



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 March and 23 May 2005

between

**Applicant: Mr Martin Upson and Respondent: Rossborough Financial Planning Ltd.**

**Adjudicator: Mr Peter Woodward**

**Nature of Dispute:**

Mr Upson claimed that he had been unfairly dismissed by reason of unfair and unfounded accusations as to his conduct and that fair and proper dismissal procedures were not followed.

Rossborough Financial Planning Limited (RFPL) denied the claim, asserting that Mr Upson, having tendered his resignation, did not want to serve the contractual three-month notice period and that he effectively withheld his services, which left the company with no choice but to dismiss him for gross misconduct.

**Adjudicator's Decision:**

After carefully considering all the evidence of both parties and their submissions, and giving due weight to the size of the company and the available resources to deal with this dismissal I find that RFPL failed to demonstrate a fair and objective process for a summary dismissal for gross misconduct. I therefore find that the dismissal of Mr Upson was unfair under the provisions of The Employment Protection (Guernsey) Law, 1998 as amended.

**Amount of Award (if applicable): An award of £23,562 will be made.** This being the amount according to RFPL submissions in the response form (EMPROT 2), earned by Mr Upson in the three months immediately preceding the effective date of termination, and in compliance with section 20 (2) of *The Employment Protection (Guernsey) Law, 1998* as amended.

The Adjudicator has considered section 34 of the Law in determining whether any element of commission should be paid as part of this award and has concluded that as no commission was paid in the three months immediately preceding the effective date of dismissal that no such calculation can be made. Note is also taken that any bonus that might have been paid to Mr Upson for the calendar year of 2004 would have been totally discretionary, and was not bound by any formula due to the trading difficulties experienced by RFPL in that year.

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 P Woodward

Date: 6 June 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



# COMMERCE AND EMPLOYMENT

A STATES OF GUERNSEY GOVERNMENT DEPARTMENT

**FORM EMPROT 3A**

For office use only.  
Case No: UD044/04

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

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

### **1.0 The Claim**

- 1.1 The claim was brought by Mr Upson, the Applicant, against Rossborough Financial Planning Ltd., the Respondent, for unfair dismissal.
- 1.2 Mr Upson claimed in his EMPROT 1 (Application Form) that he had been unfairly dismissed by reason of unfair and unfounded accusations as to his conduct and that fair and proper dismissal procedures were not followed.
- 1.3 The Company denied the claim in the EMPROT 2 on the grounds that:
  - 1.3.1 Having resigned, Mr. Upson indicated that he did not want to serve the contractual three-month notice period.
  - 1.3.2 The company needed his services and expertise during the three-month contractual notice period to respond to a GFSC audit report.
  - 1.3.3 Mr Upson effectively withdrew his services before the expiry of his three-month contractual notice and left the company with no choice but to dismiss him for gross misconduct.

### **2.0 Representatives**

- 2.1 Advocate Richardson of Collas Day represented Mr Upson.
- 2.2 Advocate Ferbrache of Ozannes represented the Company.

### **3.0 Witnesses**

**For the Applicant**  
Mr Martin Upson.

**For the Respondent**

Mr. Stephen Wrigglesworth, Group Chairman/Director, RFPL.  
Mr. Ian Smith, Group Financial Director.  
Mr. David Telfer, Managing Director, RFPL.

### **4.0 Documents**

Tabled by the Respondent

ER1 – a joint bundle of documents  
ER2 – legal authorities  
ER3 – RFPL Annual Report, 2004

Tabled by the Applicant

EE1 – undated memo from Mr Upson to Mr Wrigglesworth

## **5.0 Findings of Fact**

- 5.1 Mr Upson was initially employed by R.A. Rossborough Life and Pensions (Guernsey) Ltd. on 1 May 1992. This company changed its name to Rossborough Financial Planning Ltd (RFPL) with effect from 9 June 1994, and Mr Upson remained in employment with this company until 5 November 2004.
- 5.2 Mr Upson was employed in the role of Deputy Managing Director at the effective date of termination.
- 5.3 Mr David Telfer had been appointed as the Managing Director of Rossborough Financial Planning Ltd. in July 2004.
- 5.4 The Company experienced poor financial results in 2004 and was trading at a loss in that year.
- 5.5 Mr Upson tendered his resignation to Mr. Wigglesworth, Rossborough Group Chairman, in writing, on the 31 August 2004. He stated in this letter that this notice should take effect from 30 September 2004 and, that in accordance with his terms of employment, the required three months notice should run from that date.
- 5.6 Mr Wigglesworth acknowledged receipt of this resignation by return letter on 1 September 2004 and confirmed in this correspondence to Mr Upson that his current position with Rossborough Financial Planning would cease with effect from 31 December 2004.

