

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr Mark Chiverton

Respondent: Sahara City Co Ltd.

Represented by: Mr Daniel Elsadany

Tribunal Members: Mr Peter Woodward (Chairman)

Mr George Jennings

Ms Georgette Scott

Hearing date: 10 June 2019

Decision of the Tribunal

Having considered all the evidence presented, whether recorded in this judgment or not and the representations of both parties and having due regard to all the circumstances, the Tribunal finds that, under the provisions of the Employment Protection (Guernsey) Law, 1998 as amended that the dismissal was unfair.

Award

Wages paid for the six months prior to 20 December 2018, the "Effective Date of Termination", were agreed as £12,086.80. The Tribunal concluded it would be just and equitable to use its discretion under Section 23(2) of the Law, to reduce this amount by 15%. The Tribunal was persuaded that Applicant demonstrated a significant level of overt insubordination toward the Respondent, including in front of guests, and this contributed to his eventual dismissal.

Therefore, in relation to the complaint of Unfair Dismissal, the Tribunal makes an award in the amount of £10,273.78

P R Woodward

25 June 2019

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Signature of the Chairman

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Date

The Legislation referred to in this document is as follows:

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

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Mr. Mark Chiverton, represented himself and gave evidence on his own behalf. He submitted document bundle EE1.
- 1.2 Sahara City Co. Ltd, the Respondent, was represented by Mr. Daniel Elsadany, the owner of the company. He gave evidence on its behalf and a document bundle, ER1, was submitted.
- 1.3 Mr. Chiverton alleged he had been unfairly dismissed.
- 1.4 Both parties agreed that the Applicant had been in receipt of gross earnings for the 26 weeks prior to the Effective Date of Termination of £12,086.80.

- 1.5 The Tribunal was conscious that neither of the parties was legally represented and was anxious to make sure that all necessary steps were taken to ensure that they had a fair hearing. The Tribunal 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 with the case that they wish to present.

Accordingly, the Tribunal Chair spent time during the Case Management Meeting, held prior to this Hearing, to ensure both parties understood the process and legal tests that would be applied; the Chairman also explained the role of a "McKenzie" friend.

In addition, on the day of the Hearing, the Tribunal was prepared to 'look behind' the language used to articulate arguments where that was appropriate so that the merits of the case could be explored without pedantic insistence upon the use of correct terminology. That being said, the Tribunal was also mindful of the commentary in paragraph 44 of *Reynard v Fox* [2018] EWHC 443 (Ch) that the fact that a litigant was acting in person was not in itself a reason to dis-apply procedural rules or orders or directions, or excuse noncompliance with them. The exception to that principle being that a special indulgence to a litigant in person might be justified where a rule was hard to find, difficult to understand, or it was ambiguous.

- 1.6 Given the significant possibility of minors being named during the giving of evidence, even inadvertently, the Tribunal took the decision to hear the evidence "in camera".

2.0 Facts Found

- 2.1 The Respondent has managed the La Trelade Hotel since 1 April 2018.
- 2.2 Included in the Applicant's bundle of documentation was a copy of the Applicant's contract of employment with his previous employer, Mr. Doughty, owner of the La Trelade Hotel, this dated 1 August 2017. In evidence it was determined this was a yearly renewal of a continuing contractual relationship commenced in 2011. It ceased on 31 March 2018.
- 2.3 The Tribunal was also provided with a copy of the employment contract dated 1 April 2018 with the Respondent (ER1 refers).
- 2.4 The Tribunal consulted the "Schedule Continuous Employment" Section 34(1) of The Law and concluded that employment under the two contracts as continuous; there was no gap in time between the contracts, no notice payment was made under the initial contract, the Applicant continued to be the Reception Manager. Prior to evidence being heard the Tribunal informed the parties that in the absence of any contractual provision, and in accordance with section 5 of the schedule the Applicant's employment was continuous for at least 7 years; thus he met the requirement to have his complaint heard.
- 2.5 Mr. Chiverton was employed as a "Reception Manager" during the period 2011 to 20 December 2018, the "Effective Date of Termination"
- 2.6 The Respondent's business is seasonal in nature with increased demand in the spring and summer months and a lesser demand in the winter months such as November. It was customary to close the hotel over the Christmas period.
- 2.7 On 7 December 2018, whilst the Applicant was taking a vacation in Scotland, he fell ill and was diagnosed with "Bells Palsy". Given the prognosis of a slow recovery, combined with the need to take powerful drugs, the Applicant sent an email on 14 December proposing he take one month's unpaid leave. This being part of a medically predicted period of a 2 to 3 month's total recovery period. He stated in the email that he hoped to return to work on Monday 7 January 2019. In this email the Applicant also suggested that he receive variable levels of pay during 2019, less in winter and more in summer, with a claimed £2000 yearly saving for his employer. (Page 10 ER1 refers)
- 2.8 The Respondent replied on 14 December as follows. *"Dear Mark, sorry to hear what happened to you and thank you for your email of suggestion. However it was in my intonation to give you notice to end your employment with Sahara city on your return originally but you have called sick. I thought it was not the right time to give you the notice to help you to recover. It seam that you are fit to write this email and giving me suggestion of your next year increase of your wages from £8.80 £10.50 per hour, more then 19% increase.*

Please find attached your notice to end your employment as per your contract. The company overdue 18 days holiday as it will be paid by the end of the month. As

*goodwill will allow you to stay in the staff accommodation for a month or 2 to help you find another work and your own accommodation.
I wish you all the best in your future."*

- 2.9 A letter "Termination Notice" dated 10 December 2018, was also issued to the Applicant; it read as follows:-

"This letter of termination is to inform you that's your employment with Sahara city will end as of December 20, 2018. This decision is final and will not be modified.

