

FORM: ET3

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr James Harvey
Represented by: Mr Harvey represented himself

RESPONDENT: Vista Hotels Limited
Represented by: Mr Timothy Coates, Commercial Director

Tribunal Members: Ms H Hubbard (Chairman)
Mr A Vernon
Mr G Jennings

Hearing Date(s): 28 May 2015

Decision of the Tribunal

Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that under the provisions of Section 5(2)(a) of the Employment Protection (Guernsey) Law, 1998 as amended, (the 'Law') the Applicant was unfairly dismissed.

When calculating the Award under Section 22(1)(a) of the Law, the Tribunal determined that the Applicant's pay during the six months prior to the termination of his employment was £14,875.

The Tribunal further concluded that it would be just and equitable in all circumstances to use its discretion provided for under Section 23(2) of the Law, to reduce the six month Award of compensation for unfair dismissal by 25% (twenty five percent). The amount of £14,875 is therefore reduced.

Amount of Award: £11,156.25

Ms Helen Hubbard
.....
Signature of the Chairman

19 June 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 (Recoverable Costs) Order, 2006 (the Costs Order).

Extended Reasons

1.0 Introduction

1.1 The Applicant, Mr James Harvey, represented himself and gave evidence under Oath. The Applicant was supported by form ET1 and document bundle EE1. Mr Harvey made an application to the Tribunal for costs of £314 in relation to his travel and accommodation to attend the hearing, under the Employment Protection (Recoverable Costs) Order, 2006.

1.2 The Respondent was represented by Mr Tim Coates, Commercial Director of Vista Hotels Limited who also gave evidence under Affirmation. The Respondent was supported by form ET2 and document bundle ER1 and document ER2.

1.3 The Respondent called the following witness who had prepared a witness statement and gave evidence under Oath:

Mr Paul Guillou, Financial Controller, Blue Islands

1.4 The Applicant, Mr James Harvey, claimed that he had been unfairly dismissed within the meaning of Section 5(2)(a) of the Employment Protection (Guernsey) Law, 1998, as amended.

1.5 The Respondent, Vista Hotels Limited, claimed that they had acted reasonably in dismissing the Applicant on the grounds of gross misconduct in the circumstances of his remand in custody following an altercation at the staff accommodation of Fermain Valley Hotel and his subsequent imprisonment.

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 hereto, document bundles ER1, ER2 and EE1.

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.

2.3 The gross earnings in the final six months of the Applicant's employment were not included, as required, on either the ET1 or ET2 form. As a preliminary matter and following cross examination of the Applicant and Respondent's representative, Mr Tim Coates, the Tribunal determined the sum of £14,875 to be the correct amount for consideration of this claim by the Tribunal.

2.4 The Applicant was employed as the Head Chef of Fermain Valley Hotel. On 9 March 2014 the Applicant was arrested for aggravated assault and criminal damage in an

incident that occurred during the night at the staff accommodation of the Fermain Valley Hotel, when the Applicant was not on duty. The Applicant was remanded in custody from the night of 9 March 2014, and did not return to work.

- 2.5 The Applicant was held in custody from the date of arrest, 9 March 2014, until the date of his Court hearing on 28 March 2014.
- 2.6 The Respondent sought advice from Commerce and Employment in the light of the unusual circumstances. The Respondent claimed that advice received was to take no disciplinary action until such time as the Applicant's case was heard and he was sentenced by the Court.
- 2.7 The Respondent's representative, Mr Coates, advised the Tribunal of a letter that was prepared by Ms Suzy Heyworth, the former HR Manager, after the Applicant was sentenced on 28 March 2014, within which it was alleged the Respondent informed the Applicant of the termination of his employment with immediate effect. Mr Coates informed the Tribunal that he recalled that the letter was addressed to the Applicant at Guernsey Prison. A copy of the letter was not shown to the Tribunal. Mr Coates advised the Tribunal that the Company could not find a copy of this letter and no trace of the letter could be found on the hard disc of the computer on which it was prepared.
- 2.8 Mr Harvey gave witness testimony that he had not received the letter informing him of his dismissal at the end of March 2014. The Prison log of mail received by the Applicant (EE1 refers) confirmed that no letter was logged as received by Guernsey Prison for the Applicant at the end of March 2014.
- 2.9 The Respondent did not provide any evidence of a follow up to the missing letter of 28 March 2014, prepared by Ms Heyworth and there was no formal communication received by the Applicant between 9 March 2014 and 8 July 2014.
- 2.10 The Applicant received a reply to his letter of 4 July 2014, from the Respondent on 8 July 2014. This letter (EE1, page 1 refers) informed the Applicant that his personal belongings had been passed to his girlfriend to be kept at the staff accommodation for her "employer." The letter makes no reference to the dismissal of the Applicant (EE1, page 1 refers).
- 2.11 On 4 September 2014 the Respondent replied to the Applicant's letter of 12 August 2014 and confirmed the reason for his dismissal was gross misconduct on the basis that the Applicant was convicted of a criminal offence; imprisoned and unable to work for the Company (EE1, page 2 refers).
- 2.12 The letter of 4 September 2014, (EE1, page 2) enclosed the Applicant's final payslip confirming that he had been paid from 1 to 9 March 2014.
- 2.13 On 15 September 2014 (EE1, page 3) a letter from Ms Sarah Langford, the Respondent's new HR Manager, confirmed that the Applicant's termination date was 9 March 2014.
- 2.14 The Applicant sent an apology for his conduct on 9 March 2014, to the Respondent on 29 March 2014, the day after he was sentenced. The Applicant admitted to the

