Judgment 6/2012

Cams Limited v Cluer – Royal Court (Civil Action File No 1653) - 20th February, 2012

The Employment Protection (Guernsey) Law, 1998 s.25(1) – appeal against the findings of The Employment and Discrimination Tribunal – compensation for unfair dismissal award – Employer's appeal dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 20th day of February 2012 before Richard John Collas, Esquire, Deputy Bailiff

Between

CAMS LIMITED

Appellant

v

MICHAEL CLUER

Respondent

WHEREAS on 13th February 2011 the Deputy Bailiff considered an appeal against the findings of The Employment and Discrimination Tribunal ("the Tribunal") dated 11th June 2011 and heard thereon Mr C Littlewood, Director on behalf of the Appellant and the Respondent in person this day handed down judgment in the terms attached hereto and DISMISSED the Appeal.

S J COLLINS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

On Appeal from decision of
The Employment and Discrimination Tribunal

Between

CAMS LIMITED **Appellant**

and

MICHAEL CLUER **Respondent**

Case heard on: 13th February 2012

Judgment handed down: 20th February 2012

Before: Richard John COLLAS Esq., Deputy-Bailiff

The Appellant was represented by Mr C Littlewood, Director

The Respondent represented himself

Legislation and cases referred to:

Burford v Flybe Limited (Royal Court, 23 June 2009)

A J Troalic & Sons Limited v Kinsey (Royal Court 9 April 2010)

1. This is an appeal against the findings of The Employment and Discrimination Tribunal ("the Tribunal") dated 11th June 2011, concerning an application by Mr Michael Cluer, the Respondent in this appeal, for compensation for unfair dismissal. The provisions of The Employment Protection (Guernsey) Law, 1998, as amended, ("the Law") apply and the appeal lies on a point of law only (Section 25 (1) of the Law, as amended).

2. The Appellant in this matter is the unsuccessful Respondent in the Tribunal hearing (CAMS Limited). In this judgment, I refer to the Appellant as the Employer and to the Respondent as the Employee.

3. The Tribunal unanimously found that the Employee had been unfairly dismissed and awarded him £12,000 under Section 22 (1) (a) of the Law. Before the Tribunal and before the Royal Court, the Employer was represented by Mr Marc Littlewood and the Employee represented himself.

4. The findings of fact of the Tribunal are set out in paragraph 2 of its Decision:

> *"2.1 Mr Cluer was employed by CAMS Limited as a Sales and Hire Operative from January 2002 until October 2010.*

2.2 CAMS Limited is a small company consisting of two full-time employees and one part-time employee.

2.3 Mr Cluer reached the age of 65 on 6 October 2010.

2.4 Neither Mr Cluer's contract of employment nor any company policy made reference to a retirement age for employees.

2.5 On 26 October 2010 Mr Cluer received a letter form (sic) Mr Littlewood (EE1, p23 refers) asking him to take the day off to consider his retirement plans and to return at 4.00 pm to discuss them in a meeting with Mr Littlewood.

2.6 On 27 October 2010 Mr Cluer received a further letter from Mr Littlewood (EE1, p24 refers) confirming that he would like Mr Cluer to retire at the end of the month. He was to take the rest of the week off and would have any "underpayments" on his salary to date in his final salary."

5. In its written decision issued on 11th June 2011 ("the Decision"), the Tribunal summarised the main submissions of the parties, their evidence and the evidence of two witnesses, the general manager and an engineering operative of the Employer, both of whom were called by the Employer.

6. The conclusions and decision of the Tribunal are recorded in paragraph 5 of its Decision:

"5.1 It is clear from the statements made by Mr Littlewood at the outset of the Tribunal that the reason for Mr Cluer's dismissal had been one of conduct in the workplace. Mr Cluer's age, having reached 65, presented an opportunity to Mr Littlewood for the matter of their poor working relations and Mr Littlewood's failure to deal with the issue of Mr Cluer's conduct in the workplace to be dealt with under the guise of retirement.

