

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr David Hutchinson

RESPONDENT: Mr Darrell Masterton, T/A Drives +

Decision of the Tribunal Hearing held on 21 August 2008.

**Tribunal Members: Mrs Tina Le Poidevin
Mr John Guilbert
Mr Steven White**

UNANIMOUS DECISION

1. Based on the evidence presented, the Tribunal found, under the provisions of The Employment Protection (Guernsey) Law, 1998, as amended, that the Applicant, Mr David Hutchinson, was unfairly dismissed on 27 April 2008.
2. Under Section 22(1)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, the Respondent shall pay to the Applicant an award of £10,364.00, this being the equivalent of six months' pay as determined by the Tribunal.
3. In relation to the Respondent's claim that the written reasons for dismissal were inadequate or untrue, the Tribunal upholds this claim and awards a further payment of £797.23, being the equivalent of two weeks' pay.
4. The claim of non-payment in lieu of two weeks' notice is a breach of contract issue which cannot be dealt with by this Tribunal.

Mrs T Le Poidevin
Signature of the Chairperson

29 August 2008
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
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 are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF

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

Extended Reasons

1. Introduction

The Applicant was not present at the Hearing, despite being made aware of the Hearing details in writing by the Secretary to the Tribunal. Numerous attempts were made to make telephone contact with the Applicant, to no avail.

The Tribunal Panel made the decision to go ahead with the Hearing, stating that their decision would be made on the basis of the written evidence supplied by the Applicant and on both the written and verbal evidence of the Respondent.

1.1 In his written Application form (ET1), the Applicant claimed that:

- a) He was employed by the Respondent as a labourer from 6 May 2005 until 27 April 2008.
- b) He had been unfairly dismissed by the Respondent by virtue of a telephone call received by him whilst at his home on the morning of Sunday 27 April 2008. During this telephone call, the Respondent had told him that he was going to lay him off because of an incident involving the Respondent and the Applicant's fiancée's brother-in-law the night before, but that if his fiancée's brother-in-law apologised, the Respondent would reinstate his job.
- c) He had not received payment in lieu of two weeks' notice.
- d) He further claimed that the reasons for dismissal provided by the Respondent were inadequate or untrue.

1.2 The Respondent disputed the claims on the grounds that:

- a) The Applicant had repeatedly ignored his requests to wear protective clothing for health and safety reasons.
- b) The Applicant did not hold a driving licence.
- c) The Applicant was not courteous in his request for time off work.

1.3 The Respondent appeared in person and gave evidence on his own behalf.

1.4 No further witnesses were called in person on behalf of the Respondent.

1.5 The Respondent submitted a written witness statement from Mr Len Harvey, which related to events after the dismissal, consequently, it was disregarded by the Tribunal.

1.6 The following documents were submitted:

On behalf of the Applicant:

Form ET1 (Application Form) from the Applicant

On behalf of the Respondent:

Form ET2 (Response Form) which attached: a letter, dated 13 May 2008, from the Respondent, to Commerce and Employment, giving reasons why he wished to contest the claim made by the Applicant; an undated letter entitled "RE: Redundancy" from the Respondent to Miss K A Brehaut, noting his reasons for dismissing the Applicant; and an undated statement noting that the letter giving reasons for dismissal had been delivered to the Applicant on 28 May 2008, the Tribunal have noted that there appears to be some confusion over dates contained in the paperwork.

A document bundle marked ER1 was also presented in evidence. This bundle included:

- a further copy of the letter dated 13 May 2008 from the Respondent to Commerce and Employment; a letter, dated 27 June 2008, from the Respondent to Mrs Airley, at Commerce and Employment, noting the reason for dismissal as misconduct;
- an undated letter, from the Respondent to the Applicant, c/o Miss K A Brehaut, setting out reasons for dismissing the Applicant, but with additional text added to a similar letter attached to the ET2;
- a letter dated 28 April 2008, from the Applicant to the Respondent, in response to his letter, mentioned above, setting out the reasons for dismissal;
- a letter, dated 2 May 2008, from the Applicant to the Respondent requesting two weeks' pay in lieu of notice;
- a completed Social Security Unemployment Benefit questionnaire, dated 8 May 2008, from the Respondent to the Social Security Department;
- a note, dated 15 August 2008, detailing the Applicant's employment dates;
- a document entitled Terms and Conditions of Employment, dated 14 May 2005;
- a document, entitled "Further Incidents" dated 15 August 2008; and
- an undated witness statement from Len Harvey.

1.7 One of the Tribunal Panel members declared to the Respondent that he had had contact in the past with Mr Robin Hutchinson, the Applicant's brother, in his capacity as a football coach and asked if the Respondent had any objection to him being involved in the case. The Respondent did not object.