Tribunal that he was drunk on the night of 9 March 2014, and had engaged in an argument with his girlfriend that had got "out of hand" because of the involvement of a third party. The Applicant had resisted his subsequent arrest as a result of the incident.

- 2.15 The witness for the Respondent, Mr Guillou, was not required to read out his witness statement to the Tribunal. Mr Guillou was the Special Constable that had been involved in the serious altercation with the Applicant on the night of the incident at the staff accommodation of the Fermain Valley Hotel when the Applicant resisted his arrest. Under cross examination, it was established that Mr Guillou was also the Financial Controller of Blue Islands, a 'sister' company to Vista Hotels Limited. The witness statement was prepared by Mr Guillou two weeks before the Tribunal hearing and was not the official Guernsey Police statement made on 9 March 2014.

3.0 The Law

- 3.1 In determining whether the dismissal of an employee was fair or unfair, Section 6 (1) of the Law states 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) states "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 states *"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 for 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 substantial merits of the case."*
- 3.3 Section 22(1) of the Law states *"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 states *"Where in relation to such a complaint the Tribunal considers that, by reason of any circumstances other than those mentioned in sub section (1), it would be just and equitable to reduce the amount of the Award of compensation for unfair dismissal to any extent, the Tribunal shall, subject to subsection (3) and subsection (4), reduce that amount accordingly."*
- 3.4 Section 4 of the Employment Protection (Recoverable Costs) Order, 2006 states the maximum costs which may be recovered by a party shall be a) *in respect of his costs, fees and expenses reasonably incurred in the preparation or presentation of his case, £100, b) where he is necessarily absent from his place of residence overnight in order to attend the hearing, a night allowance not exceeding the expenses actually and reasonably incurred for board and lodging for that night, c) where he necessarily incurs expenses in travelling to and from the place of the hearing for the purpose of attending the hearing, an allowance not exceeding the expenses actually and reasonably incurred.*

