

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: *Ms Anita Guza*

Represented by: Mr John Le Noury

RESPONDENT: *Auberge du Val Hotel*

Represented by: Mr Fernando Andrade

Decision of the Tribunal Hearing held on 24 October 2012

Tribunal Members: Mrs Tina Le Poidevin (Chair)
Mrs Paula Brierley
Mr George Jennings

DECISION

1.0 Minimum Wage Claim

- 1.1 Having considered all the written and oral evidence produced in connection with this claim, the Tribunal determined that the Applicant, Ms Guza, was paid below the minimum wage within the meaning of Section 10(1) of The Minimum Wage (Guernsey) Law, 2009, as amended.
- 1.2 In accordance with Section 10(2) of The Minimum Wage (Guernsey) Law, 2009, as amended, the Respondent shall pay to the Applicant an award of £1,648.00, this being determined by the Tribunal as the difference between the remuneration received by the Applicant and the remuneration she would have received had she been paid at the minimum wage during the period 1 October 2010 and 30 April 2012.

2.0 Unfair Dismissal Claim

- 2.1 Having considered all the written and oral evidence produced in connection with this claim, the Tribunal determined that there was insufficient evidence to prove that the Applicant's conduct had resulted in previous disciplinary action being taken by the Respondent and that the Respondent dismissed the Applicant without following a proper disciplinary procedure.
- 2.2 The Applicant was, therefore, unfairly dismissed under Section 6(2)(b) of the Employment Protection (Guernsey) Law, 1998, as amended.
- 2.3 In accordance with Section 22(1)(b) of The Employment Protection (Guernsey) Law 1998, as amended, the Respondent shall pay to the Applicant an award of £6,396.00, this being the equivalent of twenty-six weeks' pay in accordance with the minimum wage applicable at the time of dismissal.

The total award to be paid by the Respondent to the Applicant in respect of both claims is **£8,044.00.**

Mrs Tina Le Poidevin
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Signature of the Chairman

21 November 2012
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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

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 Laws referred to in this document are:

**The Minimum Wage (Guernsey) Law, 2009 as amended (“MW Law”),
and**

The Employment Protection (Guernsey) Law, 1998, as amended (“The Law”)

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Ms Anita Guza, claimed that she had been paid below the minimum wage by the Respondent during the period from 1 October 2010 (the date the law was introduced) and 30 April 2012 (her last day of employment with the Respondent) within the meaning of Section 10 of The Minimum Wage (Guernsey) Law, 2009, as amended.
- 1.2 The Applicant also claimed that she had been unfairly dismissed on the grounds of her behaviour and conduct within the meaning of Section 6(2)(b) of The Employment Protection (Guernsey) Law, 1998, as amended.
- 1.3 The Respondent, Auberge du Val Hotel, represented by Mr Fernando Andrade, disputed both claims.
- 1.4 Ms Andra Le Bideau, an interpreter provided by Commerce & Employment, interpreted for the Applicant under oath.
- 1.5 The Applicant was represented by Mr John Le Noury.
- 1.6 The Applicant gave witness testimony in person under oath.
- 1.7 Form ET1 and document bundle EE1 (containing employer references from Mrs D F of Professional Cleaning Services and Mr A L, Committee Member of The Guernsey Sporting Club together with a character reference from Mr R B, a customer of the Auberge du Val Hotel) were presented in evidence by the Applicant.
- 1.8 The Respondent, represented by Mr Fernando Andrade (Managing Director of the Auberge du Val Hotel) represented himself and gave evidence under oath.
- 1.9 Mrs M A, gave witness testimony in person under oath.
- 1.10 In addition to form ET2, document bundle ER1 (containing witness statements from Mrs M A, Mr R A, Mr A H, Mr J J and Ms W M; Miss Anita Guza’s contract of employment; copies of forty-three of Miss Guza’s payslips; unsigned personnel file notes dated 2 May 2010, 3 December 2010, 10 May 2011, 4 December 2011 and 3 April 2012 noting alleged instances of misconduct by the Applicant; a letter dated 9 April 2012 from Mr F Andrade to the Applicant terminating her employment; a document, signed by Mr Andrade, outlining the Applicant’s working hours; a document signed by Mr Andrade commenting on the Applicant’s complaint and a copy of the Applicant’s complaint as attached to her ET1 were presented in evidence by the Respondent.

