

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr J Andrade
Represented by: Mr Paul Guillou

RESPONDENT: Maxicorp Limited
Represented by: Mr Z Eisenberg

Decision of the Tribunal Hearing held on

Tribunal Members: Ms Helen Martin (Chair)
Mr Norson Harris
Mr Roger Brookfield

DECISION

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

Amount of Award (if applicable):

Ms Helen Martin

.....

Signature of the Chairman

13 May 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

Witnesses

Respondent: Mr Zef Eisenberg, Managing Director, Maxicorp Ltd

Applicant: Mr Jorge Andrade

1.0 Introduction

- 1.1 The Applicant, Mr Jorge Andrade, gave both oral and documentary evidence (EE1 refers) and was represented by Mr Paul Guillou.
- 1.2 The Respondent, Maxicorp Limited, was represented by Mr Zef Eisenberg, Managing Director of Maxicorp Limited.
- 1.3 The Applicant claimed that:
 - a) He had been unfairly dismissed from his employment as Head Gardener and Caretaker at the property known as “Normanville”, Fosse Andre, St Peter Port;
 - b) He had suffered an injury at work and that he had been medically signed off work as a result of this injury.
 - c) Mr Zef Eisenberg on behalf of Maxicorp Limited had sought to find ways for him to continue working although he was certified medically unfit to do so and that, although he had offered to do different work, the Respondent had ignored this offer (ET1 refers).
- 1.4 The Respondent disputed the claim (ET2 refers) on the grounds of the following:
 - a) The Applicant had a poor attendance record at work and regularly turned up late for work, left early and/or took extended lunch breaks without notice to the Respondent or staff. The Applicant failed to keep the Company properly informed as to his absences from work. He provided inconsistent information about his health and behaved inconsistently.
 - b) The Applicant was frequently absent from the property “Normanville” particularly at night and incidents and altercations between the Applicant and other members of staff had increased immediately leading up to the decision to dismiss the Applicant.

2.0 Facts Found

- 2.1 The Applicant was employed by the Respondent from 4 February 2009 to June 2010 as Head Gardener/Caretaker.
- 2.2 Mr Andrade was contracted to work 45 hours per week from 1 April to 31 October and 35 hours per week from 1 November to 31 March.

- 2.3 The Applicant's salary was £16.00 per hour, payable in arrears on the last day of each calendar month.
- 2.4 The effective date of termination of employment was 07 July 2010.

3.0 Summary of Respondent's Opening Submission Statement

- 3.1 Mr Eisenberg read his opening statement to the Tribunal (ER1 refers).
- 3.2 The Respondent commenced his opening statement by informing the Tribunal of various clauses stated in the terms and conditions of employment of the Applicant's contract of employment, as follows:

Clause 2.1. "the start date" commences on the date that Mr Z Eisenberg acquires beneficial ownership of "Normanville" (that being 06 March 2009);

Clause 3. "the employer shall pay the employee by bank transfer to an account nominated by the Employee at the rate of £16.00 per hour gross payable in arrears on the last day of each calendar month (there is no contractual obligation to pay overtime);

Clause 4.1. the aggregate number of hours of employment which the employee is required to undertake is 35 hours each week from 1 November to 31 March each year, and 45 hours per week from 1 April to 31 October each year, to be worked at such times and on such days of the week as the employer shall determine;

Clause 6.1. In the event of the absence on account of sickness or injury, the employee (or someone on his behalf) must inform the employer of the reason for the employee's absence as soon as possible and must do so no later than one hour before the employee is due to commence work;

Clause 6.2. In respect of an absence lasting 3 or fewer days, the employee is not required to produce a Medical Certificate unless specifically so requested by the Employer;

Clause 6.3. In respect of an absence lasting more than 3 calendar days, the employee must on the fourth calendar day of absence provide the employer with a Medical Certificate stating the reason for absence;

Clause 6.4. Sick pay will not be automatically paid to the employee. Sick pay will only be paid on a discretionary basis and no more than 6 days in any one year is paid;

Clause 8.1. The employment of the employee may be terminated:

8.1.2. By the employer on giving to the employee written notice as follows:

a) during the first two years of continuous employment not less than 2 weeks' notice;

and

Clause 8.6. The terms of this contract assume that the employee has a clean, full driving licence. Should the employee have his licence suspended or otherwise have his right to drive a motor vehicle on the public roads of Guernsey removed, the employer has the right to amend the job specification and remuneration or terminate the Contract on 2 weeks' notice.

