



COMMERCE AND EMPLOYMENT

A STATES OF GUERNSEY GOVERNMENT DEPARTMENT

FORM EMPROT 3

For office use only.

Case No: UD003/04

EMPLOYMENT PROTECTION (GUERNSEY) LAW, 1998 NOTIFICATION OF ADJUDICATOR'S DECISION

On a complaint of unfair dismissal, suffering a detriment for refusing, or proposing to refuse, to work on a Sunday or failure by an employer to provide a written statement of reason(s) for dismissal, this award, (subject to the rights of appeal to the Royal Court, as set out in the Law), is legally binding and is the final decision of the Adjudicator.

Adjudication Hearing held on 13th January 2005

between

Applicant: Mr Philip Edward Hall Respondent: The States of Guernsey Education Council

Adjudicator: Mr David Cotterill

Nature of Dispute: This is a claim for unfair dismissal by Mr Hall against the Education Council arising from a notice of dismissal alleging that there was a lack of appropriate conditions for a successful reintegration of Mr Hall to his post as caretaker at Amherst Primary School and that he was unwilling to accept an alternative post.

Adjudicator's Decision: The Respondent did not act reasonably in dismissing the Applicant in accordance with s. 6(2) (e) of The Employment Protection (Guernsey) Law, 1998.

Amount of Award (if applicable) : £4,347.46

NOTE: Any award made by an Adjudicator may be liable to Income Tax
Any costs relating to the recovery of this award are to be borne by the Employer

Signature of Adjudicator

Mr David Cotterill

Date

27th January 2005

The detailed reasons for the Adjudicator's Decision are available on application to the Secretary to the Adjudicators, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF



EMPLOYMENT PROTECTION (GUERNSEY) LAW, 1998
REASONS FOR ADJUDICATOR'S DECISION

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

1. **Representatives**

- 1.1 Mr Shepherd (Advocate) and Miss Eales for the Applicant
- 1.2 Mr McMahon (Crown Advocate) for the Respondent

2. **Witnesses**

- 2.1 For the Applicant: The Applicant and Mr Derek Neale
- 2.2 For the Respondent: Mr John Lamb

3. **Introduction**

- 3.1 This is a claim by Mr Philip Edward Hall ("the Applicant") against the States of Guernsey Education Council ("the Respondent"). The Applicant claims that on 29th March 2004 the Respondent wrote to him dismissing him retrospectively without any kind of hearing. In its defence the Respondent claims that the dismissal was for "some other substantial reason".
- 3.2 This means it is for the Respondent to show the reason (or principal reason) for the dismissal and that the reason was of a kind such as to justify the dismissal of an employee holding the position which the employee held. If the Respondent shows this then (subject to other provisions which do not apply in this case) 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 the question shall be determined in accordance with equity and the substantial merits of the case (s. 6 The Employment Protection (Guernsey) Law, 1998).
- 3.3 The reasons the Respondent seeks to establish are:
 - 3.3.1 The lack of appropriate conditions for the Applicant's successful re-integration as Caretaker at Amherst Primary School/Longfield Centre.

- 3.3.2 The unwillingness of the Applicant to accept an alternate post within the Education Service. [Letter Director of Education to the Applicant dated 29th March 2004].
- 3.4 It is the Respondent's argument that a management decision was taken in what was regarded as being in the best interests of all the staff concerned and primarily to enable the continued smooth running of both Amherst Primary School and the Longfield Centre.
- 3.5 The Applicant's case in outline is that he worked for the Education Council for 18 years, 16 years of which were spent at the Amherst Schools/Longfield Centre initially as Assistant Caretaker and latterly (nearly 6 years) as Caretaker. It was an unblemished career until about June 2003 when things went wrong. The Applicant was found guilty in disciplinary proceedings of using "threatening and abusive language" towards Mr Marsh, an Assistant Caretaker, "with the intention of intimidating and bullying" him. The penalty was a Final Written Warning. A similar allegation against another Assistant Caretaker, Mr Help, was found unproven.
- 3.6 It was then that other allegations surfaced. Reports were prepared as to the Applicant's unsuitability as a Caretaker. His Appeal against the decision in the disciplinary hearing was never concluded. He was offered other employment which he found unsatisfactory. The issue of re-integration was strung out so long that the chances of a successful re-integration became less and less.
- 3.7 In order to determine the merits of this case it is necessary to delve into the background much of which involves careful consideration of a number of documents.
- 3.8 Before doing so I should mention that at the commencement of the hearing Mr Shepherd took a preliminary point on jurisdiction. This was on the ground that the Applicant had a right of Appeal which extended beyond the duration of the contract of employment. Mr Shepherd reserved his position on this point should the matter be taken to a higher level.
- 3.9 I propose first to review the documentary evidence in chronological order and then review the oral evidence. The documentation represents an almost 100% record of what happened. In what follows I will extract from minutes, letters and other documents what I consider relevant to the issues in this case.

4. Documents

- 4.1 The Applicant tabled three bundles of documents marked EE1, EE2 and EE3. The main body of documents was EE1. EE2 consisted of some work references of the Applicant. EE2 consisted of salary slips.
- 4.2 The Respondent tabled one bundle of documents marked ER1.

