



EMPLOYMENT AND DISCRIMINATION TRIBUNAL:  
NOTIFICATION OF TRIBUNAL'S DECISION

On a complaint made to the Employment and Discrimination Tribunal, as specified below.

Hearing held on 16 November 2006

between

**Applicant: Mr Darren Clarke** and **Respondent: Mr Trevor Hockey of Trev's Motorcycles**

**Tribunal Chairman: Mr P Woodward**

**Side Members: Mr R Brookfield and Ms K Tracey**

**Nature of Dispute:**

During the period 4 August 2003 to 14 June 2006 Mr Darren Clarke was employed as a Motorcycle Technician and Mechanic. Mr Clarke claimed that, on 2 June 2006, his employer informed him that he was to be made redundant with immediate effect. Mr Clarke subsequently claimed that his employer had failed to observe multiple elements of the recommended redundancy procedures contained in the Commerce and Employment Department's Code of Practice entitled "Handling Redundancy"; and this constituted an unfair dismissal under The Employment Protection (Guernsey) Law, 1998 as amended. The Respondent contested this allegation and believed that they had acted as a reasonable employer in selecting Mr Clarke for redundancy.

**Tribunal Decision:**

After carefully considering all the evidence and submission, and giving due weight to the size of the company and the available resources to deal with this dismissal, the Tribunal found that under the provisions of The Employment Protection (Guernsey) Law, 1998 as amended, Mr Darren Clarke was unfairly dismissed by the Respondent.

**Amount of Award : £6,445.99**

Further it was established, from documents given in evidence and oral testimony, that the written statement of reason(s) for dismissal was not provided to Mr Clarke within the prescribed time limit.

**Amount of Award: £1,074.33**

NOTE: Any award made by a Tribunal may be liable to Income Tax  
Any costs relating to the recovery of this award are to be borne by the Employer

Signature of Tribunal Chairman:

Mr Peter Woodward

Date:

30/11/06

The detailed reasons for the Tribunal's Decision are available on application to the Secretary to the Employment and Discrimination Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF



## REASONS FOR TRIBUNAL'S DECISION

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended.

### 1.0 The Claim

- 1.1 During the period 4 August 2003 to 14 June 2006 Mr Darren Clarke was employed as a Motorcycle Technician and Mechanic. Mr Clarke claimed that, on 2 June 2006, his employer informed him that he was to be made redundant with immediate effect. Mr Clarke subsequently claimed that his employer had failed to observe multiple elements of the recommended redundancy procedures contained in the Department of Commerce and Employment's Code of Practice entitled "Handling Redundancy"; and this constituted an unfair dismissal under The Employment Protection (Guernsey) Law, 1998 as amended. The Respondent contested this allegation and believed that they had acted as a reasonable employer in selecting Mr Clarke for redundancy.

### 2.0 Representatives

- 2.1 Advocate Ms L Eels represented Mr Clarke  
2.2 Mr Trevor Hockey appeared for Trev's Motorcycles

### 3.0 Witnesses

- 3.1 For the Applicant  
Mr D Clarke  
  
3.2 For the Respondent  
Mr T Hockey  
Mr M Strachan  
Mr J Adams

### 4.0 Documents

- 4.1 For the Applicant: Documents identified as EE1 and EE2  
4.2 For the Respondent: Document identified as ER1

### 5.0 Findings of Fact

- 5.1 During the period 4 August 2003 to 14 June 2006 Mr Darren Clarke was employed as a Motorcycle Technician and Mechanic.

### 6.0 Testimony given by Mr Trevor Hockey

- 6.1 Mr Hockey stated that, in the year ending December 2005, Trev's Motorcycles had suffered a trading loss of £14,145 and continued to trade at a loss in the first few months of 2006; a photocopy of the profit and loss account was included in the document ER1.