- 1.11 During the Hearing, the Respondent was ordered by the Tribunal to provide missing pay details to complete the Applicant's pay record for the period 1 October 2010 to 30 April 2012. The Respondent produced a wages book noting pay records of all its employees for the period in question which was reviewed by the Tribunal before being returned to the Respondent. The Secretary to the Tribunal prepared a note of the relevant information relating to the Applicant and this was produced in evidence, with a copy being provided to the Applicant.

Claim of failing to pay the Minimum Wage

2.0 Facts Found by the Tribunal

- 2.1 The Applicant was employed as a Waitress/Chambermaid at the Auberge du Val Hotel from 31 May 2009 to 30 April 2012.
- 2.2 Mr Fernando Andrade, Managing Director of the Auberge du Val Hotel, dismissed the Applicant by letter of termination dated 9 April 2012 which noted the Applicant's last day of employment as 30 April 2012.
- 2.3 The Respondent produced a contract of employment relating to the Applicant. This was signed by Mr Andrade.
- 2.4 The Respondent did not keep a record of the hours actually worked by the Applicant during the period from 1 October 2010 to 30 April 2012.
- 2.5 The Respondent produced conflicting evidence to verify the Applicant's working hours. The Applicant's contract of employment clearly noted her weekly working hours as "about 40", whereas Mr Andrade's note of the Applicant's working hours within the document bundle ER1 totalled 34 hours and the ET2 35 hours.
- 2.6 The Applicant's ET1 noted 40 hours per week and her verbal testimony indicated that her working hours were variable but at least 40 hours per week.
- 2.7 The Respondent failed to produce a full pay record for the period from 1 October 2010 to 30 April 2012 as ordered at the Case Management Meeting but later produced the missing evidence within a wages book when ordered to do so by the Tribunal.
- 2.8 Evidence contained within the payslips and wages book confirmed that regular gross payments of £220 per week were made to the Applicant during the period from 1 October 2010 to 30 April 2012, with a few exceptions in circumstances when the Hotel was closed or when the Applicant had worked on a public holiday.
- 2.9 The pay reference period was determined as one week and the offset in respect of the Applicant's food and accommodation was determined as £40 per week.
- 2.10 The Respondent provided the Applicant with a £20 cash in hand payment each week during the period of her employment. There was no written evidence to support these payments and statutory deductions were not applied at source.

3.0 The Law

The Law referred to within this section is The Minimum Wage (Guernsey) Law, 2009, as amended.

- 3.1 In accordance with Section 7 of the MW Law, an employer is required to keep records “sufficient to establish that he is remunerating the worker at a rate at least equal to the minimum wage”.
- 3.2 Section 10(1) of the MW Law states that “If a worker who qualifies for the minimum wage is remunerated by his employer at a rate which is less than the minimum wage, the worker shall be taken to be entitled under his contract to be paid, as an additional remuneration in respect of that period, the amount described in subsection (2).”
- 3.3 Section 10(2) of the MW Law states that “That amount is the difference between – (a) the relevant remuneration received by the worker for the pay reference period, and (b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the rate of minimum wage which was payable in respect of the worker during that period.”
- 3.4 In making her claim, the Applicant exercised her right under Section 10(3)(a) of the MW Law.
- 3.5 Section 20(2) of the MW Law states that “Where in any civil proceedings a person seeks to recover the amount described in section 10(2), it shall be presumed for the purposes of the proceedings, so far as relating to that amount, that the individual in question was remunerated at a rate less than the minimum wage unless the contrary is established.”
- 3.6 Section 21(1) of the MW Law states that “If the employer of a worker who qualifies for the minimum wage refuses or wilfully neglects to remunerate the worker for any pay reference period at a rate which is at least equal to the minimum wage, that employer is guilty of an offence.”
- 3.7 Section 21(2) of the MW Law states that “If a person who is required to keep or preserve any record in accordance with section 7 fails to do so, that person is guilty of an offence.”

4.0 Conclusion

- 4.1 Evidence put before the Tribunal from both parties demonstrated that flexible arrangements existed on both sides of the employment relationship in that the Respondent accommodated the Applicant's additional working commitments outside of her employment at the hotel and the Applicant made herself available to work over and above her normal working arrangements when the hotel was busy.
- 4.2 Whilst contested by the Respondent, the Applicant claimed that she had not received a contract of employment and had only seen this when it was produced in evidence by the Respondent for the Hearing.

