

FORM: ET3

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mrs Tracey Benedito
Represented by: (Mrs Benedito represented herself)

RESPONDENT: Grand Havre Holdings Limited
Represented by: Advocate John Langlois

Witnesses: Called by the Applicant:
Ms Aija Pusilova

Tribunal Members: Ms Helen Martin (Chairman)
Mr Norson Harris
Mr Roger Brookfield

Hearing date(s): Wednesday 27 and Thursday 28 August, 2014

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 Applicant was not unfairly dismissed.

Ms Helen Martin
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Signature of the Chairman

27 October 2014
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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, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended

Extended Reasons

1.0 Introduction

1.1 The Applicant, Mrs Tracey Benedito, represented herself and gave oral evidence in addition to her submission on form ET1 and document bundles EE1, EE2, EE3 and EE4.

1.2 The Applicant called the following witness:

- Ms Aija Pusilova, General Manager, The Peninsula Hotel

1.3 The Respondent, Grand Havre Holdings Limited, was represented by Advocate John Langlois, Chairman, Grand Havre Holdings Limited. Advocate Langlois gave oral evidence for the Respondent, in addition to form ET2 and addendum to ET2, document bundles ER1, ER2 and supplemental response to form ET2 (Question 7).

1.4 The Applicant claimed that she had been unfairly dismissed on 15 February, 2014.

1.5 The Respondent, in its ET2 form, denied that the Applicant had been unfairly dismissed. The Respondent contended that the claim should not proceed as the claim was made 'out of time.'

2.0 Facts Found

2.1 The Applicant was employed by Grand Havre Holdings Limited as 'Events and Function Manager' at the Peninsula Hotel in Guernsey from 11 June, 2009 until she was dismissed on 15 February, 2014.

2.2 The Applicant was suspended from her employment on 30 December, 2013 on full pay pending an independent investigation into the alleged misappropriation of money from the Peninsula Hotel. An independent investigator, Mr Neville Quartier, was appointed to undertake the investigation.

2.3 The Applicant received a 'Disciplinary' letter dated 5 February, 2014, delivered by hand. The 'Disciplinary' letter set out the allegations, namely that on a number of occasions the Applicant had misappropriated money that was either due to other employees by way of tips for good service or to the Hotel. The Applicant was warned in the letter that one outcome of the disciplinary proceedings could be dismissal. The Applicant was provided with copies of witness statements and other documents to be used at the hearing. In addition, the Applicant was invited to submit any other documents that she wished to be considered at the disciplinary hearing.

2.4 In a further letter from Ms Pusilova on 11 February, 2014, the Applicant was invited to bring a companion to the hearing.

- 2.5 The Applicant attended a disciplinary hearing chaired by Advocate John Langlois on 14 February, 2014. The Applicant had elected not to be accompanied by anyone else.
- 2.6 The Applicant was informed that she would have the right of appeal to Mr Shirke, a Director of Grand Havre Holdings Limited.
- 2.7 As a result of his findings on each allegation, Advocate Langlois took the decision to dismiss the Applicant with immediate effect.
- 2.8 The decision to dismiss was set out in a letter to the Applicant dated 15 February 2014 which was given to her in person by Advocate Langlois.
- 2.9 The Applicant appealed to Mr Shirke on the grounds that she was still under police investigation and therefore was unable to discuss anything to do with the investigation into the missing tips.
- 2.10 Mr Shirke replied to the Applicant that he would postpone a decision on the appeal until such time as she was in a position to bring to his attention any additional facts that she may regard as pertinent.
- 2.11 On 9 March, 2014 the Applicant confirmed to Mr Shirke that the police were not taking the matter any further and set out an account which documented her response to the allegations.
- 2.12 The appeal took place by way of a full document review and on 17 March, 2014, Mr Shirke emailed the Applicant to inform her that her appeal had been rejected as he could not find any reason to alter the decision taken by Advocate Langlois. Mr Shirke advised the Applicant that the decision had been made on the appeal papers and the 'Decision' document and that he was not required to re-interview witnesses.