## **6.0 Evidence and Submissions**

- 6.1 Prior to the commencement of evidence and submissions Advocate Ferbrache requested that Advocate Richardson should present his case first. After a brief adjournment to consider this request the Adjudicator responded that he would wish the Respondent to proceed with their evidence and submissions prior to those of the Plaintiff.

### **6.2 Evidence given by Mr Stephen Wigglesworth.**

- 6.2.1 Mr Wigglesworth stated that Mr David Telfer had been appointed to the role of Managing Director of RFPL in July 2004 with a remit to improve business performance. The company had lost a number of staff and, following a "mediocre" 2003, the company was trading at a loss in 2004. Mr Upson had been the Deputy Managing Director for six years and reported to Mr Telfer; however, as Mr Telfer was new in the role Mr Wigglesworth stated that Mr Upson was often in contact with him (Mr Wigglesworth) in the period late July and August 2004.
- 6.2.2 Mr Wigglesworth stated that, during August 2004, he had had discussions with Mr Upson regarding his future role with the Rossborough Group. Mr Upson had stated he wanted more autonomy and wished to form a French company. Mr Wigglesworth had indicated the possibility of supporting such a venture but was concerned that it should meet high standards of compliance.
- 6.2.3 During a meeting on 25 August 2004 there was a discussion with Mr Upson as to his possible end of year 2004 bonus payment. Mr Wigglesworth stated that, as in previous discussions with Mr Upson on this issue, whilst RFPL was in trading

difficulties there was still the possibility of a discretionary bonus; but an amount could not be specified at this time; Mr Upson had not raised an objection to this position.

- 6.2.4 Advocate Ferbrache drew the attention of Mr Wigglesworth to document ER1 /15 in which Mr Upson on the 31 August 2004 had stated his understanding that his 2004 bonus would not be based on company net profit and that he would receive £38000. Mr Wigglesworth referred to document ER1 /17, his letter of 1 September 2004, in which he stated that no such undertaking had been given. Nevertheless in this letter he emphasised the option that the company might still pay a bonus at the end of the year.

Mr Wigglesworth then referred to Mr Upson's contract of employment (ER1 /1) and a subsequent letter dated 28 January 2002 (ER1 /11) which had revised Mr Upson's remuneration. In his opinion these documents were a clear determination that all bonuses were discretionary, and further, that in the case of gross misconduct the contract of employment stated that an employee shall not be entitled to any bonus due or payable to him at the date of dismissal. With the receipt of a further letter from Mr Upson on the 6 September 2004 (ER1 18) Mr Wigglesworth believed that Mr Upson had accepted the company position on any potential year end bonus.

- 6.2.5 Mr Wigglesworth stated that during September and early October attempts were made to accommodate a continuing employment relationship with Mr Upson, document ER 20 refers. However on 15 October 2004; the day on which his resignation as a member of the Board was accepted, Mr Upson made a formal request (ER/21) to leave his employment at the end of October 2004. Mr Wigglesworth met with Mr Upson the same day and told him that given the imminent arrival of a GFSC audit report on RFPL he was not in a position to agree this request, given the possible need for input from Mr Upson. Mr Wigglesworth said that Mr Upson then became very agitated and indicated that unless he allowed him to leave when he wanted he would just sit at his desk and do absolutely nothing other than draw his salary until the end of the year. Mr Wigglesworth responded to Mr Upson that he had obligations and a duty to the company whilst still in employment; however Mr Upson was apparently dismissive of this advice (document ER1/22 refers).
- 6.2.6 Mr Wigglesworth stated that the request for Mr Upson to be available for the GFSC audit response was critically important. The GFSC had the power to force the company to stop trading if it was not satisfied with the responses to audit issues. A letter from the GFSC on 27 October 2004 (Document ER1 /26) together with the audit report were further confirmation of serious concerns by the GFSC that would need detailed responses from RFPL.
- 6.2.7 Mr Wigglesworth stated that he had taken a brief vacation at the end of October and, given other priorities, did not have the opportunity to review the GFSC report until 3 November. In the meantime Mr Upson came into the office on 1 November 2004 in casual clothes requesting his leaving date and apparently indicated to Mr Telfer that he had finished all his outstanding tasks. Mr Telfer recorded in a file note (ER1 29 refers) that he reiterated the instruction from Mr Wigglesworth that until the GFSC report had been reviewed no release date in advance of 31 December 2004 could be approved. Mr Telfer subsequently gave evidence in person during the Hearing.

