

JERSEY / JUDGMENT

Wolfson -v- Trident Trust Company Ltd [2014] JRC 228 (21 November 2014)

[2014] JRC 228

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judgment

the bailiff: 1. This is an appeal against the decision of the Jersey Employment Tribunal ("the Tribunal") dated 19 th November, 2013, in which it found that the appellant was unfairly dismissed by the respondent ("Trident" or "the company") (so that he was prima facie entitled to compensation of £49,000.12) but then reduced that figure by 100% on the grounds that it was just and equitable to do so. Factual background 2. I take the facts as found by the Tribunal. Trident is a company carrying on trust and company administration business. The appellant was employed by Trident from 1 st December, 2004, as its in-house legal counsel. 3. Following the economic crisis of 2008 Trident's business fell both in volume and value. Over the two years till 2010, staff who left were not replaced with the result that staff numbers reduced. In early 2011, Trident conducted a review of the work undertaken by the appellant and concluded that, because of the reduction in business, less legal work was being referred to him and his position was potentially redundant. Accordingly, Mr Williams, a director of the company, wrote to the appellant on 10 th May, 2011, informing him that his position was at risk of redundancy and a meeting with him would be arranged to discuss the situation. 4. Mr Williams and Mr Killian of the company met with the appellant on 12 th May. The Tribunal quoted in its judgment from a minute of that meeting as follows:- "As a part of this review, what has become apparent over the last 18 months is that [the appellant's] role and workload as [Trident's] in house lawyer has reduced. This has been a factor of the reduced client base, the decrease in new business and the overall slowdown in client activity due to the current extended poor economic conditions. It has now been established that economically it is not viable to maintain this position. Where [Trident] would require these services going forward they would be obtained on an outsourced third party basis as and when required. '...this meeting is to open an individual consultation process with [the appellant] and to advise that when [Trident] have concluded their considerations it may lead to [the appellant] being made redundant'. 'The criteria to establish the selection of the employee in this instance would not apply as [the appellant] was the only staff member holding this position'. '... [Trident] would like to receive [the appellant's] views on the proposed redundancy and any suggested alternatives including ways to avoid redundancy. They did not have to occur at this meeting and [the directors present] would meet with [the appellant] at any time' ... [Trident] did not have any current vacancies elsewhere within the company and we have not been able to

establish that [the appellant] has skills which would be transferrable to another department'. '[The appellant] indicated that he had commenced seeking alternative employment but the timing of securing an appointment may cause a problem. Of particular concern was that if he lost his J category licence prior to getting a new job then he may have to vacate his house. It was confirmed that [Trident] was not planning to take [any] immediate decisions on this matter and they would attempt to make the process as easy for [the appellant] as possible'. [It] was noted that all the parties should now consider matters further and another meeting can be called to continue discussions as required.'" 5. The following day the appellant requested a meeting with Mr Williams at which he (the appellant) was very distressed because he had realised that if he was made redundant he could lose his home, which was occupied under a J category housing licence. Although the directors had originally had in mind that the redundancy process for the appellant would be completed by the end of 2011, they agreed as a result of that meeting that any redundancy would not take place until April 2012, by which time the appellant and his family would have acquired housing qualifications so that his housing position would be secure. 6. Although the meeting of 12 th May had suggested that it was to open an individual consultation process with the appellant, there were no further meetings or discussions until 8 th December. The appellant applied for jobs during that time but was unsuccessful in obtaining any alternative employment. 7. On 8 th December, 2011, the appellant was invited to another meeting with Mr Williams and Mr Killian. The minutes of that meeting were as follows:- "[Mr Williams] advised that the reasons for considering the redundancy had not changed from the meeting on 12 th May, 2011 ... and [the appellant's] workload has further reduced and also his chargeable time recovery. Mr Williams noted that [Trident] have concluded their consultation and wished to proceed with making [the appellant] redundant and to set out the terms. Mr Williams confirmed that [Trident] would continue with their consideration of not terminating [the appellant's] employment until April 2012 so that he and his family could continue to reside in their property." The meeting went on to deal with the practical matters of the appellant's redundancy and these were subsequently confirmed in a letter dated 22 nd December, 2011, which also contained a note of the appellant's right of appeal against his selection for redundancy to another director of Trident who had not been directly involved in the process of the appellant's redundancy. 8. The appellant requested a further meeting with the company which was held on 16 th December, 2011. At that meeting he discussed the work load of other in-house counsel engaged by Trident's group of companies and suggested a similar utilisation of his skills but all of these suggestions were turned down on the grounds that it was not economically viable to maintain his position. However, the company did agree to enquire whether there were any positions within its group of companies which might be of interest to the appellant. Subsequent enquiries were made and it was confirmed to the appellant that no such opportunities existed in the group at that time due to the current economic climate. 9. The appellant was unfortunately not able to secure new employment and on 28 th March, 2012, he stated that he wished to appeal against his selection for redundancy. The appeal was heard by Mr Bester. He met with the appellant in a board room in London on 3 rd April, 2012. Mr Bester did not require a pack of documents briefing him about the background to the appeal as he believed he had acquired all the knowledge he needed about the situation through his general management discussions with Mr Williams over the preceding months.

