Judgment 22/2008 **Da Mata v George (trading as Private Home Care) – Royal Court (Civil Action File 1170) – 7 July 2008**

Employment Protection (Guernsey) Law, 1998 – appeal to Royal Court from rejection of claim of unfair dismissal – Employment Tribunal unable to establish that a dismissal had taken place – right of appeal to Royal Court limited to points of law – held that the findings of the Tribunal were not perverse or irrational – appeal dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1170

The 7th day of July 2008 before Richard John Collas, Deputy Bailiff; sitting alone

CELESTINA DA MATA

Appellant

v

CHARLENE GEORGE
T/A's PRIVATE HOME CARE

Respondent

On appeal from a decision of the Employment and Discrimination Tribunal the Deputy Bailiff having considered the oral and written submissions thereon this day handed down judgment in the terms attached hereto and dismissed the said appeal

S M D ROSS
H M Deputy Greffier

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Approved Text
07.07.08

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

On Appeal from the Employment and Discrimination Tribunal

Between **CELESTINA DA MATA** **Appellant**

- and -

CHARLENE GEORGE **Respondent**
T/As PRIVATE HOME CARE

Judgment handed down: 7th July 2008

Before: Richard John COLLAS Esq., Deputy-Bailiff

Both Parties appeared in person

Legislation and case referred to:

1. Section 25 of the Employment Protection (Guernsey) (Amendment) Law, 2005, amending the Employment Protection (Guernsey) Law, 1998.
2. Cyma Petroleum (CI) Limited v The Chairman of the Policy and Finance Committee of the States of Alderney , Guernsey Court of Appeal, 12 December 2006.

1. The Respondent operates an organisation known as "Private Home Care", which provides personal care services to people in their own homes. She engaged the Appellant as a Carer in about January 2006 and from that date the Appellant had been providing care to clients in their own home. She was paid by the Respondent on a monthly basis after deducting Income Tax and employee Social Security contributions.

2. The Appellant was not entitled to holiday or sickness pay and when she went on holiday she was responsible for finding a suitable replacement to undertake her work in her absence and this role was normally fulfilled by her daughter whose abilities were considered acceptable by the Respondent. The Appellant had not signed a contract of employment and the first issue to be determined by the Tribunal was whether she was an employee or whether, as alleged by the Respondent, she was self employed.

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3. The finding of the Tribunal was that the Appellant enjoyed the status of an employee. The Respondent accepted that finding and there has been no appeal in respect of it.

4. The employment ended on 8 July 2007 and the Appellant brought a claim for unfair dismissal that was heard by the Employment & Discrimination Tribunal on 20 November 2007.

5. The Tribunal decided that it "could not establish that a dismissal had taken place and, therefore, rejected the claims of unfair dismissal and failure to provide a written reason for dismissal."

6. The Tribunal's findings of fact relevant to the Appellant's dismissal are as follows:-

> "2.15 The Applicant had not signed a contract of employment.
>
> 2.16 Following an altercation at a client's home between the Applicant and the Respondent it was alleged by the Applicant that the Respondent had dismissed her.
>
> 2.17 The Respondent considered the Applicant to be a good worker and denied dismissing her.
>
> 2.18 No witnesses to the alleged dismissal were called by either party and no witness testimonies were provided in evidence.
>
> 2.19 There was some confusion as to when the alleged dismissal took place as the ET1 and Advocate Nick Barnes' letter of 19 September 2007 noted 28 June 2007 whereas the Applicant's sworn statement indicated 4 July 2007.
>
> 2.20 The Patient Log noted the Applicant as working up to and including 8 July 2007.
>
> 2.21 Neither the Applicant nor her representative, Advocate Nick Barnes, had written to the Respondent requesting a written statement of the reason for the alleged dismissal."

7. The Tribunal then concluded:-

> "3.4 Under Section 5(2)(a) of The Employment Protection (Guernsey) Law, 1998 an employee shall be treated as dismissed by his employer if "the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice;".
>
> 3.5 The Respondent denied dismissing the Applicant and, after cross questioning by the Tribunal members, it was apparent that the Applicant herself was unsure of her alleged dismissal date.