- 6.2.8 Mr Wigglesworth then referred to document ER1 30, a file note recorded by Mr Ian Smith of a telephone discussion with Mr Upson on 3 November 2004. During this telephone call Mr Upson stated that he had been signed off work for 10 days and that he would make himself unavailable to work for the rest of the year. Apparently Mr Upson stated that if he was not able to contact clients or conduct business with them, then he was not going to sit in the office carrying out administrative work. The file note recorded that Mr Upson felt Rossborough was "playing games" with him. Mr Smith stated that he denied this and then enquired as to the nature of the illness which Mr Upson declined to describe. Mr Smith subsequently gave evidence in person to the Hearing.
- 6.2.9 Mr Wigglesworth then referred to ER1 /32 which was a copy of an Email sent by himself to Mr Upson in which he again reiterated his decision that Mr Upson could not be given an early release date from his contractual notice period.
- 6.2.10 Following discussions with Mr Smith on 4 November 2004 Mr Wigglesworth sent a letter of dismissal (ER1 /33) by post to the home address of Mr Upson.
- 6.2.11 Mr Wigglesworth was then asked if Mr Upson had subsequently exercised his right to appeal against the decision to dismiss. He replied no, however he stated if Mr Upson had made such an appeal he would have heard him.
- 6.2.12 Mr Wigglesworth was asked if, in the event that Mr Upson had stayed to the end of year 2004, the "Production Figures" (a summary of current and new business activity) for Mr Upson would have formed the basis for a year end 2004 discretionary bonus. In reply he stated this would not have been the case and he would have based any discretionary bonus on the basis of team effort.
- 6.2.13 Mr Wigglesworth also referred to the year 2003 and noted the company had been generous to Mr Upson in not strictly adhering to the percentage of profits rule for bonus calculation; given that profits were significantly lower than the previous year due to very significant voluntary "top up" payments into the company pension fund.

Cross Examination by Advocate Richardson

- 6.2.14 Mr Wigglesworth confirmed that Mr Upson had given good and loyal service to the company in 12 years of his employment.
- 6.2.15 Mr Richardson asked if his file note of the meeting with Mr Upson (ER1 /22) immediately before a Board meeting on the 15<sup>th</sup> October was verbatim? Mr Wigglesworth responded that it was only an impression that Mr Upson had given that he would sit at his desk but not work. But it was a serious impression.
- 6.2.16 Mr Wigglesworth was asked if Mr Upson had responded to his advice that he should observe his duties to the end of his notice period. Mr Wigglesworth responded that Mr Upson had smiled, but had said nothing.
- 6.2.17 Mr Wigglesworth was asked if Mr Upson's apparent intention of non compliance had been minuted at the Board meeting of the 15 October 2004. He stated it had not.
- 6.2.18 When asked if he had shown the file note to Mr Upson of the 15 October to confirm if it was a fair record of the discussion, he stated he had not done so.

- 6.2.19 Mr Wigglesworth stated there was potentially so much work for Mr Upson that he could not commit to a leaving date ahead of the 31<sup>st</sup> December, however Advocate Richardson then drew the attention of Mr Wigglesworth to a client briefing letter sent out by David Telfer on the 28 October 2004 indicating that to all clients that Mr Upson would be leaving in November 2004. Mr Wigglesworth did not recall seeing this letter at the time it was sent.
- 6.2.20 Mr Wigglesworth was asked if he discussed the contents of his letter of 3 November 2004 (ER1 /32) with Mr Telfer or any other Directors prior to sending it to Mr Upson? He replied that he had not.
- 6.2.21 Mr Wigglesworth was asked if he knew that Mr Upson was certified medically unfit to attend work on the 3 November 2004. He stated he did not know this at the time.
- 6.2.22 Mr Wigglesworth was then asked how the letter of dismissal had been conveyed to Mr Upson and he stated it had been posted to his home address and that it was his personal decision to dismiss Mr Upson.
- 6.2.23 Mr Wigglesworth was asked if his decision to dismiss Mr Upson was based on the fact that he no longer needed Mr Upson for the GFSC audit reply. Mr Wigglesworth stated that it had now become a disciplinary problem with three refusals by Mr Upson to carry out his duties. In his opinion Mr Upson did not want to work and withdrew his labour, Mr Wigglesworth stated that in his opinion Mr Upson had wanted to leave the company early and that this desire had been satisfied with the justifiable dismissal for gross misconduct.
- 6.2.24 When pressed as to what jobs Mr Upson had refused to perform he stated that this would form part of the testimony from Mr Telfer.
- 6.2.25 When asked if he thought there was a need to investigate the allegations of withdrawal of labour by Mr Upson with Mr Upson directly he stated that this was not necessary as he had worked closely with Mr Smith for 16 years, that he trusted Mr Telfer, and that both their inputs had confirmed his own experience with Mr Upson on the 15 October.
- 6.2.26 When asked if he had considered any other disciplinary penalty he replied that Mr Upson as a senior member of the company would know how serious his actions were and that a dismissal would follow.
- 6.2.27 Mr Wigglesworth was asked if he had involved the Rossborough Group Human Resource Manager in his decision making process to dismiss. He responded he had not.
- 6.2.28 Mr Wigglesworth when asked if he was aware of the right of appeal against his decision to dismiss stated that he was not aware at the time of writing this letter but, had he known, he would have included the right as good business practice.

