

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Daniel McIntosh
Represented by: Mrs Ricci Gauld

RESPONDENT: Airain Limited
Represented by: Advocate Jessica Roland

Tribunal Members: Mr P Woodward (Chairman)
Ms A Girollet
Ms J de Garis

Hearing date(s): 25 November 2014 and 15 January 2015

Decision of the Tribunal

In relation to the claim of Unfair Dismissal, The Tribunal finds that the Applicant was unfairly dismissed under Section 5(2)(a) of The Employment Protection (Guernsey) Law, 1998, as amended.

When calculating the Award under Section 22 of The Employment Protection (Guernsey) Law, 1998, as amended, the Tribunal has determined that it is just and equitable within the meaning of section 22(2)(b) to make an award of £22,000.

Having considered the conduct of the Respondent in relation to this dismissal the Tribunal find no merit in its request that in accordance with section 23(2) of the Law the Award be reduced on any just and equitable grounds.

Mr P Woodward
.....
Signature of the Chairman

9 March 2015
.....
Date

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 Legislation referred to in this document is as follows:

The Employment Protection (Guernsey) Law, 1998, as amended (the 'Law')

Extended Reasons

1.0 Introduction

- 1.1 The complaint by the Applicant, Mr Daniel McIntosh, was one of alleged unfair dismissal as defined in Section 5(2)(a) of the Employment Protection (Guernsey) Law, 1998, as amended; the Applicant was represented by Mrs Ricci Gauld.
- 1.2 The Respondent, Airain Limited, was represented by Advocate Jessica Roland and whilst admitting the dismissal, contended that the Applicant had been in breach of Guernsey Housing and Right to Work legislation by vacating his company provided accommodation and by not providing the Company with official documentation of his new residential status and, consequently, his continuing right to work. Given the requirements of this law the dismissal of the Applicant was not unfair.
- 1.3 This Tribunal does not have jurisdiction to rule on Guernsey Housing and Right to Work legislation and decide if there was a proven statutory breach of such legislation; however it does have the role of deciding whether this dismissal was handled fairly and reasonably, following a careful and methodical investigation.
- 1.4 The Applicant gave witness evidence on his own behalf and in addition called:
 - Mr Alistair Kent
- 1.5 The Respondent called the following witnesses:
 - Mr Peter Weedon
 - Mr Igor Pirnau
 - Ms Natasha Brennan (by witness statement)
- 1.6 A joint bundle was submitted by the parties; ER1.
- 1.7 The Applicant claimed that his gross earnings in the last six months of his employment were £37,500; this being comprised of base pay of £16,000, a bonus of £12,000 awarded in April 2014 and an accommodation allowance of £9,500. The Respondent contested this claim. After consideration of submissions by both parties the Tribunal disallowed the accommodation allowance as not coming within the definition of pay in accordance with Sections 22 and 34 of the Law. In consideration of the bonus payment the Tribunal applied section 20(2)(b) and considered that a sum of £6,000 would be just and equitable. Thus in total, if the claim were to succeed, the Tribunal ruled that the eligible earnings in the six month period leading up to the date of dismissal would be £22,000.

2.0 Facts Found

- 2.1 The Respondent is a multi jurisdictional enterprise using innovative technology to trade financial securities. The Applicant was employed as an 'Execution Analyst' and, given the valuable 'Intellectual Property' of the software employed, he was required to observe stringent security and privacy protocols.

