



COMMERCE AND EMPLOYMENT

A STATES OF GUERNSEY GOVERNMENT DEPARTMENT

FORM EMPROT 3

For office use only.
Case No: UD45/04

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 4th March 2005

between

Applicant: Miss Teresa Ann Hanley and **Respondent:** Offshore Electronics Limited

Adjudicator: Mr David O Le Conte

Nature of Dispute: Miss Hanley was summarily dismissed by Offshore Electronics, on grounds of gross misconduct. She claimed unfair dismissal on the grounds that she denied the misconduct, and that Offshore Electronics had not followed an appropriate disciplinary procedure.

Adjudicator's Decision: I find that Miss Hanley was unfairly dismissed, on the grounds that the disciplinary procedures carried out by the Offshore Electronics were deficient, in that it did not sufficiently inform her of the contents of the allegation against her, did not carry out adequate investigation, did not inform her of the fact or nature of a disciplinary interview, did not make any provision for her to be accompanied at that interview, and did not provide for any appeal.

Amount of Award (if applicable): £6,804.52

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 O Le Conte

Date: 17/03/05

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 The claim

- 1.1 Miss Teresa Ann Hanley claimed that she had been unfairly dismissed by Offshore Electronics Limited ("the Company"), on the grounds that she had been summarily dismissed following allegations of gross misconduct, which she denied, the Company not having not having carried out due disciplinary procedures.
- 1.2 The Company denied the claim, on the grounds that it had adequate grounds for dismissal, following investigations, and that Miss Hanley had been given ample opportunity to refute the allegations.

2 Representatives

- 2.1 Miss Hanley was represented by Advocate C Green.
- 2.2 Offshore Electronics Limited was represented by Advocate C Edwards.

3 Witnesses

- 3.1 For the Applicant
Miss Teresa Ann Hanley.
- 3.2 For the Respondent
Mr S Marshall, Managing Director.

4 Documents

- 4.1 The Applicant tabled a bundle of 4 documents, marked EE1 to EE4.
- 4.2 The Respondent tabled a bundle of 6 documents, marked ER1 to ER6.

5 Preliminary consideration

- 5.1 Prior to the start of the hearing Advocate Edwards, on behalf of Offshore Electronics, requested that I give consideration to holding part of the hearing in camera, and without Miss Hanley present, in order to accommodate two witnesses for the Company who were only prepared to give evidence if she was not present. Advocate Green, for Miss Hanley, contended that the whole of the hearing should be held in public.
- 5.2 Having heard the arguments of both Advocates in private, and after due consideration, I re-opened the proceedings in public, and advised that I had given due consideration to Advocate Edwards's request, but had decided not to accede to it, having taken into account section 1.(1)(c) and noted section 1.(1)(m) of the Schedule.

6 Findings of fact

- 6.1 Miss Hanley had been employed as a charge hand by the Company since 1990, having started employment with its predecessor, Eurotherm, in 1985. On Friday, 12 November 2004 she was called, without notice, into a meeting with four directors of the Company, and another employee, hereinafter referred to as "Employee B", and confronted with the allegation that she had, the previous day, supplied illicit drugs to that employee for money, on Company premises. Both employees denied the allegation, and were suspended, with pay, until Monday, 15 November 2004, when both were dismissed on the grounds of gross misconduct.

7 Submissions

7.1 Witnesses

- 7.1.1 Mr Marshall, having been placed on oath, said that he had been Managing Director of the Company for 15 years. The Company, which had just under 70 employees, assembled electronic equipment for clients worldwide, importing components, and exporting the finished products.
- 7.1.2 On Thursday, 11 November 2004, after 4.00 p.m, an employee came to him, "quite distressed", and alleged that she had seen Miss Hanley give a small black bag belonging to the company to Employee B, who had given Miss Hanley cash. The employee making the allegation said that Employee B had put the bag in her handbag, and that she (the employee making the allegation) had inspected it while wearing surgical gloves, seeing what she believed to be a package of cannabis resin. Mr Marshall asked her to hold onto the gloves for further inspection. He found her very credible.

