

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mrs Aija Keisa
Represented by: Self-represented

Respondent: 1st Class Cleaning Services Limited
Represented by: Mr Venancio de Gouveia

Tribunal Members: Mrs Tina Le Poidevin (Chair)
Mr George Jennings
Mr Wayne Hassall

Date of Determination of Complaint: Monday 5 December 2016

Decision of the Tribunal

The Applicant, Mrs Aija Keisa, claimed that she had been unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended, following her request for a day off work. She further claimed that she had not been given any warning of her dismissal, in writing or otherwise, had not received a contract of employment, had not been given one week's notice and had not been provided with the reasons for her dismissal. The Respondent, 1st Class Cleaning Services Limited, contested the claim on the basis that it had dismissed the Applicant because she had driven the company vehicle whilst under the influence of alcohol and she had not turned up for work on various occasions.

Having considered all the evidence, whether specifically referred to in this judgment or not, the Tribunal found that, whilst the Respondent did not appear to follow a full disciplinary process, the Applicant's conduct was so serious that the Respondent's actions in dismissing the Applicant were the actions of a reasonable employer. The Tribunal therefore makes no award.

In relation to the Applicant's claim that she had not been provided with reasons for her dismissal, the Tribunal concluded that, there was no evidence of the Applicant requesting the reasons and being unreasonably denied this information. The Tribunal therefore makes no award.

The Applicant's claim that she had not been provided with a contract of employment and had not been given one week's notice are matters which do not fall within the remit of this Tribunal.

Mrs Tina Le Poidevin
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Signature of the Chairman

23 December 2016
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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, 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)

The Conditions of Employment (Guernsey) Law, 1985, as amended

Extended Reasons**1.0 Introduction**

- 1.1 The Applicant, Mrs Aija Keisa, claimed that she had been unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended, following her request for a day off work. She further claimed that she had not been given any warning of her dismissal, in writing or otherwise, had not received a contract of employment, had not been given one week's notice and had not been provided with the reasons for her dismissal.
- 1.2 The Respondent, 1st Class Cleaning Services Limited, contested the claim on the basis that it had dismissed the Applicant because she had driven the company vehicle whilst under the influence of alcohol and she had not turned up for work on various occasions.
- 1.3 The Applicant represented herself.
- 1.4 The Respondent was represented by Mr Venancio de Gouveia, Director and owner of the business.
- 1.5 A Case Management Meeting was scheduled for 19 October 2016, however, the Applicant failed to attend.
- 1.6 The Secretary to the Tribunal made contact with the Applicant by telephone and it was established that the Applicant would not be attending.
- 1.7 The Case Management Meeting was postponed and numerous attempts were made to establish an alternative date for the meeting with the Applicant.
- 1.8 The Secretary to the Tribunal managed to speak with the Applicant's husband who indicated that he and Ms Keisa would shortly be leaving Guernsey and did not confirm if they would or would not be returning.
- 1.9 The Applicant did not provide a forwarding address or any alternative contact details.
- 1.10 At no time did the Applicant indicate that she wished to withdraw her claim so the decision was taken for the Tribunal to determine the complaint on the basis of written evidence without the presence of either party.

- 1.11 The Applicant and Respondent were invited, in writing, to submit any written evidence in support of their assertions in advance of the determination of the complaint, which took place on 5 December 2016.
- 1.12 The Applicant's only submission was her completed ET1 form which included a one- page attachment. No further documents were provided.
- 1.13 In addition to the Respondent's completed ET2 form, a bundle of documents marked ER1 was submitted.

2.0 Facts Found

- 2.1 The Respondent is engaged in the provision of domestic and office cleaning services in Guernsey.
- 2.2 The Applicant commenced employment with the Respondent as a Cleaner on 11 May 2015.

3.0 The Law

- 3.1 According to Section 1(1) of the Conditions of Employment (Guernsey) Law, 1985, as amended, under the heading "Written particulars of terms of employment" it states "Not later than four weeks after the beginning of an employee's period of employment with an employer the employer shall give to the employee a written statement in accordance with the succeeding provisions of this section."
- 3.2 Section 5 of the Conditions of Employment (Guernsey) Law, 1985, as amended, notes "Section 1 ... of this Law shall not apply to an employee if and so long as the following conditions are fulfilled in relation to him, that is to say – (b) there has been given to the employee a copy of the contract (with any variations made from time to time), or he has reasonable opportunities of reading such copy in the course of his employment, or such a copy is made reasonably accessible to him in some other way."
- 3.3 According to the Employment Protection (Guernsey) Law, 1998, as amended, Section 5(2) of the Law notes that an employee shall be treated as dismissed by his employer if "the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice".
- 3.4 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".

