

**THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL**

**Applicant: Ms Tracy Walker (Mrs Fallaize)**

Represented by: Self

**Respondent: Aurigny Air Services Limited**

Represented by: Ms Keira Gore Appleby

**Tribunal Members:** Ms Helen Martin (Chairperson)

Andrew Vernon

Darren Estasse

**Hearing dates:** 8 and 9 January 2020

**Decision of the Tribunal**

The Applicant, Ms Tracy Walker, claimed that she had been unfairly constructively dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended.

Having considered all of the evidence submitted and the representations of the parties, whether specifically recorded in this judgment or not, the claim for unfair dismissal under the provisions of The Employment Protection (Guernsey) Law, 1998 is dismissed and the Tribunal makes no award.

Ms H Martin

Signature of the Chairperson

16 March 2020

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, The Secretary to the Tribunal, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.

(Telephone: 01481 717056)

Email: [Employmentrelations@gov.gg](mailto:Employmentrelations@gov.gg).

**The Legislation referred to in this document is as follows:**

The Employment Protection (Guernsey) Law, 1998, as amended (the "Law")

**Extended Reasons**

**1. Introduction**

1.1 The Applicant, Ms Tracy Walker (Fallaise) represented herself and gave both oral and documentary evidence under Affirmation (ET1, EE1, EE2 refers).

1.2 The Applicant called the following witness:

- Mr Geoff Chapman

Mr Chapman gave witness testimony under Affirmation.

1.3 The Respondent, Aurigny Air Services Limited was represented by Ms Keira Gore and gave both oral and documentary evidence (ET2, ER1, ER2, ER3 refers).

1.4 The Respondent called the following witnesses:

- Mr Richard Portsmouth
- Ms Susan Batiste
- Ms Amanda Hobart

All witnesses gave witness testimony under Affirmation.

1.5 The Applicant claimed that she had been constructively dismissed within the meaning of section 5(2)(c) of the Employment Protection (Guernsey) Law, 1998 as amended. The burden of proof was on the Applicant to prove that she had been constructively dismissed.

1.6 The Respondent resisted the complaint, asserting that the Applicant had not been dismissed but that she had resigned from her position.

1.7 The Tribunal was conscious that the Applicant was not legally represented during the hearing and took account of the Deputy Bailiff's general comments in *Cotterill V States of Guernsey* (Guernsey Royal Court Judgment 58/2017) and in particular those at paragraph 45 concerning the need to give appropriate help to unrepresented parties regarding procedure and possibly also the case they wish to present.

1.8 All submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgment or not.

**2. Summary of Evidence**

- 2.1 The Applicant commenced employment with the Respondent on 2 June 2015 on a zero hours contract. The Applicant was employed on a permanent contract of employment from 14 March 2016 and her employment ended on 8 March 2019 when she resigned.
- 2.2 The Respondent is a commercial airline based and registered in Guernsey.
- 2.3 The Applicant resigned from her employment by letter on 8 March (EE1/ER1 Tab 40) and claimed in her ET1 application form that the Respondent had not shown a duty of care in relation to her injury at work and neither had she been offered a suitable alternative position nor compensation.
- 2.4 The Applicant was employed as a Customer Services Agent.
- 2.5 It was admitted by the Respondent that the Applicant had suffered an injury whilst lifting four items of luggage at work on 2 July 2018.
- 2.6 The Respondent arranged several meetings with the Applicant to discuss her condition and recovery and explained her entitlement to company sick pay in writing in a letter dated 23 October 2018. In this letter the Respondent confirmed that although it had been the Applicant's express wish to return to the role of Customer Services Agent with adjusted duties there was a risk of further injury by twisting and lifting bags onto the conveyor belt and therefore this was not a suitable alternative at this stage of the Applicant's recovery.
- 2.7 The Respondent made an appointment for the Applicant with an occupational health provider in January 2019 to assist in assessing the Applicant's prognosis.
- 2.8 The Respondent met with the Applicant on 21 February 2019 to discuss the outcome of the occupational health report and the potential of the Applicant to undertake alternative roles within the company in the future that were suited to the Applicant's health requirements.
- 2.9 The Applicant was offered alternative part time work on a flexible basis in the Respondent's 'Disruption' team as an option to return to work on reduced hours, but this was rejected by the Applicant due to her medication protocol. The Respondent wrote to the Applicant on 22 February 2019 regarding the potential for her to take on alternative roles (ER1/EE1 Tab 39).
- 2.10 The Respondent sought to reassure the Applicant in writing on 22 February 2019 that she would remain an employee of the Company until such time as she was well enough to return to her full duties in her role without risk of injury to herself and that the Respondent had no plans to terminate her contract.
- 2.11 The Applicant did not raise a formal or informal grievance about her injury at work nor did she express her concern in relation to the injury or that the Company had failed in its duty of care prior to the end of her employment.

