

**THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL**

**Applicant:** Mr Richard Battle  
**Represented by:** Self Represented

**Respondent:** CT Plus Guernsey Limited  
**Represented by:** Ms K Parker

**Tribunal Members:** Advocate Jason Hill (Chairman)  
Mrs Alison Girollet  
Mr Roger Brookfield

**Hearing date(s):** 6 November 2019

**Decision of the Tribunal**

The Applicant made a claim of unfair dismissal contrary to section 3 of *The Employment Protection (Guernsey) Law, 1998*.

Having considered all of the evidence submitted by, and the representations of, the parties, whether specifically recorded in this judgment or not, the claim of unfair dismissal under the provisions of the 1998 Law is dismissed and the Tribunal makes no award. The Tribunal also considered the claims for costs made by both parties and decided not to make any award.

Mr J Hill  
.....  
Signature of the Chairman

12 November 2019  
.....  
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, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

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

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

The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 ('the Ordinance')

The Employment Protection (Recoverable Costs) Order, 2006 ('the Order')

Code of Practice "Disciplinary Practice and Procedures in Employment" (February 2019 issue)

**The authorities referred to in this document are as follows:**

Cotterill v States of Guernsey (Guernsey Royal Court, Judgment 58/2017)

Reynard v Fox [2018] EWHC 443 (Ch)

British Leyland UK Ltd v Swift [1981] IRLR 91

British Home Stores Ltd v Burchell [1978] IRLR 379

**Extended Reasons**

**1.0 Introduction**

- 1.1 The Applicant, who was employed by the Respondent from 13 January 2018 to 1 May 2019 as a bus driver and relief controller, complains that he was unfairly dismissed within the meaning of the Law. The Respondent admits that the Applicant was dismissed for gross misconduct, but denies that the dismissal was unfair. The Tribunal, consisting of three members, met on Wednesday, 6 November 2019 to hear and determine the Applicant's complaint using a joint bundle of documents ('EE/ER1') and extracts from a CCTV recording. All of the material in that bundle and the CCTV recording has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.
- 1.2 The Tribunal was conscious that the Applicant was not legally represented and was anxious to make sure that all necessary steps were taken to ensure that he 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 took care to explain the Tribunal's procedure carefully to the Applicant throughout the proceedings and to explore potential arguments and lines of questioning that the Applicant could have advanced. 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 disapply procedural rules, orders or directions or excuse non-compliance 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.
- 1.3 The Tribunal heard oral evidence from Mark Varley, Kevin Jackman, Steve Baldwin and Jimmy Sommerville (on behalf of the Respondent) and from the Applicant, Terry King and Neil Shepherd (on behalf of the Applicant). The parties agreed the Applicant's earnings for the last 26 weeks of his employment.

**2.0 Background**

- 2.1 The Respondent's case is that following a passenger complaint contained in an email dated 12 April 2019 (page 127 of EE/ER1) about the way in which the Applicant behaved whilst operating the number 71 service at about 3pm on that day, the Respondent conducted an investigation (pages 96 - 131 of EE/ER1) that ultimately led to a disciplinary hearing on 26 April 2019 conducted by Kevin Jackman which the Applicant attended. The invitation to that hearing (pages 91 - 95 of EE/ER1) set out the Respondent's allegations against the Applicant, namely: (1) continued rudeness to passengers throughout the journey; (2) continued poor driving throughout the journey; (3) driving at over 25mph on certain parts of the route up to approx. 30mph; and (4) the seriousness of the allegations coupled with the potential to bring the Company into disrepute class this as Gross Misconduct. The invitation also made clear the possible range of sanctions. During the course of that disciplinary hearing the Applicant was accompanied by Steve Baldwin. The outcome of the hearing was that the Applicant was summarily dismissed without notice (pages 62 - 65 of EE/ER1). Notes of the hearing are at pages 68 - 83 of EE/ER1.
- 2.2 The Applicant exercised his right of appeal against Mr Jackman's decision relying upon the single ground that the "decision was too harsh on all 4 allegations" (page 48 of EE/ER1). Jimmy Sommerville conducted the appeal hearing on 16 May 2019 during which the Applicant was accompanied by Terry King. Notes of that hearing are at pages 35 - 44 of EE/ER1. The outcome of the appeal (pages 33-34A of EE/ER1) was that the dismissal was upheld, but with pay in lieu of notice instead of without.
- 2.3 The Applicant's case is that far from this being a properly conducted disciplinary process, there was a deliberate campaign of bullying and victimisation carried on against him by the Respondent with the ultimate aim of dismissing him. He specifically relies upon: (1) his successful appeal against a previous disciplinary hearing (pages 155 - 232 of EE/ER1); (2) his belief that the Respondent was improperly "trawling through" vehicle CCTV footage looking for disciplinary breaches to allege against him; (3) his perception that the Respondent was prejudiced against "local" drivers; (4) that there were repeated occasions when his wages were underpaid; and (5) the Respondent's refusal to allow Terry King to accompany him during his disciplinary hearing on 26 April 2019.
- 2.4 The Applicant further relies upon what he understands to be the Respondent's failure to progress through a mandatory sequence of escalating sanctions, namely verbal warning, written warning and final written warning, before dismissal. He also referred to the Respondent's inconsistent approach to disciplinary standards and relied upon a number of instances in which he maintained that other drivers had committed more serious disciplinary offences, but had not been dismissed.

