

Judgment 12/2011

**Cotterill v Blanchelande Park Nursing Home
Ltd – Royal Court (Civil Action File 1554) –
3rd May 2011**

Employment Protection (Guernsey) Law, 1998 (s.27) – employee’s application for leave to appeal from Tribunal decision – held that the appellant had raised no point of law or procedural irregularity on which to found an appeal to the Royal Court – application for leave dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

3rd day of May 2011 before Richard John Collas, Esquire, Deputy Bailiff

Susan May Cotterill

Appellant

v

Blanchelande Park Nursing Home Limited

Respondent

In the matter of an application by the Appellant for leave to appeal from the dismissal by the Royal Court on 21st January 2011 of her appeal from a decision of an employment tribunal given on 12th November, 2010;

THE DEPUTY BAILIFF this day, as presiding judge in the Royal Court, ISSUED JUDGMENT in the terms attached hereto and DISMISSED the application for leave to appeal.

K. H. TOUGH
Her Majesty’s Greffier

Approved Text
03.05.2011

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between

SUSAN MAY COTTERILL

Appellant

- v -

**BLANCHELANDE PARK NURSING HOME
LIMITED**

Respondent

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF
APPEAL UNDER SECTION 27 OF THE EMPLOYMENT PROTECTION (GUERNSEY)
LAW, 1998 AS AMENDED**

Judgment handed down: 3rd May 2011

Before: Richard John COLLAS Esq., Deputy-Bailiff

1. On 21st January 2011, sitting in the Royal Court, I dismissed an appeal by the Appellant from the Employment and Discrimination Tribunal under section 25 of the Employment Protection (Guernsey) Law, 1998, as amended (“the 1998 Law”). The Appellant has now given written notice that she wishes to appeal my decision to the Court of Appeal. This is my decision, as the first instance judge, on her application for leave to appeal.
2. In this decision, I have set out the background in some detail in the hope that it may assist anyone else who has to consider the matter if the Appellant seeks to renew her application before the Court of Appeal, or a judge thereof. The facts are not succinctly summarised elsewhere and at the conclusion of the hearing at which I dismissed the Appellant’s appeal from the Tribunal, I did not reserve judgment but gave a brief *ex tempore* decision, without explaining the background to it.
3. The Appellant has been unrepresented throughout these proceedings so I endeavoured to assist her in understanding the limits that are placed on the rights of appeal from decisions of the Tribunal under section 25 of the 1998 Law. At times she has had to assist me, with the assistance of Advocate Dunster for the Respondent (who did not appear at the Tribunal), in explaining some aspects of the proceedings that are not covered in the decision of the Tribunal because, unfortunately, there is no transcript of the Tribunal hearing. The transcript to which I refer in this decision is the transcript of the hearing that took place before me in the Royal Court.
4. Section 27 of the 1998 Law provides a right of appeal to the Court of Appeal but only with leave of the Royal Court or of the Court of Appeal. The Appellant’s correspondence has only recently been drawn to my attention but I will treat it as having been received within the time period prescribed for serving notice of appeal, in the circumstances described below.

5. The grounds on which a party can appeal a decision of the Tribunal to the Royal Court are set out in section 25 of the 1998 Law:

“25 (1) A person aggrieved by a decision or award of the Tribunal on a question of law may, subject to the provisions of subsection (2) and (3), appeal therefrom to the Royal Court in such manner and within such period as may be prescribed by order of the Royal Court.

(2) No decision or award of the Tribunal shall be invalidated solely by reason of a procedural irregularity unless the irregularity was such as to prevent any party to the complaint under this Law from presenting his case fairly before the Tribunal.

(3) This section does not confer a right of appeal on a question of law which has been referred to the Royal Court under section 26.”

6. I will begin by setting out what I understand to be the chronology of relevant events.

- 1) 8 February 2010 – The Appellant commenced employment with the Respondent as a Care Assistant.
- 2) 19 April 2010 - The Appellant was dismissed by the Respondent.
- 3) Date unknown – The Appellant issued a complaint in The Employment & Discrimination Tribunal claiming unfair dismissal. Pursuant to section 15 of the 1998 Law, the Appellant had been employed for less than one year and so had to show that her dismissal was for one of the reasons set out in section 15(2) of the 1998 Law. In the Tribunal’s decision, it stated (in paragraph 1.7) that the parties agreed to treat the complaint as being for reasons of health and safety and as asserting a statutory right, either of which are grounds for asserting a claim notwithstanding that the employee has not been employed for 12 months.
- 4) 29 September 2010 – the Tribunal heard the Appellant’s complaint. The Appellant represented herself, as she is entitled to do, and called one witness in addition to herself. The Respondent was represented, not by an Advocate but by a solicitor.
- 5) 12 November 2010 – The Tribunal issued its decision, dismissing the complaint on the ground that it found the Appellant was not dismissed for refusing to carry out a Health and Safety task or asserting a statutory right. The Tribunal awarded costs in favour of the Respondent.
- 6) 23 November 2010 – the Appellant wrote to the Secretary to the Tribunal giving notice of appeal on the following grounds:

“Thank you for your recent letter and documents relating to my recent tribunal.

