



# COMMERCE AND EMPLOYMENT

A STATES OF GUERNSEY GOVERNMENT DEPARTMENT

FORM EMPROT 3

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Case No: UD003/05

## 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 10<sup>th</sup> June 2005**

**between**

**Applicant:** Mr Anthony Warden **and Respondent:** Fermain Legal Services Limited

**Adjudicator:** Mr David O Le Conte

**Nature of Dispute:** Mr Warden claimed unfair constructive dismissal, the terms of his contract of employment having been unilaterally changed by the respondent. The respondent countered that Mr Warden had been dismissed because he was redundant, and that his dismissal was fair.

**Adjudicator's Decision:** I find that Mr Warden was dismissed, that the reason for his dismissal was that he was redundant, and that the dismissal was fair.

**Amount of Award (if applicable) :** None

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 David O Le Conte

Date

20/06/05

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.

**1 The claim**

- 1.1 Mr Warden claimed that he had been unfairly dismissed by Fermain Legal Services Limited ("Fermain"), his dismissal having been for "some other substantial reason" namely constructive dismissal, on the grounds that Fermain had unilaterally changed the terms of his contract of employment.
- 1.2 Fermain denied the claim, contending that Mr Warden had been dismissed because he was redundant, and that his dismissal was fair.

**2 Representatives**

- 2.1 Mr Warden was represented by Advocate P. Richardson.
- 2.2 Fermain was represented by Advocate N. J. Barnes.

**3 Witnesses**

**3.1 For the Applicant**

Mr Anthony Warden.

**3.2 For the Respondent**

Mr Ian C. Tickler, Director.

Ms Jennifer Le Cheminant.

A written statement was received from Mr Mark Jefferies.

**4 Documents**

- 4.1 The Applicant tabled a bundle of documents, marked EE1, and a further document, marked EE2.
- 4.2 Fermain tabled a bundle of documents, marked ER1.

## **5 PRESENTATION OF COMPLAINT**

- 5.1 I noted the judgement of Lieutenant Bailiff Hancox, dated 31 December 2004, in the case of an appeal by Mr Warden against the rejection of his complaint by another Adjudicator on the grounds that his complaint was out of time. I further noted that Lieutenant Bailiff Hancox had ordered that the matter be remitted back to this hearing, and that he was of the view that Mr Warden's case should be heard and determined under the provisions of Section 17(1) of the Law.
- 5.2 I further noted that I had been appointed as Adjudicator under that Section of the Law, that the Commerce and Employment Department had discretion, under Section 17(2)(a), to allow further time for presentation of the complaint, and that the case had been registered by the Department.
- 5.3 During the course of the hearing, Advocate Barnes, on behalf of Fermain, raised the question as to whether the complaint had been submitted out of time. I advised him that I had not been appointed to hear those arguments, which appointment would have been made under Section 17(3). He accepted that the hearing, the claim having been registered, was on the substantive case.

## **6 FINDINGS OF FACT**

- 6.1 Fermain is part of a group (Corporate Secretarial Services Limited, "CSSL") of eleven companies which specialised in fiscal services to clients. The Company's role was to carry out internal administration and employ staff for the other companies in the group, which had no staff of their own. In 1997, when Mr Warden first started working for the Company, it had 15 staff, but by 2003 this had reduced to eight. Mr Tickler is the beneficial owner.
- 6.2 Mr Warden started work with Fermain on 16 July 1997, and received a statement of terms and conditions of employment with effect from 1 September 1997. Initially he was employed as Client Accountant, but was later promoted to Financial Controller. In this position he was responsible for accountancy and taxation functions of the group and its clients, of which there were over 100. This work included statutory accounting, tax returns, VAT returns, administration of some of the clients, and general supervisory responsibility for the small accounts team. He also carried out some work direct for Mr Tickler.
- 6.3 In 2001 *The Regulation of Fiduciaries, Administrative Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law* came into force, and CSSL made application to the Guernsey Financial Services Commission (the "Commission") for a fiduciary licence, as required under the Law. The Commission granted CSSL a temporary licence to enable it to continue operating until its application had been determined.
- 6.4 In August 2003 CSSL was informed by letter from the Director of Fiduciary Services and Enforcement that the Commission's Enlarged Assessment Committee was not prepared to grant a fiduciary licence to CSSL.
- 6.5 At the same time, Mr Warden, who had appeared before the Commission in respect of his own position under the Law, was advised that the Commission "did not feel that the evidence justified a conclusion under the Law that you were

not a fit and proper person to hold a management accounting position within a licensed fiduciary which is able properly to control your activities.”

