

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Geraldo Gomes
 Represented by: Unrepresented

RESPONDENT: Carlton Hotels Limited
 Represented by: Mr Andrew Castle

Decision of the Tribunal Hearing held on 18 November 2010

Tribunal Members: Ms H Martin (Chairman)
 Mr R Brookfield
 Ms Norson Harris

DECISION

Having considered all the evidence and the representations of both parties and having due regard to all circumstances, the Tribunal finds that under the provisions of The Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not unfairly dismissed on grounds of:

1. Refusal by the Respondent to provide a written contract of employment and/or payslips;
2. Asserting a statutory right.

In these circumstances, the Applicant is not entitled to claim exemption from the qualifying period of employment as required by 'the Law'.

The complaint is dismissed.

After careful consideration, the Tribunal concluded that the Applicant's claim that he was dismissed on the grounds of 'the assertion of a statutory right to a written contract of employment' was neither frivolous nor vexatious; the Tribunal did however conclude that the Applicant was misguided in terms of his understanding and interpretation of the Employment Protection (Guernsey) Law, 1998, as amended.

As a result of the above, the Tribunal determines that no costs against Mr Gomes should be awarded.

Ms Helen Martin

 Signature of the Chairman

5 January 2011

 Date

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

Extended Reasons

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.

1.0 Introduction

1.1 The Applicant, who represented himself, gave witness testimony, which was also supported by documentary evidence (EE1 and EE2 refers).

1.2 The Applicant called the following witness:
Mr M Gomes, brother of the Applicant.

1.3 The Respondent, Carlton Hotels Limited, was represented by Mr Andrew Castle.

1.4 Mr Andrew Castle called the following witnesses:
Mr John Carpenter (Managing Director)
Mr Keith Read
Mr Sean Potts

The Respondent was supported by documentary evidence (ER1 refers).

1.5 The Applicant claimed he had been unfairly dismissed. He stated that Mr John Carpenter, the Managing Director of Carlton Hotels Limited had refused to comply with the statutory requirement to provide a written contract of employment and payslips. The Applicant claimed that this disagreement led to him being falsely accused of theft and to his dismissal. He stated that his attempt to assert his statutory right to a written contract of employment had caused Mr John Carpenter to turn against him.

1.6 The Respondent claimed that Mr Gomes was dismissed for gross misconduct associated with the alleged misappropriation of company funds. The Respondent claimed that Mr Gomes had attempted to misrepresent the real reason for his dismissal by alleging that he was asserting a statutory right because he had been employed by the Respondent for less than 12 months and therefore, in normal circumstances, was not eligible to claim unfair dismissal under the Employment Protection (Guernsey) Law, 1998, as amended.

2.0 Facts Found

2.1 The Applicant was employed by the Respondent for four months from 11 January 2010 to 14 May 2010 as the Restaurant Manager of Latinos Restaurant at the Carlton Hotel.

2.2 The Applicant did not have a written contract of employment.

2.3 The Applicant's salary was £400.00 per week.

2.4 The Applicant received a letter from the Respondent notifying him of his dismissal for gross misconduct dated 16 May 2010.

3.0 Mr Geraldo Gomes

3.1 The Applicant, Mr Geraldo Gomes, appeared in person and gave evidence under oath.

3.2 Mr Gomes told the Tribunal that he had a right to have a contract of employment and that it was five weeks after the commencement of his employment on 11 January 2010 at Carlton Hotels Limited before he received his first wage.

3.3 The Applicant claimed that in the second week of February 2010 he spoke with Mr John Carpenter about his wages and agreed that he would be paid £400.00 per week. Mr Geraldo

Gomes told the Tribunal that Mr John Carpenter had agreed to speak with Mr Keith Read who was acting as a Consultant to the business and that Mr Read would prepare his contract of employment.

