

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Mark O'Meara

Represented by: Himself

RESPONDENT: J W Rihoy and Son Limited

Represented by: Mr Gavin Rihoy and Mr Michael Veron

Decision of the Tribunal Hearing held on 3 and 10 March 2011**Tribunal Members:** Ms Georgette Scott (Chair)

Ms Alison Girollet

Mr Norson Harris

DECISION

Having due regard to all the circumstances and evidence presented, the Tribunal unanimously finds that, under Section 6(2)b of the Employment Protection (Guernsey) Law, 1998, as amended, Mr Mark O'Meara was fairly dismissed from his employment as a driver with J W Rihoy & Son Ltd.

Mr O'Meara's claim of unfair dismissal is therefore dismissed and no award is made.

Amount of Award (if applicable): N/A

Ms Georgette Scott

.....
Signature of the Chairman

14 April 2011

.....
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, Mr Mark O'Meara (also known as "Tony"), claimed he had been unfairly dismissed by his employer, J W Rihoy, based on allegations of gross misconduct following an accident at work where he had reversed a lorry into a wall and subsequently had allegedly verbally abused and threatened a colleague.
He claimed that the Respondent was influenced in its treatment of him because of a further accident at work in which he had fallen off the rear of a lorry injuring himself, as a result of which he had not only been absent from work for several weeks but had claimed that under Health & Safety regulations, the company was negligent.
- 1.2 Mr O'Meara also claimed that the Respondent's disciplinary procedure had been flawed and he had been prevented from adequately presenting his own defence during the Disciplinary Hearing and Appeal.
- 1.3 Just prior to the Tribunal Hearing, Mr O'Meara had requested that a recording of the disciplinary hearing that he had made be submitted in evidence. Given that this had not been discussed at the Case Management Meeting it was agreed that the parties would have an opportunity to discuss the request as a Preliminary Matter at the Tribunal Hearing.
- 1.4 The Respondent, J W Rihoy and Son Limited, disputed the Applicant's claims on the grounds that the Applicant was fairly dismissed for gross misconduct following a full and fair disciplinary process.
- 1.5 The Applicant submitted, in addition to the ET1 (Unfair Dismissal Complaint Form) and enclosures, a file of documents referenced 'EE1'.
- 1.6 The Applicant appeared in person and gave witness testimony under oath on his own behalf and also called two witnesses, Mr Eddie Osborne and Mr Hayden Cozens, both of whom gave testimony under oath.
- 1.7 The Respondent submitted in addition to ET2 (Response Form) and enclosures, a file of documents referenced 'ER1'.
- 1.8 The Respondent was represented by Mr Gavin Rihoy, Managing Director of J W Rihoy and Son Limited and was assisted by Mr Michael Veron, Labour Manager;
Mr Veron also gave witness testimony under oath.
- 1.9 The Respondent also called the following witnesses, all of whom gave witness testimony under oath:
- Mr Mark Page, Carpenter
 - Mr Neil Price, Site Foreman
 - Mr Stuart Giles, Director
 - Mr David Tostevin, Director

2.0 Facts Found by the Tribunal

- 2.1 J W Rihoy and Son Limited, a family owned construction business had been established for over 80 years. The business employed over 120 people directly and subcontracted around the same number again on a variety of projects around the island.
- 2.2 Mr O'Meara was employed by J W Rihoy as a Driver from 7 July 2008 through to 7 September 2010.
- 2.3 The Applicant's gross earnings over the last six months of his employment were agreed at £14,388.66.
- 2.4 An accident at work occurred on 1 July 2010, when Mr O'Meara collided with a wall when reversing a lorry into a driveway of a building site. Relatively minor damage was recorded which included the dislodging of a few pieces of stone from the wall.
- 2.5 A further accident at work involving Mr O'Meara occurred on 13 July 2010, when he fell off the rear of a lorry and was injured and subsequently signed off sick for several weeks.
- 2.6 Two threatening texts of unknown origin were received by Mr Mark Page between 9 – 19 July 2010.
- 2.7 An investigation was carried out between 20 – 11 August 2010 into the alleged threatening behaviour by Mr O'Meara of a colleague, Mr Mark Page, following the latter reporting the accident on 1 July 2010.
- 2.8 Mr O'Meara was notified both verbally and in writing of a disciplinary hearing. The letter was dated 12 August and the hearing date was set for 16 August 2010.
- 2.9 The hearing was delayed between 16 August and 6 September due to Mr O'Meara being signed off sick.