3.0 The Law

- 3.1 The Applicant claimed she had been unfairly dismissed within the meaning of paragraph 5(2)(a) of the Employment Protection (Guernsey) Law, 1998 as amended; *"the contract under which he/she is employed is terminated by the employer, whether it is so terminated by notice or without notice."*
- 3.2 The Tribunal took into account paragraph 6(3) which states *"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 the circumstances (including size and administrative resources of an 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."*

4.0 Preliminary Matter

- 4.1 The Applicant's ET1 claim form was submitted to the Commerce and Employment Department with the Respondent's name listed incorrectly.
- 4.2 The Respondent, represented by Advocate Langlois, argued that the claim for unfair dismissal should not proceed to a full hearing and it was 'out of time' as a result of the delay that ensued before the name of the Respondent was corrected.
- 4.3 Advocate Langlois claimed that the Applicant had completed the form in such a manner 'out of spite' and to cause maximum embarrassment to the named parties and that in her role as Manager of the Peninsula Hotel, the Applicant was fully cognisant that her employer was Grand Havre Holdings Limited.
- 4.4 The Applicant claimed that her completion of the ET1 form was a 'genuine mistake' and that no embarrassment was intended by listing the Directors' names rather than the Company name.
- 4.5 Following a short adjournment, the Chairperson informed the parties that the Tribunal had determined that the claim would proceed to a full hearing. In the view of the Tribunal the inaccurate completion of the form had been corrected at the earliest opportunity once the ET2 response had been submitted showing the correct name and that this swift action had ensured that there was no public record of the misstatement of the name of the Respondent on the original form.

5.0 Opening Statement: Advocate John Langlois

- 5.1 Advocate Langlois referred the Tribunal to the 23 page 'Decision' document (addendum to ET2 and page 1, ER1) and informed the Tribunal that there was a clear separation in the Company investigation and disciplinary process from any criminal proceedings. Advocate Langlois told the Tribunal that when he had discovered that there was money missing at the end of December he had concluded that the alleged theft and/or misappropriation of money should be reported to the Police. Advocate Langlois stated that he had completely withdrawn from the police investigation once it had been reported. He informed the Tribunal that the Applicant was interviewed by the Police and arrested immediately.
- 5.2 Advocate Langlois told the Tribunal that he had engaged an independent investigator, Neville Quertier, to undertake an investigation on behalf of the Respondent and that he (Advocate Langlois) had not taken any part in the subsequent investigation.
- 5.3 Advocate Langlois informed the Tribunal that he made the decision to dismiss the Applicant based on the evidence that was put before him at the time of the disciplinary hearing and that the Company had decided not to pursue the criminal complaint further on compassionate grounds so as not to prejudice any future employment opportunities for the Applicant.

6.0 Opening Statement: Mrs Tracey Benedito

- 6.1 Mrs Benedito stated that she had been employed for four and half years at the Peninsula Hotel as Events and Function Manager. Mrs Benedito said that following

her suspension she had attended the Police Station and had been arrested and placed on police bail. Mrs Benedito said that she did not wish to incriminate herself by answering any questions during the internal investigation undertaken by the Respondent. Mrs Benedito told the Tribunal that she felt the investigation was unfair because she could not answer any questions that were put to her and that, in any event, she “did not do anything wrong.”