You have been terminated for the following reasons:

Recent economic conditions have caused a significant downturn in sales, necessitating a 20% workforce reduction at Sahara City T/A La Trelade Hotel. Unfortunately your position is part of this reduction and has been eliminated. Other reasons will be mentioned in request.

You will receive your final payment after your last day, for remaining leave. To provided the attached release of claims document is signed and return'

You are requested to return the company keys on your last day of employment.

Also please keep in mind you have signed agreements which prohibits you from divulging confidential information."

3.0 Mr. Elsadany

- 3.1 Mr. Elsadany explained to the Tribunal that as Mr. Doughty, the current owner of the hotel, was in ill health it was agreed that Sahara City Co Ltd would run the hotel in its entirety from 1 April 2018 and Mr. Doughty would take a back seat.
- 3.2 From the outset the working relationship between Mr. Elsadany and Mr. Chiverton had been marked by disagreement. Mr. Elsadany decided to change the computing software and this initially met with considerable resistance; also other operational disagreements were common and on one occasion Mr. Chiverton walked out of a management meeting.
- 3.3 Mr. Elsadany described the Applicant as very difficult to work with and insubordinate but chose not to deal with his concerns via the disciplinary process. The Respondent did not provide any record of diary entries, emails or memorandums, to support his allegations against the Applicant whilst he was employed in the period April to December 2018.
- 3.4 In July 2018 Mr. Chiverton gave 3 months formal notice of resignation to Mr. Elsadany, however in September this was withdrawn by mutual agreement and Mr. Chiverton continued in his employment.

- 3.5 The Respondent explained to the Tribunal that confronted with a challenging period of financial strain during the “low season” he had little choice but to reduce his payroll.
- 3.6 The Tribunal requested the Mr. Elsadany prepared a list of employees at the end of 2018 and the current headcount (ER2) refers. This in an attempt to understand the scope of the redundancy beyond that of the Applicant. This proved to be very confusing with an employee double counted in different roles and those described as redundant apparently still in employment; despite detailed questioning from the Tribunal this analysis cannot be taken as reliable.
- 3.7 The Respondent had no prior knowledge in December 2018 of the “Redundancy Code of Practice”.
- 3.8 In response to further questioning the Respondent did not have a redundancy policy and there was no attempt in December 2018 to prepare even the most elementary process of consultation and prior notice of redundancy.

4.0 Mr. Michael Doughty

- 4.1 The witness provided a written statement. (ER1 section 5 refers)
- 4.2 Mr. Doughty confirmed the original hiring of the Applicant in 2011 and the subsequent transfer of the Applicant’s employment from the hotel to that of the Respondent on 1 April 2018 without any break in service. (ER1 section 5 refers)
- 4.3 He observed disputes between the Respondent and the Applicant but stated that as Mr. Elsadany had a strong personality he could not be bullied by the Applicant.
- 4.4 Apparently Mr. Doughty had been content with the standard of the Applicant’s work performance between 2011 and 2018

5.0 Mr. Hany Abelrazek

- 5.1 The witness provided a written statement. (ER1 section 4 refers)
- 5.2 Mr. Abelrazek is the Respondent’s “Food and Beverage Manager”.
- 5.3 The witness stated that there were observable differences and arguments between the Respondent and the Applicant after April 1 2018. One very stormy argument occurred in front of guests.
- 5.4 In the first Management meeting of the new team Mr. Elsadany described the “road map” for the future running of the hotel. The content of this road map so angered Mr. Chiverton that he stormed out of the meeting before it ended.
- 5.5 In September Mr. Abelrazek convinced the Applicant that he should give his employer another chance and rescind his notice