- 3.3 The Respondent stated that the Applicant was dismissed for the following reasons:

- i. Poor attendance record at work;

- ii. Regular unavailability for work of any kind;
- iii. Failing to appropriately inform the Respondent of his absences at work;
- iv. Providing inconsistent information and/or behaviour regarding health and sickness;
- v. Frequent absences from "Normanville" at night without prior notification; and
- vi. Failing to work harmoniously with other members of staff.

- 3.4 Mr Eisenberg told the Tribunal that the persistent breaches of the express and implied terms of the Applicant's contract of employment resulted in the dismissal of the Applicant.
- 3.5 The Respondent entered into a Licence Agreement with the Applicant dated 4 February, 2009, that permitted the Applicant to live at "Normanville" rent free for the duration of his employment which suited the Respondent for security reasons. The Licence Agreement required either party to provide one week's notice in writing of termination of the arrangement.
- 3.6 The Respondent stated that at the time of employing Mr Andrade, unbeknown to the Respondent, the Applicant had been convicted of a driving offence following a serious accident involving a lorry in February 2008. The Applicant was found guilty of dangerous driving and disqualified from driving for 18 months.
- 3.7 The Applicant did not inform the Respondent of his prior driving conviction and the Respondent felt it appropriate to issue a verbal warning to the Applicant (ER1, Tab 18 refers) pursuant to stage 1 of the Respondent's Dismissal and Disciplinary procedure, in light of the fact that the Applicant was required to hold a clean full driving licence (clause 8.6, contract of employment refers).
- 3.8 Arising directly from the Applicant's disqualification from driving, the Respondent told the Tribunal that he employed an Assistant Gardener, Fernando Henrique to assist with the driving duties involved.
- 3.9 The Respondent submitted that the Applicant had a consistently poor record of attendance and would often be unavailable for work of any kind. Mr Eisenberg told the Tribunal that the Applicant would turn up late for work, take extended lunch breaks (approximately 2/3 hours) and would often leave work early. The Respondent stated that at no time did the Applicant obtain permission from the Respondent to do so. The Respondent told the Tribunal that on one particular occasion (18-23 January, 2010), the Applicant simply failed to attend work for 6 days without informing the Respondent.
- 3.10 Upon the Applicant's return to work on 24 January, 2010, the Respondent stated that he issued a formal verbal warning to the Applicant when he failed to provide a Medical Certificate to explain his absence. The Respondent told the Tribunal that he advised Mr Andrade at the time that any periods of absence had to be notified to him on the morning of the first day of absence. The Respondent documented his concern regarding the Applicant's absences in a letter to the Applicant (ER1, Tab 7 refers) dated 26 January, 2010. The Respondent told the Tribunal that the Applicant claimed he had been absent due to pain in one hand.
- 3.11 The Respondent told the Tribunal that he proposed that the Applicant undertook light duties out of concern for the Applicant's health until the pain in the Applicant's hand subsided. The Respondent told the Tribunal that he felt justified in doing so because he (and many others) had witnessed the Applicant cycling his bicycle around the island without any obvious difficulty. The Respondent advised the Tribunal that he had been informed that the Applicant had been working at a fish and chip shop in Fountain Street, St Peter Port.