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 a 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.
- 4.3 The Tribunal was persuaded that the employer had shown a potentially fair reason for dismissal. However, the Tribunal did not consider a potentially fair reason sufficient enough, on its own merits; to justify summary dismissal. Whether the Respondent acted reasonably or not is not a question of Law and the Tribunal had discretion to base its decision on the facts of the case before it. In doing so, the Tribunal was mindful not to put itself in the position of the Respondent by considering what it would have done in the circumstances. Expressly, the Tribunal did not attempt to undertake its own investigation into the alleged incident. The Tribunal sought to assess whether the Respondent's interpretation and application of the Company disciplinary policy was reasonable in the circumstances. In determining the reasonableness of the Respondent's decision to dismiss, the Tribunal could only take into account those facts that were known to the Respondent at the time of the decision to summarily dismiss the Applicant for gross misconduct. It was confirmed in writing by the Respondent on 15 September 2014, (EE1, page 3) that the "termination date" was 9 March 2014. In concluding this, the Tribunal took the view that the summary dismissal could not be made 'reasonable' by events that occurred after the dismissal had taken place.
- 4.4 The Tribunal gave careful consideration to the process followed by the Respondent in dismissing the Applicant for alleged gross misconduct. In particular, the Tribunal noted that the Respondent did not carry out a proper investigation into the incident that the Applicant was involved in on the 9 March 2014. Notably, the Respondent did not interview the Applicant in Prison to ascertain his version of the incident and subsequent altercation with the Special Constable in resisting his arrest. No notes were recorded of the events of 9 March 2014 by the Respondent. In addition, no other witnesses or participants of the incident were formally interviewed by the Respondent. Dismissal is an employment issue and not a criminal matter and the Tribunal regarded the lack of a proper investigation as a critical failure by the Respondent in relation to an essential employment process. In concluding, the Tribunal was mindful of the size and administrative resources of the Respondent in consideration of the fairness of the dismissal. In the Tribunal's view, the Respondent is a medium sized employer with a professional Human Resources Department with access to professional advice and therefore an appropriate response and process invoked as a result of the incident could reasonably be expected. In support of this view, the Commerce and Employment, Code of Practice, 'Discipline at Work', Page 6, paragraph 12 expressly states: *"Do not dismiss or discipline an employee merely because he or she has been charged with or convicted of a criminal offence..."* In addition paragraph 11 states: *"Dismissal without notice for gross misconduct should only take place after the normal investigation to establish the facts..."*. The Tribunal applied the 'range of reasonable responses' test not only to the decision to dismiss

but also to the procedure by which the decision was reached and concluded that the lack of a proper independent investigation by the Respondent did not fall within the band of reasonable responses of a 'reasonable' employer of the size and administrative resources of the Respondent.

- 4.5 The Tribunal noted that the formal communication to the Applicant of his dismissal did not take place until nearly six months after his arrest on 9 March 2014. The Respondent informed the Tribunal that the decision to dismiss the Applicant happened after his Court hearing on 28 March 2014, in accordance with advice received by Commerce and Employment that no decision should be made until the case was heard in Court and the Applicant was sentenced. However, the termination date for the finding of gross misconduct was backdated to 9 March 2014 by the Respondent, in writing; evidence that the process was not in accordance with the principles of natural justice. The Tribunal took the view that the Applicant could only assume, in the absence of a fair hearing and right of appeal, that he had been 'presumed guilty' by this retrospective action and in the absence of his employer communicating with him either verbally or in writing according to the Prison log of received mail, between 9 March 2014 and 8 July 2014. In particular, the Tribunal noted that there had been no attempt by the Respondent to speak to the Applicant since he was arrested and that the communication of his dismissal was in writing in a letter dated 4 September 2014 (EE1, page 2). The Tribunal was persuaded that the complete absence of a disciplinary process with no right of appeal did not fall within the band of reasonable responses open to an employer in justifying the fairness of a summary dismissal on the grounds of gross misconduct for a first disciplinary offence.
- 4.6 The Tribunal acknowledges in this judgment the seriousness of the alleged violent domestic incident and was sympathetic to the Respondent in terms of the resulting impact to the staff accommodation of the Fermain Valley Hotel. In addition, the Tribunal was mindful of the circumstances in which the Respondent found itself, with limited access to the Applicant, as a direct result of his incarceration. The Tribunal took note in their conclusions of the decision of the Guernsey Employment and Discrimination Tribunal case (ED0015/09) of Yoli V States of Guernsey (acting by) Health and Social Services (2009). In this case the Applicant was arrested for a criminal offence and the Respondent claimed that the imprisonment of the Applicant had frustrated the contract of employment and was justification for the subsequent dismissal. The Applicant in this case received visits by the Respondent at the Prison and was informed during the second visit of the decision to terminate her contract of employment. The case demonstrates that Vista Hotels Limited could have taken steps to communicate with the Applicant, Mr Harvey, in person after his arrest and remand in custody. Ms Yoli's claim for unfair dismissal was upheld by the Tribunal "*A fair and reasonable employer, with the resources and procedures available to them, following a measured and considered process, and taking into account the equity and substantial merits of the case, would not have dismissed an employee so precipitately. This apparent rush of judgement was not conducive to a fair and reasonable dismissal...*" (Paragraph 10.29).... "*A reasonable employer might have concluded....that the Applicant may have made some poor judgements in her personal life which led to a difficult situation for both herself and her employer.*" (Paragraph 11.5). The Tribunal took the view that the Applicant in this case had enacted through his imprisonment a similarly "difficult situation" for both himself and his employer.