5. The Documentary Evidence

- 5.1 On 21st November 1997 the Applicant was offered employment as a Caretaker by the Education Council at Amherst Schools and the Longfield

Centre with effect from 9th December 1997. He had been employed for many years previously as an Assistant Caretaker at the same establishments. The conditions of service are contained in the States of Guernsey Manual Workers' Joint Council handbook. Section 2 was the only section produced in evidence. Sub-section 5.1 provides that continued employment is subject to satisfactory performance and conduct. Five penalties were available for imposition in the event of unsatisfactory performance or conduct:

- 5.1.1 An informal warning – for minor complaints an informal warning will be given to the employee by his or her immediate supervisor.
- 5.1.2 A first written warning - after an informal warning, for subsequent minor complaints a first written warning shall be given by the Head of Department (or other senior nominated officer).
- 5.1.3 Final written warning - for serious complaints and, after a first written warning, for subsequent minor complaints, a final written warning shall be given by the Head of Department (or other senior nominated officer).
- 5.1.4 Dismissal - a Head of Department (or other senior nominated officer) may dismiss either with or without notice an employee where a final written warning has been ineffective.
- 5.1.5 Instant dismissal - an employee may be instantly dismissed for gross misconduct.
- 5.2 Sub-section 5.2 sets out the procedure to be adopted in dealing with disciplinary matters:
 - 5.2.1 At all stages of the disciplinary procedure the following shall be adopted.
 - 5.2.2 The employee shall be informed of his or her right to be represented by a work colleague or a Trades Union Official.
 - 5.2.3 The employee shall be interviewed and told why his or her performance or conduct is considered to be unsatisfactory.
 - 5.2.4 The employee shall be given an adequate opportunity to explain and defend himself or herself.
- 5.3 In addition, at all stages of the disciplinary procedure:
 - 5.3.1 A written record of the interview shall be taken.
 - 5.3.2 All disciplinary action shall be confirmed in writing and, if the employee concurs, a copy sent to the Trades Union Official. The written warning shall state the grounds for the action taken (and in the case of a final written warning specify the implications of any further unsatisfactory performance or conduct in the future) and shall confirm that the employee has a right of appeal. In the case of dismissal, the reasons for dismissal shall be stated.
 - 5.3.3 Suspension With Pay - An employee may be suspended from duty pending a disciplinary hearing, either to enable investigation to be made when the

possibility of dismissal may arise or where there are grounds for doubt as to the suitability of the employee to continue at work for whatever reason.

- 5.3.4 Appeals - If at any time an employee wishes to appeal against any form of disciplinary action taken against him or her, the employee must do so within 10 working days of receipt of the warning, notification of dismissal or advice of any other disciplinary action.
- 5.4 An employee shall have the right of appeal:
 - 5.4.1 In the case of an informal warning, to higher management.
 - 5.4.2 In the case of a formal warning or dismissal, to the employing Committee; whose decision in each case shall be final.
 - 5.4.3 In the event of an employee having been disciplined and not receiving any further disciplinary action for a period of two years from the receipt of a written warning, the written warning shall be removed from the employee's file EXCEPT THAT in special circumstances this period may be extended.
- 5.5 The events that unfolded commence on 12th May 2003 when it is alleged that the Applicant had refused to use a mobile phone to ease communications around the site. The Head Teachers of the Amherst Schools and the Longfield Centre held a meeting on 14th May 2003 to discuss this and a number of other complaints about the Applicant. There were 12 other complaints ranging from clearing up vomit, the allocation of holidays between the Caretakers and the scope of work for the Caretakers. It was alleged that the Applicant refused to do certain things, or he objected to certain things. They appear to me to be matters of conduct and/or performance.
- 5.6 On 12th June 2003 a letter was addressed to the Applicant from the Head Teachers of the Amherst Schools and the Longfield Centre. The letter addresses three matters – overtime, locking up the premises and the use of a mobile phone. The question of overtime had been discussed with the Education Department and the letter concludes: “We hope the enclosed will clarify matters and that we can draw a line under what has been an unfortunate time.”
- 5.7 The enclosure was an overtime schedule. It is not clear over what period of time these complaints were accumulated. However, it appears that the Head Teachers were prepared to put the past in the past. In any event no other action (e.g. disciplinary action under the procedure referred to above) had been taken in respect of these matters.
- 5.8 The scene now moves on to the 16th June 2003 when the events giving rise to the disciplinary hearing occurred. The two Assistant Caretakers each reported in writing to Mrs King at the Education Department that the Applicant had sworn at them that morning for doing overtime. Mr Help phrased his complaint as follows:
 - 5.8.1 “I came to work this morning and Phil Hall called me a ”fxxxing shit head” for doing overtime for the Headteachers of Amherst and Longfield. He also said I was “licking Mr Steer’s boots.

- 5.8.2 I don't feel I should be spoken to like this and feel that unless things change I won't be able to work with Phil anymore.
- 5.8.3 I like working at Amherst and don't really want to leave, but unless things alter I feel I won't have any alternative. I must add that this isn't the first time Phil has pulled me up for doing extra work for the schools."
- 5.9 In his letter the other Assistant Caretaker Mr Marsh stated:
- 5.9.1 "Mr Pat Help and myself another assistant Caretaker at Amherst schools and Longfield have had our final straw at the way we are being treated by Mr Phil Hall... This morning he called as a F---in Sh-- house for going behind his back and doing overtime which is needed around... the site for improvements also for licking the headmasters boots.
- 5.9.2 Mr Steer has given us a list of duties to be done at the three schools, all to be done on overtime. It is Mr Hall's fault if he doesn't want to do any of this.... So therefore it has come to the stage where I will give a weeks notice which I don't really want to do because I just love working on the site or try and be transferred somewhere with Mr Pat Help. I'm so sorry this has come to this but this is the final thing. Do not be surprised if the school loses the cleaners."
- 5.10 On 17th June 2003 a meeting was held between the Applicant, Mr Steer, Mr Clancy (the Union Representative) and Mr Frank Flynn (Assistant Director of Finance, Personnel and Administration of the Respondent). The meeting had been called to discuss the two written complaints. The Applicant denied speaking the words stated in the letters. This has been his consistent stance throughout and up to and including this Tribunal hearing.
- 5.11 Mr Flynn told the Applicant that he would be placed on an immediate precautionary suspension for seven days to enable investigations to be carried out into the complaints. Mr Flynn explained that this was not a disciplinary measure. This was confirmed in a letter of the same date by Mr Flynn to the Applicant. Mr Marsh and Mr Help were also informed of this in writing.
- 5.12 On 18th June 2003 Mr Flynn interviewed Mr Help. They went through the events of 16th June 2003. During the course of the interview Mr Help said: "When we started the overtime that's when the trouble started. Mr Steer did not tell Phil. Phil found out, he said he was losing power."
- 5.13 On the same day Mr Flynn interviewed Mr Marsh who said: "We got on pretty well together. He's a changed man over the last month or so because of other circumstances. He's taking it out on me."
- 5.14 Mr Flynn continued his fact finding mission by interviewing Mr Steer on 23rd June 2003. Mr Steer said that it was Mr Help, who had only recently started as an Assistant Caretaker, who raised the question of overtime. This had led to the letter to the Applicant about overtime. The response, alleged Mr Steer, was that the Applicant was "furious about it." He had requested a meeting to discuss it but the meeting had been put on hold as "this last incident had taken precedence." Mr Steer also felt that the Applicant had

