Convenor of the Employment and Discrimination Panel and The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005
Royal Court
7th February, 2014

JUDGMENT 08/2014

Ruling on the Reference of a Point of Law by the Convenor of the Employment and Discrimination Panel as prescribed in the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005

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IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Ruling on the Reference of a Point of Law by the Convenor of the Employment and Discrimination Panel as prescribed in the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005

Decision handed down: 7th February 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Cases, Texts & Legislation referred to:
The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005
The Employment Protection (Appeals and References) Order, 2006
The Companies (Guernsey) Law, 2008
The Employment Tribunal Rules of Procedure
Slater v Provident Personal Finance Limited (Appeal No. UKEATPA/1639/07/CEA)
Akewushola v Secretary of State for the Home Department [2000] 1 WLR 2295
The Employment Protection (Guernsey) Law, 1998

Introduction

1. On 21 January 2014, pursuant to section 4(1) of the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, the Convenor of the Employment and Discrimination Panel made a reference to the Court. Although the origins of the reference relate to a particular case (ED 027/12), to which the statement of case refers, the questions of law or procedure to which answers are sought are potentially of wider application.

2. The procedure for references of points of law by the Employment and Discrimination Tribunal is prescribed by Part II of the Employment Protection (Appeals and References) Order, 2006. However, references made by the Convenor of the Panel are not expressly dealt with in that Part. By virtue of article 5 of the 2006 Order:

> "*If the Royal Court is of the opinion that a question of law referred to it under this Part of this Order can properly be determined on the basis of the statement of the case and any further particulars furnished under article 4(a), the Royal Court may dispense with a hearing and determine the question on that basis*."

I am satisfied that the guidance sought by the reference can be provided without needing to convene a hearing at which submissions can be heard and have, therefore, proceeded to give this ruling on the basis of the papers submitted by the Convenor.

Names of parties

3. The first issued raised in the reference is about "*a party who is moving into some form of administrative process, whether voluntarily or by compulsion [and the] correct designation of a Respondent in such circumstances and what representation might be made on behalf of them in their changing circumstances*". The Convenor has offered some examples of the experience of various recent Tribunal hearings as follows:

> "*1) A party informs the panel of their being in administration or likely to enter a state of administration in the near future.*
> *2) A party may put themselves into voluntary liquidation during the proceedings, on occasion just prior to the commencement of the hearing.*
>
> *3) A party is put into compulsory liquidation; either before, during or after the hearing, but prior to the judgment being issued.*
> *4) A Respondent possibly being declared as "En Desastre".*
> *5) On some occasions the Respondents have sought to have the Hearing set aside as no longer having merit, stating that no monies will be paid. On one occasion at least a Respondent has informed a Case Management Meeting that liquidation would be entered into if the complaint proceeded to hearing. None of these assertions have been accepted and Tribunal Hearings have always proceeded.*
> *6) Representation on the [sic] behalf of the Respondent in such circumstances is very variable, possibly a senior manager or director may appear on behalf of the company or not at all; and in some cases a Liquidator makes an appearance to explain the current status of the company, hence placing themselves in some form of quasi representation.*"

4. In the light of those examples and the issues raised, the Convenor's specific requests are that:

> "*1) The Royal Court prescribe how we should refer to such parties in our future proceedings.*
> *2) The Tribunal to be given guidance as to whether the name of the party should change as they move through a liquidation process to acknowledge their changed status.*
> *3) The Tribunal to be advised as to how it should refer to liquidators in these proceedings and what is their legal role, if any, in these proceedings.*"

General comments

5. The legislation under which the Tribunal operates refers to "*parties*". For example, paragraph 2(c) of the Schedule to the 2005 Ordinance provides that:

> "*The parties are entitled to be present during any hearing by the Tribunal of representations made in person, and for the purposes of this paragraph a party may be represented by any person, whether or not legally qualified, except that if in a particular case the Tribunal is satisfied that there are good and sufficient reasons for*

> *doing so, it may refuse to permit a particular person, other than one who is legally qualified, to represent the party*".

The reference focuses in particular on the correct manner of referring to a corporate Respondent but, before turning to the specific questions raised, I can comment that any person who is a party to proceedings before the Tribunal may change his, her or its name during the course of the proceedings, with the consequence that the Tribunal needs to be alive to that fact and ensure that, when it gives its decision, it records it in a form that the person in question desires as at the time the decision is taken. If necessary, it is permissible also to refer to the former name of the person for clarification.