As suggested in your letter I now wish to appeal under the law mentioned for the following reasons;

The code of practice booklet published by your department raises several issues which I believe did not comply with my employment rights, that is I was not given any verbal warning prior to dismissal and the person who investigated was also the person who dismissed me and therefore did not meet the code of practice requirements for

an investigation, also they had taken money from my wage without consulting me, and the issues I raised earlier in regard to the mistreatment of patients and residents whom I was trying to protect from abuse.

Yesterday's press also gives misrepresentation of me and makes accusations which are wholly untrue.

I was not attempting to discredit Blanchelande Park Nursing Home. I was simply doing my job as a carer and that is my first duty to them.

I believe I have been mistreated by them as employers and have not had a fair hearing.

I maintain my claim based on Health and Safety grounds and look forward to your reply."

- 7) 26 November 2010, the Secretary to the Tribunal forwarded the Notice of Appeal to H M Greffier with a copy of the decision of the Tribunal.
- 8) 1 December 2010 – A member of the Greffe staff notified the Secretary to the Tribunal that the Appeal had been listed for directions to be given on 17 December at 10 a.m. and requested that notice of the hearing be given to the parties.
- 9) 17 December 2010 – I sat to give directions as to the progress of the Appeal. The Respondent was represented by Advocate Dunster. The Appellant failed to appear and was not represented. The Deputy-Greffier informed the Court that the Appellant had telephoned to say she could not attend because she was working and that she had spoken to the Bâtonnier's secretary and was waiting for an Advocate to be appointed. I observed that the Bâtonnier had no power to appoint an Advocate. I was not minded to adjourn the directions hearing as the Appellant had had ample notice Advocate Dunster had submitted an application to have the appeal struck out without a hearing on the ground that the Appellant's letter of 23 November did not disclose any valid ground of appeal. I declined to dismiss the appeal in her absence. I gave directions for the Appellant to lodge with H M Greffier, and copy to the Respondent's Advocates, by 4 pm on 14th January, a notice setting out (a) any question of law and (b) any procedural irregularity before the Tribunal which denied her a fair hearing, upon which she intended to rely and I set the date for a hearing at 11 am on 21st January. Those directions were communicated to the Appellant by letter from the Greffe dated 29th December, a further copy of which was sent to her by H M Greffier by letter dated 5th January.
- 10) 10 January 2011 – The Appellant replied to H M Greffier acknowledging his letter. She also wrote:

"The basis for my appeal is the unconventional methods used throughout my employment at Blanchelande Park Nursing Home against both myself and the residents and patients.

Also the Employment Tribunal Panel were denied access to the full paperwork requested by them and myself, and the file I have from Carey Olsen was signed by someone who claimed to be an advocate, I am reliably informed she is not in fact an advocate.

A copy of this letter is being sent to Advocate Dunster whom I believe is now acting for the nursing home.”

- 11) 13 January 2011 – The Appellant sent another letter to the Greffe:

“Further to the direction hearing held on 17th December 2010 regarding an appeal against the tribunal decision for myself against Blanchelande Park Nursing Home, I am writing to inform you of the basis of my appeal.

Under the Employment codes of Practise, Blanchelande should have had 2 people investigate the circumstances surrounding my unfair dismissal and this was not done.

Also both the tribunal and myself were denied by them vital information relating to my claim in that even though the handover book was requested at the hearing access was denied by Matron.

Also I believe I was denied a full hearing and the person claiming to be an Advocate acting for Blanchelande I have been reliably informed is not in fact an advocate and requested via the chairperson that parts of the hearing not be reported which has led to the Press giving a wrong impression of me and defaming my otherwise exemplary character.

I also very strongly object to paying them any money as they have claimed. As this would amount to me paying them for abusing me.

Clearly I believe I have been unfairly treated throughout this process and would like a full hearing.”

- 12) 14 January 2011 - Advocate Dunster wrote to the court, via the Greffe:

“Susan Cotterill v Blanchelande Park Nursing Home

I note the receipt of copy correspondence from Ms Cotterill to you dated 13 January 2011 (enclosed for ease of reference).

I understand that this letter is intended as Ms Cotterill’s skeleton argument, filed in response to the Deputy Bailiff’s directions made on 17 December 2010.