There appeared to be no correspondence about the appeal and no minutes were kept of the meeting. Mr Bester told the Tribunal that he had no 'enthusiasm' for making the appellant redundant and that he wanted to encourage an alternative plan, but he saw no evidence of engagement by the appellant of what to do in the situation. Mr Bester did not issue a letter to the appellant confirming the outcome of the appeal. Mr Bester telephoned Mr Williams to say that, in the absence of a suitably persuasive argument that Trident would see a substantial increase in revenues from work of a legal or para-legal nature, the redundancy would proceed. It appears that the appellant was never formally told the result of the appeal. 10. However, the appellant met with Mr Williams and Mr Killian again on 26 th April, 2012. At that meeting the appellant was able to show that the amount of his chargeable time was increasing and that in the first and second quarters of 2012 he had covered his target for that part of the year. At that meeting, the company agreed to delay the redundancy date to 31 st July, 2012, in order to give the appellant more time to find a new job. This was subsequently confirmed by letter dated 27 th April, 2012. No further extension was granted and accordingly the appellant's employment was terminated on 31 st July, 2012. The company had not replaced the appellant and stated to the Tribunal that it had made significant savings in costs as a result of having made his post redundant and instructing external law firms as required. The Tribunal's decision 11. The Tribunal accepted that the reason for the dismissal of the appellant was that the requirement for his post as in-house counsel had ceased and therefore the reason for his dismissal was one of redundancy. However, the Tribunal pointed out that, even where a dismissal was for reasons of redundancy, the process followed had to be fair and it referred to *Goguelin v Stuart Banks (Carpenters and Builders) Limited* JET

[2006] 2502037/06 which laid down that there are four principles of fairness which must always be considered in situations of redundancy:- (i) the employer's duty to consult with the employee regarding the proposed redundancy; (ii) the employer's duty to warn an employee of the possibility of redundancy; (iii) the employer's duty to establish fair criteria for the selection of an employee for redundancy; and (iv) the employer's duty to explore alternatives to redundancy with the employee. 12. The Tribunal found that there was no difficulty over (ii) and (iii). Trident had warned the appellant of the possibility of redundancy and he was in a pool of one for redundancy purposes. The Tribunal was also satisfied in connection with (iv) that there were no alternatives for the appellant within Trident as it was not hiring staff at that time and his position was unique. The Tribunal also accepted that there was no role available for the appellant within Trident's group of companies. 13. The Tribunal's key finding was that Trident had failed to consult with the appellant regarding the proposed redundancy as required at (i). Although at the meeting on 12 th May, 2011, he had been informed that this was the beginning of a consultation process, it was clear that the company felt that it was for the appellant to revert to it with any ideas to avoid redundancy. The Tribunal acknowledged that the appellant was a member of the senior management team and had access to all the information he required to formulate a report on the sustainability of his office but it considered that it was insufficient for there to be no meeting to discuss the topic (other than that on 13 th

May which was simply to discuss the appellant's housing qualifications) between 12 th May and 8 th December, 2011, at which time he was told that his position was being made redundant. There should have been further consultation and, if nothing was received from the appellant, the company had an obligation to ask him about his progress and to take the opportunity of discussing any alternatives to his redundancy such as reduced hours or even a cut in pay. The Tribunal was understanding of why the company had not done this because the meeting of 13 th May had been a difficult one by reason of the appellant's distress over the loss of his housing position and there was also a feeling that the directors and the appellant were in regular contact because the appellant held such a senior position and he could have raised any issues which he wished to raise at any time. The Tribunal was also critical of the appeal process in that there was no formality to it, no minutes were made and there was even uncertainty on the appellant's part as to the outcome. Putting these matters together, the Tribunal held that, although for understandable reasons, Trident had not followed an appropriately fair process and accordingly the appellant had been unfairly dismissed. This meant that he was prima facie entitled to compensation as laid down in the Employment (Awards)(Jersey) Order 2009 ("the Order"). Under the provisions of the Order, given the length of his employment, he was entitled to receive 26 weeks' pay by way of compensation for unfair dismissal. This amounted to £49,000.¹² 14. The Tribunal then went on to consider whether it should reduce the award in accordance with Article 77F(3) of the Employment (Jersey) Law 2003 ("the Law") having regard in particular to paragraphs (5) and (10) of Article 77F. The relevant provisions are as follows:- "77F Compensation awards ...

