IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

On appeal from the Employment and Discrimination Tribunal

Case No: ED042/16

Between:	**SUSAN COTTERILL**	**Appellant**
	-and-	
	THE STATES OF GUERNSEY (acting by and through the Policy & Resources Committee)	**Respondent**

Date of hearing: 4th December 2017

Decision handed down: 19th December 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

The Appellant was not represented

Advocate for the Respondent: Advocate E Bamber

Legislation referred to:

The Employment Protection (Guernsey) Law, 1998
The Employment Protection (Guernsey) (Amendment) Law, 2005
Da Mata v George (unreported, 7 July 2008)
Cyma Petroleum (CI) Limited v States of Alderney (unreported, 12 December 2006)
Burford v Flybe Limited [2009-10] GLR N-10
The Employment Protection (Summonsing of Witnesses and Documents) Order, 2006
The Employment Protection (Appeals and References) Order, 2006

Introduction

1. By a Notice of Appeal dated 22 September 2017, Susan Cotterill (the Appellant) appeals against the dismissal by the Employment and Discrimination Tribunal of her complaint that she had been unfairly dismissed by her former employer, the States of Guernsey (the

Respondent). The Tribunal had heard the Appellant's complaint on 22 and 23 June 2017. The Tribunal's decision is dated 18 September 2017.

2. Although the Respondent has resisted this appeal on the basis that the Notice of Appeal does not disclose an arguable ground of appeal on a question or law or, if it does, that the Tribunal reached a decision that it was entitled to reach, I am persuaded that this appeal should be allowed for the reasons that follow and that the Appellant's complaint of unfair dismissal must be remitted to the Tribunal to be re-heard.

Background

3. The Appellant's complaint of unfair dismissal was made on Form ET 1 dated 17 December 2016. There was no dispute between the parties that she had been employed by the Respondent from 3 August 2015 until 14 December 2016. The Tribunal determined a preliminary point relating to the Appellant's gross earnings for the purposes of section 22 of the Employment Protection (Guernsey) Law, 1998, as amended, in favour of the Respondent (see section 2 of its Decision). It was satisfied that the Respondent had demonstrated that the maximum amount of compensation, being six months' pay, should be lower than the amount claimed by the Appellant. There is no appeal from that determination and, as such, there should be no need for that preliminary issue to be addressed again when the complaint is remitted. If the Appellant is successful, the maximum amount to which she will be entitled is £10,609.14.

4. The basis of the Appellant's complaint, as set out in Section 10 of her Form ET 1 is:

> "*False accusation of completing application form incorrectly, no evidence has ever been submitted.*
>
> *Breach of contract, regarding pay band.*
>
> *Bullying and harassment ignored for 3 months.*
>
> *Not following procedures.*"

As noted by the Respondent in its detailed response set out in Section 7 of its Form ET 2 dated 16 January 2017, the Appellant had not set out her complaint as fully as she might have done. The reason advanced by the Respondent in Section 4 of the ET 2 is "*False declaration of qualifications*". Advocate Bamber confirmed that the potentially fair ground being advanced on behalf of the Respondent was "*related to the conduct of the employee*" (section 6(2)(b) of the 1998 Law) and that the Respondent had not sought to advance a reason in either para. (a) (qualifications) or (e) (some other substantial reason). The summary of the Respondent's case is contained in para. 6 of what it set out in that Section 7:

> "*… it was found that after a full and fair disciplinary process that the Applicant had dishonestly completed her job application forms and supporting documents by making false statements as to her level of qualification (and thereafter had been deliberately evasive when the Respondent had attempted to clarify this issue), and as such the dismissal for gross misconduct was within a reasonable band of responses available to the Respondent's Disciplinary Panel (having followed a fair process under the States of Guernsey Health and Social Care Policy Dealing with Disciplinary Matters (G614)).*"

The reference to dishonesty is significant, as will become apparent.

5. Prior to the Tribunal hearing in June 2017, there were two case management meetings, which were held on 24 February and 15 March 2017. These were held before the person appointed to chair the Tribunal, Paula Brierly. A letter dated 10 April 2017, to which I will return, sent by the Secretary to the Tribunal, summarises the outcome of those meetings.

Facts

6. The Tribunal's decision fully sets out the facts found. Many appear to me not to have been in dispute. Many of them are supported by the contemporaneous documentation. Given my decision to remit this complaint, I will not set out the facts as fully as I might otherwise have done and will summarise them instead.