- 3.12 The Respondent told the Tribunal that he sent a further letter to the Applicant (ER1, Tab 8 refers) reminding the Applicant of his duties in relation to health and safety and the requirement to report any serious accidents or minor accidents.
- 3.13 The Respondent stated that the Applicant did not notify him that he had suffered an injury at work. Furthermore, the first time that the Respondent became aware of an injury was on receipt of the Applicant's ET1 form (ER1, Tab 9 refers). The Respondent told the Tribunal that failure to inform him of an injury sustained at work was a breach of the implied duty of the Applicant to carry out lawful orders of the Respondent but also of the implied duty to take reasonable care of his own safety.
- 3.14 The Respondent told the Tribunal that following a further period of absence for six days commencing 20 May, 2010 that the Applicant's Medical Certificate was hand delivered to the Respondent's Personal Assistant and stated that the Applicant was suffering from "nerve damage to both arms" and incapable of work (ER1, Tab 11 refers) and was dated 12 May to 11 June, 2010.
- 3.15 The Respondent advised the Tribunal that the Applicant had been working for him during the period 12 May to 20 May, 2010 without informing the Respondent that he had been signed off as "incapable to work." Mr Eisenberg told the Tribunal that during the former period (12-20 May) the Applicant had attended work without complaint and had continued to perform heavy duties without difficulty. The Respondent contended that the Applicant should not have performed such duties if he knew he was unfit for work and/or would make his symptoms worse.
- 3.16 The Respondent stated that at no time had he 'forced' the Applicant to work despite the issuance of a Medical Certificate. Mr Eisenberg alleged that Mr Andrade was earning other income from alternative employment in a fish and chip shop whilst he was absent from work.
- 3.17 The Respondent told the Tribunal that he wrote to the Applicant to address his latest absence and confusion regarding the Medical Certificate (ER1, Tab 12 refers). The Respondent did not receive a response to this letter.
- 3.18 The Respondent stated that the Applicant had been reluctant to complete the medical insurance application forms to join the Company's new private health insurance scheme and to undergo the necessary medical examination to gain benefit from the scheme. The Respondent stated that when the Applicant did eventually complete the forms the insurance precluded pre-existing conditions that were specified as relating to his "repetitive strain injury", "psychiatric troubles" and for any investigations and treatment related to his "arm trouble." The Respondent stated that he had wished to elicit from the Applicant whether he suffered with these symptoms previously or whether they arose after commencing employment with the Respondent.
- 3.19 The Respondent told the Tribunal that despite repeated requests to the Applicant, he had not received a Medical Certificate for the period of absence in January, 2010.
- 3.20 The Respondent told the Tribunal that he had cause to issue another verbal warning to the Applicant during May 10 following an incident at "Normanville" when Mr Andrade allowed two Latvian ladies to sunbathe naked on the lawns. When the Respondent's wife visited "Normanville" with their children she questioned the ladies concerning their presence at "Normanville" they informed her that the Applicant had invited them and that they would not be leaving. The Respondent contended to the Tribunal that this was a clear breach of the implied term of mutual trust and/or confidence that exists in the Employment Contract.

