

**States of Guernsey**



**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

**APPLICANT:** Mr Scott Andrew Bougourd

Represented by: Advocate Simon Geall

**RESPONDENT:** Mrs Sheryl Batiste trading as Beauty By Shezam

**Decision of the Tribunal Hearing held on 19 February 2013**

**Tribunal Members:** Mrs Tina Le Poidevin (Chair)  
Mr Norson Harris  
Ms Christine Le Lievre

**DECISION**

**1. Unfair Dismissal Claim**

- 1.1 The Applicant claimed that he had been unfairly dismissed by reason of his conduct within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended. Having considered all the written and oral evidence presented by both parties and having due regard to all the circumstances, the Tribunal determined that the Respondent's actions in dismissing the Applicant were not those of a reasonable employer and the Respondent also substantially failed to follow a fair procedure.
- 1.2 The Tribunal therefore found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed.
- 1.3 In accordance with Section 22(1)(a) of The Employment Protection (Guernsey) Law 1998, as amended, the Respondent shall pay to the Applicant an award of £5,485.40, this being the equivalent of six months' pay as determined by the Tribunal.
- 1.4 The Respondent's request for a 90% reduction in award was considered and rejected by the Tribunal.

Mrs Tina Le Poidevin

14 March 2013

.....  
Signature of the Chairperson

.....  
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 (Form ET3A) 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 ("The Law")**

**Extended Reasons**

**1.0 Introduction**

- 1.1 The Applicant, Mr Scott Andrew Bougourd (SAB), claimed that he had been unfairly dismissed on the grounds of his conduct within the meaning of Section 6(2)(b) of The Employment Protection (Guernsey) Law, 1998, as amended.
- 1.2 The Respondent, Mrs Sheryl Batiste trading as Beauty By Shezam (SB), disputed the claim.
- 1.3 The Applicant was represented by Advocate Simon Geall, assisted by Mr William (Bill) Brogan.
- 1.4 The Applicant gave witness testimony in person under oath.
- 1.5 Form ET1, document bundle EE1 (containing copies of forms ET1 and ET2; the Applicant's witness statement; a witness statement from the Applicant's mother, Mrs SB; the Applicant's contract of employment with Thomas Hotels Limited, trading as La Trelade Hotel; an unsigned letter dated 10 July 2012 from SB to SAB requesting a meeting on Friday 13 July 2012; a letter dated 7 February 2013 from Advocate Geall to SB seeking to verify whether or not she was alleging that four written documents relating to warnings allegedly given to SAB had been physically received by him and had been written and signed by her contemporaneously; email correspondence dated 7 February 2013 to SB from Kim Penney of AFR Advocates on behalf of Advocate Geall and 14 February 2013 from Advocate Geall to SB asking for a response to the 7 February 2013 letter; an email from SB to Advocate Geall responding to his letter of 7 February 2013; email correspondence from Advocate Geall to SAB on 15 February 2013 and 18 February 2013 requesting electronic copies of each of the alleged verbal warnings in Word format; and Commerce and Employment's Code of Practice on Disciplinary Practice and Procedures in Employment).
- 1.6 BB, an employee of Cable & Wireless, was summoned by the Tribunal to the Hearing and placed under oath before producing documents to evidence whether or not a text message was received by SAB from SB on or around 9.11 am on 11 July 2012. Document bundle EE2 (containing a signed letter from BB dated 19 February 2013, a document noting SAB's incoming SMS record on 11 July 2012 and a document noting SAB's outgoing SMS record on 11 July 2012) was presented in evidence.
- 1.7 The Respondent represented herself and gave witness testimony in person under oath.
- 1.8 Witness testimony in person for the Respondent was provided under oath by SW (a client of the Respondent); RB (an employee of the Respondent); LB (the Respondent's husband).

