



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 25 May 2005

between

Applicant: Ian Mc Mahon **and Respondent:** Guernsey Nightclubs Limited

Adjudicator: Mrs Barbara Bartie

Nature of Dispute: This is a claim of Unfair Dismissal by Mr McMahon against Guernsey Nightclubs Limited on the grounds that he had been made redundant without prior notice or consultation as recommended in the Code of Practice - Handling Redundancy, issued by the Department of Commerce and Employment.

Guernsey Nightclubs Limited maintained that the Applicant was aware that the Company was having difficulties and that the decision had been taken to ensure that the Company survived.

Adjudicator's Decision: Having heard all the evidence presented and having due regard to all the circumstances I consider that the Respondent did not act unfairly or unreasonably in dismissing the Applicant. Accordingly, I make no award.

Amount of Award (if applicable) :

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 Mrs Barbara Bartie

Date 3 June 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.

1.0 Claim

- 1.1 This claim was brought by Mr Ian Mc Mahon against Guernsey Nightclubs Limited, (hereinafter referred to as 'the Company' or 'Guernsey Nightclubs') on the grounds that he had been made redundant on 11 October 2004 without prior notice or consultation
- 1.2 Guernsey Nightclubs Limited disputed the claim, on the grounds that the Applicant knew the Company was having difficulties and it took the decision to dismiss Mr Mc Mahon in order to ensure that the business survived.

2.0 Representation

- 2.1 Mr Mc Mahon represented himself.
- 2.2 Guernsey Nightclubs Limited was represented by Advocate Peter Ferbrache.

3.0 Witnesses

- 3.1 Mr Mc Mahon gave evidence on his own behalf.
- 3.2 Mr Martin Stephen Rogan, Director and Principal of Guernsey Nightclubs Limited and Mr Philip Dunne, an Accountant trading as 'Acumen' gave evidence on behalf of the Respondent.

4.0 Documents

- 4.1 A bundle of documents marked as EE1 was submitted by the Applicant.
- 4.2 Documents relating to financial statements and wages were tabled by the Applicant during the Hearing and marked as EE2.
- 4.3 A bundle of documents marked as ER1 was submitted by Advocate Ferbrache on behalf of the Respondent.

5.0 Findings of Fact

- 5.1 The Applicant was employed as General Manager and Licensee of the premises known as Club 54 from 28 June 1999 to 11 October 2004.
- 5.2 In 2004 he also became responsible for a restaurant (Milano's) in the same premises. These premises were run by a restaurant manager but the Applicant held the licence and was responsible for overseeing the running of the restaurant.
- 5.3 From 1999 until 2003 the Company had been jointly owned by three directors but in March 2003 Mr Rogan became sole beneficial owner.
- 5.4 The Applicant had previously worked as manager of other premises which Mr Rogan had co-owned and they had a good working relationship. Mr Rogan attended the premises on a daily basis.
- 5.5 After March 2003 the nightclub business experienced a downturn, partly attributable to competition from other nearby premises, and partly due to changes in the local liquor licensing laws.
- 5.6 Mr Rogan and the Applicant discussed the reduction in takings and various measures were put in hand to cut costs and to attract more customers. Mr Rogan decided to open the Milano pizza restaurant to generate more revenue.
- 5.7 In late August and early September 2004 the Applicant was on annual leave for four weeks. Mr Rogan looked after the business, and was worried about the level of business and the financial situation. After discussing the situation with his wife he decided that he could not afford to employ a manager and must take direct control.
- 5.8 About ten days after the Applicant returned from holiday, Mr Rogan told him that he could no longer afford to pay him, and that he was also terminating the employment of the full time barman and the DJ who came from England at the weekends.
- 5.9 A letter setting out the reasons for his dismissal was sent to the Applicant the following week but this was not delivered as the Applicant had recently moved. In the event he was given a copy of that letter when he returned to the nightclub premises to hand back some keys.

6.0 Evidence

- 6.1 Mr Rogan gave evidence that he had been involved in similar businesses for 25 years and in Guernsey since 1990. He outlined the circumstances leading up to the dismissal of the Applicant and said that he had started to cut back in every area possible. He and the Applicant socialised together and were very good friends so he had lost a friend as well as an employee.

- 6.2 He did not consider dismissing the restaurant manager was a viable option as the concept was one of a genuine Italian pizzeria and it needed authentic Italian staff.
- 6.3 Mr Philip Dunne gave evidence that the recently completed audit of the Company's accounts showed a drop in income over the past two years to the extent that the Company was now showing a trading loss for 2004.
- 6.4 Mr Mc Mahon gave evidence that he had consistently reached the levels of return which had been set as the targets to achieve bonus payments when the company was in joint ownership. He had known that business had dropped but thought he was still achieving what was expected of him.
- 6.5 His relationship with Mr Rogan had been on such good terms that on two occasions he had lent him substantial amounts of money.
- 6.6 He had detected a change in his previous harmonious relationship with Mr Rogan when he returned from holiday and had asked him if anything was wrong. The weekend before he was made redundant Mr Rogan had spoken about the need to get more business but had not indicated he was about to be sacked.
- 6.7 Mr Mc Mahon said that the restaurant manager, Mr Roberto Mascherucci, was now the Licensee for both premises and he believed that a new manager was employed at Club 54.

