

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Jonathan Bessin

RESPONDENT: Island Waste Limited

Decision of the Tribunal Hearing held on 22 June 2010

**Tribunal Members: Mrs Tina Le Poidevin
Ms Alison Girollet
Ms Katie Vidamour**

UNANIMOUS DECISION

1. Based on all the evidence presented, the Tribunal found that the Applicant was fairly dismissed under Section 6(2)(b) of the Employment Protection (Guernsey) Law, 1998, as amended.
2. The claim of unfair dismissal is, therefore, dismissed and no award is made.

Mrs Tina Le Poidevin

16 July 2010

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Signature of the Chairperson

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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

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

1.0 Introduction

1.1 The Applicant claimed that:

- He had been unfairly dismissed on 19 January 2010 for allegedly drinking and driving whilst working for the Respondent.

The Applicant also claimed that he was entitled to four weeks' full pay by law but was advised that this was not a matter for consideration by this Tribunal.

1.2 The Respondent disputed the claim on the grounds that:

- The Applicant had been fairly dismissed as he was found to be over the drink drive limit whilst at work and this constituted an act of gross misconduct.

1.3 The Applicant, Mr Jonathan Bessin, appeared in person and gave witness testimony under affirmation on his own behalf.

1.4 Form ET1 was presented in evidence by the Applicant.

1.5 Mr Dan Hubert appeared for the Respondent and gave evidence under oath.

1.6 Form ET2 and a bundle of documents labelled ER1 (containing file notes prepared by Amanda Brehaut dated 19 January 2010 and 25 January 2010, letters dated 19 January 2010 and 25 January 2010 to Mr Bessin from Mr D Hubert, letter/form from Social Security to Island Waste dated 28 January 2010, letter dated 5 February 2010 from Mr J Bessin to Mr D Hubert, invoice addressed to Mr D Hubert for breathalyser and mouthpieces from Breathalyser Direct & Blood Pressure Direct Ltd dated 11 March 2009, user guidelines for the breathalyser, Mr D Hubert's statement dated 21 June 2010, Ms Amanda Brehaut's statement dated 17 June 2010, Mr Ty Hockey's statement, Mr J Bessin's terms and conditions of employment with Island Waste Limited dated 1 October 2004 and signed on 4 October 2004 and Mr J Bessin's unsigned terms and conditions of employment dated 1 December 2009) were presented in evidence by the Respondent.

1.7 Two witnesses were called for the Respondent, namely Ms Amanda Brehaut, an employee with Human Resources and Office Management responsibilities, (who gave evidence under affirmation) and Mr Ty Hockey, an employee with responsibility for health and safety (who gave evidence under affirmation).

1.8 Upon seeing the witness, Ms Amanda Brehaut, at the hearing, Mrs Le Poidevin declared that Ms Brehaut's partner was the son of a friend of Mrs Le Poidevin. Both parties were asked if they had any objection to Mrs Le Poidevin continuing to hear the case. No objections were raised.

- 1.9 As the Applicant's pay details varied on the ET1 and ET2 both parties were asked if they could agree upon a figure. The higher figure of £12,391.52 as noted on the ET2 was agreed by both parties.

2.0 Facts Found by the Tribunal

- 2.1 The Applicant commenced employment on 28 July 2004.
- 2.2 As evidenced by the Applicant's form ET1 and the Terms and Conditions of Employment documents, the Applicant was employed as a Skip Driver by Island Waste Limited.
- 2.3 Island Waste Limited, a non trading company, owned three subsidiaries, Circuit 2001 Limited, Skips RUS Limited and R F Mills Limited.
- 2.4 Mr Dan Hubert was the Managing Director of Island Waste Limited and its subsidiaries.
- 2.5 Approximately 55 members of staff were employed by the Respondent at the time of the Applicant's dismissal.
- 2.6 All members of staff were employed through Circuit 2001 Limited although their employment contracts were with Island Waste Limited as a holding company.
- 2.7 The Applicant had signed the Terms and Conditions of Employment dated 1 October 2004 but had not signed those dated 1 December 2009.
- 2.8 On 19 January 2010 the Applicant was asked to take a breath test using the office breathalyser.
- 2.9 The Applicant agreed and took the test twice. On both occasions the test readings recorded were over the legal limit.
- 2.10 The Applicant was told that he would need to stop working and was taken home by a colleague.
- 2.11 A letter terminating the Applicant's employment without notice was hand delivered to the Applicant by Ms Amanda Brehaut that evening.