- 2.2 The Applicant commenced his employment as an Execution Trader in October 2012 and was dismissed on 8 May 2014.
- 2.3 The Applicant is an accomplished Bridge player who plays at national tournament level and first became aware of Airain as a potential employer when he met Mr Alistair Kent at a tournament in 2012.
- 2.4 Mr Kent suggested that the Applicant might wish to make a formal application to Airain and this subsequently led to employment with the Respondent; Mr Kent in the role of direct Manager to the Applicant. It was also agreed that the Applicant and Mr Kent would team up to play Bridge at future tournaments.
- 2.5 In October 2013, by mutual agreement, the Applicant relocated from company provided accommodation in a shared house to a two bedroomed apartment in Tudor House, St Peter Port; this being provided by the Company under an occupation agreement. This move was occasioned by the Applicant's wish to live with his partner, Alexandra Gauld. The Applicant's salary was reduced by £4,000 to facilitate the relocation and accommodation of Ms Gauld.
- 2.6 In March 2014 Mr Pirnau joined the Company and moved into the apartment; shortly thereafter Mr Pirnau's partner also moved into the same apartment with the Applicant. Initially the Applicant believed that Mr Pirnau's partner was only staying for a short period, however it soon became evident that this was to become a long-term arrangement. It became apparent that the combination of two additional tenants and the fact that Mr Pirnau and the Applicant were on very different work shifts was causing some stress for the Applicant. He alleged that Mr Pirnau made a lot of noise late into the night and this disrupted his sleep pattern, particularly when he was scheduled to work shifts commencing at 5.00 am.
- 2.7 The Applicant raised his concerns with Mr Kent and he understood that the Company would be hiring again in the near future and this would provide an opportunity for the Applicant to vacate his accommodation. Mr Kent indicated that they would "talk salary when [he was] back from holiday" (ER1 tab 11 refers). There was no date agreed at that point for the actual date for vacation of the flat or to review salary.
- 2.8 On 23 April 2014 the Applicant met with Mr Kent and informed him that he did not wish to partner him in a Bridge tournament scheduled for the weekend 26 / 27 April 2014.
- 2.9 On 25 April 2014 a second meeting took place during which the Applicant was given a letter stating that he was to have moved out of the apartment by 12 May 2014 (ER1 tab 5 refers). In this letter he was advised that he must remain lawfully housed in order to obtain a Right to Work document and that the Company was aware that it was a criminal offence to employ staff in the absence of such documentation. The Applicant was requested to liaise with Natasha Brennan in the Jersey office on his new arrangements.
- 2.10 At the meeting of 25 April 2014 Mr Kent informed the Applicant that he wished to definitively end their Bridge partner relationship. He also instructed the Applicant not to attend work on Tuesday 29, Wednesday 30 April. He was told that he should

attend a meeting with Mr Kent on 7 May 2014 at 11.00 am and on that day he would work a shift between 11.00 am and 8.00 pm. The Applicant was then sent home before the end of his normal work shift. In effect, with weekends, a Bank Holiday and scheduled leave days the Applicant did not work between 25 April and 7 May. There was no contact between Mr Kent and the Applicant for the entirety of this period.

- 2.11 On the 26 and 27 April 2014 the Applicant attended a Bridge tournament in Jersey, returning to Guernsey Monday 28 April. Subsequently on 30 April the Applicant went to the States of Guernsey Housing Department.
- 2.12 The bundle ER1 included an email sent to the Applicant by a Senior Housing Control Officer, Housing Department, dated 4 November 2014. Whilst this was some six months after the effective date of termination (EDT) it sets out the position of the Housing Department as communicated directly to the Applicant on 30 April 2014 as follows:

“Dear Dan

Further to our meeting today [4 November 2014] I can confirm that you came into the Housing Department reception on 30 April 2014 and had a meeting with two Housing Control staff members

In the meeting you discussed your housing situation, that you had been residing in an Open Market Part A property provided by your employer but that due to a dispute you needed to move out by 12 May 2014

The Staff members went through your housing options and that the Department would issue you with a Temporary Exemption Certificate while you looked to regularise your position. The time frame agreed was three months.

You were subsequently issued with a Temporary Exemption Certificate reference TEC/2014/692 which was valid (on our system) from 12 May until 11 August 2014, date given on the document, while you occupied 7 Ellingham Cottages, Les Camps Du Moulin, St Martin.

Kind Regards”

In a continuing email exchange between the Housing officer and the Applicant there is confirmation that the Applicant had an uninterrupted Right to Work between 1 October 2012 and 4 November 2014.

- 2.13 The Applicant returned to work on 7 May 2014, having taken 6 May as scheduled leave and discovered that his work ‘Key Card’ had been deactivated and he was required to ring the doorbell to gain access to his workplace. Having gained access to the workplace he attempted to log on to his company computer and found his ‘user account’ had been blocked.
- 2.14 The Applicant then met with Mr Kent and the content of that meeting is disputed; however it resulted in the Applicant producing a certified sick note from his doctor before leaving the premises. The Applicant left his office pass and deactivated work phone with Mr Kent.

- 2.15 On 8 May 2014 Mr Kent informed Mr Weedon by phone that the Applicant was on seven days certified sick leave and that Mr Kent was concerned that the Applicant had moved out of the company provided accommodation.
- 2.16 Mr Weedon then involved Ms Brennan and she made contact with the Housing Department, by telephone, some time prior to 1.00 pm. Ms Brennan informed an officer of the Housing Department that the Applicant had moved out of the company provided accommodation. Ms Brennan asked whether it could be confirmed that the Applicant had a new Licence [Right to Work document] but the housing officer could not confirm that to Ms Brennan.
- 2.17 Mr Weedon, believing the Applicant to be in breach of his employment contract and as such potentially exposing himself and the Company to prosecution for contravention of the housing laws, dismissed the Applicant for not providing any new Right to Work documentation.
- 2.18 The specific reason given by the Respondent for this dismissal was as follows:
“The only housing licence which the Company is aware of for you relates to 15 Tudor House Apartments. However you have expressly confirmed to the Company (and the Company has independently verified) that you no longer reside at that address. In accordance with section 7 of the Housing (Control of Occupation)(Guernsey) Law, 1994 (as amended) a housing licence for a property ceases to be valid immediately upon you ceasing to be resident at that property. Consequently the Company is not aware of you currently having any valid Right to Work Document.
- The Company has as recently as 25 April 2014 given you a written reminder of the critical importance of having a valid Right to Work Document. However, no documentation regarding any new Right to Work Document which you may have been issued with has been provided to the Company.*
- Therefore the Company has no option but to exercise its rights under clause 12.1.8 of your Contract of Employment to terminate your employment with the Company with immediate effect.”*
- 2.19 The letter of dismissal did not refer to any right or process for appeal as described in the Staff Handbook.

