

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Gary Thompson
Represented by: Mr Andy Castle

RESPONDENT: On the Rocks Limited (T/A Beaucette Marina Restaurant)

Mr William Dodd, for the Respondent, advised the Tribunal prior to the Hearing, in writing, that the Respondent would not attend the Hearing. In this communication the Respondent requested that the Tribunal take into account documentation submitted in support of the Respondent's ET2 response form.

Included in the documentation from the Respondent were witness statements from:

- Mr William Dodd, on behalf of the Respondent
- "AB" Office Manager Beaucette Marina
- "DM" Yard Hand Beaucette Marina
- "CS" Yard Hand Beaucette Marina
- "JT" Easy-Clean employee

Applicant's Witnesses:

- Mr Thompson - gave oral and written evidence
- "CB" a Kitchen Assistant - gave oral and written evidence

Evidence was provided by witness statement only from:

- "GDL" a Chef
- "JH" a Kitchen Porter
- "DS" the Applicant's previous employer
- "JE" a Kitchen Assistant

Decision of the Tribunal Hearing held on 8 November 2012

Tribunal Members: Mr Peter Woodward (Chairman)
Ms Georgette Scott
Ms Caroline Latham

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.

The Tribunal awards £23,425.56 and, having considered if this award merits any reduction, finds no reason to apply such a reduction.

The Tribunal makes a further award under the Employment Protection (Recoverable Costs) Order 2006, of £373.16; these being the costs necessarily incurred, by the Applicant, in attending the Tribunal Hearing.

Mr Peter Woodward

28 November 2012

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Signature of the Chairman

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Date

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 Gary Thompson, was represented by Mr Andy Castle.

- Mr Thompson gave oral and written evidence
- “CB” a Kitchen Assistant, gave oral and written evidence

Witness statements were also given by:

- “GDL” a Chef
- “JH” a Kitchen Porter
- “DS” the Applicant’s previous employer
- “JE” a Kitchen Assistant

1.2 Mr William Dodd, the designated representative for the Respondent, On the Rocks Limited (T/A Beaucette Marina Restaurant), did not attend the Hearing. It is noted that Mr Dodd had written to the Secretary to the Tribunal on 19 October 2012 stating that the Respondent would no longer be appearing at the Hearing to defend the claim, as a result of the Company’s insolvency. The Respondent requested the Tribunal should review the documentation that had already been provided and in his words “reach a fair decision in relation to the claim”.

In respect of this request the Tribunal has taken into account documentation submitted in support of the Respondent’s ET2, Response form on 15 May 2012 and 20 June 2012. Included in this documentation were witness statements from:

- Mr William Dodd, on behalf of the Respondent
- “AB” Office Manager Beaucette Marina
- “DM” Yard Hand Beaucette Marina
- “CS” Yard Hand Beaucette Marina
- “JT” “Easy-Clean” employee

1.3 Documentation was provided by the Applicant at the Hearing

EE1 Primary Bundle

EE2 Payroll Record

EE3 designated as “Failure to Provide Written Particulars”

EE4 Submission on Unfair Dismissal and Marital Status

EE5 Closing Statement

In addition to his ET2, the Respondent had submitted a bundle (ER1 Refers) prior to consideration of the preliminary issue. The Tribunal has seen fit to rely on several documents in this bundle in consideration of the substantive issue i.e. the complaint of alleged unfair dismissal.

