

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Kieron Allen
Represented by: Mr Chris Allen

RESPONDENT: All Island Carpet Co Limited
Represented by: Mr Anthony (Tony) Gosselin

Additional Witnesses:

Called by the Applicant:
Mr Mark Ferbrache

Called by the Respondent:
Mrs June Gosselin
Mr Brian Dorey

Decision of the Tribunal Hearing held on 12 July 2011

Tribunal Members: Ms Caroline Latham (Chair)
Mr Peter Woodward
Ms Christine Le Lievre

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, the Applicant was unfairly dismissed.

Under Section 22 (1)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, the Respondent shall pay to the Applicant an award of £8,370 having been determined by the Tribunal with reference to the Applicant's final six months employment with the Respondent.

Amount of Award (if applicable): £8,370

Ms Caroline Latham

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Signature of the Chairman

25 August 2011

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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

The Law Referred to in this document is The Employment Protection (Guernsey) Law 1998, as amended ('the Law')

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.

Extended Reasons

1.0 Introduction

1.1 The Applicant, Mr Kieron Allen, was represented by his father, Mr Chris Allen both of whom gave evidence under oath.

1.2 The Applicant also called the following witness who gave evidence under oath:

Mr Mark Ferbrache

1.3 The Respondent, All Island Carpet Co. Limited, was represented by Mr A M Gosselin, a Director of the Company who gave evidence under oath.

1.4 In addition, the Respondent called the following witnesses who gave evidence under oath, supported by documentary evidence:

Mrs June Gosselin

Mr Brian Dorey

1.5 After discussion with the parties, and having regard to the terms of the Applicant's employment including his record of absence, the Tribunal determined that the Applicant's pay for the six month period to 18 February 2011 was £8,370.

The Tribunal formulated this calculation as follows:

Period to 24 September when on 5 day week:

25 days less 4 days sick = 21 working days @ £90 per day £1890

Period post 24 September when 4 day working week

84 days less 12 working days sick (net) = 72 working days @ £90 per day £6480

Total pay £8370

This calculation takes into account absence due to illness for which the Applicant was not paid. During the period when a four-day week was in operation, calculations for any week long absences were based on the net number of working days missed (i.e. 4 days per week).

1.6 It was agreed between the parties at the hearing and supported by written evidence (ET2 refers), that the effective date of the termination of employment was 18 February 2011.

1.7 The issues to be addressed were as follows:-

Did a dismissal occur within the meaning of The Employment Protection (Guernsey) Law, 1998, as amended and if so, was this dismissal fair or unfair within the provisions of this Law?

1.8 Mr Allen alleged that he was unfairly dismissed.

1.9 The Respondent asserted that the reason for the dismissal was due to "unacceptable absence and threatening behaviour".

2.0 The Law

- 2.1 The Law Referred to in this document is The Employment Protection (Guernsey) Law 1998, as amended ('the Law').
- 2.2 Section 3 of "the Law" states that "every employee shall ... have the right not to be unfairly dismissed by his employer."

3.0 Facts Found by the Tribunal

The following facts have been derived from the evidence presented by the parties, written statements of witnesses, Forms ET1 and ET2 and attachments thereto provided to the Tribunal.

- 3.1 The Applicant commenced employment on 11 May 2006. He had received a contract of employment in a letter dated 11 May 2006 (ET2 refers).
- 3.2 In early December 2009, there was a dispute between Mr Allen and his employer which had resulted in Mr Allen "walking out for a couple of days". This dispute was resolved and Mr Allen recommenced his employment on 10 December 2009 with a new contract of employment, which included a three month probationary period (ET2 refers). There was no paid holiday or pay for absence due to sickness. The Company's policy was stated to be "no work no pay".
- 3.3 On 24 September 2010, it was agreed that Mr Allen's working week, together with other co-workers would be reduced to four days.
- 3.4 It was customary in the Respondent's business to close between Christmas and New Year. Employees were paid in full for this period.
- 3.5 During the period January to December 2010, Mr Allen received no holiday pay other than the payment made for the Christmas break referred to above. Mr Allen was aggrieved that he had not received additional holiday pay in 2010.
- 3.6 During the period of Mr Allen's employment he had been absent from work due to illness as follows:
- 2009 – 3 days
2010 – 7 days
2011 – 14 days (see below)
- The absence in 2011 was during a period of four- day working weeks. The net number of days absence in 2011 during normal working days was 12 days
- 3.7 On 23 December 2010, after Mr Allen had been paid for the Christmas period and had left his place of work, his mother Mrs Caroline Allen, attended the business premises of the Respondent. She complained about the fact her son had not received two weeks holiday pay for 2010. Mrs Allen shouted on the premises and stated that the Applicant would not be working for the Respondent any more. She left slamming the door behind her. Mrs J Gosselin, an employee of the Respondent, found the behaviour threatening.
- 3.8 After this incident, Mrs J Gosselin telephoned the Applicant on 23 December 2010 to enquire whether he had resigned. As a result of his response, Mrs Gosselin believed that he had resigned.