difficulty being managed by a female, namely, Ms. Guilbert of the Longfield Centre.

- 5.15 There then followed another meeting with the Applicant. It was established that the Applicant had been working as Assistant Caretaker, then as Caretaker at the schools for 17 years. Mr Steer had been there even longer. Mr Marsh had been Assistant Caretaker for about 2 years and Mr Help about 2 months. The Applicant said that the relationship between him and Mr Steer had not been good for about the last 18 months to 2 years. The Applicant considered he might have been "over conscientious" and perhaps had not done as he was told. The meeting lasted over 3 ½ hours.
- 5.16 On 26th June 2003 the Applicant was invited by letter to attend a formal disciplinary hearing on 30th June 2003. The scope of the hearing was to be limited to the incidents with Mr Marsh and Mr Help on 16th June 2003.
- 5.17 The procedure to be adopted at the hearing was spelled out in the letter. This included the provisions that (1) if new facts emerged the hearing might be adjourned if it was decided that further investigations were necessary and (2) an Appeal against any disciplinary action must be lodged within 10 days. In the case of a formal warning or dismissal the appeal was to be to the employing committee.
- 5.18 The disciplinary hearing was held on 30th June 2003 and it lasted three hours. No issue exists as to this hearing or its conduct so I will not extract what is covered in the 17 pages of notes save for the following points.
- 5.19 During the hearing Mr Help said that he would: "Ask for a transfer if he [the Applicant] comes back to Amherst and Jamie will do the same – and the two girls. You will lose four staff."
- 5.20 Mr Steer said that in the last two or three years similar things had happened. He was asked if the problems revolved around what orders were given and not who gave them. Mr Steer said, "It was not initially a problem or I did not know there was a problem. I assumed things were fine but subsequently things have been said."
- 5.21 The minutes of the hearing also record the following exchange:-
- 5.21.1 "Mr Flynn directing his comment to Mr Steer said "This is not the first time you have had complaints made against Mr Hall?" He added that, in the interests of natural justice, to give Mr Hall an opportunity to answer the allegations, these should be explored. He asked Mr Steer if these complaints had resulted in the note from the three Headteachers. Mr Steer confirmed that he had received complaints from Mrs Luscombe, Mr Marsh, and subsequently Mr Help and also the cleaners. He added that these members of staff had asked him not to bring up the issues in the past. He had also received complaints from members of staff about the way Mr Hall had spoken to them."
- 5.22 The Applicant stated that he had worked with one cleaner for six or seven years and he had worked with the other for over 10 years. He said, "If they were unhappy, it was hard to believe."

- 5.23 Mr Help is recorded as saying that Mr Steer should have told Mr Hall that we were doing overtime. He said there was a good relationship between the Caretaker and the Assistant Caretakers until the overtime business started.
- 5.24 In his evidence Mr Steer was asked if there was often conflict with such issues arising, for example, line management, reporting procedures or chain of command. Mr Steer said that these incidents were "very rare; they did not happen very often."
- 5.25 It was noted that Mr Steer would be retiring at the end of the term as was the case with Mrs Steer.
- 5.26 On 1st July 2003 the Applicant was informed by Mr Flynn that the allegations by Mr Marsh were accepted but those by Mr Help were unproven. The decision was to issue a Final Written Warning.
- 5.27 Mr Flynn then added, "The issue for the Council is whether or not the relationship has been irreparably damaged... If, in our opinion, we believe it is not possible to establish appropriate working relationships, it may result in your transfer to another post..."
- 5.28 The Applicant's suspension was continued not as part of the disciplinary process but so as to allow the work required in re-establishing relationships to take place.
- 5.29 This decision was confirmed in writing on 1st July 2003 and the Final Written Warning was itself issued on 9th July 2003.
- 5.30 On 3rd July 2003 a meeting was held attended by Mr Marsh, Mr Help, Mr Steer, Mrs Steer, Mrs Guilbert, Mr Du Port and others for the Respondent to discuss how "they" could move on. The general attitude was that "they" would feel uncomfortable if the Applicant returned to work. Mr Marsh insisted that he, Mr Help and the cleaners would leave.
- 5.31 On 8th July 2003 Mr Flynn contacted Mr Steer and advised him of the "need to prepare a report on the other allegations... The existing report could be used as the basis of the report, but, given that all the heads were saying that Mr Hall should not be allowed to return, more evidence of acts of a serious nature needed to be produced than was currently the case. Mr Steer agreed that the next stage would be a hearing of the so far unheard allegations..."
- 5.32 On 8th July 2003 Mr Flynn wrote to Mr Lamb with an overview of the current situation. I set out the contents of that memorandum:
- 5.32.1 "In any investigation or disciplinary interview, the rules of 'natural justice' must be followed. This means that:
- 5.32.2 The employer must act in good faith.
- 5.32.3 Employees should know the allegations against them.

