

## States of Guernsey

**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

**APPLICANT:** Miss Maria Spinola  
 Represented by: The Applicant represented herself

**RESPONDENT:** Les Ormes Care Home Limited  
 Represented by: Mrs Pippa Best

**Tribunal Members:** Mrs C Latham (Chairman)  
 Ms C Le Lievre  
 Mr G Jennings

**Hearing date(s):** 20 November 2014

**Decision of the Tribunal**

In relation to the claim of Unfair Dismissal, the Tribunal found, having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, that the Applicant was unfairly dismissed under Section 5(2)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, due to a technical breach by the Respondent in that it failed to follow all the stages of an appropriate disciplinary procedure.

When calculating the Award under Section 22(1)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, the Tribunal determined that the Applicant's pay during the six months prior to the termination of her employment was £8,650.67.

However, the Tribunal further concluded that it would be just and equitable to use its discretion under Section 23(2) of The Employment Protection (Guernsey) (Amendment) Law 2005, to reduce the six month Award of compensation by 95%.

**Amount of Award: £432.53**

Mrs Caroline Latham  
 .....  
 Signature of the Chairman

22 January 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')  
The Employment Protection (Guernsey) (Amendment) Law, 2005

**Extended Reasons**

**1.0 Introduction**

- 1.1 The Applicant, Miss Maria Spinola (known as Zelia Spinola) gave evidence to the Tribunal under Oath. She was assisted for the purposes of translation by Ms Isabel de Menezes who took the approved Interpreter's Oath.
- 1.2 The Respondent, Les Ormes Care Home Limited was represented by Mrs Pippa Best, a Director of the Company who also gave evidence under Oath.
- 1.3 The Respondent called the following witnesses who prepared written statements and gave evidence under oath:

Mr James Meechan  
Miss Fiona Carroll  
Mrs Marie Waddell

**2.0 Findings of Fact**

- 2.1 The following facts have been derived from the evidence presented by both the Applicant and the Respondent, form ET1 and ET2 and attachments thereto, document bundles ER1, EE1 and EE2.
- 2.2 All submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgment or not, the Tribunal noted the following key points:
- 2.3 Miss Spinola's first language is Portuguese. On occasion she has difficulty understanding the English language and requires assistance and translation. For this reason she was assisted by an interpreter, for parts of the hearing.
- 2.4 The Respondent is a registered residential care home providing care for 25 clients and employs about 15 people including nursing and other staff. The care home is run and managed on a daily basis by a Care Manager.
- 2.5 Miss Spinola commenced employment with the Respondent as a Night Care Assistant at Les Ormes Care Home on 13th May 2013. At her induction meeting, the Applicant was given a Contract of Employment that referred to an Employee Handbook, a Policy and Procedure Manual, an Authority to deduct from wages and a copy of the Disciplinary Policy and Procedures. The induction also included working two daytime shifts and two full night shifts under full supervision.
- 2.6 Miss Spinola's employment was subject to a probationary period of three months.
- 2.7 Miss Spinola's gross wages for the six months of her employment were £8,650.67.