- 1. I can see no point of law contained in this skeleton argument on which Ms Cotterill might appeal against an Employment Tribunal decision (pursuant to s.25 of the Employment Protection (Guernsey) Law, 1998).*
- 2. I can neither see any procedural irregularity contained in this skeleton argument on which Miss Cotterill could also appeal against an Employment Tribunal decision (pursuant to s.25 of the Employment Protection (Guernsey) Law, 1998).*

For the avoidance of doubt, the matter of the “handover book” referred to by Ms Cotterill was considered by the Employment Tribunal who decided (as a matter of fact) that it was not relevant. Please see para 2.5 of the Tribunal’s decision.

Ms Cotterill has had ample time within which to provide a full and proper legal basis for her appeal. Ms Cotterill has also been informed (by

Commerce and Employment and via the Deputy Bailiff's directions on 17 December 2010) of what would constitute such a legal basis for appeal.

Ms Cotterill has further had ample notice of the forthcoming appeal date (adjourned from 17 December 2010 by warrant of Ms Cotterill's failure to attend) of 21 January 2011.

I therefore ask that this matter is not allowed to be delayed any further and that regardless of the lack of a full skeleton argument filed by Ms Cotterill, the Court proceeds with a substantive hearing in this matter on 21 January 2011."

- 13) 21 January 2011 – The hearing of the appeal took place in the Royal Court. The Appellant appeared without legal representation and Adv Dunster appeared on behalf of the Respondent. After hearing from them both, I dismissed the appeal.
- 14) 24 January 2011 – The Appellant wrote to the Secretary to the Tribunal requesting a reference of her case back to another Tribunal as she had not had a fair hearing.
- 15) 7 February 2011 – The Secretary to the Tribunal wrote to the Appellant advising her that any further rights of appeal would have to be discussed with the Royal Court.
- 16) 9 February 2011 – The Appellant wrote to H M Greffier. I understand from the letter that she was asking for his advice as to what further action might be taken.
- 17) 25 February 2011 – H M Greffier replied advising the Appellant that she could only appeal to the Court of Appeal with leave and asking her to advise him of the question of law or procedural irregularity on which she sought to appeal.
- 18) 1 March 2011 – The Appellant replied

"Thank you for your recent letter and please accept the following reasons for requesting an appeal to the court of Appeal.

As I have not had a fair hearing because my request for an adjournment was refused at the tribunal hearing, I believe I have good reason to have a fair hearing that includes my witnesses and other paperwork which was withheld from the hearing on the 12th November 2010 at Les Cotils.

Also I understand the person who claimed to be an Advocate representing Blanchelande Park Nursing Home was Advocate Dunster's assistant and not an Advocate as claimed in the file documents.

I hope these reasons are sufficient for taking this to the appeal court and me exercising my right to appeal.)"

7. The request for an adjournment of the hearing before the Tribunal was raised by the Appellant during the hearing before me on 21st January 2011. It was mentioned for the first time on page 3 of the transcript of the appeal hearing when the Appellant told me:

"..the main witness who was the nurse that I worked under couldn't be there because she'd been on night duty, she was requested to come."

8. There is a further explanation recorded at page 10 of the transcript where the Appellant told me that, at the start of the Tribunal hearing, she requested an adjournment because the witness had not appeared. She also explained there had earlier been an administrative hearing, described by Adv Dunster on page 11 as being in the nature of a pre-trial review, at which she had forgotten to mention that she wanted to call this witness. She later contacted the Tribunal and explained (at page 10):

“..a couple of weeks before the Tribunal date I wrote to the Tribunal and asked if I could request the sort of main witness on my behalf which they said I could and I had to write to her so I did and then she sent me a text message saying she couldn’t come because she’d been on night duty, it was a Wednesday I think, the day of the hearing and she works three nights at the beginning of the week, so she just texted me back to say she couldn’t come on that day so I did ask them if we could adjourn based on that but they said they wanted to go ahead that day.”

9. At the foot of page 10 of the appeal transcript, the Appellant said that she requested the adjournment at the start of the hearing. Advocate Dunster explained that his client resisted the application for an adjournment, they were ready to go ahead, everyone else had turned up for the hearing that day and they wanted it to start.
10. On page 15, the Appellant said the reason she had appealed was because she thought the Royal Court had the power to request witnesses to attend. That was an unfortunate misunderstanding on her part, if the Royal Court has any power to require the attendance of witnesses, it must be limited to evidence of matters relevant to an appeal, such as an allegation of procedural irregularity at the Tribunal hearing. The Royal Court has no power to conduct a re-hearing.
11. Another complaint of the Appellant is that she was not able to produce the handover book to the Tribunal. My understanding of the Appellant’s case is that one of the purposes of trying to call the witness who failed to attend was to give evidence of what was recorded in the handover book. The handover book is referred to in a number of places in the transcript of the appeal hearing, notably at the foot of page 1 and on pages 2, 4, 5, 6, 7, 8, 11 and 12. The significance of the handover book is explained by the Appellant at page 12. She said it would show that she had informed the nurse in charge of night duty

“..that I would refuse to look after one particular patient who was abusive towards me- not physically abusive but verbally abusive towards me, which she noted and spoke to the matron about and her other role would be to confirm that it was her who I complained to about the mistreatment and neglect of some of the patients and residents and it was recorded in the handover book..”