- 4.3 The Respondent failed to keep a record of the actual hours worked by the Applicant and the evidence put before the Tribunal to determine the Applicant's working hours was inconsistent.
- 4.4 In the absence of consistent evidence to the contrary, the Tribunal relied upon the hours noted within the contract of employment in order to determine the hourly rate of pay, namely 40 hours per week.
- 4.5 The Respondent claimed that the Applicant's weekly pay was £240 per week as he had regularly provided her with an additional £20 per week cash in hand payment and, whilst the Applicant readily confirmed that she had received this regular cash in hand payment without statutory deductions being applied, she claimed that this represented regular overtime worked by her which was paid at a rate of £5 per hour.
- 4.6 As there was no written record of the reason for the cash in hand payments provided to the Applicant, the Tribunal relied upon the evidence contained within the Respondent's pay records and established that the Applicant's weekly pay was £220 per week.
- 4.7 As the £40.00 per week deduction from the Applicant's pay in respect of food and accommodation was within the £87.13 offset noted within the Law, no adjustment to the gross pay was required in order to determine whether or not the minimum wage had been paid.
- 4.8 On the basis of the Applicant's pay being £220 gross for a 40 hour week, the Applicant's hourly rate of pay (£5.50 per hour) was below the minimum wage.
- 4.9 The Respondent's pay records were used to calculate the underpayment in accordance with Section 10(2) of the Law:
- 4.10 For the period 1 October 2010 to 30 September 2011 inclusive the minimum wage was £6.00 per hour. During the 52 week period between 1 October 2010 and 30 September 2011 inclusive, the Applicant was paid 50 pence per hour less than the minimum wage for 46 of those weeks. 50 pence per hour x 40 hours per week = £20.00 x 46 weeks = £920.00 underpayment.
- 4.11 For the period 1 October 2011 to 30 April 2012 inclusive the minimum wage was £6.15 per hour. During the 31 week period between 1 October 2011 and 30 April 2012 inclusive, the Applicant was paid 65 pence per hour less than the minimum wage for 28 of those weeks. 65 pence per hour x 40 hours per week = £26.00 x 28 weeks = £728.00 underpayment.
- 4.12 The Tribunal strongly recommends that the Respondent maintains an accurate, written record of the hours worked by its employees.

5.0 Decision

- 5.1 Having considered all the written and oral evidence produced in connection with this claim, the Tribunal determined that the Applicant, Ms Guza, was paid below the minimum wage within the meaning of Section 10(1) of The Minimum Wage (Guernsey) Law, 2009, as amended.

- 5.2 In accordance with Section 10(2) of The Minimum Wage (Guernsey) Law, 2009, as amended, the Respondent shall pay to the Applicant an award of **£1,648.00**, this being determined by the Tribunal as the difference between the remuneration received by the Applicant and the remuneration she would have received had she been paid at the minimum wage during the period 1 October 2010 and 30 April 2012.

Claim of Unfair Dismissal

6.0 Facts Found by the Tribunal

- 6.1 The Applicant was employed as a Waitress/Chambermaid at the Auberge du Val Hotel from 31 May 2009 to 30 April 2012.
- 6.2 Mr Fernando Andrade, Managing Director of the Auberge du Val Hotel, dismissed the Applicant on the grounds of unsatisfactory behaviour and conduct, providing her with a letter of termination dated 9 April 2012 which noted the Applicant's last day of employment as 30 April 2012.
- 6.3 The Respondent produced the Applicant's contract of employment. This was signed by Mr Andrade. It was not signed by the Applicant.
- 6.4 The Respondent did not have a disciplinary procedure. This contradicted evidence contained within the ET2.
- 6.5 The Respondent provided five unsigned personnel file notes providing details of separate instances of alleged misconduct by the Applicant between 2 May 2010 and 3 April 2012. These file notes had never been seen by the Applicant and had only been prepared by the Respondent for the purposes of the Tribunal.
- 6.6 Flexibility existed within the employment relationship in that the Respondent accommodated the Applicant's additional working arrangements outside of her work at the hotel and the Applicant made herself available to purchase and deliver items for the Respondent and work flexibly when the hotel was busy.

