

Appeal against a Decision of the Employment and Discrimination Tribunal, concerning whether the Appellant had been unfairly dismissed by their previous employer.

[2021]GRC028

**IN THE ROYAL COURT OF GUERNSEY**  
**ORDINARY DIVISION**  
**ON APPEAL FROM THE EMPLOYMENT AND**  
**DISCRIMINATION TRIBUNAL**

**Case No. ED021/20**

<b>Between:</b>	<b>JOAO BRUNO GOMES</b>	<b>Appellant</b>
	<b>and</b>	
	<b>G4S (GUERNSEY) LIMITED</b>	<b>Respondent</b>

**Date of hearing: 5 May 2021**

**Judgment handed down: 13 July 2021**

**Before: Jessica E Roland, Deputy Bailiff**

**Counsel for the Applicant: Advocate C Fletcher**

**The Respondent appeared through its employed senior counsel: Mr N Sheppard**

**Introduction**

1. By a Notice of Appeal dated the 31 December 2020 Joao Bruno Gomes (the “Appellant”) appealed against a decision dated 2 December 2020 (the “Decision”) of the Employment and Discrimination Tribunal (the “Tribunal”). The Tribunal dismissed the Appellant’s claim and found that he had been dismissed by his former employer, G4S (Guernsey) Limited (the “Respondent”) for a fair reason.
2. The Appeal proceedings were first before this Court on the 19 February 2021 when directions were given. There was a further review on the 19 April 2021 in relation to disclosure of handwritten notes of the closing speech that Advocate Fletcher used at the Tribunal hearing which were subsequently disclosed. Submissions were filed by both parties. Both parties elaborated on their written submissions by way of oral submissions on the 5 May 2020. At the end of the hearing in accordance with Article 9 of the Employment Protection (Appeals and References) Order 2006 which provides that this Court’s decisions “*shall be in writing signed and sealed by the Greffier and transmitted by him to the Secretary*” I reserved judgement. This judgment sets out my reasons for dismissing the appeal.

## **The Tribunal's Decision**

3. The Appellant was employed by the Respondent from 20 August 2018 to 5 February 2020 as a cleaner. The Appellant had been the subject of police investigations arising from an allegation of indecent assault, an allegation of sending an indecent video to a minor and allegations of kidnap, false imprisonment and indecent assault. The Appellant was found guilty of the first offence and pleaded guilty to the second. No further action was taken on the third matter. The trial, plea and sentencing in relation to the first two offences took place after the Appellant was dismissed although the Appellant had admitted to the Respondent that he had sent the indecent video before he was dismissed. The Respondent summarily dismissed the Appellant on the 5 February 2020. The Appellant sought to appeal this decision in accordance with the Respondent's disciplinary process (the "Disciplinary Appeal"). The Disciplinary Appeal concluded the decision to dismiss was fair and upheld the decision. The Appellant made a complaint under the Employment Protection (Guernsey) Law (1998) as amended (the "Law"). In his complaint he alleged that the decision was unjustified and unfair. The Respondent had the burden of proving to the civil standard, that is to say on the grounds of probabilities, that the reason (or principle reason if more than one) for the dismissal was a fair one. The Tribunal heard the Appellant's complaint on the 18 and 19 November 2020. The Tribunal consisting of 3 members decided that the Respondent had shown on the balance of probabilities that the dismissal was fair. The Decision was handed down with extended reasons (the "Extended Reasons").

## **The Appeal**

4. The Appellant in his Notice of Appeal contended (in summary):
  - (1) that the actions the Respondent relied on were insufficient in law to justify summary dismissal;
  - (2) had failed to take into account relevant parts of the Respondent's handbook in relation to dismissal;
  - (3) that the Tribunal was wrong to take into account the Appellant's convictions in its decision as these convictions were after the Appellant's dismissal;
  - (4) that the Tribunal was wrong to place any or any significant weight on the fact that the Appellant's work phones had been seized by the Police.
  - (5) That to the extent that the actions of the Appellant could be sufficient to justify summary dismissal he contended that the Respondent affirmed the Appellant's contract of employment.
  - (6) That in the above circumstances the Tribunal was wrong in law to find that the Respondent had acted reasonably in treating the Appellant's actions as bringing the employer into disrepute as a sufficient reason for dismissing the Appellant and had affirmed the Appellant's contract.