- 5.32.4 Employees should know the evidence against them so they can prepare their defence properly.
- 5.32.5 Employees should be given a fair hearing, with an opportunity to state their case, explain their conduct and/or offer evidence in mitigation.
- 5.33 Mr Hall has been dealt with in accordance with the above principles in relation to the allegations of his use of foul and abusive language on Monday, 16th June 2003.
- 5.34 Both complainants during the hearing said they could work with Mr Hall again and both refused to affirm when questioned that Mr Hall was a bully.
- 5.35 Mr Hall when questioned about the possibility of re-establishing effective working relationships confirmed that he could work again with Mr Help, but that he did not feel he could work again with Mr Marsh.
- 5.36 In a meeting attended by the three headteachers, the complainants and Mrs K. Brown and Mr P. Duport (TGWU representative) on Thursday, 3rd July, the heads and the two Assistant Caretakers expressed the view that they did not want Mr Hall back. The reasons for not wanting Mr Hall back related to incidents which occurred in the past, but for which, seemingly, no formal action had been taken. This is contrary to the requirement to establish a genuine belief on reasonable grounds after reasonable investigation. There does not appear to have been an investigation into these matters, nor the opportunity for Mr Hall to give his side of the story. Where I think this leaves us is:
- 5.36.1 If Mr Hall were reinstated, the Assistant Caretakers might resign (as previously stated) and there could be grounds for constructive dismissal: previous claims of bullying and intimidation appear not to have been dealt with formally by line management;
- 5.36.2 If Mr Hall is not re-instated he will appeal that the penalty is unduly harsh for one offence given his long-service record.
- 5.37 My own view is that a Final Written Warning was probably the right decision in this case. Moving Mr Hall could be construed as punishing him twice for the same offence.
- 5.38 The current apparent impasse can only be moved forward by moving into the next hearing referred to in the initial hearing. The Headteachers and Assistant Caretakers (and other personnel, if appropriate) will need to demonstrate why it is they cannot work with Mr Hall. The three headteachers, in particular, will have to show how their trust in Mr Hall has irrevocably broken down.
- 5.39 Actions Required:
- 5.40 The three heads need to put together the evidence in a formal report ready for the hearing. The hearing will be held in September, given that the summer break is now upon us.”

- 5.41 The position of the Respondent stated in the above memorandum is reinforced by the handwritten note of Mr Derek Neale, the Director of Education, attached to a memo to him dated 14th July 2003 from Mr Flynn, which reads:-
- 5.41.1 *"Frank,
The role of a relief Caretaker is potentially more fraught than Mr Hall's current post. He will be unsure of his duties and answerable to other Caretakers. A transfer to this role could also be seen as a disciplinary act without due consideration being given to the facts.
On the other hand, the heads have a right to expect their employer to treat their views seriously. If they say there is a fundamental breakdown in trust, I do not see how we can do anything but go to another hearing. A transfer to being a relief Caretaker is an option that should only be considered following the next hearing. If he were to refuse our offer, we could be left with constructive dismissal being claimed anyway. Therefore, I do not see how we can do anything but continue the suspension.
Derek"*
- 5.42 The situation was emphasised in a letter from Mr Flynn to Mr Steer on 14th July 2003 the relevant part of which reads:
- 5.42.1 "I confirm, therefore, that I require a written report, either a consolidated report, or one from each head, concerning the reasons why it is not felt possible that Mr Hall could resume his duties. Any statements you make will be shared with Mr Hall and I expect that the matter may well have to be resolved through a further formal disciplinary hearing, since Mr Hall has stated his unwillingness to transfer. To do this you may wish to build upon your notes of 11th June 2003, which have still to be addressed. I would remind you that Mr Hall is currently suspended from duty which is a course of action normally taken when gross misconduct could be involved and the prospect of dismissal a possibility. It is, therefore, particularly vital that I know from you and the other heads what it is that Mr Hall has done that effectively means that his contract is repudiated. It is for the employer to say whether he accepts the employee's breach as doing so and whether to allow the contract to continue."
- 5.43 I would interject in the chronology to say that Mr Flynn, who is supposed to be trying to re-integrate the Applicant, consistently asks for more ammunition to demonstrate misconduct or inability to re-integrate, rather than seeking a balanced view or even asking for any favourable points. It is also noteworthy that Mr Flynn is also considering dismissal.
- 5.44 Again, at a meeting on 15th July 2003 between the Applicant, Mr Flynn and others it was recorded that Mr Flynn: "confirmed that the only other alternative was for Mr Hall's suspension to continue with a further Disciplinary Hearing hanging over him."
- 5.45 The Applicant was adamant that an alternative post within the Education Council was unacceptable.
- 5.46 At that meeting Mr Flynn said that:-