- 6.2 Mr Hockey stated that he had cashed in most of his personal savings to support the business and had also taken out a personal loan through Lombard Finance, and an equity release loan, from HSBC, to enable continued trading.
- 6.3 Despite trying to reduce costs wherever possible, and raising finance to try to keep the business afloat, there was renewed pressure from the bank in spring 2006 to reduce costs further. With a forecast loss of £35,000 for full year 2006 it was inevitable that staff costs would need to be cut to ensure continued survival of the business.
- 6.4 Mr Hockey stated that he and his wife, as joint partners of Trev's Motorcycles, kept all their employees informed constantly about the financial state of the business.
- 6.5 Mr Hockey stated that continuing attempts were made during early spring 2006 to save costs in a number of areas such as office supplies, advertising and postage, however these were still insufficient. Mr Hockey testified that he had consulted with the two mechanics, Darren Clarke and Joe Adams, to reduce their working hours. Up until that time, they had been working a 40-hour week but working overtime on top of that to "top up their wages"; as a result they were being paid for 50 hours per week. Consideration was also given to reducing "Front of house" staff; however no such reductions were implemented, as by this time Mr and Mrs Hockey realised that savings from such actions would fall significantly short of the required target.
- 6.6 Mr Hockey informed both Darren Clarke and Joe Adams sometime in March/April 2006 that they were the two individuals who would be affected by redundancies, as whilst the business could survive with only one mechanic, it could not survive if any of the other employees were made redundant.
- 6.7 Mr Hockey contacted the Commerce and Employment Department and obtained advice as to how to proceed; however because the business was so small (with four full time employees, including the two mechanics), they were unable to minimise redundancies using most of the ideas set out at paragraph 5 of the Code of Practice on handling redundancy. One action that was taken was to have the office administrator (a Mrs Hollings) reduce her hours, at the same time as Mr Clarke was made redundant.
- 6.8 Mr Hockey did not think any one would volunteer for redundancy given past conversations and so he and Mrs Hockey had to consider who to make redundant within the guidelines set out at section 7 of the Commerce and Employment Code in handling redundancy. They considered records of attendance and also the reliability of both mechanics, noting that Mr Clarke had "walked out on the job" twice in the previous three years and had then been reinstated. After the second reinstatement he was informed that if he ever did it again there would be no further re-employment. He had also lost his driving licence on at least two occasions, which caused considerable business disruption. They also considered experience and it was conceded that Mr Clarke's skills and experience were superior to those of Mr Adams; however Mr Clarke would often argue over decisions made in relation to repairs to be undertaken to motorcycles, whilst Mr Adams would simply get on with the job, and there was an excellent working relationship with Mr Adams which did not exist with Mr Clarke.
- 6.9 Mr and Mrs Hockey also prepared several different economic scenarios (which can be found in ER1) and Mr Hockey claimed that this data illustrated that they had not arrived at the decision easily and had also considered other alternatives.

6.10 Finally Mr Hockey decided that Mr Clarke would need to be made redundant. He called Mr Clarke to his office on 2 June 2006 and told him he would be made redundant with two weeks notice, which would not need to be worked.

6.11 Mr Hockey stated that he had been most reluctant to take this action. He had assisted Mr Clarke when he was in financial difficulties; when Mr Clarke was homeless he had lent money to enable him to obtain new accommodation. Mr Hockey stated that he believed these were not the actions of an uncaring employer.

#### **7.0 Cross Examination of Mr Hockey by Advocate Eels**

7.1 Under cross examination, Mr Hockey agreed that Mr Clarke was both more experienced and better qualified in motorcycle maintenance than Mr Adams, however Mr Adams was more methodical in his approach to his work and more reliable, and this was an important part of his selection criteria.

7.2 Mr Hockey refuted the assertion that the workshop was the most profitable part of the business, citing the unpredictability of demand for such services over any 12-month period.

7.3 Mr Hockey agreed that he might not have been formal enough in communicating the threat of redundancy to Mr Clarke, nor had he communicated the selection criteria to him. However he believed Mr Clarke was in no doubt as to the potential for redundancy and, by consulting with Mr Clarke on reduced hours and by seeking ideas for cost savings during early 2006, that he had clearly been seeking alternatives short of a redundancy in line with the Code of Practice.

7.4 Mr Hockey agreed that by not issuing Mr Clarke with a written contract of employment he had been in breach of the 1985 law, however he stated that this situation had now been rectified with all remaining employees.

7.5 Mr Hockey agreed that whilst he could have proposed a reduction in overtime payments to Mr Clarke as part of cost savings, he was aware that Mr Clarke was in debt and that the benefit from reducing his overtime hours would not have been sufficient to resolve the economic challenge to his business.

7.6 Mr Hockey confirmed that he had considered making Mr Strachan redundant as an alternative, however his duties were different from those of Mr Clarke and could not be eliminated or replaced by other employees or Mr and Mrs Hockey.