- 6.6 CSSL then had to decide whether to appeal against the Commission’s decision in respect of its application for a fiduciary licence, or to disband the business. Having taken advice it decided on the latter course, and to discontinue business with effect from 31 December 2003.
- 6.7 Between August and December 2003 some staff left of their own accord, and found employment elsewhere. Some transferred to other companies along with parts of CSSL’s client business. In discussions with Mr Tickler held in November and early December 2003, Mr Warden was offered temporary work, on a self-employed basis, winding up Fermain’s affairs and conducting some work direct for Mr Tickler, with effect from 1 January 2004.
- 6.8 Mr Warden took legal advice, and on 11 December 2003 he wrote to Mr Tickler stating that he regarded Fermain’s action to be a breach of his contract of employment. He stated that he would leave on 17 December, a date which took into account several days of holiday entitlement before the termination date of 31 December. He received no reply to this letter, no further discussion was held, and he left. He submitted a claim of unfair dismissal on 26 February 2004, and subsequently expressed the view that his claim was in time, notwithstanding the provisions of Section 17(2)(a) of the Law, which require a claim to be presented within one month of the effective date of termination, as he had been due four weeks notice and the effective date of termination should, therefore, be construed as 28 January 2004.

## **7 SUBMISSIONS**

### **7.1 Witnesses**

- 7.1.1 Mr Tickler, having been placed on oath, said that the application to the Commission for a fiduciary licence had taken a lot of Fermain’s time and effort. The application had been submitted in 2001, and nothing had been heard about it for some 12 months. CSSL had been inspected by the Commission in July 2002, and had subsequently sent the group letters raising extensive queries. In March 2003 the Commission had indicated that it was not minded to grant a licence, and its decision not to do so had been transmitted by letter dated 18 August 2003.
- 7.1.2 CSSL decided not to appeal against this decision, because such a course would have been uneconomic. He had, therefore, decided to wind up the business, and had had two main concerns: the clients and the employees. It had been concluded that the possibility of the whole business being taken over by another Guernsey fiduciary business was not the way forward; rather, the group should seek to transfer its client business.
- 7.1.3 About 40-50 of the clients took the opportunity to collapse their structures because their purpose had ceased. 20-30 went to a Swiss company, of which Mr Tickler was, with another, the beneficial owner. The Operations Manager, Mr M. L. Jefferies, who was the group’s senior salaried employee, secured an arrangement with another trust company, Marlborough, which moved into spare space at Fermain’s office building, took over 30-40 of the clients, and employed

Mr Jefferies and another of Fermain's employees. Other employees left to work elsewhere, leaving just Mr Warden and Ms Jennifer Le Cheminant.

- 7.1.4 Mr Tickler said that he had agreed that Ms Le Cheminant should leave Fermain and work for Moorgate Management Group, which had formerly shared space in Fermain's office building, and continue to do some work for him. CSSL's ongoing fiduciary business had to finish by the end of December 2003, and there was a lot of work to finalise its business after that date. He had, therefore, offered Mr Warden part-time work with Moorgate and with himself, for a limited but unspecified period. While Ms Le Cheminant had accepted the arrangement, Mr Warden had not. All staff had, therefore, left by mutual consent, with the exception of Mr Warden. He had requested and been given a reference (dated 1 December 2003, tab 6 in bundle EE1) to assist him find other employment. He had left in mid-December, and had been paid his salary up to 31 December 2003.
- 7.1.5 Mr Tickler said that, while Mr Jefferies had taken the lead in dealing with the application for a fiduciary licence, Mr Warden, and other staff, had been involved in it and had been very aware of the process the whole time. He had seen copies of the Commission letters and had seen draft replies. Mr Warden had also had his own hearing with the Commission. After the Commission had rejected the application in August 2003 the situation faced by the group had been discussed with all staff. A lot of meetings had been held, and he could not recall which Mr Warden had been present at; nor could he remember whether he had met Mr Warden on the dates specified by the latter. He had not convened and minuted meetings formally because the Company did not work that way; it had lots of dialogue with its employees. He refuted Mr Warden's contention that he had not been informed as to what was going on. Fermain was not in a position to continue employing people, as there was no business. All staff knew that 31 December was the cut-off date. He was surprised that Mr Warden's claim made no reference to the situation with regard to the fiduciary licence.
- 7.1.6 With regard to a summons which I had issued to Fermain for documents requested by Mr Warden's representative, Mr Tickler said that these had not been produced because they did not exist. There had been no written agreements concerning the transfer of clients to other companies, and no accounts had been prepared for 2004.
- 7.1.7 Mr Tickler said that the bonus which Mr Warden claimed he had been owed for 2003 had been discretionary, and dependent upon the performance of the business. There was no money to pay the bonus.
- 7.1.8 Mr Tickler said that he had had no complaints about Mr Warden's performance as an employee of Fermain, and he confirmed that the favourable reference dated 1 December 2003 was accurate. He had been happy for Mr Warden to look for other work, and had been aware, when asked for a reference, that Mr Warden was at an advanced stage of obtaining other employment. He had not replied to Mr Warden's letter of 11 December as he had been informed that Mr Warden had secured other employment and had "effectively resigned". Mr Warden had known his employment had to be discontinued, and he had effectively been made redundant along with other employees.

