Appeal against an award of unfair dismissal granted by the Employment and Discrimination Tribunal

[2019]GRC070

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

On appeal from the Employment and Discrimination Tribunal

Case No: ED008/19

Between:	**SAHARA CITY CO LIMITED**	**Appellant**
	-and-	
	MARK CHIVERTON	**Respondent**

Date of hearing: 28th November 2019

Decision handed down: 18th December 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

The Appellant appeared through its director, Daniel Elsadany

The Respondent appeared in person

Advocate R.J. Calderwood made written submissions as *amicus curiae*

Legislation referred to:

The Employment Protection (Appeals and References) Order, 2006
The Employment Protection (Guernsey) Law, 1998
Burford v Flybe Limited [2009-10] GLR N-10
The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005
The Rehabilitation of Offenders (Bailiwick of Guernsey) Law, 2002
The Protection of Children (Bailiwick of Guernsey) Law, 1985
The Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law, 2004
Crime and Disorder Act 1998
R (Minter) v Chief Constable of Hampshire Constabulary [2014] 1 WLR 179
R v Wiles [2004] 2 Cr App R (S) 88
R v Graham S [2001] 1 Cr App R 7

Introduction

1. By a Notice of Appeal dated 17 July 2019, Sahara City Co Ltd (the Appellant) appeals against the decision of the Employment and Discrimination Tribunal to find that Mark Chiverton (the

Respondent) had been unfairly dismissed by the Appellant, his former employer, and making an award of £10,273.78. The Tribunal had heard the Respondent's complaint on 10 June 2019 and its decision is dated 25 June 2019.

2. These appeal proceedings were first before this Court on 23 August 2019 when directions were given. As a result, Skeleton Arguments were provided by both parties. Those directions also included providing to the Chairman of the Tribunal the opportunity to lodge any written comments he wished to make relating to the allegations of procedural impropriety raised by the Notice of Appeal. This resulted in written representations being provided in September prior to the hearing fixed for 23 October 2019.

3. In light of the submissions made by the Appellant relating to the effect of a conviction of the Respondent dating from 2011 and how that was dealt with by the Tribunal, because neither party was represented, I felt the need to have some input from an Advocate on that discrete issue of statutory interpretation. Accordingly, I decided to adjourn the appeal hearing to enable an *amicus curiae* to be appointed. Advocate Calderwood was appointed and provided helpful written submissions dated 14 November 2019. Neither party wanted Advocate Calderwood to elaborate on his written submissions by way of oral submissions so, at the hearing on 28 November 2019, I heard from Daniel Elsadany, a director of the Appellant, and from the Respondent.

4. At the end of the hearing, in accordance with article 9 of the Employment Protection (Appeals and References) Order, 2006, which provides that this Court's decision "*shall be in writing, signed and sealed by the Greffier and transmitted by him to the Secretary*", I reserved judgment. This judgment sets out my reasons for allowing the appeal and remitting the matter to the Tribunal to be re-heard.

Preliminary comments

5. Before I turn to the grounds of appeal advanced on behalf of the Appellant, I think it will be helpful to point out that the outcome reached by the Tribunal may, if the complaint made could properly be pursued, be at or about the level that should have followed from what happened in respect of the Respondent. However one looks at the process by which the Respondent was dismissed by the Appellant, those procedures were not compliant with what the regime created under the Employment Protection (Guernsey) Law, 1998 requires. Mr Elsadany conceded that he did not hold any form of hearing with the Respondent before terminating the latter's employment. Whatever the reasons for the dismissal, which is an issue to which I will turn shortly, the process fell short of what is required to make a potentially fair dismissal actually fair, the distinction being that to be found fair, proper procedures must be followed. As a result, assuming for this purpose that the Respondent's complaint satisfied the requirement for one year's continuous employment, another issue to which I will turn, there was always going to be a finding that the dismissal was unfair and the Tribunal would then have needed to consider whether the amount to be awarded to the Respondent ought to be reduced and, if so, by how much.

6. I recognise that the Tribunal Chairman and members are lay persons doing their best. I have endeavoured to give the Tribunal as much latitude as I properly can because the way they express their decision will not necessarily be in as full a form as would probably be the case were a legally-qualified judge sitting (see, eg, the comments made in *Burford v Flybe Limited* [2009-10] GLR N-10). The main reason for noting what I just have is to point out that the ultimate answer may, subject to what follows, be within a range that this Court would not otherwise have interfered with. However, the reasoning that led to that conclusion is, in my judgment, flawed, as I will proceed to explain. It is as a result of that flawed reasoning that I feel obliged to allow this appeal and invite the Tribunal, (which does not, in my view, need to

be comprised of different members, although that is a matter on which the Convenor of the Panel may wish to give some further thought), to consider the issues that the Respondent's complaint raises afresh.

