

JERSEY / JUDGMENT

CI Fire and Security -v- Browning

[2008] JRC 163 (25 September 2008)

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judgment

commissioner: 1. This appeal raises the question of whether the Jersey Employment Tribunal ("the Tribunal") has the power to impose fines for offences created under the Employment (Jersey) Law 2003 ("the Law").

Background

2. The respondent, Mr Browning, was employed by the representor as an alarm engineer from 10 th February 2003. He was dismissed from his employment on 29 th November 2006 for reasons and following a process which it is not necessary for the purposes of this appeal to go into. 3. On 22 nd January 2007 the respondent lodged a complaint of unfair dismissal by the representor with the Tribunal. Tribunal decision 4. By letter dated the 8 th February 2007, the Tribunal gave the representor formal notice of the complaint and enclosed a copy of that complaint (application JET1) and the employer's response form (JET2) to be completed and submitted. In its letter, the Tribunal warned the representor that failure to respond to the letter or to appear at any subsequent hearing could lead the Tribunal to determining any matter in dispute in its absence and making an award against it which would be enforceable by law. There was no reference in the letter or in the form to the possibility of fines for offences being imposed. 5. The hearing before the Tribunal (comprising Mrs N Santos-Costa, Deputy Chairman, and Mrs K Flaguel and Mr P Kirwan, Panel members) took place on 12 th November 2007 at which the representor was represented by Mr Paul King, the engineering manager of the representor, and the respondent represented himself. There were no other witnesses. The Tribunal issued its decision on 29 th November 2007 in which it found that the respondent had been unfairly dismissed and awarded him £8,640. No appeal is now pursued in relation to that award. 6. However, having dealt with the award, the Tribunal then went on in its written judgment to impose a fine. It is helpful to set out what it said in full:- " Failure to provide written statement of terms of employment in accordance with Article 3 of the Law 27. Article 3(2)(9) (vi) of the Law requires a written statement of the terms of employment to contain particulars of any existing terms and conditions relating to disciplinary and grievance procedures. From the evidence heard by the Tribunal it is apparent to the Tribunal that Mr

Browning's contract of employment did not contain any disciplinary procedures and until his contract of employment was altered by the introduction of the JACS disciplinary procedure by the letter of the 21 st November 2006 but he was not informed of such alteration to his terms of employment as required by Article 4 of the Law. 28. In accordance with Article 9 of the Law this is an offence punishable by a fine not exceeding £5,000 (being level 4 on the Standard Scale) in accordance with the Criminal Justice (Standard Scale of Fines)(Jersey) Law 1993. The Tribunal hereby fines the Respondent the sum of £250.00 for failing to comply with Article 3 of the Law". (Tribunal's emphasis) 7. Miss Milner, for the representor, informed us that at no stage during the hearing was any reference made to the possibility of fines being imposed and certainly the notes of the Tribunal do not appear to contain any reference to the possible imposition of fines. However, the letter of the Tribunal to the representor enclosing its decision contained an information leaflet which said this in relation to fines:- " Fines and Penalties are a punishment for not complying with the Law. The money does not go to the other party, but to the States of Jersey via the Social Security Dept. They must be paid: 1. By cheque made payable to the ' Social Security Department' and forwarded to the Jersey Employment Tribunal office. 2. Within 21 days of receipt of the decision. (unless the decision states otherwise). A receipt will be issued by the Department." (Tribunal's emphasis) The Appeal 8. Article 94 of the Law provides that an appeal on a question of law shall lie from a decision or order of the Tribunal to the Royal Court with the leave of the Tribunal or the Royal Court. Leave to appeal was granted by the chairman of the Tribunal on 11 th February 2008. There is no procedural timetable set down in the Law or any subordinate legislation for the procedure for appeals, and this appeal was fought by way of representation. 9. The respondent did not appear at the hearing. The fine is payable to the States of Jersey and he therefore had no interest in the outcome. 10. I questioned with Miss Milner whether the Attorney General should be convened to the representation as the appeal raised the issue of whether the Tribunal was impinging upon the exclusive power and right of the Attorney General to control the prosecution of offences in the Island. She resisted the suggestion mainly on the grounds of costs (the fine concerned being only £250). I allowed her to make her submissions, during which, consistent with her duty as an officer of the court, she drew to my attention any contrary arguments to the submissions she was putting forward on behalf of the representor. Following her submissions, the position appeared to me to be so clear that it was unnecessary to convene the Attorney General and unjust to inflict further costs on the representor by so doing. 11. The appeal was brought on the following grounds namely that:- (i) The Tribunal acted ultra vires by fining the representor when it had no power under the Law to do so; (ii) In the alternative, if it did have such a power, the Tribunal misapplied the Law regarding the statutory requirements relating to written statements of employment terms and changes to employment terms; (iii) The Tribunal acted in breach of the representor's rights under Article 6 of the European Convention on Human Rights. Power to Fine 12. The Tribunal purported to impose a fine under Article 9 which comes within Part 2 of the Law which is concerned with employment particulars. Article 9 is in the following terms:- "Offences under this part (1) A person who, being an employer - (a) fails to give to a person he or she