- 5.46.1 “the Headteachers regarded the other issues to be serious matters and they considered that they had a bearing on the fundamental way in which Mr Hall carried out his duties as Caretaker. Mr Flynn clarified that if the Headteachers' report showed that there were no issues to answer they would be told that there was no substance to the content of their complaint. However, Mr Flynn added that this would not solve the problem and the Education Council would not discount the idea of moving all three caretaking staff from Amherst.”; and
- 5.46.2 “... it was vital that the Headteachers reported exactly why they did not want Mr Hall back. Again he said that he did not know what the remedy would be for the Education Council. Whatever happened, Mr Hall would have the right of appeal. He continued to be of the mind that to move Mr Hall would be the only option. If Mr Hall did appeal however, the Council would insist that the all issues be taken into consideration.”
- 5.47 At this meeting Mr Flynn agreed an extension of time to appeal against the whole judgment, that is, including any further hearing which might be held.
- 5.48 A joint report was submitted from Mr and Mrs Steer on 11th September 2003. The report repeats most of the allegations already made but it adds some new material. It is a fair characterisation of the report that it relates to the Applicant's performance and conduct. All of the allegations bar two, were undated. In addition a report of a conversation with the Applicant in September 2001 was produced and a report from Mrs Guilbert. Mrs Gilbert's overall view was that if there was a major change in the Applicant's attitude and a faster response time to requests for assistance she could work with him.
- 5.49 The Applicant was invited to respond to the allegations which he did by way of notes and a letter. The notes are undated but the letter is dated 24th September 2004 which may have been a typographical error for 2003.
- 5.50 Mrs Guilbert then wrote to Mr Flynn on 10th October 2003 to say that she had read the Applicant's letter but was concerned that her report, which she said had been typed by Mr Steer contained changes of which she did not approve.
- 5.51 Meanwhile on 3rd October 2003 Mr Flynn was able at a meeting to inform the Applicant that he had examined the latest reports carefully and had concluded that he would not proceed with formal disciplinary action. He acknowledged that it was a difficult situation and that he was anxious to resolve the matter as soon as possible. He went on to say in the record of that meeting:
- 5.51.1 “He could only conclude that there had been a breakdown in the trust and confidence necessary to the working relationship with the two Assistant Caretakers and the one remaining Headteacher. He concluded that the most appropriate solution would be for Mr Hall to be moved to an alternative position within the Education Council's service.
- 5.52 Mr Flynn explained that at the present time there were no vacancies for

Caretaking posts, only five Assistant Caretaking posts. He continued by clarifying with Mr Hall that his own personal service, pay and conditions would be protected with any move. Should a vacancy for a Caretaker be available in the future, Mr Hall would be considered for such a post.”

- 5.53 The Applicant asked why he could not return to Amherst. Mr Flynn replied that the two Assistant Caretakers and one Head Teacher were against it.
- 5.54 I would interject into the chronology at this point that, on the evidence before me, the last recorded opinion of Mrs Guilbert was that she could work with the Applicant if he changed his attitude. The last views of the Assistant Caretakers was at the disciplinary hearing where it was recorded that they could work with the Applicant.
- 5.55 The alternative posts offered to the Applicant were all Assistant Caretaker positions at various educational establishments around the island.
- 5.56 Mr Lamb then wrote to the Applicant on 14th October 2003 to ask him let him (Mr Lamb) know about the alternative posts by 17th October 2003 failing which it would be concluded that he was not willing to accept a transfer and, since he would not then be willing to make himself available for work, his salary would cease on 18th October 2003.
- 5.57 Mr Lamb went on to state in the letter: “...please confirm in writing that you wish to appeal against the Final Written Warning, advising us of the reasons for your appeal. Following the conclusion of the Appeal Process against the Final Written Warning issued to you a final decision will then be made with regard to your future employment with the Education Council.”
- 5.58 On 16th October 2003 the applicant wrote to Mr Neale notifying him that he wished to appeal and stating the grounds.
- 5.59 Preparations for the Appeal Hearing were made and on 10th November 2003 the Panel duly convened. It is not clear to me who was to represent the Respondent at the Appeal.
- 5.60 The Panel members met Mrs Rhyde (the Respondent’s adviser to the Panel), Mr Lamb (Personnel Manager) and Mrs Brown (Assistant Personnel Manager) to discuss the options open to them as an Appeal Panel. It was the view of the Panel that “they could not hear this one incident in isolation and, in relation to the “background issues” they could not hear a case for which there had not been any disciplinary action...”
- 5.61 Mrs Rhyde, Mr Lamb and Mrs Brown went outside to see the Applicant, Mr Du Port (Trade Union Representative) and Mr Clancy (Shop Steward of the TGWU). The latter confirmed that they were not interested in the “other allegations”, the issue at this hearing was the disciplinary hearing and the two actions taken as a result, namely, the Final Written Warning and the transfer. The Applicant said he understood the need to transfer staff in circumstances such as staff shortages and other similar situations but in this case the transfer was related to the disciplinary action.

- 5.62 The Applicant stated that he was prepared to abandon his appeal if he was not required to transfer to an alternative post. He maintained this innocence but noted that the charge would be removed from his record after two years.
- 5.63 Mrs Rhyde, Mr Lamb and Mrs Brown then returned to the Appeal Panel and further discussions ensued. Then Mrs Rhyde, Mr Lamb and Mrs Brown returned to speak to the Applicant, Mr Du Port and Mr Clancy.
- 5.64 They discussed how to implement the Applicant's return to work. It appears that Mrs Moore the new Head Teacher (at Amherst) was prepared to take the Applicant back. [Mrs Guilbert was too, as previously mentioned.] Mr Marsh and Mr Help were now saying they could work with him too. The Applicant acknowledged that he would be closely monitored and he would be under a Final Written Warning. Mr Lamb pointed out that it would be necessary for the Union to assist with any problems and the "fall back" position would be to seek the assistance of the Board of Industry.
- 5.65 With that the parties then joined the Appeal Panel. Mr Lamb said that (a) the Applicant would not be proceeding with the Appeal (b) the Union Representative would contact Mr Marsh and Mr Help to ascertain if they would work with the Applicant and (c) he and Mrs Rhyde would contact Mrs Guilbert and Mrs Moore to obtain their opinion as to whether the Applicant's return would be workable and as to the monitoring procedures (d) if agreements were secured, the Applicant would return to Amherst having accepted the Final Written Warning (e) if no agreement were secured the assistance of the Board of Industry would be sought.
- 5.66 The Appeal Panel accepted this noting that there had been a portion of fault on all sides.
- 5.67 The Appeal Panel's "decision" was not formalised. Only the notes made at the time record what happened. There was no letter to the Respondent setting out their understanding of the result.
- 5.68 The next recorded event was over a month later. It is a letter from Mr Du Port to Mr Lamb dated 15th December 2003 stating that the Applicant wished to pursue the Appeal which had only been suspended at the hearing on 10th November 2003. The reason was that the interview with staff had not been positive and the Education Council were not prepared to let the Applicant return to Amherst.
- 5.69 Mr Lamb had had a meeting with the Applicant on 15th December 2003 and on 17th December 2003 he wrote to the Applicant confirming that both Head Teachers had agreed to the Applicant's conditional return. The positions of Mr Marsh and Mr Help on the question of the return to work were not referred to. However the six members of the cleaning staff had now also been consulted and five of them said they did not wish to see the Applicant return. This was based on alleged intimidating behaviour in the past – none of which appears to have been reported let alone investigated at the time. Four of the five cleaners said they would resign or seek transfers if the Applicant returned.