7.0 Witness Testimony: Advocate John Langlois

- 7.1 Advocate Langlois gave witness testimony under the oath. Advocate Langlois read out his ET2 submission, addendum and supplemental response (question 7) to the Tribunal (ER1 refers).
- 7.2 In addition, Advocate Langlois told the Tribunal that although the Applicant, Mrs Benedito, had provided a reason for her not answering any questions during the internal investigation by referencing the ongoing criminal investigation, importantly, she had not repudiated any of the questions she was asked except to say that she had “never lied.” Advocate Langlois said that he did not accept that the Applicant could not answer any questions because she was undergoing an investigation by the Police. Advocate Langlois said that the police investigation could have been ongoing for considerable time because as an ‘internal matter,’ it would not be a priority and that it would likely have extended over several months. Advocate Langlois told the Tribunal that the independent investigator, Mr Neville Quertier, was a retired policeman and a very fair gentleman who was not socially connected to him.
- 7.3 Advocate Langlois stated that the Applicant, as a manager, was not entitled to tips other than those that may have been given specifically to her by patrons of the Hotel. In addition, the Applicant had alleged that further missing money must have been stolen from her desk. Advocate Langlois said that the Applicant had not escalated this allegation of theft from her desk at the time which in itself would have been a failing of her management responsibilities. Advocate Langlois referred to page 25, ER1, where the Applicant had sent an email, purportedly seeking to explain that no money was in fact missing as the missing money had been paid by a personal cheque by the customer. Advocate Langlois said that it had subsequently been proved that there was no cheque as the payment had been in cash and a signed copy of the receipt verifying this had been obtained as proof by contacting the customer. Advocate Langlois referenced other examples of alleged misappropriation of money by the Applicant including the inappropriate withholding of social security sickness benefit that was owed to the Peninsula Hotel by the Applicant.

8.0 Witness Testimony: Mrs Tracey Benedito

- 8.1 Mrs Benedito gave witness testimony under oath. Mrs Benedito told the Tribunal that she did not have sufficient time to read and digest the witness statements prior to the disciplinary hearing.
- 8.2 Mrs Benedito said that there had not been anything ‘set in stone’ about tips. Mrs Benedito said that if a tip was given to her there was an understanding that it was hers to keep and that when tips were for staff she had taken £10 or £20 for herself before passing the tips on.
- 8.3 Under cross examination by Advocate Langlois, Mrs Benedito admitted to having a conversation with Alison, the Accounts and Payroll Manager, about the tips policy

for managers but could not remember a similar conversation with Ms Pusilova, the General Manager.

9.0 Witness for the Applicant: Ms Aija Pusilova

9.1 Ms Pusilova, General Manager of the Peninsula Hotel, gave witness testimony under oath. Ms Pusilova read out her witness statement to the Tribunal (EE1 refers). Ms Pusilova's witness statement, included in EE1, was the report written in February 2014 by Ms Pusilova addressed to Advocate John Langlois concerning the outcome of the investigation conducted by her.

9.2 Ms Pusilova said that the Applicant was very aggressive in her first meeting with the independent investigator, Mr Neville Quertier. Ms Pusilova confirmed to the Tribunal that the distribution and handling of tips was a matter of trust prior to the dismissal of the Applicant but that subsequently a reconciliation process control had been introduced.

9.3 Ms Pusilova told the Tribunal that whilst she had been called as a witness for the Applicant, as she had been involved in the investigation into the misappropriation of funds and was part of the management function of the Respondent's business, she had discussed the evidence with Advocate John Langlois immediately prior to the Tribunal. The Tribunal adjourned to consider this matter in the light of Ms Pusilova attending the Tribunal as a witness of the Applicant.

10.0 Closing Statement: Advocate John Langlois

10.1 Advocate Langlois said that he was focussed on ensuring that justice was served at all times. Advocate Langlois said that he had sought to comply entirely with the Law and that he had taken great care to ensure that there was an independent investigation and brought in the Police to ensure that evidence and ultimately the truth were discovered. Advocate Langlois stated that the process followed had been exemplary and in accordance with both the 'spirit' and 'letter' of the Law. He said that the Applicant was 'virtually mute' in the disciplinary hearing. Advocate Langlois said that the Applicant was focussed on small points of ambiguity in her defence before the Tribunal and that he believed that the Applicant had wished to be on suspension and full pay for several months whilst on police bail. Advocate Langlois told the Tribunal that he agreed with the independent investigator that the Applicant was an 'accomplished liar.'

11.0 Closing Statement: Mrs Tracey Benedito

11.1 Mrs Benedito is not legally trained and as she did not have a legal representative, she was permitted by the Tribunal to make her final closing statement last.