3.0 Mr Peter Weedon

- 3.1 Mr Weedon read his witness statement (ER1 Tab C refers).
- 3.2 The witness first became aware that there could be a problem with the Applicant’s Right to Work status on 8 May 2014.
- 3.3 Mr Kent had advised that the Applicant had moved out of his company accommodation sometime in the past, and this had been independently verified by Mr Igor Pirnau; Mr McIntosh’s fellow tenant.
- 3.4 Having discussed the situation with Mr Kent Mr Weedon was concerned that the Applicant had been in breach of his Right to Work obligations and both the Applicant and Respondent were in imminent danger of prosecution by the Guernsey

authorities and Mr Weedon himself could be personally liable. He took advice from his 'in house legal counsel' who confirmed these concerns.

- 3.5 He understood that if the Applicant did not reside at the company flat then the Right to Work document provided via the Company would not be valid and not least because the document would only be valid if the holder continued to occupy the specific dwelling named in the document.
- 3.6 He requested Ms Brennan phone the Housing Department to ask for its assistance in tracing a new Right to Work document but she could not gain any confirmation as to whether such a document existed; it was explained that the Housing Department was under the constraints of Data Protection legislation and could not give this information over the phone.
- 3.7 Mr Weedon believed that he was "in the position of having actual knowledge of Airain Limited being the employer of someone whose only Right to Work document had been invalid for an unknown period of time". In addition Mr Weedon was aware that the Applicant was signed off with a medical certificate for seven days. The Applicant had given Mr Kent his Blackberry phone and office pass and, taking into account his reported demeanour in the meeting of 7 May 2014, Mr Weedon believed that the Applicant might never return to work.
- 3.8 The Applicant's employment contract made it very clear that not providing the Respondent with a valid Right to Work document was very serious and he believed that the Applicant must have been aware of the risk he was taking in moving out of the company flat. Given the nature of Guernsey's Housing legislation the Respondent held the belief that the Company and Mr Weedon, as a director, could be prosecuted.
- 3.9 Mr Weedon decided his only course was to effect a summary dismissal under clause 12.1.8 of Mr McIntosh's employment contract.
- 3.10 There was no way to contact the Applicant, other than by email, and Mr Weedon decided to send a copy of the dismissal letter via that email address.
- 3.11 Mr Weedon stated that he would normally expect to meet with an employee before dismissing him, so that he could be given a full explanation and this would have provided the opportunity to clear up any misunderstandings. On this occasion it was not possible.
- 3.12 The letter of dismissal (ER1 Tab 4 refers) dismissed the Applicant with reference to the clause 12.1.8 in the Applicant's contract of employment. The letter did not advise of the Applicant's right to appeal or reference the Staff Handbook in this regard.
- 3.13 The Applicant did not appeal his dismissal although there was provision in the disciplinary process for the Applicant to make such an appeal.

4.0 Mr Igor Pirnau

- 4.1 Mr Pirnau read his witness statement (ER1 Tab C refers).

- 4.2 Mr Pirnau was a work colleague of the Applicant and together with his girlfriend shared the apartment with the Applicant and his partner. The witness held the view that the two bedroomed apartment was spacious and was not aware in the March / April 2014 time frame as to how stressful their joint living conditions were for the Applicant.
- 4.3 The witness became aware that the Applicant was moving out of the apartment in the latter part of April 2014 and his recollection was that the last night that the Applicant slept in the apartment was 26 April 2014.
- 4.4 Having not seen the Applicant for several days Mr Pirnau called him on 2 May 2014 to find out what his plans were and to ask him when he would remove the few possessions that he had left behind at the apartment. The Applicant asked what possessions they were and Mr Pirnau suggested they were so minimal that the Applicant might not need them in the future.
- 4.5 On 7 May 2014 during a discussion with Mr Kent he informed him that the Applicant had moved out of the apartment at some date prior to 2 May 2014.