### **3.0 Evidence Summary**

- 3.1 Mark Varley's evidence related mainly to the earlier disciplinary hearing, which the Applicant successfully appealed. The Tribunal found him to be a reliable and accurate witness. In particular, the Tribunal accepted his evidence that he had not instructed the CCTV Administrator to "trawl through" footage relating to the Applicant in an attempt to find something to use against the Applicant. He explained that CCTV footage would only be examined as a result of a customer complaint or an accident and that it would

be a disciplinary offence for anyone to examine CCTV footage without due cause. The Tribunal accepted his denial that he was trying to "get rid of" the Applicant.

- 3.2 Kevin Jackman conducted the disciplinary hearing on 26 April 2019 and he produced to the Tribunal the CCTV recording that was used as part of the disciplinary process. The Tribunal watched, with the agreement of both parties, several extracts that the Respondent alleged encapsulated the Applicant's behaviour. Mr Jackman also explained that sometimes there are errors with payroll, usually as a result of shifts being wrongly attributed to drivers, but that there was no campaign of underpayment against the Applicant. He also explained that the speedometer on the CCTV was factory calibrated and the Respondent had no way to alter it. There is, in any event, apparently a 10% allowance made by the Respondent when considering allegations of speeding against a driver. Mr Jackman told the Tribunal that the Respondent did not "trawl through" CCTV footage and that it would only be examined following an accident or customer complaint. The whole of the journey would then be viewed in order to put any allegations into context. The Tribunal found this witness to be reliable and accurate.
- 3.3 Steve Baldwin was the fellow employee who accompanied the Applicant during his disciplinary hearing. His recollection is that the explanation given in paragraph 1 on page 84 of EE/ER1 was correct (*i.e.* that peer-to-peer representation was appropriate). He had no criticism to make of the way in which the disciplinary hearing was conducted and he recalled that the Applicant did not object to his role. The Tribunal found this witness to be reliable and accurate.
- 3.4 Jimmy Sommerville conducted the appeal hearing. He explained that Terry King was permitted to accompany the Applicant following the Applicant's dismissal because there could not be any conflict even though Terry King was not a "peer" during the Applicant's employment. He accepted that there are times when driving on the pavement is necessary, but that it should be done at a walking pace. The allegation of not issuing a passenger ticket on one occasion during the journey was noticed by him and had not been part of the earlier disciplinary hearing. He thought that verbal or written warnings would not have had any effect on the Applicant and that although he had looked at the Applicant's file and the previous disciplinary sanction that was dismissed on appeal, it did not have any bearing on his decision. The Tribunal found this witness to be reliable and accurate.
- 3.5 The Applicant gave evidence on his own behalf and explained that he thought that things had started after his return from holiday in January 2019. He thought that there was a campaign of bullying and harassment against him, particularly by Kevin Jackman, to "force him out". Other drivers had told him that management was taking the CCTV "cartridge" out of almost every bus that he drove and that the footage would be "trawled through". He could not explain why the Respondent wanted him "out" and although he asked what had he done and why did they want him out he never received any satisfactory explanation. The Applicant explained that although he did not raise a formal grievance about the bullying, harassment and unjustified examination of CCTV footage he did tell Mr Jackman about it a number of times in March and April.
- 3.6 When the Applicant was cross-examined, he maintained that the evidence used at his disciplinary hearing should have been restricted to that relating to the girl who missed her stop; anything else was just trawling through the evidence looking for other things

to allege against him. He conceded that he had signed the notes of the disciplinary hearing as a correct record, but could not remember doing so. Consequently, although he had said that he agreed to Mr Baldwin accompanying him (top of page 68 of EE/ER1) no weight should be attached to that. He agreed that the invitation to the disciplinary hearing had pointed out that dismissal could be a potential outcome and had identified examples of what could amount to gross misconduct. Although he had received a copy of the company handbook, he had never read it. He did not recall the incident described in the file note of 27 June 2018 (page 227 of EE/ER1). He also appeared to be confused about the number of disciplinary hearings that he had attended.