employs a written statement of the terms of the person's employment in accordance with Article 3; or (b) where there is a change in the matters included or referred to in a statement under Article 3, fails to give a person he or she employs a written statement containing particulars of the change in accordance with Article 4, shall be guilty of an offence and liable to a fine of level 4 on the standard scale. (2) On the issue of a summons, or on the arrest and charge of a person, in respect of an offence under paragraph (1) the Connétable or Centenier responsible shall notify the Minister and the Tribunal in writing of the fact. (3) Where notification under paragraph (2) has been received the Tribunal shall stay any proceedings which may have been or may be started under Article 7 until the criminal proceedings have been concluded and the time available for an appeal has expired". 13. Offences are also created by Article 35, which comes under Part 4 of the Law (dealing with the minimum wage), where the penalties imposed in relation to some of the offences extend to imprisonment for a term of twelve months, by Article 55, which comes under Part 5 of the Law (payment of wages) and by Articles 90 and 95, which comes under Part 9 of the Law (dealing with the Tribunal), where the penalties to be imposed extend for certain offences to imprisonment for a term of two years. 14. Offences have been created under the Law in the same way as offences have been created in numerous other laws, for example:- (i) Health and Safety at Work (Jersey) 1989 , Part 6, Article 21(2) (ii) Regulation of Undertakings and Development (Jersey) Law 1973 , Articles 3(2) and 8; (iii) Social Security (Collection of Contributions)(Jersey) Order 2001 Article 19 (iv) Social Security (Jersey) Law 1974 , Article 36 15. The reference in Article 9 and the other Articles in the Law creating offences to a person being found "guilty of an offence", to the "arrest and charge of a person", to "imprisonment" and to "criminal proceedings" makes it clear that these are criminal offences. The reference to fines being imposed "on the standard scale" is a reference to the Criminal Justice (Standard Scale of Fines)(Jersey) Law 1993, which makes provision for a standard scale of fines for offences against enactments. Article 2 of that Law provides:- "Construction of enactments Where an enactment provides or confers a power to provide that a person convicted of an offence shall be liable on conviction to a fine by reference to a specified level on the standard scale or, in the case of an enactment in the French language, by reference to a specified niveau du tarif uniforme, that reference shall be construed as a reference to the standard scale for the time being". 16. The exclusive jurisdiction of the Attorney General over the prosecution of offences in Jersey is clearly established. In *Attorney General v Devonshire Hotels Limited*

[1987] JLR 577 , *Tomes*, Deputy Bailiff put it this way:- "The principle that the Attorney General alone has the power and the right to prosecute is deep seated in the common law of this Island and, in the words of Lord Atkinson in *Leach v R.* (3) ([1912] A. C. at 311): '... I think if it is to be overturned it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case'. There have been examples where the power of the Attorney General alone to prosecute has been eroded by clear, definite and positive enactments. These are to be found in the *Loi (1853) Etablissant la Cour pour la Répression des Moindres Délits* and the *Loi (1864) réglant la Procédure*