- 2.8 On 5 July 2013 Ms J Hyzy, a Registered General Nurse (RGN), made a written complaint to Mr James Meechan, the Care Home Manager, about Miss Spinola. The complaint documented the events of the night shift on 3/4 July. Briefly, Miss Spinola failed to comply with requests to undertake her duties correctly; taking excessive time for breaks, sleeping when other staff were on breaks and ignoring cries for help from a resident. On the same day, Mr Meechan met with Ms Hyzy who stated that she did not want to work another night shift with the Applicant (Tab 4, pages 1-4 ER1 refer).
- 2.9 Mr Meechan wrote to Miss Spinola, inviting her to a meeting on 12 July 2013 to discuss her progress (Tab 4, page 6 ER1 refers).
- 2.10 At the meeting, Miss Spinola accepted that she still had much to learn and that there were problems with her working relationship with Ms Hyzy. A written note of the meeting was made and signed by the Care Manager and the Applicant (Tab 4, pages 7 and 8 ER1 refer).
- 2.11 Following further complaints from nursing staff who worked with her on night shifts, the Care Manager held a meeting with Miss Spinola on 20 November 2013, to discuss her progress. Mr Meechan made a detailed note of the improvements required and procedures to be followed by her. These included handover procedures, time keeping, length of breaks, hygiene requirements, locking up procedures as well as identifying the need for training in manual handling (Tab 5, page 1 ER1 refers).
- 2.12 During the night shift on 21 April 2014, Miss Spinola made a request to the duty RGN to take a fifteen minute break at nine o'clock to deal with a personal problem. This request was granted even though it was only one hour after the commencement of the shift. Despite requests by the RGN, Miss Carroll, for Miss Spinola to return to her duties, she remained outside the building for fifty minutes, leaving Miss Carroll alone in the building with 25 vulnerable clients. During this period Deputy Manager Mrs Waddell, who lives behind the Care Home, observed an unfamiliar gentleman outside the back of the home with Miss Spinola.
- 2.13 On her arrival for the day shift on 22 April 2014, Mrs Waddell enquired at the handover meeting who the person was at the rear of the building the previous evening and the reasons why he was there. She further enquired whether Miss Spinola was wearing the correct uniform. The night shift RGN explained what had happened the previous evening and confirmed that Miss Spinola had not followed the dress code both on that and other occasions. Mrs Waddell reported the event to the Care Manager the same morning because the health and safety of clients had been compromised by the Applicant's behaviour. Both managers documented the events for the record (Tab 6, page 1 ER1 refers).
- 2.14 When Mr Meechan met with the Applicant at the beginning of the night shift later that day, she confirmed that the events involving the gentleman, the fifty minute break and wearing incorrect uniform the previous evening were true. Although Miss Spinola wished to discuss the matter, he directed her to return to her shift duties and said he would arrange a meeting for this purpose.

- 2.15 On 23 April 2014, a letter was sent to Miss Spinola inviting her to attend a meeting with Mr Meechan at 3.00 pm on 25 April 2014. At the meeting she confirmed again that the report of the events was true and, when asked, said she had nothing to say. She was informed that due to the serious nature of her actions on 21 April 2014, the unsafe practice and her failure to meet the required performance standards, he would have to issue a final written warning (Tab 6, page 4 ER1 refers).
- 2.16 Miss Spinola was invited to attend a meeting at 5.00 pm on 8 May 2014 ((Tab 6, page 5 ER1 refers). The letter included the following statement *“The purpose of this meeting is to discuss the disciplinary action of a final written warning that you were made aware of at our last arranged meeting.....This meeting will also give you the opportunity to comment on the allegations and to put forward any defence or arguments that you feel the need to express”*. Miss Spinola was invited to bring a companion with her to the meeting.
- 2.17 At the meeting with Mr Meechan on 8 May 2014, Miss Spinola arrived unaccompanied. She was invited to comment on the allegations of a) failing to meet required standards b) leaving a RGN on her own during a night shift and c) not responding when she was asked to help on three consecutive occasions. She had no comments to make regarding the incident and stated that she understood the reasons for the meeting. She was informed that she must maintain standards and if they were not met or if there was further misconduct she would be dismissed. The meeting was documented and signed by all parties (Tab 6, page 4 ER1 refers). Mrs Waddell was present throughout the meeting.
- 2.18 On 19 May 2014 RGN Miss Carroll telephoned the Care Manager to express her concerns regarding Miss Spinola’s performance. She documented these concerns including the use of inappropriate language to clients. She also gave details of a conversation on the night shift of 14 May 2014 when the Applicant had stated that she was aware that it was Miss Carroll who had reported the incident of 21 April 2014 and that in future she would document any failure by Miss Carroll to practice in accordance with regulations. Miss Carroll concluded that this was a *“veiled threat”* and that she was no longer willing to work with the Applicant.
- 2.19 The Care Manger decided to take immediate action and telephoned Miss Spinola to inform her that he would not permit her to work the shift that night and would like to meet with her. He declined to discuss the matter over the telephone and gave her the option of coming to the Care Home that evening or at the beginning of her shift the following day, 20 May 2014. Miss Spinola chose to attend that evening.
- 2.20 When the Applicant arrived, Mr Meechan asked her whether she wished to have a representative present but she declined. During the meeting, at which the Deputy Manager was also present, the Care Manager disclosed the concerns raised by Miss Carroll and asked for an explanation. The Applicant disagreed with the RGN’s concerns but admitted to using inappropriate language in the past. She claimed that Miss Carroll had misinterpreted the statements she had made but was unable to clarify what she had meant by what she said.
- 2.21 Mr Meechan explained to her that in view of the recent written warning and her failure to meet the required performance standards, her employment was terminated. This was confirmed in writing in a letter that was sent to the Applicant