- 1.4 This Judgement should be read in conjunction with a Judgement on a preliminary issue dated (23 November 2012) in which the Tribunal found that the Applicant had been in continuous employment with the Respondent for a period sufficient to entitle him to bring a complaint of alleged unfair dismissal, as defined in the Employment Protection (Guernsey) Law, 1998, as amended. The period of employment commenced on 1 October 2010 and the effective date of the termination of that employment (EDT) was 29 April 2012.
- 1.5 The Applicant claimed he was unfairly dismissed on 29 April 2012.
- 1.6 At the outset of the hearing it was confirmed that the Applicant received a monthly gross salary £2,904.26 (EE2 Refers) in the six month period prior to the EDT. However, the Applicant also claimed that a verbal agreement with the Respondent had included several additional elements:
- A Rent Allowance of £1000 per month
 - A Bonus based upon the gross profit of the “food side of the business”
 - Four Weeks holiday
 - A three month notice period

The Applicant requested that, in the event of the complaint being upheld, the Tribunal should give consideration to an award which took account of some or all these elements, under the provisions of section 22(2)(b) of the Law.

2.0 Facts Found

- 2.1 The Applicant and his wife were introduced to Mr Stephen Haines, the founder and an owner of “On the Rocks”, via a previous employer of the Applicant. It was the intent of the Respondent to establish a restaurant at Beaucette Marina and he chose the Applicant and his wife to become part of this project. An email written on behalf of Mr Haines by WG, his PA, dated 3 June 2010 (Tab 10 ER1 Refers) stated that Mr Haines wished to “reconfirm his verbal offer of employment” to both of them and that it was his intention to match the Applicant’s current salary package in Sark.

The email contained the following statement:

“Steve has asked me to write to reconfirm his verbal offer to you both to work as the permanent and full time Chef and Front of House” at the Marina Restaurant with your salary to be matched to your current salaries. In addition a profit share scheme will be implemented and this and other package details can be discussed in more detail once you are in Guernsey”.

The Applicant did not resign from his previous post until he had this assurance (EE2 Page 2 Refers); an email dated 30 May 2010 from Lisa and Gary Thompson to Stephen Haines had stated:

“We look forward to receiving something in writing as soon as possible then we can proceed with our resignation and plan our move to Guernsey.”

Further to these communications an email dated 30 September 2010 set out the Applicant's understanding of the oral contract between himself and the Respondent (ER1 Tab 11 Refers).

- 2.2 The Applicant was not issued with a contract of employment at any time in the period 3 June 2010 to 29 April 2012.
- 2.3 Work was undertaken by Mr Thompson on behalf of the Respondent from the 1 October 2010; defining the future restaurant business, obtaining equipment and prospecting for staff.
- 2.4 Salary payment was made personally each month by Stephen Haines in the period October 2010 to April 2011 and then via a payroll mechanism from May 2011 onwards.
- 2.5 In his role of Chef, the Applicant was in charge of the kitchen and responsible for all food preparation.
- 2.6 On 27 March 2012, an alleged assault took place between the Applicant and "Mr RS", Manager of Beaucette Marina and also an employee of Mr Stephen Haines.

The Applicant asked the Respondent to intervene to manage the issue of the alleged assault and to ensure there would not be a repetition, but found support from the Respondent wanting.

- 2.7 The Applicant consulted his doctor on 3 April 2012 and was signed off for a week following a stress related diagnosis. He was subsequently signed off, with the same diagnosis, for two weeks from 10 April 2012, and again for a month from 23 April 2012.
- 2.8 The Applicant met with Mr Stephen Haines and Mr William Dodd twice during April 2012 to express his concerns about the lack of support regarding the alleged assault.
- 2.9 On 29 April 2012, the Applicant's wife was on duty at the Restaurant and was given a letter by Mr Stephen Haines to pass to her husband. The letter read as follows:

"Dear Mr Thompson

I am writing to confirm that as of today's date your employment as Chef with Beaucette Marina Restaurant is terminated"

This letter being signed by Stephen Haines.

3.0 The Law

- 3.1 The Applicant claimed that he had been unfairly dismissed within the meaning of paragraph 5 (2) (a) of the Employment Protection (Guernsey) Law, 1998 as amended; i.e. *"the contract under which he is employed is terminated by the employer, whether it is so terminated by notice or without notice"*; and under the provisions of paragraph 6 of the Law relating to fairness of dismissal.