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3.6 The alleged dismissal dates of 28 June 2007 and 4 July 2007 were inconsistent with the length of notice worked by the Applicant who continued to work as a carer for Private Home Care up to and including 8 July 2007.

3.7 The Tribunal found that there was insufficient evidence to substantiate that a dismissal actually took place.

3.8 The claim for unfair dismissal was, therefore, rejected by the Tribunal and the case dismissed."

8. The Appellant appealed the Tribunal's decision, setting out the following contentions in her Notice of Appeal which she described as contentions of law. (I have added paragraph numbers to the 8th to 12th paragraphs in her Notice):-

"I, Celestina da Mata, wish to appeal on Grounds of Law as follows that:

1. *The Employment and Discrimination Tribunal (ED 028/07) acted unreasonably and/or Ultra Vires:-*

2. *The procedures were not correctly followed in every respect.*

3. *The Discrimination issues, appertaining to my case, were insufficiently developed.*

4. *The facts of the case were wrongly adduced.*

5. *Members of the public were not present throughout the hearing leading to changing ground-rules during the hearing.*

6. *The procedure hearing was not taped on (sic) transcribed.*

7. *The law was not correctly followed or applied.*

   - *The Tribunal did not adequately determine the Employment Contractual rights and obligations and my right to receive written particulars of my terms of Employment – It was not considered at the Tribunal, whether I had a right to receive a statement of pay.*

   - *Moreover, the Tribunal did not also fully consider my Rights to receive Notice of Termination of Employment, my Right not to be dismissed unfairly, and my Right to receive a written statement of reasons for dismissal.*

8. *The Tribunal, during the course of the Hearing, identified that Mrs Charlene George post-dated retrospective Contracts of*

Employment for staff, such as myself, but subsequently still found in her favour, and this was a mistake in law.

9. *The case was rushed compared to some other cases, such as Albert Good v Credit Suisse (2 days) and Jane Stephens v the States of Guernsey Education Department (15 days).*

10. *My Advocate Nick Barnes and myself were given insufficient time and space to present our particular case and arguments over due process. I have a knowledge that this case was over very quickly and that the Hearing did not give sufficient time for a totally fair judgement on the evidence presented to the Tribunal body.*

11. *I was not asked to bring forward my witness. The Tribunal failed to facilitate a witness.*

12. *I want the opportunity, before the trained Judges of the Royal Court of Guernsey, to present the evidence obscured and not considered at the Tribunal Hearing held on November 20th 2007."*

Right of Appeal

9. The scope of an Appeal from the Tribunal to the Royal Court is very limited. Section 25 of the Employment Protection (Guernsey) (Amendment) Law, 2005, amending the Employment Protection (Guernsey) Law, 1998 provides as follows:

> ***"Appeals from Tribunal to Royal Court***
>
> *25. (1) A person aggrieved by a decision or award of the Tribunal on a question of law may, subject to the provisions of subsections (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."*

10. The Appellant was unrepresented on the appeal and appeared to have difficulty understanding the scope of the appeal. I allowed further submissions to be made on her behalf in writing, reserving the right to have a further hearing if necessary. I am grateful to Advocate Barnes who prepared the further submissions on the Appellant's behalf.

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11. I regard many of the matters raised in the Notice of Appeal to be procedural irregularities which, by virtue of section 25(2) of the Law would not invalidate the decision of the Tribunal unless the Appellant was prevented thereby from presenting her case fairly. I refer to the matters in paragraphs 2, 3, 4, 5, 6, 9, 10 and 11 of the Notice. Some of them, such as paragraph 5 (members of the public were not present throughout) and paragraph 6 (the proceedings were not taped or transcribed) could not have affected her presentation of the case.

12. Other matters, such as paragraph 3 (discrimination issues insufficiently developed), paragraph 4 (facts were wrongly adduced), and paragraph 11 (I was not asked to bring forward a witness) suggest criticism of the way her Advocate presented her case rather than any irregularity on the part of the tribunal. Paragraphs 9 and 10 complain that the hearing was rushed and that she and her Advocate had insufficient time to present her case.