- 7.1.3 On the morning of the following day, Friday, 12 November 2004, he met with other directors who were present, and interviewed the employee who had made the allegation. He was very concerned about the allegation, especially given the nature of the business, which involved import and export. Miss Hanley had a responsible position in the Company, and was a valued employee. He sought advice from the Industrial Relations section of the Commerce and Employment Department about how to proceed in the matter, and followed the advice to act very carefully, give the two accused employees the opportunity to state their case, and give them the benefit of the doubt.
- 7.1.4 He interviewed both Miss Hanley and Employee B at the same time, and with three other Company directors present. At the interview he advised them (Miss Hanley and Employee B) of a serious allegation of transferring drugs for cash, and asked them to admit or deny it. They denied it completely. He asked them to give a credible explanation, but they did not do so.
- 7.1.5 The meeting had been tape recorded, and a transcript made (ER5). No reference had been made to those who had made the allegation, who wished to remain anonymous because they were terrified of physical reprisals. He told Miss Hanley and Employee B that the Police and sniffer dogs would probably be involved.
- 7.1.6 Both employees were suspended with pay, and escorted from the premises, but whilst being escorted Miss Hanley ran away.
- 7.1.7 The Police came with a sniffer dog that afternoon, and conducted a sweep of the premises. While no drugs were found, they found evidence of drugs in the cloakroom, in the incoming goods area (both areas to which all staff had access), and on the gloves used by the employee making the allegation.
- 7.1.8 On Monday, 15 November 2004 he again obtained advice from the Commerce and Employment Department. He first interviewed Employee B and then Miss Hanley. He informed her that the allegation had been substantiated, without telling her of the details of the police investigation. Her denials lacked credibility. He dismissed both Employee B and Miss Hanley.
- 7.1.9 Mr Marshall said that the decision to dismiss them had been taken collectively by the directors. It had been a difficult decision as they were good employees and the Company had difficulty replacing them. However, this activity was quite inappropriate in the workplace.
- 7.1.10 Mr Marshall confirmed that the Company had no written disciplinary procedures or manual. He refused to name the employee who had made the allegation, and had not informed Miss Hanley of the employee's name. He confirmed that he had not himself seen the incident. He felt that he had given Miss Hanley sufficient details of the allegation, and had not prejudged the issue.

- 7.1.11 The meeting held on Monday, 15th November 2004 had lasted less than ten minutes the decision to dismiss her having already been taken before the meeting. There had been no police prosecution. He had not informed her of any right to representation or appeal. After the police investigation the Company had no option but to dismiss her, unless she could give an explanation. He was absolutely convinced of her misconduct.
- 7.1.12 Mr Marshall said that the employee making the allegation was not prepared to make any statement if Miss Hanley was to see or hear it.
- 7.1.13 Miss Hanley, having been placed on oath, described her job in the Company as that of a charge hand, in charge of a team of girls, a job which she had held for many years. The job involved inspecting circuit boards, and arranging and inspecting the girls' work. She worked a lot of overtime.
- 7.1.14 On Friday, 12th November 2004, at about 10.00 am, she was asked by one of the directors to accompany him to the office, where they met with Mr Marshall, other directors, and Employee B. She was asked if she had supplied drugs to Employee B the previous day. There was no truth in this allegation, and both she and Employee B had denied it. She was not informed of where the allegation had come from, or of any evidence for it, just that someone had seen her handing over a package and receiving money. The meeting lasted about 15 minutes. No statements were taken.
- 7.1.15 She had not "run away" whilst being escorted, as alleged by Mr Marshall, but had merely gone through the ladies toilet to get to the machine room, which was the normal route.
- 7.1.16 She said that there was an employment contract pinned on a notice board, but the employees were not given a copy; they were only given written notification of their specific hours of work, holidays, wages, etc.
- 7.1.17 At the meeting on Monday, 15th November 2004, in the presence of director Ralph Ford, Mr Marshall had dismissed her, given her an undated letter (EE4), and let her read it, telling her that she was being dismissed on the grounds of gross misconduct. The meeting lasted less than ten minutes. She was not given the opportunity to say anything, and had been given no further information about the evidence which had led to her dismissal. Mr Marshall had told her nothing about the police investigation; neither had he told her of any right of appeal.
- 7.1.18 I referred to her statement in EMPROT 1, which said that at the Friday meeting she had "... requested that they search me and my property which they declined. I then demanded that they get the Police ...". Those words did not appear in the transcript, other than the words "bring em in", referring to sniffer dogs. She said she had not been aware that the meeting was being tape-recorded.