5.0 Ms Natasha Brennan by witness statement (Tab C ER1)

- 5.1 Ms Brennan works in the Respondent's Jersey office and had responsibility for maintaining the company records which show that all the Respondent's employees have Right to Work documents.
- 5.2 Her role includes preparing the appropriate documentation for employees living in company supplied accommodation. Prior to the issue with the Applicant all employees had been correctly provided with up to date and compliant documentation.
- 5.3 If an employee wishes to live in personally rented premises then they have to make arrangements to obtain an appropriate Right to Work document in order that they may legally work in Guernsey and they must provide Ms Brennan with this paperwork.
- 5.4 On 8 May 2014 Ms Brennan was contacted by Mr Kent and informed that the Applicant had moved out of the apartment at some point in the past. Ms Brennan was requested by Mr Weedon to provide him with a copy of the Applicant's employment contract and it was evident that this contract required the Applicant to have a valid Right to Work document.
- 5.5 Given the apparent lack of a valid Right to Work document Ms Brennan understood her duty was to contact the Housing Department and inform it of the Respondent's concerns.
- 5.6 Ms Brennan spoke to a member of the Housing Department staff before 1.00 pm on 8 May 2014, advised this person that the Applicant had moved out of the company provided accommodation and asked if a new Right to Work document was in existence. This could not be confirmed.

6.0 Mr Alistair Kent

- 6.1 Mr Kent read his witness statement (ER1 Tab C refers).
- 6.2 Mr Kent was the Applicant's manager and had been instrumental in hiring the Applicant in 2012 after they had met at a Bridge tournament. Until early 2014 all had gone well with their relationship, both in the work environment and socially as frequent and successful Bridge players attending events at both a regional and national level.
- 6.3 The Applicant had been a good employee and such was the level of his performance Mr Kent recommended he be awarded a discretionary bonus of £12,000 in early 2014 for his work the previous year.
- 6.4 The Applicant seemed to be very pleased when he was offered accommodation in which his partner could join him at the end of 2013. As the Tudor House apartment cost the Company a lot more to rent than previous accommodation a mutually agreed reduction of £4,000 per annum was applied to the Applicant's salary.
- 6.5 In March 2014 Mr Pirnau commenced employment with the Respondent and moved into the second bedroom of the apartment.
- 6.6 After Mr Pirnau moved in the situation began to deteriorate. Mr Pirnau was joined in his occupancy by his girlfriend; once this was confirmed as a continuing arrangement the Applicant seemed to become more stressed. He expressed his wish to move out and Mr Kent stated he was free to do so, but would not automatically receive a pay rise; this was dependent on his accommodation being occupied by a new tenant.
- 6.7 Mr Kent thought the accommodation was spacious enough to allow two couples to share, but this was not the opinion of the Applicant.
- 6.8 Mr Kent noted a slight deterioration in the Applicant's job performance and his attitude; but Mr Kent stated *"his job was in no way at risk"*.
- 6.9 In his evidence Mr Kent stated he had become aware that the Applicant was considering alternative employment (Tab 12 ER1 refers).
- 6.10 On 23 April 2014 the Applicant met with Mr Kent and informed him he was in agreement to vacate the apartment by mid May. The Applicant then informed him that he would no longer be partnering him at the Jersey Bridge tournament scheduled for 26 / 27 April 2014, that upcoming weekend. The Applicant had found an alternative partner.
- 6.11 In his evidence Mr Kent stated that he did not deny he was hurt by this action. In Mr Kent's opinion *"it is no small thing in the bridge world to renege on a long standing weekend tournament at very short notice, most especially if already having replaced your erstwhile partner; Mr McIntosh knew this full well"*.
- 6.12 On 25 April 2014 Mr Kent met again with the Applicant and informed him that he would no longer be his Bridge partner and informed him that in future their relationship would purely be on a professional basis. Mr Kent further informed the

Applicant that, as he had booked the following Monday²⁸, Thursday 1 May, Friday 2 May and Tuesday 6 May as holiday the Company would also give him the Tuesday 29 April and Wednesday 30 April off. Mr Kent hoped the Applicant would reflect on recent past events, have some regrets and return with renewed determination to make a success of his career with Airain Limited.

