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Industry Information

## Holbrey v States Employment Board and Others [2022] TRE 31A

December 2022

In *Holbrey v States Employment Board and Others* [2022] TRE 31A the Jersey Employment and Discrimination Tribunal had to consider a number of potential issues, including disability discrimination for a non-physical disability, knowledge of disability and whether the removal of counselling amounted indirect discrimination by failing to make a reasonable adjustment.

Mr Holbrey was partially successful, and the key points for employers are:

1. As we have said previously there is a low bar to establishing disability in Jersey;
2. Employers can be fixed with knowledge of a disability where they know or ought to know that the employee has a disability. So where they are aware of relevant symptoms this can be enough to establish knowledge; and
3. Where an employer has offered support or made adjustments for an employee, they should be very careful before removing that support, and need to understand the impact on the employee.

### Summary of the Facts

Mr Holbrey was employed under two zero hours contracts with the States Employment Board (“SEB”). Firstly, as a Test and Trace Support Team Member and secondly as a Census Collector. Mr Holbrey agreed with SEB that he would work on the Jersey Living Costs and Household Income Survey from September 2021 until March 2022. The work entailed lone working and visiting people in their homes.

In August 2021, Mr Holbrey socialised with his colleagues from Test and Trace outside of work. Afterwards, two of his female colleagues made serious allegations against him in relation to his conduct that evening. The allegations were reported to Mr Holbrey’s line manager and to the police. At no time was Mr Holbrey arrested or charged in relation to the allegations and the police investigation did not continue against him.

The SEB carried out an investigation into Mr Holbrey’s conduct which concluded in November 2021, some three months after the allegations were made. During the investigation the SEB attempted to find Mr Holbrey alternative work as they did not feel it was appropriate for him to undertake the household survey role involving lone working in public homes. By October 2021 it was evident the SEB were unable to find any alternative work. However, despite having been provided with the Suspension Policy at the outset of the investigation, Mr Holbrey was never formally suspended.

Mr Holbrey’s was diagnosed with C-PTSD in 2020 and informed the SEB during a meeting in August 2021 that he had a trauma based anxiety disorder and that the allegations against him were making his symptoms worse. The SEB offered to pay for counselling sessions in order to support Mr Holbrey. Mr Holbrey undertook six counselling sessions with his own counsellor whilst the investigation was ongoing, paid for by the SEB. Mr Holbrey’s counsellor requested that the SEB provide further counselling sessions and two further sessions were approved. The SEB said that if Mr Holbrey required any further support he should be referred to the GP.

Mr Holbrey was invited to a disciplinary hearing in January 2022, five months after the allegations first arose. Mr Holbrey informed the SEB he was unable to attend the disciplinary hearing due to his poor health. The SEB decided that a hearing would not be in the best interest of Mr Holbrey and instead issued an informal warning without consultation with him, stating he could return to work at the end of January 2022. The outcome letter did not include the right of appeal and no one from the SEB contacted Mr Holbrey during the 17 days prior to his return date. Mr Holbrey subsequently resigned and claimed constructive unfair dismissal, sex and disability discrimination.



## Disability and Sex Discrimination Claims

Mr Holbrey made claims of sex and disability discrimination in respect of the investigation process, neither claim was upheld. Mr Holbrey also claimed indirect disability discrimination in respect of the removal of his counselling support and this claim was upheld.

### Was Mr Holbrey disabled?

The first question for the tribunal was whether Mr Holbrey could be considered disabled as defined under the legislation. Discrimination (Jersey) Law 2013 provides that a person is disabled if they have:

*“one or more long-term physical, mental, intellectual or sensory impairment which can adversely affect a person’s ability to engage or participate in any activity in respect of an act of discrimination prohibited under this Law”.*

The law states that an impairment is long term if it lasts for not less than six months.

The SEB denied that Mr Holbrey was disabled at the time of the alleged discrimination in August 2021 and had relied on Mr Holbrey’s response to a questionnaire as part of a job application in early 2021. Further to this, the SEB claimed that Mr Holbrey’s condition was situational and not long term. They pointed to his witness statement where he said that his mental health issues were *“due to the allegations”*.

However, the tribunal found that despite Mr Holbrey’s impairment having been exacerbated by situational facts, including the investigation, that didn’t detract from the fact he was suffering from C-PTSD for at least six months prior to August 2021. This is a reminder that so far as disability discrimination in Jersey is concerned, the cause of the disability is irrelevant. In situations like these it will be relatively easy to establish that the employee had a disability, and the focus will move to whether they have been discriminated against as a result of that disability.