3.0 The Law

- 3.1 The relevant section of the Employment Protection (Guernsey) Law 1998 (as amended) in relation to this case is Section 5(2) (a), which states 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;"
- 3.2 In determining whether the dismissal of an employee was fair or unfair, Section 6(1) of the Law notes that "it shall be for the employer to show (a) what was the reason (or if there was more than one, the principal reason) for the dismissal; and (b) that it was a reason falling within subsection (2)" and Section 6(2) notes "For the purposes of subsection (1)(b), a reason falling within this section is a reason which...(b) related to the conduct of the employee."

4.0 Preliminary Matter

- 4.1 The Applicant had requested that a tape of the Disciplinary hearing and two transcripts of the same be admitted in evidence for the Tribunal.
- 4.2 The first of the transcripts had been provided by the Secretary to Mr O' Meara's Advocate, Mr David Domaille and the second of the transcripts was provided by Mr O'Meara's partner.

- 4.3 The Tribunal agreed to listen to the recording and compare this with the transcripts and then to hear both parties comments regarding their use as evidence in the hearing.
- 4.4 The Respondent expressed concern that the Applicant had not requested agreement to the use of a recording device at the disciplinary hearing and had denied it when asked if he was using one.
- 4.5 In addition, the Respondent raised objections to the transcript undertaken by the Applicant's partner, saying that it had not been brought up at the Case Management Meeting; it was inaccurate and had substituted an ending where it was clear the tape had run out before the disciplinary hearing had ended.
- 4.6 The Applicant claimed that he had requested and received permission to record the Disciplinary Hearing from Mr Veron after he had been denied the attendance of his Advocate at the hearing. He added that it was clear that the Respondent knew he had the recording device since he was asked to switch it off at the end of the hearing.
- 4.7 After an adjournment the Tribunal informed the parties that it had agreed to admit the first of the transcripts and allow the parties to test its validity during the course of the hearing. The panel also took into account a judgment from a UK Tribunal that was relevant to the matter – Chairman and Governors of Amwell View School v Dogherty [2007] ICR 135, EAT.

5.0 Summary of Parties' Main Submissions

(a) The Respondent's case

5.1 Witness Testimony - Michael Veron

- 5.1.1 Mr Veron stated that on 1 July 2010 he received a copy of an e-mail sent by Dave Tostevin to Chris Pols, Transport Manager (ER1 Tab 2, page 1 refers) reporting an accident which had occurred earlier that day on a site involving Tony O'Meara reversing into a wall at Colombiere. Mr Pols replied that the accident had not been reported to him (ER1 Tab 2, Page 8 refers). When confronted Mr O'Meara completed the accident report form (ER1 Tab 2, page 2 refers) in line with company procedure.
- 5.1.2 Sometime later Mr Veron received an official complaint from Mark Page that he had been verbally abused and threatened by Tony O'Meara as a result of the accident.
- 5.1.3 Following the complaint Mr Veron gathered information through interviews with various members of staff to establish the facts and made notes of all the interviews held.
- 5.1.4 Mr Veron discussed these notes with his line manager Dave Tostevin and it was agreed that both incidents, i) failing to report an accident in line with company policy ii) verbally abusing a colleague were serious enough to warrant formal disciplinary procedures being brought against Mr O'Meara.
- 5.1.5 Mr Veron's investigations started with an interview with the complainant Mark Page, who informed him that the day after an accident involving Tony O'Meara, he received a message from the Site Foreman, Neil Price, that Tony O'Meara had asked him to pass on a message that he would break his legs for telling Dave Tostevin about the accident the previous day.
- 5.1.6 Some time the following week, when Tony O'Meara was on site, Mark Page said that Tony O'Meara called him a "little rat" for telling tales and also threatened to break his legs if he saw

him out. Mark Page also said that Tony O'Meara had told him to go away while his legs could still carry him.