- (3) An award under Article 77(2) or Article 77E(3)(a) may be reduced by such amount as the Tribunal considers just and equitable having regard to any of the circumstances described in paragraphs (4), (5), (7), (8), (9) and (10).
- (5) The Tribunal considers that any conduct of the complainant before dismissal (or, where the dismissal was with notice, before the notice was given) that contributed directly to the dismissal was such that reduction of the award is just and equitable. ...
- (10) Any circumstances that the Tribunal considers would be just and equitable to take into account." 15. Having considered these provisions in relation to the facts of the case, the Tribunal held that it would be just and equitable to reduce the award by 100% so that the appellant in fact received no award of compensation. 16. The Tribunal said that paragraphs (5) and (10) of Article 77F both applied. Although it does not specifically say so, it would appear that paragraph 35 of the decision is dealing with the position under Article 77F(5). The Tribunal found that Trident was genuine in its request to the appellant made at the original meeting on 12 th May, 2011, that it would like to receive the appellant's views on any possible ways of avoiding redundancy and that had it received a viable proposition, it would have reconsidered the decision to make the role redundant. The Tribunal pointed out that the appellant was a senior lawyer and it was well within his capacity to prepare a report dealing with this aspect but he had done no such thing until after the appeal process. It is

implicit from paragraph 35 of its decision that the Tribunal found that the appellant had thereby 'contributed directly to the dismissal such that it would be just and equitable to make a reduction of the award'. 17. The second aspect related to Article 77F(10). The Tribunal was satisfied that the company had acted in a very generous and kind way towards the appellant. The moment the housing position was drawn to Trident's attention, it agreed to extend by four months the date for termination of the employment (i.e. from 31 st December, 2011, as was originally envisaged to 30 th April, 2012). It agreed then to delay the termination date by a further three months so that the appellant would have more time to find employment. The Tribunal thus found that, due to the sensitive consideration given to the appellant's situation by Trident, he had stayed in work for a further 30 weeks (1 st January, 2012, to 31 st July, 2012,) at a time when the post was redundant. The Tribunal calculated the salary received by the appellant during this 30 week period as being £56,538.60, which was in excess of the amount awarded to him by way of unfair dismissal and was a sum which it held would have been of great benefit to the appellant at a time when the alternative was for him to have lost everything in a difficult market for re-employment. 18. The Tribunal did not articulate what reduction it was making in respect of each of paragraphs (5) and (10) respectively but concluded that overall it was just and equitable for the award to be reduced by 100%. This appeal 19. Article 94 of the Law provides that an appeal lies to this Court from a decision of the Tribunal on a question of law with the leave of the Tribunal or this Court. 20. Advocate Staal took the preliminary point that the appellant had not sought leave to appeal from either the Tribunal or this Court prior to the hearing. That is correct and in some circumstances that might be fatal. However, given that the appellant was unrepresented, and given my view from a reading of the papers that the appellant had at least an arguable case on the merits, I granted leave to appeal at the outset of the hearing. 21. An appeal only lies on a question of law. In *Voisin v Brown*

[2007] JLR 141 at paras 18 and 19 this Court held that the Court only had power to interfere with the Tribunal's decision if it could be shown (a) that the Tribunal misdirected itself in law or misunderstood the law or misapplied the law; or

(b) that there was no evidence to support a particular conclusion or finding of fact; or (c) that the decision was either perverse in that it was one which no reasonable tribunal, directing itself properly on the law, could have reached, or alternatively, it was one which was obviously wrong. The Court added there was some disagreement as to whether the ground of being 'obviously wrong' was sufficient to constitute an error of law but did not need to decide it in that case and I similarly do not need to decide it today. Grounds of appeal 22. The appellant sought to appeal on two major grounds. The first was that, having found that he had been unfairly dismissed, the Tribunal did not consider the remedy of a direction that Trident should continue to employ the appellant pursuant to Article 77A of the Law. However, shortly before the hearing, the appellant (sensibly if I may say so) abandoned that ground of appeal and I say no more about it. The second major ground was that the Tribunal erred in law by reducing the compensation to zero in that it either misunderstood the law or acted perversely. 23. In his skeleton and during the argument before us, the appellant

