

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Martin Crittall

Represented by: Mr Andrew Castle, Castle Defence

RESPONDENT: Channel Islands Fuels Limited

Represented by: Mr Richard Hignett, No 5 Chambers, Birmingham

Decision of the Tribunal Hearing held on 15 and 16 May 2013.

Tribunal Members: Mrs Tina Le Poidevin (Chair)
Mrs Paula Brierley
Mrs Joanne de Garis

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 those of a reasonable employer.
- 1.2 The Tribunal therefore found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was fairly dismissed and makes no award.

Mrs Tina Le Poidevin

17 June 2013

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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 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 Martin Crittall (MC), 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, Channel Islands Fuels Limited, disputed the claim.
- 1.3 The Applicant was represented by Mr Andrew Castle of Castle Defence.
- 1.4 The Applicant gave witness testimony in person under affirmation.
- 1.5 Witness testimony in person for the Applicant was provided under oath by PL (the Respondent's former Operations Manager) and under affirmation by CO (Unite Shop Steward and the Respondent's Fuel Tanker Driver).
- 1.6 The Respondent was represented by Mr Richard Hignett of No 5 Chambers, Birmingham.
- 1.7 Witness testimony in person for the Respondent was provided under oath by DC (Investigating Officer and the Respondent's Terminal Operations Manager), and under affirmation by MT (Disciplinary Officer and the Respondent's Logistics Manager) and AH (the Respondent's Director and General Manager and Appeal Hearing Officer).
- 1.8 A joint document bundle EE1/ER1 (containing copies of witness statements from DC, MT, AH, MC, PL and CO together with those from former delivery drivers, JJ and MLT; forms ET1 and ET2; notes of a Case Management Meeting held on 14 February 2013; the Respondent's Employee Handbook; Attendance Record of Marine/Manual Handling/Petrol Delivery Course; document noting distribution/receipt of Drivers Handbook October 2008 Edition; email correspondence between AH and PM (the Respondent's Non-Executive Director and former General Manager) on 29 and 31 October 2012; email from IE (the Respondent's Sales & Marketing Manager) to AH on 2 November 2012; email from TDG (the Respondent's Business Support Manager) to AH on 2 November 2012; email from DC to AH on 2 November 2012; email from MT to AH on 2 November 2012; Procedure for De-Gassing a Vehicle Following the Carrying of Motor Spirit dated 29 April 1996; Memo dated 1 July 1997 to Operations Department from Operations Manager dated 1 July 1997 re: Pump Out Procedures and Tank Recovery; Driver Procedure document dated 1 April 2005; Terminal Loading of ISO and IBC Tanks document dated 1 April 2005; Procedure 043: Offset Fill Deliveries dated April 2012; document entitled 'Total Channel Islands, Service Station Fuel Deliveries'; the Applicant's Statement of Terms & Conditions of employment signed and dated by him on 3 July 2008; the Applicant's Daily Sales Sheets for 24 September 2012; letter of suspension dated 1 October 2012 from MT

to the Applicant; documents noting investigation questions and answers from the Applicant and other drivers (AW, MP, AJM and HLM); Investigation Summary notes; notes of an Investigation Meeting held on 3 October; notice of disciplinary hearing letter dated 4 October 2012 from DC to the Applicant; letter dated 8 October 2012 from the Applicant to MT confirming attendance of JJ at the hearing and enclosing the Applicant's witness statement; the Applicant's witness statement dated 8 October 2012; notes of the disciplinary hearing held on 10 October 2012; letter of dismissal dated 11 October 2012 to the Applicant from MT confirming the decision to summarily dismiss him on the grounds of gross misconduct ; letter dated 18 October 2012 from the Applicant to MT appealing against the dismissal decision and enclosing his manually amended copy of the disciplinary hearing notes of 10 October 2012; email correspondence dated 23 and 24 October 2012 between DG (the Respondent's Logistics Administrator) and PS (UK Training Manager of GB Oils Ltd); letter dated 24 October 2012 from MT to the Applicant requesting the Applicant's grounds for appeal; a letter dated 1 November 2012 from the Applicant to MT setting out the grounds for his appeal and confirming his representative as BL (Unite Regional Officer); Notice of Appeal Hearing letter dated 13 November 2012 from AH to the Applicant; email correspondence between MPS (Guernsey District Office of Unite) and AH dated 23 November 2012 and 11 December 2012; notes of the Applicant's Appeal Hearing on 11 December 2012; and a letter dated 20 December 2012 from AH to the Applicant providing the outcome of the Appeal Hearing) were presented in evidence.