- 5.1.7 Mark Page also told Mr Veron that a couple of weeks after the incident with Tony O'Meara, he received two threatening text messages. The first one he said he had deleted as he did not think it was meant for him. The second one was received on 19 July, 2010. Mark Page showed him the second message on his phone which read, "Be very careful because your head and mouth are too big for your body do you understand, Pago". Mark Page told Mike Veron that it was at this time that he decided to report the matter to himself as Labour Manager.
- 5.1.8 Mr Veron's next interview was with Neil Price, Site Foreman, who confirmed that at about 4.30 pm on the day of the accident he had received a telephone call from Tony O'Meara who had asked him who had told Dave Tostevin about the accident. Neil told Tony that it was Mark Page. Tony then asked Neil Price to deliver a message to Mark Page that he would break his legs for telling tales.
- 5.1.9 At the request of Chris Pols (Tony O'Meara's line manager) Mr O'Meara attended a meeting at the company offices on 11 August. He was informed that formal disciplinary procedures were to be followed in regard to incidents at La Colombiere involving an unreported accident and directing abusive language at and threatening a colleague, Mark Page.
- 5.1.10 Whilst Mr O'Meara said he wanted to discuss the incidents he was informed that neither Chris Pols nor Mr Veron would go into detail, as he was not accompanied by a colleague, and that the hearing would require formal notification and he would need time to consider who would accompany him at the hearing. It was agreed that the hearing would take place on his first day back at work on Monday 16 August at 8 am.
- 5.1.11 A letter informing Mr O'Meara of the date and time of the meeting, the grounds for the hearing and the fact he could be accompanied by a colleague was sent the following day (ER1, Tab 1 Page 3 refers).
- 5.1.12 At 7.30 am on the day of the hearing Mr Veron received a phone call from Mr O'Meara informing him that he was returning to his doctor that day and would not be able to attend the meeting. The following day Mr O'Meara telephoned Mr Veron to say that he had been signed off for another week.
- 5.1.13 On Friday, 20 August 2010, Mr Veron received a phone call from Advocate David Domaille who told him that he was acting for Mr O'Meara and that he had been asked by him to attend the disciplinary hearing which had been rescheduled for the 23 August. Mr Veron said this was an unusual request and that he would check with his colleagues to find out if they would agree to his request. After telephoning Commerce & Employment Mr Veron informed Mr Domaille that as this was an internal matter Rihoy's did not have to agree to accept anyone from outside the business attending.
- 5.1.14 On Monday, 23 August 2010, Mr Veron received a phone call from Mr O'Meara who informed him that he had been signed off for another week.
- 5.1.15 On Friday, 27 August 2010 Mr Veron received a fax message from Advocate Domaille informing him that Mr O'Meara had been signed off work and would not be able to attend the disciplinary hearing scheduled for that day (ER1 Tab 2, page 4 refers). That afternoon a letter was sent to Mr O'Meara agreeing to his request that the meeting be rearranged for Tuesday, 31 August 2010 at 3.30 pm, but stating that should he fail to attend the hearing it would take place in his absence (ER1, Tab 2 page 5 refers).

- 5.1.16 On the 31 August 2010, Mr Veron received another fax message from Advocate Domaille advising him that Mr O'Meara's doctor did not consider him fit to attend the hearing and therefore on medical advice would not be attending (ER1, Tab 2 page 6 refers).
- 5.1.17 On 1 September 2010, Mr Veron received a telephone call from Mr O'Meara advising him that he planned to return to work on Monday, 6 September. Mr Veron confirmed by letter (ER1, Tab 2 Page 7 refers) that the hearing would take place at 2.30 pm at the company office on that day.

The meeting convened at 2.30 pm and in attendance were:

- Mr Stewart Giles, J W Rihoy Director
- Mr Mike Veron, J W Rihoy Labour Manager
- Mr Mark (Tony) O'Meara, J W Rihoy Employee
- Mr Eddie Osborne, J W Rihoy Employee (colleague in attendance)