- 3.5 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.”
- 3.6 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.”
- 3.7 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.”
- 3.8 Section 2(1) of the Law states “An employee shall be entitled – (a) if he is given by his employer notice of termination of his contract of employment, (b) if his contract of employment is terminated by his employer without notice, ... to be provided by his employer, on request, within seven days of that request, with a written statement giving particulars of the reasons for his dismissal.”

4.0 Summary of Parties’ Submissions

Applicant

- 4.1 The Applicant commenced employment with the Respondent on 11 May 2015 and ceased employment on 6 August 2016.
- 4.2 During her employment, the Applicant was engaged in domestic and office cleaning, working 60 hours per week over 7 days which she found very tiring. She had taken 2 weeks’ holiday during her employment.
- 4.3 The Applicant did not have a contract of employment.

- 4.4 On 6 August 2016 the Applicant telephoned her boss, Mr Venancio de Gouveia, to ask if she could take the day off and, at first, she was told that if she took the day off she would have £100 deducted from her pay. She was then told that she had lost her job and Mr de Gouveia, would be coming around in five minutes to take the keys for the company vehicle, which he subsequently did.
- 4.5 When Mr de Gouveia arrived, the Applicant's husband met him at the window and told Mr de Gouveia that his wife still needed to be paid the money she was owed for July and August but Mr de Gouveia just said "Blah, blah, blah".
- 4.6 The Applicant's husband telephoned Mr de Gouveia later in the day to ask again for his wife to be paid for the two weeks she had worked plus one week's holiday pay that she was owed but again Mr de Gouveia said "Blah, blah, blah" and "Keep smiling when you are out on the street".
- 4.7 On 12 August 2016 Mr de Gouveia telephoned and spoke with the Applicant's husband and asked "What is your wife doing?" and laughed. The Applicant's husband reminded Mr de Gouveia again about the money he owed his wife and Mr de Gouveia then said "You know you have to be out of your room in 3 days?" which led the Applicant to believe that Mr de Gouveia had been talking to their landlord.
- 4.8 The Applicant could not pay the rent because she had not been paid.
- 4.9 The Applicant was not given any warning of her sacking, in writing or otherwise.
- 4.10 The Applicant had worked for over a year and considered that she was entitled to one week's notice and reasons for her dismissal.

Respondent

- 4.11 In March/April 2015 the Respondent was looking for additional staff as the company was growing rapidly and, following external advertising, the Applicant applied for a cleaning role noting that she had cleaning experience, having worked at Smart Choice. She had also worked at the Grab and Go sandwich shop in town, preparing baguettes.
- 4.12 The Respondent had some concerns as to why the Applicant had left Smart Choice and Grab and Go so made some enquiries of her previous employers.
- 4.13 The Respondent established from both employers that the Applicant had been dismissed due to her drinking problems and failing to turn up for work but Smart Choice did confirm that she had been a good cleaner.

- 4.14 The Respondent had previously employed an ex-Smart Choice cleaner with similar problems so decided to give the Applicant a chance by employing her, albeit warning her that such behaviour would not be tolerated by the company.
- 4.15 The Applicant worked well for the first few months. She initially undertook 2/3 weeks training with two other cleaners and managed to cover another cleaner's work over a 3-month period.
- 4.16 The Respondent then teamed the Applicant up with another cleaner. The Applicant drove the company vehicle as the other cleaner did not drive.
- 4.17 After this, the Applicant started texting Mr de Gouveia at 2.00 am on Mondays or 10.00 pm/11.00 pm on Sundays saying that she was drunk and could not work the next day. This meant that Mr de Gouveia had to get out of bed to get the car from her because products and keys were inside and he had to transport the other cleaner to and from jobs as well as undertake some of the early morning jobs himself in the evenings, because he was committed to other work. Also at times, the Applicant did not turn up on a Tuesday either.
- 4.18 Despite the Applicant not turning up for work on numerous occasions (estimated to be over 30 times), Mr de Gouveia kept contacting her to ask if she would be coming to work as she was a good cleaner and she could drive. He did not have many drivers and could not afford to lose her.
- 4.19 At regular office meetings, the Applicant told the Respondent that she could not stop drinking and she needed to drink at least once a week.
- 4.20 As the Applicant regularly failed to turn up for work and was often rude and abusive towards one of her colleagues on Mondays, when she was suffering from hangovers, that colleague told the Respondent that she wanted to leave the company and she also texted Mr de Gouveia saying that she did not want to work with the Applicant.
- 4.21 Email correspondence between Mr de Gouveia and that colleague on 8 June 2016 was produced in evidence, the content of which implied that this colleague did not wish to work with the Applicant.
- 4.22 Another employee was also angry and upset when she was teamed up with the Applicant as she constantly failed to turn up for work – sometimes for a full week.
- 4.23 Print outs of text messages from those colleagues were produced in evidence.
- 4.24 The Applicant texted Mr de Gouveia on one occasion saying she was sorry and that she wasn't going to do it again but it happened again and again.