- 3.21 During January and February 2010, Mr Eisenberg questioned the Applicant concerning his belief that he was working at a fish and chip shop when he was required to be at the property known as "Normanville". The Respondent told the Tribunal that he was concerned that the Applicant was 'fit' enough to work at the fish and chip shop but seemingly not 'fit' enough to perform light duties at "Normanville".
- 3.22 The Respondent told the Tribunal that he had no alternative but to instigate disciplinary proceedings against the Applicant for his various breaches of his Employment Contract and/or implied duties. The Respondent stated that despite the Respondent's previous attempts at trying to address the issues and despite giving the Applicant "chances" to change his behaviour, the continued poor attendance at work, regular unavailability for work of any kind and/or failing to appropriately inform the Respondent persisted.
- 3.23 The Respondent advised the Tribunal that he invited the Applicant to attend a disciplinary hearing to be held on 22 June, 2010 at "Normanville" and that he set out his overall concerns in relation to the Applicant's employment in a letter dated 20 June, 2010 (ER1, Tab 17 refers).
- 3.24 The Respondent told the Tribunal that the disciplinary hearing took place on 22 June, 2010 and that the Applicant chose not to be accompanied by a witness and therefore only he and Mr Eisenberg were in attendance. Mr Eisenberg told the Tribunal that it was agreed from the outset that the meeting was to be recorded (ER1, Tab 19 refers). During this meeting, the Respondent told the Tribunal that he raised all of his concerns relating to the Applicant's employment and that on each occasion that he asked a "difficult" question of the Applicant, he responded with "no comment."
- 3.25 The Respondent stated that the Applicant would only answer questions relating to him working in a fish and chip shop with "no comment." During this meeting, the Respondent told the Tribunal that Mr Andrade did not make any representations about his employment or try to explain his periods of absence. The Respondent told the Tribunal that as a result he felt it was no longer possible to employ the Applicant.
- 3.26 The Respondent told the Tribunal that following the disciplinary hearing he wrote to the Applicant (dated 23 June, 2010) to advise that he had been dismissed in accordance with stage two of the Company's dismissal and disciplinary procedure (ER1, Tab 20 refers).
- 3.27 Mr Eisenberg told the Tribunal that the Applicant wrote to the Respondent giving formal notice of his intention to appeal the dismissal (ER1, Tab 24 refers). In this letter, the Respondent told the Tribunal that the Applicant set out six grounds of appeal.
- 3.28 Following receipt of the Applicant's notice of appeal, Mr Eisenberg told the Tribunal that he wrote to the Applicant (ER1, Tab 25 refers) confirming that following a further review of all matters, the Applicant's appeal was rejected and the decision to dismiss was upheld.
- 3.29 The Respondent outlined to the Tribunal his review of matters relating to the Applicant's employment as part of the appeal process including a meeting with the Assistant Gardener, Fernando Henrique on around 01 July, 2010 (ER1, Tab 19 refers). Mr Henrique confirmed to the Respondent that the Applicant was frequently late for work, took extended lunch breaks and/or extended periods of absence throughout the day and was careless with machinery. Mr Fernando Henrique also confirmed that the Applicant had been working in a fish and chip shop.
- 3.30 The Respondent told the Tribunal that he also spoke with the Head Housekeeper at Normanville, Ms Michaela Balazova (ER1, Tab 31 refers). The Respondent told the Tribunal

that Ms Balazova was reluctant to attend the Tribunal hearing for fear of intimidation and harassment by the Applicant. In Ms Balazova's statement, she refers to her previous conversations with the Applicant in which he told her that he 'owned' almost half of "Normanville". The Respondent told the Tribunal that this was complete fabrication. Ms Balazova also admitted in her statement seeing the Applicant riding his bicycle throughout the town during working hours and stated that he had invited her and other employees of the Respondent to work for his takeaway business. She said he often complained of pain in his left hand but on a subsequent occasion showed her the alleged area of pain but to his right hand in a further contradiction to his alleged injuries.

- 3.31 The Respondent outlined to the Tribunal the losses that he alleged that he had incurred as a result of employing Mr Jorge Andrade as the Head Gardener/Caretaker at "Normanville". These losses included the employment of an Assistant Gardener, Fernando Henrique, directly as a result of the Applicant being disqualified from driving; and the discovery that the Applicant had been overpaid from January 2010 when his hours had been reduced from 40 to 35 per week, at the Applicant's request, without the necessary deduction in his salary being processed. In addition, the Respondent felt the Applicant showed a disregard for the Respondent's equipment resulting in various repairs and associated costs (ERI, tab 1 refers) and that he had incurred an £800 bill from Guernsey Water for a water outlet that Mr Andrade had left on when he watered the plants.
- 3.32 The Respondent told the Tribunal of his concern regarding the conduct and/or behaviour of the Applicant and his representative, Mr Paul Guillou, since the claim for unfair dismissal had been lodged, involving a late night visit to "Normanville". He also told the Tribunal that due to the considerable time and expense spent in responding to the claim for unfair dismissal and preparing for the Tribunal hearing, he sought to recover either the whole or part the of the costs.