- 1.9 In addition to documents contained within the joint bundle, the Respondent presented ER2 (a seven page extract from a Bill of Lading Report dated from 1 September 2012 to 30 September 2012); ER3 (a further one page extract from a Bill of Lading Report dated from 1 September 2012 to 30 September 2012) and played CCTV footage (timed at 8.11 am on 13 September 2012 and 14.05 pm on 26 September 2012) in evidence and ER4 (closing submissions).
- 1.10 In addition to documents contained within the joint bundle, the Applicant presented EE2 (closing remarks).
- 1.11 The Tribunal determined the Applicant's pay during his last six months of employment with the Respondent as £14,816.12.

2.0 Facts Found by the Tribunal

- 2.1 The Respondent (which has had a number of changes in ownership) operates a fuel distribution business in Guernsey to commercial, marine and domestic markets, with a staff complement of approximately 20, including some eight drivers.
- 2.2 The Applicant commenced employment as a Driver with the Respondent on 1 December 2004 (when it was then known as TOTAL Channel Islands Limited).
- 2.3 The Applicant was initially trained to undertake his job by another driver.
- 2.4 The Applicant attended compulsory training sessions that were relevant to his role, including a course on 14 June 2012 covering Marine, Manual Handling and Petrol Delivery.

- 2.5 On 25 September 2012 DC observed the Applicant removing two 5 litre cans from the back of the loading rack where his fuel tanker vehicle was parked and placing them in the boot of his personal vehicle.
- 2.6 DC did not confront the Applicant at that time but waited until he had viewed random items of CCTV footage during September 2012 before approaching MT on 28 September 2012 with his concerns.
- 2.7 MT subsequently suspended the Applicant on 28 September 2012 whilst an investigation was conducted into allegations that the Applicant had stolen fuel in 5 litre cans from the Respondent's Terminal Loading Rack on four separate occasions.
- 2.8 Following an investigation conducted by DC, the Applicant attended a disciplinary hearing on 10 October 2012 accompanied by fellow employee, JJ.
- 2.9 During the disciplinary hearing, the Applicant admitted taking 'drain offs' (i.e. fuel remaining in the fuel tanker vehicles after delivery and prior to reloading) for his own personal use and confirmed that he did not have verbal or written permission to do so.
- 2.10 The Applicant did not provide names of any other employees who had taken fuel for their own personal use.
- 2.11 During the Applicant's disciplinary hearing, JJ admitted taking fuel for his personal use but denied knowing of anyone other than himself and the Applicant doing so.
- 2.12 In a letter dated 11 October 2012 the Applicant was advised by MT that he was being summarily dismissed on the grounds of gross misconduct for taking fuel from the Respondent's premises without permission.
- 2.13 The Applicant indicated his intention to appeal the decision in a letter to MT on 18 October 2012 and provided grounds for the appeal in a letter to MT dated 1 November 2012.
- 2.14 The appeal hearing took place on 11 December 2012 (with delays being due to annual leave and union representative availability).
- 2.15 The Applicant was advised in a letter from AH dated 20 December 2012 that the original decision to summarily dismiss him had been upheld.
- 2.16 During the course of the Applicant's employment relationship with the Respondent, no formal disciplinary action had ever been taken against him.
- 2.17 The Respondent provided all of its employees, including the Applicant, with an Employee Handbook containing its Disciplinary Procedure.

- 2.18 The Respondent's Disciplinary Procedure clearly noted stealing as a serious offence under the heading of 'Gross Misconduct' and an act that would 'render the individual liable to summary dismissal'. Within the section entitled 'Termination of Employment' it also clearly noted that "The services of any member of staff may be terminated summarily by the Company without notice or pay in lieu of notice in cases of gross misconduct, ..."
- 2.19 The Employee Handbook also noted under 'Duties of Employment' that employees shall "... well and faithfully serve the Company to the best of your abilities and be diligent, honest and ethical in the performance of your duties and not to knowingly or willingly do or omit anything to be done to the prejudice, detriment or injury of the Company."

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."