- 3.2 The Tribunal took into account paragraph 6 (3) which states “..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 size and administrative resources of an 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”
- 3.3 Whilst not legally binding the Tribunal took account of the Commerce and Employment Code of Practice “Disciplinary Practice and Procedures in Employment”.

4.0 Respondent’s Submission

- 4.1 The Respondent submitted an ET2 on the 15 May 2012, alleging that the Restaurant dismissed the Applicant for two reasons:-

- Whilst the Applicant was on sick leave the Respondent had inspected the kitchen and found it “alarmingly filthy” and well below food hygiene and health and safety standards. The Respondent had found it necessary to engage a specialist firm of cleaners to undertake a deep clean
- The Applicant had made sexually offensive comments about an employee of Beaucette Marina

- 4.2 The Respondent subsequently provided further particulars on 20 June 2012. In this document he alleged three reasons for the dismissal (EE1 Pages 31 & 32 Refer):-

- The state of the kitchen was in breach of prevailing Food Hygiene and Health and Safety Standards
- He was foul mouthed and abusive to staff
- Gross misrepresentation of his expertise, experience and standards of quality when he commenced employment with the Respondent

The Respondent also submitted a picture, taken on 30 April 2012, of a dirty oven in the restaurant kitchen, alleging that it was due to the Applicant’s negligence that the oven was in such an unsatisfactory state. The Respondent further stated that there had been customer complaints as to the quality of the meals being prepared under the Applicant’s supervision.

5.0 “CS” Yard Hand Beaucette Marina - by witness statement only

- 5.1 The witness’ sister had requested the Applicant to clear up some cigarette papers which he had allegedly dropped near the restaurant. The Applicant was reportedly upset and allegedly made a rude response about “CS”.
- 5.2 “CS” subsequently reported this altercation to his manager, “Mr RS”.

6.0 “DM” Yard Hand Beaucette Marina - by witness statement only

- 6.1 The witness recalled “CS” asking his sister to talk to the Applicant re. the cigarette papers.

7.0 “AB” Office Manager Beaucette Marina - by witness statement only

- 7.1 The witness stated that “Mr RS”, the Marina Manager, was upset over the Applicant’s allegedly rude remarks to the sister of “CS”. “Mr RS” informed her that he had tried to confront the Applicant on the issue but the Applicant reportedly did not want to discuss the issue and had turned his back on “RS”.

8.0 “JT” “Easy-Clean” employee - by witness statement only

- 8.1 The witness confirmed that her organisation had been approached by the Respondent on 30 April 2012 to inspect the kitchen and recommend any necessary action. The witness found the kitchen in need of a thorough “deep clean” which was conducted the following day by a team of eight cleaners. In a subsequent letter “JT” stated that in her opinion the kitchen was dirty and not up to standard; further, it was her opinion that the kitchen equipment had not been properly cleaned since its installation in April 2011.

9.0 Mr Gary Thompson, Applicant - Oral Evidence & Witness Statement

- 9.1 The Applicant read from a witness statement (EE1 Pages 3 & 4 Refer).
- 9.2 On 27 March 2012, “Mr RS”, the manager of the Beaucette Marina, came to the kitchen and insisted they talk outside. The Applicant stated that “Mr RS” then grabbed him by the arm and swearing at the top of his voice said “you don’t tell my staff what to do”. Mr Thompson asked him to take his hand off him and explain what the issue was. “Mr RS” accused him of giving instructions to his staff. Despite Mr Thompson’s request that he calm down, “Mr RS” stated he wanted to fight him. The Applicant stated he was very scared and only with difficulty managed to extricate himself from the situation and return to the kitchen.
- 9.3 Following this confrontation the Applicant emailed both Mr Haines and Mr Dodd in the hope they would intervene and resolve the problem; however the response from the two directors was to place equal blame on both the Applicant and “Mr RS” and to advise him he should resolve his differences personally with “RS”.
- 9.4 The Applicant emailed the two directors again telling them he was genuinely fearful but obtained no response. In a state of agitation and stress he consulted his doctor and was signed off for reasons of stress related sickness.
- 9.5 The Applicant met with the two directors twice, on 4 April and 17 April 2012. The directors continued to advise him to resolve the problem personally with “Mr RS”. They made no attempt to investigate his complaint or interview any of the witnesses to the incident.
- 9.6 The Applicant was in no doubt that he was dismissed because of his extended period of certified sickness and because the Respondent believed it easier to dismiss him rather than deal with the allegations of assault by “Mr RS”.
- 9.7 The Applicant stated he had maintained the highest hygiene standards in the kitchen and this would be confirmed by oral evidence from his kitchen assistant “CB”. He