- 1.9 In addition to form ET2, document bundle ER1 (containing copies of a document entitled 'ET2 In response to attachment to form ET1'; a signed statement dated 14 January 2013 from SB; a signed, undated statement from KF (employee); a signed letter dated 4 November 2012 from KB (the Respondent's daughter); signed letters dated 19 October 2012 and 3 November 2012 from RB (client of the Respondent); a signed, undated statement from LB (the Respondent's husband); a signed document dated 12 October 2011 from MSD (Proprietor of La Trelade Hotel); a signed letter dated 15 February from SD (client of the Respondent); a signed letter dated 5 October 2012 from PCP (client of the Respondent); a signed statement dated 9 October 2012 from SW (client of the Respondent); a signed undated document from NM (client of the Respondent); a signed letter dated 12 December 2012 from GC (Accredited Exercise Physiologist from the Centre for Modern Medicine; a text message timed at 9.11 am on 11 July recorded on a Samsung mobile 'phone; two A4 documents noting clock in information on 10 March 2012; two post-it notes recording details of Commerce & Employment staff contacts; a signed letter dated 8 January 2013 to SB from AD (Inspector, Computer Crime Unit, Guernsey Police); a document noting membership rates; notes of verbal warnings in respect of SAB, signed by SB, and dated 18 February 2012, 14 March 2012, 29 May 2012 and 7 July 2012; a document noting holiday entitlements for RE, KF and SAB; timesheets dated 1 January 2012, 8 January 2012 and an illegible date sometime in 2011 in respect of hours worked by RE, KF and SAB; a pay notification document in the name of SAB dated 26 December 2011; three payslips for SAB dated 31 March 2012, 31 May 2012 and 30 June 2012; eight pages of shift details for RE, KF and SAB during the period December to June; a document entitled Grievance Policy And Procedure; and a document entitled 'La Trelade Guernsey Heads of Agreement for the License for the Running of the Health Suite' dated 3 January 2012 signed by SB and MC) was presented in evidence by the Respondent.
- 1.10 In response to an order by the Tribunal for the Respondent to provide additional evidence to establish the Applicant's complete pay record over his last six months of employment, document bundle ER2 (containing a pay notification document in the name of SAB dated 26 December 2011 and payslips in the name of SAB dated 29 February 2012, 31 March 2012, 30 April 2012, 31 May 2012, 30 June 2012 and 16 July 2012) was presented in evidence.
- 1.11 The following declaration was made by the Tribunal:

Mrs Tina Le Poidevin declared that she knew Mr William (Bill) Brogan who had worked with her husband whilst they were serving Police Officers some years ago but she had not had contact with him socially or professionally since that time. No objections were raised by either party in relation to this declaration.

## **2.0 Facts Found by the Tribunal**

### **Continuous Employment**

- 2.1 The Applicant was employed by Thomas Hotels Limited, trading as La Trelade Hotel, in the capacity of Health Suite Attendant from 12 July 2010 and signed a contract of employment on 14 July 2010 in connection with his employment.

- 2.2 In or around October 2012, the running of the Hotel was transferred to Mr Michael S Doughty trading as La Trelade Hotel Limited.
- 2.3 Whilst the Applicant continued to undertake his role of Health Suite Attendant, he did not receive a revised contract of employment or a written statement of particulars of employment to reflect the change in employer.
- 2.4 On 3 January 2012, Mr Doughty entered into an agreement with the Respondent trading as Beauty by Shezam for her to operate the licence to run the Health Suite at La Trelade Hotel for five years from 4 January 2012.
- 2.5 This agreement clearly stated that Beauty by Shezam's responsibilities included the operation of both the Health Suite and the Beauty Salon and the remuneration of all staff within the health suite with the exception of one employee (RE) who was to remain on the payroll of La Trelade Hotel Limited.
- 2.6 Whilst the Applicant did not receive a revised contract of employment or a written statement of particulars of employment to reflect the change in employer, he continued to undertake his role as Health Suite Attendant.
- 2.7 The Tribunal determined that the Applicant's employment was continuous during the period from 12 July 2010 to 13 July 2012 in accordance with Section 34 of the Law and Section 7(2) of the Schedule relating to Continuous Employment.

#### **Applicant's Pay**

- 2.8 The Tribunal determined the Applicant's pay during his last six months of employment with the Respondent as £5,485.40.

