

States of Guernsey**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

APPLICANT: **Mr Rex Robert**
Represented by: Advocate Paul Richardson

RESPONDENT: **Mr Anthony Hansen/Hansen Grab & Go Bar**
Represented by: Advocate Tom Crawford

Decision of the Tribunal Hearing held on 13 March 2008.

Tribunal Members: **Mr John Guilbert**
 Mrs Tina Le Poidevin
 Ms Alison Anderson

UNANIMOUS DECISION

Based on the evidence presented, the Tribunal finds

1. That the Respondent did have a potentially fair reason for the dismissal under the provisions of The Employment Protection (Guernsey) Law, 1998 as amended. However the Respondent failed to follow a reasonable procedure in making that dismissal, in that the disciplinary procedure used, was fundamentally flawed. Therefore the Applicant was unfairly dismissed.
2. That the Applicant's poor conduct was largely to blame for his dismissal and therefore has reduced the award.
3. Awards the Applicant two months salary, a total of £1,362,70

Mr J Guilbert
Signature of the Chairman

10 April 2008
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.

Extended Reasons

1.0 Introduction

- 1.1 The Applicant claims that the Respondent unfairly dismissed him on 24 October 2007.
- 1.2 The Respondent disputed the claim on the grounds that:
 - The Applicant was guilty of gross misconduct and ongoing insubordination.
 - The Applicant had been given a series of verbal warnings about his conduct, prior to his dismissal.
 - The Applicant was dismissed for insubordination and his continued refusal to follow his employer's legitimate instructions.
- 1.3 The Applicant appeared in person and gave witness testimony under oath on his own behalf, as guided by his representative, Advocate Paul Richardson.
- 1.4 In addition to form ET1 there was an attachment confirming 24 October 2007 as the date on which the Applicant finished his employment.
- 1.5 The Respondent appeared in person and gave witness testimony under oath on his own behalf, guided by his representative, Advocate Tom Crawford.
- 1.6 In addition to form ET2, there was attached an undated letter from the Respondent in which he outlined his reasons for the dismissal.

2.0 Facts Found by the Tribunal

- 2.1 The Applicant was employed by the Respondent as a food delivery van driver, working approximately 5.5 hours a week, between 1 October 2006 and 24 October 2007.
- 2.2 The co-proprietors of Hansen's Grab and Go Sandwich Bar, Lower Pollet, St Peter Port, are Mr Anthony Hansen and his wife Mrs Maija Hansen. The business commenced trading on the 10 July 2007, following the closure of the former business "The Lunch Box", which had employed the Applicant as a food delivery driver.
- 2.3 Some time after the business commenced trading the Respondent contacted the Applicant and asked him if he would like to work for him as a food delivery driver. The Applicant agreed to this request and commenced his employment on the 1 October 2007.

- 2.4 The business employed four staff plus the co-proprietors at the time of the dismissal and operated in business premises, which consisted of a main retail serving area, with attached kitchen and separate toilet facility.
- 2.5 The Respondent did not have any written Disciplinary Procedures or any Statement of Main Terms and Conditions of Employment for the Applicant or any of his work force. Because the Applicant worked under 15 hours a week for the Respondent, the Respondent was not required under 'The Conditions of Employment (Guernsey) Law, 1985 (as amended)' to provide the Applicant with a Statement of Main Terms of Employment.
- 2.6 The Respondent did not seek any advice from the Department of Commerce and Employment regarding the legal requirements for the employment or dismissal of staff.
- 2.7 In August 2007 the Applicant was in charge of the company van while carrying out his normal delivery round, when the van door opened and he lost stock and the money box containing the day's receipts and float. He reported the incident to his employer by telephone. The lost items were handed into the Police Station and were recovered by the Respondent, though the lost stock was unusable. The Applicant offered to pay for the loss but the Respondent said that as it was a pure accident he would bear the loss himself.
- 2.8 As a result of the incident the Respondent informed the Applicant that in future the van must be kept locked when left unattended and the money box must be kept in the possession of the driver or left securely in the front of the van.
- 2.9 One week after this incident when the van had returned to the business premises, the Respondent found the cash box in a crisp box, in the back of van. When questioned by the Respondent, the Applicant explained that it was only at the end of the delivery round that he put the cash box in the covered crisp box, in the back of the van. The reason for his action was that there wasn't any room in the front of the van to enable him to follow the Respondent's previous instructions concerning the cash box.
- 2.10 The company van had a hot box and a refrigerator installed to keep the food in good condition. As these items of equipment put a strain on the van battery the Applicant was verbally instructed by the Respondent, on how to operate the van in order to mitigate the battery problem.
- 2.11 The Applicant had been off work sick on two occasions, during which time the Respondent took over the delivery duties and stated that he didn't find any problem in operating the van in the same manner as his verbal instructions to the Applicant.
- 2.12 While covering the Applicant's duties the Respondent was informed by some customers that the prices being charged appeared higher than those charged by the Applicant.
- 2.13 On the Applicant's return to work the Respondent instructed the Applicant not to give any unauthorised discounts on food to friends and furnished him with a list of correct prices.