- 7.1.9 Mr Tickler said that he was aware of the Code of Practice on handling redundancy, and felt that the situation had been handled in the proper manner. Fermain did not have a redundancy procedure, as it was small enough to deal with staff matters on a one-to-one basis. Mr Warden himself handled some employment matters. He was not treated any differently from other employees.
- 7.1.10 Ms Le Cheminant, having been placed on oath, said that she currently worked as a PA for Saumarez Management at the Fermain office building, and was tying up loose ends from CSSL for Mr Tickler. She, and all Fermain's employees had been aware of the fiduciary licence application. Because it was taking a long time she had realised that it might not be granted, and that in that case the fiduciary business would have to close. There had been no point in asking for redundancy pay as there was no money to pay it.
- 7.1.11 Mr Jefferies had informed all staff about the situation and had suggested that they look for other employment. All staff were treated identically. Some decided not to wait and started leaving. Mr Tickler had started talking to her about alternative employment in October 2003, and in November he had asked her to transfer to Moorgate part-time on a self-employed basis at the same wage. She had had sight of an employment contract later.
- 7.1.12 From her position outside Mr Tickler's office, she knew that a lot of discussions had been held about the situation, including some between Mr Tickler and Mr Warden, although she did not know the details of any offers made. Mr Warden frequently went for job interviews, and had told her that he had "quite a few lucrative offers". When he left he had said that he had a lucrative job to go to. Mr Tickler had been quite upset by Mr Warden's letter of 11 December 2003, and had said that he could not believe Mr Warden had written it. She was surprised that Mr Tickler had not replied to it, but he did not generally reply immediately to letters, and he had had a bereavement in the family at that time.
- 7.1.13 Ms Le Cheminant said that while she saw Mr Tickler's correspondence, the letter of 18 August 2003 from the Commission had been passed direct to Mr Jefferies, and she had not seen it. Mr Warden, Mr Tickler and Mr Jefferies all had sight of the Commission's letters.
- 7.1.14 Mr Jefferies, in a written statement, said that it became clear in August 2003 that CSSL's application for a fiduciary licence was likely to fail. He, Mr Tickler, and, he believed, Mr Warden, had had discussions with some trust companies about a sale of the business, but this had been difficult, and it had, therefore, been decided to break up the business, and transfer it piecemeal, since certain clients were managed by certain members of staff. With Mr Tickler's approval he had secured the transfer of some of the business to Marlborough Trust Company Limited, and he and another employee transferred to that Company along with the business, and with the approval of the clients. No consideration had been paid by Marlborough. He had asked if Marlborough could take on other CSSL staff, but that had not been possible.
- 7.1.15 He said that he understood that Mr Tickler had also had discussions with Mr Warden about him looking after another client, and about continuing some

accounting functions for CSSL in 2004, including assisting with the winding up of the remaining business.

