States of Guernsey

EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: **Mrs Vuyiswa Yoli**
Represented by: Advocate Simon Geall

RESPONDENT: **States of Guernsey (acting by) Health and Social Services Department**
Represented by: Ms Lisa Evans

Witnesses
Mrs Yoli gave evidence to the Tribunal

Called by the Respondent
Mrs Wilma Edwards
Mrs Susan Fleming
Mrs Fiona Robertson

Decision of the Tribunal Hearing held on 5 & 18 May 2009

Tribunal Members: Mr Peter Woodward
Mrs Tina le Poidevin
Mrs Caroline Latham

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.

The Tribunal has concluded that in light of these considerations it would be just and equitable to reduce the six month award of compensation for unfair dismissal by 25% (twenty-five percent) as provided for by Section 23(2) in The Employment Protection (Guernsey) (Amendment) Law, 2005. The amount of £19,174.36 is therefore reduced.

Amount of Award (if applicable): £14,380.77

Mr P Woodward	9 July 2009
……..	…….
Signature of the Chairman	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 Tribunalôs 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

1.0 Introduction

1.1 The Applicant, Mrs Vuyiswa Yoli, was represented by Advocate Simon Geall and gave evidence to the Tribunal.

1.2 The Respondent was represented by Ms Lisa Evans.

1.3 Ms Evans called the following witnesses to give evidence: -
Mrs Wilma Edwards
Mrs Susan Fleming
Miss Fiona Robertson

These witnesses were supported by documentary evidence (ER1-3 Refers).

1.4 At the outset of the hearing the Chairman clarified with the parties that the primary issues to be addressed were as follows:-

1.4.1 Did the contract become frustrated or
1.4.2 Did a dismissal occur within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended and if so
1.4.3 Was this dismissal fair or unfair within the provisions of this Law

1.5 The parties agreed that the sum of £19174.36, as stated in the ET2, was as a correct summary of gross earnings in the final 6 months of the Applicant's employment.

2.0 Facts Found

2.1 The Tribunal determined the following in relation to this complaint.

2.2 The Applicant, Mrs Yoli commenced employment with the Respondent on 22 June 2006 as a Staff Nurse. She was assigned to one of her employer's "Continuing Care Wards" for older people with mental health problems.

2.3 On 26 November 2008 Mrs Yoli was arrested by the Guernsey Police.

2.4 Criminal charges were preferred against Mrs Yoli on 27 November 2008.

2.5 On 28 November 2008 Detective Constable Vicky Jeffreys telephoned Mrs Wilma Edwards, HR Director HSSD, and informed her that Mrs Yoli had been arrested and allegedly had been involved in serious fraud involving possessing and using counterfeit money.

2.6 On the same day Ms Edwards informed Susan Fleming of the arrest. Mrs Fleming was the Senior Manager of the department in which the Applicant worked.

2.7 On 1 December 2008 Fiona Robertson informed Wilma Edwards, via email, that arrangements had been made with the prison authorities for her to visit Mrs Yoli on 3 December 2008.

2.8 On 3 December 2008 Mrs Fleming and Fiona Robertson visited Mrs Yoli in the Guernsey Prison and spoke to her in the presence of Advocate T. Crawford. During this meeting it was communicated both verbally and in writing (page 111 ER3 Refers) that Mrs Yoli had been suspended from her duties with no pay with immediate effect. Mrs Yoli was advised that the suspension had been invoked under the terms of the Health and Social Services Department Policy "Dealing with Disciplinary Matters" G614, a copy of which was enclosed for her information.

2.9 On 8 December 2008 Fiona Robertson sent an email to a Gail Lickley, who was a member of the salary administration team, stating that she believed a decision had been made regarding two nurses, one of whom was Mrs Yoli. In this email Mrs Fleming asked advice on the December 2008 payroll cut off date and also asked Gail Lickley if she wanted leaver forms for Mrs Yoli and one other member of staff. (Page 108 ER3 refers).

2.10 On 10 December Mrs Yoli was further remanded in custody and her case was transferred to a higher court.

2.11 On 12 December 2008 Mrs Yoli was again visited in prison by Fiona Robertson and Susan Fleming. She was informed that, as a consequence of being on remand, she was not available for work and was unable to fulfil the most basic requirement of her contract of employment with the HSSD. Mrs Yoli was given a letter during this visit which confirmed the decision taken by her employer. The letter informed Mrs Yoli that as her detention had been confirmed for a longer period than a few days that her employer took the view that her contract of employment was terminated. She was informed that her contract was terminated on the 30 November. The letter stated that the frustration of contract occurred when the police had first detained Mrs Yoli. (ER3 103 refers).

