

THE EMPLOYMENT & DISCRIMINATION TRIBUNAL

Applicant: JOAO BRUNO GOMES
Represented by: Advocate C. Fletcher

Respondent: G4S (GUERNSEY) LIMITED
Represented by: Mr. N. Sheppard (Senior Counsel)

Tribunal Members: Crown Advocate J. Hill (Chairman)
Mrs. J. de Garis
Ms H. Martin

Hearing date: 18 and 19 November 2020

Decision of the Tribunal

The Applicant made a complaint of unfair dismissal.

Having considered all the evidence presented, whether referred to in this judgment or not, the representations of both parties and with due regard to all the circumstances, the Tribunal finds that, under the provisions of *The Employment Protection (Guernsey) Law, 1998*, as amended, the Applicant was dismissed for a reason that was fair. In the circumstances, the Applicant's claim is dismissed. The Tribunal made no order for costs.

J Hill

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Crown Advocate

2 December 2020

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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, The Secretary to the Tribunal, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.
(Telephone: 01481 717056)
Email: Employmentrelations@gov.gg.

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 Employment Protection (Recoverable Costs) Order, 2006

The authorities referred to in this document are as follows:

L'Estrange v. Graucob Ltd. [1934] 2 K.B. 394

Curtis v. Chemical Cleaning & Dyeing Co. [1951] 1 K.B. 805

Extended Reasons

1.0 Introduction

1.1 Throughout these extended reasons documents within the hearing bundle (labelled "ER1") shall be referred to like this: "[x]", which means "page x".

1.2 The Applicant, who it was agreed was employed by the Respondent from 20 August 2018 to 5 February 2020 as a cleaner, complained that he was unfairly dismissed. The Respondent admitted that the Applicant was dismissed, but maintained that the dismissal was for gross misconduct and therefore fair. Accordingly, the Respondent had the burden of proving to the civil standard, that is to say on the balance of probabilities: (i) the reason (or principal reason if more than one) for the dismissal; and (ii) that it was a reason falling with section 6(2) of the Law. The Tribunal, consisting of three members, met on Wednesday and Thursday, 18 and 19 November 2020 to hear and determine the Applicant's complaint. All of the material submitted by the parties has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.

2.0 Background

2.1 The parties agreed that the Applicant had been the subject of police investigations arising from: (i) an allegation of indecent assault on a female minor on 21 July 2019; (ii) an allegation of sending an indecent video to a female minor on 17 December 2019 via Facebook; and (iii) allegations of kidnap, false imprisonment and indecent assault on a male on 19 January 2020. In respect of the first matter, the Applicant was convicted by the Magistrate after a trial and sentenced to 80 hours of community service; in respect of the second matter, following a guilty plea, he was sentenced to 60 consecutive hours of community service; in respect of the third matter the police investigation was discontinued and no further action was taken. The trial, plea and sentencing took place some months after the Applicant's dismissal.

2.2 The Respondent initiated an investigation into the allegation of indecent assault against a female and invited the Applicant to an investigation meeting by a letter dated 21 October 2019. The issues for discussion specifically identified in the invitation were: (i) allegation of indecent assault; (ii) not providing sufficient information to the Respondent when questioned about the allegation; (iii) misuse of the Respondent's property and putting an asset of the Respondent at serious risk by virtue of the Respondent's mobile telephone having been confiscated by the police; and (iv) "the alleged conviction which could affect the integrity of the services" (sic) and actions which could bring the Respondent into disrepute. That meeting took place on 24

October 2019. On 11 November 2019 the Respondent wrote to the Applicant and explained that the investigation would be adjourned pending the outcome of the Applicant's criminal trial.

