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EMPLOYMENT TRIBUNALS IN THE CHANNEL ISLANDS—TIME FOR A CLOSER LOOK?

Vicky Milner and Jessica Roland

The Employment (Jersey) Law 2003 came into force in 2005, some six years behind Guernsey's equivalent regime. This article considers a number of decisions by the Employment Tribunal and the Royal Court and asks whether an independent review of Jersey's employment law and systems could be helpful before further legislation is introduced, as has happened in Guernsey. The article also considers the Guernsey model and how it differs from its counterpart in Jersey.

Introduction

1 In the First Annual Review of the Jersey Employment Tribunal, 15 November 2006 (the "Jersey Tribunal") the then Chair described the nature of hearings before the Jersey Tribunal as "similar to that of courts of law, but less formal and less circumscribed by procedural rules".

2 The intention has always been that the process should be cheap, quick and accessible,[1] without the rigidity and complexity of legal proceedings in other *fora*. However the lack of formal process has at times raised its own conundrums, a prime example being the lack of a prescribed route for appealing decisions of the Jersey Tribunal to the Royal Court of Jersey, burdening potential appellants with the cost of investigating and developing their own appeal procedures. This is now being remedied by the Judicial Greffe, which hopes to issue an appeal procedure (and other Jersey Tribunal procedures) in 2013, but it comes late in the day given that the Employment (Jersey) Law 2003 ("the EJL") came into force in 2005.

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[1] See the "Overriding objective", at Regulation 1 of the Employment Tribunal Regulations 2005.

3 The EJL provides well-known and widely-used remedies. Between 1 July 2005, when the EJL came into force, and the beginning of 2012, the Jersey Tribunal received more than 1,100 JET1 claim forms, lodged by employees seeking a remedy against an employer or former employer. Given the Island's 2011 population of 98,000, with a working-age population at that time of approximately 65,000, the number of claims lodged seems high. During the same period there were only three published appeals of decisions from the Jersey Tribunal to the Royal Court.[2] These cases have been important in highlighting strengths and weaknesses of the system, including by confirming where the right approach has been taken by the Jersey Tribunal, as in *Jones v RBSI*. The scarcity of appeals may be attributable to the comparatively low value of Jersey Tribunal claims, the heavy financial burden of such litigation and the inability to recover costs.

4 The States of Jersey are under pressure from within and outside Jersey to implement additional employment legislation (such as maternity rights and anti-discrimination measures). This article considers a number of decisions of the Jersey Tribunal and asks whether an independent review could be helpful before further employment laws are introduced. It also looks at the Guernsey Tribunal system and whether it can offer any guidance for the younger Jersey model.

The jurisdiction of the Jersey Tribunal in relation to criminal offences

5 The purpose of the EJL is to—

> "amend and consolidate enactments relating to employers' obligations to specify terms of employment, the payment of wages, and the notice required to terminate contracts of employment; to provide for compulsory minimum periods of leave and rest time for employees; to provide employees with rights not to be unfairly dismissed and to be paid a minimum wage; and to repeal and replace enactments for the establishment and jurisdiction of Tribunals to hear and determine employment disputes; and for incidental and connected purposes."[3]

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[2] *Voisin v Brown* [2008]JRC047; *Jones v RBSI* [2007]JRC125; C.*I. Fire & Security Ltd v Browning* [2008]JRC163. Now see also *Hughes v Helm Trust Co Ltd* [2012]JRC168.

[3] Headnote to the Law.

6 Although the EJL is primarily concerned with rights and obligations as a matter of civil law, it also created a number of criminal offences.

7 On 27 October 2005, the Jersey Tribunal heard its first constructive dismissal case, *Huet v Harbour View*.[4] In that case it also dealt with an offence under Part 2 of the EJL, which deals with "Employment Particulars". Part 2 requires an employer to provide an employee with a legally compliant statement of employment terms (a "Statement"). Article 3 deals with information to be included in a Statement while art 4 deals with changes to Statements. Under art 9(1) of the EJL, an employer who fails to comply with the requirements of arts 3 and 4 "shall be guilty of an offence and liable to a fine of level 4 on the standard scale."