3.0 Evidence from Mrs Vuyiswa Yoli

3.1 The Applicant read from a prepared statement (ER 3 refers). Mrs Yoli stated that she had no prior notice of the visit by Fiona Robertson and Susan Fleming on 3 December 2008. The witness stated that she was being interrogated by detectives that morning and was permitted a pause in these proceedings such that she could meet Susan Fleming and Fiona Robertson. It was her recollection that the meeting was brief and lasted between 5 and 10 minutes. A duty advocate was present during this meeting and Mrs Yoli recalled that he only asked questions concerning her pay. In response to these questions the witness stated that Susan Fleming had informed her that if she was guilty of an offence there would be no pay, if she was innocent she would be paid.

3.2 Mrs Yoli informed the Tribunal that during the meeting of 3 December 2008 she was not informed of any option by her employer to appeal the decision to be suspended without pay, and the letter of the 3 December was also silent on any possible appeal.

3.3 On 12 December 2008 Mrs Yoli was again visited by Susan Fleming and Fiona Robertson. She had not been notified that they were due to visit. During this visit they read the letter which informed Mrs Yoli that her contract of employment had been frustrated (ER3 103 refers). Mrs Yoli was not aware that that the HSSD had a practice of waiting to see if detention would be confirmed for a longer period as had been stated in the letter. Also, as with the previous letter of 3 December 2008, there was no right of appeal against the HSSD decision.

3.4 Mrs Yoli stated that she had been given no opportunity to state her side of the story, neither did anybody explain the term "frustration of contract" during the meeting on 12 December 2008. In addition she stated that there had been no opportunity to comment on the penultimate paragraph of the letter which referenced an "outstanding clinical matter".

3.5 Under cross examination Mrs Yoli agreed that having been held in custody from 26 November 2008 she had not been able to fulfil her contractual duties up to and including 12 December 2008. She also confirmed that there was an agreement with Fiona Robertson and Susan Fleming during the two prison visits that they would not discuss the charges to which she was currently subject to avoid any chance of self incrimination. She stated that there were no independent witnesses present at the meeting on 12 December 2008.

3.6 Responding to further questions from Ms Evans the Applicant confirmed she understood the reasons for the letter of 12 December 2008 and had not asked for any subsequent meetings with her employer.

3.7 Mrs Yoli stated that she had not received the letter dated 9 December 2008 from the Healthcare Officer in relation to the renewal of her registration with the Nursing and Midwifery Council (ER3 107 refers).

4.0 Evidence from Mrs Wilma Edwards

4.1 The witness read a prepared witness statement (ER 3 refers). She informed the Tribunal that she was the most senior Human Resources employee in the HSSD. As such she was a decision maker in relation to the Applicant's contract and the events that that unfolded in December 2008.

4.2 Mrs Edwards told the Tribunal that whilst she knew that nurses' accommodation had been raided prior to 28 November 2008 she was not informed by the police until 28 November 2008 that Mrs Yoli had been arrested and was detained in custody. From her conversation with the police she knew that the charges were serious. It was from this point she told the Tribunal that, given the Applicant could not perform her contract, she decided that suspension without pay was an appropriate step. However, as at that time Mrs Yoli might not have been detained for a long period, then the

opportunity to have her come back to her employment and for her pay to continue was a possibility.

4.3 The witness informed the Tribunal that recruitment of qualified nurses to the Island was always challenging and reflected trends in the UK. Approximately 20 to 25% of the current nurse staffing was drawn from agencies in the UK and the problems of recruitment and retention were further complicated by the need to ensure that amongst the nursing team a significant number of fully qualified staff were available for the more complex nursing tasks. Finally the problems of recruitment and retention were not assisted by the limited availability of residential accommodation for nursing staff. Occupancy of States accommodation was running at circa 98% and the HSSD was forced to rely upon hotel accommodation to meet the needs.

4.4 Mrs Edwards met with Susan Fleming on 3 December 2008 and decided with her agreement that a visit to Mrs Yoli was required in order to communicate the decision to suspend without pay and to communicate that any further decision in regard to this process would be determined on or after 10 December 2008 when Mrs Yoli was due to make a further court appearance. In her witness statement Mrs Edwards stated that the reference to the HSSD disciplinary code in the letter of 3 December 2008 was necessary as it was likely that, if the employee had subsequently been able to return to work, she may have been required to face disciplinary proceedings in relation to the alleged fraud and another unrelated clinical issue.

4.5 Mrs Edwards was advised by a member of Guernsey Police on 10 December 2008 that Mrs Yoli's case was being referred to the Royal Court and that due to the seriousness of the charges, she was likely to remain in custody for a long period; the police stated that it could be a matter of months. It was at this point that the witness made the decision that, in her opinion, the employment contract was frustrated and that in her words "the disciplinary processes in the employment contract were not engaged". In consequence to this decision Mrs Edwards did not believe that that Mrs Yoli had any right of appeal against the ending of her employment.

4.6 On 12 December 2008, acting on this decision, Susan Fleming and Fiona Robertson visited Mrs Yoli in prison and communicated the decision both orally and in writing.