- 5.1.18 Mr Veron opened the meeting and said that it had been called to allow Mr O'Meara to put his version of events that had led to the disciplinary hearing being called.
- 5.1.19 Using the notes Mr Veron had taken from his investigation he outlined the two counts which the company considered were acts of gross misconduct. Firstly that Mr O'Meara had failed to report an accident in line with company procedures. Mr O'Meara said that he had tried to contact Chris Pols at the time of the accident on the two way radio and also by mobile phone but could not get in touch with him. Mr O'Meara told the meeting that he reported it to Chris Pols when he went into the office later that morning. Mr O'Meara was told that Chris Pols had denied being told by Mr O'Meara about the accident to which Mr O'Meara replied that he was a liar.
- 5.1.20 Mr Veron read out the second count of gross misconduct and referred again to Mr Page's version of events. Mr O'Meara refuted the allegations of using threatening and abusive language towards Mark Page at La Colombiere site. He was asked if he had sent any abusive text messages to Mark Page and was read a transcript of the message to him. He denied that he had sent it.
- 5.1.21 Mr O'Meara recalled his version of events as having challenged Mark Page as to why he had got involved in reporting the accident. Mr O'Meara recalled that Mark Page went back into the garage and came out with a hammer raised above his head in a threatening manner.
- 5.1.22 Mr O'Meara said that Neil Price had lied when he said that he had been asked by Tony O'Meara to tell Mark Page that he would break his legs.
- 5.1.23 At the end of the meeting Mr O'Meara was asked if he had anything further to add, he said that he did not. His colleague in attendance, Mr Osborne was asked if he had anything to say. He replied that he was not aware that he was allowed to say anything. Mr Giles told him that everybody in the room was entitled to have their say.
- 5.1.24 Mr O'Meara asked what would happen next and was told that he would be suspended on full pay while the disciplinary panel considered all the evidence, and that he would be informed of the decision in writing.
- 5.1.25 At this point Mr Veron noticed Mr O'Meara fumble with an envelope he had positioned on the table in front of him. Mr Veron asked him if he had recorded the meeting. He denied that he had done so. Mr Veron asked him if he would show the meeting the contents of the envelope

which he refused to do. Mr Giles informed Mr O'Meara that if a recording had been made without the knowledge or consent of all present, then it would be inadmissible as evidence at any time in the future (ER1, Tab 2 page 10, section 5.1 refers).

- 5.1.26 During post meeting discussions Mr Giles said that he would like the opportunity to interview Mark Page and Neil Price prior to making a final decision. As a consequence the following day Mr Veron accompanied Mr Giles to the sites where Mark Page and Neil Price were working. Mr Giles took written statements from both of them (ER1, Tab 3, page 1 and Tab 4, page 1 refer).
- 5.1.27 The meetings with Mark Page and Neil Price, Stewart Giles and Mr Veron discussed the disciplinary meeting notes and the evidence gathered and were unanimous in deciding that the evidence of Mr Page, Mr Price and Chris Pols was credible and the fact that Mr O'Meara's main defence had been that everybody was lying, and given that he had shown no remorse for his actions, they concluded that both counts of gross misconduct had been proved and that Mr O'Meara should be dismissed without notice.
- 5.1.28 A letter to that effect was sent to Mr O'Meara on the 7 September 2010 (ER1 Tab 2 page 11-12 refers).
- 5.1.29 Under cross-examination Mr Veron could not recall being told by Mr O'Meara at the Disciplinary Hearing that Mr Hayden Cozens had witnessed the accident and events that immediately followed.
- 5.1.30 In response to questions from the panel Mr Veron confirmed that no documents, including witness documents had been sent to Mr O'Meara ahead of the hearing. Mr Veron however, stated that minutes of the hearing were sent with the letter of 7 September 2010. Mr O'Meara denied that there were any enclosures with the letter.
- 5.1.31 Mr Veron confirmed that Mr O'Meara made several attempts to refer to matters he said were relevant to his case but was not allowed to expand on them as they were deemed irrelevant to the charges against him.
- 5.1.32 Mr Veron confirmed that no instructions had been given to Mr O'Meara regarding the role of his workplace colleague when in attendance at the meeting until the end when Mr Osborne had been asked if he had anything to say.

5.2 Witness Testimony – Mark Le Page

- 5.2.1 Mr Mark Le Page confirmed that he had worked for J W Rihoy as a Carpenter for 15 years.
- 5.2.2 On Thursday 1 July 2010 he was working on site at La Colombiere, Havilland Road when at about 8:15 am he heard a vehicle reversing beeper and then an impact noise.
- 5.2.3 On hearing the noise he looked up the driveway and saw a J W Rihoy vehicle against the wall. He also noticed that the next door neighbour was looking at the scene. He then went back to what he was doing.
- 5.2.4 Some time after the accident Dave Tostevin, a Rihoy's Director, visited the site and he told him that one of the company vehicles had damaged a wall at the top of the drive.
- 5.2.5 The following morning a colleague, Neil Le Cheminant, said that he had been told by Neil Price, the Site Foreman that Tony O'Meara had phoned Neil Price and accused him of telling Dave Tostevin about the accident the previous day.