## **The Law**

5. Section 25 of the Law provides:
  - (1) *A person aggrieved by a decision or award of the Tribunal on a question of law may, subject to the provisions of subsections (2) and (3), appeal therefrom to the Royal Court in such manner and within such period as may be prescribed by order of the Royal Court.*

- (2) *No decision or award of the Tribunal shall be invalidated solely by reason of a procedural irregularity unless the irregularity was such as to prevent any party to the complaint under this Law from presenting his case fairly before the Tribunal.*
- (3) *This section does not confer a right of appeal on a question of law which has been referred to the Royal Court under section 26.*
6. Subsection (3) is not relevant on this appeal. In order for the Appellant to be successful, he would have to show that the Tribunal had misdirected itself in law, misunderstood the law or misapplied the law, or made a decision that was perverse or irrational, or one which no reasonable tribunal, properly appreciating the law and the evidence, could have made.
7. In relation to the first ground of appeal, the Appellant submits that the actions the Respondent relied on were insufficient in law to justify summary dismissal. The Appellant submits that the only action that he undertook that could have brought the Respondent into disrepute, is the Appellant sending an indecent video to a minor. This incident was admitted by the Appellant; however, he submits in the circumstances this was not sufficient to amount to conduct entitling the Respondent to summarily dismiss the Appellant where the Appellant submits that the Respondent's Handbook (as provided to the Tribunal) was not applicable or otherwise.
8. The Tribunal set out in the Extended Reasons at paragraph 5.6 that the reason that the Respondent dismissed the Appellant was the reason set out in the letter of dismissal to the Appellant dated 5 February 2020. The letter set out the series of incidents in which the Appellant was involved and the consequences of these incidents which the decision-maker concluded could have brought the Respondent into disrepute.
9. Section 6 (3) of the Law, sets out the test for the fairness of the reason for a dismissal:
- “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.”*
10. While the reason for dismissal is a subjective matter (what was in the mind of the employer at the time the decision was taken), the question whether the dismissal for that reason was fair imports a degree of objectivity, albeit to be tested against the standard of a reasonable employer and allowing that there is a margin of appreciation in a range of reasonable responses rather than any absolute standard.
11. Nothing within the Extended Reasons of the Tribunal decision shows that the Tribunal misdirected itself, misunderstood or misapplied the law. The Tribunal sets out in paragraphs 5.5 and 5.6 that it was satisfied that the dismissal was fair both substantively and procedurally.
12. As set out at paragraph 4.2 of the Extended Reasons, the Tribunal was also satisfied it was entitled to treat the Respondent as having received and read a copy of the handbook as he had signed that he had done so. Further, whilst the version of the handbook included within Respondent's bundle may be a different version from the one received by the Appellant, there is no evidence that the Tribunal misdirected itself and it was entitled to come to the conclusions that it did. I reject this ground of appeal.
13. In relation to the second ground of appeal, the Appellant argues that the Tribunal failed to take into account the section of the handbook entitled “General” which states *“these actions of misconduct and gross misconduct are not absolute; the seriousness of the particular breach of*

*discipline will depend on the severity of the circumstances of the case*". In developing this submission, which under this ground relies on the version of the handbook within the Respondent's bundle, the Appellant's skeleton argument provides various examples of conduct which the Appellant says would justify summary dismissal and seeks to distinguish the Appellant's position. The Tribunal at paragraph 5.1 specifically refers to the section of the handbook which includes this section. There is no evidence that the Tribunal failed to take into account the terms of the handbook. This section of the handbook does no more than set out what an employer must do in relation to assessing the seriousness of misconduct. In any event as I have set out above, the Tribunal when considering whether a dismissal is fair must consider section 6 of the Law. It came to the conclusion that the Respondent had not only acted procedurally fairly but that the decision to dismiss the Appellant was substantively fair. The Tribunal was entitled to come to the conclusions it did. This ground of Appeal is rejected.