6. By way of example, a single woman who has claimed that her former employer dismissed her unfairly may marry before judgment is given. If she informs the Tribunal of her new name and indicates that she wishes any judgment to be given in that new name, the Tribunal should accede to that request. The decision of the Tribunal could include relevant details of the change of name and the decision might refer to the person's maiden name by adding it, together with "*formerly*", in parentheses after the name in which the decision is formally recorded. The benefit of doing so is that members of the public, including possibly former colleagues, are better able to understand who the party to the claim was. By way of a further example, if a company decides to change its name, complying with the requirements of Part III of the Companies (Guernsey) Law, 2008, it would be the new company name in which any decision of the Tribunal should be given. By virtue of section 25(7)(c) of the 2008 Law, "*all actions and other legal proceedings which, immediately before that [name] change, were extant or pending by or against it may be continued by or against it in the new name*". Again, if the Tribunal wished, referring to the previous corporate name in similar fashion in parentheses may assist.

7. It may be helpful, at the outset, to remind those engaged in Tribunal hearings of the nature of a company, as described in section 1 of the 2008 Law:

> "*A company is a legal person, separate from its members, which comes into existence upon incorporation and continues until it is removed from the Register of Companies.*"

Accordingly, if a complaint is made against a Guernsey company, subject to the company changing its name, subject to what follows, the identity of the Respondent remains the same throughout and that is the entity that continues to be the party to the proceedings before the Tribunal.

8. The examples offered by the Convenor concern the different ways by which a company in financial difficulties may seek to address them. However, whatever steps the company, its members or its creditors may take, the company continues as a distinct person and, because the relationship which is the subject of the proceedings was formed between the employee (or applicant) and the corporate employer, it would only be if an application to substitute a different party were made that the identity of the party would change. For example, if an initial application were to mis-describe the Respondent, the Tribunal might grant an application to substitute the correct description of the Respondent meaning that subsequently the proceedings would continue against that substituted Respondent.

Company in administration

9. An administration order may be granted by the Court under Part XXI of the 2008 Law. The application for an administration order may be made by the persons listed in section 375,

including the company itself, its directors, any member of the company and any creditor of the company, including any contingent or prospective creditor. A person bringing a claim before the Tribunal is potentially in that last category. The purpose of an administration order must be to achieve the survival of the company, and the whole or any part of its undertaking, as a going concern or a more advantageous realisation of the company's assets than would be effected on a winding up. One of the effects of applying for an administration order is (section 376(1)(b) of the 2008 Law) that:

> "*no proceedings may be commenced or continued against the company except with the leave of the Court and subject to such terms and conditions as the Court may impose*".

This also applies during the period for which an administration order is in force (section 377(2)(b)). By virtue of section 378(1):

> "*All correspondence of a company (or cell of a protected cell company) subject to an administration order shall contain the administrator's name and a statement that the affairs, business and property of the company are being managed by the administrator, unless this is readily ascertainable –*
>
> *(a) from the context of the correspondence, or*
>
> *(b) from a course of dealing between the company and the person to whom the correspondence is addressed.*"

10. As a result of these provisions, if a company Respondent were to be placed in administration by an order of this Court, any subsequent communication with the Tribunal on behalf of the company should highlight that the company is now in administration. It is commonplace to add "*(in administration)*" after the name of the company when referring to it. That solution could readily be adopted in official communications made by or on behalf of the Tribunal, including its decision and the notice thereof displayed in the Royal Court House pursuant to para. 2(l) of the Schedule to the 2005 Ordinance.

11. The powers of an administrator are set out in section 379 of, and Schedule 1 to, the 2008 Law. The general position of an administrator is conveniently summarised in section 379(4):

> "*In performing his functions the administrator is deemed to act as the company's agent (or the protected cell company's agent in the case of a cell), but shall not incur personal liability except to the extent that he is fraudulent, reckless or grossly negligent or acts in bad faith.*"

Consequently, if a company Respondent is made the subject of an administration order, it continues to be that company, and not the administrator, which is the party to the proceedings before the Tribunal. However, because "*The administrator may do all such things as may be necessary or expedient for the management of the affairs, business and property of the company*" (section 379(1)), the administrator may choose to appear before the Tribunal on behalf of the company (in administration) or instruct someone else to do so on the company's behalf. Either way, it is the company which remains the party to the proceedings; the administrator does not become the Respondent.

