Judgment 2/2004 **Guernsey Press Company Limited v Crocker – Royal Court, (Civil action file 745) – 27 February, 2004**

Employment Protection (Guernsey) Law, 1998 – employer's appeal from adjudicator's finding of unfair dismissal – relevance of post dismissal regulations for offering alternative employment – threat of withdrawal of redundancy offer.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 27th day of February, 2004 before Sir de Vic Carey, Bailiff; sitting alone

IN THE MATTER OF

GUERNSEY PRESS COMPANY LIMITED

Appellant

and

MARTYN CROCKER

Respondent

WHEREAS on 6th February, 2004 the Bailiff considered an appeal against a decision of the Adjudicator sitting in accordance with the provisions of the Employment Protection (Guernsey) Law, 1998 and handed down on 3rd April, 2003 and heard thereon Advocates P. Richardson and A. J. Ayres Counsel for the Appellant and Respondent respectively the Bailiff this day GAVE JUDGMENT in the terms attached hereto and

1) DISMISSED the Appeal

2) AWARDED costs to the Respondent on the standard recoverable basis.

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

FINAL DRAFT

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

ON APPEAL FROM THE DECISION OF THE ADJUDICATOR UNDER THE EMPLOYMENT PROTECTION GUERNSEY LAW, 1998

Between

GUERNSEY PRESS COMPANY LIMITED

Appellant

and

MARTYN CROCKER

Respondent

Date of Hearing: 6th February, 2004
Date judgment to be handed down: 27th February, 2004

Advocate for the Appellant: P. Richardson
Advocate for the Respondent: A. J. Ayres

Judgment of the Bailiff.

Introduction

1. This is an appeal against a decision of Mr. D. O. Le Conte sitting as an Adjudicator in accordance with the provisions of the Employment Protection (Guernsey) Law, 1998 handed down on the 3rd April, 2003. In this decision the Adjudicator found that the Respondent had been unfairly dismissed and that he was entitled to full compensation in accordance with the provisions of the Employment Protection (Guernsey) Law, 1998. The Appellant employer appeals against that decision citing errors of law in the decision of the Adjudicator.

The factual background

2. I adopt the careful summary of the history of this matter as set out in section 6 of the Adjudicator's judgment. There are two points that I would at this stage emphasise from that statement of facts. The first is that the Book Production Division of the Guernsey Press

Company Limited had been in difficulty for many years. The number of staff had been reduced from 70 to 21. Increasing costs in Guernsey and over capacity in other parts of the world made it impossible to compete with persons engaged in similar activity elsewhere particularly when one took into account the transport costs involved in bringing materials to and exporting the finished product from Guernsey. The employer claims that it was faced with a situation in June 2002 that it had reached the end of the road and that there was no alternative but to close the whole operation. In such a situation there was little that consultation with staff could do, but in accordance with its procedures the employer advised the staff of the position on the 19th June without at that stage specifying a date when contracts of employment would terminate.

3. It appears to be common ground that it was the representatives of the employees who were keen to bring matters to a head and have proper notices of redundancy served and information provided as to redundancy payments under the employers agreed conditions. All twenty members of staff were being treated in the same way. All were to be dismissed albeit that there were four vacancies elsewhere within the Guernsey Press that were available to be filled by persons previously employed in the Book Division if they had the necessary skills. It must be noted that this was not a down sizing in the operation as had presumably occurred when the work force reduced from 70 to 21 but a complete closure of this particular division. The employer's position was made clear in the documents generated by Mr. Ramsden on the 20th June in the form of a circular to all staff members and individual letters to affected employees.

Proceedings before the Adjudicator

4. The employer submitted that it had engaged in consultation prior to June 2002, although I have no detailed evidence on what was said beyond the findings of fact of the Adjudicator in section 6 of his judgment. Mr. Richardson for the employer claimed that the effective date of termination of the Contract of Employment was the 13th September, 2002, and not the 20th

June, 2002. This was contradicted by Mr. Ayres, who submitted that the contract had not stayed alive until the 13th September. There was also a certain amount of argument as to the precise terms of the employer's offer of an alternative job as credit control manager and what would be required of Mr. Crocker in that post. We are not here dealing with whether the employer had made an offer of alternative employment which entitled it to refuse to pay redundancy to Mr. Crocker so I do not have to review what evidence there was before the Adjudicator in this regard. It is also not necessary for me to review in detail the oral evidence, which the Adjudicator helpfully summarised in paragraph 7.3 of his judgment.

Conclusions of the Adjudicator

5. This is dealt with in section 8 of the judgment. Quite rightly the Adjudicator starts by saying that the matter of the redundancy payment is not an issue for him and that his task was to determine whether the dismissal was fair or unfair. He then goes on to review the letter of dismissal of the 20th June. He takes issue with the failure by the Employer to consult. In this regard the Adjudicator lays considerable weight on the Code of Practice that was issued by the Board of Industry on the 1st April, 2002.

