

JERSEY / JUDGMENT

Hughes -v- Helm Trust Co Ltd

[2012] JRC 168 (25 September 2012)

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judgment

the bailiff: 1. This is an application for leave to appeal on a point of law against a decision of the Employment Tribunal (Deputy Chairman Mrs Santos-Costa presiding) dated 12th January, 2012, when it struck out the appellant's claim for unfair dismissal on the ground that the appellant had not been continuously employed for a period of at least 26 weeks. It was ordered at a preliminary directions hearing that the hearing before me would be treated as the hearing of the appeal.

Accordingly full argument was heard. 2. I am satisfied that leave to appeal should be granted. The issue raised is one of law. Furthermore, as appears below, the decision of the Tribunal in this case is inconsistent with that of another division of the Tribunal in another case on the same point.

The matter therefore needs to be resolved by this Court so that the Tribunal knows how to proceed in future. The factual background 3. I take the facts from the decision of the Tribunal.

The appellant was employed by the respondent ("Helm") on 1st June, 2011, as an associate director. His contract of employment contained the following provision:- "The probationary period will be for three months from the commencement of employment. At the end of this period you will be advised if you have become a permanent member of staff. During this period the notice period will be one month." The contract went on to provide that after the probationary period had passed, both parties were required to give each other three months' notice in writing of any intention to terminate the contract. 4. According to the appellant, nothing untoward as to his performance was said prior to his departure on two weeks holiday commencing 26th August. The three month probationary period expired on 31st August and according to the appellant, no contact was made by Helm prior to that date. However, on his return to work on 6th September, he was told that he had in fact failed his probationary period and he was give one month's notice in writing expiring on 5th October. 5. Subsequently the appellant lodged a complaint before the Tribunal alleging that he had been unfairly dismissed. He also brought a contractual claim for wrongful dismissal alleging that he should have been paid for three months' notice, not one month and that holiday pay had accrued to him in respect of the additional two months' notice period. 6. Helm disputes both the unfair dismissal claim and the contractual wrongful dismissal claim and requested that the complaint in respect of unfair dismissal be struck out on the basis that the appellant did not have the 26 weeks continuous service required by Article 73(1) of the Employment (Jersey) Law 2003 ("the Law") in order to make a complaint of unfair dismissal to the

Tribunal. The appellant, on the other hand, contended that, if he had been given three months' notice as he should have been, he would have been employed for more than 26 weeks. He was therefore entitled to bring a claim for unfair dismissal. 7. Having heard the parties, the Tribunal ruled in favour of Helm. It held that the appellant had only in fact been employed from 1st June to 5th October, 2011, (which was less than 26 weeks) and accordingly he was not entitled to claim for unfair dismissal. It struck out the appellant's claim in that respect. It is therefore only his claim for breach of contract which remains before the Tribunal. The relevant statutory provisions 8. Article 73(1) of the Employment (Jersey) Law 2003 ("the Law") provides that, subject to certain exceptions (which it is not contended apply in this case), no claim for unfair dismissal may be brought:- "... unless the employee has been continuously employed for a period of not less than 26 weeks ... computed in accordance with Article 57, ending with the effective date of termination." 9. The "effective date of termination" is defined in Article 63 of the Law and the relevant provisions are as follows:- "(1) Subject to the following provisions of this Article, in this Part and in Part 6A the "effective date of termination":-

- (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his or her employer or by the employee, means the date on which the notice expires; (b)...
- (c) ...
- (2) Where
 - (a) the contract of employment is terminated by the employer; and
 - (b) the notice required by Article 56 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination, for the purposes of Article 73 the later date shall be the effective date of termination.
- (3) In paragraph (2)(b) "the material date" means:-
 - (a) the date when notice of termination was given by the employer; ..." 10. Article 56 deals with minimum periods of notice. Article 56(1) provides as follows:- "Subject to paragraph (9) the notice required to be given by an employer to terminate the employment of an employee who has been continuously employed for one week or more shall be not less than:- (a)..." There then follow a series of sub-paragraphs which provide for increasing minimum periods of notice where there have been increasing lengths of continuous employment prior to the termination. Thus at sub-paragraph
 - (a) the minimum period is one week's notice where the continuous employment has been less than two years. This increases gradually to sub-paragraph
 - (l) where 12 weeks' notice is required if the period of continuous employment has been 12 years or more. 11. The appellant argues that Article 56(7) is relevant to the present case. It provides as follows:- "(7) A relevant agreement may specify periods of notice longer than those specified in paragraphs (1) and (2)." For the purposes of this case a "relevant

agreement" means a contract of employment. 12. Article 57 deals with the computation of the period of employment but there is no dispute between the parties in connection with the provisions of that Article as they apply to the facts of this case. There is no dispute between the parties that, if the effective date of termination for the purposes of Article 63 was 5th October (as contended by Helm) the period of continuous employment was less than 26 weeks whereas, if the effective date of termination was 5th December (as contended by the appellant) the continuous period of employment exceeded 26 weeks.