12. If the Tribunal is informed that a company Respondent is likely to go into administration, nothing changes until such time as the Court makes an administration order. Providing such information may, for example, be regarded as a tactic designed to persuade the person bringing the claim to give up on it because it will be commercially unrealistic to pursue it further. However, the threat of proceeding to apply for an administration order has no effect

on the status of the company or the manner in which reference should be made to it in the proceedings. The company continues in existence and the directors continue to manage the company as required by section 134 of the 2008 Law. Until an administration order is actually made, the name of the company as Respondent needs no modification at all.

Company being wound up voluntarily

13. A company may be wound up voluntarily pursuant to Part XXII of the 2008 Law. In all cases where the company resolves that it be wound up voluntarily, a copy of the resolution must be delivered to the Registrar within 30 days (see section 391 and, in the case of a special resolution, section 178(7)). The Registrar then gives notice of the fact of such a resolution having been passed in accordance with section 392. By virtue of section 394(1) of the 2008 Law:

> "*From the commencement of a voluntary winding up, the company shall cease to carry on business except in so far as may be expedient for the beneficial winding up of the company.*"

Further, section 394(2) confirms that "*the company's corporate state and powers … continue until dissolution*". The role of the liquidator includes to "*realise the company's assets and discharge the company's liabilities*" (section 397(1)(a)) and, upon the appointment of a liquidator, "*all powers of the directors cease, except to the extent that the company by ordinary resolution or the liquidator sanctions their continuance*" (section 395(2)).

14. Whilst there is no requirement for a liquidator to do so, it is commonplace for a company in liquidation to be referred to with the addition of appropriate wording indicating that status, eg, adding "*(in voluntary liquidation)*" or simply "*(in liquidation)*". The benefit of doing so is to identify that the provisions of Part XXII of the 2008 Law apply, highlighting who it is who can act on behalf of the company. However, until the company's affairs are fully wound up, the status of the company as a distinct legal person continues, after which the provisions relating to dissolution apply. Accordingly, the identity of the company Respondent in proceedings before the Tribunal continues as it was before the company resolved to wind itself up voluntarily, although out of expediency adding some wording to its name to show that a voluntary winding up has commenced would normally be appropriate.

15. The timing of the passing of the resolution to commence a voluntary winding up has no impact on the identity of the company Respondent but may affect the personnel who can properly take decisions on behalf of that company. Because of the effect of section 395(2) of the 2008 Law, if a company has commenced a voluntary winding up just prior to the commencement of the hearing before the Tribunal, the status of anyone purporting to appear on behalf of the company should be checked. If it is a director, the Tribunal should satisfy itself that the company by resolution or the liquidator appointed has sanctioned that person appearing to represent the company. If it is the liquidator, or someone clearly acting on the instructions of the liquidator, he or she will be doing so as part and parcel of the obligation to wind up the company's affairs and should be regarded in exactly the same light as any other authorised representative of the company. However, care needs to be taken not to confuse the positions of the actual corporate entity which is the party to the proceedings and whoever attends to represent that entity.

Company being wound up compulsorily

16. The position in relation to compulsory liquidation is broadly similar. The principal difference initially is that a compulsory liquidation of a Guernsey-registered company arises following

application to this Court made by the company, by any director, member or creditor or it or by any other interested party (see section 408(1) of the 2008 Law) and that the conduct of the liquidation is thereafter supervised by the Court, including liquidator's accounts being reviewed by a Commissioner. A person appointed by the Court to the office of liquidator in a compulsory winding up is sworn into office and empowered *inter alia* "*to bring or defend civil actions in the name of and on behalf of the company*" (section 413(4)(a)). Among the consequences of the making of a compulsory winding up order are that "*all powers of the directors cease, except to the extent that the liquidator or the Court sanctions their continuance*", "*the company shall cease to carry on business except in so far as may be expedient for the beneficial winding up of the company*" and "*the company's corporate state and powers shall … continue until dissolution*" (see section 414(1), (3) and (4) respectively).

17. Once again, although there is no requirement to qualify the name of the company in liquidation in any way, it is commonplace to add appropriate words to demonstrate the current status of the company. As with a voluntary winding up, making the status clear serves to clarify that the management of the company's affairs has been taken out of the hands of the directors. However, just as the company was distinct from its members and directors before it was put into liquidation, so it continues to be distinct from the persons appointed to the office of liquidator.

