Judgment 66/2004 **Warden v. Fermain Legal Services Limited – Royal Court (Civil Action File 850) – 31 December, 2004**

Employment Protection (Guernsey) Law, 1998 – appeal from decision of Adjudicator rejecting an employee's complaint – whether complaint had been filed within one month of the effective date of termination of his employment – matter should not have been disposed of by way of a preliminary issue – remitted for hearing before a different Adjudicator.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 31st day of December, 2004 before Alan Robin Winston Hancox Esquire, EGH, CBE, Lieutenant Bailiff; sitting alone

In the matter of the Employment Protection (Guernsey) Law, 1998 and an appeal by Anthony Warden against the decision of the Adjudicator dated the 13th day of April.

Whereas on 16th December, 2004, the Lieutenant Bailiff considered an appeal from a decision of the Adjudicator dated 13th April, 2004, and heard thereon Advocate P Richardson and with no appearance being entered by the Respondent company, the Lieutenant Bailiff this day gave judgment in the terms attached hereto and ORDERED that the matter be remitted back for a hearing before a different Adjudicator.

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

Approved Text

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION.

IN THE MATTER OF THE EMPLOYMENT PROTECTION (GUERNSEY) LAW, 1998.

And

IN THE MATTER OF AN APPEAL BY ANTHONY WARDEN AGAINST THE DECISION OF THE ADJUDICATOR DATED THE 13th DAY OF APRIL 2004.

Judgment

1. On the 13th April this year the Adjudicator appointed by the Board of Industry (as it then was) under Section 17(1) of the Employment Protection (Guernsey) Law 1998 (Mr. Bruce Mansell) rejected a complaint by the present Appellant, Mr. Warden, that he had been unfairly dismissed by his employer, Fermain Legal Services Ltd (the Company), for whom he had worked since 1997, initially as Client Accountant, but for the majority of his service with the Company as Financial Controller.

2. The alleged facts (I say alleged because they have been put forward by the Appellant, first in his letters to the Board, secondly before the Adjudicator and thirdly through his Advocate Mr. Richardson and are as yet unchallenged) were that Mr. Ian Tickler, said to be the beneficial owner of the Company and its Chief Executive Officer at the material time, decided in late 2003 to restructure the corporate group of which the Company formed part. This had the consequence that Mr. Warden's position and terms of service were radically altered. As the Company was unaware of the proceedings held by the Adjudicator, and has only been represented briefly before the Court, it has had no opportunity to challenge these alleged facts.

3. Mr. Warden has claimed that the changes, of which he was the main casualty, were made arbitrarily by Mr. Tickler and without consultation. Whereas the Company's other employees were transferred to Marlborough Trust Company Mr. Warden was told he was to be excluded from the agreement made with Marlborough and that he would continue to work for Fermain on a self-employed basis as from 1st January, 2004. Mr. Tickler also informed the Appellant that his (the Appellant's) sole duty thereafter would be to wind up the in-house structures of the Group plus some low level accountancy and administrative work for Mr. Tickler personally.

4. The first inkling of the drastic changes that were to affect him came to Mr. Warden at a meeting with Mr. Tickler on 20th October, 2003, and were confirmed at their subsequent meetings of 6th November and 1st December. As was observed by Mr. Mansell in his Ruling, Mr.Warden protested to Mr. Tickler regarding that which he regarded as the Company's unfair treatment of him in his letter of the 11th December, but received no response.

5. In his memorandum to the Adjudicator accompanying the statutory Form EMPROT 1, Mr. Warden contended that the changes which I have outlined resulted in the Fermain Group becoming an empty shell and his position being materially devalued as from the New Year. This chain of events, which he said Mr. Tickler had set in motion in order to further his personal financial interests, constituted a fundamental breach of his contract of employment with Fermain. He attempted to make the best of the situation by carrying on for as long for as he could, but his position eventually became untenable by 31st December, 2003, when he left.