4.0 Conclusion

- 4.1 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.
- 4.2 As in the case of *British Home Stores Limited v Burchell* [1978] IRLR 379, the Tribunal's decision does not rest on whether the employee was actually guilty of misconduct or not, but instead a) whether the employer actually believed that the employee was guilty of misconduct, b) whether it had reasonable grounds on which to base that belief, and c) whether it had carried out as much investigation as was reasonable in the circumstances of the particular case. In other words, whether or not the employer had a genuine belief on reasonable grounds after a reasonable investigation.
- 4.3 The taking of fuel in the form of 'drain-offs' was freely admitted by the Applicant whose defence rested on his belief that he had implied permission to do so on the basis of custom and practice.
- 4.4 The Applicant believed that the taking of fuel in this way was not theft as the product at this stage was waste that did not belong to the Respondent or its clients, whereas the Respondent asserted that fuel contained within its vehicles before or after client delivery was its property and taking fuel in the form of 'drain-offs' was theft.
- 4.5 The Applicant believed it was a perk of the job, particularly as the fuel needed to be drained off to prevent contamination when the fuel load was changed (although the Respondent disputed the issue of contamination) and, as the fuel was waste, he was also saving the Respondent money by them not having to dispose of it.
- 4.6 Whilst the Applicant may have thought that it was custom and practice to take fuel, the Tribunal preferred the Respondent's evidence. The fuel did not belong to the Applicant and there was insufficient evidence to support his belief that it was custom and practice to take fuel in the form of 'drain-offs'. The following specific points are made:
 - 4.6.1 Other than the Applicant, JJ was the only other driver who admitted taking 'drain-offs' prior to the Applicant's dismissal. Prior to the dismissal decision being made, the Applicant was asked to provide names of others who he alleged to have taken fuel but he declined to do so. The Respondent, therefore, had to rely on the evidence available to it at the time, including the CCTV footage where only the Applicant was observed taking 'drain-offs'. It was only after the dismissal decision had been taken that JJ provided names of others who he alleged to have taken fuel, although this was denied by those individuals who were subsequently interviewed prior to the Applicant's appeal hearing.

- 4.6.2 The Respondent asserted that CO refused to be interviewed during the investigation (although this was denied by CO). CO said in evidence at the hearing that he was aware of the practice of taking 'drain-offs' but he did not provide the Respondent with any evidence to support his assertion prior to the Applicant's dismissal.
- 4.6.3 BL, who did not appear in person, is noted as saying that he spoke to 'many drivers who were adamant' that the practice of taking 'drain-offs' went on but, again, did not name any individuals.
- 4.6.4 PL stated that, during the handover of his role to DC, he told him about the practice of taking 'drain-offs', although this was denied by DC. MLT, who did not appear in person, admitted taking 'drain-offs' when he was working for the Respondent. However, the evidence from both PL and MLT was not available to the Respondent prior to the Applicant's dismissal or his appeal hearing. It was also reasonable for the Respondent to exclude PL and MLT from the investigation as they were not current employees and neither was put forward by the Applicant as potential witnesses.
- 4.7 In the absence of any named individuals who admitted to taking fuel from the Respondent at the time of the Applicant's dismissal, any perceived 'custom and practice' extended only to the Applicant and JJ, both of whom were dealt with by the Respondent on a similar basis.
- 4.8 The Applicant had never sought to obtain permission from the Respondent to take fuel for his own personal use.
- 4.9 The Applicant had the opportunity to put forward whatever evidence he considered to be appropriate in his defence, he exercised his right to be accompanied at both the disciplinary and appeal hearings and had the support of a union representative.
- 4.10 The Tribunal preferred the Respondent's evidence in relation to the delays that were evident in the process, even though the delays themselves would not have been significantly substantial to render the procedure unfair.
- 4.11 The Applicant considered that the penalty of dismissal was too severe, particularly in view of his service and good disciplinary record. The Respondent's Disciplinary Procedure (which was provided to the Applicant within the Employee Handbook) clearly notes summary dismissal as a potential outcome for an act of gross misconduct, with the act of theft being included in its list of examples. The Tribunal concluded that it was, therefore, reasonable to expect the Applicant to understand the consequences of committing such an act.
- 4.12 The decision to dismiss the Applicant after determining that he had taken fuel fell within the range of reasonable responses open to an employer and was, therefore, an appropriate penalty.
- 4.13 The Respondent made its decision to dismiss the Applicant on the basis of the information available to it at the time and the Tribunal concluded that its decision was reasonable in the circumstances, after conducting a reasonable investigation.

- 4.14 In summary, the Tribunal concluded that the Respondent had a genuine belief that the Applicant was stealing fuel. The Respondent adopted a reasonable procedure by suspending the Applicant whilst conducting its investigation which was subsequently followed by a disciplinary hearing. The Respondent made the decision to summarily dismiss the Applicant on the grounds of gross misconduct after considering all the evidence available to it at that time and the Applicant was provided with, and exercised, his rights to be accompanied, defend his position and appeal against the Respondent's decision.
- 4.15 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 those of a reasonable employer.

5.0 Decision

- 5.1 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 those of a reasonable employer.
- 5.2 The Tribunal therefore found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was fairly dismissed and makes no award.

Mrs Tina Le Poidevin
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17 June 2013
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Signature of the Chairman

Date