



# COMMERCE AND EMPLOYMENT

A STATES OF GUERNSEY GOVERNMENT DEPARTMENT

**FORM EMPROT 3**

For office use only.  
Case No: UD042/05

## EMPLOYMENT PROTECTION (GUERNSEY) LAW, 1998 NOTIFICATION OF ADJUDICATOR'S DECISION

On a complaint of unfair dismissal, suffering a detriment for refusing, or proposing to refuse, to work on a Sunday or failure by an employer to provide a written statement of reason(s) for dismissal, this award, (subject to the rights of appeal to the Royal Court, as set out in the Law), is legally binding and is the final decision of the Adjudicator.

### Adjudication Hearing held on 9 March 2006

between

**Applicant:** Mr Peter McKenzie      **and Respondent:** White Rock Café,  
Mr John Carroll

**Adjudicator:** Mrs T.J. Le Poidevin

#### Nature of Dispute:

The Applicant claimed that he had been unfairly dismissed by the Respondent on 19 December 2005. He also claimed that the Respondent had failed to provide him with a written statement of the reason for his dismissal.

The Respondent denied the unfair dismissal claim asserting that the Applicant had resigned from his position as Chef / Manager. The Respondent had not received a request for a written statement of the reason for the Applicant's dismissal.

#### Adjudicator's Decision:

In light of the evidence presented before me and having due regard to all the circumstances, I find that the claim for unfair dismissal is unfounded and I make no award. I also find that the claim for failure to provide a written statement of the reason for the dismissal is unfounded and make no award.

**Amount of Award (if applicable): Nil**

Signature of Adjudicator:

Mrs T. J. Le Poidevin

Date: 21 March 2006

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

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



EMPLOYMENT PROTECTION (GUERNSEY) LAW, 1998  
REASONS FOR ADJUDICATOR'S DECISION

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

**1. The claim**

- 1.1 The Applicant claimed unfair dismissal on the basis that the Respondent had mistreated him and had not honoured their agreement.
- 1.2 The Applicant also claimed that he had not received a written statement of the reason for his dismissal.

**2. Representatives**

- 2.1 The Respondent, White Rock Café, represented by Mr John Carroll.
- 2.2 The Applicant, Mr Peter McKenzie, represented himself.

**3. Witnesses**

For the Respondent:

Mrs Ann Carroll and Mr C Almeida

For the Applicant:

Himself

**4. Declaration**

- 4.1 The Adjudicator declared that she had come into contact with Mr Almeida as a customer of the Half Moon Café where he had previously worked but had not been aware of his surname until the day of the hearing. Both parties confirmed that there was no objection to her hearing the case.

## **5. Documents**

In addition to the Emprot 1 (Application Form) and Emprot 2 (Response Form), the following documents were produced:

- 5.1 The Respondent produced a bundle of documents: Bundle ER1 included statements by Mr John Carroll, Mrs Ann Carroll and Mr C Almeida, an Island FM radio advert, Mr P McKenzie's letter of resignation, a receipt from Mr P McKenzie in respect of his bonus payment, a reference dated 22 December 2005 concerning Mr P McKenzie from Mr John Carroll, a White Rock Café Staff Contract and sample signatures for Mr and Mrs Carroll from NatWest. Bundle ER2 contained a Management Agreement between John Patrick Carroll and Peter George McKenzie.
- 5.2 The Applicant produced a bundle of documents: Bundle EE1 included a statement from Mr McKenzie, a letter dated 25 November 2002 from Advocate L Le R Strappini to Mr P G McKenzie enclosing a draft Management Agreement between John Patrick Carroll and Peter George McKenzie, a letter dated 15 January 2004 from Willow Fiduciaries to Mr and Mrs Carroll, a letter dated 13 February 2004 from Willow Fiduciaries to Mr P McKenzie, a reference concerning Mr Peter McKenzie dated 22 December 2005 from White Rock Café Ltd.