Conclusion of Cross Examination by Advocate Richardson, further examination by Advocate Ferbrache.

- 6.2.29 Mr Ferbrache asked for confirmation that Mr Upson would have had a copy of the Employee handbook, Mr Wigglesworth confirmed that this would have been in his possession for a number of years.

- 6.2.30 When asked if he had any other course of action on 5 November 2004 Mr Wrigglesworth stated there had been no choice but to dismiss, Mr Upson was guilty of Gross Misconduct.

Evidence given by Mr David Telfer

- 6.2.31 Mr Telfer confirmed that he was currently Managing Director of RFPL and that he had been appointed to this role in July 2004.
- 6.2.32 When requested to summarise his relationship with Mr Upson he stated it was professional but distant. He thought Mr Upson was proficient in his "Production Tasks" but less so in matters of "Compliance".
- 6.2.33 Turning to the GFSC audit he confirmed he had been party to it, however he did not believe Mr Upson had been interviewed by GFSC audit staff.
- 6.2.34 Mr Telfer was asked if Mr Upson had been briefed on the GFSC audit when it arrived late October. He stated that he had not reviewed it in detail with Mr Upson but had reiterated the need for Mr Upson to stay with RFPL whilst audit issues were being considered.
- 6.2.35 Mr Telfer brought the attention of the Hearing to emails from Mr Upson to the Rossborough Group HR Manager and another employee in which Mr Upson seemed to indicate a clear intention to leave the company at the end of October and that he was surprised at their content as Mr Upson did not have permission to leave at the end of October.
- 6.2.36 Mr Telfer was asked if he had seen the file note of 15 October (ER1 /22) written by Mr Wrigglesworth, he stated no, but was aware of the issues contained in it.
- 6.2.37 Mr Telfer confirmed that he had dictated the letter to clients indicating the departure from the company of Mr Upson in November but also stated no final date had been agreed with Mr Upson for an early departure.
- 6.2.38 Mr Telfer believed that Mr Upson by coming into the office late on the morning of 1 November, and dressed in casual clothes, was presumably indicating that he was no longer working for the company. He also noted that Mr Upson's office appeared to have been cleared as if he had already left the company. He stated that Mr Upson had asked him if there was an agreed date for his release from the company to which Mr Telfer had replied no date had yet been agreed.
- 6.2.39 During the meeting on 1 November Mr Upson stated that it was his last day in the office and that on the following day he would be attending the dentist all day and would then be signed off by the doctor for flu from 3 November onwards. There was more debate between them on the GFSC audit and Mr Upson had responded that, having spent millions of pounds on IT systems, Rossboroughs was quite capable of obtaining this information from the databases. Mr Telfer disagreed with this assertion, as apart from Mr Upson there were no senior qualified staff in a position to respond face to face with the GFSC on certain issues.
- 6.2.40 Mr Telfer stated he that agreed Mr Upson was correctly dismissed for gross misconduct.

Cross Examination by Advocate Richardson

- 6.2.41 Mr Telfer when asked if Mr Upson was working normally between his resignation and the 15 October stated that he thought so, but he did not oversee the work of Mr Upson in detail.
- 6.2.42 Mr Telfer was asked if could recall Mr Wigglesworth stating on the 15 October that Mr Upson was agitated. He stated that he could not recall this with clarity and that he had not seen the file note of that date prepared by Mr Wigglesworth before the Hearing today.
- 6.2.43 Mr Telfer stated there had been constructive discussions between Mr Upson and himself in the period September to 15 October 2004 and that they had agreed a list of client reallocations.
- 6.2.44 When asked if Mr Upson had been asked as to non-completion of work on the 1 November 2004, he stated no and that the discussion with Mr Upson had centred round the GFSC audit.
- 6.2.45 When pressed on the client letter that he had issued on the 28 October which had indicated Mr Upson leaving in November he repeated his assertion that there was only an option to release Mr Upson early, not a decision.
- 6.2.46 Advocate Richardson stated that in reality there was only a small element of the GFSC audit that required input from Mr Upson. This was denied by Mr Telfer.
- 6.2.47 Mr Telfer was asked if had provided Mr Upson with a full copy of the report, he stated no, but that he had allowed Mr Upson to browse through it.
- 6.2.48 Advocate Richardson noted from previous testimony that when Mr Upson had returned to work on the 1 November 2004 there had been a "vacant office" sign on Mr Upson's office door. Mr Telfer was asked if Mr Upson had placed it there, or was it placed by an office prankster. Mr Telfer did know the answer.
- 6.2.49 When pressed on the veracity of Mr Upson's Medical Certification Mr Telfer stated that he did not dispute it was genuine illness. He was also aware that Mr Wigglesworth had requested an independent medical review of this certification and that Mr Upson had been agreeable to this request.