4.0 **Opening Statement by the Applicant**

- 4.1 Mr Paul Guillou, representing the Applicant, told the Tribunal that the Applicant had made a claim for unfair dismissal because he did not believe that his dismissal had been fair. Mr Guillou advised the Tribunal that neither the four reasons given verbally, letters of 20 and 23 June 2010 nor the process by which the Applicant had followed to enact the dismissal were fair. The Applicant's representative told the Tribunal that "nothing had been fair" about the employment of Mr Jorge Andrade. Mr Guillou stated that the reasons given for the dismissal were sketchy and vague. No specific dates and times had been given for the alleged absences from work and the timing of the letters written by the Respondent make it quite clear that the Applicant's absence from work was when the Applicant was signed off sick by his Doctor and that the dates of the Skype records (ERI, tab 28 refers) confirm this.
- 4.2 Mr Guillou told the Tribunal that the Applicant would state that when he was first signed off work in January 2010, he was told by the Respondent that he would be "sacked" if he did not work.
- 4.3 Mr Guillou stated that the Respondent had attempted on numerous occasions to make the Applicant work whilst he was signed off sick with a Medical Certificate. The Applicant's representative stated that Mr Eisenberg had put this in writing in his letter of 20 June 2010 (ERI, tab 17 refers) and repeated this verbally several times in the disciplinary meeting on 22 June 2010.
- 4.4 The Applicant's representative stated that clearly the Respondent had been unsympathetic to the Applicant's absence as he had not paid for the Applicant's absence due to sickness on the

first occasion in January 2010 and had in fact, deducted 5 days' pay for days that the Applicant was signed off work.

- 4.5 Mr Guillou told the Tribunal that Mr Eisenberg had "persecuted" the Applicant from the start of his employment in 2009, to the present day.
- 4.6 Referring to the dismissal, Mr Guillou told the Tribunal that there was no evidence of a fair procedure being followed. Mr Guillou stated that there were no verbal warnings although there were discussions and allegations in the yard at work but that these were not noted on the personnel file of the Applicant.
- 4.7 Mr Guillou told the Tribunal that the first letter from the Applicant on 20 June 2010 (ERI, tab 17 refers) constituted a written warning but that it was not clear if the 48 hours' notice of a disciplinary hearing constituted a further written warning.
- 4.8 The Applicant's representative told the Tribunal that the Respondent had denied the Applicant the opportunity to have a friend present at the meeting. Mr Guillou told the Tribunal that the transcript of the disciplinary meeting (ERI, tab 19 refers), hid the nature and tone of the Respondent's domination of the meeting and his aggressive attitude towards Andrade.
- 4.9 Mr Guillou advised the Tribunal that the Applicant felt afraid and threatened in the disciplinary meeting and that the reason for the dismissal was simple, Mr Eisenberg dismissed the Applicant for his absence from work whilst signed off sick or medically certified by his Doctor.
- 4.10 Mr Guillou stated to the Tribunal that Mr Eisenberg had attempted to justify his reasons for the dismissal but that none of the allegations against the Applicant had any bearing on the dismissal or failure to follow proper procedure.
- 4.11 Mr Guillou told the Tribunal that the Applicant's claim for unfair dismissal had caused much distress and significant time spent to defend and prepare for the Tribunal hearing to date.

5.0 **Cross examination of the Respondent by the Applicant's representative**

- 5.1 Mr Eisenberg confirmed to the Tribunal that the Applicant was responsible for watering the plants and that it was his belief that Mr Andrade had left the taps open and flooded the surrounding area. Under cross examination, Mr Eisenberg told the Tribunal that the Assistant Gardener, known as Fernando also used the same water outlet.
- 5.2 The Respondent told the Tribunal that there was no 'clocking in' process but that the Applicant's unauthorised absences were observed by other members of staff; specifically Fernando Henrique and Michaela Balazova (ERI, tab 19 & tab 31 refers).
- 5.3 Under cross examination, Mr Eisenberg told the Tribunal that the Applicant's relationship with the Assistant Head Gardener, Fernando Henrique had become increasingly fraught and tense due to the Applicant's behaviour in coming to work late and taking long lunch breaks.
- 5.4 Referring to the attempt to find light duties for the Applicant whilst he was signed off sick, Mr Eisenberg told the Tribunal that there were questions raised regarding the sincerity of the 'carpal tunnel syndrome' pain that the Applicant claimed to have suffered from. The Respondent told the Tribunal that he did not have to pay the Applicant sick pay but wished to find him lighter duties e.g. putting labels on pots and containers that meant that he would continue to pay the Applicant.