1.8 The Applicant's employment dates were discussed as the commencement dates varied between the ET1 and ET2 forms. It was subsequently established that the Applicant had worked for the Respondent on two separate occasions, the most recent of which commenced on 30 November 2005.

1.9 Details of the Applicant's remuneration for the last six months of his employment were undisputed at £10,364.00.

2. Facts Found by the Tribunal

- 2.1 The Respondent's business, Drives+, is a small business involved in the laying of block paving and excavation work for the laying of such items as electrical cabling and water pipes.
- 2.2 The Applicant initially worked for the Respondent as a Labourer from 16 May 2005 to 27 August 2005.
- 2.3 The Applicant signed a Terms and Conditions of Employment document dated 14 May 2005, noting hourly rates of pay, entitlement to holiday and sickness pay, transportation charges and other wage deductions in the event of loss/damage of items belonging to the Respondent and statutory deductions in respect of income tax and social security contributions.
- 2.4 The Respondent re-employed the Applicant in a similar capacity on 30 November 2005.
- 2.5 The Respondent was aware that the Applicant did not hold a driving licence when he employed him.
- 2.6 The Applicant's normal working day commenced at 7.30 am.
- 2.7 The Applicant was dismissed by the Respondent by telephone on Sunday 27 April 2008.
- 2.8 The statement of reasons for the dismissal noted the term "redundant" although the reasons cited related to misconduct.
- 2.9 At the time of the Applicant's dismissal the Respondent employed two staff including the Applicant.

3 The Law

- 3.1 The Applicant claims that he was unfairly dismissed by his employer. Section 5(2) of the Law notes that "an employee shall be treated as dismissed by his employer if, but only if

the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice;" 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 are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF

(a)

- 3.2 The Applicant claims that he was not provided with payment in lieu of two weeks' notice by the Respondent.

Section 1(1)(b) of the Law, states that "The notice required to be given by an employer to an employee, in order to terminate the contract of employment of the employee shall be not less than two weeks' notice, where the employee has been continuously employed for a period of two years or more but less than five years; and

Section 1(5) of the Law states that "A failure by an employer or employee to give the notice required by this section shall (subject to the provisions of subsection (2), and without prejudice to any other remedy of the parties) be deemed to be a breach of contract and actionable as such."

The claim of non-payment in lieu of two weeks' notice is a breach of contract issue which cannot be dealt with by this Tribunal.

3.3 The Respondent claims that he dismissed the Applicant on the grounds of his misconduct.

3.3.1 Section 6(2)(b) of the Law relates to dismissal relating to the conduct of the employee.

3.4 The Applicant claims that the written reasons for dismissal provided to him by the Respondent were inadequate or untrue.

3.4.1 Section 2(5) of the Law states that a complaint may be presented by an employee to the Employment and Discrimination Tribunal ("the Tribunal"), under section 16(b), that the employer unreasonably failed to provide, in accordance with the provisions of section 2, a written statement giving particulars of the reasons for his dismissal or that the particulars of reasons given in purported compliance with that section are inadequate or untrue; and

4 Summary of Parties' Main Submissions

4.1 During the Applicant's first period of employment from 16 May 2005 to 27 August 2005, the Respondent did not experience any problems with the Applicant's work performance or conduct.

4.2 During the course of the Applicant's second period of employment the Respondent was disqualified from driving and, as the Respondent's business was dependant upon the availability of transportation, he asked the Applicant to obtain a driving licence.

4.3 The Applicant did not wish to learn to drive and refused to do so.

4.4 The Respondent admitted that it was reasonable for the Applicant to refuse to obtain a driving licence.

4.5 The Respondent was left with no choice but to hire another employee who held a driving licence to ensure the continuation of his business.

4.6 The Respondent had always considered the Applicant to be a good employee, however, after employing a driver in late December 2007, the Respondent alleged that he started experiencing problems with the Applicant.