- 5.70 That anyone other than the Head Teachers and the two Assistant Caretakers would be consulted was clearly not part of the arrangements made at the Appeal Hearing.
- 5.71 Mr Lamb, in the letter, classified "the decision" which had now been finally made that the Applicant "would not return" as a management decision. He offered the Applicant a post as Caretaker at the Education Department offices.
- 5.72 Both Mr Du Port and the Applicant wrote objecting (on 18th and 23rd December 2003 respectively) insisting that the Appeal be resumed.
- 5.73 There is then silence until 10th February 2004 when Mrs Rhyde wrote to the Applicant acknowledging his letter of 23d December 2003 and stating that the Respondent's position remained unchanged. She invited the Applicant to respond to the offer of alternative employment in seven days failing which he would be dismissed.
- 5.74 Mr Du Port replied on 12th February 2004 re-iterating the Applicant's position and stating that the Applicant could not accept the offer of alternative employment due to transport problems.
- 5.75 On 1st March 2004 Mr Lamb wrote to the Applicant. He appeared to accept the Applicant's reason for not accepting alternative employment at the Education Department and offered him instead a position as Assistant Caretaker at another school. The Applicant would suffer no loss of salary or other rights.
- 5.76 I would comment here that this was not a definite offer.
- 5.77 On 5th March 2004 Mr Beynon of the TGWU wrote to Mr Lamb re-iterating the Applicant's position and noting that the new job offer was a demotion. He asked for the Appeal to be resumed as soon as possible.
- 5.78 On 29th March 2004 Mr Neale wrote to the Applicant terminating his employment on 8 weeks' notice expiring on 3rd May 2004.
- 5.79 Emprot 1 is dated 7th April 2004. On 27th April 2004 Mr Lamb wrote to the Board of Industry to say the he was not completing section 3 of Emprot 2 (which asks the Respondent to state if it is resisting the Application to the Tribunal) because "Mr Hall's complaint of unfair dismissal will be put on hold pending the outcome of his Dismissal Appeal Hearing."
- 5.80 As I understand this last comment, it appears that it was intended to resume the Appeal. Whatever the merits of the argument raised by Mr Shepherd as to the right to appeal after the termination of the contract, in this particular instance the contract of employment still had about six days to run. Nothing further was heard of the Appeal.
- 5.81 When challenged later in the year by Mr Shepherd to fix a date for the Appeal, Mr Lamb replied on 16th December 2004: "...as Mr Hall's contract with the Education Department was terminated in March 2004, his contractual right to exercise a right of appeal ended at the time..."

- 5.82 Mr Shepherd's view is that the Applicant's rights have not been exhausted. Whatever the outcome of that argument, it is clear that Mr Lamb was incorrect. The earliest date the Applicant's rights could have ended was 3rd May 2004.

6. **The Oral Evidence**

6.1 **Applicant's Evidence**

- 6.2 The Applicant gave evidence and related his story essentially from the documents. In cross-examination of the Applicant, Mr McMahon asked if a transfer was disciplinary, pointing out that it is not in the list of disciplinary penalties, and whether it was, therefore, managerial. The Applicant agreed with this.

- 6.3 Mr McMahon asked the Applicant why he could not accept that the transfer was not punitive. The Applicant replied that it all started with Mr Steer being vindictive and that even Mr Flynn did not think he needed to move.

7. **Respondent's Evidence**

7.1 **Mr Neale**

- 7.2 Mr Neale gave evidence. He clarified that the two Amherst schools were joined in September 2003 with one head teacher. He said the situation with the Applicant moved from being a disciplinary situation to a situation not just consequent on that but on other matters as well, if Mr Hall had returned before investigating those other matters.

- 7.3 He was asked in his evidence in chief whether, if further investigations were started but not pursued because there were no grounds, how that would not be disciplinary. He replied that there was a need to consider further disciplinary action and whether we, as managers of the school, could be comfortable that the school could work in proper fashion.

- 7.4 He said the suspension was a neutral situation but it could be difficult for a person if left suspended. He considered a transfer wrong at the time because if pushed into accepting another post the Applicant could say that his claim of not working in the old school had not been considered or determined.

- 7.5 Mr Neale said that he had been told by those in the department that the eventual termination was the end of the line. He found it difficult to say if the termination was done the right way as he had not been involved in the meetings and he had had to rely on others in whom he had faith. He said the Applicant appeared only to want to return to Amherst. It was an intractable position. His line manager was opposed to his return as well as the two Assistant Caretakers and five cleaners. Without them the school's operations would be jeopardised.