13. The Appellant was represented at the Tribunal by Advocate Barnes who is a very competent and experienced Advocate and he would, I am sure, have raised with the Tribunal any concerns he might have had over the procedures being followed if he considered his client was denied the opportunity to present her case fairly. It is significant that the further submissions he prepared on behalf of the Appellant in this appeal do not advance any complaint about the procedures followed at the Tribunal. If Advocate Barnes thought that he had been prevented by the Tribunal from presenting the Appellant's case fairly, I have no doubt that he would have said so.

14. If the Appellant is criticising her Advocate's presentation of her case, there is no evidence that his conduct could be faulted but even if it could, that would not be a ground of appeal that could be validly pursued.

15. I have carefully examined the Appellant's complaints and am satisfied that there is nothing before me to suggest that the Appellant was denied a fair hearing and I therefore dismiss the grounds set out in paragraphs 3, 4, 5, 6, 10 and 11 of the Notice. Paragraph 2 is a general complaint that is not otherwise particularised and I therefore also dismiss that ground of appeal.

16. Paragraph 12 also fails as a ground of appeal. The Law does not empower the Royal Court to hear fresh evidence on appeal that was not adduced before the Tribunal.

17. The first of the two bullet points in paragraph 7 relates to the Appellant's contractual rights and is not relevant to the alleged dismissal. The Tribunal found that she was an employee of the Respondent. There was no need for it to make further findings as to the terms of the employment or whether, for example, she was entitled to receive a statement of pay.

18. In the second of the bullet points under paragraph 7, the Appellant states that the Tribunal did not fully consider her right to receive a written statement of the reasons for her dismissal. That is dealt with in paragraph 2.21 of the Tribunal's factual findings. Neither the Appellant nor her Advocate requested a written statement of the reasons for her dismissal. The right to be provided

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with a written statement of reasons is in section 2 of the 1998 Law. It was for the Appellant or her Advocate to decide whether to request a written statement. If they chose not to do so, there was nothing more for the Tribunal to consider in that regard.

19. The grounds of appeal that remain were explained in the further written submissions prepared on the Appellant's behalf by Advocate Barnes. In substance they amount to challenges to the Tribunal's findings of fact. The starting point in considering them is to draw attention to the very narrow limits laid down by statute for the scope of this appeal. It is limited to points of law.

20. In seeking to understand the scope of the appeal, I have referred myself to the decision of the Guernsey Court of Appeal in *Cyma Petroleum (CI) Limited v The Chairman of the Policy and Finance Committee of the States of Alderney* 12 December 2006. The case concerned an appeal, or appeals, under the Health and Safety at Work (Alderney) Ordinance 2003 against certain notices issued by the Committee to the company. Section 21 of the Ordinance gave a right of appeal to the Court of Alderney on the ground that the decision in the notice was either *ultra vires* or an unreasonable exercise of the Committee's powers. There was a more limited appeal to the Royal Court and thereafter top the Court of Appeal but only on a point of law. At paragraph of 14 of the Court of Appeal's judgment, Sumption JA noted that the ground of appeal to the Royal was that the decision of the Court of Alderney "was perverse, irrational or such as no properly directed decision-maker mindful of his duties could have reached". He then commented that given "the statutory limitations on the right of appeal to the Royal Court to points of law, nothing less than that would have entitled the company to succeed".

21. So, if the Appellant is to succeed in the present appeal, she must show that the Tribunal's findings of fact were perverse, irrational or such as no properly directed decision-maker mindful of his duties could have reached. The Appellant faces a high hurdle!

22. I turn now to the Appellant's complaints, as explained in the further submissions. In the first paragraph thereof, the Appellant complains that the Tribunal placed undue weight on the discrepancy between the date of dismissal alleged by the Appellant in her Form ET1 and the date in her signed statement. It is alleged that the discrepancy is irrelevant as what mattered was what was said in the conversation, or altercation, between the parties, not the date of it.