## **6. Findings of Fact**

- 6.1 The Applicant commenced employment for the Respondent in 1999 as a Chef / Manager.
- 6.2 On 26 November 2002, Mr John Carroll, owner, proprietor and manager of the White Rock Café, and the Applicant entered into a Management Agreement whereby the Applicant agreed to manage the business for a minimum of six months and a maximum of eight months in any twelve month period, such periods being determined by Mr Carroll, in return for an equal share of the profits.
- 6.3 A written statement of the terms and conditions of the Applicant's employment was in existence with an issue date of 26 June 2005. The document was unsigned.
- 6.4 The Applicant was paid on a weekly basis.
- 6.5 The Applicant signed a letter of resignation dated 3 December 2005, providing three weeks' notice ending on Friday, 23 December 2005. This letter also confirmed that a £2,500 payment was to be provided to him representing the balance of his agreed £5,000 bonus, the other half of which had been paid to him in November 2005.
- 6.6 The Applicant worked two weeks' notice and was paid in lieu of notice, on 19 December 2005, for the remaining period.

- 6.7 The Applicant's employment was deemed to have terminated on 19 December 2005.

**7. Respondent's Submission**

- 7.1 Mr Carroll had been the proprietor of the White Rock Café for the past nine years.
- 7.2 He and the Applicant had had a good working relationship for nearly seven years and while he was away for two six-month periods the Applicant had run the café for him, under the terms of a management agreement.
- 7.3 A draft management agreement had originally been drawn up at the end of 2002, by Advocate Strappini, but this remained unsigned as a number of loopholes had been identified and there was insufficient time to finalise the document prior to Mr and Mrs Carroll's forthcoming period of absence from the island.
- 7.4 Instead, a revised agreement was modelled on Advocate Strappini's draft by Mr Venn, the Respondent's accountant, and signed by Mr Carroll and Mr McKenzie.
- 7.5 Mr McKenzie ran the White Rock Café for Mr Carroll whilst he and his wife were out of the island for extended periods of time in 2003 and 2004 and, in return, Mr McKenzie received bonuses of £25,000 and £15,000 respectively and was provided with two three-month periods of paid leave upon their return.
- 7.6 As Mr McKenzie's partner, Miss Roberts, had been assisting him in the running of the café, it was agreed between Mr Carroll and Mr McKenzie that she would also receive a share of the profits for 2004 and she subsequently received £10,000.
- 7.7 In April 2004, Mr and Mrs Carroll decided for family reasons that they needed to stay in Guernsey and run the café and Mr McKenzie was advised that they would not be taking extended periods of absence during 2005.
- 7.8 As a result, during 2005 Mr McKenzie undertook a five-day week, without management responsibilities and under the terms of the agreement the bonus of 50% of the profits was no longer due to him.
- 7.9 During 2005, Mr Carroll issued new contracts to all members of staff, including Mr McKenzie. Mr McKenzie returned the new contract the following day unsigned saying that, as he still had the one from Advocate Strappini, he didn't need a new contract and if anything happened he wouldn't go running to the States.
- 7.10 Mr Carroll advised Mr McKenzie that the old contract was no longer applicable as he and his wife were not leaving the island for extended periods any more. Mr McKenzie confirmed that he understood that.