7. As will become clear from the remainder of this judgment, there are a number of quite complex legal issues that arise from the complaint made by the Respondent. Section 25 of the 1998 Law permits an appeal on a question of law. As will be explained, there are a number of points of law raised on behalf of the Appellant. As I commented during an earlier stage of these appeal proceedings, with the benefit of hindsight, I imagine that making use of the power to refer points of law to this Court under section 26 of the 1998 Law, section 4 of the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, as amended, and Part II of the 2006 Order is a step that the Tribunal may wish it had followed. In that way, clarity on the question of whether or not the Respondent's conviction should be regarded as spent under the Rehabilitation of Offenders (Bailiwick of Guernsey) Law, 2002, as amended, and how to approach the change of the Respondent's employer could have been resolved before the Tribunal proceeded to consider the evidential issues that arose.

Effect of conviction

8. The Tribunal chose to sit in private but to give its decision in public. That decision is set out in para. 1.6 of its Extended Reasons (*"Given the significant possibility of minors being named during the giving of evidence, even inadvertently, the Tribunal took the decision to hear the evidence "in camera""*), although the response provided by the Chairman shows that this decision was also linked to potentially complex issues arising from the Respondent's previous conviction.

9. Although no particular point has been taken by either party in relation to this element of the Tribunal's decision, because it relates to an issue that has been raised on behalf of the Appellant relating to the effect of the Respondent's previous conviction, I briefly mention that para. 4(1) of the Schedule to the 2005 Ordinance provides that "*A hearing and every part of a hearing before a Tribunal shall be held in public unless the Tribunal directs otherwise.*" There is also provision stating in general terms that the Tribunal is the master of its own procedure. However, there is a fundamental principle of open justice in this jurisdiction, the consequence of which is that there is a requirement before a court sits in private that a test of strict necessity applies. I see no reason why that test should be any different in respect of a complaint being determined by the Tribunal, and it is that test to which the Tribunal should have directed its attention.

10. In the present case, the Tribunal determined first a discrete issue about whether the Respondent's employment was continuous for long enough to permit his complaint of unfair dismissal to be progressed. Even on the basis of the possibility of minors being named, even inadvertently, on which the Tribunal has founded its decision, I struggle to see how that could apply to the discrete issue concerning the Respondent's continuity of employment. In any event, had the Tribunal asked itself the correct question, I doubt that it would have concluded that it was appropriate to hold the entirety of the hearing in private. There would, in my view, have been other means to guard against any possible reference to minors, short of holding all the hearing in private.

11. One of the main grounds advanced by the Appellant is that the Tribunal erred in treating the Respondent's previous conviction as spent under the 2002 Law. It had before it material supplied by the Respondent that included a Basic Police Disclosure document dated 25 April 2019 recording that "*There are no convictions or cautions recorded in respect of this individual*", identifying the Respondent, who has formally changed his surname since the date when he was convicted. There was a covering letter from the Office of the Policy & Resources Committee dated 30 April 2019, which purports to explain that "*all records now*

accurately reflect the appeal court decision" and further that "*Due to the inaccuracies in how your appeal results were recorded, the rehab period for a 12 month sentence was applied rather than one for a three month sentence*". That letter also apologised to the Respondent. However, in the light of the submissions from Advocate Calderwood, with which I agree, I fear that the corrections made are not consistent with the whole statutory framework that should have been applied before deciding whether what was recorded was accurate.

12. The Respondent had pleaded guilty in 2011 to seven counts of offences contrary to section 3A(1) of the Protection of Children (Bailiwick of Guernsey) Law, 1985, as amended. The Royal Court sentenced him to 12 months' imprisonment in respect of the first three counts, each sentence to run concurrently, and to three months' imprisonment in respect of the fourth to seventh counts, again to run concurrently with each other, but consecutively to the 12-month sentences. In other words, the aggregate sentence was one of 15 months' imprisonment. The Royal Court also imposed an extended sentence licence period of three years under the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law, 2004. Later that year, the Respondent successfully appealed these sentences to the Court of Appeal. As a result, sentences of three months' imprisonment were upheld in respect of the sixth and seventh counts only, with all the other sentences of immediate imprisonment being set aside, amounting effectively to no separate penalty in relation to each of them. As regards the extended sentence licence, the Court of Appeal reduced the period by 12 months to two years. The outcome for the Respondent, therefore, was that he was sentenced to a total of three months' imprisonment plus the extended sentence of two years.

