



COMMERCE AND EMPLOYMENT

A STATES OF GUERNSEY GOVERNMENT DEPARTMENT

FORM EMPROT 3

For office use only.
Case No: UD019/05

EMPLOYMENT PROTECTION (GUERNSEY) LAW, 1998 NOTIFICATION OF ADJUDICATOR'S DECISION

On a complaint of unfair dismissal, suffering a detriment for refusing, or proposing to refuse, to work on a Sunday or failure by an employer to provide a written statement of reason(s) for dismissal, this award, (subject to the rights of appeal to the Royal Court, as set out in the Law), is legally binding and is the final decision of the Adjudicator.

Adjudication Hearing held on 29 September and 7 October 2005

between

Applicant: Mr Paul Gosney and Respondent: Ferryspeed (CI) Limited

Adjudicator: Mr Barry Ferguson

Nature of Dispute:

Mr Gosney alleged that he was constructively dismissed because of the actions of his employer, Ferryspeed (CI) Limited, as defined in Section 5(2) (c) of the Employment Protection (Guernsey) Law, 1998, as amended.

Adjudicator's Decision:

Having considered all the evidence given to me in person and the documentary evidence that was placed before me, I found that on the balance of probabilities there was no evidence which enabled me to conclude that Ferryspeed (CI) Limited had breached a fundamental term of Mr Gosney's contract of employment which would have enabled him to claim that he was constructively dismissed.

I therefore make no award.

Amount of Award (if applicable) : N/A

NOTE: Any award made by an Adjudicator may be liable to Income Tax
Any costs relating to the recovery of this award are to be borne by the Employer

Signature of Adjudicator **Mr Barry Ferguson**

Date **4 November 2005**

The detailed reasons for the Adjudicator's Decision are available on application to the Secretary to the Adjudicators, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF



EMPLOYMENT PROTECTION (GUERNSEY) LAW, 1998
REASONS FOR ADJUDICATOR'S DECISION

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended.

1.0 Claim

- 1.1 The claim is made by Mr Paul Gosney, the Applicant, against Ferryspeed (CI) Limited, the Respondent, for unfair dismissal.
- 1.2 The basis of the claim is that Mr Gosney was constructively dismissed due to the actions of his employer Ferryspeed (CI) Limited effectively as defined in section 5(2)(c) of the Law.
- 1.3 Ferryspeed (CI) Limited denies such unfair dismissal and claim that Mr Gosney was intending to resign anyway for reasons unconnected with the Respondent's conduct.

2.0 Representatives

- 2.1 Mr Gosney was represented by Advocate Jessica Roland.
- 2.2 Ferryspeed (CI) Limited was represented by Advocate Tom Crawford.

3.0 Witnesses

- 3.1 For the Applicant:

Mr Paul Gosney
Mr Stephen King
Mrs Maureen Gosney

- 3.2 For the Respondent:

Mr Keith Le Poidevin
Mr Leonel Dinis
Mr Christopher Dodd
Mrs Marguerite Le Poidevin
Mr Lionel Saunders

Adjudicator's Note:

I enquired of Mr Dinis if English was his first language, it was in fact his second language; in the interest of natural justice I offered him the support of an interpreter but this offer was declined.

4.0 Documents

4.1 The Applicant tabled two documents EE1 and EE2.

4.2 The Respondent tabled three documents ER1, ER2 and ER3.

5.0 Opening Applications

5.1 On opening the hearing I was asked by Advocate Crawford on behalf of the Respondent to consider the matter in camera. Having heard representations from the Advocates of both parties, I decided that the Hearing should be in public.

5.2 After some further discussion various documents were withdrawn from the bundles by agreement between both parties.

6.0 Findings of Fact

6.1 Ferryspeed (CI) Limited is a Freight Agency Company serving the Channel Islands. It has depots in Guernsey, Jersey, Portsmouth and Southampton.

6.2 The company specialises in the shipment and distribution of chilled and frozen food.

6.3 The Guernsey depot also has a secure area for the storage of beer and spirits.

6.4 In addition, the Guernsey depot also provides warehousing facilities for local companies, some of which use the premises to store as many as 50 pallets of non-perishable goods at any one time, drawing stock on a daily basis as required.

6.5 The Guernsey operation has a staff of 17. It is headed by the Depot Manager, Mr Keith Le Poidevin, who reports directly to his Directors in Jersey and Portsmouth. Mr Le Poidevin has overall responsibility for the day-to-day operation of the Guernsey depot, taking all management decisions and dealing with all personnel matters.

6.6 Mr Le Poidevin is assisted by Mr Christopher Dodd. His prime responsibility is to operate the warehouse floor, assisting drivers with the loading of vehicles and the issuing of distribution details. In the absence of Mr Le Poidevin, Mr Dodd has the authority to take all management decisions, including personnel matters, which can be referred to Jersey and Portsmouth for guidance as required.