- 5.5 The Respondent told the Tribunal that the only time he had become aware of the alleged 'injury at work' was on the ETI relating to the Applicant's claim for unfair dismissal.
- 5.6 Under cross examination, the Respondent told the Tribunal that the Applicant had failed to notify the Respondent on day one of his absence in January 2010 and that, when challenged, the Applicant said he had a problem with his arms and hands.

6.0 Witness Statement of the Applicant

- 6.1 The Applicant's representative read out a Statement, prepared by the Applicant, to the Tribunal.
- 6.2 The Applicant said to the Tribunal that he had made no mention of losing his driving license at the time of his hiring but that subsequently when this was discovered he had offered to buy an electric bicycle and trailer at his own expense in order to go off site to buy fuel, parts and other materials.
- 6.3 The Applicant told the Tribunal that throughout his employment he was made to work many more hours than his Contract required; often 80-100 hours per week but that he was only paid £16.00 per hour for his contracted hours.
- 6.4 The Applicant stated that he had hidden from the Respondent in his flat on a Sunday to avoid Mr Eisenberg requiring him to undertake additional work.
- 6.5 The Applicant stated that the Respondent made him move to a different flat and deducted rent from his salary to pay for it. The Applicant alleged that this was in contravention to the terms of his contract of employment which allowed for free accommodation. The Applicant claimed that he did not agree to the deduction of rent from his salary and that the Respondent's letter (EEI, JF3 refers confirming this was "deception".
- 6.6 The Applicant stated that at the end of December 2009, he had worked with the Assistant Gardener, Fernando to break up concrete around a swimming pool at a property near Saumarez Park and other concrete areas at "Normanville". The Applicant stated that he suffered serious pains to his shoulders and arms as a direct result of using the 'Kango' hammer for long periods. The Applicant advised the Tribunal that the Respondent had refused to accept his medical certificate and required him to continue working.
- 6.7 The Applicant told the Tribunal that he had continued working whilst taking medication prescribed by his Doctor because he was "scared" of his losing his job.
- 6.8 The Applicant stated that he did not return to the Doctor until 12 of May, 2010 because the Respondent had told him if he did not work he would be sacked. The Applicant's Doctor signed him off work for four weeks.
- 6.9 The Applicant told the Tribunal that he always attended work on time and never left early. The Applicant stated that the Respondent had not suggested lighter duties in view of his medical problem and continued to make persistent attempts to make the Applicant work in spite of being signed off sick.
- 6.10 The Applicant stated that he was not issued with a Job Description and never considered that his role included "security" of the premises and that the damage to the vehicles was not a

result of negligence on his part. The Applicant denied leaving the water running by the potting shed.