8. Mr Lamb

- 8.1 The only witness for the Respondent was Mr Lamb. He said he had first become involved as advisor to Mr Flynn at the disciplinary hearing. After the decision to issue the Final Written Warning he ceased to be involved. He had spoken to the Applicant a couple of times. He was present at the Appeal Hearing as adviser.
- 8.2 He said it is difficult to come to terms with the Applicant's willingness to accept the Final Written Warning since he was claiming he was innocent.
- 8.3 After the Appeal Hearing he visited the school. He spoke with Mrs Moore who said there were issues with the cleaners. He had not been aware of this beforehand. He spoke to five cleaners and four said they would be "very unhappy" if the Applicant returned. Mrs Moore said she would do all she could to make it work. She agreed to oversee the integration. Mrs Guilbert also eventually said yes though reluctantly.
- 8.4 Mr Lamb said that to put the Applicant back was likely to lead to five people seeking re-employment or terminating. They had confirmed this in writing.
- 8.5 I would comment here that no such documents have been adduced in evidence.
- 8.6 Mr Lamb went on to say that another dimension was whether it was responsible as manager if we felt it was basically doomed to failure. He felt that by March 2004 all that was reasonable in finding alternative employment had been exhausted and there was no alternative but to dismiss. He said that the decision was not disciplinary or due to culpability but solely managerial. "We were responsible for ensuring a smooth service, not having pupils' education hindered."
- 8.7 In cross-examination Mr Lamb conceded that the Final Written Warning and the transfer could be construed as a double punishment. He agreed that Mr Steer's report, which had not been investigated, escalated the situation. He agreed that the report referred to in Mrs Guilbert's letter of 10th October 2003 appeared to have been "sexed up." He said that Mr Steer's last involvement had been the report.
- 8.8 He was asked by Mr Shepherd if it might have been better to accept the Applicant's offer to withdraw for three weeks until Mr Steer had retired. Mr Lamb replied: "Maybe... the situation changed after the Appeal, after Mr Du Port's visit and after the cleaners expressed their concerns."
- 8.9 Mr Lamb was referred to the scope of the Appeal and was asked by Mr Shepherd if he (Mr Lamb) ever said it was a "single issue". This was in the context of the Appeal being against all the disciplinary steps taken. He replied that he believed he did and that he was cautious about whether he agreed or disagreed.
- 8.10 Mr Shepherd asked Mr Lamb whether he had ever accepted something he did not like. Mr Lamb agreed and Mr Shepherd asked if the Applicant was

prepared to accept the Final Written Warning reluctantly provided he was not required to transfer. Mr Lamb agreed.

- 8.11 Mr Shepherd asked if that was the deal. Mr Lamb agreed.
- 8.12 Mr Shepherd asked Mr Lamb:
 - 8.12.1 "If forced to transfer, he would appeal against the Final Written Warning?"
Answer: "Yes."
 - 8.12.2 "In line with the agreement on 10th November 2003 [if re-integration failed] he could then proceed with the Appeal. Answer: "Yes."
- 8.13 Mr Lamb said that it had been agreed that we would talk to the Board of Industry. They were consulted and feedback was received from them together with further legal guidance. It was suggested that the key issue was the Applicant's wish to return to school. Even if the Appeal had taken place it would not have addressed this key issue. "Why bring together an Appeal Panel that would not address this issue?" Mr Lamb asked. It was the Applicant who wanted this dealt with. The dismissal was not on the basis of the Final Written Warning but on the failure to re-integrate.
- 8.14 Mr Shepherd put it to Mr Lamb that the Applicant's ability to re-integrate had been blocked by allegations to which he had had no opportunity to respond. Mr Lamb agreed but said that these allegations had been put to him. There was a body of evidence over a considerable period which generated considerable concern about his return. Mr Lamb went on to say, "If we had asked him he would probably have denied it. If we had put him back and the allegations were true, it would be a breach of duty of care to our other employees."

9. Submissions

- 9.1 In his closing statement Mr Shepherd referred to procedural errors but his main point was that it was only on 16th December 2004 that the Respondent acknowledged there would be no appeal. Until that date all parties had accepted there was a right of appeal. That right had now been denied.
- 9.2 Mr McMahon in his closing address said the reason for dismissal was spelled out in the dismissal letter. Clashes of personality so that different employees find it difficult to work together is recognized by the English Courts as "some other substantial reason." All proper procedures had been followed. What does a reasonable employer do? Lift the suspension and return an unwelcome employee?
- 9.3 It was not a disciplinary matter but a management problem. It could have happened without the disciplinary problems. A reasonable employer has to balance the outcome. Three offers of alternative employment. Each would have preserved the Applicant's position. None were accepted. What more could they do?
- 9.4 As a final matter, since there was disagreement in the Emprotts 1 and 2 over the Applicant's gross wages, Mr Shepherd produced a bundle of wage slips

and stated that the Applicant's gross earnings for the last 13 weeks were £4,347. 46. The Respondent accepted the figure.

10. Findings

10.1 In this case the Respondent accepts that it must satisfy me:

10.1.1 as to the reason for dismissal.

10.1.2 that the reason for dismissal falls within the provisions of section 6 (2) (e) namely "some other substantial reason";

10.1.3 that it acted reasonably in dismissing the Applicant, which question has to be determined in accordance with equity and the substantial merits of the case.

10.2 The Applicant was dismissed for two reasons, the first being the lack of appropriate conditions for a successful re-integration into his post as Caretaker at Amherst Primary school and secondly, unwillingness to accept an alternative post within the Education Service.

10.3 I will deal with two above first, that is, the Applicant's unwillingness to accept an alternative post. The Applicant was employed as a Caretaker at Amherst schools and the Longfield Centre. No evidence was adduced to the effect that the Applicant could be transferred elsewhere without his agreement. Accordingly, a transfer could not be imposed and he was within his rights to refuse a transfer. This was, therefore, not a valid or proper reason to dismiss and, therefore, it cannot justifiably be "some other substantial reason" for dismissal.

10.4 With regard to reason one the lack of appropriate conditions for successful re-integration, this is a potentially fair reason for dismissal since an issue over re-integration into a school where complaints by fellow employees have been made must be within the band of reasonable responses. However, I must consider whether the Respondent acted reasonably in dismissing for this reason in this particular case and, in doing so, I have to consider the equity and substantial merits of the case for dismissal.