- 7.1.16 Mr Warden, having been placed on oath, said that his annual bonus payment had invariably been the maximum of one month's salary, having been determined by Mr Tickler on the basis of performance. He felt that he had been entitled to a bonus in 2003.
- 7.1.17 The group had had 127 client companies and trusts, and had administered £87 million with seven salaried employees, Mr Tickler not being salaried. Mr Tickler was the 100% beneficial owner of the group, with members of his immediate family. Mr Warden felt that the organisation chart was misleading, as it indicated that all staff reported to Mr Jefferies, who had prepared the chart, whereas he, Mr Warden, had been responsible for one and a half of the staff. He had been in a senior position with the Company, being paid only slightly less than Mr Jefferies. He had felt a valued employee until August 2003, and felt that the reference given him by Mr Tickler had been fair and accurate. He had had his own assessment by the Commission, as part of the application process, and the Commission had found him to be a fit and proper person.
- 7.1.18 On 20 March 2003 the Commission had written formally to CSSL expressing concern about some aspects of the application, and the group had provided the Commission with a considerable amount of documentation. He had been fully involved in the application, which Mr Tickler and Mr Jefferies had supervised. He had provided input into the information for the Commission, and had assisted with the drafting of letters.
- 7.1.19 After 18 August 2003, however, this situation had changed "absolutely and radically". He had been totally shut out. He had been aware of some information but not entirely complete information. By early September it had become clear that Mr Tickler was not going to carry the application further, but was working to negotiate with the Commission. On 17 October he, Mr Warden, approached Mr Jefferies to find out what was going on, but Mr Jefferies had refused to discuss it. On 20 October he had challenged Mr Tickler about it during a meeting about other business. On 6 November he raised the matter of his future employment with Mr Tickler, who described the arrangements made to transfer some of the business and the employment situation of some of the employees. He said that Mr Tickler's principal concern had been to ensure that the office building, which he owned, was fully occupied. At that meeting Mr Tickler had proposed that Mr Warden become self-employed with effect from 31 December to clear up the remaining CSSL business and do some work for him. Mr Tickler had not thought about the terms and conditions of this arrangement. There had been no prior discussion and no consultation about the termination of his employment.
- 7.1.20 Mr Warden said he was angry at this offer, as some other staff had been looked after well, and he had been "tossed a few crumbs". He was being asked to give up a secure, salaried, senior position with a business of substance. Mr Tickler had known that at his age (59) he would have difficulty getting other employment. He denied ever saying that he had lucrative job offers. At the meeting on 1 December 2003 Mr Tickler had repeated the offer.

- 7.1.21 Mr Warden said that he and all other staff had read the Commission's letter of 18 August 2003 without the knowledge of Mr Tickler and Mr Jefferies. The latter had given staff a considerably sanitised version, and had told them that the Company had two options: either to appeal or to compromise. He had been aware that if the application for a fiduciary licence was not approved then the employees would be redundant, although it did not mean that the Company had to cease all activity. Mr Tickler had used his influence to arrange the transfer of some of the employees to other companies, with parts of the business. He had started work with Moorgate in January 2004, but this had been arranged by himself. He had been constructively dismissed because of Mr Tickler's actions, there being no job for him after 31 December 2003.

## **7.2 Applicant's submission**

- 7.2.1 For the Applicant, Advocate Richardson said that he fundamentally disagreed with the Respondent's representative's statement that consultation was not needed when a business ceased. Mr Warden's employment had been brought to an end by his letter of 11 December 2003, and was constructive dismissal. Mr Tickler had sought to vary the terms of employment from full-time to self-employed. Even though the Commission had refused to grant the fiduciary licence the Company could have continued to have some function, and Mr Warden's work might have continued. Some other employees were still involved with the CSSL group as late as October 2004, and some were still working in the same building, probably doing the same work. Under the Law employers and associated employers were treated as one. Mr Tickler had control of a business in Switzerland and there were associated employers in Guernsey. It was extraordinary that business had been given away for nothing, and with no agreement. He had doubts about the claims of reduction of work at the building.
- 7.2.2 He pointed out that the burden of proof was on the Respondent. There was no evidence that Fermain had consulted the Code of Practice or sought advice on the implementation of a redundancy programme. It had given no thought to the redundancy process or to Mr Warden's situation. There had been no consultation, even though it had been clear that there was work to do. This, he contended, was sufficient to render the dismissal unfair. No evidence had been presented to show that Fermain had made enquiries or thought about alternative work. Mr Tickler, as an English solicitor, could have been expected to respond in substance to Mr Warden's letter of 11 December 2003, but he had not done so, and had not even addressed the issues in the EMPROT 2 form. Mr Warden was an exemplary employee who should have been treated better.

## **7.3 Employer's submission**

- 7.3.1 For Fermain, Advocate Barnes said that if Mr Warden was dismissed by reason of redundancy because the business ceased then that was the end of the matter. All the employees were going to be redundant, the only remaining business being the winding down. The Company took account of the Code of Practice: it carried out a selection process; the issue of consultation did not arise because the business was ceasing. Most employees had to seek alternative employment. Mr Tickler had helped the employees, but that was nothing to do with Fermain's obligations under the Law. No evidence had been presented that the Swiss



company was under Mr Tickler's control, and it would have been unrealistic for Mr Warden to have been employed in another jurisdiction. Mr Tickler did not control Marlborough; he did control a property company, but that was not relevant.