4.7 In point 13 of her witness statement (Page 176 refers) Mrs Edwards stated that the necessity to hire an agency replacement for Mrs Yoli had nothing to do with the decision to end the contract of employment. She further stated that the replacement of Mrs Yoli was not taken into consideration in declaring the contract frustrated.

4.8 Under cross examination Mrs Edwards stated she had not seen the email correspondence between Susan Fleming and the Payroll department prior to 10 December referring to decisions having been made with regard to Mrs Yoli and the need to complete "leavers" documentation.

4.9 Mrs Edwards confirmed that she had not made any attempt to contact the legal representative of Mrs Yoli prior to her decision to end the contract. She was not aware if Mrs Yoli had made any application for bail.

4.10 In response to a question from the Tribunal Mrs Edwards was not aware if Mrs Yoli had a union or staff representative. It was her opinion that the HSSD had carried out a sufficient and careful investigation into the matter. It was also her opinion that no meaningful purpose would be served by holding a formal disciplinary enquiry.

4.11 Advocate Geall asked the witness why, as the employer's representative, she had completed and signed the ET2 form confirming that a dismissal had occurred and that this was fair "within the meaning of section 6(2)(a)(b) and (e) of the Employment Protection (Guernsey) Law 1998" The witness stated this was done on legal advice.

4.12 In response to a question from the Tribunal, Mrs Edwards stated that at no time during the period 28 November 2008 to 12 December 2008 had she made any file notes relating to the Applicant in relation to meetings held, contacts with external authorities, decisions taken or any other relevant data.

5.0 Evidence from Mrs Susan Fleming

5.1 The witness read a prepared witness statement (ER 3 refers). In this statement Mrs Fleming made clear the urgent and pressing need to provide cover for Mrs Yoli from the UK. There was no opportunity to redeploy other nurses and there were fundamental duties of care in relation to patients with chronic dementia and related illnesses on a 24 hour per day basis.

5.2 Mrs Fleming confirmed that, together with Mrs Edwards, she took the decision on 3 December 2008 to suspend Mrs Yoli without pay and subsequently visited her that same day to communicate this decision. Prior arrangements were made with the prison authorities for the visit to take place, however, unfortunately the prison authorities had not noted the visit in the prison appointments log and, therefore, Mrs Yoli had no prior notice of the visit.

5.3 During the visit she agreed with Mrs Yoli that it would be unwise to discuss any of the alleged criminal issues and so the conversation centred on the decision to suspend and in addition Mrs Fleming offered personal assistance to Mrs Yoli to contact relatives or provide other support.

5.4 On 10 December Mrs Fleming again met with Mrs Edwards and was advised that the period of detention would continue for some time. In light of this advice she decided with Mrs Edwards that the view should be taken by the HSSD that the contract of employment had been frustrated and that this decision be communicated to Mrs Yoli.

5.5 Mrs Fleming visited Mrs Yoli in prison on 12 December 2008 together with Fiona Robertson. She stated that once she had explained the situation and passed the letter to Mrs Yoli she asked if she needed any more information; Mrs Yoli declined. At no point during this meeting, according to the witness, did she refer to this meeting as a disciplinary meeting. It was her recollection that the meeting lasted between 20 to 30 minutes.

5.6 Mrs Fleming was in agreement with Mrs Edwards that on 12 December 2008, whatever the outcome of the legal processes, Mrs Yoli would not be able to return to work for several months.

5.7 Mrs Fleming stated that the outstanding "clinical matter" in relation to Mrs Yoli in December 2008 had no bearing on the decision to consider the contract of Mrs Yoli to be frustrated.

5.8 Under cross examination Mrs Fleming was asked what was meant in the letter of 3 December 2008 by the expression "When the outcome of charges are known". Mrs Fleming stated that this meant when the employer had more information from the police.

5.9 Mrs Fleming stated that it was difficult to identify an independent "contact person" for Mrs Yoli as defined in the disciplinary policy as the conditions of her custody militated against such an individual being defined and made available to Mrs Yoli. In the event Mrs Fleming assumed this role.

5.10 Mrs Fleming agreed that the disciplinary policy under which Mrs Yoli was suspended on 3 December 2008 had no provision for suspension without pay.

5.11 Mrs Fleming was closely questioned on the meaning of the email exchanges on 8 December 2008 between herself, Fiona Robertson and the Payroll Department which asked if the email exchange served as sufficient authority for the "leaver process" or did the situation require a "leavers form". She denied that a decision regarding Mrs Yoli had been made on that date and stated that she was continually assessing the situation, and that a final decision was made on 10 December 2008. Mrs Fleming elaborated on this response by telling the Tribunal that she and her colleagues were considering options throughout the period 3 December 2008 to 10 December 2008.

5.12 In response to a question from Advocate Geall the witness stated that a sickness absence could not reasonably be compared with the facts of this case. Therefore a sickness absence of several weeks would not, in her opinion, amount to frustration of contract.