- 2.3 The Respondent initiated an investigation into the allegations of sending an indecent video, kidnap, false imprisonment and indecent assault on a male and invited the Applicant to an investigation meeting by a letter dated 20 January 2020. The issues for discussion specifically identified in the invitation were: (i) the police investigation concerning sending inappropriate emails to a minor; (ii) kidnapping and the sexual harassment of a colleague; (iii) provoking, instigating or taking part in violent behaviour against a colleague; and (iv) these actions bringing the Respondent into disrepute. That meeting took place on 22 January 2020. An investigation report was prepared by Tony Curtis and was used at a disciplinary hearing that took place on 5 February 2020 conducted by Michael O'Leary. The Applicant admitted that during the police investigations his mobile telephones, including those issued to him by the Respondent, had been seized by the police for examination. During the Tribunal hearing there was some dispute about whether the Applicant had told the Respondent about his arrest and the seizing of the Respondent's telephones before the disciplinary investigation. The outcome of the disciplinary hearing was that the Applicant was summarily dismissed without notice for gross misconduct arising principally from the Applicant bringing the Respondent into disrepute.
- 2.4 By a letter dated 13 February 2020 from Advocate Fletcher to the Respondent, the Applicant lodged an appeal against his summary dismissal. The appeal was heard by Simon Haywood on 6 March 2020 who upheld the decision to summarily dismiss the Applicant.

3.0 Evidence Summary

- 3.1 The Tribunal had a joint bundle of documents labelled "ER1" and a written skeleton argument from the Respondent labelled "ER2", which was given to the Tribunal immediately before the Respondent's closing speech. As a consequence of the Covid-19 restrictions, the Respondent's representative, Mr. Sheppard, and witnesses appeared by video link. The Applicant had the benefit of an interpreter who made the affirmation at the beginning of the hearing.
- 3.2 In its opening speech the Respondent submitted that the Applicant was fairly dismissed for gross misconduct or some other substantial reason. Even if the Respondent was not entitled to dismiss the Applicant without notice the Respondent explained that the cumulative effect of the three matters of a sexual nature alleged against the Applicant meant that there was an irretrievable breakdown of trust and confidence between them. The Respondent submitted that the Applicant was aware of the procedures applicable to his employment and should not have placed himself in such a position. A significant feature of the case was that the Applicant had withheld his involvement from the Respondent. On that basis, the Respondent submitted that it was entitled to conclude that the Applicant was not going to obey instructions from the Respondent. The Respondent also submitted that the Applicant wholly contributed to his own dismissal and had given no particulars of procedural deficiencies.

- 3.3 Tony Curtis took the oath and read out his statement ([338-345]). He explained that the Respondent became aware of the allegation that the Applicant sent inappropriate emails to a minor following contact from the police and he was also aware of a previous allegation of indecent assault upon a female. On 20 January 2020 he arranged fact-finding meetings to investigate the allegation that the Applicant and his brother had kidnapped, falsely imprisoned and indecently assaulted "Person A" on 19 January 2020. His investigations led him to invite the Applicant and his brother (who was also employed by the Respondent at the time) to separate interviews on 22 January 2020 ([101-102]). During those interviews he noted some differences between the account given by Person A, the Applicant and his brother. He also found the Applicant's account of how the dashboard video camera fitted to his motor car came to have its footage erased to be suspicious. Following his investigations he prepared a report ([192-196]) for use in any subsequent disciplinary proceedings.
- 3.4 Under cross-examination by the Applicant's Advocate he broadly confirmed his evidence in material respects. He did, however, accept that at paragraph 22 of [342] he had added an extra ground of investigation to those contained in the invitation, namely "*Failure to bring to the company's attention, notification that you had been arrested by the Police*". He explained this by saying that he had evidence from the manager responsible for the Applicant that the Applicant had been to work the day after the alleged indecent assault on Person A and had not told his manager about his arrest.
- 3.5 Michael O'Leary took the oath and read out his statement ([346-349]). He explained that he undertook the disciplinary hearing based upon the report prepared by Tony Curtis. The invitation to the Applicant is at [197-198] and the hearing took place on 5 February 2020 having been postponed from 30 January because of disruption to travel plans caused by fog. The invitation included a copy of the report prepared by Tony Curtis and a copy of the relevant disciplinary policy. Following the hearing he concluded that although the Applicant was remorseful there were three separate allegations involving sexual misconduct covering six months and the Applicant's behaviour had brought the Respondent into disrepute. He was also concerned that the Applicant did not appear to appreciate how serious the allegations against him were, that he did not seem to be learning from his mistakes and that the police had attended at the Respondent's premises looking for the Applicant. He concluded that the appropriate sanction was summary dismissal without notice. A copy of the written notification of this decision sent to the Applicant appears at [217-218].
- 3.6 Under cross-examination by the Applicant's Advocate he broadly confirmed his evidence in material respects.
- 3.7 Simon Haywood took the oath and read out his statement ([350-355]). He explained that as the Respondent's managing director he was responsible for hearing the Applicant's appeal against Michael O'Leary's decision. A copy of the letter of invitation to the appeal hearing is at [220]. The hearing took place on 6 March 2020 and began by Simon Haywood asking the Applicant what were his grounds of appeal. Notwithstanding that the disciplinary hearing conducted by Michael O'Leary did not include the allegation of indecent assault on a female, the Applicant said that he wanted his job back because the allegations of slapping a young woman's bottom, sending indecent images to a minor and the alleged indecent assault on a male had all happened on different weekends and occurred in the Applicant's own time. He asked the Applicant about why he had not told his manager about his arrests on three