13. The 2002 Law introduces rehabilitation periods, after which a person's conviction is to be treated as spent. Although some sentences are excluded from rehabilitation, it is the length of the rehabilitation period that affects how to treat the Respondent's previous conviction. The Schedule to the Law contains the rehabilitation periods. In respect of a sentence of imprisonment for a term not exceeding six months, the period is seven years. However, for a sentence of imprisonment exceeding six months but not exceeding 30 months, the rehabilitation period is 10 years. At face value, a sentence of three months' imprisonment would attract the shorter rehabilitation period but this overlooks the effect of the extended sentence imposed pursuant to the 2004 Law.

14. Section 3 of the 2004 Law provides as follows:

> "*(1) This section applies where a court which proposes to impose a sentence of imprisonment for a sexual or violent offence considers that the period (if any) for which the offender would, apart from this section, be subject to supervision under section 1 would not be adequate for the purpose of preventing the commission by him of further offences and securing his rehabilitation.*
>
> *(2) Subject to subsections (3) to (5), the court may pass on the offender an extended sentence, that is to say, a sentence of imprisonment the term of which is equal to the aggregate of –*
>
> *(a) the term of the sentence of imprisonment the court would have imposed if it had passed a sentence of imprisonment otherwise than under this section (**"the custodial term"**), and*
>
> *(b) a further period (**"the extension period"**) for which the offender is to be subject to a licence (an **"extended sentence licence"**) and which is of such length as the court considers necessary for the purpose mentioned in subsection (1).*"

By virtue of subsection (4)(a), the extension period in the case of a sexual offence must not exceed 10 years. Section 4 then deals with release and clarifies, in particular, that the existence of the extension period is ignored when determining the release date of the prisoner.

15. As Advocate Calderwood points out, the wording of section 3 of the 2004 Law is not ambiguous. The custodial term and the extension period are to be aggregated into a term of imprisonment comprising both elements. Although the custodial term, as adjusted by the Court of Appeal, imposed on the Respondent was just three months' imprisonment, the aggregation results in an overall sentence of imprisonment of 27 months. Given that the 2002 Law refers to lengths of a "*sentence of imprisonment*" when fixing rehabilitation periods, it must be the aggregate sentence of imprisonment that applies. As such, the rehabilitation period for the Respondent is 10 years, which has not yet expired, rather than the seven years he suggested applied to him as a result of the documents he was able to produce.

16. Although I am satisfied that the wording in the 2004 Law can only be interpreted in this fashion (and if there is any consolation to the Respondent it should be that his successful appeal turned what would have been an excluded sentence, and so never capable of being regarded as spent, into one that will in time be treated as spent), Advocate Calderwood has looked at the regime in England and Wales, which appears to have been the model on which the 2004 Law was based to show that this would be the construction given in that jurisdiction as well.

17. The policy letter leading to Guernsey's 2004 Law indicated that provision along the lines of sections 58 and 59 of the Crime and Disorder Act 1998 should be introduced. Section 58(2) was in similar terms to what became section 3(2) in the 2004 Law. In that form, it was only in force for a couple of years, but the enactment repealing and replacing it retained the substance of that subsection, until it was itself repealed in 2005. In ***R (Minter) v Chief Constable of Hampshire Constabulary*** [2014] 1 WLR 179, the Court of Appeal in England and Wales agreed that the way the interpretation of this provision had been covered in ***R v Wiles*** [2004] 2 Cr App R (S) 88 was correct, in which case the different approach taken in ***R v Graham S*** [2001] 1 Cr App R 7 was regarded as being reached *per incuriam*. In ***Wiles***, the Court of Appeal stated that "*it is clear that the term of imprisonment or detention includes the extension period and is not confined to the custodial term*" (para. 14). That conclusion was explained in greater detail in para. 15:

> "*It is also consistent with the nature of a modern determinate sentence of imprisonment or detention. It is not, as the phrase might in ordinary language suggest, an order for a period of incarceration of defined length: it is an order for a period of restriction on freedom of the offender, which begins with a period of incarceration and then may include a period of release on licence and will end with a period during which the offender is liable to be ordered to serve the unexpired term if he reoffends during the currency of the term. All that an extended sentence does is adjust the length of the second (licence) period. Therefore, for the purposes of s.28, the whole length of the extended sentence is to be taken into account in determining the length of the qualifying sentence.*"

Although this case did not relate to rehabilitation periods, I am persuaded that the reasoning as it applies to an order disqualifying the offender from working with children, which required a minimum sentence of imprisonment to be imposed before it could be made, supports the interpretation to which I have referred of section 3 of the 2004 Law. Accordingly, the "*sentence of imprisonment*" to which the Respondent became subject following his appeal to our Court of Appeal in 2011 is the aggregate sentence and so the effect under the 2002 Law is that it should not have been treated as spent for the purposes of the Tribunal hearing.