5.13 Responding to questions regarding 12 December 2008 when, with Fiona Robertson, she again visited Mrs Yoli in prison, the witness stated that she did not know if Mrs Yoli had been advised in advance of the end of contract letter which she delivered on 12 December 2008. She stated that she had not provided Mrs Yoli with an opportunity to have her advocate or any other representative at the meeting.

5.14 In response to a question from the Tribunal, Mrs Fleming stated that at no time during the period 28 November 2008 to 12 December 2008 had she made any file notes relating to the Applicant in relation to meetings held, contact with external authorities, decisions taken or any other relevant data.

5.15 Mrs Fleming stated that Mrs Yoli was paid until 30 November 2008 as this was the payroll date for that month and, in the circumstances, it seemed unfair to withhold pay between 26 November and 30 November. This was the deciding factor in

concluding that 30 November should be confirmed as the date Mrs Yoli's contract was terminated and that, as stated in the letter of 12 December 2008, Mrs Yoli had frustrated her employment contract from the date she was arrested by the police, namely 26 November 2008.

6.0 Evidence from Miss Fiona Robertson.

6.1 The witness read a prepared witness statement (ER3 Refers Page 179). Miss Robertson is employed as a Modern Matron and was Mrs Yoli's manager, although her day to day supervision was conducted by senior nurses.

6.2 Miss Robertson confirmed earlier statements from both Mrs Edwards and Mrs Fleming that given the chronic nurse staffing problem, the HSSD was regularly operating at 15% or more below planned levels. The witness stated that this problem existed throughout the British Isles and was not due to be remedied in the short term. There were no qualified nurses available on the Island either for a longer term assignment or drawn from the "Bank Nurse" pool for a short term need; hence the reason for needing to replace Mrs Yoli on an immediate basis with an agency nurse recruited from a United Kingdom agency.

6.3 Miss Robertson told the Tribunal that she had no role in the decision to suspend Mrs Yoli or the subsequent decision to end her contract. Such decisions were taken by other more senior staff than her.

6.4 Miss Robertson confirmed that she attended the prison visits on 3 December 2008 and 12 December 2008 acting as a support to Mrs Fleming. She corroborated the events during the visits as evidenced by Mrs Fleming.

6.5 The witness stated that she had attended the court hearing on 10 December 2008 which was dealing with Mrs Yoli's charges and as the legal determinations were complex, she sought advice from a court official. He informed her that the deferment to subsequent proceedings would be a lengthy process.

6.6 Miss Robertson stated that she had not pre notified the prison authorities personally of her planned visits with Mrs Fleming but she was not sure if this would have made any difference in pre- notifying Mrs Yoli as this decision was under the control of the prison authorities.

6.7 When questioned on the email exchanges between herself, Mrs Fleming and the Payroll Department it was her opinion that a decision to end the contract had been made by Mrs Edwards and Mrs Fleming by that date, otherwise she would not have been asking to complete for a "leavers form" to be completed.

6.8 Miss Robertson thought that the decision to end Mrs Yoli's contract on the 12 December was fair and reasonable in the circumstances.

7.0 Consideration of UK Authorities

7.1 The Tribunal is not bound by UK law or UK precedent in any way, however, given the consideration of frustration in employment contracts by Tribunals of First Instance, Employment Appeal Tribunals, Courts of Appeal and The House of Lords over the past 30 to 40 years, the Tribunal did consider the UK authorities presented by both parties.

7.2 Advocate Geall argued that the Tribunal would need to answer two questions to conclude that a frustrating event had occurred:-

1) Whether what happened was capable in law of frustrating the contract of employment and
2) Whether the event did, in fact, frustrate the contract

7.3 It was drawn to the attention of the Tribunal that neither party could refer to an authority which dealt with the issue of an employee in detention awaiting trial. The Tribunal might conclude that this apparent paucity of relevant UK cases could indicate that the argument of frustration is rarely used. Advocate Geall argued that the lack of comparable cases indicated that the doctrine of frustration in employment contracts was only invoked in clear and compelling circumstances. In his skeleton argument he quoted from the decision in Shepherd V Jerrom in which a member of the Employment Appeal Panel commented as follows:-

"We are particularly mindful that neither party has been able to refer us to any cases where, as opposed to an eventual term of imprisonment it has been suggested that a period of bail, even if it prevents the employee from attending work, can be considered as a frustrating event"

7.4 Advocate Geall referred the Tribunal to the following cases:

- In Hare V Murphy 1974 the employee was bailed and it was only after a 12 month custodial sentence was passed that the court held that the employment contract was frustrated

- In Shepherd V Jerrom 1987 an employee on a 4 year apprenticeship was bailed for various alleged offences and was subsequently sentenced after trial to an indefinite period of detention of up to 2 years. As with Hare V Murphy the passing of the sentence was held to be the frustrating event

7.5 Ms Evans argued that in Hare V Murphy a key principle was that it was the employee's actions which created the employment problem and the Court of Appeal held that the Tribunal which originally heard this case should have considered contributory fault by the employee. Also in this case it was noteworthy that in this judgement Mr Stephenson expressed the opinion that a period of 12 months' imprisonment was too long to keep the employment open. This begs the question as too how long the HSSD should have waited, given the particular and pressing issues faced with the detention of Mrs Yoli.