7.7 Mr Hockey confirmed that he had received the letter of 1 September 2006 from Advocate Shepherd (EE1 tab 8 refers), requesting a written statement of the reasons for Mr Clarke's dismissal (as required by the Employment Protection (Guernsey) Law, 1998, as amended, and had failed to reply to this letter.

7.8 Mr Hockey repeated his view that he had, in his opinion consulted Mr Clarke as to potential redundancy and had made an objective selection of Mr Clarke, bearing in mind expertise, experience and reliability. Mr Hockey conceded he had not communicated these criteria to Mr Clarke.

## **8.0 Testimony given by Mr Michael Strachan**

- 8.1 Mr Strachan had been employed by Trev's Motorcycles in the position of Assistant Manager for the previous three years.
- 8.2 Mr Strachan testified that there had been a very open climate at Trev's Motorcycles and there had been numerous discussions between the proprietors and staff during the spring of 2006 and that redundancy was openly discussed as a possibility with all the staff. It was clear to him that whatever action had to be taken, it was to "keep the company afloat" and that nobody was exempt from a potential redundancy.
- 8.3 Mr Strachan could not remember if Mr Clarke had been asked to reduce his hours in spring 2006 and also agreed that there was no formal request that any member of the staff volunteer for redundancy in this period.
- 8.4 Mr Strachan was aware that Mr and Mrs Hockey had developed several scenarios for major cost reductions and it had become obvious in April to May 2006 that either Joe Adams or Darren Clarke would need to be made redundant.
- 8.5 Mr Strachan denied that there had been any large scale inefficiencies in the company billing system in 2006, although he stated that there may have been some invoices which had not been sent out to customers as promptly as they should have been.

## **9.0 Testimony from Mr Joe Adams**

- 9.1 Mr Adams confirmed he was a motorcycle mechanic employed by Trev's motorcycles since September 2005 and that Mr Hockey had been very open as to the financial state of the business and that he had been consulted by Mr Hockey in early spring 2006 as to a potential reduction of his hours to save costs. He was aware in that same timescale that redundancy was a possibility.
- 9.2 Mr Adams stated that he was frequently consulted on possible cost savings in the period leading up to June 2006 and was very aware of the financial difficulties facing the business.
- 9.3 Mr Adams agreed that the redundancy selection procedure was never explained to him but was not surprised to understand that it was a decision that had to be made by Mr Hockey, between himself and Mr Clarke as to who would be made redundant.

## **10.0 Testimony from Mr Darren Clarke**

- 10.1 Mr Clarke confirmed his period of employment with Trev's motorcycles but went on to point out that he had never been given a contract of employment, despite several requests to Mr Hockey. He stated that he had over 12 years experience as a motorcycle mechanic and was City and Guilds qualified.
- 10.2 Whilst Mr Clarke agreed that the business was apparently in some financial difficulties in spring 2006, he stated that it was a very seasonal business and that it seemed no more of a

problem than in previous years.

- 10.3 Contrary to an assertion by Mr Hockey, the applicant stated that he was not aware he could consult the office computer to look at the financial figures for the business at any time.
- 10.4 Mr Clarke testified that he was never formally informed of an impending redundancy and saw no evidence of the cost saving activities described by Mr Hockey.
- 10.5 Mr Clarke denied he had ever been consulted on the possibility of him moving to a four-day week in spring 2006 to save costs, nor was the subject of voluntary redundancy raised by Mr Hockey.
- 10.6 Mr Clarke stated he was called into the office on 2 June 2006 and bluntly told he was to be made redundant. There was no prior consultation; no opportunity to contest the decision and neither was there any mention of an appeal process against this decision. It was all over in just a few minutes and he was paid two weeks pay and told he did not need to work his notice.
- 10.7 Mr Clarke asserted that this was yet another example of “panic management” by Mr Hockey and that, in his opinion, it was already known in September 2005, when Mr Adams was hired, that the business was not in the best financial state.
- 10.8 Mr Clarke did state, however, that Mr Hockey had, in his own words, “bent over backwards” to assist him during his period of employment and particularly whilst he was going through periods of financial uncertainty.