2.12 The Applicant stated in the meeting on 21 February that she did not intend to resign and that she was keen to return to work with the Respondent.

2.13 The Applicant resigned on 08 March 2019 and asserted that the uncertainty about her future with the company had caused her a great deal of stress and anxiety and that due to the lack of duty of care shown to her in relation to the injury she had experienced at work she no longer felt she could continue to be an employee of the company.

### **3. The Law**

3.1 The Law referred to in this section is The Employment Protection (Guernsey) Law, 1998, as amended.

3.2 Section 5(2) of the 1998 Law grants, subject to subsection (3), an employee shall be treated as dismissed by his employer if, but only if –

(c) the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.

### **4. Ms Tracy Walker (Fallaise)**

4.1 The Applicant requested that her opening statement should also be taken as her witness statement (ER1/EE1 Tab 71 refers).

4.2 The Applicant told the Tribunal about the injury that she had experienced at work on 02 July 2018. She had been working on Check in and received a phone call from Ellie Burt in Operations informing her that a passenger was coming to the airport to collect his bags and that they needed to be retrieved from 'the cage' in the Arrivals hall. The Applicant described lifting three heavy bags of 32 kilos onto a trolley to wheel out to the passenger and that she had strained herself badly in doing so. The Applicant finished her shift on the same day in discomfort and during the next two days when she was not due to work rested completely. On the third day after the injury the Applicant was still in pain but took her Grandfather out in her car and told the Tribunal that this had involved helping her father in and out of her car into a wheelchair.

4.3 The Applicant was in considerable pain and was signed off work for one week the following day with a follow up appointment with her Doctor arranged for the end of the week of absence.

4.4 During the week that the Applicant was signed off work she received a telephone call from her colleague Susan Batiste advising her that they were very short staffed on Saturday. The Applicant spoke to the duty manager and agreed to go in to help in spite of the pain she was experiencing from her injury. The Applicant continued to help in this way for a further 5 weeks. At the end of this period the Applicant remained signed off sick until her resignation on 08 March 2019.

- 4.5 The Applicant told the Tribunal that she felt very let down by the Respondent and that she had been left with a lifelong back and neck injury. As a result, she had felt that she had no option but to resign and that she had been left feeling that the Respondent was playing 'mind games.'

## **5. Mr Geoff Chapman**

- 5.1 Mr Chapman told the Tribunal that he had been asked to accompany the Applicant to a meeting on 21 February 2019 to discuss her prognosis and the possibility of her return to work.
- 5.2 Mr Chapman made notes throughout the meeting and told the Tribunal that the Applicant was only able to stand for a maximum of 30 minutes or sit for 60-90 minutes before her condition became painful and that the medication that she had been prescribed had the side effect of making her sleepy. The Applicant had been referred to the pain clinic and was waiting for an appointment.
- 5.3 Mr Chapman told the Tribunal that Ms Hobart had accepted that the injury sustained by the Applicant had occurred when she had been working for Aurigny Air Services.
- 5.4 The Applicant had explained in the meeting that there was potential to consider a part time role within an office environment in circumstances where it had been established that it was not possible to return to check-in because the job involved lifting and twisting.
- 5.5 Ms Hobart had discussed the option of the Applicant working as a member of the Disruptions team and that typically this work took place in the evening. The Applicant explained that her medication protocol meant that early morning work and evening work was to be avoided and that this was therefore unsuitable.
- 5.6 Ms Hobart had confirmed that the Applicant could continue as a member of staff on no pay whilst waiting to see if a suitable flexible working vacancy came up in another department that the Applicant may be able to perform.
- 5.7 Mr Chapman asked if Aurigny Air Services would offer the Applicant compensation in the light of the injury she had sustained at work and Ms Hobart confirmed that she was not in a position to make such an offer and that if the Applicant was inclined to seek compensation she would need to take external advice.