- 3.4 Mr Gomes told the Tribunal that other members of staff had asked him for their payslips and that Mr John Carpenter had said that they would be issued the following week.
- 3.5 The Applicant told the Tribunal that he had spoken to Mr Keith Read on the 26 April 2010 and requested a contract of employment and payslip. Mr Geraldo Gomes told the Tribunal that Mr Read had said that he would issue a contract of employment but had not committed to do so immediately. Mr Gomes claimed that this was not fair to staff and that he needed a contract and payslip in order to pay the suppliers.
- 3.6 Mr Geraldo Gomes referred to a letter from a supplier, Cimandis (EE2 refers) and the payslip that was provided, dated 11 January 2010. He told the Tribunal that documentary evidence in the form of a payslip was essential for him to prove his salary to the supplier as he had personal debts arising from his former role as manager of Chouet Tea Rooms.
- 3.7 Mr Geraldo Gomes referred the Tribunal to EE1, the written statement of Elin Silina and Juris Jirgenson. Both witnesses were no longer working on the island and both claimed in their joint written statement that they did not have contracts of employment and that the Applicant had requested them from Mr John Carpenter and that they had witnessed him doing so.
- 3.8 Mr Gomes told the Tribunal that he wrote a letter of resignation to Mr John Carpenter on 14 April 2010 giving two weeks notice because he felt that he was being treated "like a child." The Applicant told the Tribunal that this letter followed an altercation between him and Mr John Carpenter in the early hours of the night before when Mr Carpenter complained about the noise Mr Geraldo Gomes was making with his friends in one of the hotel rooms. Mr Gomes did not have a copy of this letter available for the Tribunal and told the Panel that he placed the letter under the door of Mr John Carpenter's office. He told the Tribunal that he handed a second copy of the letter to Mr Carpenter the next day. The Applicant told the Tribunal that on receipt of the letter, Mr John Carpenter had told him to forget his resignation and persuaded him to continue to work as Restaurant Manager for Carlton Hotels Limited.
- 3.9 Mr Gomes told the Tribunal that all of the kitchen staff had complained that they were not paid overtime and did not have a contract of employment and that he had had several conversations with Mr John Carpenter about this. Mr Gomes said that he had sought to protect the rights of his staff. He said that five staff gave one week's notice to leave at the end of April specifically because they did not have contracts of employment and had not agreed overtime pay.
- 3.10 The Applicant told the Tribunal that he had had a further disagreement with Mr Carpenter concerning the money collected as tips from customers. Mr Carpenter had refused to distribute 'tip' money to staff that had resigned and left his employment and insisted that it was divided amongst the remaining staff.
- 3.11 The Applicant told the Tribunal that his conflict with the Managing Director, Mr Carpenter had increased in early May 2010. He told the Tribunal that Mr Carpenter asked him to come into work on 14 May 2010 at 11.00am. At this meeting, Mr Gomes stated that Mr Carpenter had told him that the takings from the previous Sunday lunch were missing and asked him to account for where they were. He told the Tribunal that Mr Carpenter accused him of taking the money. Mr Gomes claimed that he did not know anything about the missing money and that following his response, Mr Carpenter told him he was suspended from his role as Restaurant Manager. Mr Gomes told the Tribunal that he stayed for approximately 40

minutes after this conversation to prepare the tables for a party in the Godfather restaurant. The Applicant told the Tribunal that he refused to leave the Carlton hotel without a letter from Mr Carpenter explaining why he was suspended. He stated that Mr Carpenter told him to leave or he would call the police. Mr Gomes told the Tribunal that he went to Commerce and Employment for advice and then went to the Police Station himself. On his way into the Police Station he passed a police car going to the Carlton Hotel. He told the Tribunal that the police told him to come back the next day and that Mr John Carpenter was preparing a statement concerning the alleged theft.

- 3.12 The Applicant told the Tribunal that on the 17 May 2010, three days after his suspension, he took four staff to Commerce and Employment to complain about not having any contracts or payslips. He wrote to the Respondent (EE1 refers) referencing his request for a written contract in the second week of February and his understanding of the verbal agreement concerning his remuneration.
- 3.13 The Applicant told the Tribunal that he handed the letter to Keith Read on Tuesday 18 May 2010.
- 3.14 The Applicant told the Tribunal that he received a letter from the Respondent dated 16 May 2010 formally dismissing him from his role of Restaurant Manager at the Carlton Hotel. The Applicant told the Tribunal that he did not receive this letter until 29 May 2010 and that he had no further contact from the Respondent up until the receipt of this letter. Mr Gomes submitted an envelope to the Tribunal with his name and address typed as evidence to support his assertion that he had received the letter on 29 May 2010; the Tribunal found the postmark on the envelope illegible and therefore could not establish a link to the letter of dismissal.
- 3.15 Mr Gomes told the Tribunal that he received a call from the police in the first week of July advising him that a complaint had been made by the Respondent concerning £20.00 that was missing from the till at the Wicked Wolf, Carlton Hotel.
- 3.16 Under cross examination by Mr Andrew Castle, Mr Gomes was required to account for the occasions that he requested for a written contract of employment and who had witnessed these conversations. Mr Gomes recalled the dates of 18 February, 5/10 April and 24 April. He told the Tribunal that his brother Mr M Gomes had been present and witnessed the conversation late in the evening or early hours of 5 or 10 of April 2010.