## 8 CONCLUSIONS

- 8.1 If Mr Warden was dismissed by reason of being redundant, the notice of termination must have been, at the latest, at the meeting between Mr Tickler and Mr Warden on 1 December 2003, and probably earlier, ie the meeting of 6 November 2003. The effective date of termination in this instance is defined in Section 5(4)(a) of the Law. If Mr Warden terminated his own employment, ie through constructive dismissal or resignation, then there would have been no period of notice, and Section 5(4)(b) applies. In either case, therefore, the effective date of termination must be 31 December 2003. This conclusion is supported by the fact that no salary was paid beyond that date, and there was no payment in lieu of notice.
- 8.2 The facts surrounding Mr Warden's dismissal are limited, because of a dearth of documentation. What is known is that Fermain's business was in serious jeopardy; that all staff, including Mr Warden, were aware of that fact; that a number of meetings and discussions between various members of staff, including senior staff, were held; that some staff left, either because they were uncertain about their future employment or because they knew the business was ceasing; that Mr Warden was made a verbal offer in November 2003; and that he left employment with effect from 31 December 2003.
- 8.3 It is not so clear as to when the staff, including Mr Warden, knew for a fact that the Company was to cease trading at the end of 2003. However, it appears, from the evidence presented, that staff were most likely aware of this fact by October 2003, and there could have been no doubt in Mr Warden's mind when he was asked, on 6 November 2003, to assist with winding up the business after the end of 2003 on a self-employed basis. The verbal offer made to him at that time, and confirmed, again verbally, on 1 December, effectively gave notice of termination of his position as an employee with effect from 31 December 2003. While it is unfortunate that this was not put in writing by the Company, it was nevertheless a valid notice. Mr Warden himself said that it was presented to him as a *fait accompli*. I accept, therefore that the reason for his dismissal was that he was redundant. At the time he wrote the letter of 11 December, therefore, he was already under notice of dismissal, and his claim that his contract of employment had been breached fails.
- 8.4 Section 10 of the Code of Practice for Handling Redundancy in small firms states that the three principles of a fair procedure should be applied. The first principle relates to consultation. With just seven salaried employees, Fermain was a small company by any standards. All employees worked in the same office building. There was evidence that communications between them were good, including communications with senior staff. Mr Warden was himself a senior salaried employee, second only to the Operations Manager, Mr Jefferies. In his position as Financial Controller, Mr Warden would have known almost all the business details of the Company, and was certainly aware of, and heavily involved with,

the attempt to obtain a fiduciary licence. He said in evidence that he was shut out of further involvement after the August 2003 notification by the Commission. With such a crisis on its hands, however, there must, as stated in evidence by Mr Tickler and Ms Le Cheminant, have been a lot of discussion, negotiation, and work to secure the future care of clients during the last few months of that year. Mr Warden was himself involved in trying to secure the transfer of part of the business to another company; he had also seen other employees leave, and had himself been looking for alternative employment. While there was, perhaps, little formal consultation, I am satisfied that he was sufficiently informed about, and involved with, the situation leading to the redundancy.

- 8.5 The second principle requires employers to ensure that there is a fair and objective basis for redundancy selection. In a case where a company is going out of business, redundancy applies to all employees, and selection is limited to a question of whether there are positions in associated businesses, particularly those within the group, to which employees might be offered alternative employment. In this case the entire CSSL group was to cease business, and the other companies in the group did not, in any case, have any positions at all. Mr Warden's case relied heavily on implications that the beneficial owner of Fermain and CSSL had control of, or at least influence on, other companies outside the group, and it attempted to demonstrate this by reference to the transfer of other employees with parts of the business, without consideration. It did not do so, however, in any convincing way; I am satisfied that the transfer of business and employees, where it took place, was not through any process of unfair selection.
- 8.6 The third principle addresses the avoidance or minimisation of redundancy, through, for example, offering alternative work. In this case, there was very little alternative work to be offered. It is unreasonable to expect that Fermain could have offered to keep Mr Warden on as a full-time employee when the work was winding down, and, as stated above, there were limited opportunities for work relating to the transfer of business. It was not, in any case within the power of Fermain to make offers of alternative work in other companies.
- 8.7 Fermain could certainly have adopted a more structured and documented approach to the redundancy situation. Nevertheless, I conclude that it did not materially transgress the principles applying to redundancy procedures in small firms.

## **9 Decision**

- 9.1 I find that Mr Warden was dismissed, that the reason for his dismissal was that he was redundant, and that the dismissal was fair.
- 9.2 I make no award.

Signature of Adjudicator

Mr David O Le Conte

Date: 20/06/05