18. As I have said, the Tribunal fell into error in part because of the error of the Policy & Resources Committee in respect of the complaint the Respondent had made under the data protection legislation. However, there are consequences that flow from this error that, in my judgment, affect the Tribunal's decision. Although I have considered this issue in light of the Tribunal's decision to hold the hearing in private, the main argument advanced by the Appellant, is that this error meant that the Tribunal did not consider properly the case it made that the reason, or the principal reason, for the Respondent's dismissal was his conduct. On the basis that the Tribunal understood that the Respondent's dismissal was spent, and so no longer relevant, had the Tribunal realised that the conviction had not become spent, its approach to this question may have been different. It is for this reason that I am satisfied that the Respondent's complaint of unfair dismissal needs to be remitted to the Tribunal for it to consider these matters afresh. Whether it does so in public rather than in private is a further issue for it to consider in the light of the comments I have just made.

Continuity of employment

19. As I have already pointed out, the Tribunal took the question of the length of employment of the Respondent as a preliminary issue. At para. 2.4 of its Extended Reasons, the Tribunal stated:

> "*The Tribunal consulted the "Schedule Continuous Employment" Section 34(1) of The Law and concluded that employment under the two contracts as continuous; there was no gap in time between the contracts, no notice payment was made under the initial contract, the Applicant continued to be the Reception Manager. Prior to evidence being heard the Tribunal informed the parties that in the absence of any contractual provision, and in accordance with section 5 of the schedule the Applicant's employment was continuous for at least 7 years; thus he met the requirement to have his complaint heard.*"

20. Under section 15(1) of the 1998 Law, a complaint of unfair dismissal is generally not available unless the person making it had been continuously employed for a period of one year. The Appellant had argued before the Tribunal that Mr Elsadany was putting together his own team at La Trelade, which meant that new contracts were offered to staff who had been employed by the previous employer. The Form ET2 submitted on behalf of the Appellant indicated that employment had only commenced on 1 April 2018 and that the Respondent's employment then terminated on 20 December 2018, whereas the Respondent claimed his employment began on 13 July 2011. Accordingly, he argued, as the Tribunal found, that there had been no break in what he was doing even if the identity of his employer had changed, although his Form ET1 simply identified his employer as La Trelade Hotel, with Mr Elsadany as the General Manager. In respect of this discrete issue, the Tribunal heard brief evidence from the Respondent, Mr Elsadany and Mr Doughty.

21. From the Tribunal's notes of the hearing, the Respondent's evidence covered that there had been no break in his employment, that he had not been formally notified in writing or verbally, but that he was aware changes were taking place and that he had typed up correspondence relating to it. He had had a contract with Mr Doughty and was given a new contract, but the job he did was the same, running the reception. Mr Elsadany gave evidence that he had been running the restaurant and the health suite, but then took over the whole hotel. He did not intend for there to be any continuity from which the Respondent would benefit. It was an issue that was not mentioned. Contracts were offered to all staff and they accepted them. Mr Doughty's evidence was that the Respondent had helped him when negotiating change. The hotel had sufficient business to be sold as a going concern, but Mr Elsadany had become the tenant. He said the business was being transferred.

22. The Tribunal also had the benefit of a signed statement from Mr Doughty dated 15 April 2019 relating to transferring the business. It refers to some health problems he had had and why this led him to look for someone to take responsibility for the business. That statement continues:

> "*March 2018 I have approached Mr Elsadany to take on by licence all the 34 Room and health suite alongside the restaurant for me to retired [sic]. All the documents and draft of the heads of terms been done by Mark Chiverton, that means he was 100% aware of all the deals and timing of transferring of the business.*
>
> *Mr Elsadany wasn't liable or responsible of any debit to any party including all employees' wages and holiday pay's prior to 01/04/2018.*
>
> *All my Employee's being paid 12 month per a year but works 11 Month only because we close the business form [sic] 15 of December to 14 January every year.*
>
> *All Employees have been giving a choice to accept or refuse to work for the new company as all of them have renegotiated a new contract with Mr Elsadany including Mr Chiverton, even he managed to get more than £301 wages extra per Month.*"

23. The two contracts of the Respondent that were seen by the Tribunal showed that from 1 October 2013 to 30 September 2014 "*(renewed on an annual basis, after the States of Guernsey updates the Minimum Wage Legislation)*" the Respondent was employed by La Trelade Hotel Limited and from 1 April 2018 the employer was La Trelade Hotel operated under licence by Daniel Elsadany, Sahara City Limited. (The Tribunal appears to have proceeded on the basis that the proper name of the company used by Mr Esladany as the employer was Sahara City Co Limited, which he confirmed during the hearing to be correct.) Both contracts indicate that the Respondent was employed as Reception Manager. The terms of each were similar in some respects but different in others.