- 4.25 Prints outs of text messages between the Applicant and Mr de Gouveia were produced in evidence.
- 4.26 Very often the ambulance picked the Applicant up from her home or in the street as she was totally drunk and the Respondent suggested that the Tribunal contact St John Ambulance to verify this.
- 4.27 A letter dated 28 May 2016, produced in evidence, was signed by Mr de Gouveia and referred to the Applicant as having reported for work drunk on 30 August 2015, 31 August 2015, 5 September 2015, 6 September 2015, 7 September 2015, 4 October 2015, 5 October 2015, 28 November 2015, 29 November 2015, 30 November 2015, 14 February 2016, 15 February 2016, 16 February 2016, 22 May 2016, 23 May 2016, 24 May 2016, 25 May 2016, 26 May 2016, 27 May 2016 and 28 May 2016. This letter noted that reporting for work in a drunken state was not acceptable, could result in immediate dismissal and the Applicant's behaviour needed to change. It further noted that many complaints had been made by the Applicant's colleagues who were refusing to work with her and this was the Applicant's first and last written warning after several verbal warnings.
- 4.28 The Applicant was paid 4 weeks' holiday pay. In March she was paid for her 2015 entitlement and in July she was paid for 2 weeks' 2016 entitlement.
- 4.29 Payslips for March 2016 and July 2016 with handwritten notes indicating holiday payments were produced in evidence.
- 4.30 The Applicant was provided with a contract but this had not been returned to the Respondent despite requesting its return.
- 4.31 The Respondent employed another 19 full time cleaners and all of them had returned signed contracts.
- 4.32 It was not true that the Applicant had worked seven days a week during her employment although she may have done this four or five times. Also she rarely worked on Saturdays as the Respondent knew she needed to have the day off to drink or she would have been drinking on week days.
- 4.33 Timesheets for February, July and August 2016 evidenced that the Applicant had undertaken limited work on a Saturday or Sunday.
- 4.34 Payslips dated 26 July 2016 and 31 August 2016 and bank statement print outs noting July and August 2016 wages payments and a Wiltshire Property (rental) payment made on behalf of the Applicant in July were produced in evidence.

- 4.35 At 8.43 pm on 5 August 2016 Mr de Gouveia texted the Applicant and one of her colleagues about the following day's work and the Applicant answered 'OK thank you' at 8.44 pm.
- 4.36 The next day, 6 August 2016, the Applicant texted Mr de Gouveia's ex-girlfriend just before she was due to start work saying she wasn't coming to work because she was totally drunk.
- 4.37 Mr de Gouveia asked his ex-girlfriend to tell the Applicant that he was going to see her to collect the car keys and job keys but before he started driving to the Applicant's house, he received a call from the Police saying that a Seat Arosa (the Respondent's vehicle) was parked illegally and he had to move it as soon as possible.
- 4.38 Mr de Gouveia called the Applicant asking where the car was and she answered "By a scaffolding" and by the time he arrived at Les Canichers, he saw the Applicant parking the car over the pavement and on a yellow line.
- 4.39 When the Applicant left the car, Mr de Gouveia could smell alcohol and asked the Applicant why she was driving in that condition, saying that it was a really bad offence. The Applicant answered saying that she didn't want to get a ticket.
- 4.40 Mr de Gouveia then told the Applicant to give him the keys as she was driving under the effects of alcohol and that was sufficient reason for her to lose her job as she had signed a Vehicle Policy document which clarified this.
- 4.41 A Vehicle Policy Overview document (signed by the Applicant on 20 July 2016) was produced in evidence.
- 4.42 Mr de Gouveia had a short conversation with the Applicant, during which she kept saying that she needed to sleep because she had a big headache after drinking the day before.
- 4.43 The company Cleaning Manager was with Mr de Gouveia the whole time.
- 4.44 A document was produced in evidence noting the Respondent's account of the Applicant's employment. This was signed by both Mr de Gouveia and the Cleaning Manager.
- 4.45 The following day, Sunday, Mr de Gouveia tried calling the Applicant several times without success. The Applicant did not try to call him at any time to organise the collection of the car or start working again.
- 4.46 During the Applicant's last week, it had been reported to Mr de Gouveia that the Applicant had been totally drunk nearly every day and purchasing alcohol in the mornings from the Co-op supermarket near Bosq Lane. The