4.0 Mr M Gomes

- 4.1 Mr M Gomes, brother of the Applicant, told the Tribunal that he witnessed his brother request a contract of employment from Mr John Carpenter on at least one occasion. He told the Tribunal that Mr Carpenter made excuses that he had been too busy and that he was waiting for guidance from Mr Keith Read. Mr M Gomes told the Tribunal that the staff in the Pizza restaurant did not have contracts of employment or housing licences.
- 4.2 Under cross examination, Mr M Gomes told the Tribunal that he had witnessed his brother request a contract of employment on at least three occasions.

5.0 Opening statement for the Respondent

- 5.1 Mr Andrew Castle told the Tribunal that Mr Geraldo Gomes had been dismissed for gross misconduct relating to the alleged theft of money and that his claim for Unfair Dismissal by reason of asserting a statutory right was a frivolous and vexatious attempt to “stir up trouble.” He told the Tribunal that the alleged theft was in the hands of the police and that

whether the prosecution proceeds or not was irrelevant to the Employment Tribunal proceedings.

- 5.2 Mr Andrew Castle told the Tribunal that the issuance of contracts of employment to staff had taken time to sort out but that all employees of the Carlton Hotel businesses were now in possession of a written contract of employment. Mr Castle stated that the Applicant had only sought to assert his statutory right after the decision had been taken to dismiss him for gross misconduct.

6.0 Mr John Carpenter

- 6.1 Mr John Carpenter told the Tribunal that he was the Chairman of Carlton Hotels Limited and that originally he had been the 'sleeping partner' but that following his partner leaving the business in September 2009 he had taken over direct management of the business. He told the Tribunal that he was supported in doing so by Mr Keith Read, an experienced hotelier and restaurateur.
- 6.2 Mr Carpenter told the Tribunal that he found that Mr Geraldo Gomes had a very volatile personality although he was popular with the customers. He told the Tribunal that Mr Gomes had a 'habit of resigning' and that he had lost count of the number of times that he had done so verbally.
- 6.3 Mr Carpenter stated that he had become concerned about discrepancies in balancing the tills in the work areas that Mr Gomes was responsible for.
- 6.4 Mr Carpenter stated that he noticed Mr Gomes on CCTV take payment from a customer and subsequently put it in his pocket and not in the till. He stated that he reported the matter to the police the following day and after consulting with Mr Keith Read suspended Mr Gomes.
- 6.5 Mr Carpenter said that he had not provided a written contract for Mr G Gomes because he was not meeting targets and his role had changed from that of Manager of Latinos restaurant to Manager of the Wicked Wolf restaurant. He said that the Respondent, Mr Carpenter met with Mr Gomes on a regular basis and that the Applicant had not asked specifically for a written contract of employment at any time.
- 6.6 Mr Carpenter told the Tribunal that following the discovery of the missing money he had set up a meeting with the Applicant on 14 May to give him an opportunity to own up to the theft and pay back the money. He said he was deliberately unspecific in his enquiry to the Applicant because he did not want to prejudice the police questioning concerning the alleged theft. He told the Tribunal that the conversation had become very heated and that Mr Gomes had refused to leave the premises.
- 6.7 Mr Carpenter told the Tribunal that he did not know 'how to dismiss' an employee and that he had signed a letter dismissing Mr Gomes subsequently and posted it to the Applicant on 16 May 2010. He told the Tribunal that the envelope was handwritten and not typed. The Respondent told the Tribunal that he posted the letter immediately because he did not want Mr Gomes to come into work on the following Monday.
- 6.8 The Respondent stated that he could not recall any specific meetings with the Applicant about contracts or payslips and that he had not dismissed anyone other than Mr Geraldo Gomes. He stated that he had plenty of opportunity to accept his Mr Gomes' verbal threats to resign if he had wanted to 'dismiss' him for anything else.

- 6.9 Mr Carpenter told the Tribunal that at no time had he perceived that Mr Geraldo Gomes represented staff of the Carlton Hotel regarding any matter or matters pertaining to their employment. He told the Tribunal that in his view the staff disliked Mr Gomes and that he often instigated heated arguments with them and when they did not agree with his ideas he would threaten to leave or threaten to resign.

7.0 Mr Keith Read

- 7.1 Mr Keith Read told the Tribunal that he did not have direct management responsibility for the Carlton Hotel businesses but that he helped Mr Carpenter whenever he could.
- 7.2 Mr Read told the Tribunal that he found Mr Gomes to be a very excitable and unpredictable character who was very difficult to communicate with; often talking incessantly which made him almost incomprehensible. Mr Read stated that Mr Gomes had told him on a number of occasions that he had resigned for one reason or another.
- 7.3 He told the Tribunal that he could not recall Mr Gomes requesting a contract of employment but that he did recall him requesting a payslip and that he had referred this request to Mr Carpenter.
- 7.4 Mr Read told the Tribunal that having seen the CCTV footage of the alleged theft by Mr Gomes he had no doubt that he was dismissed for theft and for no other reason.