## **6 Mr Richard Portsmouth**

- 6.1 Mr Portsmouth told the Tribunal that he was employed by Aurigny Air Services as the Guernsey Station Manager and that he had held this position for approximately 2 years. Mr Portsmouth stated that he had previously fulfilled the role of Deputy Ground Training manager and had been employed by Aurigny for five years. As Station manager Mr Portsmouth was responsible for the organisation and welfare of ground

staff including the Customer Service Agents, of which the Applicant was one although on a day to day basis the Applicant had reported to a duty manager.

- 6.2 Mr Portsmouth explained that the Applicant had a pre-existing ankle condition and that she was not able to stand for long periods of time and her duties were adjusted as a result prior to the injury at work on 2 July 2018.
- 6.3 The Applicant had initially continued to work following her accident but she had emailed Mr Portsmouth on 10 August 2019 to advise that she had been signed off work for two weeks and Mr Portsmouth had confirmed that her health was important and to rest and not to worry.
- 6.4 The Applicant emailed Mr Portsmouth to advise that she had been signed off for a further 4 weeks from 21 August 2019 on account of damaged muscles, tendons and ongoing pain. The HR department sent the Applicant some flowers and Mr Portsmouth said he had told the Applicant how much she was valued and wished her a speedy recovery. The Applicant's sickness certificate was subsequently extended to 15 November 2018.
- 6.5 Mr Portsmouth told the Tribunal that in October 2018 the Applicant was hopeful that her GP would support her return to work on a reduced hours and adjusted duties basis. On 19 October the Applicant emailed Mr Portsmouth to say that her GP was willing to let her return to work limited to a 4 hour shift but that she was not to lift anything. Mr Portsmouth said that both he and Ms Hobart were eager to assist the Applicant to return to work if they could.
- 6.6 Ms Hobart and Mr Portsmouth met with the Applicant on 23 October 2019 to discuss what adjustments could be made to the Applicant's role and hours to assist her back to work. In this meeting, the Applicant was accompanied by Ms Susan Batiste. It was confirmed that the Applicant could return to work on reduced hours to the same role but after discussion that option was not considered suitable because it required twisting towards the conveyor belt. Mr Portsmouth said that there was also concern that the Applicant might try to lift a suitcase onto the conveyor belt for a customer as she was known to be very accommodating towards customers. Consideration was given towards the Applicant working on the gate but as this required her to stand for more than 20 minutes and she was not able to do so because of a pre-existing condition. As it had not been able to identify a suitable adjustment to her role to enable her to work safely Ms Hobart suggested that the Applicant's osteopath attended the workplace at the Respondent's expense to advise in a real life situation what type of duties she might be able to do and for how long. Mr Portsmouth stated that they had communicated that they would continue to explore other positions in the company that the Applicant might be able to do and that she was welcome to attend any staff meetings or come in to see staff during her sick leave if she wished to do so.

- 6.7 Mr Portsmouth said that the Applicant emailed an update on 2 November 2018 that her GP had changed her sickness certificate from fit to work on reduced hours to unfit to work on account of some injections she had received as part of her treatment.
- 6.8 On 29 November 2018 the Applicant emailed Mr Portsmouth and Ms Hobart to inform them that she had been referred for a CT scan and physiotherapy treatment and that she had been signed off work for a further 6 weeks.
- 6.9 On 10 January 2019 the Applicant emailed Mr Portsmouth and Ms Hobart to inform them that she was suffering from protruding spinal discs as well as a severe tear and nerve compression in her spine. The Applicant had been informed that under no circumstances could she return to a role on the Check in desk as a result of these injuries. The Applicant was signed off for a further 6 weeks and suggested a meeting to consider alternative roles.
- 6.10 Following the Applicant's referral to occupational health, Mr Portsmouth said that the report received stated that sitting upright caused her pain to become severe after 60-90 minutes and that due to a pre-existing condition she could not stand for more than 15-30 minutes for which adjustments had already been made. The report made it clear that the Applicant was not fit to carry out any role that involved lifting, stretching or twisting. The report also indicated that at least to start with the Applicant would need to start work mid-morning due to her medication and work for a maximum of 3 hours.
- 6.11 At the meeting on 21 February 2019 to discuss the occupational health report, Mr Portsmouth said he found the Applicant's friend Mr Chapman very aggressive and that he did not seem interested in finding a suitable alternative role for the Applicant but in finding fault and seeking compensation for the injury that the Applicant had experienced at work.
- 6.12 During the meeting a number of roles were discussed but Mr Portsmouth felt the Applicant was dismissive about these options although she agreed to consider a role in the Reservations Team if a vacancy arose. A further review was suggested in 3 months after which it was hoped that a suitable position would have been found or there would be some improvement in the Applicant's condition.
- 6.13 Mr Portsmouth told the Tribunal he had been disappointed by the Applicant's resignation and that he had felt he had a good working relationship with her and that he had hoped to find a solution that would enable her to return to work. Mr Portsmouth said that he and Ms Hobart had done everything they could to support her and help her back to work and that they had treated her with empathy and understanding throughout her sickness absence.

