Appeal against a decision of the Employment and Discrimination Tribunal dismissing the Appellant's complaint of unfair dismissal because his period of continuous employment with the Respondent, was shorter than the necessary qualifying period of 12 months.

[2022]GRC025

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

On appeal from the Employment and Discrimination Tribunal

Case No: ED032/20

Between:	**VITOR JOSÉ FREITAS GONÇALVES**	**Appellant**
	-and-	
	CHANNEL ISLAND RAINBOW SERVICES LIMITED	**Respondent**

Date of hearing: 7th December 2021

Decision handed down: 26th April 2022

Before: Richard James McMahon, Esq., Bailiff

The Appellant appeared in person
The Respondent appeared through a Director, Colin Waterton

Legislation and cases referred to:

The Employment Protection (Appeals and References) Order, 2006
The Employment Protection (Guernsey) Law, 1998
The Employment Protection (Guernsey) (Amendment) Law, 2005
Da Mata v George (unreported, 7 July 2008)
Burford v Flybe Limited [2009-10] GLR N-10
The Civil Contingencies (Bailiwick of Guernsey) Law, 2012

Introduction

1. By a Notice of Appeal dated 13 August 2021, Vitor Gonçalves (the Appellant) appeals against the decision of the Employment and Discrimination Tribunal dismissing his complaint of unfair dismissal because his period of continuous employment with the Respondent, Channel Island Rainbow Services Limited, was shorter than the necessary qualifying period of 12 months. The Tribunal had taken the question of whether the Appellant was eligible to bring his complaint of unfair dismissal as a preliminary issue.

2. This Notice of Appeal raises two bases on which it is argued this appeal should be allowed:

    (i) failure to produce information and dated documents as evidence in accordance (by the Respondent), and

    (ii) making statement, wich [sic] Andrew Galsworthy and his witnesses know to be false, deceptive, misleading and dishonest.

3. At the hearing, the Appellant represented himself. He read out his submissions commenting on what was contained in the Tribunal's Extended Reasons dated 13 July 2021. He has since provided a typed version of what he read out. The Respondent appeared through Colin Waterton, one of its directors, to resist the appeal. Upon receipt of the typed version of the Appellant's submissions, Mr Waterton has e-mailed suggesting that what has been provided in written form appears to have been amended from the handwritten notes from which the Appellant had made his submissions. I have relied principally on the note of the submissions I took at the hearing, although I have read the typed version so as to check that I had accurately recorded those oral submissions.

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 was obliged to reserve judgment. This judgment sets out my reasons for dismissing the Appellant's appeal.

Proceedings before the Tribunal

5. The preliminary issue arose because the Tribunal recognised from the Respondent's Form ET2 that the dates of employment given by the Appellant on his Form ET1 were not agreed. The Appellant stated that his employment commenced on 3 June 2019 and ended on 1 June 2020, but he indicated that he had not been given any notice period. The Respondent stated that the date employment commenced was agreed, but that there had been a break in employment, and which had finally ended on 31 March 2020. The Appellant was employed as a cleaner.

6. Section 15(1) of the Employment Protection (Guernsey) Law, 1998, as amended, specifies that generally a person claiming unfair dismissal must have been continuously employed for a period of not less than one year. The Appellant's case before the Tribunal was that he had only known about the termination of his employment on 1 June 2020 and, by virtue of section 5(5) of the Law, for the purposes of section 15(1) the date of expiry of his notice period should be treated as the effective date of termination. Accordingly, he satisfied the qualifying period. The Respondent's case was that the Appellant had broken his employment in the summer of 2019 and, in any event, his dismissal was notified to him in March 2020, meaning that he did not satisfy the qualifying period.

7. In the Tribunal's Extended Reasons, the evidence heard is summarised in the third section.

8. On behalf of the Respondent, Romao (or Luis) Santos provided a written statement but was not present to be cross-examined. His partner, Tatiana Natal, gave oral evidence, which included reading out her witness statement. She explained that the Appellant had been unhappy about returning to work after his break, but her partner had indicated he would sort things out. She also gave evidence that she knew the Appellant had been dismissed in March 2020 because she was asked to deliver the letter of dismissal to the Appellant's home address, which was a shared house in which she also lived, but on a different floor. She placed the letter in the communal area where post for occupants was left. She also recalled telling the Appellant at a barbeque they attended that he had been dismissed.