- 5.2.6 Neil Price had told Tony O'Meara during the call that he had not told Dave Tostevin but that it was Mark Page who had. Neil Le Cheminant then told him that Tony O'Meara had asked Neil Price to deliver a message to Mark Page that he would break his legs.
- 5.2.7 Later in the day Neil Price came to the site. He said that Tony O'Meara had asked him to give Mr Page a message that he would break his legs.
- 5.2.8 During the following week Mark Page was working in the garage with an apprentice Alex McIver, and was approached by Tony O'Meara who was shouting loudly at him.
- 5.2.9 Tony O'Meara called him "a little rat" for telling tales and said if he ever saw him out he was going to break his legs.
- 5.2.10 Mark Page asked him why he was threatening him and tried to explain why he felt it was necessary to report the accident to Dave Tostevin. Mark Page said that he would have reported any accidents that he saw on site regardless of who had been involved. Tony O'Meara then told him "to go away while his legs could still carry him." Mark Page reported that he was shocked and shaken by the incident.
- 5.2.11 After the confrontation with Tony O'Meara, Mark Page received two threatening text messages. The first one he deleted straight away as he did not think it was intended for him. The second one was received on the 19 July from an unknown mobile phone number. The message said: "Be very careful because your head and your mouth are too big for your body, Do you understand Pago" (Pago was Mark Page's nickname).
- 5.2.12 It was at this time that he decided to report the matter to the company Labour Manager, Mr Veron.
- 5.2.13 Under cross-examination Mr Page stated that he had been so concerned about the text messages that he had reported them to the Police but that he had not told his employers of this.
- 5.2.14 In relation to the incident with the hammer, Mark Page denied raising the hammer at all but confirmed it was in his hand. He also confirmed that he would have shouted back if shouted at by Tony O'Meara.
- 5.2.15 Mark Page confirmed that Hayden Cozens was on the site and nearby when the incident occurred.

5.3 Witness Testimony of Neil Price, Site Foreman

- 5.3.1 Mr Neil Price confirmed he was employed by J W Rihoy & Son Ltd as Site Foreman and had been with the company since June 2009.
- 5.3.2 Neil Price stated that on Thursday, 1 July 2010 at 8.10 am, he was standing at the bottom of the driveway to the site at La Colombiere. He observed a J W Rihoy truck being reversed into the driveway. The truck was too close to a granite wall and consequently the truck reversed into the wall.
- 5.3.3 Neil Price walked to the top of the driveway and inspected the damage which was minimal. Just a few pieces of granite had been dislodged and a small section of block work had been moved by the impact. Neil Price offered to the driver, Tony O'Meara that he would repair the damage next time he had cement mixed up.

- 5.3.4 Tony O'Meara then got back into his vehicle and reversed down the driveway to unload. The accident was witnessed by two other site operatives, John Chatterton and Hayden Cozens.
- 5.3.5 At approximately 4.30 pm the same day Neil Price received a call from Tony O'Meara asking Neil Price if he knew who had reported the accident to Dave Tostevin, a company Director. He replied that it was Mark Page, this information had been passed to him by a site operative during the day.
- 5.3.6 Neil Price stated that "Tony O'Meara asked me to pass on a message to Mark Page that he would break his legs. He delivered the message to Mark the following day on site".