## **7.0 Ms Susan Batiste**

- 7.1 Ms Batiste told the Tribunal that she was employed by Aurigny as a Dispatcher but that previously she had been employed as a Customer Services Agent.
- 7.2 Ms Batiste said that she had gone to school with the Applicant and that they had had a good working relationship. Although they did not see each other very much outside of work Ms Batiste said that she would have described the Applicant as a friend.
- 7.3 Ms Batiste stated that the role of Customer Services Agent involves working on the check in desks at the airport but can sometimes involve other duties, like assisting those in need of special assistance, helping with boarding or locating missing or damaged bags
- 7.4 When the Applicant suffered an injury at work on 02 July 2018 she had informed Ms Batiste and the duty manager. Ms Batiste said that she had told the Applicant that she should not have lifted the heavy bags and that if she had been in the Applicant's position she would not have done so even if she had been the only staff member present. Ms Batiste said that she would have telephoned for assistance from the loaders and would have waited for help to arrive.
- 7.5 Ms Batiste had stayed in touch occasionally with the Applicant whilst she was off sick and accompanied her to the meeting on 23 October 2018 when a number of possible positions were put forward to the Applicant to consider in order to assist her in returning to work. Ms Batiste described the meeting as supportive and that Ms Hobart and Mr Portsmouth were doing their best to accommodate the Applicant and that they genuinely wanted to help her.

## **8.0 Ms Amanda Hobart**

- 8.1 Ms Hobart told the Tribunal that she had held the position of Human Resources Manager at Aurigny Air Services since June 2014.
- 8.2 In response to the Applicant's GP confirming that she could return to work on reduced hours on 19 October 2018, Ms Hobart and Mr Portsmouth invited the Applicant to a meeting to discuss options. Ms Hobart said that Aurigny was very willing to try to find a solution to help the Applicant return to work and that although the options discussed were considered unsuitable she had reassured the Applicant that she would continue to explore other positions in the company that the Applicant might be able to do. Ms Hobart said that there was a reasonably frequent turnover of staff in some areas and that she had thought that a vacancy might arise in a team that was worthy of discussion with the Applicant.
- 8.3 Ms Hobart offered to assist the Applicant by meeting with a representative from social security with her to try to assist with identifying any adjustments that could be made to the Applicant's duties to expedite her return to work and telephoned social security to offer this assistance in person. As a corollary, Ms Hobart sought to reassure the



Applicant that she would not be pressurised to return to work in a capacity that would jeopardise her recovery.

8.4 At the meeting to discuss the Occupational Health Report and possible alternative roles on 21 February 2019, Mr Chapman had been an unexpected attendee. Company policy required that only Union Representatives or work colleagues could attend in a supportive capacity. Ms Hobart told the Tribunal that she had exercised her discretion to allow Mr Chapman to attend with the Applicant.

8.5 Ms Hobart asserted that Mr Chapman's approach to the meeting was unnecessarily adversarial. Although the meeting was aimed at discussing alternative roles and assisting the Applicant back to work, Mr Chapman seemed to be pressing for an admission of liability in respect of the Applicant's initial injury and that she was no longer able to work and should be offered financial compensation. This was contrary to the Occupational Health Report that had indicated that the Applicant was fit to work with adjustments. Ms Hobart said that the Applicant had previously been keen to return to work and that Aurigny did not want to lose her as an employee.

8.6 Ms Hobart described a number of roles that were discussed in the meeting on 21 February 2019 including a position on the ticket desk but that the Applicant was concerned about the periods that she would be required to sit although Ms Hobart had explained that additional breaks could be accommodated.

8.7 The position on the Disruptions Team had initially seemed a viable option as it enabled working from home predominantly during the evening, but the Applicant had felt this was unsuitable because of her medication routine. Ms Hobart suggested that the Applicant discussed her medication routine again with her GP to see if anything could be done that would enable her to consider this position. Ms Hobart also referred to the possibility of the Applicant joining the Reservations team during the meeting subject to a vacancy arising. During her period of sickness absence, the Applicant continued to receive internal emails advertising all internal vacancies and Ms Hobart confirmed that she would be happy to discuss any job opportunity that the Applicant considered might be suitable for her.