Submissions

13. The appellant's case is straightforward. He says that the probationary period had expired on 31st August and therefore he was not given notice of dismissal until after the expiry of the probationary period. Accordingly he was entitled to three months' notice under the contract. If he had been given three months' notice, his employment would have terminated on 5th December. He would by then have been employed for just over 26 weeks and would therefore have been entitled to bring a claim for unfair dismissal. He argued that it could not be right to allow an employer to take advantage of his own breach of contract (by failing to give the required contractual notice of termination) so as to remove the right which an employee would otherwise have had to bring a claim for unfair dismissal. 14. In more detail he argues as follows. He accepts that, under Article 63(1)(a), the effective date of termination is normally the date upon which the notice of termination by the employer expires i.e. in this case 5th October. However, he relies on Article 63(2) which provides that, where the period of notice required by Article 56 would expire later than what would otherwise be the date of termination, the later date shall be treated as the effective date of termination. 15. He then goes on to argue that the reference in Article 63(2) to Article 56 is not just to the terms of Article 56(1), which provide for certain statutory minimum periods of notice on the part of the employer. He refers to Article 56(7) which provides in effect that a contract of employment may specify a longer period of notice of termination than the minimum statutory requirement as set out in Article 56(1). He says therefore that, for the purpose of deciding whether an employee has been employed for 26 weeks, the employment is deemed to have expired only at the end of period of notice which should have been given under Article 56, whether as the minimum statutory notice period under Article 56(1) or under the contract of employment as referred to in Article 56(7). On his evidence, that would be 5th December (i.e. three months' notice as required under the contract). In support of his interpretation of the Law, he relies upon the decision of the Employment Tribunal (Advocate Le Quesne, Chairman, presiding) given on 13th January, 2012, in the case of Bator-v-Bonnie Beverage Company Limited, which applied similar reasoning to that which he contends for. 16. He also refers to the observation of Lord Denning MR in the case of Brindle-v-Smith

[1972] IRLR 125, which was decided shortly after the right to claim for unfair dismissal was first introduced in England and Wales by the Industrial Relations Act 1971. In that case the court in fact held that the dismissal took place when the contract was terminated and that the termination took place when the notice expired. However, in passing Lord Denning

MR added this:- "I would add at this point that I do not think the Act can be got round by wrongfully dismissing the person summarily or by giving him a notice that is too short. No person should be able to take advantage of his own wrong in that way. If an employer should try to escape the Act by giving no notice at all or a notice that was too short, I should have thought that the tribunal, by means of a claim for wrongful dismissal (see S113 of the Act), or by some such way, would see that the employee would get the same compensation as he would have done if he had been given notice of a proper length." 17. In relation to the two English cases to which I shall refer in a moment, the appellant argues that they can be distinguished because the equivalent provision to Article 56 in the English Act (Section 86 of the Employment Rights Act 1996 ("the 1996 Act")) does not contain the equivalent of Article 56(7), which states that a contract of employment may specify a longer period of notice than the minimum statutory period. Discussion 18. I have considered the submissions put forward by the appellant and have also had regard to the reasoning of the Chairman of the Tribunal in the case referred to at paragraph 15. 19. One starts from the position that, as the Deputy Chairman said in her judgment, as a matter of fact and law, a person is only an employee of another for as long as a contract of employment between them subsists. Thus, once the contract has been terminated, there is no longer a relationship between them. The employee is no longer an employee of the employer. He does not have to turn up for work or to perform any services for the employer and the employer does not have to perform his obligations under the contract. 20. The employee may of course have a claim for wrongful dismissal (i.e. breach of contract) on the grounds that the termination was in breach of the terms of the contract. Thus, if the employer fails to give the required notice, the employee may sue for the wages he should have received during the stipulated period of notice. But that is a claim for damages for breach of contract. It does not mean that the employee continues in fact to be employed by the employer during the period of notice which should have been given, but was not. 21. All of this is trite law and is consistent with Article 63(1)(a) of the Law which states that the effective date of termination is the date on which the notice given by one party to the other terminating the contract expires. 22. It follows that, applying general principles and the terms of Article 63(1) an employee ceases to be employed on the day that any notice of termination actually expires. On this basis, the appellant ceased to be employed by Helm on 5th October and has therefore not been continuously employed for the required period of 26 weeks. 23. If the appellant is to succeed, he must find some provision in the Law which deems the employment to have terminated at a later date for the purposes of the Law. There is such a provision. It is to be found in Article 63(2). This provides that, if the notice of termination given by the employer is less than that required to be given under Article 56, the effective date of termination of the contract shall be taken as the date of the expiry of the notice which was required by Article 56. 24. This provision is clearly apt to cover the minimum statutory periods of notice set out in Article 56(1). Those minimum periods are "required" to be given under Article 56 because the provisions of Article 56(1) are mandatory; "... shall be not less than ..." So if, for example, an employer gives one week's notice of termination to an employee who has been employed for 20 years