5.4 Witness Testimony of Stewart Giles, Operations Director

- 5.4.1 Mr Stewart Giles confirmed that he was the Operations Director for J W Rihoy and had held the position since August 2009. He had been in the construction industry for twenty four years and been a Chartered Builder since 1997. In September 2010, he obtained Fellowship status of the Chartered Institute of Building.
- 5.4.2 On 6 September 2010, he attended the disciplinary hearing of Mr O'Meara and produced the meeting minutes. Up until this point in time he had not been involved with the disciplinary procedure in relation to Tony O'Meara.
- 5.4.3 The following day he obtained the witness statements from Mr Mark Page and Mr Neil Price.
- 5.4.4 From the evidential statements he and Mr Veron agreed that the dismissal of Mr O'Meara was appropriate on the grounds of gross misconduct.
- 5.4.5 Mr Giles confirmed under cross-examination that Mr O'Meara was not allowed to deviate from the line of questioning the hearing had undertaken as the nature of Mr O'Meara's evidence was irrelevant. He was of the view however that the hearing was open and frank and that everyone got an opportunity to have their say.
- 5.4.6 Whilst Mr Giles was certain that Mr O'Meara had copies of all the documents for the hearing, when asked if Mr O'Meara had received copies of the witness statements he said he was not aware that these had been provided. He also commented that he was not responsible for sending out the minutes and enclosures, only for drafting the minutes.
- 5.4.7 Mr Giles confirmed that he did not recall Mr O'Meara mentioning his witness, Mr Cozens, and admitted that this was subsequently picked up in the Appeal stage.

5.5 Witness Testimony – Mr David Tostevin, Contract Director

- 5.5.1 David Tostevin confirmed that he was Contract Director for J.W.Rihoy & Son Ltd and had been with the Company from leaving school in 1980, and was made a director in 2003.
- 5.5.2 On Thursday 1 July 2010, he was visiting one of J.W.Rihoy sites at La Colombiere, Havilland Road, when he was informed by Mark Page that the van driven by Tony O'Meara had collided with the neighbour's wall dislodging some granite and cracking some block-work. Mr Tostevin confirmed that he had taken pictures of the damaged wall.
- 5.5.3 On return to J.W.Rihoy office, he sent an email at 2.01 pm to Chris Pols, Transport Manager to inform him of the accident and gave him copies of the pictures. Mr Pols replied at 3.40 pm saying that no one had reported the accident to him.

- 5.5.4 His next involvement was when he was asked to attend the Appeal to the disciplinary hearing of Tony O'Meara together with Peter Trotter, another J.W.Rihoy Director.
- 5.5.5 Mr Tostevin chaired the meeting whilst Peter Trotter took the minutes. During the appeal hearing Mr O'Meara suggested that they contact Hayden Cozens who witnessed the argument on site.
- 5.5.6 It was arranged for Mr Cozens to attend Rihoy's offices as he was no longer an employee of J.W.Rihoy. Mr Tostevin then asked him if he saw any argument between Mark Page and Tony O'Meara. Mr Cozens stated that he had seen an argument taking place but did not intervene and carried on unloading/loading the van. Mr Cozens then said that he did not want to get involved with the case so Mr Tostevin thanked him for coming in.
- 5.5.7 Under examination Mr Tostevin confirmed that he had read and understood the disciplinary procedure and that they had followed it fully.
- 5.5.8 Mr Tostevin confirmed that he knew of Mr O'Meara's sickness prior to the disciplinary hearing but that it had played no part in the consideration of the case.
- 5.5.9 Mr Tostevin confirmed that he understood that Mr O'Meara had received the witness statements at the original hearing and that the Appeal was Mr O'Meara's opportunity to present his points of appeal and to rectify any concerns he had with the original hearing.
- 5.5.10 In response to questions regarding the additional evidence of Mr Cozens, Mr Tostevin said that it had made no discernable difference to the outcome of their deliberations.

(b) The Applicant's Case

5.6 Testimony – Mr Hayden Cozens

- 5.6.1 Mr Cozens read through his statement confirming that he had been on a site on 3 or 4 July 2010 and had been loading materials onto a truck when Tony O'Meara and Mark Page started a heated discussion when Mr O'Meara had questioned him regarding the incident on 1 July.
- 5.6.2 Not wanting to get involved he had carried on with his work however he noted that Mark Page was holding a hammer in his hand whilst the heated discussion took place.
- 5.6.3 Mr Cozens confirmed that he had left Rihoy's employ.
- 5.6.4 Mr Cozens advised that when called into Rihoy's office to explain his version of events he was not asked about the hammer at any point in the discussion.
- 5.6.5 Under cross examination Mr Cozens said that he did not see Mr Page raise the hammer during the incident but had seen Mr Page with the hammer at his side.

5.7 Witness Testimony - Mr Eddie Osborne

- 5.7.1 Mr Osborne confirmed that he had been working for Rihoy's for 18 years and had attended Mr O'Meara's disciplinary hearing as a workplace colleague on 6 September.
- 5.7.2 Mr Osborne stated that he believed that Mr O'Meara was not given the opportunity to put forward his version of events at the hearing in relation to the two counts of gross misconduct made against him as he was repeatedly told not to deviate from the questions put to him.