8.8 Ms Hobart stated that she was saddened by the Applicant's letter of resignation on 08 March and that Aurigny was fully supportive of the Applicant remaining an employee and that they were fully committed to trying to find suitable alternative employment for her. Ms Hobart told the Applicant that she was still searching for alternative employment for her and that if she wished to change her mind about her resignation over the next few days to let her know. Ms Hobart said that the Applicant had been a very well- liked and valued employee.

8.9 Ms Hobart said that she did not believe that there was anything more that she or Mr Portsmouth could reasonably have done to support the Applicant in returning to work and that she and her colleague Mr Portsmouth had wished to do whatever was possible to help her.

## 9.0 Findings

9.1 A party to a contract of employment may only terminate the contract without notice if the other party has committed a fundamental breach of contract. The legal test applied by the Tribunal was therefore whether or not the conduct of the Respondent was sufficiently serious to repudiate the contract of employment. There are four factors that have been established in a case of constructive dismissal for it to succeed:

- The employer must be in breach of an express or implied term of the contract of employment;
- The breach must be fundamental;
- The resignation must be a response to that breach; and
- The employee must not delay too long in resigning following the breach. If they do delay too long, then the breach will have been waived and the contract affirmed.

9.2 The Tribunal was mindful that the Applicant was not legally represented and sought to review the evidence carefully in order to determine if there had been a fundamental breach of the contract or a cumulative breach of the contract with a 'last straw' event.

9.3 The Applicant suffered an injury to her back at work and this was not disputed in the hearing. Whether this was sufficient to be considered a fundamental breach of contract was excluded by the Tribunal because after the injury at work the Applicant did not resign immediately and returned to work for five weeks before continuing to be signed off sick until her resignation. The Tribunal concluded that the Applicant's contract of employment was affirmed by the action of continuing to work for 5 weeks after the injury and that this would have been wholly inconsistent with an intention to treat the contract as at an end and claim constructive dismissal.

9.4 Notwithstanding that the Tribunal viewed the contract as affirmed, the Tribunal also concluded that because the Applicant delayed approximately 8 months after the injury at work before resigning that this was too long after the injury occurred in any case to claim a repudiatory breach of the contract arising *directly* from the injury at work.

9.5 The Tribunal was persuaded that the Respondent had gone to significant lengths to try to accommodate adjustments to enable the Applicant to return to work in an alternative role on a flexible basis and importantly the Tribunal was persuaded that these were genuine attempts to facilitate her return from sickness absence as a well-liked and valued employee. As a result, in relation to the Respondent's handling of the Applicant's sickness absence, the Tribunal did not find evidence of a fundamental breach of the Applicants' contract of employment.

9.6 The Applicant told the Tribunal that both Mr Portsmouth and Ms Hobart treated her with compassion and empathy during their interactions with her. Both Mr Portsmouth and Ms Hobart were the only employees in the company managing the Applicant's sickness absence which the Applicant asserted had caused her to resign claiming constructive unfair dismissal and therefore by the Applicant's own admission as they did not treat her unreasonably the Applicant failed to show the Tribunal that there was

a fundamental breach of contract in relation to the communication about her sickness absence and ongoing employment. Notably, in the meeting on 21 February 2019, the Applicant had specifically restated that she was keen to return to work with the Respondent. This was incongruent with her subsequent letter of resignation on 8 March 2019 and evidence to the Tribunal that there had *not* been an identifiable 'last straw' event prior to her resignation.

9.7 The Tribunal determined that the Applicant was a well-liked and valued employee and that the Respondent had genuinely wished to enable her to return to work. The Tribunal took the view that the claim for constructive dismissal had been made because the Applicant wished to seek compensation for an injury at work. However, the Tribunal was not the correct forum in which to determine liability for personal injury and this could only be determined in the Royal Court. Furthermore, it was not appropriate for the Tribunal to speculate on the outcome of any such proceedings.

9.8 In conclusion, the Tribunal determined that the Applicant's claim for constructive unfair dismissal under Section 5 (2 (c) of the Law fails on all counts to reach the appropriate standards of the statutory tests set out in the Law.

## **10.0 Decision**

The Applicant failed to prove on the balance of probabilities that she had been constructively dismissed by the Respondent. In the circumstances, the Applicant's claim is dismissed.

Ms H Martin

.....  
Signature of the Chairperson

16 March 2020

.....  
Date