- 6.13 However, Mr Kent thought there was a chance that the Applicant would never return to work; therefore, in case that happened Mr Kent arranged for the Applicant's shift to be covered on 7 May 2014, his scheduled return date, and, as the Respondent's business is very sensitive to the risk of leakage of highly confidential information he arranged for the Applicant's Blackberry and office entry pass to be suspended. He also gave the Applicant a letter confirming that he should vacate the company accommodation (ER1 Tab 5 refers) by 12 May 2014.
- 6.14 The Applicant returned to the office on 7 May 2014 and Mr Kent asked him if he still wanted his job. Mr Kent felt that he was clearly not happy with his job or his living arrangements. The Applicant did not answer this question directly; instead the Applicant wanted Mr Kent to tell him why he had been told to take extra leave and he also asked for his pay rise.
- 6.15 In the meeting of 7 May 2014 the Applicant told him that he had already moved out of the Tudor House apartment. At the end of this discussion the Applicant produced a medical certificate signing him off work for seven days for stress. The Applicant handed Mr Kent his Blackberry and entry pass, without being asked, and left the meeting having given Mr Kent a personal email address.
- 6.16 In his witness statement Mr Kent believed the Applicant had an 'agenda' for the meeting and had it gone differently would not have produced the certificate. In oral evidence he claimed the Applicant had a "smug" demeanour during the meeting.
- 6.17 After the meeting Mr Kent believed he had no choice but to escalate the issue to Mr Weedon. He phoned him on 8 May 2014 saying the Applicant had left the office with a seven-day sick note, he had returned his Blackberry company phone and office pass and he had moved out of the Tudor apartment, this being confirmed by Mr Pirnau. Mr Kent stated that his only remaining contact with the Applicant was via a private email account.
- 6.18 Having discussed the issue with Mr Weedon Ms Brennan was brought into the telephone discussion and then made attempts to clarify the situation with the Guernsey Housing Authority; but without success.
- 6.19 Mr Kent gave Mr Weedon the email contact details for the Applicant which Mr Weedon subsequently used to issue a copy of the dismissal letter.

7.0 Mr Daniel McIntosh

- 7.1 The Applicant read his witness statement (ER1 Tab C refers).
- 7.2 The Applicant confirmed that he had first met Mr Kent at a Bridge tournament in 2012 and as an outcome he was asked by Mr Kent if he would like to apply to Airain Limited and join his team; this subsequently led to his employment by the

Respondent. Once in this employment he formed a strong friendship with Mr Kent and together they won many Bridge events.

- 7.3 The work and social life progressed well and in October 2013 the Applicant moved into the two bedroomed Tudor House apartment so that he could have his partner join him in that accommodation in January 2014. He understood the agreement with Mr Kent was that they would be joined by one other work colleague in the apartment.
- 7.4 In March 2014 Mr Pirnau moved into the accommodation and was shortly joined by his partner, having asked Mr McIntosh if this was acceptable for a short period. The Applicant thought that four people in the apartment was too many and made his opinion known to Mr Kent when it became clear that Mr Pirnau's girlfriend was not leaving the apartment. There was also the issue of the different working hours for the Applicant, with the Applicant typically working 5.00 am to 12.30 pm and Mr Pirnau often working from 11.00 am to as late as 9.30 pm. As a consequence the Applicant would often go to bed early whilst Mr Pirnau would stay up late; the consequent noise disturbing the Applicant's sleep.
- 7.5 In discussions with Mr Kent he came to understand that, with the Company probably hiring additional employees in May 2014, it would then be possible for the Applicant to vacate the apartment at which point the Applicant would have a salary review. No date was agreed for the actual date of termination of lease.
- 7.6 On 23 April 2014 he informed Mr Kent that he did not wish to partner him in the upcoming Bridge tournament scheduled for 26 and 27 April 2014. The Applicant told the Tribunal he was stressed and felt he needed personal space away from Mr Kent for that weekend.
- 7.7 On 25 April 2014 he again met with Mr Kent and was told he needed to move out of the apartment by Monday 12 May 2014. The letter confirming this decision was quite explicit in the requirement that he be legally housed in order to hold a valid Right to Work document.
- 7.8 In addition, during the meeting on 25 April, Mr Kent instructed the Applicant not to come into work on Tuesday 29 and Wednesday 30 April. As the Applicant had already booked Monday 28 April, Thursday 1 May, Friday 2 May and Tuesday 6 May, the practical effect of this instruction was that he did not return to work until 7 May 2014.
- 7.9 On leaving the Company premises on 25 April the Applicant then realised that his phone had been deactivated.
- 7.10 Returning from a weekend away from Guernsey he went to the Housing Department on 30 April 2014 and was reassured that he could live in local market accommodation for a short period whilst searching for new accommodation and would be given official temporary exemption.
- 7.11 On returning to the office on 7 May 2014 the Applicant was expecting a normal return to work. However he found his key pass and computer were deactivated and was called into the Boardroom by Mr Kent. He was asked if he still wanted his job.