(so the minimum statutory notice required by Article 56(1) is 12 weeks), the Law will, for the purposes of calculating the continuous period of employment under Article 73(1) deem the employment only to have terminated 12 weeks after the date of the notice, rather than one week. 25. But that provision does not assist the appellant because there is no suggestion in this case that the period of notice given by Helm was less than the required statutory minimum period under Article 53(1). As mentioned above, the appellant argues that one must also have regard to Article 56(7), which provides that a contract of employment may specify longer than the statutory minimum specified in Article 56(1). But this does nothing more than confirm what would be the legal position in any event in the absence of Article 56(7). All that Article 56(1) does is specify certain minimum statutory periods of notice according to length of service. It is obviously open to parties to agree longer periods of notice in their contract and those will then become the provisions binding on the parties. The notice period which then has to be given is not required by Article 56; it is required by the terms of the contract. In my judgment the expression "... the notice required by Article 56 ..." in Article 63(1)(2)(b) cannot sensibly be interpreted as referring to a notice required to be given by a contract of employment. It is a reference to the minimum statutory periods of notice required to be given under Article 56. 26. Applying that to the present facts, one asks whether the period of three months' notice which it is claimed that Helm had to give the appellant was "required" by Article 56. The answer is that it was not. It was required by the contract of employment which Helm and the appellant had chosen to enter into. That would be the position whether Article 56(7) was contained in the Law or not. 27. That is sufficient to decide this appeal, but, in deference to the arguments raised, I shall refer to two English cases. However, it is important to understand that they relate to a somewhat different topic. In all the English cases (including *Brindle-v-Smith*) the English courts decided that, for the purposes of deciding whether an employee could claim for unfair dismissal, he had to show that he was actually employed for the minimum required statutory period and that if his employment was terminated before the expiry of such a period (even if wrongly) he could not bring such a claim. However, the courts went on to consider whether the injustice which this might cause in the case of wrongful termination by the employer could be alleviated by allowing the employee, in his claim for breach of contract for wrongful dismissal, to claim as damages for that wrongful dismissal what he would have received had he been able to bring a claim for unfair dismissal. That was the very solution suggested as a possibility by Lord Denning in the passage referred to at paragraph 16 above. 28. The English courts have held that this is not possible. 29. *Harper-v-Virgin Net Limited*

[2004] IRLR 390 is a decision of the English Court of Appeal. The facts of the case were that, under her contract of employment, Ms Harper was entitled to three months' notice of termination. She was summarily dismissed 33 days short of the date when she would have completed the one year period of employment qualifying her to bring a claim of unfair dismissal. An employment tribunal found that she had been wrongfully dismissed (i.e.

dismissed in breach of contract) as she should have been given the three months' notice. It therefore awarded her the normal damages of the wages she would have received during that three month period. The tribunal agreed that she had no statutory right not to be unfairly dismissed because her dismissal had in fact taken effect 33 days short of the required qualifying period needed for a claim for unfair dismissal to be open to her. However, the tribunal went on to award damages for the wrongful dismissal which represented the full amount she would have received for unfair dismissal, on the basis that she would have succeeded in such a claim had the employer not wrongfully prevented her from fulfilling the one year period by dismissing her on inadequate notice in breach of contract. 30. The Court of Appeal held that this was not permissible. A claim for unfair dismissal could only be brought where an employee had actually been employed for the requisite period. The period of employment came to an end on the "effective date of termination". That was defined in the 1996 Act in terms similar to the definition in the Law. 31. The Court of Appeal pointed out that, no doubt in response to the observations of Lord Denning referred to earlier, Parliament had amended the legislation concerning unfair dismissal so as to deem the effective date of termination to be extended in certain circumstances. The relevant legislation at the time of the decision was Section 97 the 1996 Act which provided:- "(2) Where (a) the contract of employment is terminated by the employer, and