- 3.9 The Applicant was unaware of his mother's actions and of her statement to Mrs Gosselin. He sent a "text message" to the Respondent on 24 December to confirm this and to say that he would see the Respondent in the New Year (i.e. 2011).
- 3.10 On 23 December 2010 there was an altercation in St Sampson's between Mrs C Allen and one of the Applicant's co-workers, Mr B Dorey.
- 3.11 The Applicant returned to work on 4 January 2011. Mrs Gosselin spoke to him about the incident at Christmas.
- 3.12 A new contract of employment, dated 22 January 2011, was issued to the Applicant (ET2 refers). In a letter of the same date (ET2 refers), the Respondent stated "...To say that if you have any problems with us or your work you must come directly to us, where we will endeavour to sort it out".
- 3.13 During January and February 2011 the Applicant was absent from work due to sickness for a total of 14 days (ET2 refers).
- 3.14 On 7 February 2011 the Respondent sent a letter to the Applicant stating that "due to your illness and the amount of time off work I am giving you two week's notice from 4 February, also you made threatening behaviour to one of my staff" (ET2 refers).

4.0 Summary of Parties' Main submissions

- 4.1 Although all submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgement or not, the Tribunal noted the following key points:

Evidence for the Respondent

5.0 Evidence of Mrs J Gosselin

- 5.1 Mrs Gosselin read verbatim a letter dated 21 March 2011 (letter attached to ET2 refers).
- 5.2 The witness recounted an incident, on 23 December 2010, that she described as "threatening behaviour" involving the Applicant's mother, Mrs C Allen. Mrs Allen had come into the Respondent's shop during the afternoon and started shouting that her son had not been given holiday pay and had threatened that this was "not the last we had heard about this", she also said Kieron would not be working for us anymore. After that Mrs Allen had walked out of the shop slamming the door behind her.
- 5.3 On the same day, Mrs Gosselin telephoned the Applicant to ask if he had resigned. She stated that he had said "yes".
- 5.4 On 24 December 2010, a text message was received from the Applicant saying "he did not know his Mum had been in the shop and would see us in the New Year".
- 5.5 Mr Allen returned to work on 4 January 2011 and she spoke to him about the incident with his mother on 23 December 2010.
- 5.6 She sent a new contract of employment in a letter dated 22 January 2011 (ET2 refers). She believed that the Applicant had resigned on 23 December 2010 and that it was now necessary to issue a new contract of employment. This letter was handed to the Applicant on 26 January 2011, on his return from sick leave.

5.7 The following day the Applicant telephoned the Respondent stating he would be absent from work due to sickness for a further two weeks.

5.8 On 7 February she sent a letter to the Applicant terminating his employment (ET2 refers).

6.0 Evidence of Mr B Dorey

6.1 Mr B Dorey read verbatim an undated letter addressed "to whom it may concern" (letter attached to ET2 refers).

6.2 Mr Dorey described an incident in the Respondent's shop on 23 December 2010, when Mrs C Allen allegedly displayed abusive behaviour and foul language towards Mrs J Gosselin.

6.3 On 24 December 2010, he was approached by Mrs C Allen whilst he was shopping in St Sampsons. Mrs C Allen had said to him "this was not over yet".

7.0 Evidence of Mr C Allen

7.1 Mr Allen's concerns regarding his son related to the terms of the Applicant's employment which he believed to be less favourable than those of others employed by the Respondent in that his son received no paid holidays.

7.2 He confirmed that his wife had been to the Respondent's shop on 23 December 2010 because she had felt it was unfair that her son had not received paid holiday. It was his belief that she had been shouting whilst in the shop.

7.3 Although no specific details were given, Mr Allen did make reference to a serious head injury that the Applicant had suffered in 2007 which had resulted in him having several months off work and which still, on occasion, caused him to become confused.

8.0 Evidence of Mr K Allen

8.1 He confirmed the dates of his employment. His original contract of employment dated 11 May 2006 (ET2 refers) included a provision for two weeks holiday pay plus the normal bank holidays.

8.2 He had had an argument with Mr Gosselin in late 2009 and had left his job for a few days. He had subsequently apologised and was re-employed by the Respondent. The terms of his new employment contract dated 10 December 2010, differed from the previous one, notably by the absence of a provision for holiday pay, it also included a three month probationary period.

8.3 He said that he had "kept his head down and did my work in 2010".

8.4 He had no discussions with his employer about his new 2010 contract and assumed that after completion of his probation he would revert to his original more favourable contract, which included holiday pay.

8.5 When he received his pay on 23 December 2010 he believed he would also receive a payment for two weeks holiday pay, which had been included in his original 2006 contract. He was frustrated and felt that he was being treated differently from his co-workers.