- 7.11 Mrs Carroll gave evidence, stating that, on 1 December 2005, she had spoken to Mr McKenzie at the café to advise him that she and her husband would be away for a week visiting her husband's elderly mother; she asked Mr McKenzie to come to her home, together with his partner Miss Roberts, to discuss Christmas opening hours with Mr Carroll, who was recuperating from an operation. Mr McKenzie said he thought the café wouldn't be opening during the Christmas week and, on Mrs Carroll's return to the café to take the wages, Miss Roberts advised Mrs Carroll that she and Mr McKenzie would not be visiting her home to discuss Christmas opening hours, as they were too annoyed.
- 7.12 As a result of this, Mr Carroll visited the café the following day to speak with Mr McKenzie about Christmas opening hours, but as Mr McKenzie wouldn't acknowledge him, he asked Miss Roberts what the problem was.
- 7.13 When Miss Roberts said they were unhappy about having to work at Christmas, Mr Carroll said they were always open during the Christmas period, excluding the bank holidays, the rest of the staff were working and she and Mr McKenzie had to work during that time.
- 7.14 Mr Carroll gave them the option of working the same hours as the rest of the staff or he would have to have their resignations. He said that perhaps she and Mr McKenzie wanted to leave and, if that were the case, he would still pay them a bonus.
- 7.15 Miss Roberts spoke with Mr McKenzie before coming back to Mr Carroll saying they would take the money.
- 7.16 Mr Carroll then asked if Mr McKenzie was giving three or four weeks' notice, to which he replied, in abusive terms, on two occasions, that he didn't care what notice he gave, before eventually agreeing to give three weeks' notice.
- 7.17 When asked by Mr Carroll for his resignation in writing, he replied, "You write it. I'll sign it." As a result of this, Mrs Carroll drafted a resignation letter and gave it to him on Saturday 3 December.
- 7.18 No pressure was put on Mr McKenzie to sign the document and it was returned signed to Mr Carroll on Sunday 4 December. Mr Carroll gave him his bonus cheque that day.
- 7.19 Mr McKenzie made no attempt to discuss the situation with Mr Carroll whilst he was working his notice or ask for any written explanation. He did not communicate at all with Mr Carroll even when they were working together in the café but he appeared happy when talking with the staff and customers.
- 7.20 Mr McKenzie worked two weeks of his notice but, as a result of approaches from the staff, who were finding it difficult to work within the strained atmosphere, Mr Carroll advised Mr McKenzie that under the circumstances he would pay him in lieu of his last week's notice; Mr McKenzie responded angrily in no uncertain terms that he didn't need the money and told him what he could do with it.

- 7.21 Mr Almeida gave evidence confirming that he had known Mr Carroll for nine years. He had been working for him for 18 months and during that time he had not been threatened, he had been treated fairly and he found him to be a good boss. On 16 December 2005, he heard Mr Carroll have a conversation with Mr McKenzie and he heard Mr McKenzie's reply, which he confirmed to be as reflected in 7.20 above.
- 7.22 Miss Roberts requested a reference for Mr McKenzie on his behalf and this was willingly provided by Mr Carroll.
- 7.23 Mr Carroll had told Mr McKenzie that, as an alternative to taking the Christmas 2005 period, he could take the whole of January 2006 as holiday.
- 7.24 Mr McKenzie was always well paid for his work, had three months' paid holiday on Mr Carroll's return from extended periods of absence as well as his annual leave and generous bonuses.

## **8. Applicant's Submission**

- 8.1 Mr McKenzie had worked at the White Rock Café for some six and a half years, working five days per week when Mr and Mrs Carroll were on the island and seven days a week when they were on holiday.
- 8.2 At the end of 2002, Mr McKenzie agreed to enter into a Management Agreement with Mr Carroll whereby he would run the café, whilst Mr Carroll took extended breaks, in return for 50% of the profits.
- 8.3 Mr McKenzie stressed that he had been advised by his Advocate not to sign the original draft agreement drawn up by Advocate Strappini, as it was all stacked in Mr Carroll's favour; that is why he didn't sign it, but he did sign the agreed version prepared by Mr Venn.
- 8.4 In 2003 and 2004, whilst Mr Carroll took periods of extended leave, Mr McKenzie worked seven days per week running the café, which also involved preparing staff rosters, ordering, banking and cheque signing. During this time, Mr Carroll was in contact with Mr McKenzie by telephone from time to time.
- 8.5 Mr McKenzie received bonuses of £25,000 in October 2003 and £15,000 in October 2004 respectively and, in both years, Mr McKenzie was given three months' paid holiday upon Mr Carroll's return.
- 8.6 During the latter part of 2003, before Mr Carroll was about to take a period of extended absence, it was agreed between Mr Carroll and Mr McKenzie that Mr McKenzie's partner, Miss Roberts, would also receive a bonus for assisting with the running of the café. It was also agreed that Miss Roberts would work on Mondays to allow him one day off a week, as it was too tiring for him to work for seven days (without a break). In 2004, Miss Roberts received £10,000.