7.6 Ms Evans further argued that in Shepherd V Jerrom this case distinguished itself from that brought by the Applicant as she was being held in custody for an indefinite period whereas Jerrom was released on bail prior to trial.

7.7 Advocate Geall turned to Four Seasons Healthcare Limited V Maughan 2004 suggesting that this case had direct relevance as the employer did not use its disciplinary procedure. The judgement included the following:-

"Further in this case the employers did have the opportunity, if they so wished, of dismissing the employee. Whilst they had been asked by the police not to carry out detailed investigations for fear of prejudicing the criminal trial, there was clearly some information available to them in relation to the allegations against the employee"

7.8 Whereas Ms Evans suggested that during the original Tribunal hearing counsel made an important significant error by not advising the Tribunal of significant cases dealing with frustration; and that the case was not comparable.

7.9 Ms Evans also advised the Tribunal that they should look behind the principles of these cases, the facts of other cases might be misleading. The Tribunal should not, in her opinion, conclude that as a sickness absence of 4 weeks does not normally frustrate an employment contract that, in this case, a shorter period should not create a situation of frustration. Given the facts of this case the Respondent was faced with the possibility of months of absence with an indefinite outcome.

8.0 Advocate Geall Closing Statement

8.1 It was his opinion that the Applicant was dismissed with flagrant disregard of employment rights. The Tribunal should only consider the facts available to the employer at the time of the dismissal.

8.2 The Applicant was given no notice of either the meeting of 3 December 2008 or 12 December 2008; and, in relation to the second meeting, Susan Fleming did not check out if Mrs Yoli wanted employee representation.

8.3 There were breaches of the disciplinary procedure relating to the suspension. It was suspension without pay which Mrs Edwards accepted that the employer had no power to implement.

8.4 Further, in relation to the act of suspension, no support contact was identified, this was not set out in the letter of 3 December 2008. The only hint of support was an offer by Susan Fleming to assist. This was entirely inappropriate as Susan Fleming was a joint decision maker in the termination of the contract.

8.5 Huge reliance was placed on telephone conversations with Police, which only represents half the story in any criminal proceedings. Mrs Edwards made no attempt to contact or discuss the issues with the Applicant's advocate and, therefore, had no idea of the Applicant's intention in relation to bail applications or other potential actions.

8.6 Absolutely no record whatsoever was kept of telephone calls which influenced decisions, or of the meetings up to and including that when the final decision was taken.

8.7 The basis of the suspension on 3 December 2008 was awaiting the outcome of the 10 December court hearing according to the Respondent. This was never communicated to the Applicant either in the letter of 3 December 2008 or at the meeting. The impression given by the letter of 3 December 2008 was that suspension would continue until the outcome of criminal proceedings.

8.8 If the decision to end the contract was pending the outcome on 10 December, the Tribunal has heard evidence that a decision was made prior to 10 December. Mrs Robertson stated that a decision must have been made on or before 8 December 2008. Mrs Fleming had stated that the leavers form was completed on 9 December 2008 and sent to the Central Treasury Department.

8.9 The Applicant was given no right of appeal or any opportunity to make representations about the termination decision. HSSD states that this was because it was not a disciplinary issue. Fairness dictates that such representations should be made.

8.10 The practice of the Department outlined in the letter of 12 December 2008 to "normally wait several days" is not in the disciplinary policy and was not pointed out to the Applicant. Mrs Fleming said she had experience of this practice, however, the Applicant would not have had experience of this practice.

8.11 The Respondent's disciplinary policy had clearly envisaged the issue of fraud, therefore, as in the "Four Seasons" case disciplinary proceedings could have been brought against the Applicant. It was not a frustration of contract if the Tribunal is guided by the Four Seasons case referred to in "Authorities".

8.12 The ET2 form accepts a dismissal took place and Wilma Edwards signed this form with the benefit of legal representation.

8.13 Mrs Fleming stated that, in another scenario where an employee was detained for two weeks, the contract was not frustrated. Also four weeks sick leave did not constitute frustration. The effect of the event needed to be looked at, not the cause.

8.14 A decision was made before 10 December to end the contract of employment, in contrast to the Respondent's claims

8.15 There was confusion over the date of frustration between the letter of dismissal and the ET2. On questioning Mrs Fleming asserted that 26 November was the frustrating date for a legal event. However, the letter of 12 December 2008 stated this date was 30 November 2008. The Respondent cannot pick or choose the date.

8.16 Both Mrs Edwards and Susan Fleming asserted that the importance of recruiting a nurse to cover the position of the Applicant or the cost of employing an agency worker were not factors that influenced their decision. Thus there was no apparent reason why the Applicant should not have been suspended without pay and events allowed to run to a conclusion; and then for the HSSD to make a disposition.