- (b) the notice required by S86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by sub-section 1(1)), for the purposes of S108(1) ... the later date is the effective date of termination." As can be seen, this is similar in terms to Article 63(2) of our Law. Section 86 is the equivalent of our Article 56 and sets out the minimum statutory required periods of notice. 32. Lord Justice Brooke said this at paragraph 16 of his judgment:- "I agree with the judge that it would have been open to Parliament, when it reviewed the scheme following Lord Denning's observations in *Brindle*, to enable someone in Ms Harper's position to have a statutory right to claim compensation for unfair dismissal by crafting [the amending legislation] so that the EDT [effective date of termination] in the case of an employee whose contract of employment was terminated by no or inadequate notice would be the date on which a contractual period of notice (if given) would have expired. But Parliament decided not to adapt its statutory scheme in this way, and I do not consider it is open to the courts, through the machinery of an award of damages for wrongful dismissal, to re-write Parliament's scheme and to place a financial burden on employers which Parliament decided not to impose on them. In this context I accept Ms McCafferty's submission on behalf of the respondent to the effect that Ms Harper did not lose the right to right to claim compensation for unfair dismissal: she never had such a right because she fell short of the requirement of one year's continuous service which Parliament has described as the gateway to such a right." 33. Lord Justice Chadwick spoke in similar terms at paragraph 27:- "It is, I think, plain

- as Lord Justice Brooke has pointed out - that [the amending legislation] was Parliament's response to the observations of Lord Denning There are two features in that provision which are of significance in the present context. First, Parliament did not leave the matter to be dealt with in an action for wrongful dismissal. It dealt with the problem directly; by postponing the effective date of termination. Second, Parliament did not think it appropriate to have regard to the contractual period of notice. It postponed the effective date of termination by reference to the period of statutory notice. In particular it did not - as it easily could have done - postpone the effective date of termination to whichever should be the later of the expiry of the periods of contractual or statutory notice. That must be seen as a deliberate policy choice." 34. Finally he concluded at paragraphs 30 and 31:- "... for whatever reason, the democratic decision has been to deal with the problem which arises where a contract is determined summarily - in circumstances where determination on proper notice would have given a right to compensation for unfair dismissal
 - by postponing the effective date of termination to the end of the period of statutory notice and to disregard (in that context) the contractual period of notice.
31. In my view that legislative decision must be respected. Employment tribunals should not seek to circumvent that decision by awarding compensation for unfair dismissal in cases which are outside the statutory scheme by the pretence that what they are doing is to value the loss of a chance." 35. Mr Buckley also referred us to the *Wise Group-v-Mitchell* a decision of the Employment Appeal Tribunal under reference UKEAT/0693/04/ILB. This followed the decision in *Harper* and a convenient summary of the current position is to be found at paragraph 53:- "We derive from *Harper* an affirmation of the (perhaps self-evident) principle that a former employee will only be entitled to bring a claim for unfair dismissal against his former employer if he has first acquired a statutory right not to be unfairly dismissed under the ERA [Employment Rights Act]. If he is dismissed wrongfully, in breach of contract, before he has acquired such a right, he will have no statutory claim for unfair dismissal; and nor - even if under the terms of his contract he could only lawfully have been dismissed after he had completed one year's continuous service - will he be entitled to recover common law damages from his former employer for the loss of the chance of bringing an unfair dismissal claim. ..." 36. As I have pointed out, these cases are concerned with the slightly different point as to whether a person who cannot bring a claim for unfair dismissal (because he has not been employed for the qualifying period) can recover what he would otherwise have recovered on such a claim in an action for wrongful dismissal. However, it is clear from both cases that it was accepted without question that if, as a matter of fact, an employee has not been continuously employed for the relevant threshold period entitling him to bring a claim for unfair dismissal, he cannot do so. 37. In my judgment, the reasoning in the cases is persuasive. The appellant argues that the position in Jersey is different because S86 of the 1996 Act (which is the equivalent of our Article 56 and sets out the minimum statutory periods of notice) does not contain the equivalent of our Article 56(7) with its reference to the fact that a contract of employment may specify periods of notice longer than the minimum period specified in Article 53(1). However, as I have already

pointed out, I do not think that this assists him. Article 56(7) is completely unnecessary. The position in England is exactly the same as the position in Jersey, namely that the parties may, by their contract of employment, agree to a longer period of notice of termination than the statutory minimum. But a period of notice required under a contract of employment is not a period of notice required under Article 56. 38. For these reasons, I conclude that the Deputy Chairman was entirely correct in her reasoning and the decision of the Chairman in the case of Bator was erroneous. Even if he was not given the period of notice required by his contract - and Mr Buckley informed me that Helm disputes this - the appellant's employment came to an end on 5th October and that was his effective date of termination for the purposes of Article 73 (as elaborated at Article 63). He had therefore not been employed for the required period of 26 weeks. The Employment Tribunal accordingly correctly struck out his claim for unfair dismissal. 39. I reserved my decision at the conclusion of the hearing and both parties agreed at that time that, regardless of the outcome, there would be no order for costs. I therefore so order. Authorities Employment (Jersey) Law 2003. Bator-v-Bonnie Beverage Company Limited. Brindle-v-Smith [1972] IRLR 125. Industrial Relations Act 1971. Employment Rights Act 1996 . Harper-v-Virgin Net Limited

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