on the same day, 19 May 2014; it also informed her of her right to appeal the decision within five days from receipt of the letter.

- 2.22 In a letter dated 23 May 2014, that was hand delivered to the Care Home, Miss Spinola lodged her appeal in writing against her dismissal stating that she would like to provide her account of recent events that resulted in disciplinary action against her. Her letter included details of the event on 28 April 2014 and admitted that although she was given permission to have a 15 minute break at 9.00 pm she was absent from her duties for 50 minutes. She stated that she offered to work through her two hour break to make up the time and was surprised to be called to the meeting on 8 May 2014. Her letter included the following:

*“I was not given the opportunity to explain what had happened on the evening of 28<sup>th</sup> April and as I did not wish to cause any problems between myself and Fiona I accepted the warning.*

*On 14<sup>th</sup> May Fiona and I had a discussion about the above events and during that discussion I said to her in a non -threatening manner that I felt she had been unfair reporting the incident when I had asked her permission to leave and she had granted it and said no more. I felt she had lost my trust and I told her, again in a non-threatening manner, that in future I felt it was my right to report her mistakes.*

*I believe this comment concerned her and she subsequently made a call to you which resulted in me being once again called to your office on the 19<sup>th</sup> May and given a verbal termination of my employment, without being given the opportunity to explain my side of the story...”*

- 2.23 In a letter from Mrs Pippa Best dated 28 May 2014, Miss Spinola was invited to attend an Appeal Meeting on 30 May 2014 at 11.00 am. She was informed that Mrs Best would be the ‘Presiding Person’, Mr Meechan would be the ‘Management Representative’ and witnesses would be called to give evidence. The letter went on to explain that Miss Spinola could bring someone to represent her and that she could arrange for witnesses to give evidence. At the appeal hearing, which would be limited to those items identified in her letter of appeal, she or her representative would be invited to summarise her appeal.
- 2.24 The Appeal Meeting took place on 5 June 2014, the date having been mutually agreed to enable Miss Spinola to be accompanied by a translator. Mr Meechan called Miss Carroll as a witness. As the Presiding Person, Mrs Best conducted the meeting formally and followed an appropriate procedure (ER1 tab 3, page 28 refers) giving parties the opportunity to state their case, call witnesses, examine and question the witness. The outcome of the Appeal Meeting was that the dismissal of Miss Spinola was upheld.

### **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"*

#### **4.0 Conclusions**

- 4.1 The Tribunal heard oral evidence and representations from both parties. It also considered all the written evidence before it, whether specifically referenced in this judgment or not.
- 4.2 In any claim for 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 in accordance with the Law. By way of summary, the Tribunal must decide whether the dismissal was within the band of reasonable responses open to the employer.
- 4.3 In this case the Respondent has argued that the dismissal was for reasons that can be generally described as 'conduct and performance issues'. The Respondent alleged that the performance standards and conduct of the Applicant had caused concerns with the nursing staff and management of the Care Home. In particular, in April and May 2014 there were two specific incidents when the Applicant breached safe working practices, failed to perform her duties in accordance with the Respondent's performance requirements, used inappropriate language to clients and caused a member of the nursing staff to state that she was no longer willing to work with Miss Spinola. On the other hand, the Applicant claims that her dismissal was unfair and that she had not been given the opportunity to state her case during a disciplinary meeting that resulted in her dismissal.
- 4.4 The Tribunal was mindful in its deliberations of the helpful decision reached in the case of *Henderson v Channel Islands Ceramics, December 2010*. In that case the Tribunal described a number of basic tests which should be applied in cases of unfair

dismissal and the Tribunal found it useful to structure its deliberations around the basic tests applied in that case:

- “i) Was the employee aware of the reasonable requirements of their role and the required adherence to the policies and practices of their employer?*
- ii) When the employer considered they had not met these requirements and/or there had been a failure to adhere to reasonable policies and practices were these deficiencies communicated to the employee.*
- iii) Was the employee made aware of the impact of their alleged failings and the potential outcome to them personally if they failed to correct their alleged shortcomings; up to and including their dismissal.*
- iv) Was the employee given enough time to correct the alleged shortcomings, and, where applicable, given support from management to achieve the required changes.*
- v) Was the sanction applied one that a reasonable employer might apply given their reasonable consideration of the above tests.*
- vi) What was the adherence to company disciplinary policies and did the employer try to abide by the Commerce and Employment Department code of Disciplinary Practice and Procedures in Employment”*

- 4.5 The Tribunal heard evidence that the Applicant was offered employment as a Care Assistant on 23 April 2013 and commenced employment on 13 May 2013. Her employment was subject to a probationary period of three months. It was satisfied that she was given an appropriate induction to her role when she commenced employment with the Respondent; she was given a copy of the Employee Handbook in force at the time, a copy of the Home’s Policy and Procedures and confirmed that she had read and understood the contents of the documents. She was required to work two night and two day shifts under full supervision at the commencement of her employment. She was managed/supervised on a daily basis by the Home’s nursing staff.
- 4.6 There was evidence that as early as approximately seven weeks after the commencement of her employment that a member of the nursing staff was unhappy with her performance. In a written communication to the Care Manager, RGN J Hyzy complained about her performance, attitude towards clients, sleeping on duty and taking long breaks. As a result the Care Manger held a meeting with Miss Spinola on 12 July 2013 to discuss her progress and performance. In particular she was requested to listen to what was being asked of her by nursing staff and that she return from breaks on time. It was acknowledged by the Manager that there was negativity on both sides and it needed to be resolved.
- 4.7 The Applicant’s progress was discussed with her on 20 November 2013 because nursing staff still had concerns about her performance and although she was given

specific feedback and requirements as to her future performance, it appears that there was no specific provision for monitoring or reviewing this on an ongoing basis. Interestingly, these discussions took place just a few days after the expiry of Miss Spinola's probationary period but there was no mention of this at the meeting or confirmation of her appointment by the Respondent.