24. Section 34(1) of the 1998 Law provides that "*continuously employed*" is a term to be construed in accordance with the Schedule to the Law. Paragraph 7 of the Schedule deals with the situation where there is a change of employer. Sub-paragraph (1) provides that "*Subject to the provisions of this paragraph, this Schedule relates only to employment by the one employer.*" Because it was common ground that the identity of the Respondent's employer changed with effect from 1 April 2018, meaning that the continuity of employment required for section 15(1) of the Law would not exist unless previous employment could be aggregated, some other sub-paragraph of para. 7 of the Schedule would have to apply. The Tribunal has not spelt out which sub-paragraph it applied. I am afraid that I simply do not understand its reference in para. 2.4 to "*section 5 of the schedule*"

25. Paragraph 7(6) of the Schedule provides:

> "*If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer –*
>
> *(a) the employee's period of employment at that time counts as a period of employment with the second employer, and*
>
> *(b) the change of employer does not break the continuity of the period of employment.*"

It appears from what the witnesses said in evidence that an employee such as the Respondent might be regarded as being "*taken into the employment of another employer*", but the definition of "*associated employer*" found in section 34(2) of the Law appears not to be

satisfied. At the very least, it does not appear to have been an issue explored by the Tribunal. Section 34(2) provides:

> "*For the purposes of this Law any two employers are to be treated as "**associated**" if–*
>
> *(a) one is a company of which the other (directly or indirectly) has control, or*
>
> *(b) both are companies of which a third person (directly or indirectly) has control,*
>
> *and the expression "**associated company**" shall be construed accordingly.*"

There has been no suggestion that sub-para. (6) applies, although it is possible it does if the relationship between the two companies were to show that they are associated. However, this issue does not appear to have been considered at all, which I imagine means that it was known to be inapplicable.

26. Sub-paragraphs (3), (4) and (5) appear to have no relevance to the Respondent's situation. They deal with where an enactment has the effect of substituting a new employer, if the employer is an individual who dies or where there is a change in the partners, personal representatives or trustees who employ the person. Accordingly, the only sub-paragraph left to consider is sub-para. (2), which provides:

> "*If a trade or business, or an undertaking (whether or not established by or under an enactment), is transferred from one person to another –*
>
> *(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and*
>
> *(b) the transfer does not break the continuity of the period of employment.*"

27. The material before the Tribunal did make reference to the business being transferred. Indeed, the impression I have formed is that this must have been the basis on which the Tribunal concluded that there was no break in the continuity of the Respondent's employment and that the previous length of employment with La Trelade Hotel Limited counts as a period of employment with the Appellant. If so, it would have been helpful if the Tribunal had expressly stated that it was satisfied that the trade, business or undertaking had been transferred. However, in order to reach that conclusion, the Tribunal potentially needed to see the basis on which such a transfer, if that is what it was, had been effected. There was reference in Mr Doughty's statement to there being heads of terms, but no such document appears to have been produced before the Tribunal. Reference was also made by Mr Doughty to Mr Esladany (or perhaps more accurately the corporate vehicle he was using) becoming tenant of the hotel premises. The arrangements may, therefore, not have extended to transferring the business itself, and with it any employee. Because more than one conclusion is available to the Tribunal on the material before it, the Tribunal should have set out its conclusion and the reasons for reaching it more fully so as to avoid any possible ambiguity.

28. For these reasons, I take the view that the preliminary objection made by the Appellant to whether the Respondent had satisfied the qualifying period has not been explained adequately by the Tribunal. This is an issue upon which the Tribunal may have misdirected itself because it has not identified the actual basis on which it found there had been no break in the continuity of employment. It is possible that the conclusion it has reached is the correct one,

but that really depends on looking more fully at the question of whether there has been a transfer of the trade, business or undertaking, which ought to involve considering the terms on which the Appellant has contracted with Mr Doughty and/or Mr Doughty's company. The absence of anything paid by La Trelade Hotel Limited may lead to an inference that there was a transfer or it may mean no more than that that company has failed to meet its obligations to its employees.

29. This is an important issue because, if the Respondent cannot persuade the Tribunal that there is continuity of employment as set out in para. 7 of the Schedule to the Law, his complaint of unfair dismissal cannot be heard by the Tribunal. I take the view that this ought to have been considered in more detail by the Tribunal and that its reasoning on such an important issue should have been clearer. It is another reason why the appeal succeeds and the complaint needs to be considered afresh in the light of this analysis of para. 7.