6. Mr. Warden claims that under his terms of service he is entitled to four weeks' notice of termination of employment, which period coincides with that laid down in section 1(1)(c) of the

Law in the case of a person who has been continuously employed for five years or more. This provision is highly significant in determining Mr. Warden's effective date of termination, because section 17(2)(a) requires a complaint of unfair dismissal (or that the employer failed to provide written reasons for dismissal) to be lodged in the appropriate form within one month (meaning a calendar month under section 3 of the Interpretation Law 1948) beginning with the effective date of termination.

7. By section 5(4)(b) of the Law the effective date of termination in relation to an employee whose contract of termination is terminated without notice (as is the case here) means the date on which the termination takes effect. Mr. Warden sent in the Form EMPROT 1 on 26th February, 2004. The Board, through its Secretary Mrs. Robey, took the view in its letter of the 1st March that as Mr. Warden had received verbal notice of termination at the meeting of the 6th November, 2003, his effective date of termination was the 31st December of that year at the latest. Accordingly the Form EMPROT 1 should have been submitted by the 30th January, 2004. It followed that the complaint was out of time and that the Board could not act on it in view of the provision in Section 17(2) of the Law to which I have just referred.

8. Mr. Warden did not accept this. He maintained that his entitlement to four weeks' leave meant that as he had carried on working, despite the difficulties, until the 31st December, that period should be reckoned in determining his effective date of termination, bringing it to the 28th January, 2004. He therefore wrote on 16th March seeking reconsideration of the Board's decision in this respect. This, in turn, led to Mr. Mansell's appointment as Adudicator 'to determine the appeal against the rejection of Mr. Warden's application'.

9. Mr. Mansell, despite the provisions in paragraph1 (1)(a) of the Schedule to the Law, which provides that an adjudicator shall afford the parties a reasonable opportunity of being heard (or, if they so elect, of submitting written statements) agreed with the Board's decision that EMPROT 1 was not submitted within the required period. He then purported to dismiss the appeal, subject to the variation that he treated Mr. Warden as having been dismissed from his employment at the meeting of the 1st December. Thus the effective date of termination remained as the 31st December 2003

10. Under the Law the role of an adjudicator is two-fold. First, by Section 17(1) once a complaint of unfair dismissal (or of a failure to furnish written reasons for the dismissal under Section 2) is presented to the Board it must appoint an adjudicator to hear and determine the complaint. It will be observed that the reference to an adjudicator under sub-section (1) is not, strictly speaking, an appeal *from* the decision of the Board. An adjudicator's jurisdiction under this section is original and not appellate. Secondly, if a complaint is presented out of time under Section 17(2), then by paragraph (b) the Board must exercise its discretion whether to allow further time if satisfied that it was not reasonably practicable for the complaint to be presented within a month.

11. Only if the Board is not so satisfied is the next sub-section activated. Under sub-section (3) the appointment of an adjudicator only comes into play if the complainant requires the Board to appoint him after a decision (adverse to the complainant) has been arrived at under the first part of that sub-section. He then has to determine whether the Board's decision not to allow further time was reasonable. To that extent only does an adjudicator have an appellate function under the Law. This is relevant to Ground 3 *(infra).*

12. This point was taken by Advocate Roland in paragraph 3 of her letter to the Greffier of 15th December, when she pointed out that neither the Board nor the Adjudicator had been requested to exercise any discretion under sub-section (2)(b). Miss Roland said that, having now seen the papers submitted on Mr. Warden's behalf, her client maintained that the Adjudicator's decision was correct. She also informed the Court that neither she nor her client would be appearing on the 16th December, which was the date previously fixed in the presence of both Advocates.

13. After Advocate Richardson was instructed on behalf of Mr. Warden he did not immediately lodge an appeal. He wrote to the Board's Secretary on the 6th May setting out his client's contentions, which broadly followed the main grounds he indicated he would be submitting in support of the appeal when it was listed on the 2nd December, which I will enumerate shortly. He requested reconsideration by the Board, in particular as to the effective date of termination of Mr. Warden's employment.