3.0 The Law

- 3.1 Section 5(2)(a) of the Law states that an employee shall be treated as dismissed by his employer 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."
- 3.2 Section 5(4)(b) of the Law states that the effective date of termination "in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect".
- 3.3 Section 6(1)(a) of the Law notes that it shall be for the employer to show what was the reason for the dismissal and 6(1)(b) that it was a reason falling within Section 6(2).
- 3.4 Section 6(2)(b) of the Law relates to the conduct of the employee.

4.0 Summary of Parties' Main Submissions

Respondent

- 4.1 Mr Hubert and Ms Brehaut confirmed that sometime in 2009 the Applicant had been breathalysed at work and the reading was a little over 0.35 mg per litre of alcohol. At this time, the Applicant claimed that he had been using Listerine mouthwash which he kept in his lorry and when asked by Ms Brehaut if she could see it, he explained that he had finished it that morning. As the reading was slightly over and alcohol consumption by the Applicant could not be proven, no action was taken. This evidence was also confirmed by Mr Ty Brehaut.
- 4.2 On the morning of 19 January 2010, around 11 am, Mr Hubert was alerted by other members of staff that Mr Bessin's breath smelt strongly of alcohol.
- 4.3 Mr Hubert spoke with him in the office and found this to be the case.
- 4.4 Mr Hubert asked Ms Amanda Brehaut, Office Manager, to ask Mr Bessin if he would agree to take a breathalyser test.
- 4.5 Ms Brehaut gave evidence saying that Mr Bessin agreed to take this test and, in fact, two tests were taken, one giving a reading of 0.760 and the other 0.655, both being over the drink drive limit of 0.35 mg per litre of alcohol.
- 4.6 The breathalyser equipment had been purchased a few months before January 2010.
- 4.7 Mr Bessin did not dispute the readings but kept repeating "I can't believe it. I have not had a drink for two days. It must have been the Listerine that I used this morning".
- 4.8 As the Applicant had started work at 7 am and the test was conducted some four hours later, Mr Hubert did not believe him.
- 4.9 Mr Hubert continued to question the Applicant who was adamant that he had not been drinking the night before or that morning.
- 4.10 As the office breathalyser tests only provided a guideline, Mr Hubert asked the Applicant if he wanted him to call the Police so that they could conduct a formal breath test to verify the accuracy of the office breathalyser. The Applicant refused, saying "Oh no, don't do that. It might prove positive."
- 4.11 Ms Brehaut also confirmed that the Applicant had not wanted the Police to be called.
- 4.12 Mr Hubert then tested the machine himself and obtained a reading of 0.001 which confirmed that the machine was working accurately; this was verified by Ms Brehaut.
- 4.13 The Applicant was told that he would have to take the rest of the day off work whilst Mr Hubert reflected on the situation before making a decision in relation to the Applicant's continued employment or otherwise.

- 4.14 The Applicant asked if he could drive his lorry home but Mr Hubert refused and arranged for him to be taken home by another employee.
- 4.15 Mr Hubert then deliberated on the events of that morning and reviewed the Applicant's Terms and Conditions of Employment document.
- 4.16 Whilst Mr Bessin had only signed the Terms and Conditions of Employment document dated 1 October 2004, Clause 11 (relating to termination of employment) of the most recent Terms and Conditions of Employment document dated 1 December 2009 had not altered.
- 4.17 Mr Hubert appreciated the Applicant's long service but felt that the possibility of an accident being caused by the Applicant being over the drink drive limit, whilst driving a 14 tonne lorry, was sufficiently serious to justify the termination of his employment.
- 4.18 Mr Hubert prepared a letter dated 19 January 2010 terminating the Applicant's employment and this was hand delivered to the Applicant that evening by Ms Brehaut.
- 4.19 Ms Brehaut advised the Applicant that if he wanted to discuss anything he could contact her or Mr Hubert and they would be happy to speak with him.
- 4.20 Ms Brehaut confirmed that the Applicant had been upset at the situation but said he understood why the decision had been made.
- 4.21 Following the Applicant's departure from the office premises, the Applicant made contact with another employee in the office but made no attempt to contact Mr Hubert or Ms Brehaut even though such communication channels were offered to him.
- 4.22 In relation to Mr Bessin's dismissal without notice, Mr Hubert referred to Clause 11 and considered that the reason for his dismissal fell within the meaning of "... other similar wrongdoing or any other matter that the company considers grievous to its operations".
- 4.23 Mr Hubert believed that his actions were appropriate in the circumstances as, if the Applicant had continued to be employed in the capacity of Skip Driver, harm could have been caused to the general public, the Applicant himself, other staff and/or company property.