- 6.11 The Applicant stated that at the Disciplinary Hearing on 22 June, 2010 he had only been permitted to bring a work colleague but that the Respondent had known that he was not able to bring anyone from work and that he was denied the right to be “accompanied by an appropriate friend” in accordance with the Company Dismissal and Disciplinary Procedure.
- 6.12 The Applicant told the Tribunal that he replied to all the points that were to be raised at the Disciplinary Hearing (EE1, tab JF7 refers).
- 6.13 The Applicant stated that in the final part of the Disciplinary Hearing Mr Eisenberg had requested an ‘off the record’ separate discussion in the garden and that he had refused to do this because he was intimidated by this.
- 6.14 The Applicant stated that the letter (EE1, JF9 refers) from Mr Eisenberg to the Applicant confirming the termination of his employment contained unsubstantiated allegations. The Applicant contended that he was dismissed because he took time off work while signed off by the Doctor.
- 6.15 The Applicant referred the Tribunal to his reply to his dismissal letter (EE1, JF10 refers).
- 6.16 The Applicant told the Tribunal that he had never worked in a fish and chip shop or takeaway and that he still did not.
- 6.17 The Applicant stated that he did not receive any money from anyone else while employed by the Respondent.
- 6.18 The Applicant stated that the pain to his hands, arm and shoulders was first diagnosed on 14th January, 2010 (EE1, JF12 refers) as confirmed by a letter from Queen’s Road Medical Practice.
- 6.19 The Applicant stated that the letter from the Respondent (EE1, JF14 refers) dated 23 March, 2011 had caused him and his Representative distress.
- 6.20 The Applicant told the Tribunal about other matters that were disputed between him and the Respondent including storage costs for his tools and equipment and the requirement to repay the over payment of salary.
- 6.21 The Applicant stated that he had suffered physically and mentally because of his employment and subsequent dismissal and that he and his Representative, Mr Paul Guillou had carried out much more work than was originally envisaged in preparing for the Tribunal hearing. The Applicant stated that he wished to apply for an award to cover some of the costs incurred.

7.0 Cross examination by the Respondent

- 7.1 The Applicant told the Tribunal that he worked 10-12 hour days and that his accommodation in the “gym” was connected to the main house.
- 7.2 The Applicant confirmed that the reference to ‘free’ accommodation was in a Licence Agreement linked to the Contract of Employment.
- 7.3 The Respondent showed the Applicant an Invoice from SGB for October 2009 (ER2 refers) in which the ‘compressor’ and ‘braker’ were delivered. The Applicant told the Tribunal that the

work had continued later in the year resulting in the pain he experienced in early January, 2010.

7.4 The Respondent referred to Form ET1 where the Applicant had stated that he had offered to undertake lighter duties but this had been refused by the Respondent. In response to the Chairperson's requirement for clarity concerning what alternative work he had offered to undertake, the Applicant declined to answer.

7.5 In response to cross examination by the Respondent concerning his relationship with his representative, Mr Paul Guillou, the Applicant stated that they had known one another for 8/9 years and that he had no relationship to 'Callipus.co.uk' or the 'Bringmefood' website or 'wheretoeat.gg' website. The Applicant denied that he owned and worked in a fish and chip shop or had any financial involvement in such a business. The Applicant swore under Oath that this was the case.

At this point in the Tribunal Hearing, the Respondent submitted ER3 as material evidence relating to the relationship between the Applicant and his representative, Mr Paul Guillou

7.6 Referring to the reference to 'George's Santana' restaurant in Fountain Street, the Applicant denied earning a salary from the business and told the Tribunal he did not 'hold' the Lease but **rented** the premises.

7.7 The Applicant's representative admitted to the Tribunal that he had had a relationship with 'George's Santana' since November 2009 via the 'wheretoeat.gg' website.

8.0 Closing Statement by the Respondent

8.1 The Respondent told the Tribunal that he had followed all the procedures properly to support the decision to dismiss the Applicant.

8.2 Referring to the numerous allegations made by the Applicant, Mr Eisenberg said he had had his reputation attacked and accused of not paying, under paying and over working the Applicant and not allowing him to have free accommodation. The Applicant had claimed he was too ill or too sick to work but since mid-2009 he had been running a business as proven by ER3. In addition, the Respondent told the Tribunal that Mr Paul Guillou knew all about the business that the Applicant was running, in its entirety but that he had denied this. Mr Eisenberg told the Tribunal that he felt very aggrieved and that he had gone to extensive work, cost and time to protect his reputation and that this claim represented an opportunistic attack to receive money where not appropriate and that his requests for recoverable costs were extremely justified in this case.

9.0 Closing Statement by Mr Paul Guillou, the Applicant's representative

9.1 Mr Guillou told the Tribunal that the reasons for making the claim were still valid and that there had been no intent to hide evidence.

9.2 Mr Guillou told the Tribunal that the Applicant had been unable to work from early 2010 through to the present day and the Social Security Department were fully aware of Mr Andrade's sickness and involvement with the takeaway.