Mr Holbrey began seeing a counsellor in December 2020 for problems relating to anxiety and an entry in July 2021 referred to PTSD. Mr Holbrey visited the GP for mixed anxiety and a depressive disorder in November and December 2021. A letter from Mr Holbrey’s GP in January 2022 referred to low mood and anxiety being entirely situational, but also referred to a diagnosis of PTSD. Mr Holbrey informed the SEB that he had trauma based anxiety, during a meeting in August 2021 following the allegations being made. The tribunal found that when Mr Holbrey made the disclosure, the SEB should have made reasonable enquiries as to his condition and whether he was disabled. The tribunal found that if the SEB did not know at this point Mr Holbrey was disabled, they could reasonably have been expected to know and therefore had constructive knowledge of the disability.

### Reasonable Adjustment Claim

Mr Holbrey claimed that removal of his counselling sessions with a counsellor of his choice was indirectly discriminatory because it amounted to the unreasonable removal of an auxiliary aid under Article 7A(3) of the Discrimination (Jersey) Law 2013.

Article 7A(3) states that:

*“if a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with persons who are not disabled, a person discriminates against the subject if the person fails to take such steps as it is reasonable to take to provide the auxiliary aid”.*

For the purposes of the legislation an auxiliary aid includes a reference to an auxiliary service, which the tribunal found to include counselling sessions. The tribunal held that the SEB knew or reasonably ought to have known the removal of the support from Mr Holbrey’s personal counsellor would have caused him a substantial disadvantage particularly in regards to him engaging with the disciplinary process. Unusually in this case the employer did make an appropriate reasonable adjustment in the first instance by offering counselling sessions, however, the subsequent removal of the reasonable adjustment meant the SEB did indirectly discriminate against Mr Holbrey.

The tribunal stated:

*“At a time when Mr Holbrey was most in need of support from his long-standing counsellor that support was removed. He was dealing with a police investigation and an internal investigation at the same time. We do not consider that the offer of AXA support and starting with a new counsellor was a suitable substitute for continuing with his existing counsellor”.*

### Constructive Unfair Dismissal

Mr Holbrey also successfully claimed that he had been constructively dismissed on the basis that he had lost trust and confidence in the SEB as a result of their treatment during the investigation process. Amongst other points Mr Holbrey relied on: his removal from the workplace; the decision to conduct an investigation into the same allegations that were reported to the police where the allegations were outside the workplace; he was never



given a fair chance to defend himself given the unavailability to CCTV and inconsistent statements made to the police; the removal of counselling; and being told he could go back to work in January 2022 but nobody contacting him for 17 days prior to his return.

In considering Mr Holbrey's claim, the tribunal found three breaches of the implied term of trust and confidence.

1. Firstly in the failure to formally suspend Mr Holbrey and affording him the protections set out in the Suspensions Policy.
2. The removal of Mr Holbrey's counselling sessions, having been offered eight in total by the SEB during the investigation.
3. Failing to contact Mr Holbrey for 17 days after he was informed of the informal warning.

The tribunal concluded that Mr Holbrey resigned at least in part in response to each one of the breaches and that none were waived. The tribunal acknowledged that there was a longer delay in respect of the second breach where the SEB removed the counselling sessions in November 2021, however, the tribunal considered the fact that Mr Holbrey did not have his final counselling session until December 2021.

In respect of the decision to investigate the tribunal found that the allegations clearly fell within the band of conduct outside of the workplace that could warrant an internal investigation. Further to this the SEB Disciplinary Rules clearly state that conduct in or out of the workplace can lead to disciplinary action being taken when the conduct is acting in a discreditable or disorderly manner likely to bring discredit on the reputation of the States of Jersey. The tribunal confirmed the established position that if an employer thinks it reasonable they are entitled to carry out an internal investigation whilst a police investigation is ongoing. The tribunal emphasised that care must be taken not to prejudice any criminal investigation and the police should be contacted prior to investigation.

#### Takeaway points for employers

- Employers are entitled to conduct investigations in respect of alleged misconduct outside of the workplace if that conduct is sufficiently connected to their business or places the employer's reputation at risk. Where there is a criminal investigation employers may carry out their own investigation if they consider it reasonable but they must be careful not to prejudice any criminal proceedings. Employers may make recommendations based on the facts available at the time without having to wait for the outcome of the criminal investigation.
- Policies and procedures should be applied consistently, even if they are non-contractual. Failure to follow policies and procedures in a consistent manner may result in a breakdown in trust and confidence between the employee and employer, or the tribunal may draw inferences from the inconsistent treatment when considering any discrimination claim.
- Removal of an auxiliary service amounts to a failure to make reasonable adjustments under Jersey discrimination law. It is worth noting that in this case the provision of counselling services was an appropriate reasonable adjustment and it was not sufficient that alternative support through an AXA occupational support line or an alternative counsellor was offered, the counselling sessions should have continued with a counsellor of Mr Holbrey's choice.

Whilst this is a decision under Jersey law, employers in Guernsey will need to be aware of the issues due to the forthcoming introduction of the new Prevention of Discrimination (Guernsey) Ordinance, 2022 which is largely coming into force on 1 October 2023. The decision is likely to be persuasive in Guernsey and we expect the tribunal there will consider this case.

## Further information

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