18. Provided that the Tribunal is alerted to the fact that a company Respondent has been made subject to a compulsory winding up order by the Court before the Tribunal proceedings conclude with the giving of its decision, the safest and simplest solution is for official documents emanating from the Tribunal to record the name of the party as being in liquidation. Failing to do so would not be wrong, but substituting a different person for the company Respondent for whatever reason should not happen whilst the company continues to be in existence and properly remains a party to the proceedings, albeit that the persons capable of taking decisions on its behalf have changed. If a liquidator, or someone instructed by a liquidator, appears before the Tribunal, that appearance should be recorded in exactly the same way as any appearance is recorded on behalf of a party. For example, if the liquidator were to instruct an Advocate to appear before the Tribunal, the person representing the company Respondent would be that Advocate (and not any director or manager who might also be present, possibly as a witness) and it might be helpful to add "*(instructed by [insert name], liquidator of the Respondent)*" or something similar.

Company being declared <u>en désastre</u>

19. If a party is declared *en désastre* prior to the proceedings before the Tribunal concluding, that also does not affect the identity of the party. Such a declaration is made by a Commissioner of the Court when the Commissioner assesses that Her Majesty's Sheriff holds insufficient assets to satisfy the debts, including a judgment debt, of which he is at that time aware. This can arise in respect of natural persons and corporate entities. A declaration that a company Respondent is *en désastre* would mean that any person making a claim before the Tribunal would know before the matter concluded that any judgment awarded in his or her favour would need to be enforced within the Court's *désastre* proceedings, if it is capable of enforcement at all.

20. Unlike the making of an administration order or using either form of liquidation, there is no statutory regime governing *désastre*. A company Respondent would still need to be referred to in its corporate name. It would be permissible to add "*(<u>en désastre</u>)*" if the Tribunal so

wished. The directors of the company would continue to be responsible for the management of the company's affairs, including appearing on behalf of the company or arranging for someone else to do so. Because a declaration that a person is *en désastre* is effectively the same as declaring it to be insolvent, in the case of a company there is a real possibility that steps will be taken thereafter to wind up the company through the appointment of a liquidator, whether that be under the voluntary regime or by applying to the Court for a compulsory winding up order, in which case the description of the company might evolve during the course of any Tribunal proceedings.

Summary

21. In each of the situations given as examples by the Convenor, a company Respondent continues to be the party to the proceedings before the Tribunal, despite entering some form of administrative insolvency process. The precise functions of the person so appointed will depend on which course of action is followed but this affects the decision-making process of the company rather than its identity. Adding appropriate words in parentheses immediately after the name of the company will be the best way of referring to such parties. It may also affect who is eligible to appear before the Tribunal to represent such a company. The legal role of administrators and liquidators to make representations on behalf of any company for which they act is governed by the provisions of the 2008 Law. However, such administrators and liquidators do not, by virtue of their appointments, become parties to the proceedings before the Tribunal.

22. I have referred only to the position of Guernsey-registered companies. If the Respondent is a company registered in another jurisdiction or some other form of body, as distinct from an individual or group of individuals being the employer, similar principles are likely to apply. However, in such a case the Tribunal really should seek clarification from the party concerned as to whether the law of its incorporation operates in this fashion before deciding how to refer to it.

Correction of errors in decisions

23. The second issue raised by the Convenor's reference is: "*does the Tribunal have an inherent jurisdiction to make a change even when the one month appeal period as set out in the Employment Protection (Guernsey) Law, 1998 as amended, is exhausted*"? The "*change*" under consideration is a change to the Tribunal's decision arising from an error of its own making.

24. As a creature of statute, the Tribunal's jurisdiction is conferred upon it by the legislation establishing it and conferring on it its powers and authority. Section 5 of the 2005 Ordinance gives effect to the Schedule to that Ordinance, which lays down the Tribunal's procedure and its powers. By paragraph 2(m) of that Schedule:

> "*The Tribunal may, subject to the above provisions, and subject also to the provisions of any order of the Department under paragraph 3 –*
> *(i) determine its own procedure, and*
> *(ii) give such directions, subject to such terms and conditions, as it thinks fit for the purposes of the hearing and the determination of the complaint.*"

The powers of the Commerce and Employment Department of the States of Guernsey include the ability to "*regulate procedure in connection with matters … subsequent to hearings (including the publication, interpretation and enforcement of decisions and reasons for decisions)*" (paragraph 3(2)(a)).

25. There has been no intervention by the Department to introduce any limitations on what the Tribunal can do in relation to its decisions. Accordingly, the only relevant matters prescribed are those in paragraph 2(k) and (l) of the Schedule:

> "*(k) the decision of the Tribunal shall be in writing, signed by the person chairing the Tribunal and transmitted as soon as reasonably practicable to the parties,*
> *(l) the Tribunal shall cause a notice of its decision to be displayed in the Royal Court House for a period of seven days*".