7. The Appellant applied for a post with the Respondent in 2015. She completed an application form for a job within the then Health and Social Services Department at The Willows as a Band 2 Activity Engagement Care Assistant. A Band 2 post does not require an employee to hold any qualifications. Her application form included an entry under the heading "EDUCATION" that she had between 1996 and 1999, through "*Brockside via Uni of Kent*" undertaken a course "*Counselling Talking it Through*" with the qualification obtained being at "*level 3*". The form indicated that "*Successful candidates will be asked to provide original copies of qualifications and professional registration (where applicable)*". In the section of the application form where she could list any training or other experience which may be relevant to the post for which application was being made, she wrote "*Whilst working at Appletrees Residential Home, I completed NVQ level 2 in Care of the Elderly via Mulberry House*". She signed her form and dated it 21 April 2015 immediately below the following wording:

> "*I DECLARE that the information contained in this form and any attachment is true and complete to the best of my knowledge and belief. I understand that should I make a false statement regarding my history by completing this form incorrectly I will, if appointed, be liable to termination of my contract with or without notice.*"

8. The Appellant subsequently saw an advertisement for a job as a Band 4 Support Time and Recovery Worker ("a STaR Worker") in the Community Drug and Alcohol Team. It was a job that appealed to her so she applied. In respect of the Essential Key Criteria for the job, the job description set out the first requirement as "*Level 3 VQ Diploma in Health and Social Care or equivalent (NVQ Level 3)*". The Appellant was interviewed and offered the job. Those interviewing her included Michelle Aldridge, the hiring Manager, and Joe Hind, an HR Advisor. An internal appointment form was completed, counter-signed by Michelle Aldridge on 3 June 2016, the date on which the Appellant had been interviewed, requesting that the start date be as early as possible. In respect of the list of checks required, the box relating to Qualification was not ticked but the boxes relating to References, Health Check and Enhanced Police Check were. The Appellant started work as a STaR Worker on 11 July 2016.

9. Previously, the Appellant had made an application for a post of Psychological Therapist. She sent an e-mail to recruitment on 20 February 2016 in which she wrote:

> "*I qualified as a Counsellor in 1999, having completed an NVQ Level 3 with the University of Kent, via Guernsey Alcohol and Drug Abuse Council G.A.D.A.C. at Brockside, The Grange St Peter Port. This was a 3 year course, and involved some clinical practise, counselling people with Alcohol and Drug issues, many of them were in rehabilitation after spending time in prison, and many were referrals from Doctors and other Health Care Professional's.*"

10. Just before the Appellant started work as a STaR Worker, on 6 July 2016 Joe Hind had requested copies of the Appellant's qualification certificates. When he saw them, he noted that the counselling VQ put on the application was missing and was the key one they needed.

The Appellant's immediate response was that Joe Hind would need to speak to David Newman at Brockside, who could confirm her course qualifications. This was not progressed at the time. Mr Hind relayed this exchange to Lynne Duckworth on 6 September 2016.

11. Lynne Duckworth sent an e-mail to the Appellant on 12 September 2016 referring to a meeting that the Appellant had had with Michelle Aldridge and Heather West on 19 August 2016, which had led to her being "*temporarily re-banded at 3 pending receipt of confirmation of your NVQ Level 3 qualification in Counselling*". The Tribunal Decision records that the Appellant had been re-deployed to Tauteney Ward pending the outcome of an investigation into other conduct issues.

12. Lynne Duckworth wrote two letters to Mr Newman on 19 and 20 September 2016 enquiring about the qualification the Appellant stated she had obtained, requesting from him a copy of the NVQ Level 3 in Counselling certificate. Mr Newman spoke to Lynne Duckworth by telephone on 22 September 2016 and subsequently confirmed that the file note prepared by Lynne Duckworth was an accurate summary of their conversation. Mr Newman is recorded as saying that "*he felt [the Appellant] had been rather disingenuous*" and the note continued:

> "*Mr Newman said that Susan undertook a course which commenced in the latter end of 1996 and ran through to April 97. He said that course was called "Talking it Through" and was run by Rosemary Kent from the University of Canterbury. Mr Newman said that it was an accredited course recognised by alcohol concern which is the main body in the UK to deal with alcohol abuse, however it was not a qualification at NVQ level III. Mr Newman said that the course gave some skills but that there was no certificate at the end. He said that the learning could have been put towards an NVQ had this been undertaken but it was not. He confirmed that this was the only course that Susan had undertaken whilst with them.*
>
> *Mr Newman said that Susan knows full well that this is the case as he has had this conversation with her several times over the years. He also explained that they had problems with her as she was claiming to be a qualified alcohol counsellor which she was not. He said that they had to write to her and ask her to stop doing this.*"

(This note was later shared with the Appellant and she continues, it seems, to disagree with its content.) It was discussed with her by Lynne Duckworth on 23 September 2016.

13. Because the Appellant could not provide evidence of the required Level 3 qualification, and in light of Mr Newman's comments, Dermot Mullin commissioned an investigation. He asked Tracey McClean to investigate whether the Appellant had made a false statement on her application form regarding her qualifications. The Appellant was informed about this investigation at a meeting held on 28 September 2016. Confirmation of this investigation was given to the Appellant by way of a letter dated 29 September 2016, which included the advice to her that "*if it is proved that you provided a false statement by completing the application form incorrectly, it could lead to the termination of your contract, with or without notice*". The Appellant was not, however, suspended pending the outcome of the investigation because it was felt that, because she was then re-deployed into a role that did not involve her dealing directly with service users that would be disproportionate.