14. Mr. Richardson cited the case of Garenne Group Ltd v Falla [2002] Civil Appeal No. 311. He asked that the matter should proceed on the lines indicated by Southwell J.A in that judgment. Nevertheless, taking the view that the Adjudicator's determination of the 13th April was final as provided in paragraph (a) of Section 17(3) the Board's successor did not respond to Mr. Richardson's request, but instead suggested his client should appeal to the Royal Court: hence the present appeal which was lodged with the Greffe as long ago as 19th May, 2004.

15. This view was erroneous, because the provision as to finality in section 17(3)(a) only relates to an adjudicator's determination under that sub-section, namely the reasonableness or otherwise of the Board's decision not to allow further time for the presentation of a complaint under subsection (2)(b). It has no relevance to an adjudicator's substantive decision on the validity of a complaint of unfair dismissal under sub-section (1). Accordingly the Adjudicator, Mr Mansell, was not precluded from reconsidering his decision as to the effective date of termination of Mr. Warden's employment with Fermain Ltd. This gains support from Garenne's case (*supra*), in which Southwell J.A. held that the correct solution was to remit the matter to the same adjudicator to be heard on the merits of the case.

16. Leaving aside for the moment the issue of discovery raised by Advocate Richardson in relation to the documents listed in Advocate Moore's letter of the 14th December, which he sought to be determined as a preliminary issue, the contentions advanced on this Appeal may, I think, fairly be said to be comprised in the following grounds:

Ground 1. There was no justification for the Adjudicator's finding that the Company and Mr. Tickler were one and the same entity.

Ground 2. There was a material error by the Board in determining the effective date of termination of Mr. Warden's employment with Fermain within the meaning of Section 5(4) of the Law, and its consequent decision (as confirmed by the Adjudicator in his Ruling of the 13th April) that it could not act on the complaint of the 26th February, 2004.

Ground 3. Assuming (contrary to the Appellant's contention) that the Board was correct in holding the effective date of termination to be the 31st December, 2003, neither it nor Mr.Mansell gave any consideration to the discretion vested in the former by Section 17(2)(b) of the Law to allow further time for presentation of the complaint: nor was there any finding as to whether it was or was not reasonably practicable for Mr. Warden to have presented his complaint within one month (not four weeks) beginning with that date.

Ground 4. The Adjudicator's decision was fundamentally flawed inasmuch as neither party, especially the complainant, was given an opportunity of being heard, as required by paragraph 1(1)(a) of the Schedule to the Law, although I observe in this connexion that Mr. Warden submitted a very full statement as an annexure to the Form EMPROT 1, which is an alternative course permitted under that sub-paragraph.

17. I take Ground 2 first. Throughout this case the Appellant has stressed that the effective date of termination of his employment was the 28th January of this year. It is common ground that there was no notice or other act of termination by Fermain, as the employer, and consequently no dismissal of Mr. Warden under either paragraph (a) or (b) of Section 5(2) of the Law. It follows that his case is based on paragraph (c). Mr. Richardson submitted that that paragraph recognises the concept of constructive dismissal, and that it applies to Mr. Warden's case, since he has consistently maintained that the employer's conduct was such that his position became impossible due to the reorganisation and restructuring of the Group which I have outlined in paragraphs 3 to 5 hereof.

18. Section 5(2) of the Guernsey Law is very similar to Section 95(2) of the United Kingdom Employment Rights Act 1996. Paragraph (c) thereof is the foundation of the doctrine of constructive dismissal, as is clear from the following passage from Halsbury's Laws of England 4th Edition Volume 16 paragraph 478:

> "An employee who terminates the contract of employment, with or without notice, may still claim to have been dismissed if the circumstances are such that he is entitled to terminate it without notice by reason of the employer's conduct."

19. The essence of the doctrine is that the employer has been guilty of a breach of the employment contract and that the employee leaves in response to the breach. In his letter to Mr.Tickler of the 11th December, 2003, Mr. Warden claimed that the restructuring would force him to leave Fermain: that there was a fundamental breach of his contract of service which would take effect on the 31st of that month. That letter was written within ten days of the meeting which the adjudicator held was the date when Mr. Warden considered that he had been dismissed.