- 5.7.3 Mr Osborne, under questioning advised the Tribunal that Mr O'Meara had said to the disciplinary that a further witness, Mr Hayden Cozens had not been approached.
- 5.7.4 Under cross examination Mr Osborne said he had not heard Mr O'Meara being asked if he had a recording device at the hearing but confirmed that Mr O'Meara had been told that any recording at the hearing would be inadmissible.
- 5.8 Mr Mark (Tony) O'Meara's Testimony
- 5.8.1 Mr Tony O'Meara confirmed that he had started working for J W Rihoy & Son in July 2008 as a Lorry Driver.
- 5.8.2 On 1 July 2010, he was delivering building materials to La Colombiere site. When backing down the drive he scraped the wall and dislodged two stones. He stopped the truck and got out to see the damage, which was minimal and there was no damage to the truck.
- 5.8.3 Neil Price witnessed the accident the accident and commented, 'Don't worry about it the wall was damaged already, I will mix a bit of cement and bed the two stones back in.
- 5.8.4 Mr O'Meara tried to get hold of Chris Pols, his line manager, on the two-way radio in the truck and on his mobile phone and he did not respond to either. Mr O'Meara had other sites to deliver to so he carried on with the deliveries. When he got back to the yard/office that same morning he told Mr Pols about the accident. Mr O'Meara also told Mr Pols that he had tried getting hold of him on the radio and by 'phone. Mr Pols advised Mr O'Meara that he was probably out in the yard. Mr Pols gave the Applicant an accident report form to fill out and bring back in the following morning.
- 5.8.5 The Applicant then phoned Neil Price around 4.30 pm the same day. They had a discussion regarding the potential cost of repairing the wall and who had seen the accident. They both agreed that Mark Page had not seen the accident but had been on site. Mr O'Meara emphatically denied asking Neil Price to give Mark Page a message that he would break Mr Page's legs.
- 5.8.6 Two or three days later the Applicant was sent to La Colombiere to drop off materials and to collect scaffolding to take to another site. He got out and went to the back of the truck where Hayden Cozens was waiting for him. Seeing Mark Page in the garage, about 30 feet away from the truck, he shouted to him asking why he had said that he had witnessed the accident. Mr O'Meara saw Mark Page bend down and picked up a hammer and walk towards him. Mr O'Meara walked towards Mr Page and they had an exchange regarding the reporting of the accident and Mr O'Meara's concerns that this would have made the matter worse for him. At this point Mr O'Meara said that Mr Page raised the hammer above his head in a threatening manner. Mr O'Meara said that he told Mr Page to go away, and at no point did he threaten him. He went back to helping Hayden Cozens load the truck.
- 5.8.7 On the 13 July 2010, Mr O'Meara had a further accident on a site in Queen's road. He slipped off the rear of a lorry he was unloading and fell, injuring his back. As a result of the injuries he sustained he was unable to work for the last weeks of his employment with J W Rihoy Ltd. and, ultimately, did not work for a total of six months following the accident.
- 5.8.8 Mr O'Meara made a health and safety complaint regarding the use of safety rails and a step at the rear of lorries and using a camera to aid unloading.
- 5.8.9 On the 11 August 2010, he attended the main office and was asked to speak to Mike Veron,

Labour Manager with Chris Pols in attendance. Mike Veron told him that they were holding a Disciplinary Hearing on 12 August 2010, for not reporting the accident on the 1 July and verbal abuse of a colleague; thus giving him 24 hours notice. Mr O'Meara declined to attend as he was still signed off sick and suggested that he could do it the following Monday if he was signed back to work. Chris Pols said he would have to make it unless Mr O'Meara was critically ill.