14. Following receipt of the report from Tracey McClean, part of whose investigation involved interviewing the Appellant, Dermot Mullin wrote to the Appellant on 1 November 2016 informing her that a disciplinary hearing would take place on 14 November 2016 in respect of the allegations "*that you made false statements on your application form regarding your qualifications, in particular that you claimed to hold a VQ level 2 in care of the elderly and a VQ level 3 in counselling*". He explained that the hearing was being convened in accordance with the HSSD Dealing with Disciplinary Matters Policy G614. The hearing was to be chaired by Jan Coleman.

15. That hearing duly took place on 14 November 2016. A fairly full note of that hearing was available to the Tribunal. Jan Coleman found the allegation to which she referred (that "*You falsely stated on your application form that you hold an NVQ level 3 qualification – which is an essential criteria for a STaR Worker position with the States of Guernsey*") to be proven. As explained by her at the end of the hearing and confirmed in a letter dated 16 November 2016, "*Your failure to act with honesty and integrity in relation to the claim you made on your application form, relating to holding a VQ qualification, constitutes dishonesty in relation to employment matters and is regarded as gross misconduct*". Jan Coleman decided that the appropriate sanction in accordance with Policy G614 was dismissal with notice. Accordingly, although the Appellant would not be required to attend work during the one month period of notice, her employment would terminate on 14 December 2016.

16. By way of an e-mail on 17 November 2016, the Appellant exercised her right to appeal her dismissal. She indicated that her appeal was based on procedures and severity of the outcome. She was sent a letter by Mark de Garis, the Chief Secretary of the Committee *for* Health and Social Care, dated 18 November 2016 fixing the hearing before him for 1 December 2016. The appeal hearing took place and a fairly full note of what occurred was available to the Tribunal. Two of those present when she was interviewed attended as witnesses for the Appellant: Adam Clayton and Joe Hind. Jan Coleman, assisted by Anita Gaudion, presented the case on behalf of the management. The Chief Secretary had assistance from Tim Langlois. The Appellant conceded that she did not have any complaints about the procedure adopted at the original disciplinary hearing and so her appeal concentrated thereafter on the severity of the sanction imposed for the finding made.

17. The note of the appeal hearing states in respect of the Outcome:

> "*MdeG stated that looking at the severity of the disciplinary awarded, namely dismissal, and discussion with TL regarding the opportunity for redeployment, he had concluded the ruling today would be to uphold the decision of the Disciplinary Hearing.*
>
> *The thoughts around informing his decision included: did he think that SC had acted in bad faith in making the false statements? SC has, but not with that intent in mind, as she feels she is appropriately qualified. As an employer MdeG needs to look at it professionally and HSC need to have evidence of the qualifications. If something goes wrong HSC have to have clear evidence that staff hold the correct qualifications, ie the evidence from an accrediting body.*
>
> *Clarity was sort [sic] concerning the procedures followed and SC has said she made clear it has been followed even though errors were made. MdeG acknowledged SC was upset concerning this.*
>
> *With regard to re-deployment, HSC has lost all trust and confidence on which the contract of employment is fundamentally built, leaving no alternative but to award dismissal.*"

18. By way of letter dated 2 December 2016, the Chief Secretary confirmed his decision in the following terms:

> "*I gave very careful consideration to your submissions that the penalty of dismissal that had been imposed was unduly harsh and that a lesser punishment such as redeployment should have been applied.*
>
> *I noted your repeated claims that you had not set out to be dishonest at any stage and you described the events surrounding the false declaration on your application form as a mistake and a misinterpretation of what was meant by 'qualification'.*

> *While I am prepared to accept that no malice was intended on your part, I concluded that the very fact you made a false declaration fundamentally undermined the key principles of the contractual relationship that must exist between an employer and employee namely that of trust and confidence. As a result of this breach and having carefully considered all the mitigation you presented, I have decided to dismiss your appeal and to uphold management's decision to terminate your contract with notice.*"

The Appellant's employment with the Respondent ended on 14 December 2016.

Grounds of appeal

19. The Appellant's Notice of Appeal raises a number of matters about which she complains. She refers first to the fact that the witnesses she wished to attend had not been called by the Chair of the Tribunal to give evidence. She refers in particular to Michelle Aldridge and Joe Hind, as well as Rachel Le Page. She further complains that the evidence of Tim Langlois and Jan Coleman was incomplete, referring to them being "*economical with the truth*". She raises an issue about Tina Le Poidevin being the person sitting with the representative of the Respondent at the Tribunal when Tina Le Poidevin had been allocated to the Appellant as a dignity at work counsellor. There is a related issue in her Notice of Appeal about the non-disclosure of a report prepared by Tina Le Poidevin, which she had taken up with the Data Protection Commissioner. The Appellant complains about the Respondent's witnesses conferring during breaks in the Tribunal proceedings. She finally refers to what she understands to be a right to have a verbal and two written warnings prior to dismissal. The form and content of this Notice of Appeal is not always easy to interpret but those are the principal issues she advances in it.