Mr Kent orally attacked the Applicant, calling him “lazy” and “refreshingly naïve” and confirmed that he wished to have nothing to do with the Applicant socially. Mr Kent suggested to the Applicant that he might have it in mind to sabotage the Company.

- 7.12 Mr McIntosh was very surprised by this oral attack, he had never been told before that he was lazy or realised he was so distrusted. He formed the view that Mr Kent did not wish him to be there but it was not clear why Mr Kent had adopted this attitude. Also the Applicant stated that he had not expressed, at that meeting, a wish to vacate the Company accommodation without a salary discussion.
- 7.13 Given the lack of clarification in the meeting and the attitude being taken by Mr Kent, which put him under some stress, the Applicant decided to submit the medical certificate that signed the Applicant off work for seven days. The Applicant gave evidence that his doctor had provided him with this certificate on a discretionary basis and to submit it to his employer if he felt under significant stress.
- 7.14 The Applicant stated that he voluntarily surrendered his key card and his deactivated phone given he had been accused of possible sabotage.
- 7.15 The Applicant also stated that he informed Mr Kent that he had spoken with the Housing Department and that a temporary exemption would be issued from 12 May.
- 7.16 Under cross-examination the Applicant agreed he had not slept at the apartment after 30 April 2014 and from 5 May 2014 he slept at the holiday accommodation, Ellingham Cottages; his partner’s parents were staying at the same cottages. The Applicant also stated he had picked up the last of his possessions by 8 May 2014. He argued however that he was still a key holder for the apartment and could have chosen to sleep at the apartment on any date up to 12 May 2014 and additionally continued to hold responsibility for utility bills as required under the occupancy agreement.
- 7.17 On receiving the letter of dismissal the Applicant thought the decision was ‘fait accompli’ and decided not to appeal.

8.0 Conclusions

- 8.1 This was an admitted dismissal and therefore the burden of proof rested on the Respondent to demonstrate that on the balance of probabilities it had acted fairly in dismissing the Applicant.
- 8.2 The bundle (ER1) contained copies of legal advice documents written on behalf of the Applicant after 8 May 2014, the Effective Date of Termination. It is a long established practice in this jurisdiction that the Tribunal is primarily concerned by what was known by the employer in the period leading up to the decision to dismiss the employee, that is, up to 8 May 2014: this being the knowledge that determined the Respondent’s decision to dismiss the Applicant; thus little weight has been given by the Tribunal to this specific documentation in arriving at its decision.
- 8.3 The Tribunal took into account the Code of Practice issued by Commerce and Employment ‘Disciplinary Practice and Procedures in Employment’; and whilst a failure of any person to observe any provision of the Code of Practice does not of

itself render that person liable to any proceedings, it may be taken into account in determining the reasonableness of their behaviour in relation to a complaint of unfair dismissal. The Tribunal notes some deficiencies in the observance of this Code referenced below. If the Respondent was of the view that Mr McIntosh was in breach of his contract of employment by not remaining lawfully housed, as outlined in the letter to him dated 25 April, the disciplinary procedures in the Staff Handbook (ER1 Tab 2 pages 23 to 29 refer) might reasonably have been engaged, albeit within a relatively short timescale.

- 8.4 The Respondent, whilst not a large employer, circa fourteen employees in Guernsey, is clearly a sophisticated business with in-house legal counsel and a number of employees also based in Jersey. Given the sophistication of the employment contract and related employee documentation the Tribunal has formed the view that this employer should have been well versed on employment matters and the appropriate procedures in relation to a dismissal.
- 8.5 Given the above the Tribunal would express concern that the Respondent could not produce contemporaneous agreed notes of any of the apparently critical meetings conducted between Mr Kent and the Applicant in the months, weeks and days leading up to the dismissal or of the critical telephone conference of 8 May 2014 between Mr Weedon, Mr Kent and Ms Brennan. In the opinion of the Tribunal this puts the Respondent at some disadvantage in proving a fair process.
- 8.6 The Tribunal understood that until early 2014 the Applicant had been satisfied by the company provided accommodation and appreciated the provision of an apartment in October 2013 in which his partner could join him. However with the arrival of Mr Pirnau and his partner the Applicant clearly found the living arrangements to be stressful particularly as he and Mr Pirnau undertook significantly different shifts. Discussions took place between the Applicant and Mr Kent where the Applicant made plain his dissatisfaction with the living arrangements and in particular the late night noise. He thought it had become necessary to move out of the apartment but wished to have a salary adjustment to assist him in dealing with this change; particularly as he had taken a salary reduction when he moved into this accommodation. On 11 April 2014 Mr Kent sent the Applicant an email indicating he had not yet recruited any potential new employee who would take over the Applicant's living accommodation but stated that it was "*fine to move out as soon as you likewill talk salary when I'm back from holiday*".
- 8.7 On 23 April 2014, with Mr Kent having returned from holiday, the Applicant requested a meeting with him. Whilst there was a discussion as to the Applicant's potential move date to be mid May the Tribunal has formed the view that of far more importance to both individuals on that day was the future of their Bridge partnership. They had met in 2012 at a Bridge tournament and this meeting had led to the offer of employment to the Applicant.
- 8.8 The evidence from both parties indicates that as Bridge partners they were playing frequently at a very advanced level and in important regional if not national tournaments. The Applicant, at short notice, had decided he wished to play with a different partner the weekend of 26 and 27 April. Whilst Mr Kent informed the Tribunal that he was "hurt" by this action he told the Tribunal he managed to disassociate this personal hurt from his professional duties. The Tribunal was not