8.17 Finally, the Tribunal must consider only the facts known at the time, not what subsequently happened.

9.0 Ms Evans Closing Statement

9.1 It cannot be argued that the HSSD used their disciplinary policy incorrectly as it does not state that suspension without pay is not an option. There was clear evidence why the Applicant could not be paid; she was not available for a disciplinary interview or for work.

9.2 With reference to the meetings on 3 December 2008 and 12 December 2008 it was not within the remit of the employer to state what could be told to the Applicant, this was wholly in the gift of the Prison.

9.3 There was no evidence that the Applicant did not want to attend a meeting on 3 December 2008; an advocate was present to whom she could have complained if she had wished otherwise.

9.4 Considerable personal support was given to the Applicant by HSSD employees, not the hint of support that was alleged by the Applicant.

9.5 It was true that reliance was placed on the telephone calls with the Police; however, given the circumstances of this case, where else was information going to come from?

9.6 The police clearly told Mrs Edwards that the Applicant had been further remanded in custody on 10 December 2008 and that there would be no bail.

9.7 The confusion over the date of the decision, 10 versus 8 December should be taken in the context that the person who wrote the e-mail was not the decision maker; Fiona Robertson only said it must have been decided prior to 10 December.

9.8 The Leavers Form was completed on 9 December to preserve the Applicant's financial situation. She would have been left with no money in prison. Also there was no final decision until the outcome of the court hearing on 10 December, this was the same evidence from Mrs Edwards and Mrs Fleming.

9.9 At both meetings held at the prison the Applicant was given ample opportunity to ask questions and to make representations to HSSD Management.

9.10 As to the representation by a colleague, the Tribunal has heard evidence on how difficult it would have been for another employer to gain access to a prisoner.

9.11 How could the HSSD have brought disciplinary proceedings; how could the guidance in the disciplinary process be followed with the Applicant in prison? Such a procedure would have been impossible to carry out.

9.12 The employer in this case had very demanding staffing issues at the time; it was a specialist ward in a Guernsey hospital with the limited prospects of getting relief staff

on the island and the Applicant's continuing absence combined with housing issues on the Island, made it very problematic.

9.13 The "Four Seasons" case referenced in UK authorities was not comparable to this case as the employer had another 300 care homes available in which work could be performed.

9.14 The ET2 form is not a legal pleading and, in response to Applicant's assertion of an error in the completion of this form, the reasons for the dismissal was quite clear in the totality of that submission.

9.15 Each case must be decided on its own facts.

9.16 It was agreed that there was some confusion over the date of the end of the contract; however, the employer was being generous by extending pay to 30 November 2008.

9.17 If the Tribunal did find that there had been a dismissal, and that this was unfair, then a strong recommendation was made that the award be extinguished.

10.0 Conclusions

10.1 The Tribunal considered the three possible outcomes from these proceedings. The conclusion could be that, based on all the circumstances, a reasonable employer could take the view the employment contract was no longer capable of performance and therefore frustrated. Alternatively, if this was not the case and a dismissal had occurred, as claimed by the Applicant, then it would be for the Tribunal to decide if this dismissal was fair or unfair within a reasonable range of responses by a reasonable employer.

10.2 The Tribunal first considered the arguments for and against a finding of frustration:-

10.3 The Tribunal has concluded that in applying the Employment Protection (Guernsey) Law, 1998, there are a number of ways in which a contract of employment might be terminated and a finding of frustration of contract might reasonably be drawn by a Tribunal. The decision would rest on the particular facts of the specific case.

10.4 The Tribunal considered a number of issues including the following:-

10.5 On the basis of their enquiries the Respondent had concluded that Mrs Yoli would not be released from custody for the foreseeable future. The Tribunal is concerned that these enquiries were of a limited nature, not formally recorded and only sought the opinion of the police. No attempt was made to contact Mrs Yoli's representative, even though the Applicant's advocate had been present at the first meeting on 3 December in the presence of Mrs Fleming and Miss Robertson.

10.6 The Respondent presented a convincing case that Mrs Yoli was in a post which was difficult to fill, evidence was given to the Tribunal that the Respondent was subject to a chronic shortage of qualified geriatric nurses and this shortage was replicated throughout the British Isles. An almost immediate replacement by an agency nurse

from the UK was required. However, the Respondent seems to have given little or no weight to a reasonable consideration that with a long term chronic shortage in this speciality they could have left Mrs Yoli on suspension until the outcome of the charges was known.

10.7 The Respondent rebutted the argument that they had made any final decision as to the continuation of Mrs Yoli's contract until 10 December 2008. This position was considerably undermined by the exchange of emails on 8 December 2008 between Susan Fleming, Fiona Robertson and the Payroll department. A reasonable interpretation of this email exchange (ER3 Page 108 refers) was that the decision had, indeed, been made prior to 10 December. This interpretation was further reinforced by Fiona Robertson who gave evidence that she thought a decision had been made on the termination of employment of Mrs Yoli on 8 December 2008 by her senior management.