In the absence of any other limitations imposed on the Tribunal by the States of Deliberation or the Department, the default position is that the Tribunal is able to determine its own procedure.

26. As a result of that provision, the absence of any express rule of procedure equivalent to what is described elsewhere as the "slip rule" (see, eg, rule 37(1) of the Employment Tribunal Rules of Procedure referred to by the Employment Appeal Tribunal in *Slater v Provident Personal Finance Limited* (Appeal No. UKEATPA/1639/07/CEA)) is not, in my view, a problem. Further, it is unnecessary to invoke any supposed inherent jurisdiction to correct errors because of the legislature's decision, in the absence of any contrary indication, to confer on the Tribunal the mastery of its own procedure.

27. The purpose of the Tribunal is to hear and determine complaints under the provisions of the relevant enactments (see section 2 of the 2005 Ordinance). As such, it plays its part in the overall administration of justice in this Island. In any case where it is conceded that an error has crept into the formal record of a part of the machinery of justice in the Island, it is preferable, if permitted, for that error to be corrected by the court or Tribunal making it rather than forcing the aggrieved party to institute appeal proceedings or some other means of reviewing the legality of the decision. The error might be in the proper name to be recorded of one of the parties (as was the case in *Slater v Provident Personal Finance Limited* (*supra*)) or it might be a mathematical error in how any award is calculated. These are the types of factual error to which Sedley LJ referred in *Akewushola v Secretary of State for the Home Department* [2000] 1 WLR 2295 as "*accidental errors which do not substantially affect the rights of the parties or the decision arrived at*". Any irregularity of greater significance would require some express power to enable it to be corrected by the body making that error, otherwise it would have to be dealt with by a higher authority.

28. Consequently, having reached and given its decision, the Tribunal should not entertain a request to re-open the case for further argument, because that is quite properly something to address through an appeal against the decision, but, if it is drawn to the attention of the Tribunal that there is some readily rectifiable error of fact within the decision or the notice that has been displayed in the Royal Court House, I take the view that it is within the powers of the Tribunal, determining its own procedure, to make an appropriate correction and, if necessary, re-issue the decision.

29. In reaching that conclusion, I have also taken note of the power in section 28 of the Employment Protection (Guernsey) Law, 1998, as amended, relating to the interpretation of awards. Subsection (1) provides:

> "*Any party to an award of the Tribunal may, within a period of one month immediately following the date of the award (or such other period as the Tribunal*

> *may in its absolute discretion allow), apply to the Tribunal for a decision on any question as to the interpretation of the award.*"

The Tribunal is obliged to hear the representations of the parties before making its decision, which "*shall be stated in writing to the parties and has effect as if it were an original award*". Although the timescales involved in the case in question (ED 027/12) have significantly exceeded the one month period, had a question of interpretation been raised by a person recorded as being a party to the award, it would be open to the Tribunal, after inviting representations from the parties, to explain the terms of its award, correcting any matters that were not described as they should have been, and this would be treated as if it were an original award. Because of the inclusion of the longer period, in the discretion of the Tribunal, for taking this course of action, I do not regard the fact that more than one month has passed since the date of the Tribunal's decision as creating any barrier to the Tribunal exercising its power to make factual corrections to its decision now.

30. The need to make factual corrections, or indeed to offer any interpretation of an award, should, as suggested by the Convenor, be a rare event. However, in an appropriate case, and it will be for the Tribunal to decide whether such a case exists, this Court would regard it as preferable for the Tribunal to correct obvious errors in this way rather than decline to do so, necessitating an appeal or some other process to set aside the Tribunal decision that is shown to be factually inaccurate. To that extent, the type of "slip rule" referred to elsewhere, operating in the narrow range of circumstances described by Sedley LJ in the ***Akewushola*** case (*supra*), can properly be treated as part of the Tribunal's own procedures.

31. If, as appears to be the position in case ED 027/12, there are inconsistencies in the manner in which a party has been recorded in the decision signed by the person chairing the Tribunal, which has been repeated in the notice of the decision displayed in the Royal Court House, the Tribunal might first wish to invite comments from the parties affected by the decision before deciding whether it is one of those rare cases in which a formal correction should be made. In doing so, it would make sense to treat it in the same way as an interpretation of an award previously made meaning that the corrected decision would have the same status as the original award. One consequence is that the notice of the decision as corrected should be displayed in the Royal Court House for seven days, thereby offering the public the same level of scrutiny of the perfected award as the original it replaces.