persuaded by Mr Kent. He described the Applicant as “reneging” on the Bridge partnership in his witness statement, and in the meeting of 25 April he cancelled any further Bridge partnership including a prestigious event scheduled for 3 / 4 May 2014. The Applicant’s phone was deactivated within minutes of the ending of the meeting on 25 April, an action not taken earlier, during the Applicant’s absence on leave. Mr Kent described the Applicant as being “smug” at the meeting of 7 May. The Tribunal considers that this language and the deactivation of the phone are indicative that a breakdown of trust had spilled over into the employment relationship.

- 8.9 Mr Kent also gave evidence that he had become aware that Mr McIntosh was so unhappy that he was considering leaving his employment (ER1 Tab 12 refers). The Tribunal gives little weight to such evidence. It is perfectly understandable that at any point in time many trustworthy employees are seeking alternative employment for professional development and career progression; however this seems to be part of the justification for his apparently significant distrust of this employee’s commitment to his role and for his actions in deactivating his phone, blocking access to his computer and deactivating his entry pass.
- 8.10 The letter issued to the Applicant by Mr Kent on 25 April is somewhat curt and in the opinion of the Tribunal is ambiguous; it states that the Applicant and his partner were to move out by 12 May, not on the 12 May. This, in the opinion of the Tribunal, already creates a supposition that the departure from this accommodation might not be an overnight event but a process of change. The letter is however very clear that there is an obligation on the Applicant to observe housing licence and right to work legislation. The Tribunal agrees that the Applicant, in deciding to move out of his company provided accommodation, needed to communicate with the States of Guernsey Housing Department to ensure he stayed in compliance.
- 8.11 Mindful of this the Applicant met with an appropriate Housing officer on 30 April and the Applicant was apparently reassured that in the short term, until August 2014, he did not have a problem in relation to his living arrangements. The email obtained from the Housing Department may be taken as corroborative evidence from a party to that meeting on 30 April 2014 (ER1 Tab 18 refers). It would seem that the authorities understood his accommodation difficulties and that a temporary exemption would run from 12 May. The email from the Housing Department also mentions his “requirement to have moved out of the company provided accommodation by 12 May”. The tenor of these emails is that of the officers of the Housing Department recognising a temporary difficulty and providing a legal solution.
- 8.12 In the opinion of the Tribunal any employee given these reassurances from the official body in charge of these matters might assume he had taken all appropriate steps to act within the law until August 2014. It might be argued that the Applicant should have contacted Natasha Brennan as to the outcome of this meeting but given the tenor of his discussion with the Housing Department, the fact that he was on leave from 25 April 2014 to 7 May 2014 and expecting new documentation by 12 May to provide to his employer it was not unreasonable that he had not provided this by 8 May.