7.1.19 The tape recording of the meeting held on Friday, 12 November 2004 was played during the hearing, as there was some disagreement and uncertainty about what had been said at the meeting. Miss Hanley had claimed that she had mentioned obtaining some throat sweets from Employee B on the Thursday, but upon hearing the recording confirmed that she had not mentioned the throat sweets at that meeting, and that she had not demanded that the directors get the police, or search her. She could not remember if she had said these things on another occasion. She had not been made aware of any grievance procedure or appeal procedure.

7.1.20 Mr Marshall said that Miss Hanley had made no mention of throat sweets. The Company used the Guernsey Chamber of Commerce's manual as its employment reference manual, and had a copy of the Commerce and Employment Department's Code of Practice. He felt that the Company had acted fairly and reasonably. It had given both Miss Hanley and Employee B every opportunity to give a credible reason for their actions. He had been looking for an opportunity not to dismiss anyone. He had ensured that there had been a female director present. He confirmed, however that he had not mentioned any right for an employee representative to be present, nor an appeal procedure. Human Resources functions within the Company were handled by himself and Alan Besnard, who was Director (Production).

7.2 Employee's submission

7.2.1 For the employee, Advocate Green said that the central allegation was based on hearsay evidence. There was no direct evidence from the witness who had seen the transaction. Mr Marshall had not seen it, and his comments were clearly hearsay. Hearsay was generally inadmissible evidence, and he therefore suggested that I should put limited weight on the allegation.

7.2.2 The Company had not dealt with the allegation properly; there were serious defects in the handling of it. The Company, despite having 70 staff, had no formal disciplinary procedures or manual. The allegation had first been put to Miss Hanley at the meeting on the Friday, before the investigation had started. She had not been accompanied by an employee representative, or a trade union representative. She had been told of the allegation at that meeting, but had not been told of its full circumstances. She had not been provided with any witness statements. The police had not been called in on the Thursday. The investigation was neither full nor fair. No drugs had been found. The police had identified that drugs had been present at some point, and a glove had been found with traces of drugs. However, none of this had been linked in any real way with Miss Hanley.

- 7.2.3 The second meeting, on the Monday, had been held in the early afternoon, without any witness statements being provided to Miss Hanley. Advocate Green referred to the case of *Louies v Coventry Hood & Seating Co. Ltd* (EE2). Miss Hanley had not been given any real notice of the findings of the investigation. The meeting on the Monday had been very short. Mr Marshall had confirmed in evidence that he had decided before the meeting to dismiss Miss Hanley. She had not been given a proper opportunity of giving her side of the story, following the investigation. She had a right to a fair hearing in the interests of natural justice. He referred to the case of *Polkey v A E Dayton Services Ltd* (EE3), especially the comments of Lord Bridge in relation to cases of misconduct. The investigation had not been full or fair, and Miss Hanley had not had the opportunity to put her explanation or statement of mitigation at the Monday meeting, which was the most important because the investigation had been concluded.
- 7.2.4 Advocate Green referred to the case of *Spink v Express Foods Group Ltd* (EE1). Offshore Electronics's handling of the case had been insufficient. Miss Hanley had not been given a right of appeal. The burden of proof was on the employer to show that the procedure was fair, and that therefore the dismissal was fair. The procedural defects in this case were major, and therefore the dismissal was unfair.
- 7.3 Employer's submission
- 7.3.1 For the Company, Advocate Edwards referred to the case of *British Home Stores Ltd. v Burchell* (ER2). For the dismissal to be fair, (a) there had to be a belief in the mind of the employer that misconduct had occurred, (b) that belief had to be reasonable, and (c) there had to have been a reasonable investigation. He pointed out that the Court of Appeal cases of *The Post Office v John Foley and HSBC Bank PLC* (ER3) and *Sainsburys Supermarkets Limited v Mr P J Hitt* (ER4) both referred to the authority of ER2.
- 7.3.2 Advocate Edwards said that I should have regard to the manner in which Mr Marshall and Miss Hanley had given evidence. Mr Marshall had given honest answers, even if they did not support his case, whereas Miss Hanley's evidence was confused, and/or positively untruthful. Where there were discrepancies in their evidence, therefore, he contended that Mr Marshall's should be preferred. Mr Marshall had said that a trusted employee had approached him, with an allegation of gross misconduct, which was particularly important because of the import/export nature of the Company's business. Mr Marshall had explained why the employee did not wish to be identified. The allegations had been put to Miss Hanley and Employee B at the Friday meeting, but both had given just a bare denial, with no explanation. Mr Marshall had then suspended both of them, pending further investigation, and had involved the police. Both had been summoned to a further meeting on Monday, and given the opportunity to say anything. Mr Marshall had not wanted to dismiss them, but that had been his only option.