14. The third ground of appeal is that the Tribunal was wrong to take into account the Appellant's convictions and although not in the Notice of Appeal in the submissions argues that there was a procedural irregularity in this regard. In relation to this ground, the Tribunal did state that as a fact that the Appellant had been convicted of 2 criminal offences after he was dismissed. However, as the extended reasons make clear at paragraph 5.1:

*"What is important is the way the Respondent went about investigating and conducting the disciplinary process (including the appeal hearing)."*

15. Stating the fact of the Appellant's convictions does not mean that the Tribunal wrongly took the convictions into account. The basis of the Tribunal's decision is set out very clearly as I have set out above. Further there is no procedural irregularity. I reject this ground of appeal.
16. Ground 4 of the Appellant's appeal notice is that the Tribunal was wrong to place any or any significant weight on the fact that the Appellant's work phones had been seized by the Police as this, in itself, does not show wrongdoing by the Appellant. The Extended Reasons reflect the Appellant's Advocate's own notes of her closing submissions on this argument at the Tribunal. However, the Tribunal concluded having heard the argument as it was entitled to do, that the consequences of the Appellant's actions, which included the confiscation of work telephones, did directly affect the Respondent and that dismissal was within the range of reasonable responses. The Tribunal's focus in the unfair dismissal complaint is the reasonableness of the Respondent's actions. The Tribunal was entitled to reach the conclusion that the Respondent acting as a reasonable employer in the same position as the Respondent, considered that the seizure of the work phones was a reputational issue. There are no grounds for concluding that this was wrong.
17. The fifth ground of appeal is that the Respondent affirmed the employment contract by not commencing disciplinary action sufficiently quickly in relation to the sending by the Appellant of an indecent video to a young person by Facebook Messenger. The Appellant argues that the Respondent knew for approximately 3 weeks about this issue, but it was only when the Applicant was subject to disciplinary action following his arrest for kidnap, false imprisonment and indecent assault, that the Respondent took action in relation to the indecent video incident. The Respondent disputes that the Appellant informed the Respondent about this incident in December which is supported (amongst other evidence considered by the Tribunal) by the notes from the Disciplinary Appeal. It is not clear from the Extended Reasons whether the Tribunal came to a conclusion about when the Respondent knew about this incident but, for the reasons I have set out below, I do not consider that it was necessary for them to do so.
18. The basis upon which the Appellant now argues affirmation of the Appellant's contract of employment is that the Respondent's alleged delay in dealing with this issue, presumably by commencing an investigation, occurred whilst members of the Respondent's staff accompanied the Appellant to a pre-trial review in the Magistrate Court in relation to the indecent assault

allegation. It cannot be ignored that the Respondent did this in circumstances when, as the Appellant well knew, that the Respondent's own investigation into the indecent assault had been suspended pending the outcome of the criminal investigation when it was the first of what subsequently became three incidents of the Appellant's activities bringing the Appellant to the attention of the police in a period of just over 6 months. In my view it would be most unlikely that the act of accompanying the Appellant in these circumstances could be viewed as the Respondent affirming or contributing to circumstances leading to the conclusion that the Respondent had affirmed the Appellant's contract in relation to the second incident. Although it is unnecessary for me to come to a conclusion in relation to this appeal, if the Tribunal had found that the Respondent did in fact know about the sending of the video in December, the delay of three weeks by the Respondent in commencing an investigation into the incident is unlikely to have been enough on its own to be an affirmation of the Appellant's contract in the circumstances of this case. The test for any Tribunal in considering an argument on affirmation would be to look at all the facts in the round, and then make an assessment as to whether in those circumstances there had been an affirmation of the contract, or not.

19. However, in any event, the fifth ground of appeal relies on me finding that contrary to the reason that the Respondent did dismiss the Appellant, the only action of the Appellant which was capable of amounting to a fair reason for the Respondent dismissing the Appellant (although the Appellant argued that in any event this was insufficient) was the act of sending the indecent video to a minor. As I have already set out above in relation to the first ground of appeal this is not the reason why the Respondent dismissed the Appellant. The Respondent did not seek to rely on this action by the Appellant as a repudiatory breach. The Respondent, when it dismissed the Appellant, relied on a series of incidents and the consequences of those incidents in which the Appellant was involved which the Respondent considered could have brought the Respondent into dispute. In this case, the Tribunal concluded that the Respondent had dismissed the Appellant for a reason that was fair. The Tribunal in finding that the Respondent had fairly dismissed the Appellant was not perverse or wrong in law. Therefore, I dismiss this ground of appeal.
20. Ground 6 is a 'catch all' ground incorporating the first five grounds. For the reasons I have given above I also dismiss this ground of appeal.

## **Conclusion**

21. I have decided that this appeal should be dismissed and uphold the Tribunal's decision that the Appellant was not unfairly dismissed. Costs would normally be ordered to follow the event and I hope that the parties can agree the terms of any costs orders arising from this judgment, but if there are any applications, I direct that they be submitted to me in writing for consideration and/or directions at an early sitting of the Interlocutory Court.