6. The crux of the Adjudicator's decision is to be found in paragraphs 8.12 and 8.13 of his judgment. What he is saying is that it was clear that the Division would be closed. Had there however been consultation prior to dismissal the Company could have identified those four members of staff who were suitable for alternative employment. They could then have been offered alternative employment at that stage rather than after having received notices of dismissal. As a result of that failure the Adjudicator went on to find that the dismissal was unfair.

7. So far as the offer of alternative employment is concerned the Adjudicator does not, in paragraphs 8.15 and 8.16 of his judgment, find it necessary to choose between the arguments as to whether or not the alternative employment was suitable or not. What he says in effect is that because Mr. Crocker was served with notice of dismissal on the 20th June, it was

immaterial whether or not he was offered an alternative contract of employment during the notice period (although I accept that the use of those words is not to be found in the Adjudicator's judgment). He says that the dismissal had taken place and therefore the alternative employment offer did not constitute a withdrawal of the notice of dismissal.

8. In paragraph 8.17 the Adjudicator deals with the point under section 5(3) of the Law and finds that that subsection does not apply because in the letter of the 2nd September the Respondent confirmed that he was leaving on the 13th September.

9. Finally, the Adjudicator in paragraphs 8.18 and 8.19 deals with Mr. Richardson's argument that because there was an offer of alternative employment the amount of the damages should be reduced under section 21 of the Law. Here the Adjudicator seems to change track to the extent that he does have a view on the offer of alternative employment and rejects it. He notes that the award is to be reduced if "the complainant has unreasonably refused an offer by the employer which if accepted would have had the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed". He says that this is not the case because the employee would have been employed in a different job "under a new contract of employment" albeit that the pay and conditions of service would be the same.

10. The Adjudicator therefore finds for the Respondent and awards him three months pay.

The Law

11. The right to appeal to this Court against an award of an Adjudicator is contained in section 23 of the Law of 1998. That restricts the right of appeal to being "on a question of law". I am not therefore to substitute my view of the facts or that of the Adjudicator even if the Adjudicator's view of the facts is in my view not the one I would have reached. Therefore I must look to see what Mr. Richardson's complaint is against the finding of the Adjudicator as a matter of law.

My judgment

12. The Appellant's first contention is

> "1. The Adjudicator erred in law in holding that dismissal occurred in this case on 20th June 2002. The Respondent avers that the letter of this date merely gave notice of termination of his employment terminating on 13th September 2002."

To determine whether the Adjudicator has got the law wrong one needs to look at his analysis of the dismissal of the 20th June contained in paragraphs 8.2 to 8.14 of his judgment. What the Adjudicator has found is that on the 20th June a letter was sent giving the Respondent twelve weeks notice of termination of his employment. There is nothing in this section of his judgment where he is saying as alleged by the Appellant that "the dismissal occurred on the 20th June". What he is saying is that the statement contained in the letter of the 20th June was "an unequivocal notice of dismissal the reason for the dismissal being that the employee was redundant" (see paragraph 8.3). I cannot at this stage identify a misdirection in law. Having found this fact the Adjudicator goes on to consider whether the action of the employer in delivering a notice of dismissal on this date was fair. The Adjudicator has said that before anybody was dismissed the company was to engage in a full inquiry as to whether and by whom the four posts, which the company was saying could be found in its other operations, were to be filled. As I have mentioned the Adjudicator drew assistance from the Code of Practice and its emphasis on consultation.

13. I remind myself of the provisions of section 31 of the Law of 1998 and the standing of Codes of Practice in any proceedings before the Adjudicator, as set out in subsection (9) of that section

> "(9) A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Law before an adjudicator any code of practice issued under this section shall be admissible in evidence, and if any provision of the code appears to the adjudicator to be relevant to any question arising in the proceedings (including, without limitation, any question as to whether an employer has acted reasonably or unreasonably for the purposes of section 6(3)) that provision shall be taken into account in determining that question."

14. It is quite clear from subsequently what transpired that whether or not a particular employee was suitable for one of these other tasks was something that needed exploration and with a situation like this the natural way of dealing with things would appear to me to be the way that this employer chose to deal with it with incidentally, the acceptance, it appears, of the work force as a whole. The Adjudicator no doubt was influenced by the Code of Practice and also by what is written in the book "Avoiding unfair dismissal claims" by a practitioner called Barnett. This is a practical work for employers in England where a wholly different regime pertains with regard to protection from dismissal and providing for generous redundancy where workers have to be laid off. It seems to me that little of this has much relevance to the law in Guernsey, but I have already dwelt on the unsatisfactory aspects of our law in previous judgments relating to appeals from Adjudicators. See Milford v. Seaward Marine Ltd. 1st December, 2000 and Micropublishing v. Solway 26th January, 2001, and the policy letter of or Billet d'Etat XI of 1995 Article XIV.