- 2.14 The Respondent also instructed the Applicant not to call on specific non-viable customers. This instruction was ignored by the Applicant, on at least one occasion.
- 2.15 No written instruction on how the Respondent wanted the van operated had been given to the Applicant. The Applicant did confirm that he understood what the Respondent's instructions were.
- 2.16 On the 24 October 2007, during the normal delivery round, the van broke down in the Admiral Park car park. The Applicant telephoned the Respondent for assistance, who came down to the van and jumped started it, because the battery was flat. The Respondent verbally instructed the Applicant that in future he should run the van engine when he was stopped, so as to ensure that the battery wouldn't go flat. The Applicant refused on the grounds that fumes from the van's exhaust could affect the food when he opened the van doors. The Respondent informed the Applicant that the food was sealed and would not be affected by the exhaust fumes. The Applicant still refused.
- 2.17 When the Applicant had finished his delivery round he drove the van back to the business premises and met with the Respondent, at around 1.00 p.m.
- 2.18 The Respondent requested the Applicant to come out for a walk so that they could sort out the van problems, away from the shop and the public. The Applicant refused on the grounds that the Respondent wasn't listening to him. The Respondent then spoke to the Applicant about his failure to follow his instructions on operating the van. They were both outside the shop at the time, on the public road.
- 2.19 The Applicant continued to resist the Respondent's instruction's on how the van should be operated. The Respondent then informed the Applicant of the repercussions of not following his reasonable instructions and because the Applicant refused to change his views, the Respondent gave the Applicant two weeks notice of dismissal. The Applicant drove off in the van with the agreement that he would come in to work the following day.
- 2.20 Some four hours later the Respondent rang the Applicant in one last effort to resolve the problem by offering the Applicant his job back, in return for his agreement to follow the Respondent's legitimate instructions. This offer was rejected by the Applicant and the discussion ended with the Respondent informing the Applicant that his dismissal was confirmed and not to come into work the next day.
- 2.21 Both parties agreed that a dismissal took place on the 24 October 2007 and that the Applicant's salary for the last six months was £4,088.00.
- 2.22 On his dismissal the Applicant received his week's pay and two week's pay in lieu of notice.
- 2.23 There was a conflict of evidence in that the Respondent's statement said that he had given the Applicant verbal warnings of his poor conduct but the Applicant's statement said that he had not been given any verbal warnings by the Respondent.

3.0 Case summaries

- 3.1 In Advocate Tom Crawford's summary he stated that enough evidence had been given to show that there had been a breach of faith by the Applicant and that he was guilty of gross misconduct and insubordination. The Applicant was informed by the Respondent, on more than one occasion, on how his job should be done and he had had plenty of time to comply with those orders. The Applicant failed to take heed of his employer's orders despite having been given three verbal warnings. The Advocate also believed that the size of the company and its resources should be taken into account when deciding on the reasonableness of the Respondent's actions and referred to a local case 'White v Union Street Stores'. He declared that in all the circumstances the dismissal was fair.
- 3.2 In Advocate Paul Richardson's summary he stated that the 24 October 2007 'van incident' was not supported by the evidence given by the Respondent. Also the matter of the Applicant giving customers food discounts was shaky and was denied by the Applicant, who only admitted giving food for less than the price, when known customers were short of money and he knew he would get the difference the next day. The Respondent had only cited three customers who reported getting discounts and their claims were not investigated by the Respondent. He noted that the cash box problem had never reached the warning stage and in fact it only merited a verbal warning. He gave the opinion that the Applicant must have been operating the van as instructed from the June incident until the October, because the van never broke down during that period. The burden of proof that the dismissal was fair, was on the Respondent. He condemned the fact that the Applicant had been interviewed about his conduct in the street outside the shop and that the Respondent had not kept any record of any of these alleged warnings. The Applicant had never had the opportunity to put his case to the Respondent. He declared that under the Law the dismissal was unfair.

4.0 Conclusions

- 4.1 The Tribunal are satisfied that the Respondent had a potentially fair reason for dismissing the Applicant which was for his persistent misconduct.
- 4.2 The Tribunal then considered whether the Respondent had acted reasonably in making that dismissal, giving due consideration to the size and resources of the business. The Tribunal noted the Respondent's lack of a written disciplinary procedure, but were persuaded that the Respondent clearly had a verbal disciplinary process in his mind that he was attempting to follow. The Tribunal compared the Respondent's dismissal actions with the Department of Commerce and Employment's Code of Practice 'Disciplinary Practice and Procedures in Employment'.
- 4.3 The Tribunal found overall that the disciplinary procedure used by the Respondent was fundamentally flawed in some areas particularly in relation to the lack of written records or warnings, the fact that the place where the disciplinary "meetings" took place was inappropriate and the lack of an appeal process.

- 4.4 The Tribunal therefore finds that the Respondent failed to take into account the relevant provisions of the Code of Practice issued under the Employment Protection (Guernsey) Law, 1998 as amended, and therefore unfairly dismissed the Applicant.
- 4.5 Taking into account the size of the company and the available resources to deal with this dismissal, the Tribunal believes that the Respondent's actions fell short of the requirements of the Law.
- 4.6 Page 17, Paragraph 23 of 'The Employment Protection (Guernsey) (Amendment) Law, 2005' gives the Tribunal the right to reduce any award of compensation for unfair dismissal, where a complainant refused an offer by the employer which, if accepted, would have had the effect of reinstating him in his employment in all respects as if he had not been dismissed, to such an extent as it considers just and equitable having regards to that finding.
- 4.7 The Tribunal on consideration of all the evidence before it, finds that the Applicant was largely to blame for his own dismissal, due to his misconduct and continued failure to carry out his employer's legitimate instructions. In addition, on the last day of his employment, the Applicant refused to accept the employer's offer of his job back, in return for his agreement to carry out legitimate instructions in the future. The Tribunal therefore find it appropriate under the circumstances to reduce the award of compensation accordingly.

5.0 Award

- 5.1 The Tribunal awards the Applicant two months salary, a total of £1,362,70.
- 5.2 The Tribunal directs that each party shall bear their own costs for the preparation and presentation of their own cases before the Tribunal.
- 5.3 The Tribunal directs that the States of Guernsey shall bear the costs of preparing and holding the Tribunal hearing

Signature of the Chairman: Mr J Guilbert
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Date: 10 April 2008