20. When read with her Skeleton Argument, which provides a commentary on the documents she has submitted in support of her appeal, some of these grounds become slightly clearer. In particular, the procedural shortcomings surrounding the non-appearance of witnesses, to which some reference is made in the Notice of Appeal is mentioned as follows:

> "*Witnesses who refused to attend, should have been sopeanard [sic] by the Chair in order for me to have a fair hearing, this wasn't done."*

Further, the documents commented upon include a number of requests made by the Appellant for the witnesses she wished to attend to be written to by the Tribunal. There is a response sent by the Secretary to the Tribunal on behalf of the Chairman indicating that these requests were rejected.

21. On behalf of the Respondent, Advocate Bamber is critical of these documents because they do not clearly explain certain aspects which the Respondent considers should have been set out. As a result, the primary submission of the Respondent is that the Notice of Appeal is defective in that it does not advance any contention of law. In my judgment, it is inappropriate for this Court, and other parties appearing before it, to expect unrepresented litigants to formulate their documents in the same way as an Advocate potentially would (or at least should). It is inevitable in order to do justice between the parties that some latitude needs to be given to litigants who do their best. Naturally, this cannot extend to the wholesale re-writing of grounds in documents because otherwise the other party would not know the case it has to meet. However, I am satisfied that the Notice of Appeal, read in the light of the way in which it was elaborated in the Appellant's Skeleton Argument, advances grounds capable of being pursued pursuant to section 25 of the 1998 Law. Indeed, in her Skeleton Argument, Advocate Bamber has been able to summarise and comment upon the case that the Appellant has advanced, so I am satisfied that the Respondent has not been unduly prejudiced by the manner in which the Appellant has put her case in her Notice of Appeal.

The law

22. Section 25 of the 1998 Law (as substituted by the Employment Protection (Guernsey) (Amendment) Law, 2005) provides:

> "*(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.*"

23. Subsection (3) is not relevant on this appeal. Several of the complaints made by the Appellant relate to alleged procedural irregularities, so any such irregularity must also have impacted on the fairness of the hearing. Although Advocate Bamber pointed out that the Appellant had not specified how the irregularities on which she relies had that impact, in my view it is self-evident that if a party wants a witness to attend who is not then a witness, there is clearly scope for that, if found to be a valid procedural irregularity, to affect the fairness of the hearing. In effect, it would mean that a party did not have the opportunity to elicit evidence that party wished to adduce. If the evidence can properly be characterised as relevant to the issues before the Tribunal, the fairness of the hearing is bound to be questionable.

24. Section 25 only gives rise to what has been described in *Da Mata v George* (unreported, 7 July 2008) as an appeal of "*very limited*" scope. For example, it does not entitle an appellant to a complete re-hearing. As Advocate Bamber has correctly submitted, any appeal on a finding of fact must demonstrate that the decision is such that it is perverse, irrational or one that no decision-maker properly directing himself or herself could have reached. The case from which she derives these principles (*Cyma Petroleum (CI) Limited v States of Alderney* (unreported, 12 December 2006)) is not an appeal from the Tribunal, but I am satisfied that these principles apply equally. The parties could have referred to *Burford v Flybe Limited* [2009-10] GLR N-10, which did concern an appeal from the Tribunal, in which the position was further summarised as follows:

> "*Although the Tribunal's decision as to when the employment was terminated was a question of fact not ordinarily subject to appeal, it could be reviewed on appeal if it resulted from the Tribunal's misdirection on a question of law. Tribunals were lay bodies whose process was intended to be less legalistic and speedier than that of the courts; they were not designed to examine complex legal issues such as the ones arising here in relation to repudiatory breach of contract—such issues were better suited to examination in a court of law. The exigencies of daily life in the Tribunal were such that any decision it made could probably always have been better expressed; the decisions should therefore be read on the basis that the Tribunal knew how to perform its functions and which matters to consider, unless the contrary could be shown (Piglowska v. Piglowski, [1999] 1 W.L.R. 1360,* dicta *of Lord Hoffmann followed).*"

Procedural irregularity

25. The reason why I am allowing this appeal is that I am satisfied that there has been a procedural irregularity which has affected the fairness of the hearing the Appellant had. It is apparent that the Appellant wished to have various witnesses attend before the Tribunal. The decision of the Chairman of the Tribunal was not to summons the witnesses requested by the

Appellant and that decision appears not to have been re-visited when the Tribunal convened in June 2017. In my judgment, the Tribunal fell into error in this regard.