cast doubt on the picture of the dirty oven submitted by the Respondent being that of the Beaucette Marina Restaurant. Even if the picture was genuine, which he did not admit, as it was allegedly taken on 30 April and as he had already been signed off for over three weeks before that date, it could not be reasonable to attribute such a problem to him.

- 9.8 Whilst the Applicant admitted to the occasional use of expletives, they were never personally directed to any of the staff and this would be borne out by witness statements included in bundle EE1 from “JE” and “CB” the Kitchen assistants (EE1 Pages 18 and 19 Refer).
- 9.9 The Applicant strongly denied the alleged gross misrepresentation of his expertise, experience and standards of quality by the Respondent. He referred the Tribunal to his CV (EE1 Pages 35 and 36 Refer) and his broad range of culinary achievements during a 16 year career. In addition he requested that the Tribunal consider a reference from his previous employer in Sark (EE1 Page 20 Refers); this reference paid tribute to the high levels of customer satisfaction when the Applicant and his wife ran his restaurant.
- 9.10 The Applicant stated that if the Respondent had real concerns as to any of the three grounds on which he based the dismissal, none of them was raised during his period of employment.
- 9.11 Turning to the issue of pay the Applicant stated that he had agreed a £1000 monthly rent allowance with the Respondent, rather than the £1200 originally claimed, and a profit sharing scheme. Despite the Applicant reminding the Respondent on many occasions neither allowance was paid.

10.0 “CB” Kitchen Assistant - Oral Evidence & Witness Statement

- 10.1 The witness read from a witness statement (EE1 Page 18 Refers).
- 10.2 The witness, who was employed from April 2011, was responsible for cleaning the kitchen, with some items being scheduled for a daily clean and others on a weekly schedule. She had qualifications in kitchen hygiene. She stated that the kitchen was maintained to very high standards of cleanliness and in her opinion would never have breached hygiene rules.
- 10.3 Whilst she had heard the Applicant use the occasional expletive she stated he had never been offensive, he was very even tempered and calm; she would be willing to work for the Applicant again if the opportunity arose.

11.0 “GDL” Chef - Witness Statement only

- 11.1 A witness statement was included in the bundle submitted by the Applicant (EE1 Pages 15, 16 & 17 Refer).
- 11.2 On 27 March 2012 the witness observed the Applicant leave the kitchen with “Mr RS” and then heard some shouting. He then observed the Applicant making a hasty return to the kitchen closely followed by “RS”. “RS” was apparently trying to grab

the Applicant's arm. "Mr RS' tone was aggressive and in the words of the witness statement "scary".

- 11.3 The witness intervened to try to calm the situation, however "Mr RS" was still highly agitated and according to the witness statement reportedly said the following:

"You don't talk to my staff like that, I am fed up with wiping your arse, it's been too long. My next port of call is Bill and Steve, you're finished".

- 11.4 Following this incident the witness observed that the Applicant was in his words "shaken up" and "not himself".

- 11.5 In his statement the witness asserted that the standard of hygiene in the kitchen was above average whilst under the control of the Applicant.