8.0 Mr Shaun Potts

- 8.1 Mr Potts told the Tribunal that he was employed as the Entertainments Manager at the Wicked Wolf and Assistant General Manager. He stated that he had worked at the Carlton hotels for about five years and reported directly to Mr John Carpenter. He told the Tribunal that he helped with some of the administration tasks and that it was his role to balance the takings with the till receipts for all three restaurants.
- 8.2 Mr Potts stated that not long after Mr Gomes started work at the Carlton hotel he noticed that there were discrepancies in the till balances. The money was frequently less than the till receipts by between £15 and £30 per day and this was not a problem that had been experienced previously. Mr Potts told the Tribunal that he never got to the bottom of the discrepancies but that he did notice that the problem stopped when Mr Gomes left and confirmed to the Tribunal that there is no problem now.
- 8.3 Mr Potts told the Tribunal that Mr Gomes was personable and very good with the guests but that he had a fiery temperament. He told the Tribunal that Mr Gomes regularly threatened to resign and that this was almost a weekly occurrence.
- 8.4 Mr Potts told the Tribunal that at no time did he recall hearing Mr Gomes request a contract of employment and that in point of fact, Mr Gomes had used the lack of a contract of employment to threaten to walk out without giving any notice on a number of occasions. Mr Potts expressed the view that Mr Gomes had used the lack of a written contract as an advantage or "trump card" on a number of occasions.
- 8.5 Mr Potts stated that he had never been made aware or witnessed Mr Gomes championing the cause of any other member of staff.
- 8.6 Referring to the CCTV footage, Mr Potts stated that the tape showed Mr Gomes take money from a customer, hide it under papers and subsequently put it in his pocket. He told the Tribunal that there was no doubt in his view that Mr Gomes had stolen the money.

9.0 Conclusions

- 9.1 The Tribunal was persuaded by the evidence presented by the witnesses for the Respondent and testimony from the Respondent himself, who stated that they had not heard Mr Gomes request a contract of employment. The Tribunal gave additional weight to the testimony of Mr Potts that Mr Gomes had sought to use the lack of a written contract of employment to his advantage during his employment. In addition, the Tribunal placed weight on the fact that there was only written testimony from two witnesses for the Applicant which meant that they were not available to be cross examined.
- 9.2 The Tribunal noted that Mr Gomes' letter referring to his request for a written contract of employment was written after he had been dismissed for gross misconduct and by his own admission, notably after he had sought advice from Commerce and Employment concerning his eligibility to claim unfair dismissal. The Tribunal could not establish a causal link between the alleged conversations concerning his request for a written contract and payslips with Mr John Carpenter and Mr Keith Read and his subsequent dismissal.
- 9.3 Regarding the claim for recoverable costs by the Respondent, the Tribunal took the view that this was a reasonable claim for the Respondent to make in light of the circumstances surrounding the dismissal of the Applicant for alleged gross misconduct.
- 9.4 After careful consideration, the Tribunal concluded that the Applicant's claim that he was dismissed on the grounds of 'the assertion of a statutory right to a written contract of employment' was neither frivolous nor vexatious'; the Tribunal did however conclude that the Applicant was misguided in terms of his understanding and interpretation of the Employment Protection (Guernsey) Law, 1998, as amended. As a result of the above, the Tribunal determined that no costs against Mr Gomes should be awarded.
- 9.5 The Tribunal heard evidence in relation to the lack of written statements/contracts, not just for the Applicant but for a number of employees. The Tribunal recognises that the Conditions of Employment Guernsey Law, 1985, as amended, provides employees with the statutory right to a written statement of their terms and conditions of employment (within four weeks of the beginning their employment).
- 9.6 However, the failure of an employer to provide a written statement is, in itself, a matter for a different court, not for this Tribunal, that is **unless** an Applicant can make out a causal link between asserting his right to a written statement and his dismissal by his employer – in which case he can bring a claim of unfair dismissal before the Employment & Discrimination Tribunal. In Mr Gomes' case, the Tribunal is persuaded that no such causal link has been established.

10.0 Decision

- 10.1 Having considered all the evidence and the representations of both parties and having due regard to all circumstances, the Tribunal found that under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not unfairly dismissed on grounds of:
- a) Refusal by the Respondent to provide a written contract of employment and/or payslips;
 - b) Asserting a statutory right.

10.2 In these circumstances, the Applicant was not entitled to claim exemption from the qualifying period of employment of 12 months, as required by 'the Law'.

10.3 The complaint is therefore dismissed.

Ms Helen Martin

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Signature of the Chairman

5 January 2011

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Date