

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: *Mr Peter Gambier*

RESPONDENT: *Eaton Place Investments Limited*

Represented by: *Mr Ondrej Faborsky*

Witnesses:

Called by the Respondent:

Mr Graham King
Mr Leslie Simon
Mr Paul Newman

Decision of the Tribunal Hearing held on 13 November 2009.

Tribunal Members: Mr Peter Woodward (Chairman)
Mrs Tina Le Poidevin
Mr Roger Brookfield

DECISION

Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of The Employment Protection (Guernsey) Law, 1998, as amended, that the Applicant was unfairly dismissed.

An award of £10,920 is ordered, such figure being determined by reference to the Applicant's average monthly pay during his final six months' employment with the Respondent.

Amount of Award (if applicable): £10,920.00

Mr P Woodward

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Signature of the Chairman

4 December 2009

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Date

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

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

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Mr Peter Gambier represented himself and gave both oral and documentary evidence. (EE1 Refers).
- 1.2 The Respondent, Eaton Place Investments Limited, was represented by Mr Ondrej Faborsky who gave both oral and documentary evidence. (ER1 refers).

Mr Faborsky called the following witnesses:-

- Mr Graham King
- Mr Leslie Simon
- Mr Paul Newman

- 1.3. At the outset of the hearing the parties confirmed that:-
- 1.3.1 The effective date of termination was 30 January 2009.
- 1.3.2 The salary paid in the six month period leading up to the effective date of termination as stated in the Applicant's ET1 was agreed by the Respondent.
- 1.4 The Applicant claimed he had been unfairly dismissed, that he was not redundant as claimed by the Respondent. He believed he had been dismissed because he had taken a period of sick leave earlier in January 2009.
- 1.5 The Respondent admitted that there had been a dismissal but claimed in his ET2 submission that it was a fair redundancy. There was a diminution in the kind of work undertaken by the Applicant and the Respondent needed to reduce the number of painters and decorators in its employment.
- 1.6 It should be noted that Mr Roger Brookfield stepped in at short notice as a member of the Tribunal Panel, both parties accepted that they were content with this change in the Tribunal's composition and that there were no significant issues of conflict.

2.0 Facts Found

- 2.1 Eaton Place Investments is a limited company which purchases, refurbishes and then subsequently lets properties. The refurbishment is achieved by the use of a small team of employees and the use of extra sub-contract services as required.

- 2.2 On 16 November 2006 the Guernsey Fire & Rescue Service issued a report on a property owned by Eaton Place Investments, namely 33 George Street in St Peter Port. This letter detailed numerous required works that would be needed to bring this building into conformance with current fire regulations including fire separation barriers, new fire-resistant doors and various alert / alarm systems. (ER1 refers).
- 2.3 On 8 January 2007 the Applicant commenced employment with the Respondent, his duties were to be as a painter and to conduct general maintenance. He was assigned to work on the George Street property; initially clearing out furniture, conducting some routine painting and generally preparing the building for further refurbishment.
- 2.4 A few months later a Mr McLean was also employed to work on the property and took the role of lead hand in undertaking the various tasks that were required. These tasks included a fundamental stripping out of party walls, floors etc. and the replacement of these with new materials.
- 2.5 Mr Gambier continued working on the George Street property until December 2007 when he contracted pneumonia which necessitated a significant time off work to achieve recovery. He was not fit to return to work until January 2008 and then an attack of acute bronchitis resulted in the need for further medically certificated leave.
- 2.6 Late in February 2008 Mr Gambier was certified as fit for work and returned to the George Street property. He was told that a "Stop Notice" had been applied by the relevant States building authority, and that no further work could be carried out, either by him or his colleague, Mr McLean. In consequence Mr Gambier was re-assigned to other duties including working on an adjacent property. This was a flat that required replacement floorboards, significant refurbishment and the provision of a new kitchen etc.
- 2.7 The Respondent then undertook the tasks of having the new plans drawn up together with all necessary steps to satisfy the requirements of the "Stop Notice".
- 2.8 In October 2008 Mr McLean left the Respondent's employment.
- 2.9 By November 2008 sufficient progress had been made with the authorisation of new plans for 33 George Street so that the Respondent was in the position to assess the required works to be undertaken. The Respondent consulted a number of subcontractors. In the event "T and G Décor" made a successful bid in December 2008. This bid did not envisage Mr Gambier being part of the team to undertake this work in 2009.
- 2.10 Mr Gambier was signed off as medically unfit to work for two weeks on 12 January 2009. He continued to receive his wages on a weekly basis in accordance with his employment contract.
- 2.11 On 23 January 2009 Mr Gambier received his wages via a colleague. Enclosed with his payslip was a letter of the same date which notified him that he had been made redundant with effect from 30 January 2009. The letter stated that he had been taken on originally to work on the 33 George Street property and that this project had now been given to "T and G Decor" on a contract basis. The letter further stated

that Mr Gambier should recall he had several months off at the end of 2007 with pneumonia and that he had been off on sick leave for nearly the whole of January 2009.