6.7 The remainder of the Guernsey employees consists of 13 driver/warehousemen and two administrative staff.

6.8 The Guernsey operation presently has three key holders.

- 6.9 Until the time of his resignation, the Applicant was a key holder. He also assisted Mr Le Poidevin with the implementation of recommendations made following Health and Safety reviews at the depot.

7.0 Opening Submissions – The Applicant

- 7.1 In opening the case for the Applicant, Advocate Jessica Roland stated that Mr Gosney would rely on section 5(2)(c) of the Law. This states that an employee will be treated as dismissed by his employer if the employee terminates his contract of employment, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.
- 7.2 The Applicant contends that the Respondent has committed a fundamental breach of contract by breaching the implied term of trust and confidence, which is an essential element in every employment relationship.
- 7.3 Advocate Roland cited various pieces of UK Case Law (copies of legal authorities provided in Bundle EE1), relating to constructive unfair dismissal.
- 7.4 Advocate Roland then turned to a series of events between 25 June 2005 and 28 June 2005.
- 7.5 She said that the Applicant was employed in a warehouse where security and vigilance are absolutely essential. The Applicant reported an alleged theft by a fellow employee on 25 June 2005. She maintained that management had failed to deal with this alleged theft appropriately. The Applicant was expected to work with and over a colleague after it would appear that the Respondent had failed to follow any real disciplinary process or conduct any investigation into a very serious allegation.
- 7.6 Advocate Roland suggested that that in itself is a breach of the implied term of trust and confidence.
- 7.7 Subsequently, on 28 June 2005, the Applicant was called to a meeting where he was told to repeat his allegation directly to Mr Dinis. The Applicant was humiliated by having to repeat the accusation and then both he and Mr Dinis were admonished equally for washing their dirty linen in public.
- 7.8 During this meeting Advocate Roland stated that foul and abusive language was directed at the Applicant in the presence of others and as a consequence he had no alternative other than to resign.

8.0 Opening Submission – The Respondent

- 8.1 Opening the case for the Respondent, Advocate Crawford stated that the Applicant was not unfairly dismissed, constructively or otherwise, on the basis that the events leading up to the meeting on 28 June and the events at the meeting itself did not amount to a breach, fundamental or otherwise, of the Applicant's Contract of Employment.
- 8.2 Advocate Crawford stated furthermore that the Applicant did not resign because of any alleged breach of contract – he resigned in anger because he resented a decision

made regarding a colleague and in any event was intending to resign for reasons unconnected with the Respondent's conduct.

9.0 Considerations

- 9.1 I heard in evidence that Mr Dinis was interviewed by management, that he offered, what the management believed to be a perfectly reasonable explanation for his actions, an explanation which the management accepted; Mr Dinis was given a verbal warning as a consequence of his conduct.
- 9.2 In the circumstances, I concluded that management had used a fair procedure to deal with this matter.
- 9.3 Given that management had no other evidence with which to proceed any further and that the applicant had not lodged any formal grievance about the way in which the alleged theft had been handled, I could not conclude that the manner in which the Respondent had dealt with the alleged theft constituted a breach of the implied term of trust and confidence of the Applicant's contract of employment.
- 9.4 At the meeting on 27 June, the Applicant's opening words were very revealing, "Well, is he still here then?" I have to concur with the Respondent, that the Applicant did not appear to have anticipated an extensive investigation as the only evidence to offer was that which the Applicant had seen and heard in a very brief inter-change with Mr Dinis. In the light of the explanation offered, management could only point out the error of judgement on Mr Dinis' part and warn him of the consequence of any repetition.
- 9.5 Upon learning of this decision the Applicant returned his depot keys and withdrew from his role as the company Health and Safety representative. In evidence, Mr Le Poidevin said he did not accept the keys immediately and gave the Applicant the chance to reconsider his actions. The Respondent contends that the Applicant's actions in themselves constituted a breach of the implied term of trust and confidence (a mutual duty on both employer and employee). In the circumstances I agree with Advocate Roland that the Applicant was in fact informing management that he was no longer prepared to be a key holder, he did not want to undertake the ad hoc supervisory role he had recently been fulfilling or the voluntary Health and Safety work he had performed. The Applicant wished to continue in his role of a driver/warehouseman and he assured management of his total commitment to this role. Management did not raise the issue at the time as they did not want to escalate the situation and I believe there was no intention on the Applicant's part to breach the contractual agreement. In my view, if a breach had occurred in the technical sense, it was not a significant breach.
- 9.6 Turning now to the events of 28 June 2005, Mr Le Poidevin's evidence said that morale in the workplace was very low as soon as the matter of the alleged theft was raised. It was being openly discussed on the warehouse floor, although there was no corroborating evidence to confirm that either the Applicant or the accused was responsible. Early in the morning Mr Le Poidevin had had to intervene when he overheard a senior staff member talking openly about the alleged theft with the owner of the property alleged to have been stolen – the matter had been dealt with appropriately by management and it was time to move on. The owner of the property

was told to use the services of the Police if he so wished but given the limited evidence available management could not proceed any further.