8 The Jersey Tribunal held—

> "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 . . . It should be noted that the Tribunal is empowered to levy a fine of up to £5,000 for this offence."

9 Was the Jersey Tribunal so empowered? The Jersey Tribunal was created specifically to deal with employment disputes: "individual employment disputes" under art 86 of the EJL and also "collective employment disputes",[5] as defined by the Employment Relations (Jersey) Law 2007 ("ERL"). It has a civil jurisdiction to address matters such as wrongful dismissal, statutory rights such as protection from unfair dismissal, and certain trade union matters under the ERL. It is not a criminal court.

CI Fire & Security v Browning[6]

10 The asserted power to impose fines was challenged before the Royal Court of Jersey in 2008, following an appeal from the Jersey Tribunal. Browning was employed by CI Fire & Security Ltd as an alarm engineer until his dismissal in 2006. He brought a claim for unfair dismissal in the Jersey Tribunal, which claim succeeded. In addition to awarding compensation of £8,640 in relation to the unfair dismissal, the employer was ordered to pay a fine of £250 for a "[f]ailure to notify change in terms of employment" under art 4 of the EJL. The employer initially sought to challenge both findings of the

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[4] Case Number: 019010/05, 27 October 2005.
[5] *Maindonald v States Employment Bd.*
[6] *Ibid.*

Jersey Tribunal, although ultimately only the decision as to the fine was pursued to appeal.

11 Following *Att Gen v Devonshire Hotels Ltd*,[7] the Commissioner noted that "The exclusive jurisdiction of the Attorney General over the prosecution of offences in Jersey is clearly established". Any change to the common law of the Island, in this regard, could only be made by a "clear, definite and positive enactment" and not by ambiguous legislation.

12 In light of the evidence presented to it, the court held that—

> "there can be no doubt that the Tribunal has no power to prosecute, convict and fine offenders for offences created under the Law . . . [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 . . ."

13 The fine paid by the employer was ordered to be repaid by Social Security to the employer. Subsequently *all* fines that had been imposed on employers by the Jersey Tribunal were repaid by the States of Jersey.[8]

14 In her 2011/2012 annual report, the Chair of the Jersey Tribunal noted—

> "Following a decision in *CI Fire & Security v Browning* (2008), it has not been possible for the Tribunal to impose fines upon employers who fail to provide their employees with contracts of employment or wage slips. The Tribunal is very concerned that these important and fundamental principles of employment law should carry no sanction . . . It is hoped that the Minister for Social Security will take appropriate action to address this."

15 This seems a surprising statement. There is an existing sanction for breaches of the EJL which carry criminal penalties: prosecution through the courts in the normal way. Social Security officers already carry out a regulatory function under the EJL by visiting businesses and requiring disclosure of employment contracts. There is no reason why Social Security officers should not refer matters to the Attorney General, just as civil servants enforce other laws and as would appear to have been envisaged by P.55/2003[9]—

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[7] 1987–88 JLR 577.

[8] *Jersey Evening Post*, 2 October 2008.

[9] P.55/2003 was the EJL proposition or *projet.*

> "the Employment and Social Security Committee will be empowered to appoint Enforcement Officers to ensure compliance with the legislation where appropriate . . . The Committee believes that this approach has been seen to work well under both the Social Security and Health and Safety legislation."

The jurisdiction of the Jersey Tribunal in relation to persons other than employees

16 A different jurisdictional issue arose in the *Sutcliffe* case.[10] Mr Sutcliffe worked for PBS Communications Ltd ("PBS") during 2008. Subsequently he lodged claims for a range of matters including notice pay, outstanding fees, holiday pay and accommodation costs. An interim hearing was convened as PBS' response to the claim argued that Sutcliffe was an independent contractor and not an employee. During the interim hearing the Tribunal considered evidence on a range of matters relevant to employment status, including the following—

- Mr Sutcliffe raised an invoice for his earnings at the end of each month;
- he was not registered for ITIS or Social Security purposes by the respondent "because it considered him to be acting as a consultant and thus liable for his own contributions";
- the "managerial" tone of an e-mail from Mr Sutcliffe to Mr Rylance, a senior PBS employee;
- Mr Sutcliffe was treated in the same way as other consultants who were engaged by PBS.