separate occasions; the Applicant accepted that he had not done so in respect of the sending of indecent images allegation and made excuses in respect of the other two. Following consideration of the matters raised by the Applicant the dismissal was confirmed in a letter dated 12 March 2020 ([223-224]).

- 3.8 Under cross-examination by the Applicant's Advocate he broadly confirmed his evidence in material respects. He denied saying words to the effect of "*It will cost you money*" when the Applicant had said to him during the appeal hearing that he would take the Respondent to Court if he did not get his job back.
- 3.9 The Applicant took the oath and since his English was poor his Advocate read out his statement ([333-337]) for him. He explained that he had denied the allegations of kidnap, false imprisonment and indecent assault on Person A when questioned by the police and during his investigatory interview and disciplinary hearing. He pointed out that he disagreed with what Person A said had happened and that the report prepared by Tony Curtis concluded that the facts were "inconclusive either way". He disputes that anything that he did or followed from it brought the Respondent into disrepute. He feels that he was dealt with too harshly given his previous good work record. He believes that but for the false allegations of Person A he would not have been dismissed.
- 3.10 Under cross-examination he accepted that he had signed his contract of employment, but said that he had never received or read the company handbook; in any event, he finds reading and writing very difficult. He was re-examined by his Advocate and explained that he always required help when he had a document to sign and that the references to "silly mistakes" in his interviews were to how he likes to play the fool.
- 3.11 In her closing speech the Applicant's Advocate submitted that the burden of proving that the reason for dismissal was fair is on the Respondent. Although the Respondent said that the reason for dismissing the Applicant was because of bringing the Respondent into disrepute the real reason was the complaint made by Person A. It is significant that the investigation by Tony Curtis was "inconclusive". If, therefore, the Applicant's submission about the reason for his dismissal is correct, it must be unfair. The mere act of having his work phones seized and the police attending at work premises is insufficient to bring the Respondent into disrepute. She also drew the Tribunal's attention to the fact that failing to tell the Respondent about his arrests did not form part of the investigatory process as outlined in Tony Curtis's letter. She submitted that the appeal hearing was not fair because it failed to deal with any of the arguments raised in the disciplinary hearing. Proceeding to summarily dismiss the Applicant was a disproportionate response. When questioned by the Tribunal she accepted that the Respondent was not limited to take into account only what was set out in the letter initiating the disciplinary process, but that the letter was evidence of what was the real reason for the dismissal; the indecent assault allegation against the female referred to by the Applicant during the appeal hearing was something that the Tribunal can take into account as evidence. She did not seek to argue that *L'Estrange v. Graucob* [1934] 2 K.B. 394 and *Curtis v. Chemical Cleaning & Dyeing Co.* [1951] 1 K.B. 805 gave the Applicant any basis for seeking to avoid the effect of the contract that he had signed.
- 3.12 The Respondent's closing speech consisted of slight elaboration of the skeleton argument "ER2".

4.0 Legal Framework

- 4.1 The Respondent admits that the Applicant was dismissed and so section 6(1) of the Law imposes upon the Respondent the burden of proving, to the civil standard: (i) the reason (or principal reason if more than one) for the dismissal; and (ii) that it was a reason falling with section 6(2) of the Law. In the context of this case the Respondent seeks to justify the fairness of the dismissal by relying upon section 6(2)(b) (a reason related to the conduct of the Applicant) and/or section 6(2)(e) (some other substantial reason of a kind such as to justify the dismissal of the Applicant). If the Respondent discharges the burden under section 6(1) the question of whether the dismissal was fair or unfair shall depend upon whether in the circumstances (including the size and administrative resources of the Respondent) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Applicant; and that question shall be determined in accordance with equity and the substantial merits of the case (section 6(3) of the Law).
- 4.2 The Applicant, having signed a contract of employment that expressly records that he has received and read a copy of the handbook, is deemed to have read and understood it save only as may be vitiated by fraud or misrepresentation by the Respondent (*L'Estrange v. Graucob* [1934] 2 K.B. 394 and *Curtis v. Chemical Cleaning & Dyeing Co.* [1951] 1 K.B. 805).