- 8.7 Mr McKenzie did not think that these figures were representative of the actual profit figure as he considered that the White Rock Café made more than £80,000 profit per annum.
- 8.8 In 2005, Mr Carroll told Mr McKenzie that he found it difficult to run the café on his own during the periods when Mr McKenzie and Miss Roberts weren't there and it was agreed that Mr McKenzie would spread his holiday over the course of the year, taking a few weeks at a time.
- 8.9 Upon Mr McKenzie's return from an initial period of two weeks' holiday, Mr Carroll advised him and Miss Roberts that 2005 would be the last year that Miss Roberts would receive a £10,000 bonus, as in 2006 he would not be going away for long periods of time and it would only be Mr McKenzie and he sharing the profits. Miss Roberts agreed to this and also that she would go back to working normal hours and receiving her normal hourly rate.
- 8.10 Mr Carroll said he would be opening the café in the evenings and had promised Mr Almeida a job, whereas in Mr McKenzie's opinion it was not worthwhile opening at this time because it was a workmen's café and it was already overstaffed.
- 8.11 In August 2005, Mr Carroll told Mr McKenzie that he hadn't realised Mr Almeida had booked holiday for three weeks to return to Portugal and he (Mr Carroll) couldn't work from 6 am to 8 pm if Mr McKenzie was also on holiday. Even though Mr McKenzie had booked two weeks holiday, he said he would delay taking his time off until Mr Almeida returned, but was annoyed about it.
- 8.12 When Mr McKenzie returned from taking two weeks' holiday, Mr Carroll told him that he and his wife were going on a cruise at the end of October/ beginning of November and Mr McKenzie would be able to take more time off upon their return. He did not recall Mr Carroll saying he could take the whole of January 2006 as holiday.
- 8.13 Mr McKenzie ran the café in their absence but was unable to take holiday upon their return as Mr Carroll said they were going to the UK to see his mother for her 80<sup>th</sup> birthday.
- 8.14 He considered that during 2005, Mr Carroll had a quarter of the year off and when Mrs Carroll was on the island she had only assisted by preparing the wages for the staff.
- 8.15 Whilst Mr Carroll was away, customers told Mr McKenzie that they had heard on Island FM that the café would be closed over Christmas and asked him if this was correct but, as Mr McKenzie didn't know anything about it, he couldn't confirm whether this was the case.
- 8.16 During 2005, Mr Carroll provided him with a contract, which he returned unsigned because it was not what had been agreed between them.

- 8.17 On 2 December 2005, Mrs Carroll queried a holiday entry on the calendar with Miss Roberts, which noted that she and Mr McKenzie were planning to go to Southampton; Mrs Carroll said they could not have the time off together and also that they would not be getting the bonus they expected, because the business couldn't afford it. She also said that Mr Carroll wanted them to go to the Carroll's house to discuss Christmas opening hours.
- 8.18 When Mr McKenzie asked Mrs Carroll about their week off, she said he could have his holiday next year, as she and Mr Carroll were going to Mr Carroll's mother for Christmas. At this point Mr McKenzie became very angry and said he would not be speaking with Mr Carroll that day, although Miss Roberts said they would go the following Monday or Tuesday to discuss this with them.
- 8.19 Mr McKenzie had worked every Christmas since he'd been working at the café and during the two previous Christmas periods Mr and Mrs Carroll had not been on the island. In 2005, Mr McKenzie spoke to Mr and Mrs Carroll and told them if they looked at the takings between Christmas and New Year, it was not financially viable for them to open at that time and suggested it might be better to close that week and give everyone a week's holiday. They indicated at the time to Mr McKenzie that he was probably right and would give this some consideration.
- 8.20 Mr McKenzie stated that he did not give in his notice and would still be willingly working at the café but Mr Carroll's attitude on 2 December had been totally out of order. He only signed the letter so that he wouldn't lose his £5,000 bonus and thought he would take advice afterwards.
- 8.21 Mr McKenzie did not speak with Mr Carroll for two weeks because he could not believe that he could treat him with such disrespect after everything he had done for him.
- 8.22 On 16 December Mr Carroll came into the café and asked the kitchen porter to note the Christmas opening hours on the blackboard as well as noting that the café would close in the evenings from 19 December until further notice. He then said to Mr McKenzie that it would be better under the circumstances for him to finish on Friday 16<sup>th</sup> December although he would pay him up until 23 December. Mr McKenzie admitted that he had been abusive to Mr Carroll by telling him what to do with his week's money, had given him the café keys and left.
- 8.23 In 2003 and 2004 Mr McKenzie had received his bonus in October, whereas in 2005 he had been asked to wait until December for his bonus. Mr McKenzie thought Mr Carroll had purposely delayed the bonus payment so that he would cover the period when they were away for the cruise and his mother's 80<sup>th</sup> birthday visit. Had he known beforehand that he was only getting £5,000 he would have taken the money and left earlier.