9. On behalf of the Appellant, he first gave evidence himself and explained that everyone knew that he was having a holiday in the summer of 2019. Further, when the lockdown resulting from the coronavirus pandemic started in March 2020, because he was worried about catching

the virus, when asked in April and May if he would work, he refused. When the restrictions were eased from 1 June 2020, he was prepared to work again. He accepted that there had been an altercation with Tony Gover on 24 March 2020, with Mr Gover later coming to collect the work's van and keys from the Appellant. Rachel Presland and Tina Jones both gave evidence confirming that the Appellant had asked for and been granted a period of holiday from 31 August to 27 September 2019. Pursuant to a summons to secure her attendance, the office and operations manager of the Respondent, Jocelyn Rabet, was called to give evidence on behalf of the Appellant. She offered explanations about a raft of text messages. Initially, she was unaware of the dismissal of the Appellant but her later messages were an attempt by her to help him during the difficult financial circumstances caused by the lockdown. Andrew Galsworthy, a director of the Respondent, was also summonsed to give evidence on behalf of the Appellant. He recalled a loud quarrel between Mr Gover and the Appellant at lunchtime on 24 March 2020. It escalated to such an extent that Mr Gover summarily dismissed the Appellant on the spot. In a telephone conversation later with the Appellant about Mr Gover attending to recover the work's van and some keys, he recalls telling the Appellant that he knew he had been sacked. He also recalled a conversation he had had with the Appellant when he was leaving in 2019 for what had been booked as a holiday, from which he formed the impression that the Appellant would not be returning to work with the Respondent.

10. As a result of considering the evidence of the parties, the Tribunal found the following facts, which I will set out in full:

> "*5.1 It was quite clear from the various witnesses that there was something that had upset the Applicant just before he departed in late August 2019. It was also clear that, even on Mr. Galsworthy's own evidence, the absence was originally booked as holiday. The Tribunal is, therefore, not satisfied that what the Applicant did or said at the end of August 2019 went far enough to be considered as resignation from his employment.*
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> *5.2 There is a stark contrast in the evidence on behalf of the Applicant and on behalf of the Respondent about the notification, or otherwise, of the dismissal. The Applicant maintains that he never received any letter of dismissal and that the first he knew of it was on 1 June 2020 when Mr. Gover spoke to him. The Respondent maintains that the Applicant was told to his face on 24 March 2020 that he was dismissed and that a letter confirming that dismissal was hand delivered the following day (a copy of that letter is attached to the ET2 Form).*
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> *5.3 The Tribunal considers it significant that there was an angry confrontation between Mr. Gover and the Applicant during which Mr. Gover demanded return of the work's van and keys. Combined with the argument that had happened earlier that day it seems very strange that the Applicant did not think that something was seriously wrong.*
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> *5.4 Furthermore, the Applicant makes a curious comment in his ET1 Form (my emphasis): "during the troublesome lockdown period, despite my attempts to be informed about the company's working situation and my own within it, I was never by any legal terms informed about it until on the first of June 2020,* ***as if my existence had been forgotten****, I presented myself to go back to work at the company's offices after knowing most of my colleagues were already back for weeks and that the lockdown measures had been eased". This is consistent with the Respondent having dismissed the Applicant in March 2020.*
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> *5.5 The evidence of the preparation and delivery of the confirmatory letter on 25 March is, on the balance of probabilities, consistent with the Respondent's version of events. The Tribunal found that there was no reason to disbelieve*

or doubt the account of the Respondent's witnesses on this point. It is more likely that the Applicant simply forgot about the letter or lost it."

11. The Tribunal, therefore, determined that there had been no break in the continuity of employment arising from the holiday in the summer of 2019, but that the Appellant had been dismissed without notice on 24 March 2020. Accordingly, the effective date of termination became 31 March 2020, which is why the Appellant's claim of unfair dismissal was dismissed for the reason that he did not satisfy the qualifying period. There was no award of costs.

Appellant's contentions

12. The Appellant has commented on the paragraphs found in the Tribunal's Extended Reasons. He agrees that some of the content is accurate. He expressed some concern about apparent language barriers, but he has not raised this as a discrete ground of appeal. The Tribunal seems to have been prepared to proceed without any interpreter being needed. I consider that the Appellant was able to make his submissions to this Court in English adequately enough, even if English is not his first language. He relies on the fact that the Tribunal found that the Respondent's claim that there had been a break in employment had not been proved, which supports his contention that the effective date of termination in March 2020 has been fabricated.