7.0 The Law

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

- 7.1 Section 5(2)(a) of the Law notes that an employee shall be treated as dismissed by his employer 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".
- 7.2 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 subsection is a reason which (b) related to the conduct of the employee".

- 7.3 Section 6(3) of the Law notes “Where the employer has fulfilled the requirements of subsection (1), then, subject to the provisions of sections 8 to 14 and (15I), the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.”
- 7.4 Section 22(1) of the Law notes “Subject to the provisions of section 23, the amount of an award of compensation for unfair dismissal is a sum equal to – (b) where the complainant is paid on a weekly basis, one week’s pay multiplied by 26, ...” and Section 23(2) of the Law notes “Where in relation to such a complaint the Tribunal considers that, by reason of any circumstances other than those mentioned in subsection (1), it would be just and equitable to reduce the amount of the award of compensation for unfair dismissal to any extent, the Tribunal shall, subject to subsection (3) and subsection (4), reduce that amount accordingly.”
- 7.5 Section 31(9) of the Law notes “A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Law before the Tribunal any code of practice issued under this section shall be admissible in evidence, and if any provision of the code appears to the Tribunal to be relevant to any question arising in the proceedings (including, without limitation, any question as to whether an employer has acted reasonably or unreasonably for the purposes of section 6(3)) that provision shall be taken into account in determining that question.”
- 8.0 Conclusion**
- 8.1 In any claim of unfair dismissal, the Tribunal has to firstly establish whether or not there has been a dismissal and, in circumstances where there has been a dismissal, whether that dismissal is fair or unfair.
- 8.2 Whilst contested by the Respondent, the Applicant claimed that she had not received a contract of employment and had only seen this when it was produced in evidence by the Respondent for the Hearing.
- 8.3 The Respondent claimed that Ms Guza's behaviour had started to deteriorate when a new chef started working at the hotel and made changes to working practices which were met with resistance by the Applicant. It was also claimed that she had been warned about her behaviour and conduct on numerous occasions up to and including 4 December 2011 and an alleged instance of misconduct on the Applicant's part on 3 April 2012 (when she had behaved in an inappropriate manner towards Mrs M A by being hostile towards her and refusing to assist her) had been the trigger for her dismissal.
- 8.4 The Respondent presented personnel file notes providing details of alleged instances of misconduct by the Applicant although later admitted in evidence that he had prepared the file notes specifically for the Tribunal and confirmed that they had not been seen by the Applicant prior to the exchange of bundles for the Hearing.

- 8.5 The Applicant claimed that she was not aware of any instances of misconduct on her part. She had once complained about the quality of food she had been given to eat at the hotel and had been disturbed by Mrs A allegedly closing a fridge door on her arm and shaking her arm in anger (which was denied by Mrs A) but she had not attended any disciplinary meetings prior to her receiving the Respondent's letter of dismissal dated 9 April 2012.
- 8.6 The Respondent admitted in evidence that he did not have a disciplinary procedure. This contradicted evidence attached to the ET2 where it clearly stated that a warning allegedly given to the Applicant in March 2012 had been given "... in accordance with our disciplinary and grievance procedure, which is entirely reflective of the ACAS best practice procedures."
- 8.7 In the absence of any disciplinary procedure, the Tribunal has compared the process adopted by the Respondent with the Code of Practice for Disciplinary Practice and Procedures in Employment issued by Commerce and Employment.
- 8.8 The documents produced in evidence were all carefully read and considered even if they have not been specifically referred to within this document and, based on all the evidence presented, the Tribunal has concluded that it prefers the Applicant's evidence.
- 9.0 Decision**
- 9.1 Having considered all the written and oral evidence produced in connection with this claim, the Tribunal determined that there was insufficient evidence to prove that the Applicant's conduct had resulted in previous disciplinary action being taken by the Respondent and that the Respondent dismissed the Applicant without following a proper disciplinary procedure.
- 9.2 The Applicant was, therefore, unfairly dismissed under Section 6(2)(b) of the Employment Protection (Guernsey) Law, 1998, as amended.
- 9.3 In accordance with Section 22(1)(b) of The Employment Protection (Guernsey) Law 1998, as amended, the Respondent shall pay to the Applicant an award of **£6,396.00**, this being the equivalent of twenty-six weeks' pay in accordance with the minimum wage applicable at the time of dismissal.

Mrs Tina Le Poidevin
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Signature of the Chairman

21 November 2012
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Date