Reason for dismissal

30. A further issue advanced by the Appellant in support of its appeal is that the Tribunal failed to understand the reasons given, particularly by Mr Elsadany, for dismissing the Respondent. The appeal suggests that the Appellant had dealt with the Respondent leniently by not dismissing him summarily for gross misconduct. Instead, the Tribunal proceeded to find that the dismissal was for redundancy and that there had been no awareness of the correct procedures to follow, which made the potentially fair dismissal unfair. The Tribunal's analysis of the different reasons advanced is found in para. 7.8 of its Extended Reasons:

> "*Mr. Elsadany told the Tribunal that there were other reasons for dismissal of the Applicant; there were disagreements as to how work should be carried out, which computer systems would be used and events in the Applicant's personal life; all of which were given in evidence. However, the evidence from both parties indicates that at no time during the applicant's employment did the Respondent formally confront the Applicant with these issues or instigate any disciplinary process. Indeed it would seem that Mr. Elsadany only raises these issues now to persuade the Tribunal that he had no choice but to dismiss the Applicant and that the dismissal was fair. However, the Tribunal notes the stated reason for the dismissal in the letter of 10 December 2018 was due to 'economic conditions' and a 'significant downturn in sales', this was reiterated in oral testimony by Mr Elsadany. In summary the Tribunal understands that whilst Mr. Elsadany had other concerns, sensitive to the running of the hotel, when he came to dismiss the Applicant he chose redundancy to formally communicate and justify the termination of the Applicant*".

Further, in para. 7.10: "*The Tribunal has concluded that the conduct of the redundancy process by the Respondent fell well below the standards expected of an employer in Guernsey in 2019*".

31. It is apparent that the Tribunal has decided that the reason, or principal reason, for the Respondent's dismissal was redundancy and the Appellant is aggrieved that it was not found to be conduct. Given the approach the Tribunal took to the Respondent's previous conviction, treating it as spent, it is possible that the Tribunal did not consider as fully as it ought to have done whether the Appellant had managed to discharge the burden on it of demonstrating whether one of the potentially fair reasons found in section 6(2) of the 1998 Law applied.

32. The Appellant's Form ET2 had a letter dated 24 January 2019 attached to it containing the substance of its response, which includes:

"*I chose to use "redundancy" on his dismissal reasons as I believed to be the politest way to hand the notice. I have done all my work to comply with the employment rolls [sic] and regulation. …*

I never doubted Mr. Chiverton Skills but unfortunately his performance was below my expectations,

Mr. Chiverton did not follow my orders or instruction, made and signed several business agreements without my permutation [sic] or acceptance, chose to favoured Client then anther [sic] by giving them cheap rate without my approval,

He allows friends to enter the reception area which has confidential documentation and customer details as he has been warned several time vibrable [sic].

Mr. Chiverton wasn't friendly and approachable to our guest or team member as I had several complaints including few in the trip advisor.

Mr. Chiverton have insulted me in front of guest and friends by telling me he does not like me, but he still liked to work for me. …

Furthermore it have been drawn to my attention that Mr. Chiverton being a registered criminal offender, (fact you can check within your records), our hotel was "invaded" by the Police not too long ago, all our computers were searched for inappropriate contents, a make me feel very uncomfortable in front of our guests and as a father of a young child myself."

The manner of terminating the Respondent's employment was that Mr Elsadany sent him an e-mail on 14 December 2018 attaching a document headed "Termination Notice" (which the Tribunal has set out in full at para. 2.9 of its Extended Reasons), in which the reasons for terminating the Respondent's employment with effect from 20 December 2018 were:

"*Recent economic conditions have caused a significant downturn in sales, necessitating a 20 percent workforce reduction at Sahara City T/A La Trelade hotel Unfortunately, your position is part of this reduction and has been eliminated. Other reasons will be mentioned in request.*"

33. What appears to follow from these documents is that the Appellant was inviting the Tribunal to look behind the reason given in that "Termination Document". In other words, the Appellant's case appears to be that the decision to dismiss was dressed up as a redundancy situation but was actually based on conduct. The Tribunal is, of course, correct to point out that the absence of following any procedure would make it easy for the Respondent to demonstrate that, even if conduct were the reason or principal reason for the dismissal, it was not a fair dismissal, but it has not, as I think it really should have, endeavoured to analyse the reason for the dismissal fully first. Its Extended Reasons leave the impression that it has conflated the issue of the reason, or principal reason, with the reasonableness question. In doing so, it may also have overlooked that the burden of establishing each rests on different parties.