13. In relation to the summary of evidence, the Appellant argues that the content of Mr Santos' witness statement is mostly irrelevant and false. Similarly, the evidence of Tatiana Natal was mostly incorrect and false. He denied that there were any issues about his professional ethic and drew attention to an offer once he returned from holiday to make him a supervisor of the work undertaken at the offices of one of the Respondent's more prominent clients. He denied receiving any letter left for him in March 2020. The discussions that took place at the barbeque a little later (in May 2020) were about how Mr Gover had behaved towards him. He commented that his reason for refusing jobs was that the Respondent was underpaying him. In relation to Jocelyn Rabet, because there had been no witness statement, the Appellant suggested that she was evasive and what she said in evidence went against the content of the text messages. The Appellant disputed the accuracy of the evidence of Mr Galsworthy. He suggested that there had been no discussion at all about him having been dismissed. The reason why he had telephoned was to check that the van and keys should be handed back to Mr Gover and he had been told that was OK because Mr Gover was a director.

14. As regards the Tribunal's findings of fact, the Appellant disagreed that there had been anything upsetting him in the summer of 2019. He argues that the Respondent has had to invent a story about a document that was never received by him to get around the clear evidence he had produced that showed he was still employed until 1 June 2020. At the time, Tatiana Natal was required to self-isolate having been a contact of a positive case and so it was impossible for the letter to have been hand-delivered as the Respondent had claimed.

15. The Appellant has placed considerable reliance on what is contained in the text messages that were before the Tribunal. The earlier ones relate to the summer holiday in 2019 and so are no longer relevant. On 24 March 2020, Ms Rabet told the Appellant that there had been a cancellation by one client, but perhaps a deep clean whilst that business was closed might be needed. The next day she enquired if he was working because she was working from home and he enquired whether that was a tricky question, to which she responded asking him if he was isolating because of Tatiana. In early April 2020 there was an exchange with Mr Galsworthy about wages being paid for March and about another person's money. Ms Rabet contacted the Appellant on 4 April 2020 about some possible work and he responded three days afterwards. On 27 May 2020 Ms Rabet contacted him with a proposal for him "*just to get you back earning some cash*". On 2 June 2020, Ms Rabet relayed that she had spoken with Mr Gover and he was willing to let the Appellant come back "*to work for us (not tony)*" and on the following day, Mr Galsworthy sent a message explaining that he and Ms Rabet had worked hard to get Mr Gover to change his mind and "*have now agreed with him to bring you back immediately at £9 per*

hour", explaining that everyone had taken a cut to come back to work until the company could be built up again.

Respondent's contentions

16. On behalf of the Respondent, Mr Waterton said they were perturbed and shocked that so much information given before the Tribunal was now being challenged. The Respondent's position was that there had been no error of law because the Tribunal had assessed whether the Appellant had been employed for long enough to claim unfair dismissal and agreed with the Respondent that he had not. In relation to the Appellant's arguments that the witnesses had been lying, Mr Waterton pointed out that four of those witnesses had been called by the Appellant himself, two of whom had nothing relevant to say about what took place in 2020. An analysis of the text messages do not assist the Appellant because they support what the Respondent has said. Those text messages had been read out before the Tribunal and so had clearly been considered by the members. In relation to those where Ms Rabet was mentioning work, as she had explained in her evidence, she was at the time unaware that the Appellant had been dismissed. Whilst some of those involved with the Respondent were keen to have the Appellant back as an employee, the problem related to Mr Gover and the argument that the two of them had had.

17. Mr Waterton also confirmed that the Respondent accepted the Tribunal's finding that the holiday the Appellant took in the summer of 2019 had not broken the period of his continuous employment, as the Respondent had claimed. Accordingly, there was no cross-appeal on that finding.