20. As I have indicated, it was not Mr. Warden's case that he was expressly dismissed by Fermain, but that the unilateral changes which Mr. Tickler, as Chief Executive Officer, had said would take place and which he had already begun to put into effect rendered his position, as he claims, untenable. In my judgment, therefore, the case put forward by Mr. Warden from the inception of the dispute falls squarely within the doctrine of constructive dismissal, by reason of the employer's conduct.

21. It matters not, in my view, that Mr. Tickler was responsible, as the complainant alleges, for the acts by which the re-construction would be effected, since the Company, as a juridical entity and legal *persona,* can only act through its officers. Clearly the Chief Executive Officer, who was also its beneficial owner, can be regarded as the appropriate person through whom the Company would ordinarily act in matters of importance, such as a change in the duties of its Financial Controller.

22. I do not propose, on this appeal, to decide on the veracity or otherwise of the facts and circumstances advanced by Mr. Warden. However, unchallenged, they are the assumed facts upon which this appeal has proceeded. Manifestly Mr. Warden was entitled, at the least, to have the case, as presented by him, heard and determined by the adjudicator under the provisions of Section 17(1) of the Law. To dispose of it by way of a preliminary issue was precisely that which Southwell J.A. in the Garenne case said should not be done. It was all the more wrong not to address the issue as to whether or not it was reasonably practicable for the complaint to be presented within the time specified. This led to the Board's failure to exercise its discretion under Section 17(2)(b). For these reasons I consider Grounds 2,3 and 4 succeed. I do not need to consider Ground 1.

23. I now turn to address the preliminary issue on this appeal, namely whether the documents listed in Mr. Moore's letter of the 14th December should be disclosed. Mr. Richardson puts his case for discovery in this way: that there is material to support the view that Mr. Tickler, as principal officer of Fermain, had decided to get rid of Mr. Warden for an oblique reason, possibly pressure from the Guernsey Financial Services Commission, which regarded Mr. Warden's position as Financial Controller as an obstacle to the approval of a fiduciary licence to Fermain. Mr. Richardson submitted that the documents in question would throw light on this matter and would be

highly relevant to the strength or weakness of Mr. Warden's case that he had been constructively dismissed.

24. In my judgment the documents listed in Mr. Moore's letter of the 14th December are wholly irrelevant to the principles which I should consider on this appeal. Undoubtedly an adjudicator has the power to call for the production of documents under paragraph 1(1)(g) of the Schedule to the Law, and he also has the same powers as the Royal Court in this respect under paragraph 4(c). *A fortiori* this Court also possesses such powers. However, before any evidentiary material, including documents, can be produced in any Court, it or they must first satisfy the test of relevancy.

25. All the documents listed in Mr. Moore's letter, apart from the Press report, relate to a short period of about two months some ten years before the passage of events in late 2003 which are said to have led to Mr. Warden's downfall. In my view they are not necessary for the purposes of a decision on any of the Grounds comprising Mr. Richardson's submissions. Another difficulty, if the documents were to be admitted in this appeal, would be that since those numbered 1,3 and 4 are extracts from documents, the scope of the appeal would be further enlarged, since it might well be that the Court would need to see those documents in their entirety in order to exclude any false impressions. I hold therefore that there is no warrant, on this appeal, for ordering the discovery and disclosure of the seven documents mentioned in Mr. Moore's letter.

26. As in the Garenne case, I consider the correct course is to remit this matter for a proper hearing, but before a different adjudicator. Doubtless he will consider, if application is made, whether the production of any of the documents in question should be produced as being necessary for the determination of the issue before him, namely whether the circumstances were such that the employee was entitled to terminate his contract of service by reason of the employer's conduct.

Order accordingly.

A.R.W.Hancox.
Lieutenant Bailiff
31st December 2004.