5. Applicant

- 5.1 The Applicant had readily agreed and never refused to take an office breathalyser test.
- 5.2 He did not remember being asked if he wanted the Police to be called to administer a breathalyser test.
- 5.3 He had not had a drink for at least two days prior to taking the office breathalyser test.
- 5.4 He could not understand why the breathalyser provided readings over the 0.35 mg per litre of alcohol drink/drive limit.
- 5.5 After being taken home from work, he had been left waiting for the remainder of the day on 19 January 2010 without any contact from Mr Hubert until the termination letter was hand delivered by Ms Brehaut.

- 5.6 He considered that Mr Hubert should have given him the letter himself.
- 5.7 There was no proof that he had been drinking. The office breathalyser test provided a rough guideline and if Mr Hubert thought he had been drinking, he should have called the Police.
- 5.8 A careful investigation had not been carried out.
- 5.9 He had not been given the right of appeal.
- 5.10 He did not feel that he had been fairly treated.
- 5.11 He had not been suspended, just dismissed.
- 5.12 The Applicant alleged that his attempts to find alternative employment were hampered by rumours spread by Mr Hubert in relation to his dismissal for drink driving.
- 5.13 It was some time before the Applicant managed to find work and this had placed him in a very difficult financial situation.

6.0 Conclusion

- 6.1 Based on all evidence presented, the Tribunal concluded that:
- 6.2 Mr Hubert acted appropriately in asking the Applicant to undertake a breath test when it came to his attention that he smelled of alcohol, as he had a duty to protect the public, his employees and company property.
- 6.3 The Applicant was compliant, readily undertaking the tests. He could not understand why the readings were above the drink drive limit and did not recall Mr Hubert asking if he wanted the Police to attend.
- 6.4 Whilst it would have been preferable for the Respondent to have summoned the Police to undertake an official test, the Tribunal prefers the evidence given by Mr Hubert (supported by Ms Brehaut) that he had asked the Applicant if he wished for the Police to be called but did not insist upon this because he did not wish the Applicant to lose his driving licence and livelihood if he had done so.
- 6.5 Mr Hubert tested the equipment himself and established that the equipment was working correctly.
- 6.6 The office breathalyser tests themselves (whilst only indicators) provided the Respondent with reasonable suspicion to remove the Applicant from the workplace, thus suspending him whilst considering what action should be taken.
- 6.7 Clause 11 of the Applicant's contract provided for dismissal without notice for acts of a serious nature. The Applicant understood the seriousness of being under the influence of alcohol whilst in charge of a vehicle and it was reasonable in the circumstances to reach the conclusion that the Applicant had committed an act of gross misconduct.
- 6.8 There was not 'proof beyond all reasonable doubt' that the Applicant had been drinking alcohol, but there were reasonable grounds to believe that this was the case.

- 6.9 The Respondent did what he could in terms of an investigation, particularly given that his offer to call the Police was allegedly refused by the Applicant.
- 6.10 There was not a significant delay between the Applicant's removal from the workplace and the delivery of the decision to terminate employment.
- 6.11 Specific reference to the right of appeal had not been provided but this, in itself, did not constitute an unfair dismissal. In any event, communication channels had been left open for the Applicant to speak with either Mr Hubert or Ms Brehaut and this was not taken up by the Applicant.
- 6.12 The Applicant's removal from the workplace, whilst Mr Hubert considered the situation, was, in itself, a suspension. The fact that the word suspension was not specifically used does not constitute an unfair dismissal.
- 6.13 It may have been more appropriate for the Respondent to deliver the termination decision personally rather than by letter delivered by an employee but, nevertheless, dismissal without notice was justified.
- 6.14 Any allegations relating to rumours surrounding the Applicant's dismissal, whilst distressing for the Applicant, are not relevant in determining this case.
- 6.15 Based on all the evidence presented, the Tribunal found that the Applicant was fairly dismissed under Section 6(2)(b) of the Employment Protection (Guernsey) Law, 1998, as amended.

Mrs Tina Le Poidevin

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Signature of the Chairman

16 July 2010

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Date