The basis of the appeal

18. Section 25(1) of the 1998 Law (as substituted by the Employment Protection (Guernsey) (Amendment) Law, 2005) provides:

> "*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.*"

19. As I have set out in previous decisions involving appeals from the Tribunal, this provision only gives rise to what was described in *Da Mata v George* (unreported, 7 July 2008) as an appeal of "*very limited*" scope. Given the nature of the Appellant's appeal, although it has not been put in this way by him, what he seeks to argue is that the Tribunal has reached a decision on the facts that was not open to it. In effect, an 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 itself could have reached. I have also been guided by what was said in *Burford v Flybe Limited* [2009-10] GLR N-10, an earlier appeal from the Tribunal, in which the position was 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).*"

Analysis

20. It is clear that the Appellant does not accept that his version of events was rejected by the Tribunal. The second limb of his appeal (making statements knowing them to be false, deceptive, misleading and dishonest) has resulted in this Court having to consider whether there was evidence before the Tribunal that could result in the findings made about the effective date of termination. I am satisfied that there was.

21. Once the Tribunal had resolved the question of the holiday taken in 2019 in favour of the Appellant, the only remaining question about the qualifying period was whether the Appellant had been dismissed in March 2020 or at the later time he claimed on 1 June 2020. The Appellant stated that he had not received the letter the Respondent claimed to have caused to have hand-delivered. As the Tribunal noted, that letter had been attached to the Form ET2. It is a short letter dated Tuesday, 24 March 2020, signed by Mr Gover and Mr Galsworthy and it reads:

> "*Your employment with Channel Island Rainbow Services Limited is terminated effective the date at the top of this letter for inappropriate behaviour towards one of the Directors of the Company. Due to disrespecting the Director and refusal to hand over keys and vehicle when requested it has been decided to terminate your employment without notice or payment in lieu of notice.*"

22. As the Tribunal found, there had been an altercation between Mr Gover and the Appellant. The Tribunal further found, to the required civil standard of proof, that this letter had been prepared and left for the Appellant. The Tribunal concluded that it was more likely than not that the Appellant either lost the letter or forgot about it. Each of those findings was a finding open to the Tribunal to reach on the evidence given at the preliminary hearing. Whilst the Tribunal has rejected the evidence that the Appellant have about the letter never having been received by him, and also rejected his contention that the letter is something that has been prepared subsequently and used as a means of supporting a version of events that did not happen, the person the Respondent says delivered the letter gave evidence and the Tribunal was, therefore, able to accept that evidence as well.

23. What the Appellant now relies upon as arguments against these findings relates to the start of the Island's lockdown as a result of there being cases of coronavirus in Guernsey. Certain requirements had started to be imposed by regulations made under the Civil Contingencies (Bailiwick of Guernsey) Law, 2012 from 18 March 2020. More particularly, Committees of the States of Guernsey were being empowered to issue directions, relating first to the control of premises from 20 March 2020 and then the control of events, gatherings and meetings from 24 March 2020. That is when the lockdown, as it became known, really began. It is also the day of the altercation. The impact of a lockdown on a business such as the Respondent's is something that can be viewed retrospectively as no doubt being significant. At that time, if the Respondent chose to dismiss an employee such as the Appellant who had not been employed for very long, that was a course open to it. Doing so because of the altercation was an option because there was no obligation, given the Appellant's length of service, to act fairly, although it is always preferable to seek to do so. The Tribunal was in a position of balancing the evidence given by the witnesses appearing before it and chose to prefer the version of events given by the Respondent. The Appellant had the opportunity to cross-examine Ms Natal and he was unable to shake her from the version of events that she gave to the Tribunal.

24. Because the Tribunal had the benefit of seeing and hearing the witnesses give their evidence, the Tribunal is better placed than this Court to reach the type of conclusions that it has. It is not open to this Court to interfere with those findings where, as I have just noted, there was clearly evidence given from which those conclusions derive. The outcome would all depend on which version of events was preferred. The Tribunal considered whether the Appellant's version of not being dismissed and notified about it in March should be believed and chose instead to accept that here had been a summary dismissal on 24 March 2020.

25. The second type of challenge that the Appellant has mounted is that the text messages that were before the Tribunal demonstrate that his version of events should have been preferred. They show that he had not been dismissed in March 2020 as now alleged. The Appellant's arguments concentrate on the messages sent by Ms Rabet. The earliest was sent on the evening of 24 March 2020 and there were some exchanges the following day. In her evidence, Ms Rabet explained that at this time she had not known that the Appellant had been dismissed. Given the timing, that is an explanation that I find the Tribunal could accept. It is not inevitable that what she wrote within a day or so of the dismissal supports the Appellant's assertion that the dismissal is a later fabrication. By early April 2020, the tenor of her contact with the Appellant had, I think, changed. There was no direction to go and work, which is what might have been expected if she knew that the Appellant's employment was continuing, as he claims it was, but rather an enquiry as to whether he would use someone else's vehicle to undertake some work. I take the view that the Tribunal could recognise that this showed that she had been updated about the Respondent dismissing the Appellant. I am satisfied that the Tribunal was able to find that her messages were consistent with that state of knowledge.