9.3 Referring to the dismissal, Mr Guillou stated that the Applicant felt unfairly dismissed and did not believe that any verbal warnings had been given.

10.0 **Conclusions**

- 10.1 The Tribunal heard considerable oral evidence during the Hearing and considered all the written evidence before it, whether specifically referenced in this judgement or not.
- 10.2 The Tribunal was persuaded that Mr Jorge Andrade was well aware of the reasonable requirements of his role as Head Gardener/Caretaker of "Normanville", in spite of not having a formal Job Description.
- 10.3 The Tribunal noted that the Applicant declared, on his ETI Form, in making his claim for unfair dismissal that he had offered to undertake alternative work following an injury at work and that the Respondent had declined. The Tribunal placed considerable weight on the Respondent's evidence that it was only on receipt of the ETI Form that he was made aware of an alleged injury at work and that under cross examination by the Respondent and Chairperson, the Applicant lacked credibility concerning the alleged offer to undertake alternative work and alleged injury at work.
- 10.4 The Tribunal was persuaded that the Respondent had acted in good faith in seeking to engage the Applicant in alternative lighter duties whilst he was recovering from his illness to enable the Applicant to continue to be paid during his recovery period. The Tribunal's view was that such an approach fell into the band of reasonable responses of a reasonable employer.
- 10.5 In consideration of the Applicant's alleged misconduct, the Tribunal was persuaded that there had been a wilful breach of the implied terms of the contract of employment and that the Respondent was entitled to consider all the facts relevant to the nature and cause of the breach, including the employee's culpability and any mitigating circumstances.
- 10.6 The Tribunal gave additional weight to the testimony concerning the Applicant's alleged actions while he was absent due to illness and his involvement in a fast food outlet. In the latter regard, the Tribunal found that the Applicant demonstrated lubricity under cross examination and entirely lacked credibility as a witness.
- 10.7 The Tribunal found the evidence of the Respondent concerning the Applicant's persistent misconduct very persuasive; including, but not limited to, his extended lunch breaks, late arrivals to work and failure to appropriately inform the Respondent of his absences at work. In particular, the Tribunal took the view that repeated or unexplained absences/delays in starting work, without good reason, were not appropriate for the role of Head Gardener/Caretaker of "Normanville."
- 10.8 Concerning the process followed by the Respondent leading up to and including the decision to dismiss the Applicant, the Tribunal was persuaded that the Respondent gave due and careful consideration to the Company Disciplinary procedure. The Tribunal is required to take into account the size and administrative resources of the employer in deciding what falls within the band of reasonable procedural responses in each case. The Tribunal determined that the Respondent acted reasonably in treating the Applicant's alleged misconduct as a sufficient reason for dismissing the employee; and that this was determined in accordance with equity and the substantial merits of the case. Such was the breach of trust and confidence in the Applicant's employment, the Tribunal took the view that it was entirely reasonable for the Respondent to decide that it could not in future trust such an employee and that the decision to instigate the ultimate sanction of dismissal fell within the band of reasonable responses open to a small employer. The Tribunal gave additional weight to the significant amount of time and effort that the Respondent had committed to the document his conversations with the Applicant and the Appeal process that was followed.

10.9 In summary, the Tribunal took the view that the Respondent's reason for dismissing the Applicant related to his alleged persistent misconduct and that the Respondent had reasonable grounds for his genuine belief in these matters. The Tribunal was persuaded that the Respondent had carried out as much investigation into the matter as was reasonable in all circumstances of the case and concluded that there had been a wilful breach of the express and implied terms of the contract of employment that went to the root of consideration.

11.0 **Decision**

11.1 Having considered all the evidence presented 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, 19989 as amended, the Applicant was not unfairly dismissed.

11.2 The complaint is therefore dismissed.

12.0 **Costs**

12.1 After careful consideration, the Tribunal determined that there would be no costs awarded.

Ms Helen Martin

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Signature of the Chairman

13 May 2011

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Date