3.0 Mr Ondrej Faborsky

3.1 Mr Faborsky confirmed that at the beginning of 2009 he employed the following staff:-

- Serge Russo - full time painter and decorator
- Barry Wickenden - full time caretaker and foreman
- Peter Gambier - full time painter and general maintenance
- Frank Sweet - part time car park cleaner, gardener and external decorator
- John Finnegan - part time semi-retired professional carpenter
- Lindsay Wickenden - part time secretary and general administrator

3.2 The Respondent also gave evidence that a new employee joined his employment immediately after the 30 January 2009 with a primary role to lay carpets in multiple residences.

3.3 Mr Faborsky expressed his dissatisfaction with some of Mr Gambier's behaviour at work. He alleged that Mrs Fletcher, one of his tenants, had observed Mr Gambier taking unauthorised breaks from his work. (ER1 refers). He also believed, on the basis of advice from Mr Leslie Simon (a person who Mr Faborsky regarded as 'his eyes and ears'), that Mr Gambier was drinking routinely on his lunch breaks and had used a company vehicle to drive to a pub. However, in response to questions from the Tribunal he agreed that he had not taken any formal action over these alleged events.

3.4 Mr Faborsky informed the Tribunal that once Mr McLean joined his employment in early 2008 he was placed in charge of the work being undertaken at 33 George Street. Mr Gambier worked under his authority and when he visited the property the Respondent normally spoke only to Mr McLean.

3.5 Extensive refurbishments were made to the property including new floors, sound proofing and other substantial works. The building was old and required very significant upgrading.

3.6 Mr Faborsky was very critical of the work undertaken by Mr McLean and Mr Gambier at 33 George Street although he did state that there had been confusion within the relevant States of Guernsey Authorities over building standards on such subjects as proper standards for soundproofing.

3.7 Following the application of the Stop Notice and the subsequent consultations with architects and surveyors, it became clear to Mr Faborsky that the work that would be need to be undertaken could only be carried out by skilled and qualified trades-people with long experience in plumbing, carpentry and similar. Mr Gambier was not qualified in any of these trades. As a result the kind of work that Mr Gambier was capable of had significantly diminished. The only alternative suitable work for the Applicant in 2008 involved the refurbishment of a flat adjacent to the George Street property.

- 3.8 Mr Faborsky informed the Tribunal that his company experienced significant financial pressures during the period from the end of December 2008 into January 2009 and that in December 2008 he had already made a member of his office staff redundant. Cash flow was in a parlous state and he was required to take action to reduce the operating costs of the company.
- 3.9 Mr Faborsky criticised Mr Gambier for not producing sick notes for the period 12 January 2009 to 23 January 2009; although the Tribunal notes that he continued to pay Mr Gambier his wages. The Tribunal also notes that Mr Gambier gave a conflicting version of events having stated that he had obtained a sick note promptly and sent it to Mr Faborsky via a work colleague.
- 3.10 Mr Faborsky confirmed that he had no prior discussions with Mr Gambier as to a potential redundancy and that he only communicated the redundancy notice via the letter included with Mr Gambier's payslip. In his opinion, Mr Gambier should have known the financial challenges facing the company and that redundancy would not have been a surprise.

4.0 Mr Graham Stuart King

- 4.1 The witness was a member of a two man sub-contracting team, "T and G Décor", who submitted a successful quotation to the Respondent to carry out the work on 33 George Street required in 2009, in accordance with building authority requirements. Their quotation was approved in December 2008. The Tribunal noted that Mr King had some 35 years' experience as a qualified tradesman.
- 4.2 The witness was very critical of the work undertaken by Mr McLean and Mr Gambier. He stated that all the studwork would need to be renewed, new sound-proofing materials would be needed and all the floors taken up and replaced. In short the building would have to be taken back to a shell and internally rebuilt.
- 4.3 Mr King confirmed the work could only be undertaken by qualified trade's people and would not require general labourers.
- 4.4 Mr King did not remember any specific discussion with Mr Faborsky as to the retention of Mr Gambier or his specific suitability to undertake work on 33 George Street.