- 8.6 After work the same day he went shopping. He received a telephone call from Mrs Gosselin who asked him if he had resigned. His response was “yeah”. He said that he was “all confused”.
- 8.7 On 24 December 2010 he realised that his mother had been into the Respondent’s shop and had told Mrs Gosselin that he would no longer work for the Respondent. He sent a text message to apologise and stating he would be back at work on 4 January 2011. He commented “my Mum’s my rock”.
- 8.8 On 26 January 2011 he was given a new contract of employment and a separate letter dated 22 January 2011 (ET2 refers).
- 8.9 During January and February 2011 he had taken a total of 14 days sick leave due to stress.
- 8.10 He received a letter dated 7 February 2011 terminating his employment on the grounds of unacceptable absence and threatening behaviour. He stated that he had not threatened any staff member.

9.0 Evidence of Mark Ferbrache

- 9.1 Mr Ferbrache confirmed that he was an employee of the Respondent and that he worked alongside the Applicant.
- 9.2 He stated that he could not remember when Mr Allen had been absent from work, but commented that he did not have many days off in 2010.

10.0 Conclusion

- 10.1 The Tribunal had to consider whether Mr Allen had been unfairly dismissed by his employer. In order to succeed, the Respondent had to demonstrate:
- that the reason for the dismissal was one of the potentially fair reasons under “the Law”
 - if the Respondent is successful at the first stage, then the Tribunal had to consider whether the dismissal was fair or unfair having regard to the reason given by the employer.
- 10.2 Mr Allen could, on occasion, be a difficult employee who had previously left his employment, with no notice to his employer, after an argument. The Respondent had treated him with tolerance and had re-employed him on a previous occasion in 2009, albeit on less favourable terms. These less favourable terms set out in the employment were never discussed between the parties. Mr Allen had made an incorrect assumption as to his entitlement for paid leave after his probationary period had expired. He had believed that once the probationary period was complete he would revert to the terms of his previous contract.
- 10.3 The events of 23 and 24 December 2010 clearly shocked and upset the Respondent. The Tribunal has sympathy with this reaction, particularly because the Respondent had always treated its staff well. However, the incidents were not caused by the Applicant but rather by his mother who misguidedly chose to intervene in his relationship with his employer. It is not for the Tribunal to comment on her motives for this.

10.4 The Respondent, in the first instance, accepted the comments made by the mother. However, Mrs Gosselin had the good sense to telephone the Applicant who appeared to confirm his resignation. His response of “yeah” when asked if this was the case was the result of his own confusion and not being aware of what had happened earlier in the day. He quickly attempted to put matters right on 24 December 2010 by sending a text message to his employer stating his intention to be at work as usual in the New Year. The respondent appears to have accepted this and Mr Allen returned to work as expected on 04 January 2011. The Tribunal accepts that the Applicant did not terminate his employment on this occasion and his contract of 10 Dec 2009 remained in force.

10.5 Although there was brief discussion about the incident on 4 January 2011, working life continued in the business with no further action until 26 January 2011 when the Respondent gave a new contract of employment to Mr Allen. The Respondent thought it was following the correct procedure in view of its continued assumption that there had been a resignation on 23 December 2010. The Tribunal is firmly of the view, given the evidence of both parties, that the Respondent was profoundly wrong to believe that this was the case and that the contract of employment agreed by both parties on 10 December 2009 continued in force until terminated by the Respondent on 18 February 2011.

10.6 Having considered the reasons for the dismissal put forward by the Respondent - “unacceptable absence and threatening behaviour” - the evidence presented to the Tribunal and its consideration of this evidence, it reached the following conclusion:

- Dealing first with “unacceptable absence”. The Tribunal considered the various absences due to sickness of the Applicant. His absence record during 2009 and 2010 was considered to be minimal. In January and February 2011 he was absent for a total of 14 days. The tribunal would expect even a small employer to manage absence due to the ill health of an employee. In this case there was no evidence to suggest that the absence record was excessive or that the absences were not genuine and the Tribunal concluded that these absences did not give the employer the right to dismiss the Applicant.
- In respect of the “threatening behaviour”, the Tribunal concluded that there was no evidence that the Applicant had made any threats. It had, in fact, been his mother who had caused the fracas at Christmas 2010 and Mr K Allen was not present. The Tribunal understands the irritation of the Respondent who appeared not to have let the Christmas event pass. However, the subsequent dismissal which took place occurred with no warning and was not justified on these grounds because the Applicant had made no threats.

10.7 For these reasons the Tribunal concluded that the Respondent had not demonstrated the fairness of the dismissal.

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 Under Section 22 (1)(a) of the Law, the Respondent shall pay the Applicant an award of £8,370.00, this being the six months' pay as determined by the Tribunal.

Ms Caroline Latham

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Signature of the Chairman

25 August 2011

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Date