5.2 Even accepting that the Respondent is a small company with limited resources no disciplinary procedure was followed that respected the Applicant's usual rights of notice prior to the disciplinary meeting, nor of the right to reply in relation to the allegations (given that the meeting was so brief), nor of any appeal. It is also noted that the Applicant did not receive his contractual notice or pay (although there is no redress through the Tribunal on this matter since it is dealt with through a different legal avenue).

5.3 Having considered all the evidence presented and the representations of both parties, and having due regard to all the circumstances, the Tribunal unanimously found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed.

5.4 The Tribunal therefore makes an Award of £12,000.00."

7. The Employer lodged a Notice of Appeal dated 24th August 2011 setting out its contentions of law which were as follows:

"(1) The Tribunal failed to undertake a consideration under section 23(2) of the Law as to whether by reason of any circumstances it would be just and equitable to reduce the amount of the unfair dismissal award to any extent; alternatively.

(2) Having undertaken a consideration under section 23(2) of the Law and failed to

reduce the unfair dismissal award, the Tribunal undertook its consideration Wednesbury unreasonably as it should have reduced the award to take account of:

(a) The fact that the Appellant had a fair reason for dismissing the Respondent under section 6(2)(b) of the Law, the Tribunal having found that the reason related to the Respondent's conduct; and

(b) The Respondent's misconduct in the workplace, the Tribunal having found that the Respondent's conduct in the workplace was an issue."

8. The appeal first came before me for directions on 2nd September 2011. At the directions hearing, it was agreed by both parties that the Greffe should write to the Tribunal on my directions, to ascertain whether it had exercised its discretion under Section 23 (2) of the Law to award a reduced amount of compensation. On the same day, Deputy-Greffier Ross, wrote to the Secretary to the Tribunal asking:

"(a) Whether it considered exercising any discretion under Section 23 (2) of the Law.

(b) If so, what reasons the Tribunal gave for not reducing the compensation."

9. The Secretary to the Tribunal replied by letter dated 23rd September 2011 as follows:

"In response I can confirm that:

a) The Tribunal briefly considered and eliminated the possibility of a reduction in the award.

b) The reasons the Tribunal had for not considering reducing the compensation were:

i) The Respondent made no request for a reduction in the award if we found for the Applicant.

ii) The Respondent gave the Tribunal no cause to consider a reduction in the award, this was given the considerable lack of process and procedure the Respondent showed in dismissing the Applicant for conduct and performance issues under the guise of enforced retirement, even allowing for the small size of the business operation.

iii) The Respondent provided no documented history of attempts to deal with the alleged poor conduct and performance of the Applicant other than a vague recollection of a verbal warning which had occurred 3 years prior to the dismissal, for which the Respondent could produce no documentation or recollection as to the details.

iv) Whilst the Applicant was in a number of respects not an ideal employee from the evidence given at the Tribunal Hearing his failings were not addressed at all by the Respondent until matters came to a head shortly before he was asked to retire, having reached the age of 65 years a few weeks previously. It was clearly stated by the Respondent that he had

principally asked the Applicant to retire because of conduct and performance issues and not because the company had a policy for employees to retire upon reaching their 65th birthday."

10. The Secretary's response was forwarded by the Greffe to the parties. The Employer confirmed by letter of 10th November 2011 that it wished to proceed with the appeal and attached the following reasons for doing so:

"1. The Tribunal should have stated in its original decision dated 11 June 2011 whether or not it undertook a consideration under section 23(2) of the Law and, if it did undertake such a consideration, its reasoning for not reducing he award given that these matters formed a material and substantive part of the Tribunal's decision;

2. The Royal Court, by requesting a statement from the Tribunal as to whether it considered exercising its discretion under section 23(2) of the Law and its reasons for not reducing the award, has effectively bypassed the Appellant's appeal and given the Tribunal another bite at the cherry to correct or add to its decision retrospectively;

3. The Tribunal's statement in respect of its failure to reduce the award is contradictory because on the one hand it states "The Tribunal briefly considered and eliminated the possibility of a reduction in the award" and on the other hand it states "The reasons the Tribunal had for not considering reducing the compensation were";