Question put to Mr Telfer by the Adjudicator

- 6.2.50 Mr Telfer was asked if he considered suspension given the attitude displayed by Mr Upson. He stated that it had been considered as an option but then discarded as in his opinion Mr Upson was a "loose cannon".

Evidence given by Mr Ian Smith.

- 6.2.51 Mr Smith confirmed that he joined the Rossborough Group as an accountant in 1980 and was currently the Financial Director of the Group with the added responsibility for the Human Resources function.
- 6.2.52 He confirmed that RFPL was in a poor financial state in August 2004 and had also lost some key staff.
- 6.2.53 He confirmed he had had seen the response to Mr Upson's resignation letter from Mr Wigglesworth on the 1 September 2004 within a few days of its issue and agreed with the content.

6.2.54 He confirmed he had seen the GFSC report in the closing days of October 2004 and that in his opinion Mr Upson would be required to assist with responses as RFPL had only one other member of senior staff at that time who could deal with issues arising from this report.

6.2.55 Turning to the events of the 1 November Mr Smith confirmed that Mr Telfer had made him aware of his conversation with Mr Upson on that day and that on the 3<sup>rd</sup> November 2004 he then received a telephone call from Mr Upson; in this conversation, Mr Upson advised him that he had been signed off work for 10 days and that he intended to make himself unavailable for the rest of the year, a statement he immediately retracted when challenged by Mr Smith. Mr Upson had stated to him that the GFSC responses could easily have been dealt with by administrative level employees and that the company was “playing games” with him. Mr Smith said it was the contrary situation, especially as Mr Upson was not prepared to volunteer to him what was stated on his medical certificate. (ER1 /30 refers).

6.2.56 Mr Smith gave further testimony that this refusal to work from such a senior employee was unique in his experience, and that it clearly constituted gross misconduct. In his opinion Mr Upson, as a senior employee, would have been very cognisant of the contents of the Employee Handbook and would have known how serious his offence was.

6.2.57 Mr Smith entered financial data for RFPL into evidence as follows

Year	Total Annual Income gained by Mr Upson	Total Commissions earned for RFPL by Mr Upson	Annual RFPL Profit or Loss
2000	£169,670	£321,118	£269,958 Profit
2001	£169,971	£353,260	£341,825 Profit
2002	£100,844	£265,689	£115,243 Profit
2003	£125,522	£356,037	£82,568 Profit
2004	£117,217 (Ten Months)	£209,552 (Ten Months)	-£219,268 Loss

Notes

- A) “Total Annual Income” is a combination of base salary and bonuses / profit sharing
- B) The basis of remuneration changed in 2002. Mr Upson was granted an increased base salary (from £41,000 up to £85,000) together with a profit-share of 15% of RFPL annual pre-tax profits(ER1 11 refers). This ended a period of commission-based earnings. At the same time, pension entitlement calculation moved from a “capped” basis of £50,000 per annum to a capped basis of £85,000.
- C) Bonus / Profit Sharing was paid yearly, typically in the April following the year in which it was earned.
- D) Annual income in 2004 was composed of £80,000 of base salary combined with £37,217 profit share from the year 2003.

6.2.58 Mr Smith confirmed that if the profit sharing formula had been applied in 2004 to Mr Upson’s earnings that he would have received nothing other than his base salary for that year.

6.2.59 Mr Smith confirmed that there were no issues concerning Mr Upson’s performance in the first nine months of 2004 and that despite his resignation letter of 1 September 2004 the company was actively seeking ways to continue to work with him up to 15 October.

Cross Examination by Advocate Richardson

- 6.2.60 Mr Smith confirmed that the RFPL employee handbook had been updated some five years ago.
- 6.2.61 Mr Smith expressed the opinion that Mr Upson had committed acts gross misconduct during the meeting with Mr Wigglesworth on 15 October 2004, with Mr Telfer on 1 November 2004, and during the telephone discussion he had with Mr Upson on 3 November. In each case the act of gross misconduct was the refusal to carry out his duties.
- 6.2.62 Mr Smith was asked if, after each act of gross misconduct, the company had instigated the disciplinary procedure as laid out in the Employee Handbook? In reply, he stated that the company had not instigated the disciplinary procedure because he had assumed that Mr Upson had taken the gravity of his actions "on board".
- 6.2.63 Mr Smith agreed with Advocate Richardson that there was no indication in the period that Mr Upson would not comply and Mr Smith stated that as during the period 15 October until 1 November both he and Mr Wigglesworth were engaged in serious external negotiations which were taking up to 80% of their time; this left little space to consider internal company issues.
- 6.2.64 Mr Smith confirmed that David Telfer was not involved in the external negotiations.
- 6.2.65 Mr Smith stated that he had not spoken with Mr Wigglesworth on 3 November with reference to the letter sent by Mr Wigglesworth to Mr Upson on 3 November but agreed with the content.
- 6.2.66 Mr Smith was pressed by Advocate Richardson as to why he had not informed Mr Wigglesworth of his telephone discussion with Mr Upson on 3 November during the remainder of that day, and Mr Smith responded that Mr Wigglesworth was very busy with other issues.
- 6.2.67 Advocate Richardson turned to the dismissal letter of 5 November and asked if Mr Smith had had input to this document and Mr Smith confirmed he had been consulted by Mr Wigglesworth on 4 November, however there was no file note or record of this meeting.
- 6.2.68 Mr Smith confirmed that he was "conversant" with Advisory Booklet "Discipline at Work" published by Commerce and Employment (formerly the Board of Industry), a copy of which was included at ER2/7.
- 6.2.69 Mr Smith confirmed that he had not consulted the Group HR Manager (Julie McGlinchy) on the potential termination of employment of Mr Upson, nor had he invited her to attend the meeting with Mr Wigglesworth on the 4<sup>th</sup> November. When asked if her input might have made a difference as to their decision to dismiss he expressed uncertainty.
- 6.2.70 Mr Smith was questioned as to whether he believed the company had made a sufficient investigation as to the actual behaviour of Mr Upson and he responded that in his opinion that between Mr Wigglesworth, Mr Telfer and himself that they had had tried to establish the facts prior to their decision to dismiss.