#### **Unfair Dismissal Claim**

- 2.9 During the course of the Applicant's employment relationship with the Respondent, no formal disciplinary action had ever been taken against him.
- 2.10 The Respondent provided four verbal warning notes to support her allegations in relation to the Applicant's conduct. These notes were only signed by the Respondent and not the Applicant.
- 2.11 The Respondent decided to hold a meeting with the Applicant in the presence of herself, RB and LB on Friday 13 July at 5 pm in the Health Suite to discuss a number of issues with him.
- 2.12 The Respondent prepared a letter dated 10 July 2012 addressed to the Applicant requesting this meeting but did not hand it to him in person or post it to him.
- 2.13 The Respondent did not attempt to contact the Applicant by telephone to inform him of the meeting.
- 2.14 The Respondent alleged that she had sent the Applicant a text message on 11 July 2013 advising him of the meeting.

- 2.15 The Applicant denied knowledge of the meeting and also denied receiving the text message from the Respondent.
- 2.16 Evidence from Cable & Wireless confirmed that, whilst the Applicant's mobile number had received a total of 41 Short Message Service (SMS) text messages on 11 July 2012, there was no record of an SMS text message being sent from the Respondent's mobile number to the Applicant's mobile number that day.
- 2.17 On 13 July 2012 the Applicant received a telephone call from the Respondent asking him why he had not attended a meeting with her that day, despite being advised of the meeting by text message on 11 July 2012.
- 2.18 During the Respondent's telephone call to the Applicant on 13 July 2012, she dismissed him on the basis of his conduct, offering to provide him with payment in lieu of one week's notice.
- 2.19 The Applicant's dismissal was not confirmed to him in writing.

### **3.0 The Law**

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

- 3.1 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".
- 3.2 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."
- 3.3 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 – .... (a) six months' pay, ..." 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."

- 3.4 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."
- 3.5 Section 7(2) of the Schedule relating to Continuous Employment in accordance with Section 34 of the Law states "If a trade or business, or an undertaking (whether or not established by or under an enactment), is transferred from one person to another – (a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and (b) the transfer does not break the continuity of employment."

#### **4.0 Conclusion**

- 4.1 The Respondent indicated on her ET2 form and agreed at a Case Management Meeting that the Applicant had been dismissed, however, she was misguided in her interpretation of events at the Hearing in that her offers of paying the Applicant in lieu of his notice period and providing him with a reference, did not constitute a dismissal. She believed that to dismiss someone, she had to explicitly tell them they were sacked.
- 4.2 The Applicant had clearly not volunteered to resign, the Respondent had made the first move and it was clear that the Applicant was not given the option of retaining his job.
- 4.3 The Respondent stated that she had intended to hand the Applicant an undated letter inviting him to a meeting on 13 July 2012 when he was due to attend work on 10 July 2012 but, unbeknown to her, he had agreed to swap his shift with a colleague (KF).
- 4.4 The letter prepared by the Respondent was not provided to the Applicant until the day after his dismissal and, apart from an alleged text message sent on 11 July 2012 by the Respondent to the Applicant (which was proven by Cable & Wireless evidence not to have been received by the Applicant), no attempts were made by the Respondent to advise the Applicant of the meeting via any other means of communication.
- 4.5 The Applicant was dismissed by the Respondent by telephone on 13 July 2012.
- 4.6 In any claim of unfair dismissal where a dismissal is proven to have taken place, the burden of proof lies with the Respondent to prove the reason for the dismissal and also that the dismissal was fair.