- 7.3.3 Advocate Edwards referred to the two linked cases of *Mr N Ramsey v Walkers Snack Foods Ltd* and *Mr S Hamblet and Mr R Treweeke v Walkers Snack Foods Ltd and Mr D McDonell* (ER1), in which dismissals were found to be fair following anonymous allegations.
- 7.3.4 With regard to the test of reasonableness of the investigation, Advocate Edwards said that it was difficult for a medium size employer to undertake the full disciplinary procedure. In this case, the procedure was reasonable; the employees had had the opportunity to be heard on two occasions, had been presented with the particulars of the allegations, had been brought in, suspended, and an investigation had taken place.

8 Conclusions

- 8.1 The central issue in this case is to establish whether the Company's action in summarily dismissing Miss Hanley was reasonable, given that it was faced with an allegation by an employee about a criminal activity being conducted by her on Company premises.
- 8.2 The Company's reaction to the allegation made on the Thursday was: to summon Miss Hanley, together with the other employee who was incriminated in the allegation, to a meeting with Company directors on Friday; to confront them with the allegation; to invite them to accept or deny it; when they denied it, to invite them to resign; when they refused to resign, to suspend them on full pay until Monday; to inform them that the police may be involved; to ask for their keys; to escort them from the premises; to bring in the police to carry out an investigation of the premises; to summon them to separate meetings on Monday; and to dismiss them both at those meetings.
- 8.3 The allegation made against Miss Hanley was a serious one, involving alleged criminal activity on Company premises. Miss Hanley's reaction, as shown by the transcript of the tape recording made of the meeting held on the Friday, was one of incredulity and outright, angry denial. She made little, if any, attempt to counter the allegation in any real way. She did not ask for details of the allegation, such as how it had come about, where or when the incident was alleged to have taken place, or any of the relevant circumstances. The only defence she offered at the meeting appears to have been mention of a conversation which she had had with Employee B, a statement which in evidence she could not remember, and that if she wanted to pass drugs she had ample opportunity outside of the workplace. Given her protestations of innocence, I find it somewhat surprising that at the meeting held on the Monday, of which there is no record, she seems to have accepted the fact of her summary dismissal (although not that it was fair), despite having been an apparently valued and long-standing employee of at least 17 years. These actions do not sit comfortably with her claim that the allegation was without foundation. I can understand how the Company drew the inference it did, given: (a) the allegation from someone it trusted, (b) her reaction at the Friday meeting, and (c) the police investigation which showed that there had been drugs on the premises.

8.4 Did the Company act fairly in drawing its conclusions and in dismissing her? With a total staff approaching 70, the Company is not a small one by Guernsey standards, and I would have expected it to have rules and procedures relating to disciplinary and other staff matters, as well as a member or members of staff with primary responsibility for human resources. In accordance with section 31.(9) of the Law, it is incumbent upon me to take into account the provisions of the *Code of Practice on Disciplinary Practice and Procedures in Employment*, and in the absence of any relevant Company rules the application of the Code has particular relevance.