- 6.2.71 Mr Smith was asked if he believed Mr Upson should have been summonsed to a meeting to explain himself. He responded that he felt there was no need for such a meeting, the facts had been established.
- 6.2.72 Mr Smith was asked if he felt it appropriate that given he was a witness to the alleged gross misconduct, he should also be involved in the decision to dismiss. Mr Smith responded that he felt he had been fair and questioned to whom else other than he and Mr Wigglesworth could the decision have been referred? Mr Smith further stated that his involvement as a witness was not relevant as Mr Upson could only be answerable to Mr Wigglesworth, Mr Telfer and himself.

Evidence given by Mr Martin Upson

- 6.2.73 Mr Upson confirmed that from the time he was first employed with RFPL until 15 October 2004 no disciplinary action had ever been taken against him by the management of that company.
- 6.2.74 Mr Upson confirmed, with supporting evidence from documents detailed in ER1 /11 through ER1 /14 that he had been in yearly receipt of either commission or profit sharing.
- 6.2.75 Mr Upson stated that he had been told by Mr Wigglesworth that his bonus for 2004 would be based on his "production" rather than the profits of the company.
- 6.2.76 With reference to emails to colleagues on 19 October 2004 and 25 October Mr Upson stated these emails were based on an assumption that he would be released before 31 December, an assumption he believed was reinforced by the letter sent to clients by David Telfer on 28 October, indicating he would be leaving in November.
- 6.2.77 Turning to the GFSC audit report Mr Upson stated that in his opinion that he would have been only required to assist in a small number of issues, and was surprised that the copy of the report presented to the hearing was annotated with actions for him throughout the content. He stated that he had not seen this annotated copy prior to the Hearing.
- 6.2.78 Mr Upson stated that during the meeting with David Telfer on 1 November that he sought clarification as to his leaving date and his specific role in relation to the GFSC report but did not gain agreement on either topic. He agreed that his appointment with the Dentist did not occupy the whole of 2 November but he denied that during the meeting on 1 November he had predicted to Mr Telfer that he would obtain a medical certificate by 3 November. He stated that he had made an appointment on 1 November to see the Doctor and had told Mr Telfer on the same day. He subsequently attended this appointment and was signed off as unfit for work from 3 November.
- 6.2.79 Mr Upson confirmed that the HR Manager had telephoned his home on 4 November requesting that the company wished to obtain a second opinion as to his medical state with a company appointed doctor. He stated that he had agreed this request.
- 6.2.80 Mr Upson denied that he had ever refused to assist with the GFSC audit and neither had he refused to work the rest of the year.

- 6.2.81 Mr Upson stated the first he knew of his dismissal on the 5 November was a telephoned request from the Guernsey office that he surrender his office keys. He had no prior indication that the company would dismiss him. He was dismayed at such a step, due to the implications for him both financially and for his reputation in the financial community, there were implications for his future licensing by the GFSC.