10.8 The Tribunal also considered whether the Respondent's disciplinary code had envisaged such a situation as an alleged fraud by one of their employees in relation to the public. On inspecting the Disciplinary policy (ER3 Page 27 refers) the third bulleted item of examples of Gross Misconduct is fraud involving the public; which, in the terms of this policy, could warrant dismissal for a first offence, thus combined with the power of suspension, although the policy does not mention unpaid suspension, there would seem to be provision for the circumstances under which Mrs Yoli found herself. The Tribunal is surprised so little apparent attention was given to this provision in the Respondent's disciplinary policy prior to concluding that a frustration of contract had occurred. The lack of any recorded file notes by either Wilma Edwards or Susan Fleming on this, or any other related subject, further reinforces the impression of lack of consideration of the alternatives open to a reasonable employer.

10.9 The Tribunal has sympathy with the Respondent in attempting to seek access to Mrs Yoli in early December in difficult circumstances, however, the Respondent could have made a greater effort to ensure that Mrs Yoli was given prior advice of their visits, in particular the second visit on 12 December 2008.

10.10 The Respondent argued that, as their position was that the contract was frustrated and outside of the disciplinary process, no appeal could be made. The Tribunal has a concern that this seems to be counter to the principles of natural justice that a reasonable employer should consider in bringing to an end an employee's contract of employment.

10.11 The Tribunal also considered the wording of the letters of 3 December 2008 and 12 December 2008. The language seemed to confuse and conflate the principle of frustration with the use of the disciplinary policy. This policy was clearly referred to in the first letter, using the policy to provide powers to suspend. In the opinion of the Tribunal, most reasonable employees would assume from the wording of the letter that it implied they were subject to the disciplinary policy. The second letter of 12 December 2008 states that the employer has concluded her employment contract was terminated on 30 November, a date which has no apparent relevance to the date of arrest, nor the date on which charges were brought, nor the date of suspension, and neither to the court hearing of 10 December 2008. This second letter also includes

reference to an outstanding "clinical matter" which given the evidence has apparently nothing to do with the conclusion that Mrs Yoli's contract had come to an end by cause of frustration. In consequence, the Tribunal is left with a sense of lack of clarity with muddled thinking by the Respondent.

10.12 The Respondent had the provision and express powers with their disciplinary policy to deal with the situation of an employee facing trial. Throughout the period in which the Respondent dealt with this issue from 28 November to 12 December they had no idea as to whether Mrs Yoli would be found guilty of any offence. Indeed without contacting the Applicant's representative they had no idea if new facts might emerge, bail be requested, charges dropped or indeed any other possible outcome which might occur when an individual is subject to criminal proceedings.

10.13 Finally, whilst the Tribunal does not put any inordinate weight on the UK authorities presented by both parties, there does seem to be reluctance by the UK judicial system over many years to conclude that frustration of contract can occur when other options are open to employers. Certainly none of the UK authorities demonstrated that frustration of an employment contract had been upheld after a period as short as two weeks.

10.14 Taking into account all of the above, this Tribunal has concluded that on 12 December events were not so clear cut that a reasonable employer could take the reasonable decision that the employment contract had been frustrated. The Tribunal concludes that the contract of employment was not frustrated.

10.15 The Tribunal found that a dismissal did occur on 12 December 2008, by reason of the communication with Mrs Yoli on that day.

10.16 In considering this dismissal the Tribunal has been guided by an appeal decision handed down by the Royal Court on 23 June 2009 in the case of Yvonne Burford V Flybe Limited. In this Judgement Richard John Collas Esq., Deputy Bailiff, gave guidance on the interpretation of section 6(1) of The Employment Protection (Guernsey) Law, 1998, as amended. In paragraph 30 of this decision the following was stated:-

I believe the Appellant has misunderstood section 6(1). Its first, and possibly only, purpose is to put the burden of proving the reason for the dismissal onto the employer. It does not require the Tribunal to establish that there was a reason falling within subsection (2) (which deals with matters such as the capability, qualifications and conduct of the employee, redundancy etc.). The Tribunal would not be able to ascertain a reason for the dismissal if an employer had summarily dismissed an employee without any reason whatsoever, and without following any disciplinary or dismissal procedure, which would be a clear example of unfair dismissal.

10.17 Given this guidance, and the fact that the Respondent did not argue an alternative explicit reason for the dismissal, the Tribunal considers that this could be considered as a clear example of an unfair dismissal. However the Tribunal did give consideration at to whether an implied reason for the dismissal could be deduced from the Respondent's actions prior to 12 December 2008.

10.18 Firstly the Tribunal was surprised at the lack of any methodical and formal procedure observed by a very large and well resourced employer. The lack of file notes or any other contemporaneous records by senior management during the period 28 November 2008 to 12 December 2008 is significant; it militates against a fuller understanding of the meetings conducted, people contacted, the issues considered and how decisions were made.