26. The correspondence produced shows that the Appellant initially provided a list of witnesses on 21 February 2017 to the Secretary to the Tribunal. The list is rather confusing because it refers in places to evidence being submitted in paper form. However, the Chief Secretary's name appears, as does Joe Hind's. By an e-mail sent to the Secretary to the Tribunal on 27 March 2017, the Appellant asked that the Chairman of the Tribunal write to her witnesses. The persons listed were Michelle Aldridge, Joe Hind, Mark de Garis and Heather West. In respect of the latter two, the Appellant asked that both be written to "*as they are crucial to my case*". Later the same day, in a separate e-mail, the Appellant wrote that she had received a reply from the Chief Secretary "*apologising for not responding sooner, and to say, although he hasn't been requested to appear for HSC, he feels his position may be compromised*". (I do not know what he means by that comment because, if his employer chose not to call him as a witness and the former employee wanted him to appear, he should have realised that he could be compelled to appear through a witness summons, even if unwilling to "volunteer" to appear on behalf of the Appellant.) In the light of the Chief Secretary's message, the Appellant asked the Chairman to "*write to Mr de Garis to request that he be available for the hearing date set as instructed*". Still later the same day, the Appellant sent another e-mail to the Secretary to the Tribunal explaining that Michelle Aldridge had replied that she did not want to appear at the hearing, so the Appellant requested the Chairman to write to her "*asking her to be available if needed on these dates*". The following day, the Appellant relayed similar information in respect of Heather West.

27. The response from the Chairman, relayed by the Secretary on 30 March 2017, was:

> "*Bearing in mind the burden of proof rests on the Respondent to prove that the dismissal was fair, at this point in time, I am not going to summons the witnesses who have refused to appear or make themselves available on the day of the hearing for the Applicant.*
>
> *The Applicant will have the ability to cross examine the Respondent's witnesses, I note some of those witnesses the Applicant also wanted to appear. If, however, at the hearing the Tribunal deemed it necessary to have anyone else appear then the Tribunal will request their presence and if necessary issue a summons.*"

28. In a letter dated 10 April 2017 sent by the Secretary to the Tribunal to the Appellant following the two case management meetings held on 24 February and 15 March 2017, in respect of witnesses, both Michelle Aldridge and Mark de Garis are listed, following which it states "*The Applicant has since advised that neither of the above witnesses are willing to appear.*" Nothing was added about the possibility of them being required to attend. The following day, the Appellant replied by e-mail, pointing out that the letter did not list Michelle Aldridge or Joe Hind "*whom I have informed along with Mark de Garis and Michelle Aldridge might be summoned on either day of the hearing if the panel require them to attend.*"

29. In a further letter dated 24 April 2017 from the Secretary to the Appellant, reference was made to what had been set out in the policy letter leading to the 1998 Law, envisaging a system that would "*involve the minimum amount of paperwork, provide a swift, efficient, inexpensive, non-adversarial and non-legalistic method for resolving disputes over "unfair" dismissals*". The letter continued (at point 5):

> "*It should be noted that the Applicant does not have any witnesses on her behalf. If the Tribunal, at the time of the hearing, wishes to call any additional witnesses then it will do so and that person will be the witness of the Tribunal. In such a circumstance the person will have had very little notice, clearly, there will be no witness statement.*"

30. On the face of the Tribunal's written reasons, para. 1.9 simply records that "*There were no witnesses called by the Applicant.*"

31. In this regard, Advocate Bamber properly recognised that the Tribunal is empowered to issue witness summonses. At para. 2 of the Schedule to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, sub-paragraphs (g) and (h) provide:

> "*(g) the Tribunal may call for such documents and examine such persons (including the parties) on oath, affirmation or otherwise as appear likely to afford evidence which is relevant and material to any question to be determined by the Tribunal,*
>
> *(h) the parties may, if authorised to do so by the Tribunal, cause a summons to be served on any person, in the same manner as that in which a summons may be served in a civil action before the Royal Court, summoning that person to attend any hearing of the Tribunal to give evidence or produce any document likely to assist the Tribunal in determining any question before it, and a person so summoned is under a like obligation as to the giving of any evidence or the production of any document as if he were summoned to give the evidence or produce the document in a civil action before the Royal Court*".

Further provision is made by para. 5 of that Schedule. However, Advocate Bamber refers to para. 2(m), as amended, as demonstrating that the Tribunal is master of its own procedure and on that basis did not fall into error:

> "*the Tribunal may, subject to the above provisions, and subject also to the provisions of any order of the [Committee for Economic Development] 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 determination of the complaint.*"

32. The Employment Protection (Summonsing of Witnesses and Documents) Order, 2006 clarifies (in article 4) that:

> "*The Tribunal shall not, pursuant to paragraph 2(h) of the Schedule to the Ordinance, authorise any party to cause a summons to be served on any person to give evidence or produce any document if –*
>
> *(a) the evidence to be given by the witness in question would be irrelevant or, as the case may be,*
>
> *(b) the document in question would be irrelevant.*"

