

Judgment 6/2004

**Hopkins v NRG Distribution – Royal Court
(Civil Action file 789) – 12 March 2004**

Employment Protection (Gsy) Law, 1988 – employee’s appeal from decision of Adjudicator – appeal confined to a question of law – procedure followed at the hearing before the Adjudicator – no error of law in the way the Adjudicator reached her conclusions – appeal dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 26th day of March, 2004 before Sir de Vic Carey, Bailiff; sitting alone.

IN THE MATTER OF

ANTHONY B. HOPKINS

Appellant

and

NRG (DISTRIBUTION)

Respondent

WHEREAS on 19th February, 2004 the Bailiff considered an appeal from the decision of the Adjudicator under the Employment Protection (Guernsey) Law, 1997 handed down on 26th September, 2003 and heard thereon Anthony B. Hopkins in person and Advocate P. Richardson, Counsel for the Respondent and whereas on 12th March 2004 the Bailiff GAVE JUDGMENT in the terms attached hereto and DISMISSED the Appeal and ADJOURNED the question of costs to 26th March, 2004. The Bailiff this day having heard from the said parties AWARDED recoverable costs to the Respondent, limited in any event to the sum of one thousand pounds.

S.R.D. ROSS
Her Majesty’s Deputy Greffier

FINAL DRAFT

789

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

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

Between

ANTHONY B. HOPKINS#

Appellant

and

NRG (DISTRIBUTION)

Respondent

Date of Hearing: 19th February, 2004
Date judgment to be handed down: 12th March, 2004

The Appellant appeared in person.

Advocate for the Respondent: P. Richardson.

Judgment of the Bailiff.

Introduction

1. This is an appeal by the Employee against a decision of Mrs. Barbara Bartie, sitting as an Adjudicator in accordance with the provisions of the Employment Protection (Guernsey) Law, 1998, handed down on the 26th September, 2003. The Adjudicator dismissed a preliminary point brought by the Employer which submitted that because a legally binding agreement had been concluded between the Employer and the Employee concerning redundancy compensation, she should exercise her discretion under section 17(7)(d) of the Law and refuse to act on the complaint.

2. She then went on to consider the substantive complaint of unfair dismissal brought by the Appellant. She found against the Appellant and concluded that his dismissal had been fair. It is from that decision that the Appellant now appeals.

The Law

3. Before dealing with the facts of this case I remind myself of the provisions of section 23 of the Law of 1998, which provides for an appeal to this Court against an award of an Adjudicator "on a question of Law". It is not therefore open to me on appeal to review all the evidence that was before the Adjudicator and substitute for her view, my own views of whether the evidence pointed to the dismissal being reasonable or unreasonable. My personal conclusions as to the reasonableness of the dismissal are therefore immaterial and as a result I am not required to look at all the evidence that was before the Adjudicator. My consideration of documentation has therefore been limited to the judgment of the Adjudicator and the various submissions of the parties thereon.

Grounds of Appeal

4. The Appellant helpfully put in a document, which he described as his "Contentions of Law", and I propose to follow these in my review of the Appellant's case, although the way that the case developed, it did not follow exactly what the written contentions stated. In referring to the Appellant's "Contentions of Law" I would say at the outset that I regard them more as factual complaints against the Adjudicator's decision rather than legal points, but we will look at these further as we go through them.

Point 1.

5. This was a simple procedural point which arose from the fact that in employment appeal cases the order of speeches is that the employer goes first as it is for him to satisfy the Adjudicator that the dismissal was fair. As a consequence the employer replies and there is no final right of reply given to the employee. Clearly, if new points arise in the employer's closing address which were

not dealt with in his opening, then fairness requires that despite the general rule the party who has not got the final right of reply should be allowed to address them. However, as I see it the Adjudicator had had a very long hearing – made longer because the Employer took a preliminary point as to whether there was jurisdiction to entertain a claim for unfair dismissal after the Employee had agreed redundancy compensation, and she had probably felt that she had heard everything. Certainly from her very full and careful judgment that would appear to be the position.

6. However, my experience, in particular where one of the parties is unrepresented, is that one should not be frightened of allowing the unrepresented party the right to have the last word subject to his not trying to make new points that do not arise out of his opponent's closing or his not merely repeating what he has already said. In any event I invited the Appellant to draw to my attention the matters of which he felt, that he had been unfairly taken advantage in Mr. Richardson's final address to the Adjudicator. He was unable to substantiate his point beyond reiterating one or two things that came up in other paragraphs of his argument which I will address shortly. The point about having the final right of reply on new material, which as I have said is only a procedural one, is rejected.

Point 2.