criminelle in relation to 'préventions.' Likewise in art. 46 of the Road Traffic (Jersey) Law, 1956, which vests in the Constable or Centenier of the parish in which an offence was committed the power to inflict and levy fines summarily. But none of these overturn the common or customary law power of the Attorney General in the matter of prosecutions generally." 17. The power of the Constable and Centenier to formally charge a person for offences is expressly provided by Article 3(2) of the Police Force (Jersey) Law 1974 and that is reflected in Article 9(2) of the Law (set out above), which provides that where a summons is issued in respect of an offence, the Constable or Centenier shall notify the Minister and the Tribunal in writing of the fact whereupon, under the provisions of Article 9(3) of the Law, proceedings before the Tribunal shall be "stayed until the criminal proceedings have been concluded and the time available for an appeal has expired ". 18. Therefore it is clear that the offences created under the Law are criminal offences, to be prosecuted by the Attorney General, the Constable or the Centenier and dealt with before the criminal courts of the Island in the usual way. On what basis then does the Tribunal assume for itself the power to prosecute, convict and fine offenders? 19. Miss Milner informed me that the Tribunal first imposed a fine under Part 2 of the Law in the case of *Huet v Les Ruisseaux Holdings Limited* Case No. 0109010/05, where the judgment of the Tribunal (comprising Mrs N Santos-Costa, Deputy Chairman, and Mrs Susan Armes and Mr Jim McCartan, Panel members) is in the following terms:- "1.4 Contract of Employment The Tribunal finds that Mr Huet was not given a copy of his contract signed on the 2 May 2005 as required by Article 3 of the Law. This constitutes an offence under Article 9 of the Law punishable by a fine. However, as this appears to be an oversight by Ms Keadall and not a deliberate failure to comply with the Law and that this is a new offence under a relatively new law, the Tribunal have decided to fine the respondent the sum of £100 only for this offence. The Tribunal, in deciding upon this amount has taken into consideration the size of the Respondent's business and the overall awards made against it in this judgment. It should be noted that the Tribunal is empowered to levy a fine of up to £5,000 for this offence". This judgement of the Tribunal does not explain the basis upon which it claims to have power to prosecute, convict and fine offenders under this Article. 20. As a statutory body, the Tribunal only has the powers granted to it under the Law or other legislation. A power to prosecute, convict and fine offenders for offences created under the Law would have to be given expressly and unambiguously. There is no such power vested in the Tribunal within the Law, and I was not made aware of any other legislation under which the Tribunal is so empowered. Miss Milner drew to my attention Article 89 of the Law, dealing with procedure, as possibly providing the basis upon which the Tribunal might seek to justify its position. It is in the following terms:- "89 Procedure (1) The Tribunal shall have, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in the Royal Court and, without limiting the generality of the preceding provisions of this Article, may - (a) issue a summons to any person (including a party to the proceedings) requiring the person to appear at the time and place mentioned therein to testify to all

matters within the person's knowledge relative to the subject or proceedings before the Tribunal, and to bring with him or her and produce any document, book or papers that the person has in his or her possession or under his or her control relative to such subject; (b) administer oaths and examine any person on oath, affirmation or otherwise; and (c) require a party in writing to furnish to the Tribunal a written answer to any question if it considers - (i) that answer of the party to that question may help to clarify any issue likely to arise for determination in the proceedings, and (ii) that it would be likely to assist the progress of the proceedings for that answer to be available to the Tribunal before the hearing, and appoint the time within which the answer is to be furnished. (2) In this Article "document" includes information held in electronic form". However this Article merely gives the Tribunal all of the procedural powers that are vested in the Royal Court that are necessary and proper for the due exercise of its existing jurisdiction. It does not give the Tribunal the jurisdiction to prosecute, convict and fine offenders. 21. By way of contrast, the Tribunal and its officers are given the power under the Law to make or impose financial awards and penalties, other than for offences, namely under Article 24(2) (failure to allow access to records), Article 27 (enforcement notice for payment of minimum wage), Article 29 (non compliance with enforcement notice) , Article 33 (awards in respect of a detriment), Article 54 (payment of un-notified deductions) , Article 77 (awards for unfair dismissal) and Article 88 (awards in respect of non observation of terms and conditions). However these articles set out the powers given to the Tribunal and its officers respectively expressly and unambiguously. If such awards or penalties are made or imposed, they are recoverable before the civil courts and of course do not constitute a criminal conviction for an offence. 22. In conclusion, there can be no doubt that the Tribunal has no power to prosecute, convict and fine offenders for offences created under the Law. I have to say that I find it difficult to understand how the Tribunal assumed to itself the powers of a criminal court, which it must have done without first taking the precaution of obtaining advice from the Attorney General over whose exclusive jurisdiction it has impinged. 23. I therefore declare that the Tribunal had no power by its decision of 29 th November 2007 to fine the representor £250. Remaining Grounds of Appeal 24. Although it is not necessary for me to consider the remaining grounds of appeal, a number of observations arise immediately from the Tribunal's reasons set out in paragraphs 27 and 28 of its decision (set out above) for imposing a fine. The relevant provisions of the Law are as follows:- (i) Article 3(2)(9)(vi) of the Law requires a written statement of the terms of employment to contain particulars of disciplinary and grievance procedures, if there are any. There is no requirement to have such procedures. (ii) Article 4 of the Law provides that if there is a change in the terms of employment, the employer shall give to the employee a written statement containing particulars of the change at the earliest opportunity and in any event, not later than four weeks after the change in question. 25. The heading to paragraphs 27 and 28 refers to failures under Article 3 of the Law to provide a written statement of terms, whereas the end of paragraph 27 refers to the respondent not being informed of alterations as required by Article 4 of the Law. Paragraph 28 says "this is an offence" but is it referring to failures under Article 3 or Article

