Judgment 17/2006 Credit Suisse (Guernsey) Limited v Carré – Royal Court (Civil Action File 974) – 20th March, 2006

Employment Protection (Guernsey) Law, 1998 – matter part heard before an adjudicator – employer's appeal from a ruling by the adjudicator on the effective date of termination of employment - appeal lies on a point of law only – adjudicator's decision neither ultra vires nor Wednesbury unreasonable – matter remitted to the adjudicator to continue the hearing

IN THE ROYAL COURT OF GUERNSEY

The 20th day of March, 2006 before Richard John Collas Esquire, Deputy Bailiff; sitting alone

In the matter of:

CREDIT SUISSE (GUERNSEY) LIMITED

(Appellant)

v.

ANDREW CARRÉ

(Respondent)

Whereas on 6th March 2006 the Deputy Bailiff considered an appeal from a decision of the adjudicator and heard thereon Advocates J. E. Roland and P. Richardson, Counsel for the Appellant and Respondent respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and REMITTED the matter back to the adjudicator for him to continue the hearing.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Final Judgment
20 March 2006

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between	**CREDIT SUISSE (GUERNSEY) LIMITED**	**Appellant**
	v	
	ANDREW CARRÉ	**Respondent**

Judgment handed down: 20 March 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Appellant: Advocate J E Roland
Advocate for Respondent: Advocate P Richardson

Cases, texts & statute referred to:

1. Employment Protection (Guernsey) Law, 1998.

2. Garenne Group Limited v Mrs Maura Falla Judgment of Southwell J A as a single judge of Guernsey Court of Appeal, 18 February 2002.

3. Court of Appeal (Guernsey) Law, 1961, section 15(e)

4. Walters v States Housing Authority [1997] 24.GLJ.76.

5. Barke v SEETEC Business Tecnology Centre Ltd [2005] EWCA Civ 578, Dyson LJ at para 46.

Introduction

1. This is an appeal by an employer against a decision of an adjudicator under the Employment Protection (Guernsey) Law, 1998 ("the 1998 Law") in a matter which is part heard. The adjudicator had to decide when the effective date of termination ("EDT") of the employment occurred in order to establish whether the application before him had been brought within the time period permitted under Section 17 (2) of the 1998 Law. For the reasons I explain below the adjudicator split the hearing into two parts and took the EDT issue in the first part. He has decided the issue in favour of the employee and has said he will give his reasons at the conclusion of the hearing. The employer does not want to have to wait until then to learn the reasons.

Factual Background

2. A letter from the employee to the employer on 28th February 2005 concluded:

> *"I therefore feel that I have no option but to resign, because of the situation I have found myself in through no fault of my own. I have instructed an Advocate about the treatment I received as I feel that I have been constructively dismissed."*

3. On 27th June 2005 the employee completed form Emprot 1 and lodged with the Department of Commerce and Employment a complaint of unfair dismissal, alleging a constructive dismissal. He recorded the date of termination of his employment as 31st May 2005.

4. The employer responded by filing a form Emprot 2 dated 14th July 2005 indicating the employer disagreed with the employee's dates of employment. The employer stated that the employment commenced on 3rd May 1996 and terminated on 28th February 2005. The employee had noted the date of commencement of employment as June 1996 but no significance attaches to that discrepancy. The Adjudicator had to determine whether the EDT was 28th February or 31st May.

5. The complaint was set down for hearing before the adjudicator on 11th November 2005. On the eve of the hearing the employee's counsel withdrew from acting further for him. Although I was not given the reasons for the withdrawal, I was assured that it was through no fault of the employee himself and certainly the employer was not to blame for the withdrawal. The Advocate concerned appeared at the start of the hearing on the morning of the 11th November to explain the situation to the adjudicator and to request an adjournment. By then a different firm of Advocates, Collas Day, had been instructed and the adjudicator was informed that Advocate Richardson would be available to attend in the afternoon. The adjudicator therefore adjourned the hearing until the afternoon in order not to waste the day. He was aware that some of the witnesses to be called on behalf of the employer had travelled from Switzerland to be present.

6. The EDT issue involved questions of law and fact and the adjudicator decided to commence by hearing evidence and legal submissions on that issue. The hearing was not concluded on the 11th and continued on 1st December 2005.

7. On 6th December the adjudicator issued his decision through the Secretary to the Adjudicators in which he concluded that the EDT took effect on 31 May 2005 and that therefore the Emprot 1 (application form) was submitted in time. The notification continued

> "*given this conclusion, and taking guidance from the Ruling by the Royal Court in the judgement of Falla v Garenne, it is the decision of the Adjudicator that the Hearing should now proceed to the*

substantive issue of the alleged unfair dismissal at the earliest convenience of all the parties.

The Adjudicator is mindful that his decision as to the EDT is founded on a point of law and will include detailed rationale in his findings at the conclusion of the Hearing."