- 4.8 The events that took place on the night shift of 21 April 2014 were described by the Respondent as 'unacceptable'. It considered that Miss Spinola's actions had compromised the health and safety of its staff and residents. This response is considered to be reasonable given the nature of the Respondent's business. The Care Manager responded by returning on the evening of the 22 April to inform her of the seriousness of her actions and that she would be invited by letter to a meeting to discuss the serious event.
- 4.9 When the meeting with Mr Meechan took place on 25 April 2014, the Applicant confirmed that the events described in file notes prepared by Mrs Waddell and himself were correct (tab 6 pages 1 and 2 ER1 refer). She was, appropriately, given the opportunity to question or comment on what had been written but she stated that she had no comment. The Care Manager stated that due to the severity of her actions, a further meeting would take place to give her 'a final written warning and she would have the opportunity to be accompanied and comment on the allegations'.
- 4.10 Miss Spinola was invited, in writing, to a further meeting on 8 May 2014 and informed that "the purpose of this meeting will be to discuss the Disciplinary action of a Final Written Warning". At the meeting Miss Spinola chose not to be accompanied and made no representations. She confirmed that she was aware of the implications of the disciplinary process and the fact that any further misconduct would result in dismissal.
- 4.11 The evidence confirms that the Respondent had further cause for concern following a telephone call on 19 May 2014 from a member of the nursing staff regarding Miss Spinola's working practices and use of inappropriate language. The nurse was not prepared to work with the Applicant. In the light of this serious complaint, the Tribunal agrees that the Care Manager responded reasonably by preventing her from working her shift that night and arranging to meet with her.
- 4.12 The meeting with Miss Spinola, who had opted to come to the Care Home on the same day, resulted in her employment being terminated with immediate effect. The dismissal was confirmed in writing together with notification of the appeal procedure. The appeal, which was properly convened and conducted, took place on 5 June 2014 and upheld the decision to dismiss the Applicant.
- 4.13 The Tribunal heard evidence that Miss Spinola's work performance had first given cause for concern in November 2013. In April 2014 there was a further complaint about her work performance and behaviour from a member of the nursing staff. The oral evidence given to the Tribunal and the notes prepared to record the incident, confirm that the events that took place on the night shift commencing on 21 April 2014 were serious and demonstrated the Applicant's disregard for safe and proper working practices. The Tribunal considered that it was reasonable for the

Respondent to implement a disciplinary process that could result in a final written warning, which was confirmed on 8 May 2014.

- 4.14 There was consistent evidence that nursing staff had serious concerns that Miss Spinola's working practices and behaviour were in breach of the Care Home's practices and procedures. The allegations against her in April 2014 were so serious that it was a reasonable response for the Respondent to proceed directly to a Final Written Warning which could result in dismissal after a further breach. The dismissal, following a further breach on 19 May 2014, was justified.
- 4.15 The Tribunal considered the procedures followed by the Respondent in relation to the dismissal. The Tribunal is required to take into account the size and administrative resources of the employer in deciding what falls within the band of reasonable procedural responses in each case. In this case, although the Respondent is a small employer with approximately 15 members of staff, there were procedures in place to manage discipline in the Care Home which the senior staff members attempted to follow. The Tribunal gave weight to the significant amount of time and effort that the Care Manager and other nursing staff had spent corresponding with the Applicant, documenting conversations and meetings and the Appeal process that followed. However, in its letter inviting the Applicant to a disciplinary meeting on 8 May 2014, the Respondent had already prejudged its own conclusions of the meeting by stating that the purpose of the meeting "*is to discuss the disciplinary action of a final written warning that you were made aware of at our last arranged meeting.....*".
- 4.16 The Tribunal has no doubt that the Applicant's conduct was of such a serious nature that, had a proper process been followed, her dismissal was inevitable.

## **5.0 Decision**

- 5.1 In relation to the claim of Unfair Dismissal, having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal determined that the Applicant was unfairly dismissed under Section 5(2)(a) of The Employment Protection (Guernsey) Law, 1998, as amended, due to a technical breach by the Respondent in that it failed to follow all the stages of an appropriate disciplinary procedure.
- 5.2 However, the Tribunal considered that the Applicant's behaviour amounted to a most significant contribution to the ending of the employment. The Tribunal considers that her contribution was so great that in accordance with Section 23(2) in The Employment Protection (Guernsey) (Amendment) Law, 2005 it is entitled to reduce the amount of the Award.

**6.0 Award**

- 6.1 When calculating the Award under Section 22 of the Employment Protection (Guernsey) Law, 1998, as amended, her pay during the six months prior to the termination of her employment was £8,650.67.
- 6.2 The Tribunal has concluded that in light of these considerations it would be just and equitable to reduce the Award by 95% (ninety five percent) as provided for by Section 23(2) in The Employment Protection (Guernsey) (Amendment) Law, 2005.
- 6.3 An Award of £432.53 is made having been determined by reference to the Applicant's final six months employment with the Respondent and to the reduction described at 6.2 above.

Mrs Caroline Latham  
.....  
Signature of the Chairman

22 January 2015  
.....  
Date