4. The Tribunal's statement in respect of its failure to reduce the award is further contradictory because on the one hand it states "The Respondent made no request for a reduction in the award if we found for the Applicant" – as though it did not undertake a consideration under section 23(3) of the Law because it was not asked to – and on the other hand it then specifies the reasons why it decided not to reduce the award having nevertheless undertaken a consideration under section 23(2) of the Law;

5. The Appellant's failure to request the Tribunal to reduce the award at the hearing is not a ground for the Tribunal either not to undertake a consideration in the first place as to whether to reduce the award under section 23(2) of the Law, or to exercise its discretion not to reduce the award having given a reduction of the award due consideration, because:

(a) The Appellant was unrepresented at the hearing and did not have the benefit of legal advice to know that it should request the Tribunal to reduce the award;

(b) The Law does not state that a party must request the Tribunal to undertake a consideration of a reduction in the aware under section 23(2) of the Law, or to give reasons why it should reduce the award, in order for the Tribunal to undertake that consideration and consider exercising its discretion in the first place; and

(c) On the basis that section 23(2) of the Law provides the Tribunal with a discretion to reduce the award, the Tribunal has a duty to consider whether or not it should exercise that discretion in each case and to exercise that discretion fairly in the interests of natural justice and to guard against arbitrary and/or capricious decision-making.

> 6. *The Tribunal's failure to reduce the award for the reasons specified in its statement still constituted a Wednesbury unreasonable exercise of its discretion for the reasons already stated at ground (2) of the Appellant's appeal. In the Royal Court case of Burford v Flybe Limited (2009), it was stated that the Tribunal had a wide discretion to take into account matters it thought relevant, one of which was whether the employee's previous conduct had contributed to the dismissal (as found by the Tribunal in the present case), and that the failure to follow a fair process (as found by the Tribunal in the present case) was not of itself sufficient to prevent the award of compensation being reduced."*

11. In a number of decisions on appeal from the Tribunal, the Royal Court has commented on how it should approach any review of a written decision of the Tribunal. I refer, for example, to paragraphs 4 and 5 in my judgment on Burford v Flybe Limited (Royal Court, 23 June 2009) and the judgment of Finch, Judge of the Royal Court in A J Troalic & Sons Limited v Kinsey (Royal Court 9 April 2010), paragraphs 3, 4 and 13 to 16.

12. I have borne those observations in mind in the present appeal.

13. It is apparent from the Employer's grounds of appeal that, in the present appeal, he is aggrieved at what he perceives to be a failure by the Tribunal to consider a reduction in the Award under Section 23 (2) of the Law. A similar point arose in Troalic, in relation to which Judge Finch said the following at paragraph 23 of his judgment:

> *"23…….. I am unable to see how A can argue a reduction under Section 23(2) of the law when the point was not raised in writing or oral argument. Nor does it seem to me unreasonable for the Tribunal in such circumstances not to positively assert that it is not making a reduction when it has never been suggested. How could a Magistrates' Court be criticized properly for not dismissing a defence, say, of automatism or duress if not raised at the hearing? This is an imperfect analogy, but to hold otherwise would place an insufferable burden on the Tribunal. If I am technically wrong on this point then I accept Wednesbury principles would apply and on this basis, and the finding of facts, would not consider any reduction appropriate."*

14. I respectfully agree with the learned Judge and would add the following. When the Employment Protection (Guernsey) Law, 1998 was enacted and the Tribunal established, it was the intention of the States as legislature to encourage employers and employees to use the services of the Tribunal without having to seek legal representation. I suspect that more parties are represented before the Tribunal than the States had intended, but the Tribunal is accustomed to dealing with unrepresented parties and it is my understanding that printed information is made available by the Tribunal to explain its procedures to those appearing before it. In any event, everyone is deemed to know the law and every employer appearing before the Tribunal must be deemed to know that the Tribunal has a discretion to reduce an award, even if the employer does not in fact have such knowledge.