- 11.6 Whilst the Applicant occasionally used expletives the witness statement recorded that this was not offensive to the staff.

12.0 Closing Statement: Mr Andy Castle

- 12.1 Mr Castle argued that the grounds for dismissal relied upon by the Respondent in its submissions were totally without merit.

- 12.2 It was Mr Castle's opinion that the witness statement from "GLD" and "CB" corroborated the Applicant's contention that standards of kitchen hygiene were above average throughout the period of his employment. In addition, the audit of kitchen cleanliness conducted by the Respondent took place three and a half weeks after the Applicant's last day in charge of the kitchen. Given this significant period of absence it would be difficult to imagine how the Applicant could be held responsible for any alleged minor hygiene issues after such a period of time.

- 12.3 Whilst the Applicant did not deny he used occasional expletives these were not seen as offensive to the staff; this again was corroborated by evidence from "GLD" and "CB".

- 12.4 As for "gross misrepresentation of his expertise" the excellent reference from a prior employer (EE1 Page 20 Refers) contradicted such an assertion. The attached CV (EE1 Pages 35 & 36 Refer) clearly demonstrated that the Applicant was an experienced and resourceful chef. In summary, this allegation lacked any credibility.

- 12.5 Mr Castle reminded the Tribunal that the Respondent had at no time put any of these allegations to the Applicant during the period of his employment; he questioned why, if the Respondent had had genuine concerns, these weren't raised with the Applicant prior to dismissing him.

- 12.6 Mr Castle then turned to the issue of the verbal agreement between the Applicant and the Respondent in respect of:

- A Rent Allowance of £1000 per month – negotiated down from £1200 per month
- A Bonus based upon the gross profit of the "food side of the business"

- Four Weeks holiday
- A three month notice period

None of these provisions were honoured. Mr Castle stated that the Tribunal should decide whether they accepted the Applicant's evidence that such provisions were included in the oral contract; iff they did, then they should consider whether any potential award should take into account any of the provisions.

12.7 Mr Castle also drew the attention of the Tribunal to the clear and uncontested breach of the "Conditions of Employment (Guernsey) Law 1985. In summary the law requires that:

- No later than four weeks after the beginning of the employment, a written statement should be provided
- This written statement should identify the parties and specify the date of commencement of employment
- Certain particulars relating to the scale of remuneration, pay periods, normal working hours, holiday entitlements and other employment related benefits must be specified
- Length of notice and job title must be specified

None of these particulars were provided to the Applicant in written form whilst in employment with the Respondent.

12.8 Mr Castle made an application for costs under the Employment Protection (Recoverable Costs) Order, 2006. The Applicant is now resident in the UK following his dismissal and necessarily had to incur certain travel and accommodation costs to attend the hearing. Copies of relevant invoices were presented to the Tribunal. These were:

- Cost of return flight Exeter-Guernsey-Exeter, £249.66
- Two nights' accommodation in Guernsey, £87.50
- Cost of Car Parking at Exeter Airport £36.00

13.0 Conclusions

13.1 The Respondent alleged in his ET2 and subsequent written submissions that the dismissal was based on a number of grounds namely:

- The state of the kitchen was in breach of prevailing Food Hygiene and Health and Safety Standards
- The Applicant had made sexually offensive comments about an employee of Beaucette Marina
- He was foul mouthed and abusive to staff
- The Applicant had grossly misrepresented his expertise, experience and standards of quality when he commenced employment with the Respondent