10.5 I am not satisfied that the Respondent had a reasonable belief in the integration argument as a reason for dismissal and I do not accept that they acted reasonably in dismissing for this reason. My reasons are as follows:

10.5.1 At the time that the complaints of Mr Marsh and Mr Help were being investigated, Mr Steer made known to Mr Flynn that there were complaints by other staff members (the "other issues") which had relevance to the alleged incidents [page 2 of the Notes of the meeting held with Mr Steer on 23rd June 2003]. Mr Flynn felt he should explore these during his investigations. At the disciplinary hearing Mr Steer raised again the question of the other issues. In due course Mr Flynn decided that they would not be the subject of disciplinary proceedings. The Respondent says the dismissal could have happened without their being disciplinary problems. I do not agree with this. The question of re-integration in this instance was squarely based upon these other issues which were disciplinary problems. Furthermore in his evidence Mr Lamb agreed that the question of re-integration had been

“blocked” by these other issues. The Applicant’s right to answer the other issues was held out to him until Mr Flynn quashed it. Mr Flynn was also rightly concerned that, in these circumstances, the Respondent would not be able to establish a genuine belief on reasonable grounds. [Memo from Mr Flynn to Mr Lamb dated 8th July 2003.] It is unfair and contrary to the substantial merits of the case to hold no investigation and no hearing and then use the same unfounded allegations against the Applicant as the basis for the integration argument.

- 10.5.2 The question of re-integration, if it arises, should be considered before the penalty is decided. After all, if the decision is in favour of a warning of some sort, it follows that the employer wishes to retain the services of the employee. If the question of re-integration involves considering other complaints it is even more important to consider them in order to determine the proper penalty. If it is determined that there is an irremediable breakdown once the other complaints have been investigated and considered this must be relevant to the penalty and an integral part of the hearing. Indeed this is contemplated in the Board of Industry Code of Practice on Disciplinary Practice and Procedures in Employment. Checklist item seven states that “if any new facts emerge decide whether further investigation is required: if it is, adjourn the interview and reconvene when the investigation is completed”.
- 10.5.3 If the employer fails to take steps to try to improve the relationship this is unfair. In this particular instance the attitude taken by the Respondent with regard to the other issues and the question of re-integration seems to have been one which only fanned the flames of discontent and possible prejudice. There were no attempts to build or re-build trust. As Mr Lamb said: “If we had put him back and the allegations were true, it would be a breach of our duty of care to our other employees.” I do not accept that this is a fair analysis. Mr Lamb was of the view that the determination of the truth of the other issues was of critical importance. Mr Neale also accepted that these issues (which formed the basis of an alleged “fundamental breakdown in trust”) should go to “another hearing”. What is more, the staff were encouraged to find faults so as to justify the Respondent in being able to hold the Applicant in repudiation of his contract of employment and dismiss him for that reason. [Memo of a telephone conversation on 8th July between Mr Flynn and Mr Steer and a letter from Mr Flynn to Mr Steer dated 14th July 2003].
- 10.5.4 The relevance of investigating the other issues and holding a disciplinary hearing is plain. If determined in the Applicant’s favour then the re-integration issue required serious re-examination since it could very well be the case that the objections to the Applicant’s return had been false, mistaken, unreasonable or even motivated by blind prejudice. The Respondent could not reasonably conclude that a breakdown in relations was irremediable until (a) those other issues were dealt with and (b) positive steps had been taken to alleviate the situation.
- 10.5.5 It is clear both parties accepted that the Appeal on 10th November 2003 had been “suspended”. There was no reason why it should not have resumed and been determined prior to the termination of the Applicant’s employment. It was not the sole choice of the Applicant whether the Appeal was concluded one way or the other. The Respondent must also have been entitled to

finality. If the Appeal had been successful, and given that the other issues were not investigated, the Respondent would have been left with no credible, reliable or reasonably well-established re-integration issues.

- 10.5.6 Once the decision had been made not to hold a disciplinary hearing on the other issues and, as time passed, it became increasingly difficult for the Respondent to justify the Applicant's to return to work and so the other issues, which formed the basis of the re-integration argument, were transformed into a so-called management decision.
- 10.5.7 The Respondent says there was nothing more it could do. It is, however, for the Respondent to prove that there were no steps which a reasonable employer could have reasonably taken to avoid the difficulties and/or consequences of re-integration, so that dismissal was a reasonable course. Re-integration however is a process. The Respondent disregarded the favourable aspects of the re-integration process (which were major considerations), namely, the effect of the Final Written Warning, the agreement of the Head Teachers to help and the monitoring, in favour of some doubtful aspects, namely, the attitude of the cleaners if the Applicant in fact reformed. To allow this view to prevail is submitting to blind prejudice. In any event there were reasonable steps the Respondent as a reasonable employer could have taken as an alternative to dismissal. All have been mooted in the documents:
- 10.5.7.1 The Applicant might have returned in the summer holiday after Mr Steer had retired. Mr Lamb accepted that this might have been an appropriate step.
- 10.5.7.2 One or more of the Assistant Caretakers might have been moved if the situation warranted it [this might equally have applied to the cleaners].
- 10.5.7.3 The re-integration process offered by Mrs Moore and Mrs Guilbert might have been put into practice and the situation reviewed from time to time.
- 10.5.7.3 If the Applicant's attitude did not change the question of dismissal could still be considered.

11. Decision

- 11.1 I find that the Respondent did not act reasonably in dismissing the Applicant in accordance with s. 6(2) (e) of The Employment Protection (Guernsey) Law, 1998. I award the Applicant the sum of £4,347.46 which is the amount permitted under section 20.

Signature of Adjudicator: Mr David Cotterill

Date:

27th January 2005