4? In its conclusion the Tribunal fined the respondent for failure to comply with Article 3 of the Law. 26. It is difficult to see from the Tribunal's own findings how there was a breach either of Article 3 in that there was a written statement of terms and there is no requirement for disciplinary and grievance procedures or of Article 4 in that the respondent had been informed of the introduction of the JACS disciplinary procedures by the letter of 21 st November 2006 which was addressed to him. 27. The Tribunal was very critical of the representor introducing the JACS disciplinary procedure part way through the disciplinary process it had commenced against the respondent. At paragraph 24 of its decision, it said this:- "The Respondent was clearly aware of JACS because evidence was heard that it contacted them for advice and indeed finally adopted their disciplinary procedure. JACS provide free, accessible advice on employment matters: there is no excuse not to use their services. The Tribunal will overlook badly written letters and inadvertent breaches of procedure by small businesses with no specific employment law training where no real harm is caused, but it cannot overlook an apparent lack of interest to learn or abide by new processes and laws in place". (The Tribunal's emphasis) 28. Miss Milner submitted, with some justification in my view, that the comments of the Tribunal come perilously close to elevating disciplinary and grievance procedures into a legal requirement, when it is quite clear from Article 3 that they are not. The absence of a disciplinary and grievance procedure within the respondent's contract of employment heavily influenced the conclusion of the Tribunal's judgement dealing with the award, which was in the following terms:- "The importance of a fair disciplinary procedure cannot be overemphasised by the Tribunal. Such procedures exist not only for the protection of employees to ensure that they are dealt with in a fair and consistent manner but also to assist employers in terminating the employment of unsatisfactory employees. In this case the employer had reason to be concerned about the conduct of its employee. Such conduct did not warrant instant dismissal but instead of following an established process involving investigating complaints, establishing complaints, hearing the other side, taking appropriate action and allowing appeals to be made, the Respondent appears to have adopted an ad hoc procedure which incorporated none of these principles of equity and fairness. There is no reason why a fair process of dismissal was not followed. Mr Browning may not have been a perfect employee but he was dealt with unfairly by the Respondent and for this reason the Tribunal finds him unfairly dismissed". (my emphasis) 29. I endorse the Tribunal's comments as to the desirability of disciplinary and grievance procedures being adopted but as it is not a legal requirement, the absence of such procedures cannot, of its own, be held against an employer. It is the fairness of the process actually followed by the employer that may be relevant to the Tribunal's determination under Article 64 of the Law. 30. As to the representor's Convention rights, Article 6 provides that everyone charged with a criminal offence has the minimum right, inter alia, to be informed promptly of the nature and cause of the accusation against him, to have adequate time and facilities to prepare his defence and to defend himself. The representor would appear to have been given no notice whatsoever of the charges against it under Article 9 of the Law. The first it knew of the possibility of criminal sanction was when it

received the written judgement of the Tribunal. There can be no doubt therefore that, had the Tribunal the power to prosecute, convict and fine offenders, the Convention rights of the representor would have been infringed. 31. Indeed the manner in which the Tribunal appears to have exercised the powers of a criminal court that it had assumed to itself, can only be described as extraordinary in that:- (i) It gave the representor no notice of the charge against it; (ii) It denied the representor any opportunity to defend itself; (iii) It denied the representor the opportunity of addressing it in mitigation before any penalty was imposed. In other words all the basic safeguards that natural justice requires be afforded to defendants in criminal cases appear to have been ignored. Authorities Employment (Jersey) Law 2003. European Convention on Human Rights. Health and Safety at Work (Jersey) 1989. Regulation of Undertakings and Development (Jersey) Law 1973. Social Security (Collection of Contributions)(Jersey) Order 2001. Social Security (Jersey) Law 1974. Criminal Justice (Standard Scale of Fines)(Jersey) Law 1993. Attorney General v Devonshire Hotels Limited [1987-1988] JLR 577. Police Force (Jersey) Law 1974. Huet v Les Ruisseaux Holdings Limited Case No. 0109010/05. Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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