23. The first difficulty is that the Tribunal do not say how much weight they attach to this discrepancy. They refer to it at paragraph 2.19 where they describe it simply as "some confusion" which does not suggest they are attaching great weight to it. Then at paragraph 3.5 they state that after cross-examination she was unsure of the date and in paragraph 3.6 they say the two dates of 28 June and 4 July were inconsistent with the length of notice worked up to and including 8 July. The Appellant's evidence was that the Respondent gave her one week's notice, after initially giving her only 24 hours' notice. The Tribunal were right to point out that if one weeks' notice expired on 8 July, the

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date of the alleged dismissal does not tie in with either of the dates put forward by the Appellant.

24. I believe that the Tribunal's conclusion in paragraph 3.7 is essential to understand their decision. There was a straight conflict of evidence between the Appellant and the Respondent, with no independent witness called to give evidence of the altercation. The Appellant had the burden of proving her case on the balance of probabilities. In assessing her credibility, the Tribunal were entitled to examine her evidence to see whether it made sense. The date of termination and the length of period of notice she alleged she was given are facts they were entitled to take into account. The Tribunal's conclusion that there was insufficient evidence suggests to me that they are saying the Appellant had not discharged the burden of proof. They did not say they rejected one party's evidence in favour of the other. Instead, their conclusion suggests that they found each of the two parties to be equally credible and therefore, in the absence of any independent corroborative evidence, the proof was equally balanced between the two of them and so the Appellant had to fail. They had the benefit of hearing the witnesses give their evidence and of observing their demeanour as they did so. It was for the Tribunal to form a view as to the credibility of each of them and there was nothing perverse, irrational or otherwise unacceptable in their conclusion.

25. It is argued in the third paragraph of the further submissions that the Tribunal made no finding as to the credibility of the witnesses. As I have said, I consider it is to be inferred from their decision that they regarded the two as being equally credible. It is certainly to be inferred form their conclusion in paragraph 3.7 that they assessed the credibility of the witnesses and formed a view thereon.

26. It is not perverse or irrational that the Tribunal appear to have rejected the Respondent's evidence on the question of whether the Appellant was an employee yet appear to have accepted her evidence on the dismissal issue. Nor is it beyond the bounds of acceptable decision-making. Any tribunal is required to consider the whole of the evidence given by a witness and is entitled to form a view that it accepts some of the evidence and rejects the remainder.

27. In this case there was some independent evidence on the employment issue. For example, the fact that the Respondent paid the Appellant's wages and made statutory deductions at source. Such independent evidence may have been sufficient to tip the balance of proof in favour of the Appellant on the first issue but as there was no such independent evidence on the dismissal issue, the scales remained evenly balanced and the Appellant consequently lost on that issue.

28. Submissions are made about the phone call which is alleged to have taken place on the Saturday before the Appellant's last day of work. It is alleged that the Respondent advised the Appellant that the next day was to be her last day and that in itself was a dismissal. It is unfortunate that I do not have a transcript of the hearing although I do have the detailed notes taken by the

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Tribunal Members and a helpful transcript of notes taken by the Chair Person in shorthand. It does not appear to be to have been argued that the phone call on the Saturday was a dismissal. The case appears to have been that the Appellant was working out her notice and that the phone call on the Saturday was merely to confirm her last day of work.

29. The Tribunal recorded their findings of fact and their conclusion in some detail. They are a tribunal of lay members. It is to be assumed that they recorded the matters that they considered to be relevant and significant in reaching their decision. It would not have been irrational or perverse or beyond the bounds of acceptable decision-making if they decided that the evidence of the Saturday phone call did not assist them in reaching their decision. The principal issue for them was to consider what had been said on the earlier occasion during the alleged altercation.

30. Finally, it is submitted that the Tribunal are at fault in failing to deal with the question of why the Respondent did not contact the Appellant when she failed to appear for work on the Monday. I can understand why the Appellant considers it would help her in understanding how the Tribunal reached its decision if they had dealt with this issue. It has to be remembered that this appeal can only succeed on a question of law, in the sense in which I have interpreted it. I can not say that the Tribunal's failure to deal with this issue in their conclusions is perverse, irrational or such that no properly directed decision-maker mindful of his duties could have reached.

31. For the reasons I have given, I dismiss the appeal. I am grateful to Advocate Barnes for his assistance. I apologise that due to pressure of other work, it has taken me longer to consider the papers in this case than I normally would have liked.

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