- 8.24 He also felt that when Mr Carroll employed Mr Almeida, and a Latvian girl, he knew he was going to get rid of him and his partner because they were the two highest earners and Mr Carroll had always stated that if any staff wanted to leave he'd replace them with Portuguese or Latvian staff, because they were cheaper.
- 8.25 He considered that Mr Carroll lacked management skills and had sent his wife to pass on information rather than do it himself.
- 8.26 Mr Carroll and he had had an agreement that as he wasn't going away for long periods at a time, he would get the same time off as him.

## **9. Conclusion**

- 9.1 It is my responsibility to decide whether Mr McKenzie resigned or was dismissed and if he was dismissed, whether such dismissal was fair or unfair.
- 9.2 In dealing with this claim I have taken into consideration Section 5(2)(c) of the Law which states: "An employee shall be treated as dismissed by his employer if, but only if, the employee terminates that contract, with or without reasonable notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."
- 9.3 In order to claim constructive dismissal, the employee must establish:
- that there was a fundamental breach of contract on the part of the employer
  - that the employer's breach caused the employee to resign
  - that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
- 9.4 The act by the employer provoking the employee's resignation must be a serious one, not simply something which the employee finds inconvenient or even unreasonable. The employer must also be guilty of conduct that is significant and goes to the root of the employee's contract. The resignation must also be in response to that breach.
- 9.5 Mr McKenzie and Mr Carroll had had a good working relationship and, during his period of employment, Mr McKenzie had been happy working at the White Rock Café. He had indicated, by signature, his acceptance of the terms of the management agreement and had received bonus payments and additional paid leave in return for his additional work. He had worked hard but had been well rewarded in return.
- 9.6 No evidence was presented by Mr McKenzie to suggest that there had been any past disagreement between him and Mr Carroll in connection with any aspect of his employment, financial or otherwise prior to 2 December 2005.

- 9.7 It was usual practice for the café to open during the Christmas period, excluding bank holidays, and the Applicant had worked the two previous Christmas periods. Whilst Mr McKenzie had previously suggested that it might be better for Mr Carroll to close the café during the forthcoming Christmas period, no such decision had been made.
- 9.8 Mr Carroll made an attempt to discuss Christmas opening hours with Mr McKenzie but Mr McKenzie chose not to enter into any discussion with him on the subject at the time it was raised nor at any time whilst working his notice period.
- 9.9 Whilst being told that Mr McKenzie had been annoyed at having to work over the Christmas period and could not take holiday with his partner, I do not consider this sufficient to constitute a fundamental breach of contract on the part of the employer.
- 9.10 Mr McKenzie appeared to be under the impression that the terms of the management agreement still existed but did not provide any evidence to this effect.
- 9.11 Mr Carroll provided Mr McKenzie with a bonus payment even though there did not appear to be any contractual obligation to do so.
- 9.12 Mr McKenzie admitted that he had asked for a letter of resignation to be prepared for his signature, he had time to consider his actions before giving Mr Carroll his signed letter and had not been coerced into signing.
- 9.13 I consider that Mr McKenzie, annoyed at the disruption to his leave plans, overreacted in the circumstances by resigning from his position.
- 9.14 He may have been angry at the time but he had every opportunity to speak with Mr Carroll to discuss the situation and retract his resignation but he chose not to speak with him at all, thereby indicating his acceptance of the situation.

## **10. Decision**

- 10.1 In light of the evidence presented before me and having due regard to all the circumstances, I find that the claim for unfair dismissal is unfounded and I make no award. I also find that the claim for failure to provide a written statement of the reason for the dismissal is unfounded and make no award.

Signature of Adjudicator:

**Mrs T. J. Le Poidevin**

Date:

21 March 2006