5.0 Mr Paul Newman

- 5.1 Whilst not a partner of "T and G Décor" in a business capacity, Mr Newman partnered Mr King from time to time, and did so on the work on 33 George Street. Mr Newman had a similar length of experience to Mr King and specialised in carpentry.
- 5.2 Mr Newman corroborated the evidence given by Mr King as to the state of 33 George Street and the fundamental work needed to comply with building regulations.

- 5.3 As with Mr King, he did not remember any discussions as to the possible use of Mr Gambier on the project in 2009, however, he could not foresee a requirement for an unqualified labourer.

6.0 Mr Leslie Simon

- 6.1 Mr Simon had been in the employ of the Respondent for some 30 years and gave general assistance to Mr Faborsky.
- 6.2 Mr Simon gave evidence that he observed Mr Gambier regularly going to a pub around lunch time. However, as he did not enter the pub on any of these occasions he could not confirm if Mr Gambier had consumed alcohol.
- 6.3 The witness was asked if he could assist the Tribunal with any information relating to the work carried out by Mr Gambier but stated he visited the George Street property infrequently. He knew of no specific concerns over the quality of work conducted by Mr Gambier.

7.0 Mr Peter Gambier

- 7.1 Mr Gambier informed the Tribunal that he was not a qualified tradesperson and that when he joined Eaton Place Investments Limited he was taken on as a maintenance man and painter. He gave evidence that he undertook a number of labouring roles for the Respondent including stripping out furniture and fittings from flats that required refurbishment.
- 7.2 The Applicant confirmed that he worked under the direction of Mr McLean at 33 George Street and did not normally have any contact with Mr Faborsky. He was not aware that there were any quality issues with the work being undertaken at the property and he stated that he was not qualified to judge these issues.
- 7.3 Mr Gambier confirmed the certified absences from work as recorded by Mr Faborsky and included in ER1. It was his firm opinion that he had complied with the sickness reporting rules in the period 12 January 2009 to 23 January 2009.
- 7.4 The Applicant refuted any allegations that he had malingered on the job and taken unauthorised breaks. He was also not in agreement with Mr Simon that he regularly went to the pub and stated that it was very rare that he left the work site at lunchtime. He stated that his working hours were 40 per week and that he had worked every one of those 40 hours other than when he was off sick. He also stated that he was assigned to work in a number of his employer's properties in 2008 and that Mr Faborsky was incorrect when he stated otherwise.
- 7.5 Mr Gambier agreed that some months prior to this dismissal there had been a week in which wages had not been paid. However, this problem was rectified the following week and he was not aware of any major financial issues for the Respondent at the end of 2008 and into January 2009.
- 7.6 He confirmed that, having been certified as fit for work after the 23 January 2009, he returned to work and worked one week's notice prior to leaving the Respondent on 30 January 2009. During that period he had no contact with Mr Faborsky.

- 7.7 The Tribunal asked the Applicant whether he sought out the Respondent to challenge the redundancy decision, he stated that he had not made any attempt to do this as he assumed that it was a firm decision and that it could not be reversed.

8.0 The Law/Code of Practice

- 8.1 The Tribunal considered the complaint under The Employment Protection (Guernsey) Law, 1998, as amended, and with particular reference to Sections 6(2) c relating to redundancy and 6(3) which states “*..the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including size and administrative resources of an employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case*”

- 8.2 Whilst not legally binding, the Tribunal may take into account the “Code of Practice on Handling Redundancy” which indicates principles to be observed including:-

- prior consultation well before a decision is made
- a fair and objective basis for redundancy selection and
- taking all reasonable steps to avoid or minimise redundancy

9.0 Closing statements

Mr Ondrej Faborsky

- 9.1 In summary for the Respondent Mr Faborsky stated that the company needed financing for 33 George Street and there was an overall need to lower its financial outgoings throughout the company.
- 9.2 The Applicant was not the only person made redundant in this period and that an office worker had been laid off in the previous month, December 2008.
- 9.3 The evidence was clear that Mr Gambier was taken on for dedicated employment at 33 George Street and when any prospect of his remaining on the project was no longer possible, the opportunities within his company for an unskilled person were greatly reduced. As a result it was necessary to make Mr Gambier redundant.

