

UPDATE

The 4P's: Policies, Procedures and Process = Protection

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The St John Ambulance and Rescue Service provides a recent example of a local Guernsey business successfully applying three of the Ps and by doing so not only protecting their employees in effectively investigating and managing a sensitive and difficult situation, but successfully defending a constructive unfair dismissal complaint lodged by an ex-employee, Jason Garnham. By doing so, they achieved the fourth P of protecting their business. This update further discusses that case.

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The St John Ambulance and Rescue Service (the **Service**) provides a recent example of a local Guernsey business successfully applying three of the Ps – Policies, Procedures and Process – and by doing so not only protecting their employees in effectively investigating and managing a sensitive and difficult situation, but successfully defending a constructive unfair dismissal complaint lodged by an ex-employee, Jason Garnham (**Mr Garnham**). By doing so, they achieved the fourth P of protecting their business.

The Law

The Employment Protection (Guernsey) Law, 1998 (the **Law**), provides that where an employee resigns from their employment and the primary reason for that resignation is due to their former employer's conduct (such that their resignation can be said to be at the instigation of the employer) this constitutes a 'dismissal', entitling the employee to bring a claim of constructive unfair dismissal. For such a claim to be successful, the onus is on the employee to satisfy the following test:

- their former employer breached their contract of employment;
- that breach was fundamental;
- that they resigned in response to that breach; and
- that they did not delay too long in terminating the contract.

The recent case of *Mr Jason Garnham v St John Ambulance & Rescue Service*, (22 April 2016) is an example of the Tribunal applying the law of constructive unfair dismissal and determining whether Mr Garnham's resignation was, as a matter of law, at the instigation of his former employer.

The Case

The Facts

Mr Garnham had been employed by the Service for over 20 years. Since 2012 he had held the position of station officer, responsible for supervising the staff and functions of the ambulance control room.

On 9 July 2014, an emergency 999 call was put through to the ambulance control room. An ambulance control assistant took the call and the caller gave their location and then the call was 'dropped'. The following morning, another emergency 999 call from the same location was received. A response was made to a deceased male at the location.

In view of the seriousness of the incident, the Respondent initiated a full investigation to ascertain the cause, any shortcomings on the part of the Service, and to identify ways to minimise the risk of such incidents in the future. As the incident concerned the death of a member of the public, the internal investigation by the Service was run in conjunction with Guernsey police.

Mr Garnham was one of a number of individuals interviewed as part of the investigation – which was thorough, timely and comprehensively documented – the outcome of which concluded that Mr Garnham had a case to answer in respect of his role in the incident.

Mr Garnham was invited to attend a disciplinary hearing and was provided with an investigation pack containing all the relevant documents. In response, Mr Garnham immediately commenced a period of sick leave and the disciplinary hearing was subsequently postponed for four months until he was certified as being fit to return to work.

Prior to the disciplinary hearing, Mr Garnham resigned from his employment. The Service agreed to waive his notice period with the effect that it did not proceed with the disciplinary process.

The Applicant's Claim

Mr Garnham claimed that the Service had fundamentally breached his contract of employment, in particular, the implied term of trust and confidence, as a result of:

- the Service's alleged ineffective and inadequate training and guidance on policies and procedures;
- the manner in which the Service conducted the investigation; and
- the Service's actions during his period of sick leave which he considered amounted to 'harassment' and 'bombardment'.

In reliance on the above, Mr Garnham asserted that he had no choice but to resign from his employment and that he did not unreasonably delay in doing so.

The Respondent's Position

The Service denied the allegations, and in response asserted:

- Mr Garnham had attended a range of appropriate and relevant training and development courses throughout his employment; he was responsible for training junior staff on control room operations, and there were formal and informal policies and procedures in place to assist staff in performing their duties in response to Emergency 999 calls;
- the Service had adopted a fair and thorough process in response to the incident, including independently and transparently following their internal investigation procedure, working in conjunction with Guernsey police to ascertain the cause of the incident, and initiating the disciplinary process in a fair, reasonable and well-documented manner; and
- Mr Garnham was paid in full during his four month sickness absence. The Service appointed a welfare officer to stay in contact with him to ensure his continued wellbeing who engaged in a reasonable level of contact consistent with Mr Garnham's requests.