- 13.2 The Tribunal has considered each of these allegations as set out in the following paragraphs.
- 13.3 The Tribunal heard credible evidence from the Applicant, a chef and a kitchen assistant that above average standards of hygiene were consistently maintained. On balance the Tribunal prefers this evidence to that of the Respondent.
- 13.4 Whilst some occasional use of expletives was admitted by the Applicant in the course of his work neither “GLD” nor “CB believed this behaviour was directed personally. The witnesses expressed the opinion that his behaviour was not excessive or unusual in a highly pressured commercial kitchen environment. It would seem that both these witnesses would be content to work for the Applicant again if the opportunity ever arose.
- 13.5 The allusion of gross misrepresentation in relation to the Applicant’s career to date and experience would seem groundless. The combination of a detailed CV and a reference by a prior employer are preferred to the Respondent’s assertions.
- 13.6 No direct evidence was offered in relation to the allegation that the Applicant had made sexually offensive remarks in relation to an employee of Beaucette Marina. In the absence of any supporting evidence, the Tribunal concludes that this allegation should be considered without merit.
- 13.7 It would seem to the Tribunal that the procedure used by the Respondent to dismiss the Applicant was an egregious breach of Commerce and Employment Code of Practice “Disciplinary Practice and Procedures in Employment”. In particular the following:-
- No prior warnings of management concerns over possible performance deficiencies
 - No prior and impartial investigation of the alleged deficiencies in work performance
 - No notification prior to the dismissal that a disciplinary action would be taken
 - No opportunity for a meeting with the Respondent prior to the dismissal
 - Dismissal via a letter handed to the Applicant’s wife
 - No right to appeal the decision
- 13.8 The Tribunal is conscious that the Respondent is not a large company; however judged by even the minimum standards of good practice it would seem that no reasonable employer could imagine that their actions in this matter would be seen to be fair, reasonable and balanced.
- 13.9 In summary, the Tribunal has concluded that the Respondent’s allegations have little basis in fact and there was a woeful lack of fair procedure in relation to the dismissal.
- 13.10 The Tribunal has concluded that the Applicant was unfairly dismissed for a reason other than those asserted in the Respondent’s written submissions.

- 13.11 No clear written documentation existed that clearly delineated the terms of the contract which existed between the two parties; this complicated and lengthened the Tribunal's deliberations in reaching its preliminary decision (dated 23 November 2012), that the Applicant was an employee of the Respondent. The Tribunal notes that no written statement of the main terms and conditions of employment under the Conditions of Employment (Guernsey) Law, 1985, were ever issued – however, the Tribunal has no jurisdiction in that Law, any such issues should be raised with the Commerce and Employment Department.
- 13.12 In relation to the calculation of an award the Tribunal was requested that it should give consideration to the inclusion of some or all these elements under the provision of section 22(2)(b) of the law which states:

“in a case where in the opinion of the Tribunal the basis set out in paragraph 22(2)(a) for calculating the amount of a month's pay or (as the case may be) a week's pay is inappropriate, shall be calculated on such other basis as the Tribunal may consider to be just and equitable”

The elements considered were:

- A bonus, based upon the gross profit of the “food side of the business”
- Four weeks' holiday
- A three-month notice period
- A rent allowance of £1000 per month

The Tribunal decided that there was insufficient information to determine what the bonus element might have been, if paid, and therefore it cannot be considered as part of the six months' pay in the period up to the EDT. The notice period and holiday pay constitute contractual items over which the Tribunal has no jurisdiction.

However, the Tribunal finds it very credible that a £1000 monthly rent allowance should be considered as part of the Applicant's monthly remuneration. The Applicant has testified to a discussion between himself and the Respondent which the Tribunal construes as an oral contract. In conclusion, whilst there is lack of any written contract the Tribunal finds it just and equitable to include this element as part of a month's pay; thus, monthly pay for this award will be deemed to be £3,904.26.

14.0 Decision

- 14.1 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, the Applicant was unfairly dismissed.

- 14.2 The Tribunal awards £23,425.56 and, having considered if this award merits any reduction, finds no reason to apply such a reduction.
- 14.3 The Tribunal makes a further award under the Employment Protection (Recoverable Costs) Order, 2006, of £373.16. These being the costs necessarily incurred by the Applicant in attending the Tribunal Hearing.

Mr Peter Woodward

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Signature of the Chairman

28 November 2012

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Date