Mr Peter Gambier

- 9.4 Mr Gambier believed he had worked hard for the Respondent and that any criticism of work that he had undertaken was unfair.
- 9.5 It was his firm opinion that the only reason he had been made redundant was that he had had periods of sick leave.

10.0 Conclusions

- 10.1 The Tribunal is conscious that Eaton Place Investments Limited is not a large company, does not possess any Human Resource specialists and it is unreasonable to expect the company to undertake a very sophisticated process prior to making an employee redundant. However, judged by even the minimum guidelines indicated in the Commerce & Employment Code of Practice, and also judged by the standards of what is a fair and reasonable process for a small employer when an individual is made redundant, the Tribunal has significant concerns. The Tribunal reminds the parties that it is not the role of the Tribunal to substitute what actions it might have taken, rather it is the role of the Tribunal to consider what a fair and reasonable employer of a similar size and with limited resources would have done in relation to making the Applicant redundant.
- 10.2 The Respondent has offered differing reasons for this redundancy on different occasions. In the redundancy letter sent to the Applicant the reason for the redundancy would seem to be due to there no longer being a requirement for him to work on 33 George Street. However, this same letter refers to past periods of certificated sickness. It would not be unreasonable for the Applicant to consider he had been dismissed due to this certified sickness. Turning to the ET2 the Respondent makes no mention of his periods of sickness and states that the reason for selection for redundancy was that Mr Gambier was the last person to be employed as a painter and decorator in the company.
- 10.3 During the hearing the Respondent gave significant evidence as to the inadequacy of work done at 33 George Street with the implication that Mr Gambier had not performed his role correctly. On investigation the Tribunal could not find any evidence that blame or culpability should be applied to the Applicant. It would seem that the reasons for the "Stop Notice" being applied to the work being undertaken at 33 George Street were down to decisions by other members of the company.
- 10.4 The Respondent also chose to allege that the Applicant had been regularly drinking during his lunchtime and had driven a company vehicle whilst under the influence of alcohol. Again, on investigation, the Tribunal heard no evidence to support these allegations and is left with the impression that these arguments were used to persuade the Tribunal that the employee was not a hard working and diligent employee. It would seem to the Tribunal that, on the basis of evidence given, the Applicant was hard-working and diligent whilst in the Respondent's employment. The Tribunal also prefers the evidence of the Applicant in that he worked on other properties belonging to the Respondent in 2008; this runs counter to the argument put forward by the Respondent that Mr Gambier was hired solely for the George Street project.
- 10.5 The Tribunal draws the conclusion that the Respondent was prepared to alter the rationale for his decision several times to try to justify the decision for redundancy.
- 10.6 The Respondent made no effort to consult with the Applicant prior to the redundancy decision; neither did the Respondent demonstrate the actions of a fair and reasonable employer by personally communicating the decision and explaining the rationale for it. Indeed the decision was communicated in a letter included with a wage slip.

- 10.7 The Respondent offered no appeal to this decision and Mr Gambier was left to take the consequences.
- 10.8 The Tribunal does accept that the Respondent was subject to financial problems during the period late 2008 into early 2009. This does not excuse the need for a fair and reasonable employer to firstly demonstrate that he took all reasonable actions to avoid redundancy and secondly to consult with an affected employee prior to the redundancy. A reasonable employer would seem to have the obligation to communicate a fair, reasonable and consistent rationale for such a decision and finally should communicate the decision in person; in this case none of this occurred.
- 10.9 It should be noted that the Tribunal does accept that in hiring an experienced carpet layer immediately after the dismissal of the Applicant the Respondent did recruit an individual with significantly different skills from that of the Applicant and accepts that this appointment was not a "like for like" substitution for the Applicant.
- 10.10 From the evidence the Tribunal draws the conclusion that the dismissal was due to the Respondent's view of the Applicant's sickness record rather than a reasoned, evidenced and openly justified diminution of the type of work undertaken by Mr Gambier.

11.0 Decision

- 11.1 Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of The Employment Protection (Guernsey) Law, 1998 as amended, that the Applicant was unfairly dismissed.
- 11.2 The Tribunal awards £10,920.00 and, having considered if this award merits any reduction, finds no reason to apply such a reduction.

Mr P Woodward

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Signature of the Chairman

4 December 2009

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Date