- 4.7 The Respondent alleged that the Applicant was given many warnings as a result of him not carrying out his duties, not taking complaints seriously, continually leaving early and not showing willingness to improve, however, the only written evidence produced were documents from colleagues and clients which (apart from that from SD) post-dated the dismissal; and notes of four alleged verbal warnings (not signed by the Applicant). In all cases, the Applicant denied seeing this evidence until it was presented in evidence for the Hearing.
- 4.8 The Applicant did recall being spoken with on a couple of occasions about his work, namely in March and May (which tied in with two of the verbal warning notes) but stated that at no time had he been advised that disciplinary action was being taken against him, nor that such discussions were being formally recorded, placed on his file or that his employment was under threat.
- 4.9 The Applicant explained that the March 2012 incident related to him not emptying bins and cleaning floors before he finished work and he had provided an explanation to the Respondent at that time that he fully intended to perform these duties the following morning when he was on duty. He further explained to the Tribunal that he was not made aware of these additional duties until March 2012 as they had not formed part of his role when the business was run by the previous owner.
- 4.10 The Applicant also explained that the May incident related to LB talking to him about not turning the lights off before he left work. The Applicant had explained at the time to LB that the owner of the hotel had asked him to leave some of the lights on overnight because turning them all off restricted the lighting for the new hotel dance floor which was located next to the swimming pool area. The Applicant complied with LB's instruction to ignore future directives from the hotel owner.
- 4.11 The alleged verbal warning note of 29 May 2012 was only signed by the Respondent (who had not been involved in the discussion with the Applicant) and the note made no reference to LB being the person who spoke with the Applicant on that occasion.
- 4.12 In relation to the validity of the verbal warnings, the Tribunal prefers the evidence of the Applicant.
- 4.13 The Respondent did not have a disciplinary procedure and was not aware of the Code of Practice on Disciplinary Practice and Procedures issued by Commerce and Employment.
- 4.14 The Respondent admitted that she had breached the Code of Practice albeit by way of her ignorance of it.
- 4.15 Ignorance, however, is not a defence and any person running a business and employing staff in Guernsey must be aware of their responsibilities in this regard.

- 4.16 Commerce of Employment's Code of Practice on Disciplinary Practice and Procedures clearly states that disciplinary procedures should:
- (a) Be in writing.
  - (b) Be applied equally and consistently to all staff.
  - (c) Provide for matters to be dealt with quickly.
  - (d) Indicate the disciplinary actions which may be taken.
  - (e) Specify the levels of management which have the authority to take the various forms of disciplinary action, ensuring that immediate superiors do not normally have the power to dismiss without reference to senior management.
  - (f) Provide for individuals to be informed of the complaints against them and to be given an opportunity to state their case before decisions are reached.
  - (g) Give individuals the right to be accompanied by a trade union representative or by a fellow employee of their choice.
  - (h) Ensure that, except for gross misconduct, no employees are dismissed for a first breach of discipline.
  - (i) Ensure that disciplinary action is not taken until the case has been carefully investigated. Wherever possible, the person conducting the disciplinary hearing should not also conduct the investigation.
  - (j) Ensure that individuals are given an explanation for any penalty imposed.
  - (k) Provide the right of appeal and specify the procedure to be followed. Preferably, the appeal should be conducted by someone not involved in the original hearing.
- 4.17 The Tribunal considered the size and administrative resources available to the Respondent and, whilst recognising that sophisticated processes and procedures are unlikely to be in place in such a small business, even the most basic requirements of the Code of Practice were breached and the Respondent's actions in this case clearly demonstrated a substantial failure to follow a fair procedure.
- 4.18 Having considered all the evidence, whether this is specifically referred to in this decision or not, the Tribunal concluded that the Respondent's actions in dismissing the Applicant were not those of a reasonable employer and the Respondent also substantially failed to follow a fair procedure.
- 4.19 The Respondent's request for a 90% reduction in any award has been considered and is rejected by the Tribunal.

## **5.0 Decision**

- 5.1 The Applicant claimed that he had been unfairly dismissed by reason of his conduct within the meaning of Section 6(2)(b) of the Employment Protection (Guernsey) Law, 1998, as amended. Having considered all the written and oral evidence presented by both parties and having due regard to all the circumstances, the Tribunal determined that the Respondent had not demonstrated a sufficient reason to dismiss, her actions in dismissing the Applicant were not those of a reasonable employer and further the Respondent also substantially failed to follow a fair procedure in any event.



- 5.2 The Tribunal therefore found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed.
- 5.3 In accordance with Section 22(1)(a) of The Employment Protection (Guernsey) Law 1998, as amended, the Respondent shall pay to the Applicant an award of £5,485.40, this being the equivalent of six months' pay as determined by the Tribunal.
- 5.4 The Respondent's request for a 90% reduction in award was considered and rejected by the Tribunal.

Mrs Tina Le Poidevin  
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14 March 2013  
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Signature of the Chairman

Date