34. From looking at the written materials and considering the notes the Tribunal made of the evidence adduced before it, the Tribunal has not made any express finding as to whether other employees were made redundant. At para. 7.1 of its Extended Reasons, the Tribunal describes Mr Elsadany's evidence as "*confusing and lacking in clarity*" and that "*the term redundant seemed to be applied to other individuals who were understood to be seasonal staff*". There does not appear to have been a full analysis as to whether any other employee had been made redundant, consistent with the explanation given to the Respondent that his position had been selected as part of a reduction of 20% of the workforce. There has also

been no apparent consideration as to whether the work the Respondent had done was performed by others, in which case there may not even have been any redundancy situation. Against that, the Tribunal has not set out all the matters relating to conduct on which the Appellant indicated it wished to rely and rejected them. These are matters that really ought to have been dealt with by the Tribunal more clearly so that anyone reading its decision would understand what the reason, or principal reason, found for the dismissal was. In the light of these comments, if the Respondent's complaint of unfair dismissal can be dealt with because he has satisfied the qualifying period, a clearer determination of this question at the re-hearing should be capable of being set out. This is, therefore, a further reason for allowing the appeal.

Reducing the award

35. Although it is not an issue raised prominently on behalf of the Appellant, the decision of the Tribunal to reduce the award it made to the Respondent by only 15% was something touched on by Mr Elsadany. The explanation given is found in para. 9.1 of the Extended Reasons:

> "*The Tribunal concluded that it would be just and equitable to use its discretion under Section 23(2) of the Law, to reduce this amount by 15%. The Tribunal was persuaded that Applicant demonstrated a significant level of overt insubordination toward the Respondent, including in front of guests, and this contributed to his eventual dismissal.*"

36. The power to reduce what is otherwise a fixed award as compensation for unfair dismissal of six months' pay (or 26 weeks, if the employee was paid weekly) under section 22(1) of the 1998 Law is contained in section 23(2), which provides:

> "*Where in relation to such a complaint [of unfair dismissal] the Tribunal considers that, by reason of any circumstances other than those mentioned in subsection (1), it would be just and equitable to reduce the amount of the award of compensation for unfair dismissal to any extent, the Tribunal shall, subject to subsection (3) and subsection (4), reduce that amount accordingly.*"

Subsection (1) covers where an offer having the effect of reinstating the complainant is unreasonably refused. Subsections (3) and (4) cover situations in which no reduction is permissible.

37. The Tribunal's reference to "*overt insubordination*" demonstrates that it had in mind the possibility that the Respondent could have been dealt with for misconduct. In the context of a case founded on redundancy, it looks a little odd to say that the compensation for unfair dismissal is affected by reason of insubordination. If there genuinely was a redundancy situation, the employer should, as the Tribunal pointed out, have considered more appropriately the procedure to follow to select any employee to be made redundant. The Code of Practice shows that there are various guidelines that can be used to assist this process, which include the disciplinary record and any other relevant factors important to the business. It follows that insubordination can be something to consider in making the selection of an employee for redundancy and this is what the Tribunal may have had in mind. However, the absence of a clearer explanation of why it was that there was a finding of unfair dismissal and then a reduction of the award leaves the parties, and this Court, wondering why it was thought just and equitable to make that reduction. For example, if the behaviour of the Respondent was such that, had the Appellant followed a proper procedure when selecting him for redundancy, it would have been a fair dismissal, this might justify making a reduction to the award. The level of reduction then becomes an issue. However, if it were regarded as something completely separate from any redundancy, the Respondent himself might feel aggrieved that what the 1998 Law states he is entitled to receive has been reduced inappropriately.

38. If the Tribunal had considered the reason, or principal reason, for the dismissal had been misconduct, as the Appellant argues it should have, then the level of the reduction made again becomes an issue. The basis on which the dismissal would be found to be unfair would relate to not following a proper procedure having found that the Appellant had satisfied the Tribunal that there had been misconduct. In those circumstances, the extent of the misconduct and the way it could have been considered had a full and fair procedure been followed before dismissal become issues central to the question of what level of award is just and equitable. The Respondent's contract of employment with the Appellant contained a section on disciplinary procedures, which included: "*In the case of Gross Misconduct, a hearing will be held with the Member of Staff. The Company … and an independent witness (acceptable to both parties) where the offender is given a chance to give his case before a final decision is made.*" Accordingly, if, for example, all the concerns raised on behalf of the Appellant in its Form ET2 had been put to the Respondent at such a hearing, on the basis that the most serious complaints made against him could be regarded as gross misconduct, and the decision to dismiss had then been taken, the award would potentially need to reflect that possible outcome and might even be greater than the 15% reduction made by the Tribunal.