33. The Tribunal may well not have received the level of assistance from the Appellant that would (or at least should) have been forthcoming had the Appellant been represented, but the way the Tribunal operates is such that it regularly has parties who are not legally represented appearing before it. The Tribunal does need to remember that it has to be prepared to assist an unrepresented party in order to do justice on any complaint it is called upon to determine. The Tribunal is entitled to have the question of relevance of the evidence in question at the forefront of its mind, but it should also recognise the importance of letting a party develop a case in the way he, she or it wishes to. It is not just about where the burden of proof lies because a party might be able to undermine the other party's case through the evidence that that party wishes to advance. That particular aspect appears to have been overlooked in the approach taken by the Tribunal. There is no suggestion on the face of its Decision that it

addressed its mind to the request that the Appellant had made for other witnesses to be called. In saying that, I also appreciate that the Appellant does not appear to have made any formal application for witness summonses to be issued and the Tribunal's mistake lies in not being sufficiently proactive itself when it realised what the live issues between the parties were. The final word from the Tribunal prior to the hearing appears to have left the Appellant believing that the Tribunal itself would consider calling further witnesses. The need, or at least desirability, of doing so may not have been apparent at the end of March 2017, but it should have been apparent once the documents were reviewed.

34. The final decision reached by the Respondent to dismiss the Appellant is set out in the letter dated 2 December 2016 to her from the Chief Secretary. The wording he used in that letter differs from the wording in the earlier letter of Jan Coleman recording her decision from which the Appellant appealed in accordance with the terms of Policy G614. In my view, the Tribunal should have realised that there was this difference and been prepared to explore with Mark de Garis whether the words he uses takes the basis for the decision outside of the examples given in Policy G614 of instances of gross misconduct. The Tribunal should have recalled that the Appellant wanted to call various people as witnesses and reviewed, as the Chairman had indicated the Tribunal would, whether or not that was appropriate before, or at the latest during, the hearing in respect of each, but especially in relation to the Chief Secretary. At para. 11.10 of its Decision, the Tribunal refers to both of the examples of gross misconduct from Policy G614 previously referred to but without making any particular finding as to which was operative or whether both had been established. In particular, as Advocate Bamber effectively conceded at the hearing, the Chief Secretary being "*prepared to accept that no malice was intended on your part*" could be construed as meaning that he had found that the Appellant was not dishonest. This interpretation of his words is, in my view, a possible way of viewing them especially in the light of the reference immediately preceding them to him having noted the repeated claims of the Appellant that she had not set out to be dishonest. The Respondent's Form ET 2 invited the Tribunal to find that dishonesty was the underlying reason for the Appellant's dismissal and, in my view, the Tribunal could have been clearer as to its findings on this question. Further, there is no discussion as to whether or not the re-deployment to which the Chief Secretary also referred as being sought by the Appellant had been a realistic option. Whilst the Tribunal may have felt it was sufficient for Tim Langlois to be present to give evidence because he had assisted the Chief Secretary at the internal appeal hearing, by failing to take steps to require the latter also to attend, either by way of acceding to the Appellant's request for a summons or of its own motion, the Tribunal has not had the benefit of direct evidence from the ultimate decision-maker. I am entirely satisfied that the evidence to be given by the Chief Secretary could not be characterised as being irrelevant and would go further and offer the opinion that his evidence would most probably have been more relevant than the evidence of some (and possibly all) of the witnesses who were called on behalf of the Respondent. In my judgment, this is a type of error that leads to the conclusion that the Appellant was not afforded a fair hearing.

35. In relation to the other witnesses mentioned in the Appellant's correspondence, it is less clear that their absence has affected the fairness of the Tribunal hearing. From what I was told, there was nothing of relevance that could have been said by Heather West. Michelle Aldridge, to whom reference had been made in the Secretary's letter of 10 April 2017, could, I believe, have given some evidence about the recruitment process for the STaR Worker role to which the Appellant was appointed and from which she was dismissed. This could have been relevant but it is also apparent that the allegation against the Appellant that ultimately led to her dismissal had moved on from what took place at that interview. The position of Joe Hind could perhaps be viewed as one further step removed from the evidence that Michelle Aldridge could have given. In those circumstances, whereas I can reach my decision on the basis of the Tribunal not hearing from Mark de Garis being a procedural irregularity of sufficient importance that it prevented the Appellant from presenting her case fairly, I will leave open whether or not any of these other witnesses can also be shown to have relevant

evidence to give. If the Appellant wishes to seek any summonses in respect of them, she will need to be able to persuade the Tribunal of the appropriate degree of relevance of their evidence.

36. Although I do not need to comment on any of the other grounds advanced by the Appellant, I did find the position of Tina Le Poidevin rather odd and offer the following views in case they assist. In itself, this may have been an irregularity on which this appeal could have been allowed in its own right.

37. The issue was raised by the representative of the Respondent, Glen Symons, in an e-mail to the Secretary to the Tribunal on 10 April 2017, which was copied to the Appellant. He explained that "*my instructing client for the States of Guernsey for the duration of the hearing will be Tina Le Poidevin who will be in attendance throughout the hearing – this is because Lynne Duckworth (who would normally take this role) will be a witness. I recall that I raised this at the CMH and that there was no issue.*" If that is an accurate statement of the position at the case management hearing, all I can do is express my surprise that no one at all expressed the view that this should have been avoided unless there really was no alternative.