Respondent suggested that the Tribunal verify this by contacting the Co-op to view CCTV footage.

4.47 Also during that week the Applicant's work colleague, reported that she had been driving in the vicinity of Les Canichers and saw the Applicant being collected by ambulance as she had been found totally drunk in the street.

4.48 Mr de Gouveia spoke with the Applicant's husband a week or so after the events of 6 August 2016 to ask if everything was alright with the Applicant. Her husband said that his wife didn't want to work in cleaning anymore and asked when she would be paid. Mr de Gouveia said that he was still waiting for her timesheets and uniform and when these were provided to him he would pay her.

5.0 Conclusion

5.1 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.

5.2 The Tribunal was satisfied from the evidence presented that the Applicant had been dismissed by the Respondent on 6 August 2016.

5.3 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.

5.4 It is unfortunate that the Applicant failed to attend a Case Management Meeting and did not engage in the process of evidencing her claim beyond initially lodging her completed ET1 form as the Respondent's account of events leading to the Applicant's dismissal was very different to that of the Applicant.

5.5 The Applicant stated that she had not received a contract of employment; however, the Respondent asserted that it had provided a contract of employment to the Applicant but she had not returned it. The Respondent confirmed that it did hold signed contracts for its other employees but did not include a copy of the contract issued to the Applicant.

5.6 The Tribunal could not, therefore, verify that a contract of employment had been issued to the Applicant.

5.7 The Applicant stated that she worked 60 hours per week but weekly timesheets produced in evidence noted this as ranging from 51 hours to 62.5 hours.

- 5.8 The Applicant stated that she had not been paid for July and August 2016 but evidence in the form of payslips and bank statement print-outs confirmed that she had been paid.
- 5.9 The Applicant stated that she could not pay the rent because she had not been paid but evidence in the form of a bank statement print-out confirmed that a rental payment of £500 had been made to Wiltshire Property by the Respondent on 29 July 2016 on her behalf.
- 5.10 The Applicant stated that she had not been given any warning that she would lose her job but evidence was produced in the form of a warning letter dated 28 May 2016 that dismissal was a potential outcome.
- 5.11 The Tribunal concluded that, on the balance of probabilities, it preferred the evidence of the Respondent in its summary of the events leading to the Applicant's dismissal and determined that the Respondent had a genuine belief that the Applicant was under the influence of alcohol on 6 August 2016 when she drove the company vehicle, which was contrary to the requirements of the Respondent's Vehicle Policy.
- 5.12 The Tribunal also concluded that, as a small employer, the Respondent had gone above and beyond the actions of a reasonable employer by giving the Applicant numerous chances to return to work despite her consistent unreliability as a result of her alcohol consumption, before the events of 6 August 2016 resulted in her downfall.

6.0 Decision

- 6.1 Having considered all the evidence, whether this is specifically referred to in this judgment or not, the Tribunal found that, whilst the Respondent did not appear to follow a full disciplinary process, the Applicant's conduct was so serious that the Respondent's actions in dismissing the Applicant were the actions of a reasonable employer. The Tribunal therefore makes no award.
- 6.2 In relation to the Applicant's claim that she had not been provided with reasons for her dismissal, the Tribunal concluded that, there was no evidence of the Applicant requesting the reasons and being unreasonably denied this information. The Tribunal therefore makes no award.
- 6.3 The Applicant's claim that she had not been provided with a contract of employment and had not been given one week's notice are matters which do not fall within the remit of this Tribunal



23 December 2016

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Signature of the Chairman

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Date