- 4.7 The Tribunal was further guided by an appeal decision of the Royal Court on 23 June 2009 in the case of *Burford V Flybe Limited*. In his judgment Richard John Collas Esq., Deputy Bailiff, gave guidance on the interpretation of Section 6(1) of the Employment Protection Guernsey Law, 1998, as amended:

"I believe the Appellant has misunderstood section 6 (1). Its first, and possibly only, purpose is to put the burden of proving the reason for the dismissal onto the employer. It does not require the Tribunal to establish that there was a reason falling within subsection (2) (which deals with matters such as the capability, qualifications and conduct of the employee, redundancy etc.). The Tribunal would not be able to ascertain a reason for the dismissal if an employer had summarily dismissed an employee without any reason whatsoever, and without following any disciplinary or dismissal procedure, which would be a clear example of unfair dismissal."

- 4.8 The Tribunal considered whether there was an adverse connection between the offence committed on 9 March 2014 and the employment of the Applicant. The Tribunal took the view that the scope of '(mis)conduct' as a potentially fair reason for dismissal is not strictly limited to 'conduct' in the course, or within the scope of employment. This view supported the conclusion by the Tribunal that there was a potentially fair reason for dismissal, however, in the absence of evidence from a formal investigation and subsequent disciplinary process, the Tribunal could not conclude that there was a fair reason for summary dismissal without substituting its own views, which it was mindful to avoid. The Tribunal accepted that potential damage to the Respondent's reputation was a factor for consideration. However, the Tribunal also held that the impact on the Applicant in relation to allegations of serious criminal misbehaviour, as result of a domestic incident, with regard to the loss of his job and the effect on his reputation and future employment prospects was also a relevant consideration in this case. In accordance with the principles of natural justice, the Tribunal was persuaded that such serious allegations should be the subject of the most careful investigations by the Respondent, given the potential effect that they could have on the Applicant in terms of his future employment. The Tribunal regarded the conviction on 28 March 2014 as proof that the Applicant was 'guilty as charged,' but in the context of unfair dismissal concluded that there may still be explanations, mitigating factors or arguments that the Applicant *could* have wanted to put forward in reaction to the Respondent's proposed disciplinary sanction. There was no evidence that the Respondent had ruled out an alternative approach as an option or any other alternatives, such as suspension with or without pay; that *may* have been considered appropriate in such circumstances. The conclusion of the Tribunal, based on the lack of evidence of process and after giving due consideration, was that the decision to dismiss had been a "rushed judgement" by the Respondent.
- 4.9 The Tribunal concluded that even allowing for the unusual circumstances of the incarceration of the Applicant, a reasonable employer of the size and administrative resources of the Respondent would have undertaken an independent internal investigation that was documented and taken a measured and balanced approach to the enactment of the Company disciplinary process that may arise as a result of such an investigation, even if it proved necessary to make certain adaptations to the normal disciplinary process due to the Applicant's imprisonment. The Tribunal concluded that the Respondent, in dismissing the Applicant for gross misconduct

without a fair hearing, had deprived the Applicant of access to an important right and, in doing so, the principles of natural justice. On the balance of probabilities and based on the substantial merits of the case, the Tribunal concluded that the Applicant had been dismissed and in accordance with the provisions of 6(3) of the Law finds this dismissal to be unfair.

5.0 Decision

- 5.1 Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, The Tribunal found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed.
- 5.2 In the light of the seriousness of the misconduct of the Applicant on 9 March 2014 and as a result of the ‘incapability’ of the Applicant to attend work due to his imprisonment, which the Tribunal considered a ‘catalyst’ for the summary dismissal, the Tribunal concluded that it would be just and equitable in all the circumstances, to reduce the Award of compensation for unfair dismissal by 25% (twenty five per cent) as provided for by Section 23(2) of the Law.
- 5.3 The Tribunal declined to award costs of £314 to the Applicant under the Employment Protection (Recoverable Costs) Order, 2006.

6.0 Award

- 6.1 When calculating the Award under Section 22 of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant’s pay during the six months prior to the termination of employment was £14,875.
- 6.2 An Award of £11,156.25 is made having been determined by reference to the Applicant’s final six months employment with the Respondent and to the reduction described at 6.1 above.

Ms Helen Hubbard
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Signature of the Chairman

19 June 2015
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Date