Decision

The Tribunal found in favour of the Service. In respect of the Mr Garnham's three complaints, the Tribunal was persuaded that:

- the Service had provided adequate and effective training, and was entitled to rely on Mr Garnham's experience in managing the control room;
- the investigation conducted in relation to the incident was consistent with the Service's internal procedures, and appropriate in all the circumstances; and
- the Service had taken reasonable steps to support Mr Garnham during the process, by offering him the use of a private counselling service and appropriately appointing a welfare officer whose level of contact was both reasonable and necessary.

The Tribunal had regard to the elements of the 'constructive dismissal' test. It found that the Service had not breached Mr Garnham's contract of employment and therefore it did not need to consider the remaining three elements of the test. It did, however, comment that even if they had found there to have been a fundamental breach of his employment contract, Mr Garnham did not resign in response to that breach in a timely manner.

The Tribunal also clarified that any conduct alleged by Mr Garnham after the date of his resignation was irrelevant. This was because such conduct could not be said to have influenced his decision to resign. Similarly, the Tribunal limited its consideration of the facts to the period that Mr Garnham had claimed led to his resignation (ie the investigation following the incident) and not any earlier period.

In coming to its conclusion, the Tribunal clarified that: 'in reaching its decision it must be stressed that the remit of the Tribunal was not to rehear the investigation ... but to consider the actions of the Respondent'.

Lessons

Garnham highlights that if employers wish to protect their business, they need to ensure they have in place clear Policies, Procedures and Processes and that those three P's are applied in practice. By having the three P's, the Service had not only protected its business by identifying what happened, the causes and determining future action, but had protected the affected employees within its business by ensuring that they were afforded a fair and reasonable opportunity to input into the process.

To determine whether an employer has breached the implied term of trust and confidence (a mutual term that is implied into every contract of employment), how that employer acted will be critical. Similarly, in an unfair dismissal claim, the statutory test considers whether the process the employer follows was reasonable. The Tribunal commented that: 'in reaching its decision it must be stressed that the remit of the Tribunal was not to rehear the investigation ... but to consider the actions of the Respondent'. Process is therefore key and having a policy to guide that process and a procedure to implement that process will provide vital protection against any claims.

Garnham served to confirm what employers should already know about conducting a fair and reasonable process by reinforcing:

- the importance of having a clear disciplinary policy, which provides for investigation, hearing and appeal stages. That policy should be communicated to employees and appropriate training to managers where necessary. Most importantly, that policy should be consistently and transparently applied;
- the importance of ensuring an independent process by appointing appropriately senior and independent employees to conduct each stage of the process to provide the necessary objectivity and experience in coming to any decisions;
- the need to support employees throughout the process, ensuring that they know the process to be applied, that they have the right to be accompanied to each meeting and understand what will be discussed. The offering of a confidential counselling service or perhaps a short period of paid leave to prepare for a hearing are ways in which employers can support employees through any process;
- the protection provided to business by ensuring that contemporaneous, accurate and comprehensive file notes are kept of any relevant meeting, telephone call or conversation;
- the benefits of periodically sense checking compliance with internal policies as the matter progresses and ensuring that the procedure adopted matches the policy;
- where an employee is signed off sick following the initiation of a disciplinary process, ensuring that an employer's sickness policy is clear, in particular in terms of the level of communication with and the expectations of an employee during any period of absence.

Protecting your business always comes from the inside – have the right policies in place, set out appropriate processes and implement those policies by adopting reasonable procedures and you will always be in a good position to defend any challenge to decisions made by the business by aggrieved employees.

For help and assistance with the 4P's or any employment matter, please contact the Mourant Ozannes Employment Team.

Contacts



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