26. What the Tribunal had to do was to consider the two different versions of events against these text messages. They had been produced by the Appellant as a means of supporting his contention that he had not been dismissed. I am satisfied that the Tribunal could properly conclude that the messages did not compel it to find that the Appellant's version was the only version that it could accept. As I have just explained, the earlier messages from Ms Rabet can be explained by her evidence that she had not been informed that the Appellant had been dismissed. That is evidence that the Tribunal could accept and it is apparent that it has done so.

27. For these reasons, although the Appellant continues to believe that his evidence should have been accepted, his second ground of appeal about the Tribunal preferring the evidence of witnesses he contends lied to the Tribunal is rejected. The findings made by the Tribunal were findings that it could properly make on the evidence adduced. Ultimately, the question of the effective date of the Appellant's employment turned on which version of events was preferred. This is not a case where the only conclusion that could properly be reached is different from the Tribunal's findings. It is a classic case of where the fact-finding exercise could have gone in the Appellant's favour had the evidence led by the Respondent been disbelieved, but instead the evidence led by the Appellant has not been accepted. The Tribunal even went as far as to consider whether the evidence on behalf of the Respondent should be disbelieved and determined that there was no such reason to do so. Those are findings with which this Court on this appeal cannot interfere because the findings are not perverse, irrational or findings that, having properly directing itself, the Tribunal could not have reached.

28. In relation to the Appellant's first ground of appeal (failure to produce information and dated documents as evidence), this was not really developed by him at the hearing. In any event, I am not persuaded that there is any merit in this ground. It is possible that he had in mind his contention that the letter confirming his dismissal was dated 24 March 2020 when there should have been a much later letter confirming that he was actually only dismissed on 1 June 2020. There was no suggestion from him that the Respondent failed to produce other relevant documents before the Tribunal that heard the preliminary issue. Of course, if he felt that there was some document that a witness on behalf of the Respondent should have produced but which had not been, it was open to the Appellant to ask questions of the witnesses who attended or to have made some application to the Tribunal to require the Respondent to produce any document that he would have wished to be ordered to be produced. If the document existed and was relevant, the Tribunal could then have ordered that it be produced. Equally, if the Tribunal had been satisfied that the document simply did not exist, that would have been an answer to the Appellant's contention that something has been hidden by the Respondent. In my view, this first ground of appeal has not been adequately developed and so I cannot allow the appeal on that basis. The Tribunal could only decide the qualifying period issue on the basis of all the

evidence adduced to it. That is what it did and the Appellant cannot now complain if he thinks something further should have been considered.

29. In short, this was always an appeal being advanced on the basis that the finding that there had been a dismissal on 24 March 2020, resulting in an effective date of termination on 31 March 2020, was wrong. As I have explained, however dissatisfied the Appellant is with the Tribunal's findings, it is quite clear that there was evidence before the Tribunal entitling it to make the findings that it has. The consequence is that it was permissible for the Tribunal to rule that the Appellant did not satisfy the qualifying period and so dismiss his claim of unfair dismissal on that basis.

Conclusion

30. For the reasons I have given, this appeal will be dismissed. The findings the Tribunal made were findings open to it and this Court cannot interfere with its decision on those facts that the Appellant had not satisfied the qualifying period so as to enable him to claim unfair dismissal.

31. Costs normally follow the event in this Court. If the Respondent wishes to seek an order that its costs of resisting the appeal should be paid by the Appellant, it is open to it to make that application. Equally, if it is content that there be no order as to costs, meaning the Appellant has paid the fees associated with bringing this unsuccessful appeal, then that would be an end of the matter. I will allow the Respondent 14 days from the handing down of this decision to make any application it wishes, and will then give the Appellant a further 14 days in which to respond. I would hope that any decision on costs can then be made on the papers without needing any further hearing, but either party is at liberty to request such a hearing. If no application is made, then there will be no order as to costs.