- 4.7 Despite being asked by the Respondent on numerous occasions, the Respondent alleged that the Applicant refused to wear protective gloves, glasses and ear defenders showing a total disregard for health and safety.
- 4.8 On one occasion the Respondent alleged that the Applicant appeared on site wearing only a pair of moccasin shoes when he should have worn steel toe-capped boots.
- 4.9 The Respondent began to consider the Applicant to be a liability and could not leave him on site on his own.
- 4.10 The Respondent stated that he hired all machinery for his employees but confirmed that he personally purchased protective gloves, glasses, ear defenders, safety helmets and visual jackets items for them. He did not purchase footwear but stressed that his workers wear them on site.
- 4.11 The Applicant alleged that he purchased and wore his own steel toe capped boots for work and, despite the supply of safety equipment being the responsibility of the Respondent, he had to constantly supply his own gloves.
- 4.12 The Respondent contested this allegation and produced in evidence copies of Norman Piette receipts for the purchase of gloves and glasses dating back to 2005. These were reviewed by the Tribunal Panel and returned to the Respondent.
- 4.13 The Respondent said he warned the Applicant, on approximately ten occasions during his employment, about his disregard for health and safety but he could not recall specific dates and did not make a record of these warnings.
- 4.14 The Respondent said he could only stress the importance of wearing safety equipment and could not physically put the safety equipment on the Applicant as this would constitute assault.
- 4.15 The Respondent did not at any time insist that the Applicant leave site if he was not wearing the appropriate safety attire.
- 4.16 The Respondent did recall one particular occasion when he had warned the Applicant to be particularly careful when digging a trench on a client's property as he could hit the electrical cables. On this occasion, the Applicant did not take him seriously and just laughed.
- 4.17 The Respondent's driver advised him on Wednesday 23 April 2008 that the Applicant was intending to take time off on Friday 25 April but the only direct approach the Respondent had from the Applicant in this respect was when he sent him a text at 6.50 am on Friday 25 April 2008 saying that he would not be at work as he had to babysit.
- 4.18 The Applicant stressed that the only reason that he had asked for time off at such short notice was because his fiancée's aunt, who was their usual babysitter, had died that morning; in addition, his fiancée was unable to look after the child, because she had had an operation on her foot.

- 4.19 The Respondent referred to an instance when the Applicant was about to leave site without permission with his fiancée and, rather than insist upon him staying, he told him he might as well go.
- 4.20 The Respondent said he had been very flexible with the Applicant throughout his employment, letting him leave early when a job was completed, rained off, etc but had still provided him with full pay.
- 4.21 The Respondent alleged that the Applicant spent up to two hours per day texting instead of working.
- 4.22 The Respondent confirmed that he had dismissed the Applicant over the telephone.
- 4.23 The Respondent admitted that he had erred in his written reasons for the Applicant's dismissal by using the term "redundant" when he should have specified misconduct.
- 4.24 The Applicant alleged that the dismissal was unfair as the reason the Respondent dismissed him resulted from an incident involving the Respondent and his fiancée's brother-in-law the night before, not issues of misconduct.
- 4.25 The Respondent said that he had dismissed the Applicant because of his misconduct, with the text message at 6.50 am on 25 April 2008, saying he would not be coming in to work, as the "final straw".
- 4.26 The Applicant considered himself to have always been punctual and hard working. He disputed the health and safety issues and considered it bizarre that his failure to hold a driving licence when he had never held one in his life had been given as a reason for dismissal.
- 4.27 The Respondent also referred to instances whereby he had been involved in various altercations with members of the Applicant's fiancée's family and claimed that he had feared for his personal safety as a result of receiving text messages from the Applicant's fiancée.
- 4.28 The Respondent admitted that these non-work-related issues had affected his working relationship with the Applicant.
- 4.29 The Applicant considered that this was the real reason for the dismissal.

5 Conclusion

- 5.1 It is possible that the Respondent warned the Applicant about his conduct on numerous occasions, particularly in relation to health and safety issues, but there is no written evidence to support this.
- 5.2 Whilst the resources of this small business need to be borne in mind, it would have been reasonable for the Respondent to at least maintain a simple diary noting incidents of misconduct and action taken.

- 5.3 The Applicant appeared to have been given considerable flexibility from the Respondent and may have thought it reasonable to take time off on Friday 25 April 2008 with little notice, in view of the circumstances at that time.
- 5.4 Citing one of the reasons for dismissal as the Applicant's failure to hold a driving licence is unreasonable in the circumstances, particularly as the Applicant had not been required to hold a licence before being offered employment by the Respondent. The Respondent himself agreed that it was reasonable of the Applicant to refuse to obtain a driving licence when he requested it.
- 5.5 The Respondent admitted that he had never advised the Applicant that any future misconduct would put his employment in jeopardy.
- 5.6 Having considered all the evidence from both parties, the Tribunal's decision is that the Applicant was unfairly dismissed on the grounds of misconduct as a fair procedure was not followed and make an award of £10,364.00, being the equivalent of six months' pay.
- 5.7 In relation to the Respondent's claim that the written reasons for dismissal were inadequate or untrue, the Tribunal upholds this claim and awards a further payment of £797.23, being the equivalent of two weeks' pay.
- 5.8 The claim of non-payment in lieu of two weeks' notice is a breach of contract issue which cannot be dealt with by this Tribunal.

Signature of the Chairman: **Mrs T Le Poidevin**

Date: **29 August 2008**