#### **11.0 Closing Statements**

##### ***Mr Hockey***

- 11.1 Mr Hockey agreed that there had been shortcomings in the redundancy procedure, however there had been some level of consultation and indeed the four-day working week proposal had been made to Mr Clarke as a possible way to make significant cost savings. He had always been open with all his staff as to the financial difficulties of the business and had frequently consulted them for other cost saving ideas. There had been a clear economic rationale to the decision as evidenced in his submitted documents.
- 11.2 Mr Hockey thought that his selection criteria was fair and that he needed to be sure that his one remaining mechanic after the redundancy would be reliable. Mr Clarke had twice “walked out on the job” during his employment and this was clearly a major concern for the future.
- 11.3 Mr Hockey stressed the small size of the business with only four full time employees and the lack of alternatives to the decision to make Mr Clarke redundant.

##### ***Advocate Eels***

- 11.4 Advocate Eels stated that there was no debate in this case, as to whether or not Mr Clarke was dismissed within the meaning of section 5 (2) (a) of the Employment Protection Guernsey Law 1998.
- 11.5 It was also accepted that Mr Clarke's dismissal fell within section 6 (2) of the law, as he was made redundant. It was submitted on behalf of Mr Clarke that the dismissal was unfair by reason of the employer's failure to follow a fair and reasonable procedure.
- 11.6 No issue was taken in respect of the decision to make redundancies. It was accepted that this

was a business decision and the reasons behind this decision are not in issue. What was in issue was the total and utter lack of any procedure in relation to the redundancy of Mr Clarke. Mr Clarke was not told the reason why he had been selected for redundancy and neither did Mr Clarke receive written confirmation of his dismissal, despite a formal request for such a written document.

- 11.7 Drawing on the ET1 and testimony given at the Hearing, Advocate Eels stated that it was understood that Trev's Motorcycles had considered records of attendance and had stated that they had experienced many problems with Mr Clarke as an employee, which had been discussed with him on numerous occasions; but it was also clear from the evidence given by Mr Hockey that Mr Clarke's skills and experience were superior to that of Joe Adams, their other mechanic. Mr Hockey had stated that it was also the case that Mr Clarke was a difficult employee in the sense that he would not respond constructively to requests from his employers. Nevertheless, Advocate Eel stated that it was her submission that the unfairness of the redundancy dismissal lies in unreasonable method of selection for redundancy.
- 11.8 Drawing on a UK Employment Appeal Tribunal ruling of *Williams v Compair Maxam Ltd* (rt9821 IRLR 83. EAT), Advocate Eels drew attention to guidance in this ruling on consultation, openly stated selection criteria fairly applied, and alternatives fully explored with the employee.
- 11.9 Advocate Eels also drew attention to a recent Employment Tribunal judgment Guernsey of *INK Ltd V Perry* - September 2006, where that particular tribunal recognised four basic principles of fairness 'which, in its opinion, should always be considered' in situations of redundancy; as follows:
- "the duty to consult the employee;*  
*"the duty to warn of redundancy;*  
*"the duty to establish fair criteria for the selection of employees; and*  
*"the duty to explore alternatives to redundancy".*
- 11.10 Advocate Eels also stated that Trev's Motorcycles had failed to observe the guidelines found in the Commerce and Employment code of Practice entitled "Handling Redundancies" (Tab 4 EE1 refers). It was the opinion of Advocate Eels that Mr Hockey did not ensure that that job security was maintained wherever possible, as required by the Code, and that there were absolutely no consultation arrangements with Mr Clarke. Whilst Mr Hockey alleged that there was some limited, consultation Mr Clarke denied this. Secondly, consultation would not have been futile as there was a choice of which employee to make redundant. The matter was not cut and dried.
- 11.11 Advocate Eels accepted on behalf of her client that it was not practical for Trev's motorcycles to apply the all the detailed redundancy procedures set out in the Code of Practice. However it was Mr Clarke's position that there was no consultation at all and if there was consultation it did not appear to be genuine or meaningful. The first Mr Clarke knew of a redundancy situation was on 2 June when he was called into Mr Hockey's office and made redundant. The basis and rationale for selecting Mr Clarke for redundancy was not fair and objective; and Mr Clarke had arguably a far stronger claim to be retained, on the basis of his skills and experience, than his colleague.
- 11.12 Advocate Eels requested that the Tribunal set aside any assertions by Mr Hockey as to the conduct of Mr Clarke whilst employed, it was the submission of Mr Clarke that these allegations were both unfounded and not accepted.
- 11.13 In addition to making the request that the Tribunal that it make an award of six months pay in the amount of £12,891.97 Advocate Eels also requested that the tribunal make an award

under section 24 (1) of the law as Mr Hockey failed to provide Mr Clarke with a written statement of reasons for dismissal. This amount being £1,074.33.