17 On the basis of all of the evidence, not taking a regimented "'checklist' approach" but considering the real nature of the parties' relationship, the Jersey Tribunal came to the conclusion that Sutcliffe was an independent contractor and not an employee. Subsequently the Tribunal held a directions hearing at which it adjudicated upon a range of matters and ordered the matter to be set down for a final hearing "so that the last remaining issues . . . for notice pay and the respondent's counterclaim, can be heard by the Tribunal".

18 However, as noted above, the Tribunal has a statutory jurisdiction. It is not empowered to deal with general contractual disputes, other than employer-employee matters falling within the scope of art 86. The maxims "*la cour est toute puissante*" and "the court is master of its

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[10] *Sutcliffe v PBS Communications Ltd* 1909-109/08, decisions of 29 January 2009 and 5 March 2009.

own procedure"[11] may be appropriate in relation to the inherent jurisdiction of the Royal Court but are surely inapplicable in the context of statutory bodies. One has to ask: on what basis did the Jersey Tribunal form the view that it had jurisdiction to deal with the *Sutcliffe* case, once it had concluded that there was no employment relationship?

19 In this regard, the Tribunal must of course have an opportunity to address whether or not it has jurisdiction in a particular matter before any decision can be taken. In a 2012 case,[12] the respondent, Mr Pearce, declined to lodge a response to the claim against him, on the basis that he had never been the employer of the individual in question (Miss Garcia). An interim hearing was held by the Tribunal at which the respondent did not attend. Evidence provided at the hearing by Miss Garcia included a letter from the respondent in which he wrote to Jersey's Social Security Department saying—

> ". . . I have offered employment to Miss Garcia on a full time basis commencing on the 23rd May 2011 . . ."

20 The Tribunal held that Mr Pearce was Miss Garcia's former employer and declined an application for leave to appeal. That application was renewed before the Royal Court, which noted that, inter alia—

> "Mr Pearce challenged the jurisdiction of the Tribunal on a number of grounds including that he was not 'a member of the Island of Jersey and its dependencies' and therefore he was not subject to its rules and regulations. To become subject to such rules and regulations required, he said, a voluntary act on his part. He told me it was for this reason that he had not attended the hearings as to do so would have given the Tribunal jurisdiction over him. He had attended the application for leave as 'a child of God' whose jurisdiction was the only one he recognised. At the same time he confirmed that he lived in Jersey. "

21 Upholding the Jersey Tribunal's decision to refuse leave to appeal, given that the appeal had no prospect of success, the Royal Court noted in passing art 95 of the EJL. This provides that an offence has been committed where a statement is made in proceedings before the Tribunal which is "false, misleading or deceptive in a material particular". The judgment invited the Tribunal to consider whether the matter should be referred to the Attorney General "for him to

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[11] *Finance & Economics Cttee v Bastion Offshore Trust Co Ltd* 1994 JLR 370.

[12] *In re Pearce* [2012]JRC217.

investigate whether an offence has been committed by Mr Pearce"—again making the point that criminal matters are ultimately ones for the Attorney General.

The Guernsey perspective

The development of legislation

22 The Employment Protection (Guernsey) Law 1998 (the "EPGL") has been in force since January 1999 and was the subject of a substantial review in 2004. Introduced in the hope that it would provide for "swift, efficient, inexpensive, non-adversarial and non-legalistic"[13] resolutions when it was approved by the States of Guernsey in 1995, these principles were restated when the States of Guernsey looked again at the EPGL in 2004.[14]

23 In 2002, the then Board of Industry commissioned Mr Peter Syson (an independent employment law specialist) to review the EPGL which had been in force for just over 3 years. His report of October 2002, along with the consultation after it was published, formed the basis of the recommendations that were subsequently put forward by the Commerce and Employment Department (who by 2004 had replaced the Board of Industry as the Department with responsibility for employment relations).