39. Any reduction in an award is often a difficult issue to explain satisfactorily and I consider that this is a further area where the Tribunal has not set out its reasoning as fully as would be helpful. In effect, what would be best would be a structured decision setting out the reason or reasons advanced for the dismissal, together with a finding of the single reason or, if more than one is advanced, the principal reason, so that there is a finding that a potentially fair reason (as also distinguished from any automatically unfair reason) has been found. That conclusion will then have an impact on the decision as to whether the dismissal for that reason was fair or unfair and, if unfair, whether in the light of what has been found there is a valid reason to exercise the power of reducing the amount of the award. In order to reach a rational decision on that final question, there ideally would be some connection to the other findings.

Procedural impropriety

40. The Appellant's Notice of Appeal and its Skeleton Argument also complain about the way the hearing was conducted. It is alleged that the Chairman was discriminatory as a result of Mr Elsadany's nationality and ethnic origin, that there were direct approaches to him during the luncheon adjournment and that the Chairman kept "shushing" Mr Elsadany. All of these allegations are refuted in the material put before the Court on behalf of the Tribunal. The raising of procedural irregularity is a type of question of law that can be argued on an appeal, but section 25(2) of the 1998 Law provides that such a procedural irregularity will not invalidate the Tribunal's decision unless it was such as to prevent any party to the complaint presenting his case fairly before the Tribunal.

41. I do not need to make any specific rulings in relation to these allegations on the basis that, for other reasons, this appeal succeeds and the Respondent's complaint is being remitted for a re-hearing. I will, though, indicate that I accept at face value what has been provided on behalf of the Tribunal. I am satisfied that there has been no discrimination on the grounds of nationality. It is the function of the Chairman of any Tribunal to seek to maintain order. I think it is quite possible that Mr Elsadany sought to interrupt parts of the proceedings when it would have been more appropriate for him to wait until next invited to speak. That is sometimes the way with those who represent themselves and it is permissible for the Tribunal to impress upon such a person the need to respect what is being said by the other side. To the extent that Mr Elsadany felt he was being silenced inappropriately, I very much doubt that was the case. Having seen the notes from the hearing before the Tribunal, I am satisfied that the request made to Mr Elsadany to provide details of other staff members so that the Tribunal could assess if there had been a redundancy situation was an appropriate request to make. It was not something that arose directly with Mr Elsadany outside the confines of the hearing, as

he suggests, but was an integral part of the hearing. I am not persuaded that any of the procedural irregularities raised by the Appellant can be made out and, even if any of them could be, I doubt it affected the ability of the parties to present their cases fairly.

42. For these reasons, were I not allowing the appeal on other grounds, I would not have found any merit in the Appellant's complaints about procedural irregularity. I have already commented on whether the decision to sit in private was one that ought to have been taken but these other complaints are not, in my view, matters that, if viewed in isolation or even collectively, would affect the lawfulness of the Tribunal's decision.

Conclusion

43. For the reasons I have given, I have decided that this appeal should be allowed. During the course of this judgment, I have set out where I feel the approach taken by the Tribunal was flawed. It fell into error in accepting that the Respondent's conviction was spent under the 2002 Law, but there can be little criticism of it for doing so on the basis of the materials before it at the time. This was, though, a significant factor in the overall approach to the complaint of unfair dismissal and that mistaken construction of the legal position has the potential to affect other aspects of its decision. On the question of continuity of employment, the Tribunal may have reached the right conclusion but it depends on certain factual findings being made and its reasoning does not set out whether those findings were made or even whether they could be on the basis of the evidence adduced. Thereafter, if the qualifying period is found to be satisfied, the Tribunal should have explained more clearly why it was that it was finding the principal reason for the Respondent's dismissal to be redundancy (or should have found differently). However, whatever the operative reason, the Tribunal has clearly not fallen into error in finding that the dismissal was unfair. It follows that, provided there is a finding that the qualifying period has been met, the Respondent will be entitled to a finding that he was unfairly dismissed. However, whether the award that follows should be reduced by 15% or by some other amount is something that will need to be re-considered in the light of the other findings that will be made at the re-hearing of the Respondent's complaint. Given that the outcome is that the complaint is remitted, I have not covered the factual position relating to the Respondent's complaint in much detail on the basis that the findings of fact to be made are very much in the province of the Tribunal at that re-hearing and so it is preferable that I avoid commenting further on them in this judgment.

44. If there is to be an application relating to the costs of the appeal, noting that costs frequently follow the event, but do not always do so, and, in a case like this, costs are normally limited to the fees payable in respect of the appeal itself and any permissible expenses to which the Appellant has been put, the parties are at liberty to seek to agree an appropriate order. Alternatively, if agreement cannot be reached, whoever wishes to seek an order for costs should liaise with the Greffe with a view to fixing a short hearing for that purpose.