elaborated on this second ground and it too conveniently divides into two parts. The first relates to the finding by the Tribunal that the appellant had contributed directly to his dismissal because he had not participated in the consultation process by coming forward with any alternatives to his redundancy. The appellant submits that, given that his dismissal was for redundancy and that there was no evidence that there were in fact any viable alternatives, it could not properly be said that his conduct had directly contributed to his dismissal. Secondly, he submitted that the fact that Trident extended his employment by some six months beyond that originally envisaged should not have reduced his award. The fact is that during that time he was working in exchange for his salary. The employer benefitted from the product of his work and it was therefore not permissible to make a reduction to reflect that. Even if some reduction was permissible the extent of it on this occasion was perverse. The reduction of 100% should be reserved for the most egregious cases. Discussion

- (i) The Article 77F(5) argument 24. As already stated, Article 77F(5) provides that the Tribunal may reduce an award to the extent that it thinks just and equitable where "... any conduct of the complainant before dismissal (or, where the dismissal was with notice, before the notice was given) .. contributed directly to the dismissal ..." 25. This is a provision which is clearly intended to cover the classic situation where an employer dismisses an employee for misconduct but that dismissal is subsequently found to be unfair either because the misconduct was not serious enough to justify dismissal or because there were procedural flaws in the dismissal process which rendered it unfair. That will of course not be the only circumstance in which the provision might apply but nevertheless it can only apply if the conduct of the employee contributed directly to the dismissal. 26. I do not see how that can apply in this case. The appellant was dismissed because his position had become redundant. That was a decision made by Trident on entirely economic grounds and the conduct of the appellant did not contribute in any way to that decision. It is accepted that he was an entirely competent and trustworthy employee. 27. It was held (implicitly) by the Tribunal that he contributed to his dismissal because he did not participate in the consultation process by coming up with any viable alternative to his redundancy. But there is no evidence that there was any such viable alternative. Trident has not suggested that there was and indeed its commercial decision was that there was no alternative, with the consequence that it had to proceed with the dismissal. If there was no alternative, the appellant can hardly be said to have contributed directly to his dismissal by not coming up with something which did not exist. 28. On the facts of this case, that is sufficient to lead to the conclusion that the Tribunal erred in law in concluding that a reduction could be made on this ground. However, even if, after the event someone comes up with a suggestion which might have been a viable alternative, I do not see that this should be laid at the employee's door. It is the employer who has decided that a position is redundant and that there are no alternatives and it cannot in my judgment be said that an employee contributes directly to his own dismissal merely because he does not think of an alternative to redundancy. This is an entirely different situation from that envisaged in paragraph (5) which is where some form

of misconduct on the part of the employee renders it just and equitable that he should not receive any or full compensation. (ii) The Article 77F(10) ground 29. I accept Advocate Staal's argument that paragraph (10) is a provision of general effect. The preceding paragraphs of Article 77F list various specific circumstances where the Tribunal may reduce an award and paragraph 10 is a sweep-up provision which enables it to take into account any other circumstances which would render it just and equitable to reduce the award. 30. In this case the Tribunal clearly formed the view that, although Trident had fallen down on the process of consultation by not holding any meetings between 12 th May, 2011, and 8 th December, 2011, and having an inadequate appeal process, the company had otherwise behaved in a very generous and considerate way towards the appellant. Thus it had immediately agreed to defer the termination of employment from the end of December 2011 to 30 th April, 2012, in order to allow the appellant to secure his housing position in Jersey and had then agreed a further three months extension because of the difficulty he was having in finding alternative employment. Nevertheless, the mere fact that an employer acts in a kind and considerate way does not justify a reduction in the award if the Tribunal has found that the employer has nevertheless unfairly dismissed the employee. In this case, the Tribunal reached a decision that, notwithstanding the consideration which Trident had shown, it had fallen down procedurally. That was a matter for the Tribunal and no appeal has been brought against its decision in that respect. The finding of the Tribunal entitles the employee to an award in accordance with the Order unless it is just and equitable to reduce it. 31. In this case, the Tribunal took into account that Trident extended the employment for 30 weeks beyond that which it had originally envisaged and during this time it paid the appellant a salary of some £56,500. That exceeded the compensation payable under the award. 32. There is no doubt that, if an employer makes an ex gratia payment to an employee, that can be taken into account so as to reduce an award for unfair dismissal. There is no case dealing with this in Jersey but the position seems to be well established in England (see for example *MBS v Calo*