#### Cross Examination by Advocate Ferbrache

- 6.2.82 Advocate Ferbrache asked Mr Upson that, having now seen the three file notes from his Chairman and his fellow Directors relating to the events between 15 October and 3 November that he would agree that his behaviour amounted to gross misconduct. Mr Upson denied this and stated that if the company had believed it was gross misconduct they should have followed their own disciplinary procedure as detailed in the Staff Handbook.
- 6.2.83 Advocate Ferbrache asked Mr Upson if he was familiar with the clauses in both his Contract of Employment and in the Company Handbook which required him to comply with reasonable instructions from the company. Mr Upson agreed that he signed his contract, had a copy of the Handbook and understood his responsibilities under his contract.
- 6.2.84 Mr Upson agreed that in his letter of 1 September 2004 Mr Wigglesworth had made a very firm rebuttal of the assertion by Mr Upson that he would be entitled to an end of year (2004) bonus of £38,000. He further agreed that in his response to Mr Wigglesworth on 6 September he had not sought to reassert his claim, and agreed that if there had been an end of year bonus for 2004 that it would have been totally at the discretion of Mr Wigglesworth and could have been any amount, or none.
- 6.2.85 Mr Upson accepted that given six years experience at his executive level in the company that it was reasonable for him to be retained to assist with responses to the GFSC audit.
- 6.2.86 Advocate Ferbrache asked Mr Upson why he did not make an attempt to contact either Mr Wigglesworth or Mr Telfer in late October by phone or email to clarify his leaving date and his required duties prior to release. Mr Upson stated that both were on vacation and, whilst Mr Telfer was his senior, that in reality all such agreements could only be made by Mr Wigglesworth.
- 6.2.87 Mr Upson was pressed on the veracity of the file note made by Mr Wigglesworth on 15 October and also the veracity of the file notes made by Mr Telfer on 1 November and by Mr Smith on 3 November; Mr Upson stated that these file notes were not fair representations of his meetings with these Directors. Whilst some items were true, for example he did turn up to the office on 1 November in casual dress, he stated that in the main they were "concocted" and not correct. He agreed that he had not made his own file notes of these meetings.

### **7.0 Closing Statements**

#### 7.1 Advocate Ferbrache

- 7.1.1 Advocate Ferbrache stated that there had been clear and repeated refusals by Mr Upson to carry out his duties in all three meetings with his fellow Directors in the period 15 October to 3 November 2004. These were a "wilful flouting" of his

conditions of employment and at his level of seniority in the company he knew very well that this behaviour was seriously at fault. The issue was both a matter of fact and degree.

- 7.1.2 In his opinion Mr Upson was aware of the increasingly onerous requirements of the GFSC and whilst there were no specific matters of concern re. Mr Upson he was the only experienced and qualified individual available to respond effectively to the issues raised. He must have been well aware that he was required to continue to serve his notice whilst responding to these issues.
- 7.1.3 Mr Upson had challenged the veracity of all the three witnesses and it was hard to believe that each of these three individuals would not tell the truth under oath.
- 7.1.4 The issue of any prospective year end 2004 bonus was dealt with clearly by Mr Wigglesworth in his letter of 1 September 2004. There would be a totally discretionary payment based on job performance and this could be of any amount, or none.
- 7.1.5 Advocate Ferbrache drew attention to case law "authorities" in ER2 which in his opinion indicated that other "reasonable" summary dismissals had been upheld on the basis of less serious issues than those alleged against Mr Upson.
- 7.1.6 Advocate Ferbrache, on the issue of the bonus element of Mr Upson's remuneration drew attention to "authorities" ER2 /2 "Recueil D'Ordres En Conseil" in which the rules of written conventions are stated and to ER2 /6 "Cantor Fitzgerald International V Horkulak". In this latter case Advocate Ferbrache drew attention to a number of clauses including number 37 which stated that "a defendant in an action for a breach of contract is not liable for doing that which he is not bound to do"
- 7.1.7 Advocate Ferbrache stated that whilst the Code of Practice issued by Commerce and Employment on "Discipline at Work" was issued for guidance, that each case must be dealt with on its merits.

## 7.2 Advocate Richardson

- 7.2.1 Advocate Richardson dealt initially with the issue of bonus. A sum of £9,500 had been claimed as part of the Gross Earnings in EMPROT 1. He contended that whilst Cantor-v-Horkulak dealt with "Wrongful Dismissal" that, if this adjudication was found for Mr Upson then, any award should factor in 25% of an annual bonus of £38,000. He drew attention to a number of clauses in this judgement including 72, which in summary appears to state that even with no contractual signposts for calculating a bonus it still remains the task of a Hearing of "First Instance" to decide what figure in the end would have been granted.
- 7.2.2 Turning to the act of dismissal by RFPL on the 5 November, Advocate Richardson stated that under the "*Employment Protection (Guernsey) Law 1998*", section 6.2 it was for the employer to show that the reason for dismissal was one of the potentially fair reasons and had followed fair procedure. He stated that in representing his client he did not intend that this case be based on allegations of "concocted" testimony.
- 7.2.3 Advocate Richardson stated that no action was taken by senior management after the alleged act of gross misconduct during the meeting with Mr Wigglesworth on 15 October. Neither was Mr Upson shown the file note of this meeting to

allow him to agree to its veracity. Further, there was no evidence during the period 15<sup>th</sup> October to 1<sup>st</sup> November that Mr Upson was not doing his job. He continued to all appearances to be a model employee.