8. Advocate Roland, on behalf of the employer, wrote on 20th December 2005 requesting the adjudicator's reasons. The Secretary to the Adjudicator replied on 23rd December 2005 in the following terms

"I refer to your letter dated 20 December 2005, whereby you requested the reasons for the Adjudicator's decision on the Applicant's effective date of termination, a copy of which was forwarded to the Adjudicator, the Adjudicator's response is as follows:

The Adjudicator has considered the request by the Respondent to receive detailed reasons for the decision on the Effective Date of Termination, which has been considered as a preliminary issue prior to moving on to the substantive issue of an alleged unfair dismissal, and that further the Respondent has indicated that they reserve the right to appeal this decision prior to the hearing proceeding to a consideration of the substantive issues.

The Adjudicator would refer both the respondent and the applicant to the Judgement of Garenne Group Limited v Mrs Maura Falla by Judge Richard Southwell QC on the 18th February 2002 in the Court of Appeal in Guernsey.

'In this case the issue of the definition of continuous employment was considered as a preliminary issue and then appealed prior to consideration of the substantive issue.' Judge Southwell ruled in paragraph 26 (1) that 'no preliminary issue should have been taken. The whole matter should have been heard and decided by the Adjudicator before any appeal to the Royal Court was heard.'

And further in paragraph 26(2) Judge Southwell stated 'In my opinion the Bailiff should not have decided to hear the appeal until the whole matter had been heard and decided by the Adjudicator.'

It is the firm conclusion of the Adjudicator that this ruling should guide his decision in this present case. The Adjudicator is also mindful that his decision as to the 'Effective Date of Termination' may subsequently be appealed, and has already communicated to both parties that his judgement will include his reasoned arguments for this decision, and indeed any other decisions that arise from this hearing.

As already communicated to both parties on the 6 December 2005 the Adjudicator has decided to progress to the substantive issue(s) and in the interests of prompt resolution would now request that we move with speed and expedition to conclude the hearing.

> *In light of the Adjudicators comments above, please would you let me know as soon as possible of the days when you will not be available between 10 January 2006 and 10 February 2006.*

9. Following a further request from Advocate Roland, the adjudicator later ruled, despite opposition from Advocate Richardson, that the proceedings before him be stayed pending the outcome of this appeal.

10. Advocate Roland, on behalf of the employer, argued that there are three possible outcomes to the appeal:

    (i) to order the adjudicator to give reasons for his decision;

    (ii) to remit the case back to another adjudicator to hear the entire matter;

    (iii) to hear the EDT appeal and resolve the EDT issue after hearing evidence.

11. I suggested there is a fourth alternative namely to adjourn the hearing of the appeal until after the conclusion of the proceedings before the adjudicator and after he has given his reasons.

12. At an earlier directions hearing I had questioned whether there is a right of appeal against a decision of an adjudicator which, had the same decision been made in the course of Royal Court proceedings, would be considered interlocutory and hence an appeal would only lie with leave of the presiding judge or the Court of Appeal (under section 15(e) of the Court of Appeal (Guernsey) Law, 1961).

13. I am mindful of the observations of Southwell J.A. in *Garenne v Falla* in paragraph 3:

> *"3. It is apparent from the terms of the 1998 Law that the adjudication procedure is not intended to mirror that of the Royal Court, and is intended to be less formal, less legalistic and speedier. The complainant's rights are to be determined with the reasonable speed and efficiency which is consistent with giving each party a reasonable opportunity to be heard by the adjudicator."*

14. The right of appeal is in section 23 (1) of the 1998 Law:-

> *"A person aggrieved by a decision or award of an Adjudicator on a question of law may… appeal therefrom to the Royal Court…."*

15. There is no distinction between a decision which amounts a final determination of the issues between the parties and an interlocutory decision. It might be considered that "a decision or award" means only a **final** decision or award. However I note that in *Garenne v Falla*, an appeal was pursued against a decision by the Adjudicator on a preliminary point. I also note that in this case the Secretary to the Adjudicator's letter dated 6th December 2005 referred to the "decision" of the adjudicator. I therefore accept, somewhat

reluctantly, that there is a right of appeal, without leave, from the adjudicator's decision on the on the preliminary point.

16. If the Department of Commerce and Employment consider that such appeals frustrate part of the intention of the 1998 Law by making the procedure more open to legal intervention, more costly and less speedy and if they consider it appropriate that leave be obtained before an interlocutory decision can be appealed, they could seek to amend the 1998 Law.