[1983] IRLR 189 in which an employee who was entitled to one month's notice on termination was paid three months' salary on termination by way of ex gratia payment; the additional two months was set off against the compensatory award for unfair dismissal). See also *Rushton v Harcross Timber and Buildings Supplies Limited*

[1993] ICR 230 where the Employment Appeal Tribunal emphasised that it was desirable to encourage generosity upon dismissal and that this would not be achieved if ex gratia payments were not taken into account and capable of being set off against compensatory awards for unfair dismissal. 33. In my judgment, that makes good sense. If an employer makes an ex gratia payment to an employee i.e. a payment which he is not obliged legally to pay, that is something which is capable of reducing an award for an unfair dismissal because it would be just and equitable to do so. 34. However, that is not the position here. There was no ex gratia payment as such. The payment of salary for the seven month period after 31 st December, 2012, was because the appellant continued to be employed. He was working and earning money for his employer. There can certainly therefore be no direct read-across from the salary paid to the appellant to the compensation award so that

the salary is set off against the compensatory award. 35. Nevertheless, it seems to me that it would be open to the Tribunal to make some reduction in the particular circumstances of this case. The Tribunal appears to have accepted the evidence on behalf of Trident that it had made significant savings in costs by making the appellant's post redundant and instructing external law firms as required. That is hardly surprising as it appears to have been the commercial objective underlying the decision to declare the appellant's post redundant. It follows that there was a cost to Trident in extending the appellant's employment (in order to help his housing position and thereafter to help him find employment) in circumstances where it was under no legal obligation to do so. The Tribunal received no evidence on the level of this cost and there would have to be some form of calculation undertaken. The cost certainly could not comprise the entire salary because the evidence showed that the appellant, particularly in 2012, was meeting targets for chargeable time and therefore Trident would have received fees from clients in respect of the work undertaken by the appellant. The comparison of these two figures would have produced a net cost to Trident of continuing to employ the appellant for that period. This would have to be compared with, for example, how much they paid external lawyers in the following six months to see the level of extra cost incurred by Trident as a result of keeping the appellant on for the extra 30 weeks. 36. This would of course only give an approximate indication of what the cost to Trident was of keeping on the appellant. It is not the same as an *ex gratia* payment which produces a direct non-contractual benefit to an employee. Nevertheless, it seems to me that, given the wide nature of the just and equitable jurisdiction, it might be open to a Tribunal to make some reduction to reflect the voluntary benefit conferred by Trident in extending a post which had been declared redundant, although the benefit cannot be measured by direct reference to the appellant's salary because he was earning that salary by his work. However, it seems to me that it could properly be said that there was an *ex-gratia* element by reference to that portion of the salary which was an extra (and on this analysis unnecessary) cost. 37. However, given my finding that no deduction was permissible under Article 77F(5), it would be perverse of any Tribunal to extinguish the award altogether to reflect such an unspecific and limited benefit as that which I have described above. Any reduction would have to be modest. Summary 38. It is clear from its decision that the Tribunal felt that, apart from its rather technical failure to follow through on the consultation process and its unsatisfactory appeal process, Trident had behaved as a fair and compassionate employer (to quote the headnote of the decision). One suspects that the Tribunal felt it would be rather harsh for an employer who had behaved in such a manner to be faced with a substantial award for rather technical failures in process. However, that was the necessary consequence of the Tribunal's decision that the appellant had been unfairly dismissed. Once that finding was made, the Tribunal could only make deductions from the award which could properly be made on the grounds that it was just and equitable to do so. 39. For the reasons I have given, the Tribunal was not entitled to make any deduction under Article 77F(5) and any deduction under Article 77F(10) - if made at all - could only be modest. It follows that a deduction of 100% was wrong in law on the basis that the deduction under Article 77F(5)

was erroneous and a 100% deduction under Article 77F(10) was perverse. 40. I therefore allow the appeal and remit the matter to the Tribunal to decide upon the award of compensation in the light of my ruling. *Authorities Goguelin v Stuart Banks (Carpenters and Builders) Limited* JET [2006] 2502037/06. *Employment (Awards)(Jersey) Order 2009*. *Employment (Jersey) Law 2003*. *Voisin v Brown*

[2007] JLR 141 . *MBS v Calo* [1983] IRLR 189. *Rushton v Harcross Timber and Buildings Supplies Limited*

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