6.0 Mr. Mark Chiverton

- 6.1 Mr. Chiverton provided both a witness statement and concluding remarks. (Sections 2 and 4 EE1 refer)
- 6.2 Mr. Chiverton informed the Tribunal that the hotel had been in decline for a number of years. He had been in the hotel industry for over 35 years and thought his experience should have some value in recovering from the current situation, however Mr. Elsadany considered his experience as outdated, irrelevant or incorrect. He described the relationship as pugnacious. There were many disagreements over policy.
- 6.3 They had a fundamental disagreement over replacement computer software; Mr. Elsadany had selected a cheaper system, which in the opinion of the Applicant did not have the requisite range of capabilities. Mr. Elsadany insisted it be implemented.
- 6.4 Mr. Chiverton was so upset by this unsatisfactory situation that he tendered his notice in July 2018.
- 6.5 In September 2018 he was persuaded by Mr. Abelrazek to withdraw his notice and committed to Mr. Elsadany that he would implement the new computer system. The withdrawal of his notice was accepted.
- 6.6 A timetable was agreed with Mr. Elsadany to have the system installed in October 2018. With considerable effort, including unpaid overtime, Mr. Chiverton achieved a transfer to the new system by 1 November. What had made the task particularly difficult was the lack of a training / operational manual and it was only after the implementation that he discovered that a manual did exist but Mr. Elsadany had not purchased it on cost grounds. In the absence of this Mr. Chiverton had developed an "operations briefing" to train other members of staff. In hindsight Mr. Chiverton believed that the only reason that his resignation had been rescinded in September was for him to personally complete this changeover of systems at low cost and then for his employment to be terminated.
- 6.7 Mr. Chiverton stated that his email to the Respondent as to his potential salary in 2019 was only a suggestion, not a demand, and had the merit of reducing his wage cost to the Respondent in 2019. (EE1 page 11 refers).

7.0 Conclusion

- 7.1 At many times during the hearing the Tribunal found the evidence given by Mr. Elsadany to be confusing and lacking in clarity; for example when requested to draw up a list of all current employees made redundant at or around the same time as Mr. Chiverton the analysis was totally confused, with an individual being double counted; also the term redundant seemed to be applied to other individuals who were understood to be seasonal staff and who had already agreed to return in spring 2019.

- 7.2 The Tribunal accepts that Mr. Elsadany may have been confronted in autumn 2018 with a situation that required retrenchment however the way he chose to reduce his costs led to Mr. Chiverton bringing his complaint to the Tribunal.
- 7.3 The Chairman drew the attention of both parties to the States of Guernsey Code of Practice for handling redundancy; neither party had known of the existence of this guidance at the time of the Applicant's dismissal. This code whilst not legally binding contains step-by-step advice as to how a redundancy situation should be approached and may be taken into account by a Tribunal; in the event none of this code seemed to be observed.
- 7.4 The Respondent did not have a written redundancy procedure; neither did he establish one ahead of the dismissal of Mr. Chiverton.
- 7.5 There was no consideration that Mr. Chiverton might be asked to reduce his hours further to save costs during the low season.
- 7.6 Mr. Elsadany did not prepare any analysis for a pool for selection; there was no evidence of any criteria being developed to decide who would have to go and who would be retained in this economic downturn.
- 7.7 There was no attempt at prior consultation; the Code of Practice States that even with smaller firms key principles are
- To consult with employees about redundancy situations well before final decisions are reached
 - Ensure that there is a fair and objective basis for selection
 - Take all reasonable steps to avoid or minimise redundancy
- These fundamental steps were apparently ignored
- 7.8 Mr. Elsadany told the Tribunal that there were other reasons for dismissal of the Applicant; there were disagreements as to how work should be carried out, which computer systems would be used and events in the Applicant's personal life; all of which were given in evidence. However the evidence from both parties indicates that at no time during the Applicant's employment did the Respondent formally confront the Applicant with these issues or instigate any disciplinary process. Indeed it would seem that Mr. Elsadany only raises these issues now to persuade the Tribunal that he had no choice but to dismiss the Applicant and that the dismissal was fair. However the Tribunal notes the stated reason for the dismissal in the letter of 10 December 2018 was due to 'economic conditions' and a 'significant downturn in sales', this was reiterated in oral testimony given by Mr. Elsadany. In summary the Tribunal understands that whilst Mr. Elsadany had other concerns, sensitive to the running of the hotel, when he came to dismiss the Applicant he chose redundancy to formally communicate and justify the termination of the Applicant
- 7.9 The Tribunal also takes account of the agreed withdrawal of the Applicant's resignation in September 2018; it would seem that if Mr. Elsadany was dissatisfied with Mr. Chiverton or concerned about managing costs in the "low season" he could simply have let the resignation stand. This lends weight to Mr. Chiverton's assertion that Mr.

Elsadany wished to retain him only till the implementation of the new computer system was complete.

- 7.10 The Tribunal has concluded that the conduct of the redundancy process by the Respondent fell well below the standards expected of an employer in Guernsey in 2019, and was conducted in a peremptory manner that could not fall into any band of reasonableness.

8.0 Decision

- 8.1 Having considered all the evidence presented, whether recorded in this judgment or not and the representations of both parties and having due regard to all the circumstances, the Tribunal finds that, under the provisions of the Employment Protection (Guernsey) Law, 1998 as amended that the dismissal was unfair.

9.0 Award

- 9.1 Wages paid for the six months prior to 20 December 2018 were agreed as £12,086.80. The Tribunal concluded it would be just and equitable to use its discretion under Section 23(2) of the Law, to reduce this amount by 15%. The Tribunal was persuaded that Applicant demonstrated a significant level of overt insubordination toward the Respondent, including in front of guests, and this contributed to his eventual dismissal.
- 9.2 Therefore, in relation to the complaint of Unfair Dismissal, the Tribunal makes an award in the amount of £10,273.78

P R Woodward

25 June 2019

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Signature of the Chairman

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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, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.