24 Generally, the changes introduced as a consequence of the review increased the level of protection for employees with, for example, the eligibility criteria being reduced from two to one year of employment for most claims. Interestingly, this is the reverse of developments in England, where in April 2012 the UK government increased the eligibility period from one to two years of employment. It also heralded the introduction of the sex discrimination law, and the one-person adjudicator system was replaced by the three-person Employment and Discrimination Tribunal. However, unlike the system Jersey was to adopt subsequently, it has remained, despite representations by various bodies, an entirely lay tribunal.

25 One of the report's proposals that was resisted by the Commerce and Employment Department when it put its recommendations before the States, was for the Tribunal to deal with wrongful dismissal claims up to £25,000. The Commerce and Employment Department was unpersuaded that the Guernsey Tribunal with its lay members should go beyond the statute into areas of pure contract. Thus contractual claims were left outside of the jurisdiction of the Tribunal and,

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[13] Article XIV to *Billet d'État* XI of 1995, p 500.
[14] Article XII to *Billet d'État* XVIII of 2004, p 1964.

depending on quantum, to the jurisdiction of the Petty Debts Court (at the time with a jurisdictional limit of £2,500, now £10,000) or the Royal Court.

26 Another proposal which was rejected was for the compensatory award to be changed to a more English approach so that—

> "the principle should be adopted of a basic award on fixed criteria, supplemented, where appropriate, by a compensatory award in which contributory fault would be taken into account. Mainland practice should be adapted in as simple a form as possible to the Guernsey situation."[15]

27 This was rejected as unnecessarily complex in favour of increasing the base award from 3 to 6 months, with the facility for the Tribunal to reduce the award. As observed by Collas, Deputy Bailiff (as he then was), in the case of *Good v Credit Suisse Guernsey*:[16] "The States' objective was to retain the simplicity of the Tribunal procedure without adding complexity to it."

28 Unlike its Jersey equivalent, the States of Guernsey has generally resisted interfering with the EPGL along the way and other than the changes that were introduced in 2005 after the review, and some other minor changes that were introduced when the Sunday trading law came in 2002, there have been no substantive amendments. However, of note is that following the enactment of the Minimum Wage (Guernsey) Law 2009, the Tribunal now has jurisdiction over such claims.

The treatment of the decisions of the Tribunal in the appellate courts

29 After an initial flurry, with appeals limited to questions of law, relatively few decisions have been appealed. If one looks at the views of the appellate courts on the decisions of the Tribunal as in indicator of the efficacy or otherwise of the decision-making body, then one must conclude that the Guernsey Tribunal system has been a success story.

30 In the first appeal against a decision of the Tribunal in *Milford v Seaward Marine Ltd*,[17] Carey, Bailiff expressed most robustly his concern about the proposals underpinning the EPGL stating—

> "With all respect to the then members of the Board of Industry I consider it at best naïve and at worst grossly misleading to

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[15] *Billet d'État* XVIII of 2004, p 1968.
[16] *Good v Credit Suisse* GRC 27/2009.
[17] *Milford v Seaward Marine Ltd* 1 December 2000, unreported.

> suggest that disputes between employer and employee can generally be disposed of in a non-adversarial manner."

31 However, overall, when considering appeals, the Royal Court has been at pains to distinguish the Tribunal from a court and has cautioned against an "overly critical or analytical"[18] approach to the judgments of the Tribunal.