- 5.8.10 The next day Mr O'Meara went to see his Advocate, David Domaille, Bailiwick Chambers. On contacting Mike Veron to ask if his advocate could attend the hearing Mike Veron advised that only a work colleague could accompany him. Mr O'Meara telephoned Mike Veron and asked if he could bring a voice recorder and Mr Veron said smartly "you can do what you like".
- 5.8.11 The hearings were put back couple of times due to Mr O'Meara's ill health resulting from his accident. On the 6 September 2010 the Applicant claimed he had to attend the hearing as they were intending to hear the matter without him.
- 5.8.12 Mr O'Meara felt he was not allowed to explain his version of events. He also claimed that he saw no witness statements until he put in his unfair dismissal claim. He added that he felt intimidated by the manner in which the hearing was held and the refusal to hear his version of events.
- 5.8.13 Mr O'Meara asked part way through the hearing if he was suspended as he did not know. Mr Veron said he was and that this was with pay.
- 5.8.14 Mr O'Meara mentioned that he had a witness, Mr Cozens, who Mike Veron had not approached.
- 5.8.15 Eddie Osborne, Mr O'Meara's colleague at the hearing was not instructed that he could be involved at the hearing and, when asked at the end of the hearing whether he had anything to add confirmed this saying he was not sure if he was allowed to speak or not, he then added 'I hear arguments' on site all the time, it sounds to me like six of one and half a dozen of the other, it should never of got this far'.
- 5.8.16 The Applicant said that it was very clear to him at the start of the meeting that he was going to be sacked.
- 5.8.17 The 8 September 2010, Mr O'Meara received a letter dated 6 September 2010 providing the minutes of the hearing and advising that the decision would follow within 24 hours. He again received no witness statements and he said the contents were inaccurate in saying that Mark Page went back inside to get a hammer, Mr O'Meara had said that he picked up the hammer.
- 5.8.18 On 9 September 2010, Mr O'Meara put forward his grounds of appeal. (EE1, Tab 5 page 37 refers).
- 5.8.19 On 27 September 2010 Mr O'Meara and his nominated colleague, Eddie Osborne, attended the disciplinary hearing appeal.
- 5.8.20 Mr Dave Tostevin asked Mr Osborne if he agreed with the minutes of the disciplinary hearing, Eddie replied that he could not answer yes or no because he had not received any.
- 5.8.21 On 2 October 2010 Mr O'Meara received the appeal hearing decision advising that one of the charges related to failing to report an accident had been dropped. The decision was upheld for gross misconduct involving verbal abuse and intimidation of a work colleague and he was to remain dismissed (EE1, Tab 5 page 48 refers).

5.8.22 Under cross-examination Mr O'Meara confirmed he knew of the charges being made against him prior to the disciplinary hearing but not about the allegations of sending threatening text messages.

5.8.23 Mr O'Meara denied sending the text messages to Mark Page, he did not know Mark Page's number and the number used to send the text messages was not known to him. Added to which the Respondent had produced nothing to link him directly to the text messages.

6.0 Conclusions/ Decision

6.1 The Tribunal found that whilst there were areas where the Respondent could have improved their procedures; in ensuring that the Applicant got copies of the witness statements and any other documents and evidence prior to the disciplinary hearing and appeal hearing; that the disciplinary procedures included giving some instruction to the "workplace colleague" about his role in the process; the Respondent largely followed a fair process.

6.2 The Tribunal found that the recording and first transcript of the disciplinary hearing added little to their understanding of what had taken place.

6.3 The Tribunal found that there was no evidence to suggest that the disciplinary process did not allow the Applicant to put forward his case, other than the late inclusion of Mr O'Meara's witness, Mr Hayden Cozens, whose testimony was eventually sought prior to the Appeal stage.

6.4 In addition, there was no evidence to support the suggestion that the Respondent was influenced by Mr O'Meara's sickness or his health and safety complaint following a second accident at work.

6.5 The Respondent's consideration in rearranging the disciplinary hearing on a number of occasions due to Applicant's sickness is to be commended.

6.6 The Tribunal also noted that at the Appeal stage the Respondent removed one of the charges of gross misconduct, this being the charge relating to failing to report an accident as it felt there was insufficient evidence to support this; this indicates to the Tribunal that Mr O'Meara's appeal against the findings of the disciplinary hearing was given genuine consideration by the Respondent.

6.7 Having due regard to all the circumstances and evidence presented, the Tribunal unanimously finds that, under Section 6(2)b of the Employment Protection (Guernsey) Law, 1998, as amended, Mr Mark O'Meara was fairly dismissed from his employment as a driver with J W Rihoy & Son Ltd.

6.8 The claim of unfair dismissal is therefore dismissed and no award is made.

Ms Georgette Scott

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Signature of the Chairman

14 April 2011

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Date