7.0 The Applicant's Submission

- 7.1 The Applicant questioned whether the lack of profitability of the Company constituted redundancy. He submitted that the Respondent had not followed a fair or proper procedure in dismissing him, and whether or not the Company was trading profitably this still rendered the dismissal unfair.
- 7.2 He quoted a decision by the Adjudicator, Mr Peter Woodward, in the case of Mr Gary de Garis -v- Brittain Hadley Partnership CI Ltd. in which the dismissal was held to be unfair because that company failed to demonstrate a fair and objective basis for redundancy selection and did not consult appropriately with the employee prior to his dismissal. He also referred to a statement by the Adjudicator that the lack of an appeal process would seem to place an even greater weight on Brittain Hadley to follow a fair process.

8.0 The Respondent's Submission

- 8.1 Advocate Ferbrache paid tribute to the way in which the Applicant had presented his case.
- 8.2 He stated that, unlike many of the unfair dismissal cases, in this case there was no suggestion that the Applicant had done anything wrong, merely that the Company had not been profitable. The Company was tiny and it was difficult for Mr Rogan to dismiss a friend and diligent worker. Part time work had not

been discussed, but the conversation at the time of dismissal must have been difficult.

- 8.3 The Adjudicator had to decide whether the Company had been reasonable in the way that it had acted. Each case had to be treated on its individual merits and in this case the outcome would not have been any different however much discussion had taken place.

9.0 Conclusions

- 9.1 Section 6 (3) of the Law states that the determination of the question whether a 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 a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.
- 9.2 In this case the Respondent Company is one person. Although Mr Rogan has had 25 years experience of involvement in similar businesses there is no evidence that he has had formal management experience. The Company relationship with the Applicant continued from a previous similar employment and he did not even have a written contract. Mention was made in evidence about a verbal agreement to pay a bonus if certain targets were reached but there was nothing written down. Both parties appear to have had a casual attitude towards administration. The Applicant gave evidence that he followed financial reporting procedures which he had been shown, and did what he was told. He carried out maintenance, painting, and plumbing in addition to his other work.
- 9.3 The relationship of the Director and the Licensee/General Manager was such that the latter had lent the former two substantial amounts of money and the Applicant's duties were flexible.
- 9.4 As beneficial owner of the Company Mr Rogan decided that he would carry out the duties previously undertaken by the Applicant and therefore he no longer needed to employ a manager. In practice this meant that the post which the Applicant held was no longer required, that "the requirement of the business for work of a particular kind" had ceased. I am satisfied that the reason for the dismissal was redundancy, and that it was potentially fair.
- 9.5 The question remains as to whether the Respondent acted reasonably or unreasonably in dismissing the Applicant. The Code of Practice on Handling Redundancy issued by the Department of Commerce and Employment refers to the principles of a detailed redundancy procedure that should be adopted by small firms in order to ensure that the redundancy is fair. Although a failure to observe any provision of the Code does not of itself make the dismissal unfair it is for the Adjudicator to decide, given the evidence, whether the employer acted reasonably and fairly in all the circumstances.

- 9.6 The financial state of the Company has been shown by some of the documents in the bundle ER1 and by the evidence of Mr Dunne. Mr Rogan's decision to make drastic cuts to save his flagging business is also evidenced by the fact that the only other full time member of staff, a barman, was also dismissed and a DJ flown in at weekends was no longer employed. He gave evidence that he discussed the financial situation with his wife, and that he rejected the possibility of altering the personnel in the new restaurant, but there is no evidence that he gave any consideration to any other options, such as offering the Applicant part time work or other duties.
- 9.7 Both parties agreed that some discussions had taken place about the financial situation and it is understandable that the significance placed on them by the Respondent was greater than that of the Applicant. It was not unreasonable for the Director to assume that the Applicant was aware that his job was in jeopardy. It was not unreasonable for the Director to decide that he would cease to employ any full time staff. There was no evidence of part time vacancies or the existence of alternative work.
- 9.8 The Applicant has referred to the current staffing structure, and questioned whether the Director's decision to make the staff cuts was necessary. This is not for the Adjudicator to judge. The judgement is only whether the decision was reasonable in the circumstances which prevailed at the time the decision was made. In those circumstances I do not consider the Respondent was unfair or unreasonable in dismissing the Applicant.
- 9.9 The Application form and Response form, (forms Emprot 1 and Emprot 2,) showed a discrepancy about the amount of wages paid to the Applicant. Although information was given during the Hearing with regard to the wages I have not recorded it, as I am not making an award.

10.0 Decision

- 10.1 I do not consider that the Respondent was unfair or unreasonable in dismissing the Applicant and therefore I make no award.

Signature of Adjudicator:

Mrs Barbara Bartie

Date:

3 June 2005