15. Furthermore, it seems to me that the circumstances in which the Tribunal has a discretion to reduce an award are such that it requires evidence and submissions from the employer in order to do so. Under Section 23 (1), it must be for the employer to lead evidence that it has made an offer to reinstate the employee which the employee has unreasonably refused. In respect of Section 23 (2), it is not for the Tribunal to conduct its own enquiries as to whether there are circumstances that would render it is just and equitable to reduce the amount of compensation. It must be for the employer to lead such evidence and to put forward arguments to persuade the Tribunal to make a reduction in such circumstances.

16. In the present case, the Employer did not argue for a reduction in compensation and, in my view, cannot complain that the Tribunal failed to reduce the award. Even if I am wrong on that point, there is nothing in the Tribunal's findings of fact to suggest that the Tribunal's decision not to reduce the compensation is Wednesbury unreasonable. The Secretary to the Tribunal has explained the Tribunal's reasoning in her letter of 23rd September quoted above. In my view, its decision was a decision it could reasonably have reached on the facts of the case.

17. Before me, the Employer submitted that he did not make such submission because he thought it would undermine his primary argument that the Employee was not unfairly dismissed. Unfortunately, that argument carries no weight. The Tribunal will fully understand why a party may wish to pursue alternative arguments, where it is appropriate to do so, even though they may appear contradictory.

18. I turn now to the numbered paragraphs in the contentions submitted by the Employer dated 10th November 2011.

    (1) For the reasons I have given, the Tribunal was under no obligation to consider a reduction under Section 23 (2) of the Law in circumstances where the Employer had not requested it to do so. Further, it was not obliged to reduce the award where the facts found by the Tribunal did not lead to the conclusion that it was just and equitable to do so.

    (2) As I have stated above, the Royal Court contacted the Tribunal with the agreement of the parties. Doing so did not, in my view, give the Tribunal another 'bite of the cherry'. The Court was merely seeking clarification of the Tribunal's written Decision. The response received was from the Secretary who explained the Tribunal's decision. It does not in any way suggest that it reconsidered its decision in reply to the Court's request.

    (3) The Court's approach to reviewing decisions of the Tribunal requires it to assume that the Tribunal knew how it should perform its functions (as per the passages referred to above in Troalic and Burford). With that in mind, I understand the Tribunal to be saying that its consideration was "brief" in the sense that it took only a brief period of time to decide that there was no factual basis to justify a reduction in the amount of compensation. Also, the Tribunal was not required to "consider" reducing the compensation because the Employer had not established that it would be just and equitable to do so.

    (4) In my view, the Tribunal was under no obligation to consider a reduction under Section 23 (2). Even though it was under no such obligation, the letter from the Secretary to the Tribunal indicates that attention was given to the question of whether a basis had been made out for such a reduction even though it had not been requested to do so. In my view, it was perfectly reasonable for the Tribunal to do so.

    (5) As I have explained above, unrepresented parties are deemed to know the Law even if they do not do so. In my view it is explicit in Section 23 (2) that it is for the employer to lead the evidence to show that a reduction would be just and equitable. Such evidence is a pre condition of the Tribunal exercising such discretion. If the pre condition has not been satisfied because the factual basis has not been established, the Tribunal has no discretion to reduce the award.

    (6) As I have said, in my view, the Tribunal's decision was not unreasonable in a Wednesbury sense.

19. I return finally to the matters raised in paragraph 2 of the Employer's Notice of Appeal dated 24th August 2011.

20. I do not interpret the decision of the Tribunal as concluding that the Employee's conduct in the work place had been such that it justified summary dismissal. My understanding of the decision is that the Tribunal found that the real reason for the dismissal was that the Employer was dissatisfied with the Employees' conduct. It did not say whether the Employer's views in that regard were reasonable. Instead, the Tribunal was critical of the employer for not following the proper procedures for dealing with the misconduct on the part of an employee.

21. For the reasons I have given, I dismiss the Employer's Appeal.

22. The Employee indicated to me that he may wish to pursue separate claims for damages. The Tribunal's award of compensation merely compensates the Employee for unfair dismissal. Any contractual or other claims an employee may have arising independently of the Employment Protection (Guernsey) Law, 1998, must be pursued separately and are to be adjudicated upon in a court of law, not before the Tribunal (as the Tribunal correctly stated in paragraph 5.2 of its Decision).