11.2 In summary, Mrs Benedito said that she felt that she had been singled out and that her claim was about 'clearing her name.' Mrs Benedito said that she had been punished for something that she had not done and that she did not steal any money.

12.0 Conclusion

12.1 The Tribunal heard considerable oral evidence during the hearing and considered all the written evidence before it, whether specifically referenced in this judgment or not.

- 12.2 The focus on the Tribunal was on the procedures and process followed leading up to and including the disciplinary action that was taken in February 2014 against the Applicant. It was not for the Tribunal to undertake a secondary investigation into the allegations of misappropriation of money. It was for the Respondent to prove that the process followed up until the point of dismissal was fair and that the decision to dismiss was, on the balance of probabilities, within the range of reasonable responses open to an employer.
- 12.3 The Tribunal found the witness testimony of both Ms Pusilova and Advocate Langlois credible. In the view of the Tribunal, the Respondent had made extraordinary efforts to ensure that the investigation that was undertaken into the misappropriation of money at the Peninsula Hotel was independent and fair. Indeed, the Tribunal regarded the investigative process and subsequent disciplinary hearing as highly commendable in terms of the process followed particularly in the light of the Respondent's status as a relatively small employer with limited administrative resources. The Applicant, Mrs Benedito, was given the opportunity to respond fully to the outcome of the investigation and the Tribunal was not persuaded that there had been any delay in providing documents to her that could have been considered detrimental to her preparing for the disciplinary hearing.
- 12.4 The Tribunal did not accept the Applicant's argument that she could not answer any questions because she was on police bail. Indeed, the view of the Tribunal was that the evidence against the Applicant, which was presented to her at the disciplinary hearing, was extremely compelling. Moreover, in the face of such persuasive evidence against her, the Tribunal would have expected the Applicant to repudiate the evidence, at the very least, if she believed that it were untrue. It was simply incongruent to the Tribunal that the Applicant chose not to participate in the disciplinary hearing.
- 12.5 The Tribunal regarded the witness statement of Ms Pusilova, General Manager of the Peninsula Hotel, to be persuasive. Whilst the judgment of the Tribunal does not enable extensive analysis of the details of the internal investigation into the multiple allegations of the misappropriation of money by the Applicant, the Tribunal placed weight on the view of Ms Pusilova that the 'most disturbing' of all was the Applicant's own account of falsifying her reimbursement of social security sickness benefit to her employer during the course of her employment (medical certificate, Page 30, ER1 refers).
- 12.6 Importantly, the Applicant did not succeed in communicating any substantive elements of the process followed, as examples of alleged unfair process. The Tribunal did not find the Applicant to be a credible witness and noted her evasiveness in answering some questions whilst under oath. The Applicant failed to convince the Tribunal that the process followed had been unfair.
- 12.7 Turning to the matter of the discussion that occurred immediately prior to the Tribunal hearing, between Ms Pusilova and Advocate Langlois, in relation to the evidence arising from the investigation, the Tribunal did not regard this as prejudicing the case and indeed it would have been expected in the light of the role of Ms Pusilova, as General Manager of the Peninsula Hotel, in relation to investigating this matter. The discussion took place after the dismissal and therefore had no bearing on the decision to dismiss or the process that was followed leading up to the dismissal.

12.8 The Tribunal was persuaded that the Respondent had a genuine belief that the Applicant committed the offences; that the breach of trust was so great, as evidenced by the comprehensive investigation, that no reasonable employer could continue to employ the Applicant in a position in which not only was her own integrity of paramount importance but in which she was responsible to ensure the integrity of others, in her role as Events and Function Manager.

13.0 Decision

13.1 Having considered all the evidence presented and the representations of both parties (and ET1 and ET2 forms) and having due regard to all the circumstances, the Tribunal found that, under the provisions of The Employment Protection (Guernsey) Law, 1998, the Applicant was not unfairly dismissed.

Ms Helen Martin
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27 October 2014
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Signature of the Chairman

Date