- 9.7 Mr Le Poidevin sought to bring closure to the matter by calling the Applicant to a meeting with the driver he had accused of stealing in an effort to bring about a reconciliation.
- 9.8 Ferryspeed (CI) Limited needed a quick resolution to limit the chance of further damage and because management were anxious to retain the services of both drivers, were not seeking to admonish but to conciliate. I believed that in this instance it was a reasonable decision to have wanted to explore this option.
- 9.9 Having considered the respective submissions regarding the meeting of 28 June, I believe that it is a matter of fact and degree. The phrases "dirty linen being washed in public" and "we should all have deep pockets" were used as statements of concern – in the circumstances a perfectly reasonable explanation. The Applicant accepted in cross-examination that he was referring to these words when he stated on Form Emprot 1 that he was threatened with legal action.
- 9.10 It was said that the Applicant was humiliated and undermined by having to repeat his accusation to the alleged thief. The two men were both driver/warehousemen of comparable rank, the Applicant having withdrawn from his ad hoc Leading Hand role the previous day. In the circumstances I believe that the Respondent was trying to promote discussion between the two men in order to put the matter to rest.
- 9.11 Having considered the evidence regarding the language used in the meeting, I believe that the odd expletive may have been used. The words that Mr Le Poidevin used to describe this part of the meeting were so similar to those that Mr King gave evidence of hearing in a ten second snapshot, they corroborated each other. In all probability expletives did creep in, but the usage was so small that it was only picked up by the Applicant and Mr King. In evidence Mr King said that he was present at the bottom of the stairs for no more than half a minute. I do not believe that this gave sufficient time to gauge the correct tenor of the meeting.
- 9.12 Both Mrs Marguerite Le Poidevin and Mr Lionel Saunders were working in the office adjoining Mr Le Poidevin's at the time of the meeting in question. Neither were able to say that they heard any raised voices using foul language or otherwise from anyone present in that office at the time of the meeting.
- 9.13 It was the Respondent's contention that the Applicant's use of the words "Go on, you can sack me if you want", considered alongside his alleged use of the words "I don't have to work with a thief", during the meeting of 28 June, was an admission that he, had in effect been delivering an ultimatum to the Respondent that it's a case of 'either him or me'.
- 9.14 In his resignation letter the Applicant sought to pursue this matter, because his final paragraph offered Ferryspeed (CI) Limited Directors two contact numbers should they wish to discuss the matters that he raised. I regarded this as an ultimatum to management, to which they did not respond.

10.0 Decision

- 10.1 My responsibility was to decide whether Mr Gosney was dismissed and if so was such dismissal fair or unfair.
- 10.2 I have considered all the oral testimony and written evidence placed before me.
- 10.3 I have taken into consideration the provision of Clause 5(2)(c) of the law particularly relating to constructive dismissal.
- 10.4 I have considered the case law to which I was referred by both sides and additionally the case of Conlon v Buckinghamshire County Council EAT 630/88. In this case EAT saw no reason to interfere when a Tribunal found that although the public rebuke of an employee amounted to a breach of contract, it was not a fundamental breach entitling the employee to resign. This case recognised that the question of whether a breach was fundamental or not is always a matter for the Adjudicator to decide upon when considering the evidence.
- 10.5 My decision recognises that the Respondent did not use procedures which exactly mirror those recommended by the Commerce and Employment Department, but it is my belief that those which were used were fair and reasonable.
- 10.6 Management listened to the Applicant's allegations and dealt with the matters as they saw appropriate in the light of the limited evidence that they were given.
- 10.7 The Applicant was told of management's decision and did not seek to raise a formal complaint or grievance on the way which management dealt with the matter.
- 10.8 The Applicant was unwilling to accept management's decision, surrendered his keys, withdrew his ad hoc supervisory role and the voluntary Health and Safety representative's role he had previously undertaken. He wished to be a driver/warehouseman only.
- 10.9 Management sought to conciliate these matters with the Applicant and his fellow employee because, in their view, they had not been laid to rest.
- 10.10 I consider that the Applicant overreacted to a genuine statement of concern made by management.
- 10.11 Management sought to reaffirm that they wanted to retain the services of both drivers prompting the Applicant to leave the meeting and claim to have been constructively dismissed because of his employer's conduct.
- 10.12 Disagreements and arguments do occur in the workplace but it is only conduct which is wholly inappropriate to the situation that could form the basis of a successful claim. On the balance of the evidence presented to me, the Applicant did not satisfactorily establish in my mind that trust and confidence had been broken thus enabling him to claim to have been constructively dismissed.

10.13 I therefore consider that Mr Gosney was not unfairly dismissed and make no award to him in this matter.

Signature of Adjudicator: Mr Barry Ferguson

Date: 4 November 2005