32 On only one occasion has the Court of Appeal had to consider leave to appeal from the Royal Court, and the distinction of the forum from a court was unequivocal. Southwell, JA sitting as a single judge of the Court of Appeal held—

> "It is apparent from the terms of the 1998 Law that the adjudication procedure is not intended to mirror that of the Royal Court, and is intended to be less formal, less legalistic and speedier. The complainant's rights are to be determined with the reasonable speed and efficiency which is consistent with giving each party a reasonable opportunity to be heard by the adjudicator."[19]

33 This has meant that the Royal Court has given the Tribunal considerable leeway when it has considered its decisions. For example, even where the Tribunal's line of reasoning has given the court some difficulty in understanding its judgment, the court has been prepared to interpret the Tribunal's decision on the assumption that:

> "the Tribunal knew how to perform its functions and what matters to take into account, unless the contrary can be demonstrated. What matters is whether the Tribunal has correctly understood the law, addressed the right questions and reached its decision by permissible means."[20]

34 In *Burford v Flybe*,[21] the then Deputy Bailiff stated—

> "In my opinion, the right of appeal on a point of law conferred by the 1998 Law must be read in the spirit of the legislation. I do not think it would be right to allow a party who has succeeded before the Tribunal to pursue an appeal on a point of law simply because he or she alleges that the Tribunal reached the right decision but for the wrong legal reasons."

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[18] *AJ Troalic & Sons v Kinsey* GRC 19/2010.
[19] Judgment of Southwell, JA as a single judge of Guernsey Court of Appeal, 18 February 2002.
[20] *Burford v Flybe Ltd* GRC 30/2009.
[21] *Burford v Flybe Ltd*, *ibid.*

35 The Guernsey system is a deliberately straightforward system, which has lost sight neither of the original ethos of the EPGL, despite the frequent presence of lawyers for both sides, nor the initial concerns of the judiciary. The issues that have troubled the Jersey system have perhaps not been as evident in Guernsey because of the more limited nature of the Tribunal's powers. However, with the States of Guernsey currently promising to bring into force in 2014 significant rights to maternity and paternity allowances, and the prospect of disability discrimination laws in the next few years, whether these principles can remain realistic is debatable.

Conclusion

36 Unlike Guernsey, the powers of the Jersey Tribunal are considerable. Its financial remit was significantly extended by the Employment (Awards) (Amendment) (Jersey) Order 2011 and is now effectively uncapped. The paucity of appeals to the Royal Court means that the Jersey Tribunal operates with minimal supervision or judicial guidance.

37 It is now more than 7 years since the EJL came into force. Since that time there have been 7 amendments to the EJL, as well as changes to subordinate legislation. As Stephanie Nicolle, QC might have said: "Though [statutory employment protection came late to Jersey], when it came it came in an overpowering wave".[22]

38 Laws to provide new maternity/family friendly rights and protection from discrimination are on the agenda of the Social Security Department. While arguably such measures are overdue, Jersey is in the grip of a recession with the highest rates of unemployment ever seen on these shores. There are ongoing discussions between different States of Jersey departments and industry associations about how the Island can best achieve a reasonable balance between the rights of individuals and the needs of businesses. In autumn 2012, the local branch of the Chartered Institute of Personnel & Development conducted a survey in which it asked: "Do you believe the employment law needs to be reviewed prior to any further legislation being introduced?" 82% of the 220 respondees said "yes". As the Social Security Minister has commented (with more than a hint of "turkeys don't vote for Christmas"), perhaps this response was inevitable given that the majority of respondents are likely to have been employers. Nonetheless, the number of responses to the survey

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[22] Nicolle *The Origin and Development of Jersey Law*, 5th ed., 2009, at para 15.24, on tort—"Though English influence may have come late to the law of tort, when it came it came in an overpowering wave."

was higher than for most Jersey employment consultations and the fact that the voices are those of one sector of the community does not justify ignoring them. In any event, it would seem common sense to review the systems in place, as happened in Guernsey, before introducing substantial new legislation, not least given some of the jurisdictional issues that have arisen to date. Among other things, a more accessible appeals process would encourage scrutiny of the current system, assisting in the development of a robust body of case law.

Vicky Milner is an advocate with Bedell Cristin, and Jessica Roland is an advocate with Mourant Ozannes.