10.19 It is appropriate to turn to the "Code of Practice on Disciplinary Practice and Procedures in Employment" issued by Commerce and Employment and, whilst a failure to observe any provision of this code does not of itself lead to a finding of an unfair dismissal, such a failure may be considered in the overall decision.

10.20 The employer had an apparently sophisticated disciplinary procedure in compliance with the Code of Practice, however whilst it invoked this policy to suspend the Applicant from employment on 3 December 2008, it was then seemingly dispensed with for any subsequent action taken by the employer.

10.21 The disciplinary code did provide within its section on Gross Misconduct for alleged fraud to the public (ER3 page 27 refers). There is no evidence of consideration of this, or any other reason, as an alternative. The Respondent chose to ignore this provision and end the contract on the basis of frustration.

10.22 The Code of Practice indicates that a careful investigation be conducted and action not taken until this is concluded. The Tribunal is very mindful of the circumstances in which the Respondent found themselves. They had limited access to Mrs Yoli and could not ask questions which might lead to the possibility of self incrimination. However, if they had chosen to wait for a longer period it is possible they might have learnt more as to the circumstances of the alleged offences and might have provided themselves with justification to dismiss on fair and reasonable grounds if they so wished. It was within their range of options to maintain the suspension without pay, therefore incurring no economic cost, and then decide on employment status after any potential conviction or a subsequent finding of innocence under the charges laid.

10.23 As considered already the Respondent rebutted the argument that they had made any final decision as to the continuation of Mrs Yoli's contract until 10 December 2008. This position was considerably undermined by the exchange of emails on 8 December 2008 between Susan Fleming, Fiona Robertson and the Payroll department. A reasonable interpretation of this email exchange (ER3 Page 108 refers) was that the decision had, indeed, been made prior to 10 December. This interpretation was further reinforced by Fiona Robertson who gave evidence that she thought a decision had been made on the termination of employment of Mrs Yoli on 8 December 2008 by her senior management.

10.24 The Tribunal accepts that it would have been difficult, if not impossible, to provide Mrs Yoli with a fellow employee/colleague of her choice in any of the meetings with her whilst held in custody. However, the Respondent was well aware that the Applicant was legally represented and could have made an attempt to have this

representative present on 12 December 2008. From the evidence no such attempt was made.

10.25 The Tribunal puts limited weight on the decision to suspend without pay. The Respondent's view was that it was faced with Mrs Yoli being in custody for a significant period of time and although their disciplinary code was silent on the issue of suspension without pay, the Tribunal considers that, in these specific circumstances, a reasonable employer might choose to take this action

10.26 An important element in any employment matter is the ability of an employee to appeal against a decision made by their employer. The Respondent argued that the definition of the ending of the contract by frustration meant that the employee was not entitled to any appeal process. However this approach seems to run counter to the principle that it could be fair and equitable by a reasonable employer to provide for an appeal, particularly when employment has been deemed by them to be at an end.

10.27 The Tribunal could find no implied reason for this dismissal, from the evidence submitted, other than the view of the Respondent that the employment contract had been frustrated.

10.28 A fair and reasonable employer, with the resources and procedures available to them, following a measured and considered process, and taking into account the equity and substantial merits of the case, would not have dismissed an employee so precipitately. This apparent rush to judgement was not conducive to a fair and reasonable dismissal.

10.29 The Tribunal finds that there was a dismissal and within the provisions of 6 (3) of The Employment Protection (Guernsey) Law, 1998, as amended, find this dismissal to be unfair.

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 In its consideration, the Tribunal was mindful not to use the hindsight of events post the Effective Date of Termination (EDT) as it would not be just and equitable to apply a reduction to the Award by taking into the account the eventual outcome of the criminal proceedings several months after the EDT.

11.3 Also, on the basis of their own evidence, the Respondent did not know at the time of the EDT whether or not the Respondent had admitted guilt to any offence.

11.4 Further, in this judgement, the Tribunal has concluded that a reasonable employer would have followed a more measured, considered and balanced approach to the issue of the Applicant's dismissal. This was further compounded by the total absence of pertinent file notes made at the time of the considerations of senior management.

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 Tribunalôs 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.

11.5 However, based on the facts known at the time of the EDT, a reasonable employer might have concluded on 12 December 2008 that the Applicant may have made some poor judgements in her personal life which led to a difficult situation for both herself and her employer.

11.6 The Tribunal has concluded that in light of these considerations it would be just and equitable to reduce the six month award of compensation for unfair dismissal by 25% (twenty-five percent) as provided for by Section 23(2) in The Employment Protection (Guernsey) (Amendment) Law, 2005. The amount of £19,174.36 is therefore reduced and **an Award of £14,380.77 is made.**

Signature of the Chairman: Mr P Woodward	**Date: 9 July 2009**

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 Tribunalôs 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.