- 7.2.4 Why did not Mr Telfer act on 1 November in the face of another alleged act of Gross Misconduct, i.e. the refusal to accept a reasonable order? Also why did not Mr Telfer actively involve Mr Upson immediately with the GFSC report which was to hand? Indeed Mr Telfer turned down a request from Mr Upson during that meeting that he be given a copy of the GFSC report. Finally Mr Upson was not given the opportunity to see the file note of this meeting to agree its veracity
- 7.2.5 Advocate Richardson stated that even if the file note of the telephone discussion on 3 November between Mr Smith and Mr Upson was correct it was not verified as an accurate record of the discussion by Mr Upson.
- 7.2.6 Whilst there may have been emotional outbursts from Mr Upson they were not dealt with at the time by the employer as acts of Gross Misconduct.
- 7.2.7 Finally Advocate Richardson turned to the issue of reasonableness. He stated there must be a fair and proper process to justify a summary dismissal and the evidence does not support this. In his submission RFPL needed to conduct a proper investigation prior to any final decision and this did not occur. He stated there was no minute or file record of the meeting between Mr Wrigglesworth and Mr Smith on 4 November during which the decision to dismiss was made. There was no evidence of any consideration of other disciplinary sanction being taken short of dismissal.
- 7.2.8 When the written dismissal was communicated it did not mention any possibility of appeal and in his opinion Mr Upson had lost all confidence in the process.

## **8.0 Conclusions**

- 8.1 There was clearly some contradictory testimony offered by the Applicant and the Respondents.
- 8.2 It was evident that RFPL was experiencing trading difficulties during 2004 and that with the company having been subject to a GFSC audit, it was sorely in need of retaining the expertise built up by Mr Upson for most if not all of his notice period.
- 8.3 Testimony from both parties evidenced a difficult and sometimes emotional relationship between the plaintiff and the respondents in the period 25 August to 5 November 2004.
- 8.4 There were three critical meetings with Mr Upson when there was an alleged refusal to work, however Mr Upson stated that he had not been correctly understood. It is significant that the file notes of these meetings were not submitted to Mr Upson to obtain his side of these events and this constitutes a clear challenge to the fairness of the process followed by RFPL. It is also significant that whilst the company stressed each time that Mr Upson should stay and carry out his duties that at no time before 5 November was he told that a summary dismissal would be the outcome of his continued alleged refusal to obey reasonable orders.
- 8.5 Given much of the testimony one could draw the conclusion that Mr Upson was being deliberately confrontational to drive the company toward a decision for early release. However at the meeting on 1 November with Mr Telfer he is apparently told he is not

entitled to have a copy of the GFSC report. As his expertise to deal with this report was described as a primary reason for his continued retention this act seems at variance to other testimony from the respondents and might well have attracted an emotional response from Mr Upson.

- 8.6 Given the size of the Rossborough operation in the Channel Islands and the fact that that their written disciplinary procedure formally included the Department of Human Resources in the process it is surprising that the Manager of this department apparently took no role in these proceedings. It is also noted the RFPL had other directors who might have been requested to be involved in the process to help level the playing field.
- 8.7 The manner of the dismissal does not seem to conform to the rules of natural justice, let alone any published code of conduct. Whilst it is appreciated that Mr Upson may have conducted himself in a less than reasonable manner it does not excuse the need for a company to draw back and conduct a reasonable investigation. Particularly with an employee with 12 years of previously unblemished service with the company.
- 8.8 It would seem fundamental that Mr Upson should have been told that the company viewed his behaviour as grounds for summary dismissal. He should have been invited to a meeting with a colleague of his choice, as stated in the RFPL Employee Handbook, and confronted with the evidence of his alleged wrong doings. This did not happen, indeed it would seem the first he was aware of his dismissal is whilst on sick leave when requested to return his office keys.

#### **9.0 Decision**

- 9.1 After carefully considering all the evidence of both parties and their submissions, and giving due weight to the size of the company and the available resources to deal with this dismissal I find that RFPL failed to demonstrate a fair and objective process for a summary dismissal for gross misconduct. I therefore find that the dismissal of Mr Upson was unfair under the provisions of *The Employment Protection (Guernsey) Law, 1998* as amended.
- 9.2 An award of £23,562 will be made. This being the amount according to RFPL submissions in EMPROT 2 earned by Mr Upson in the 3 months immediately preceding the effective date of termination, and in compliance with section 20 subsection 2 of *The Employment Protection (Guernsey) Law, 1998* as amended.
- 9.3 The Adjudicator has considered section 34 of the Law in determining whether any element of commission should be paid as part of this award and has concluded that as no commission was paid in the three months immediately preceeding the effective date of dismissal that no such calculation can be made. Note is also taken that any bonus that might have been paid to Mr Upson for the calendar year of 2004 would have been totally discretionary, and was not bound by any formula due to the trading difficulties experienced by RFPL in that year.

Signature of Adjudicator:

**Mr P Woodward**

Date: 6 June 2005