8.5 The Company's disciplinary action in this case failed to conform with the Code on several counts:

- (a) Given the seriousness of the allegation, and its nature, involving a possible criminal offence which might result in a prosecution, it did not conduct its investigation in a timely manner. On the Thursday it accepted the evidence of the person making the allegation without any independent investigation being carried out, and it waited until the following day before carrying out an independent investigation. The alleged presence of drugs should have been immediately investigated, before they could be removed from the premises.
- (b) Again, in view of the potential criminal nature of the allegation, the Company could have called the police to investigate by taking statements from those involved, especially given the fact that the only connection between Miss Hanley and the possible presence of drugs was the unrecorded evidence of one witness, and the gloves, which had been supplied by that same witness.
- (c) The Company did not itself record the statement of the allegation from the person making it; nor did it obtain such a statement from that person. I can understand its wish to protect the employee making the allegation, but nevertheless the allegation was sufficiently serious for it to be recorded, and the statement to be made available to Miss Hanley whilst protecting the identity of the person making it.
- (d) It did not inform Miss Hanley that the Friday meeting was to be a disciplinary interview. In fact, she was given no notice of the meeting.
- (e) It erred in interviewing both Miss Hanley and Employee B together. It would have been fairer to both, and given the Company a better opportunity at getting at the facts, if they had been interviewed separately. The Company could have ensured that they did not communicate with each other prior to and between the interviews.
- (f) It did not inform her of any right to be accompanied at either that meeting or the Monday meeting by a trade union or other employee representative or fellow employee of her choice.
- (g) It did not inform her of any of the details of the allegation. At the start of the Friday meeting Mr Marshall informed her: "we've been made aware that you've been supplying drugs in the factory." Towards the end of the meeting he said: "Yesterday you sold drugs to" [Employee B]. These appear to be the only statements at the meeting which provide any information about the nature of the alleged gross misconduct.

- (h) At the Friday meeting Miss Hanley was not explicitly asked for an explanation of her actions, as claimed by Mr Marshall; she did, however, have the opportunity to give one. The meeting held on Monday was not recorded, and Mr Marshall and Miss Hanley differ in their accounts of what was said at that meeting.
 - (i) It appears, however, that at the Monday meeting Miss Hanley was given only cursory information about the police findings. The Company admitted that by then it had already decided to dismiss her.
 - (j) The Company did not provide for any right of appeal against its decision.
- 8.6 I also found the Company's surreptitious recording of the Friday meeting did not accord with that of a reasonable employer. The fact that Miss Hanley was not informed that recording was taking place may also be considered unfair, given its potential for further use in investigation and in a defence against a claim of unfair dismissal.
- 8.7 In view of the seriousness of the allegation the Company had a particular duty to proceed with thoroughness in its investigation, and fairness in its handling of the matter. This it singularly failed to do. Although Mr Marshall, in evidence, said that he had twice obtained advice from the Commerce and Employment Department on the way to proceed, and that he was aware of the need to proceed carefully, the Company made little attempt to carry out the disciplinary procedure with any degree of thoroughness, or in conformity with the Code, other than to suspend Miss Hanley with pay while further investigations were carried out. Even given the Company's stated concern for the potential misuse of its import/export facilities, it appears to have taken precipitate action. Its conduct of the case is exemplified by the tape recording and transcript of the Friday meeting. They record the fact that the meeting was nothing short of chaotic, and could by no means be described as a proper disciplinary interview.
- 8.8 Was all of this sufficient to constitute unfair dismissal? I have noted the cases adduced by the applicant and the respondent, particularly the following. The case of *British Home Stores Ltd v Burchell* establishes three tests in cases of misconduct: that the employer had a belief, that in his mind he had reasonable grounds for that belief, and that he had carried out reasonable investigations. I am satisfied that the Company had a belief in Miss Hanley's guilt, and that in its mind it had reasonable grounds. Advocate Edwards adduced the *Walkers Snack Foods* cases in support of the Company. However, in those cases, although the statements by fellow employees were anonymous, they were written statements, and the employees who were dismissed were made aware of their contents. In the present case the statement was not written, and Miss Hanley was not informed of its content, other than the basic allegation that she had been selling drugs on Company premises.

8.9 I find more relevant the case of *Louies v Coventry Hood & Seating Co. Ltd.* In that case the Employment Appeal Tribunal held “that an employer’s dismissal procedure was prima facie unfair if an employee was not permitted to know the contents of statements on which the employer would rely ...”, and “that where there had been an investigation which had led to a belief that there had been misconduct on the part of the employee, the subsequent dismissal procedure had to be conducted so that the fairness of the procedure balanced the initial belief of misconduct”.

8.10 In the present case Miss Hanley was not informed of the contents of the statement on which the Company relied, and in my view the disciplinary procedures carried out by the Company were deficient for the reasons I have given above.

9 Decision

9.1 I find that Miss Hanley was dismissed unfairly.

9.2 I make an award of £6,804.52, being the gross earnings for the last three months of her employment.

Signature of Adjudicator:

Mr David O Le Conte

Date:

17/03/05