15. The Adjudicator's approach in a situation where twenty employees are no longer going to have jobs is to require no action to be taken to dismiss them until the four employees who can be kept on have been satisfactorily identified and accommodated. This approach may appear at first sight open to question. However the States expressly chose to have a non-legalistic approach to these matters and it is not in any event for me to overrule the Adjudicator's finding on the facts as interpreted by him that the dismissal was unfair. Reference has been made to earlier consultation and there has been some acknowledgment in the judgment that there were previous meetings. The Adjudicator has chosen to ignore those for the purpose of seeing whether the Code of Practice has been complied with and again that judgment is one that in my view he is entitled to make on the facts and again it is not one with which I can interfere. With some hesitation therefore I dismiss this appeal so far as it challenges the fundamental conclusion of the Adjudicator that the way in which the Employer conducted itself in giving a notice of dismissal to the Respondent without first consulting with him and identifying whether or not he could remain with his employer of 29 years, albeit in other employment, was unfair.

16. Turning to paragraph 8.14 and 8.15 of the judgment of the Adjudicator, this is the point about alternative employment. I have already alluded to the apparent inconsistency of the finding to those paragraphs and that in paragraph 8.18.

17. Paragraph 2 of the Appellant's Contentions of Law referred to sections 5(2)(a) and 5(4)(a) of the Law of 1998. These define dismissal and effective date of termination. For the reasons I have said I do not find that the Adjudicator has misdirected himself as to the effect of the letter of 20th June. Paragraph 3 again complains in paragraph 3.1 of the viewing of the meeting of the 19th June and the subsequent letter in isolation but as I have said it was for the Adjudicator to take what view he wished of the prior consultation by the company.

18. The Law does not provide for redundancy payments. The States expressly set their face against the introduction of statutory redundancy pay on the recommendation of the Board of Employment, Industry and Commerce in 1995. I therefore find it hard to construe the meaning of section 21 of the Law. The Adjudicator's approach is to say that there is no issue concerning offers of alternative employment once the dismissal has taken place and if that is right then section 21 cannot come into play. That in my view is the only sensible way of looking at the matter although it does beg the question as to why section 21 is included in the Law at all. This is a Law, which, as has been made clear in previous decisions of this Court and in the decisions of adjudicators, is not like English legislation. In England the Law is designed to compensate people who are thrown out of work as the result of redundancy as well as protecting people against unfair dismissal. Our Law as I said in Milford, is designed to provide a Guernsey solution to the problem of employers, who do not do right by their employees when it comes to terminating their employment and it provides for a penal payment of three months salary if the Adjudicator finds the employee has been unfairly dismissed, regardless of actual loss.

19. The Respondent, Mr. Crocker, although he clearly from the papers played the employer along for a certain time, chose in the end to accept employment with the Island Development Committee and he was entitled to do that. Under the scheme of things, having successfully

complained of unfair dismissal and obtained compensation he may be foregoing any claim to redundancy as the Law expressly provides that in Guernsey there is no statutory right to redundancy. It is for that reason of course that the issue of whether or not any redundancy payment is to be made is of no materiality to the Adjudicator or me.

20. In my view therefore the Adjudicator was right to say that section 21 had no application and that accordingly no reduction in the compensatory payment for wrongful dismissal had to be made.

21. Finally, there is the issue of section 5(3) which the Adjudicator deals with in paragraph 8.17 of his judgment. Here I come to a different conclusion from the Adjudicator. On my reading of section 5(3) it does apply to the extent that the employee is not to find himself prejudiced because, having been unfairly dismissed, he decides to bring matters to a head by resigning prior to the expiry of the employment notice. In any event nothing turns on this particular point.

22. Whilst I am satisfied that I should uphold the decision of the Adjudicator I was at first left with an uneasy feeling about this matter. As I have said the way that the employer set about disposing of the whole of the workforce in the particular circumstances did not seem to me to be open to criticism. What perhaps muddied the waters and should not have been done was the employer's apparent attempts post dismissal to find alternative employment for four of the employees and then suggest to them that if these new jobs were refused redundancy would not be paid. We do not of course know what the terms of the contract were with employees relating to redundancy payments and those are not as I have said in issue in this case.

23. With a buoyant employment market as we had in Guernsey at the time that these employees were laid off it was naturally tempting for employees to take their redundancy compensation and walk away from any offers of alternative employment when they could find other jobs. However it would be that what Mr. Crocker was offered was not a satisfactory alternative. Neither the adjudicator nor I are trying that issue and it is important to emphasise the

Adjudicator's comments in paragraph 8.16 are to be treated as *obiter*. The employer could first have sorted out whom it was going to be able to keep and who it was not, and at the end of the day the Adjudicator was entitled to conclude that the post dismissal negotiations for offering alternative employment when they involved the threat of withdrawal of the redundancy offer rendered the whole process of the original dismissal unfair.