- 3.7 The Tribunal paid very careful attention to the Applicant's evidence and noted that his recollection was often quite selective and that he would rely heavily upon what he had been told by other drivers for his interpretation of events, particularly the actions and motivation of the Respondent's managers. Whilst the Applicant was undoubtedly an honest witness doing his best to explain things as he understood them, the Tribunal was left feeling that his evidence was not as reliable as that given by the Respondent's witnesses.
- 3.8 Terry King accompanied the Applicant in the appeal hearing, but he could not understand why he had not been permitted to do so for the disciplinary hearing. He said that there had been two disciplinary hearings and one appeal hearing involving the Applicant. He had no concerns with the way in which the appeal hearing had been conducted; he described it as "very professional". His concern lay with the disciplinary hearing and in particular that he was not allowed to accompany the Applicant. The Tribunal accepted that when describing questions of fact, this witness was reliable and accurate.
- 3.9 Neil Shepherd's evidence was largely directed towards the perceived general conduct of the Respondent in other cases. He told the Tribunal that team controllers admitted they were "gunning" for the Applicant and Mark Varley had admitted to him that he was there to "remove undesirable people". He explained that he had made notes about the incidents described in his witness statement. Although this witness was being honest, the Tribunal was not assisted very much by his evidence as it did not relate directly to the matters that the Tribunal had to decide.

#### **4.0 Legal Framework**

- 4.1 Since the Respondent admitted that the Applicant was dismissed, the parties agreed that pursuant to section 6 of the Law it was for the Respondent to prove, on the balance of probabilities, that the dismissal was fair. The Tribunal must decide whether the dismissal was "fair" or not by considering whether the Respondent acted reasonably or unreasonably in treating the reasons given as sufficient for dismissing the Applicant and that a fair procedure was followed. Those questions must be determined in accordance with equity and the substantial merits of the case.
- 4.2 The Tribunal reminded itself of the test explained by Lord Denning MR in *British Leyland UK Ltd v Swift* [1981] IRLR 91, namely that they must ask themselves if the Respondent's actions fell within the range of reasonable responses open to an employer. In answering this question, regard must be had to whether the Respondent can establish that it had a genuine belief on reasonable grounds after reasonable

investigation that the Applicant was guilty of misconduct (*British Home Stores Ltd v Burchell* [1978] IRLR 379). Two matters will be of importance, namely were fair procedures followed by the Respondent and did the Respondent follow the relevant Code of Practice issued by the Committee?

## **5.0 Facts Found**

- 5.1 The Tribunal preferred the evidence given by the Respondent's witnesses to that given by the Applicant's on all relevant issues. Two particular issues concerned the Tribunal: (1) was it appropriate for Mr Sommerville to refer to the previous complaint against the Applicant and the failure to issue a ticket (the latter not having been considered at the disciplinary hearing)?; and (2) was it appropriate to have prevented Mr King from accompanying the Applicant to the disciplinary hearing?
- 5.2 During his closing submissions the Applicant drew the Tribunal's attention to his belief that the penalty was too harsh and that it fell outside the range of reasonable responses and that a written warning would have been more appropriate. He explained that if Mr King had accompanied him in the disciplinary hearing then he would not have been dismissed. He thought that Mr Baldwin did not have enough experience in helping people at disciplinary hearings.
- 5.3 In response, the Respondent submitted that Mr Sommerville's evidence made it very clear that although he referred to the failure to issue a ticket and the previous disciplinary hearing against the Applicant, he took no account of them in reaching his decision on the appeal. The decision to dismiss the appeal was based entirely upon the issues set out to the Applicant and considered at the disciplinary hearing. The Respondent submitted that the evidence was also clear that it had taken advice from the Employment Relations Department of the States of Guernsey about whether Mr King could properly accompany the Applicant in the disciplinary hearing; the advice was that it had to be peer-to-peer. Although the Respondent accepted that the relevant Code of Practice only referred to an employee of the Applicant's own choice (and thus was not restricted to a member of the same peer group), the Respondent submitted that there was, in fact, no prejudice to the Applicant and that he had confirmed during the meeting (as evidenced by the notes) that he was happy for Mr Baldwin to accompany him. The Respondent also submitted that Mr Baldwin was an entirely suitable person to accompany the Applicant and that no issue about inadequate skills was raised during the appeal. In any event, Mr King, the Applicant's preferred companion, was allowed to accompany the Applicant in the appeal hearing.
- 5.4 Having watched the CCTV footage and read the investigation report, the notes of the disciplinary hearing and the appeal hearing, the Tribunal is quite satisfied that the Applicant's conduct on the day in question when driving the number 71 bus could amount to gross misconduct. Furthermore, the invitation to the disciplinary hearing made it quite clear what the Respondent would regard as gross misconduct and the possible consequences of a finding of gross misconduct. The Tribunal has no hesitation in concluding that the finding of gross misconduct was entirely within the range of reasonable responses based upon the evidence available.
- 5.5 When examining whether the procedures followed at the investigatory stage, the disciplinary hearing and the appeal hearing were fair, the Tribunal attaches weight to