12. Advocate Dunster explained, at the foot of page 11:

“What I am told happened was that Ms. Cotterill was referring to the handover book and there was then a discussion about whether it should be produced or not and then after having heard the evidence of Ms. Moss about what was contained in the book and hearing from the matron of the nursing home on behalf of my client about what was contained in the book, the Tribunal then decided that what was contained- having heard what was contained in it, that it would not assist them in their decision making process, and that’s why they didn’t proceed with seeking to find this document.”

13. In its decision, the Tribunal said the following:

“2.5 Ms Cotterill’s assertions that issues relating to the treatment of patients had been reported to her line manager and reported in the ‘handover book’ were not proven.”

“4.5 At the request of the Tribunal, Ms D Moss, a witness for the Applicant, was called to give evidence under oath regarding the ‘handover book’ and details of the records kept in that book. Details of a confidential nature, or of a nature described by the Applicant, were not kept in the book. Ms Moss gave examples of the type of entries made, such as which residents were up, who was washed and dressed, times etc. at the time of staff handover.”

14. At page 16 of the transcript, I said that it was within the discretion of the Tribunal to decide whether to grant an adjournment. It was perhaps unfortunate that, in its decision, the Tribunal did not explain why the adjournment had been refused but the fact that the Appellant had not disclosed the name of the witness at the pre-trial administrative hearing was a factor the Tribunal were entitled to consider. Another relevant factor was that the request for an adjournment was only made at the start of the hearing, when everyone had attended and was ready to proceed. In those circumstances, the Appellant had not been able to demonstrate to me that the manner in which the Tribunal exercised its discretion was so unreasonable that it had deprived her of a fair hearing for the purposes of an appeal under section 25 of the 1998 Law. In fact, what I meant is that I did not believe there was an irregularity in the procedure adopted by the Tribunal in refusing to grant an adjournment at the start of the hearing.
15. Similarly, in relation to the production of the handover book, it seemed to me that the Tribunal had properly investigated whether it would assist to have the document produced and, after hearing evidence on the matter, had concluded that it would not do so. Yet again, the procedure followed by the Tribunal was, in my view, appropriate.
16. There were other issues raised by the Appellant:
 - a) Prior to her dismissal, her employer conducted an investigation carried out by only one person whereas the Codes of Practice advise that two people should investigate. My understanding is that the Codes of Practice are for the guidance of employers and employees and do not lay down any mandatory procedures.
 - b) She claimed she was asserting a statutory right which, if proven, could have provided her with grounds for a claim of unfair dismissal notwithstanding that the employment relationship had not lasted for 12 months. As far as I was able to ascertain, the statutory rights she asserted were that she should not have money deducted from her wages (pages 2, 8) and she should not be verbally abused by a patient (pages 2, 13) which she alleged might amount to racial discrimination against her as a Guernsey person (page 5). None of those could amount, in my view to a breach of a statutory right as envisaged by section 12 of the 1998 Law (page 14).
 - c) She asserted that she was unreasonably dismissed on health and safety grounds. In my view, that was a question of fact determined by the Tribunal and does not give rise to any ground of appeal.
 - d) The Appellant complained that the Respondent was represented at the Tribunal by someone who was not an Advocate. That is not a ground of complaint because parties are permitted to be represented by persons who are not legally qualified in this jurisdiction. My recollection is that the States deliberately intended that the procedures would be accessible to parties who could not afford legal representation but needed assistance to present their case.
 - e) The Appellant had complaints about the manner in which the proceedings had been reported in the Guernsey Press. I have no doubt that the Press reporting of the hearing, even if it was inaccurate or unfair, was an entirely separate issue.

17. Consequently, I was not persuaded by the Appellant that there was any basis for her to pursue an appeal to the Royal Court on either of the limited grounds permitted by section 25 of the 1998 Law.
18. I have now had the opportunity to consider the correspondence from the Appellant written after the date of the appeal hearing and I have had the chance to consider again the contentions put forward by her at the hearing before me, as well as the decision of the Tribunal. I am not persuaded that there are any grounds that would justify a grant of leave to appeal to the Court of Appeal under section 27 of the 1998 Law.