38. The Appellant almost immediately requested clarification of the role that Tina Le Poidevin would take at the hearing, referring to her having been allocated to the Appellant during her employment under the dignity at work arrangements. The Appellant raised the issue that she returns to in her Notice of Appeal about not being provided with a copy of a document prepared by Tina Le Poidevin. I have not seen anything clarifying the position. I appreciate that the issues being raised by the Appellant at the time were different from those about which I am now commenting, but it is indicative that insufficient thought was being given to the effect that the presence of Tina Le Poidevin might have on the Appellant. The Tribunal, acting as it was through its Chairman at the time, probably should have been giving appropriate assistance to the Appellant at this stage.

39. At the appeal hearing, I was informed that Tina Le Poidevin has a role in relation to the Tribunal arrangements. It was common ground that she is now the Convenor of the Employment and Discrimination Panel. Section 1(4) of the 2005 Ordinance provides that the States shall designate one member of the Panel as Convenor of the Panel and another member as deputy Convenor. Tina Le Poidevin was first appointed as deputy Convenor in early 2009 (see Billet d'État No. VII of 2009) and re-appointed in 2012 and 2015 (see Billets d'État No. III of each year). More recently, she has been appointed as the Convenor until the end of February 2018 (see Billet d'État No. XV of 2017). The policy letter is dated 5 June 2017. By section 2(3) of the Ordinance:

> "*The Convenor of the Panel or, if he is unavailable, the deputy Convenor thereof shall –*
>
> *(a) from the membership of the Panel, appoint the members of the Tribunal who are to hear and determine any complaint, and*
>
> *(b) nominate one of the members so appointed to chair the Tribunal,*
>
> *and for the avoidance of doubt the Convenor or deputy Convenor may so appoint and nominate himself.*"

40. I need to emphasise first that there is no question of Tina Le Poidevin herself doing anything wrong in her capacity as deputy Convenor at the time of the hearing and in the period before it. By way of example, there is no suggestion that she played any part as deputy Convenor in identifying who would constitute the Tribunal. The concern I have is not about what actually happened but rather about the way her attendance on behalf of the Respondent at the Tribunal could be viewed, ie, perception. Indeed, the Appellant has not expressly advanced any ground relating to Tina Le Poidevin as deputy Convenor (or Convenor). Instead, the

Appellant is critical of the non-disclosure of a document relating to what Tina Le Poidevin did when the Appellant was still employed, which appears to me to go beyond the scope of the complaint made to the Tribunal and so be irrelevant. (In other words, the Appellant's actual ground is not one which would have led to this appeal being allowed.) What surprises me, though, is that no one appears to have turned their mind to the perception that an informed observer might have formed if it were known to them that the person "instructing" on behalf of the Respondent is the deputy Convenor, and someone who had at the time of the hearing been proposed to become the replacement Convenor. It is apparent from the structure of the 2005 Ordinance that the Convenor and the deputy Convenor have particular tasks that set them apart from the other "ordinary" members of the Panel. They are important tasks and they involve a degree of management of the Tribunal's business, which extends to allocating members of the Panel to constitute the Tribunal. In my view, someone might think that the Tribunal members could be influenced in how they conduct themselves on a Tribunal if the deputy Convenor were in attendance, not formally as the deputy Convenor, eg, observing, but on behalf of one of the parties to the complaint the Tribunal in question is appointed to determine. Putting it starkly, someone might think that the Tribunal members reached the decision they did because they knew it would please the new Convenor. I stress that this is about perception and not about what the Tribunal members may actually have done, because there has been no allegation of actual bias. Further, given the size of the Respondent's organisation (and it is still a large organisation even if narrowing this concept to extend only to those engaged in working for the Committee *for* Health and Social Care), I do find it strange that the Respondent did not identify someone else who could perform the function that Tina Le Poidevin undertook at the hearing before the Tribunal.

41. In my view, this is a further factor that brings into question whether the Appellant received a fair hearing. I am conscious that this is not the way the Appellant has advanced her case but, had it been necessary to do so, I would have considered whether it was appropriate to invite her to seek to amend her Notice of Appeal. Because I have already decided that the procedural irregularity relating to the non-attendance of one or more witnesses who had been identified by the Appellant as witnesses she wished to have attend is sufficient to set aside the Tribunal's decision, this further shortcoming simply adds further support for that conclusion. It is something to be borne in mind in relation to the re-hearing of the Appellant's complaint.

Other grounds

42. In the light of my conclusion on procedural irregularity, I do not need to address the other grounds of appeal advanced by the Appellant. I can, however, say that I would have been unlikely to have allowed the appeal on the basis of any of them had I not been persuaded that the failure to hear from the Chief Secretary (and possibly others) affected the fairness of the hearing.