17. Does the Royal Court have discretion to stay the appeal pending the outcome of the substantive hearing before the adjudicator? Southwell J.A. was of the view that the Royal Court had such a discretion in *Garenne v Falla*. In refusing leave to appeal to the Court of Appeal he said at paragraph 26 (2) of his decision

> "*In my judgement the Bailiff should have decided not to hear the appeal until the whole matter had been heard and decided by the Adjudicator.*"

18. Advocate Roland submitted those comments were obiter dicta. As they are the comments of a single judge rather than the full Court of Appeal it may anyway be questionable as to whether they are binding on the Royal Court. But even if they are not binding, I see no reason why I should not be guided by Mr Southwell's decision. The legislation, and the relevant Rules, do not say that I can not stay the appeal and I therefore accept that I have discretion to do so.

19. Advocate Roland also submitted that it would be unjust to adjourn the appeal because the employer wants to know why it lost on this issue so that it can decide whether to continue with its defence of the complaint. The adjudicator may have questioned the credibility of the two witnesses called on behalf of the employer (its director of human resources and its operations director). They will be essential witnesses for the employer on the substantive issues. The employer needs to take a commercial decision as to whether to continue. The further hearing is estimated to last two days and the amount of damages claimed is approximately £13,000. *Garenne* is distinguishable because in that case the adjudicator gave his reasons, Garenne were in no doubt why they lost and in any event there was no substantive defence, only a technicality (see para 18 and 26(7) of Southwell J.A.'s decision).

20. In response, Advocate Richardson argued that the thrust of the decision in *Garenne* is that adjudicators should decide their own procedure and be allowed, and encouraged, to hear the complaint as they think best and in a manner that is reasonably speedy and cost-effective. The problem has arisen partly because only a single day was set aside for the hearing whereas a whole week would have been more realistic. I note in passing that in the light of what has happened here those who set down complaints for hearing before adjudicators may wish to consider whether it would be better, especially in cases where either or both the parties are legally represented, to obtain an estimate of the length of hearing before dates are allocated.

21. I must decide whether the adjudicator's decision communicated in the letter dated 23 December 2005 from the Secretary to the Adjudicators namely that he will defer giving his reasons on the EDT issue until the conclusion of the hearing was reasonable.

22. I remind myself that appeal lies to this court on a point of law only (section 23(1) of the 1998 Law). Having regard to the analysis by Beloff J.A. in *Walters v States Housing Authority* [1997] 24.GLJ.76 of the different categories of unreasonableness I should only interfere with the adjudicator's decision if it is *ultra vires* or *Wednesbury* unreasonable.

23. The adjudicator has the power to decide his own procedure under paragraph 1(1)(m) of the Schedule to the 1998 Law.

24. Although Advocate Roland has relied on cases where a tribunal has given no, or inadequate, reasons I do not regard the adjudicator as having refused to give his reasons. He has said he will give them in his judgment at the conclusion of the hearing. In my opinion, that is a procedural decision well within the powers of the adjudicator.

25. Should I interfere with the adjudicator's exercise of his discretion? The letter dated 23 December 2005 states that the adjudicator had looked to the decision of Southwell J.A. in *Garenne v Falla* for guidance. I am satisfied that he has was entitled to do so. Indeed I have done the same in this Judgment.

26. The reasons the adjudicator gave for not giving his reasons at this stage were "in the interests of prompt resolution" and with a request that "we move with speed and expedition to conclude the hearing". In my opinion, those are proper matters to consider and show that he approached the exercise of his discretion in a correct manner. His conclusion, to move on with the hearing, is not irrational. I am therefore satisfied that there are no grounds on which I could interfere, on a point of law, with the adjudicator's decision. Consequently I do not propose to order him, at this stage, to give his reasons. There is no need for me to hear the EDT issue in his place.

27. Advocate Roland has asked me to remit the matter to a different adjudicator. In the judgment of the English Court of Appeal in *Barke v SEETEC Business Tecnology Centre Ltd* [2005] EWCA Civ 578, Dyson LJ at para 46 warned that:

> *"[46] As Burton J recognised in Burns at para [13], there are dangers in asking the original tribunal for further reasons where the ground of appeal is inadequacy of reasoning. It will not be appropriate where the inadequacy of reasoning is on its face so fundamental that there is a real risk that supplementary reasons will be reconstructions of proper reasons, rather than the unexpressed actual reasons for the decision. Nor will it be appropriate where there have been allegations of bias (unless, perhaps, where these are manifestly unfounded). The employment appeal tribunal should always be alive to the danger that an employment tribunal might tailor its response to a request for*

> *explanations or further reasons (usually subconsciously rather than deliberately) so as to put the decision in the best possible light".*

28. This is not a case where the tribunal has refused to give any reasons for its decision as the adjudicator has said he will give reasons at the end of the case. Nor is it a case where he has given reasons which are inadequate. The employer has not persuaded me that in the circumstances of the present case there is any danger that the adjudicator will tailor his reasons either deliberately or subconsciously. He is an experienced adjudicator and is to be trusted for his professionalism and integrity.

29. For the reasons I have given I order that the matter be remitted to Mr Woodward for him to continue the hearing and to give his decision and reasons after the conclusion of the hearing.

