimant's birthday. In Mr Brockley's submission the enjoyment of the Claimant's birthday was not a relevant consideration for the Tribunal and (most importantly in my view) Agi is entitled to raise her voice and / or be forceful when performing her managerial function.
6. Mr Brockley also conceded (again rightly) that the bar for striking out a claim was particularly high in the Tribunal and drew my attention to *Harrison-v-Jersey Electricity PLC* [2020] TRE 197 where the Tribunal said (at paragraphs 36 and 37) as follows: "36. As I confirmed with Mr Riley at the time, I do not in general terms disagree with these findings and record, for the avoidance of all doubt (to the extent that there was any) that the hurdle for a strike-out application to be successful in Jersey is a high one. For all of the reasons set out in the above cases it must be. I do at this juncture pause to note that unlike the English Employment Tribunal (or for that matter the English Court of Appeal) the Tribunal has no costs jurisdiction and so there is no possibility for any prejudice caused to a party to be remedied or otherwise addressed in costs. The powers of the Tribunal to address issues of prejudice and / or otherwise sanction a party before it are therefore extremely limited. It seems to me therefore that the bar for strike-out in Jersey is somewhat different to the bar in England in that the remedy must be the more readily available in Jersey than it is in England. That qualification aside however, there is no doubt that the relevant hurdle is still a high one. In being asked to strike-out a claim, what I am being asked to do is to deny a party the chance to prove their claim. As above, that is the definition of a 'draconian step'; in principle, everybody has a right to bring a claim and have it adjudicated by the Tribunal. Whether or not one's claim is ultimately successful is a different issue; the fundamental point of importance and principle is that everyone has a right of access to the Tribunal and to be heard by the Tribunal; that is a fundamental aspect of the democratic society in which we live. However, it is not without limits and it is only in relation to those limits where I disagreed with the submissions being made by Mr Riley.
37. As the Tribunal itself has recently noted [see *Le Cocq -v- SEB* [[2019] TRE 037]: " Under the provisions of Article 24(1)(a) of the Procedure Order, the Tribunal may strike out a claim on the grounds that it has "no reasonable prospect of success". In the recent case of *Gautier v Gama Aviation* [2019] TRE107, the Tribunal considered the circumstances in which it may exercise its powers to strike out under Article 24(1)(a) of the Procedure Order. When considering whether to strike out a claim: a) the Tribunal must consider whether a respondent is able to show grounds that a claim has no reasonable prospect of success; and b) if so, the Tribunal must decide whether to exercise its discretion to strike out [*Hasan v Tesco Stores Ltd* UKEAT/0098/16]. A claim will have 'no reasonable prospect of success' if a

respondent can establish that a claimant does not have a 'prima facie' case. In order for there to be a 'prima facie' case, the claim must on the face of it show that sufficient evidence appears to exist to support that claim. If a 'prima facie' case exists (however weak it may appear to be), the Tribunal will not strike out the claim."

7. Mr Brockley characterised the Claimant's case, taken at its highest as being an account that 'Agi' was arguably 'insensitive' to the Claimant when raising her voice to her. He submitted that assuming the Claimant proved what she now alleged in the Further Information that could not possibly amount to a fundamental or repudiatory breach of the Claimant's employment contract. It follows, so argued Mr Brockley that the Claimant could not possibly succeed in her claim for unfair dismissal; the Claimant simply resigned.
8. In response the Claimant very much rested on the force and content of the Further Information submitting in effect that what she had set out clearly demonstrated that she had been unfairly dismissed. In truth, the Claimant did not really address the question as to the seriousness of the breach of contract she was alleging in her claim.
9. In my judgment, while raising your voice to an employee in certain circumstances could amount to a repudiatory breach of contract that would always be circumstance and context specific. It would for example very much depend on what was said. In this case I have no hesitation in agreeing with the Respondent and its characterisation of what was alleged. In my view Agi was entitled to act as she did and while Mr Brockley's epithet of 'insensitive' may well be apt in these circumstances I am not persuaded that what is set out in the claim form and the Further Information could ever amount to a fundamental breach of the contract of employment.
10. I therefore accede to the application to strike-out this portion of the claim. I will sit again to give directions so that the remainder of the case can be progressed to a final hearing.

ORDERS

ACCORDINGLY Advocate Ian C Jones Deputy Chair Date sent to parties: 14 January 2024

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