## 12.0 Conclusions

12.1 The Tribunal accepts that the company had a firm financial rationale for having to make a member of staff redundant.

12.2 The Tribunal takes account of the influential UK ruling in *Polkey V Dayton Services Ltd. In Polkey v A.E. Dayton Services Limited [1988] AC 344, HL, Lord Bridge stated that "... in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision on which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation"*.

*The judgement included four basic principles of fairness 'which should always be considered' in situations of redundancy:*

1. *The duty to consult the employee;*
2. *The duty to warn of redundancy;*
3. *The duty to establish fair criteria for the selection of employees;*
4. *The duty to explore alternatives to redundancy.*

*Accordingly, consultation should begin in good time and be completed before any redundancy notice is issued. Consultations must be conducted with an open-minded approach; the employer must not only have this approach but display it too.*

12.3 These principles are relevant to the application by Mr Clarke and it evident from the testimony that the Tribunal concludes that these principles were only partially observed by Trev's Motorcycles.

12.4 The Tribunal also notes the previous Guernsey Adjudications referenced in the closing statement by Advocate Lee and whilst not bound by these decisions, take note of the lack of consultation and lack of adequate process in those cases leading to findings of unfairness.

12.5 The Tribunal, in coming to a conclusion, focused on five fundamental issues as detailed below.

12.5.1 **Proof of economic need:** The Tribunal is entirely satisfied that Mr Hockey and his wife were faced with a major financial issue and that significant cost saving were required in the running of the business.

12.5.2 **Identification of a pool of potential individuals to be selected for redundancy:** The Tribunal is satisfied that this was given consideration by Mr Hockey, however it became evident that this was not communicated to the two individuals identified as being in the pool.

12.5.3 **Selection Criteria:** Given a pool of only two, and given that criteria included potential financial saving and the anticipated reliability of the remaining mechanic, the Tribunal is satisfied that this was considered; however, again, testimony revealed that the criteria were not communicated to Mr Clarke.

12.5.4 **Consultation:** Here there is some divergence of testimony between Mr Clarke and Mr Hockey, however the Tribunal is satisfied that, at an informal level, Mr Clarke was aware of the serious financial position and had been consulted on reduced hours as well as the issue of



redundancy being mooted; but, again, the Tribunal is critical of Mr Hockey in that he should have made this whole process of consultation more thorough and meaningful.

- 12.5.5 **Appeal Process:** Given the very small size of this business, the Tribunal does not place great weight on the lack of an appeal process, although it would have preferred that this had been given consideration by Mr Hockey and not totally disregarded, as was the case.

### 13.0 Decision

- 13.1 After carefully considering all the evidence of both parties and their submissions, and giving due weight to the size of the company and the available resources to deal with this dismissal, the Tribunal finds that this dismissal was unfair within the meaning of sections 5(2)(a), 6(2)(c) and 6(3) of the Employment Protection (Guernsey) Law, 1998 as amended by reason of the company's failure to follow a fair and reasonable procedure in relation to this dismissal.
- 13.2 An award of £6,445.99 is awarded, having been determined by reference to the Applicant's final six months employment with Trev's Motorcycles and verbal testimony given during the Hearing. This award is reduced from the £12,891.97 claimed, as provided for by section 23(2) in The Employment Protection (Guernsey) (Amendment) Law, 2005. The Tribunal has been persuaded by the testimony of the Respondent that, whilst it finds the dismissal unfair, there were mitigating actions by the Respondent in the period leading up to the dismissal. Elements of a fair procedure were apparently in place, and these are so described in section 8 of this judgment. Given the very small size of the business, with only four full time employees, and from the testimony given, it would seem that there were very limited options to take any other action other than to make Mr Clarke redundant. It would also seem to be the act of a fair and reasonable employer to include the issue of "past reliability" as one of the factors of determining selection for redundancy. The decision as to who to retain, as much as who should be made redundant, was apparently in this case critical to the continuing survival of the business. Whilst the Tribunal finds the dismissal unfair on procedural grounds it also takes account of the actions taken by the employer in the period leading up to the dismissal, in taking many reasonable steps to avoid the redundancy of Mr Darren Clarke; and thus finds it just and equitable to reduce the award.

Signature of Tribunal Chair:

Mr Peter Woodward

Date:

30/11/06