5.0 Facts Found

- 5.1 Whether the Applicant was guilty of some, all or none of the criminal offences alleged against him is somewhat immaterial. What is important is the way in which the Respondent went about investigating and conducting the disciplinary process (including the appeal hearing). A very clear explanation of the disciplinary procedure is set out in the handbook ([312-317]). "Gross misconduct" that might justify summary dismissal without notice includes "actions which could bring the [Respondent] into disrepute" at [252] and [317] (my emphasis). There is also provision in the handbook for "Criminal Proceedings and Convictions" ([305]) and "Employee Screening and Vetting" ([241-242]), which is a continuous process. All of this is relevant when it is remembered that the Respondent provides security and cleaning services generally and for schools and hospitals in particular. The Tribunal took particular note of the fact that the first investigatory interview had been translated into the Applicant's native language and so he would have been well aware of the potential risks to his employment.
- 5.2 Whilst the Tribunal acknowledges that in his report Tony Curtis found the facts relating to the indecent assault on Person A to be "inconclusive either way" ([194]), he does go on to record where he found that other matters had been admitted and/or substantiated ([195]).
- 5.3 The fact that the alleged criminal offences took place at weekends when the Applicant was not working and so may be regarded as being "in his own time" is immaterial in the Tribunal's view. The Respondent's policies do not limit consideration of matters to those that occur during working time. The consequences of the Applicant's actions, namely police attendance on site and the confiscation of work telephones, directly affected the Respondent.

5.4 The Tribunal is satisfied that and finds as facts:

- (1) The Applicant was convicted of two criminal offences (one of indecent assault on a female minor and one of sending indecent material to a female minor).
- (2) The Applicant was arrested and investigated in respect of kidnap, false imprisonment and indecent assault on a male.
- (3) The Applicant failed to notify the Respondent in a timely manner or at all of these prosecutions or of his arrests.
- (4) The work mobile phones entrusted to the Applicant had been seized a number of times by the police during its investigations.

5.5 The Tribunal is also quite satisfied that the Respondent implemented a disciplinary and investigation procedure that was in accordance with its own policies and was manifestly fair. The Applicant was given sufficient opportunities to state his case and explain what had happened; he was afforded the usual protections and in some circumstances had the notes of a meeting translated into his native language by the Respondent. The Tribunal finds that the inclusion of an extra allegation in the investigatory report prepared by Tony Curtis and the allegation of indecent assault on a female that was introduced into the appeal hearing by the Applicant did not materially affect the fairness of the procedure. It should be remembered that disciplinary investigations, hearings and appeals are not subject to the same very strict rules of procedure and evidence as Court proceedings.

5.6 The Tribunal finds that the reason for dismissing the Applicant was his performing acts which could bring the Respondent into disrepute as explained in the letter dated 5 February 2020 ([217-218]). The Tribunal also finds that this reason is one which falls within the list of potentially fair reasons contained in section 6(2) of the Law. Finally, the Tribunal has considered the test set out in section 6(3) of the Law relating to the question of fairness; in accordance with equity and the substantial merits of the case the Tribunal finds that the Respondent acted reasonably in treating that reason as sufficient to justify dismissing the Applicant.

6.0 Conclusion

6.1 For the reasons set out above, the Tribunal unanimously concludes that the Applicant was dismissed for a reason that was fair. In those circumstances the Tribunal dismisses the Applicant's claim and makes no award.

7.0 Costs

7.1 The Tribunal's power to awards costs is discretionary and governed by paragraph 6 of the Schedule to The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005 and The Employment Protection (Recoverable Costs) Order, 2006.

7.2 Having taken into account all of the material before it, the Tribunal has decided not to award costs to either party.