7. At the substantive hearing of the complaint a Mrs. Clark was called to give evidence on behalf of the Employer. Although he had given evidence at the initial hearing, which considered the question of admissibility of the claim, the Appellant for some reason chose not to give evidence and expose himself to cross-examination at the main hearing. He now says that some of Mrs. Clark's evidence was false and that she has committed the offence in giving false evidence against him. If she has committed perjury, that is a matter for the Law Officers and the criminal courts. As far as I can see she was the only witness. The Appellant having elected not to give evidence himself and to confine his contribution to making comments on the Employer's case, has meant that the Adjudicator only had one witness and was not therefore able or obliged to decide between witnesses as to which piece of evidence

was credible and which was not. The complaint of the Appellant relates to an alleged suggestion by Mrs. Clark that after his departure extra staff had to be brought in to rectify faulty work which he had carried out, when he was in the employ of the company. Whatever the truth of this, the Adjudicator has made no reference to that allegation, nor does it seem to have in any way played on her judgement in the matter or the view that she took of the facts. I therefore do not consider that there has been any error on her part in the way that she considered Mrs. Clark's evidence.

Point 3.

8. The complaint here centres around the fact that the Employer obtained the Board of Industry Code of Practice relating to handling redundancy from its Advocate but did not furnish a copy to the employee. The Employee however got a copy from the Board and then set about referring to it at the hearing and drawing attention to a number of complaints he had about the procedure set out in the Code of Practice not being followed in his case. He further complained that Mr. Richardson had apparently said that the Employee's case was "a retrospective check list of the Code of Practice". All the points that the Applicant made in connection with the Code of Practice were clearly rehearsed by the Adjudicator in 10.1 to 10.8 of her judgment. She has given these matters full consideration in her conclusions in paragraphs 12.9 to 12.13 and 12.15 of her judgment. There is no obligation on an employer to furnish copies of the Code of Practice to employees. The Adjudicator was satisfied that the Employer had correctly approached the issue of application of the Code of Practice and there is in my judgment no error in law on her part in the way she has reached that conclusion.

Point 4.

9. The Appellant claims that the Adjudicator was wrong to take the view that the Employer had correctly set about selecting a pool from which the redundant accountant would be selected. The crux of the case, which the Appellant developed in argument, was that the whole

procedure adopted by the Employer was a device to get rid of him in preference to other members of the team. This message clearly got across to the Adjudicator – see paragraph 12.5 of her judgment where she says that she had not had this point further pursued in the hearing before her. With regard to the claim that the pool was wrongly selected she answers this in paragraph 12.12 of her judgment and it is clear that she took the view that the Employer had been right to widen the pool of possible candidates for dismissal in the way it did. Again I can find no error in law in the way she reached that conclusion.

Point 5.

10. This centres on the issue as to whether or not the Employer was wrong in not offering to the Appellant, as alternative employment, the post of management accountant in the finance department, which was then currently vacant. It is common ground that this particular post was considerably less well paid and lower in the hierarchy of the Company than the one that the Appellant held. There seems absolutely no doubt that had it tried to excuse dismissing the Appellant by requiring him to take this post, that the Employer would have been accused of not offering like for like.
11. The Appellant however takes this and puts it on its head by saying that irrespective of that point, it was for him, and not for the Employer, to make the decision as to whether the job, despite its lower status, should be made available to him. In answer the Employer would say that at no stage did the Appellant seriously suggest that this post should be offered to him. The Adjudicator dealt with the matter in paragraph 12.20 of her decision. It is clear that she did not reject it out of hand and she indicated that "after much deliberation" the employer had acted reasonably. Again this was a matter that was well within her discretion and again no error in law is apparent.

Point 6.

12. The Employer acting on Mr. Richardson's advice provided copies of the payslips for the last three months immediately prior to the giving of the notice of dismissal. The Employee produced his final payslip and the two previous ones and the figures were different. What view the Adjudicator took of this is not clear as in the end she was not concerned with the quantum of any award. In any event this seems to have been an entirely innocent mistake for which Mr. Richardson himself was accepting responsibility. I am not suggesting that the employer was wrong here. The point is of no consequence and of six weak points in the Appellant's case this is perhaps the weakest and I reject it.

Conclusion

13. This Adjudicator seems to have taken great care in dealing with the Appellant fairly. Sadly redundancies do on occasions give rise to feelings of extreme grievance and upset. Here the Appellant continues to maintain that he was in effect being picked on for redundancy. That argument was clearly dismissed by the Adjudicator in paragraph 12.25 of her judgment and I have no hesitation in dismissing this appeal against what was, with respect, in my opinion an impeccable judgment of the Adjudicator. I am sorry that the Appellant still has this great sense of grievance, which has not been assuaged by what has subsequently happened namely that NRG has left Guernsey entirely as the result of external forces, which appear to bear no reflection on the island, or those who were employed by it.