- 8.13 The Respondent produced detailed evidence on a day-by-day basis for the period 27 April 2014 to 8 May 2014 as to the Applicant's occupancy or non-occupancy of the company provided apartment. This would have had significantly more weight had the Applicant not met with the officers from the Housing Department and apparently been reassured that he was not in any immediate non-compliance. The emails from the Senior Housing Officer dated 4 / 5 November 2014 (ER1 Tab18 refers) are quite explicit, the Applicant had briefed the Housing Department on 30 April and the whole thrust of those emails indicates an individual acting in a timely manner to stay in compliance.
- 8.14 Under oath the Applicant informed the Tribunal that at no time did he expressly state to Mr Kent that he had definitively moved out of the Apartment on or prior to 7 May 2014.
- 8.15 Critically, at the meeting on 7 May 2014, despite the Applicant having told Mr Kent that he had met with the Housing Department, and obtained the assurance that he was compliant. Mr Kent denied that he was ever told this. The Applicant is adamant that he communicated this key information. After very careful consideration the Tribunal prefers the Applicant's evidence. It is not clear whether Mr Kent wilfully chose to ignore this information but what is in evidence is the question put to the Applicant as to whether he wished to remain in employment; to which the Applicant asked why the question was put and was his job at risk. In his evidence Mr Kent accused the Applicant of being "smug". The Tribunal considers these facts as indicative of Mr Kent's possibly hostile and apparently unreceptive attitude during that meeting.
- 8.16 Mr Kent made much of the Applicant's actions in returning his Blackberry and his entry pass on 7 May and alluded to this as being indicative of his possible imminent complete departure from the Company. He had accused the Applicant of contemplating the potential sabotage of some unspecified element of the Respondent's business. The Tribunal notes that there is no evidence from the Respondent that the Blackberry or the key card were reactivated on 7 May 2014; it is not surprising that the Applicant might have been minded to leave them with Mr Kent. The lack of the company phone had added significance the following day as normal phone contact was no longer possible between the Applicant and the Respondent.
- 8.17 The Tribunal also notes that the Applicant was not subject to any warnings or disciplinary process. He was apparently an exemplary employee who had received a discretionary bonus earlier in 2014 based on his performance in the role for the previous year; only after 23 April does Mr Kent appear to have developed significant concerns as to the Applicant possibly causing some damage to the Respondent, by leaking critical intelligence.
- 8.18 It would seem to the Tribunal that in a remarkably short period of time the Applicant had moved from trusted employee to one who is denied routine access to the Company premises, is locked out from his computer, has had his Blackberry phone deactivated and been accused of being a potential saboteur. It is not surprising that the Applicant might seek time with his partner and her parents at a location other than the Tudor House apartment during his period on leave.

- 8.19 On 8 May Mr Weedon and Ms Brennan, unaware that the Applicant had communicated the positive outcome of his meeting with the Housing Department to Mr Kent, acted on a misapprehension. The Respondent attempted to verify over the phone that the Applicant held the appropriate documentation. In the opinion of the Tribunal it was somewhat naïve of the Respondent to think that such information might readily be obtained so informally from a Government Department charged with Data Protection responsibilities; particularly as Mr Weedon stressed the issues of Data Protection and Intellectual Property as being paramount for the effective operation of his own company and he clearly had expertise in this area.
- 8.20 In the absence of any evidence it does not seem that the employer sought advice from the Housing Department, the responsible authority for enforcement of the residency and right to work laws, as to whether they were correct in assuming they were in a situation of illegality, real or potential.
- 8.21 If the Respondent had a full understanding of the relevant laws and the practical operation, then it would seem reasonable that they would understand the provision of an exemption clause in the legislation; no evidence was offered to suggest that they had considered this possibility prior to the act of dismissal.
- 8.22 The Respondent did have a contact email for the Applicant. In the opinion of the Tribunal it was possible to send an email at short notice requesting the Applicant to state what steps he had taken to stay in compliance, it did not do so.
- 8.23 There is no evidence that any form of careful investigation was made, no contemporaneous notes as to how the Respondent had come to its decision and it apparently made an almost instant decision based on a misapprehension. There was no attempt by Mr Weedon, Mr Kent or Ms Brennan to make email contact with the Applicant to put the relevant questions directly to him; or indeed to request an urgent meeting with him in regards to the specific matter. The Tribunal notes that Mr Weedon, who took the decision to dismiss, had no contact with the Applicant during his period of employment, he totally relied on the information provided by Mr Kent and did not seek to understand personally from the Applicant what actions he might have taken with the Housing Department after receipt of the letter of 25 April 2014 requiring him to quit his tenancy by 12 May.
- 8.24 The Tribunal also notes that the letter of dismissal excludes any reference to an appeal against the decision to dismiss; this being an omission of good practice recommended by the Code of Practice and also included as an integral part of the Respondent's Disciplinary Procedure.
- 8.25 The Respondent argued there was a proven breach of the Right to Work legislation. This Tribunal does not have jurisdiction to rule on the intricacies of that legislation; however it does have the role of deciding whether a dismissal was handled fairly and reasonably. In the circumstances of this complaint, even where the employer believed it must act with great despatch, it did not preclude the employer from conducting a careful and methodical investigation and then making every possible attempt to contact the employee prior to making such a draconian decision as a summary dismissal; this did not happen.

8.26 The Respondent fails on fair process and the Tribunal finds this to be an unfair dismissal within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended.

9.0 Decision

9.1 In relation to the claim of Unfair Dismissal, having considered all the evidence presented, both written and oral, the representations of both parties and having due regard to all the circumstances, the Tribunal has determined that the Applicant was unfairly dismissed under Section 5(2)(a) of The Employment Protection (Guernsey) Law, 1998, as amended.

Mr P Woodward

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Signature of the Chairman

9 March 2015

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Date