the evidence of Mr Baldwin and Mr King; neither of whom raised any issues with the procedure adopted. No issue was taken by the Applicant with the fairness of the investigation. The Tribunal accepts the submissions of the Respondent in relation to why Mr King was not allowed to accompany the Applicant to the disciplinary hearing. Although there was no reason why he should have been disqualified, the Tribunal accepts that it was done after taking advice, that the Applicant agreed to the presence of Mr Baldwin, that the Applicant did not raise Mr King's exclusion during the appeal hearing and that there was ultimately no prejudice to the Applicant. The Tribunal rejects the Applicant's submission that if Mr King had accompanied him to the disciplinary hearing he would not have been dismissed. The Tribunal was able to form its own assessment of Mr Baldwin and concluded that he was an experienced and suitably qualified individual who would have been capable of assisting the Applicant as required.

- 5.6 The Tribunal accepts the Respondent's submission that Mr Sommerville's decision was not tainted by his mere reference to the Applicant's failure to issue a ticket (which did not form part of the original disciplinary hearing) and a previous disciplinary incident that had been successfully appealed. Any suggestion that this rendered the procedure unfair is rejected.
- 5.7 Was the penalty too harsh? In other words, did the dismissal fall outside the range of reasonable responses? The Tribunal accepted the Respondent's submission that any other response (*i.e.* a warning) would not have had any effect on the Applicant. The Tribunal formed the view that the Applicant had an unjustified perception of persecution by the Respondent and that his behaviour stemmed, at least in part, from that. It was likely that any penalty imposed by the Respondent would simply have bolstered the Applicant's mistaken perception of persecution and would not have altered his behaviour. The Applicant, in the Tribunal's view, was too eager to accept workplace rumour and speculation as established fact. In any event, the behaviour revealed on the CCTV footage was sufficiently serious to amount to gross misconduct and to justify dismissal.
- 5.8 The Tribunal gave specific consideration to the five grounds relied upon by the Applicant and summarised in paragraph 2.3. On the basis of the evidence and arguments presented, the Tribunal finds that:
- (1) The Applicant's successful appeal against an earlier disciplinary hearing had no bearing upon the ultimate decision to dismiss him.
  - (2) The Respondent only accessed and reviewed CCTV footage when there was a legitimate reason to do so and there was no evidence to support the alleged wholesale trawling through footage.
  - (3) There was no evidence to support the Applicant's allegation that there was a culture of prejudice against local drivers. The Applicant was mistaken in his perception.
  - (4) The evidence only pointed to one occasion when the Applicant was underpaid (*i.e.* following his dismissal). The Tribunal is satisfied that this incident and any other occasions of underpayment were simply mistakes and were not done to bully or victimise the Applicant.
  - (5) The refusal to allow Mr King to accompany the Applicant to the disciplinary hearing was a genuine mistake made after advice had been sought. In any event, the Tribunal is satisfied that there was no prejudice to the Applicant.

- 5.9 Furthermore, the Tribunal finds that there is no mandatory requirement for the Respondent to progress through an ascending series of disciplinary measures as suggested by the Applicant. There are circumstances in which a reasonable employer can proceed directly to dismissal without first imposing verbal or written warnings. The Tribunal also rejects the Applicant's suggestion that there was an inconsistent approach to disciplinary sanctions by the Respondent. The evidence on this point was entirely speculative and lacked sufficient detail to enable the Tribunal to be satisfied that there was any inconsistency.
- 5.10 The Tribunal unanimously concludes that the Respondent followed a fair procedure when dealing with the Applicant and, although there was a failure to comply with the relevant code of practice in one respect, that failure was inadvertent, caused no prejudice to the Applicant and did not affect the outcome of the disciplinary process. The Respondent has established that it had a genuine belief on reasonable grounds after reasonable investigation that the Applicant was guilty of misconduct amounting to gross misconduct. Consequently, the Tribunal unanimously concludes that on the balance of probabilities the Respondent's actions fell within the range of reasonable responses open to an employer.

## **6.0 Conclusion**

- 6.1 For the reasons set out above, the Tribunal unanimously concludes that the dismissal of the Applicant was fair. In those circumstances the Tribunal dismisses the Applicant's claim and makes no award.

## **7.0 Costs**

- 7.1 Both parties submitted claims for costs. The Tribunal's power to award costs is discretionary and governed by paragraph 6 of the Schedule to the Ordinance and the Order.
- 7.2 Having taken into account all of the material before it, the Tribunal has decided not to award costs to either party.

Mr J Hill

12 November 2019

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Signature of the Chairman

Date