43. The only ground about which I will briefly comment further relates to what I consider to be a challenge to the correctness of the conclusion that dismissal was within the band or range of reasonable responses available to a reasonable employer. Section 6(3) of the 1998 Law refers to this aspect depending "*on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee*". I have not spotted any reference by the Tribunal to the size of the Respondent. As the largest employer in Guernsey, and where the option of re-deployment appears on the face of the decision to dismiss and had clearly been raised at the internal appeal hearing, I consider that the Tribunal might properly have chosen to explain its reasoning on this issue a little more fully than it has. However, the way the Appellant has raised the issue of the severity of the sanction imposed against her has not been as clear as it could have been. She has referred to what she understands to be an entitlement to have a verbal and then two written warnings prior to an employer proceeding to dismiss an employee. However, this is not an absolute entitlement, as recognised by the Tribunal. Where gross misconduct can be established, it can be permissible

to end the employment relationship summarily. There is, however, some overlap here with the complaint that the Appellant now makes about the Tribunal not hearing from one or more of the witnesses she wished to have called. The ultimate decision as to whether to uphold the decision reached by Jan Coleman to dismiss the Appellant with notice and, if so, on what basis, fell to the Chief Secretary and that is one of the reasons why it was best to hear evidence from that decision-maker himself, rather than only from others, as to the decisions he took on behalf of the Respondent. The Appellant was, I believe, trying to develop a submission that the Tribunal had misdirected itself in law on this issue. As I have indicated, I have not identified much, if anything, on the Tribunal's reasoning here, which may, had it been necessary to reach a conclusion, have resulted in me finding that the Tribunal had failed to direct itself completely on the law it had to apply because re-deployment in a large organisation is potentially more available than in a smaller one. In the absence of further evidence and findings, and because that argument from the Appellant had not fully crystallised in the way I have described it, I will say nothing further, but mention this as an issue that may need to be re-visited at the re-hearing.

Disposal of appeal

44. Neither the 1998 Law nor the Employment Protection (Appeals and References) Order, 2006 sets out what this Court should do at the end of an appeal, save that the decision "*shall be in writing, signed and sealed by the Greffier and transmitted by him to the Secretary*" (article 9 of the 2006 Order), which these reasons will be. In those circumstances, I am prepared to proceed on the basis that it is open to the Court to dismiss the appeal or allow it in whole or in part. Where an appeal is allowed, the circumstances may enable the Court to substitute for the decision of the Tribunal a decision that it ought properly to have made had it directed itself properly with respect to the law. In other cases, of which this is an example, the outcome is such that the only sensible solution is to remit the Appellant's complaint to the Tribunal for it to be re-heard. In that way, the procedural irregularities giving rise to the hearing not being fair can be ironed out and a substantive decision reached. It may be that the same decision is still reached and I have asked myself whether there is anything in this appeal that means that the complaint should not be remitted. However, I am satisfied that the only proper way to address the errors that crept into the process before the Tribunal, which I have explained, is for the process to start again. Whether or not that should be before a differently constituted Tribunal will be the first issue for the recently appointed deputy Convenor.

Conclusion

45. For the reasons I have given, I have decided that this appeal should be allowed. I recognise that the Tribunal wishes to deal with complaints in a less formalistic manner than how matters might be dealt with before a Court. However, the law of unfair dismissal sometimes can raise technical questions and all cases will inevitably be adversarial. It is not, in my view, particularly helpful for material emanating from the Tribunal to quote the original desire for a "*non-adversarial and non-legalistic*" solution. Had that been the desire, the scheme of the legislation ought to have been different. Further, the Tribunal should, I think, be prepared to recognise where an unrepresented party may need particular help in procedural matters and possibly also with the case they wish to present. In my judgment, the hearing conducted in June 2017, and some of the exchanges before then, fell short of what the parties can properly expect. In particular, I take the view that the Tribunal was wrong to refuse to issue a witness summons in respect of Mark de Garis or, if that initial decision was justified, it should have re-visited the issue by no later than the hearing itself. However one looks at it, this was someone who could provide the best evidence of the decision to dismiss the Appellant and he really should have been someone's witness at the Tribunal hearing. This error was further compounded by the presence of Tina Le Poidevin on behalf of the Respondent, although this was not a ground advanced by the Appellant and so does not in itself result in the appeal being allowed.

46. I have noted what the Appellant has included in her materials about the costs she has incurred. Costs would normally be ordered to follow the event, so I would be minded to make an order that the Respondent pay the Appellant's costs of the appeal. Such costs would, however, be limited to the fees payable in respect of the appeal itself and any permissible expenses to which the Appellant has been put. The costs cannot include loss of earnings and pension. The only compensation for unfair dismissal will be the maximum award of six month's pay (section 22 of the 1998 Law, as amended). Unless the question of costs can be agreed between the parties, in which case the appropriate order can be made on the papers on written materials only and without further attendance, if the Appellant wishes to pursue a claim for costs she should liaise with the Greffe with a view to fixing a short hearing for that purpose.