Report to the States

Jersey Employment Tribunal Review

Minister's introduction

I became aware during 2012 of increasing levels of criticism levelled at the Jersey Employment Tribunal ('the Tribunal'), including criticism directed through the media, by certain employers and employer representative bodies.

The apparent lack of faith in the validity and legitimacy of the Tribunal's decisions is of great concern to me. If there is any foundation to those views, appropriate action must be taken swiftly. If, however, the comments are unfounded, swift action must also be taken to minimise the detrimental impact on the reputation of the Tribunal.

It is inevitable that employers will often be dissatisfied when a Tribunal finds in favour of the employee, particularly where this brings a cost to the employer. With our plans to bring discrimination legislation into force in the second half of 2014, it is vital that the credibility of the Employment Tribunal (proposed to be renamed 'the Employment and Discrimination Tribunal') is reinforced. It is in everybody's interest that the Tribunal functions as well as possible.

I commissioned a review of the Tribunal's decisions to determine what the grounds might be for the strongly negative reaction of certain employers and employer representative bodies. I wanted to address whether, for example, the Tribunal is unduly punishing employers for minor technicalities, and whether the Tribunal could be perceived as biased in favour of employees.

I instigated this review with the intention that, if any significant issues of potential concern were identified, that the resulting report could provide the basis for the undertaking of a wider review. This review was undertaken by Mr Darren Newman, LLB who is an independent employment law expert working as a consultant writer and trainer in the UK. As well as his UK employment law expertise, Mr Newman has a good knowledge of Jersey's employment law and its context.

I am pleased to be able to reassure States Members that, based on the decisions of the Tribunal during 2012, the review found that the Tribunal is not biased in favour of employees and the criticism that Tribunal decisions are inconsistent is unfounded. I am grateful to Mr Newman for the careful review that he has undertaken to prepare this useful and informative report.

I strongly endorse and support the work of the Tribunal Chairman, Deputy Chairman and Side Members. I hope that the publishing of this report will reinforce the reputation of the Tribunal as a provider of unbiased, sensible and sensitive decisions.

Terms of reference

The terms of reference for the review were:

"To review each of the Jersey Employment Tribunal's decisions in the 2012 calendar year and provide the Minister with a written report on the following:

- *The result in each case*
- *The reasons given by the Tribunal for reaching that decision*
- *Whether the decision of the Tribunal suggests that the complaint could be described as wholly without merit.*

To identify in the decisions of the Tribunal:

- *Any patterns or precedents*
- *Any areas of the Jersey employment legislation that appear to be a source of confusion or particular difficulty."*

Outcomes

The report considered whether there are any areas that appear to cause particular difficulties for employers. The outcomes indicate that there is not a fundamental problem with the way in which the Tribunal deals with cases. The review uncovered nothing to justify more detailed scrutiny and, based on the findings, the Minister does not propose to carry out a wider review at this time.

The report concludes that the written decisions of the Tribunal –

1. Meet the test of adequacy; the reasons for a party losing a case are usually clear, sometimes overwhelmingly so.

2. Are not overly lengthy, formal, legalistic or complex.

3. Do not identify adverse impact on any particular sector.

4. Suggest nothing in the Tribunal's approach to indicate a general bias towards employers or employees.

5. Demonstrate that the Tribunal's approach is consistent (e.g. in dealing with small employers and complaints of unfair dismissal).

6. Show a sensible adoption of 'standard directions' for unfair dismissal, providing a useful checklist for employers.

7. Demonstrate sensitivity to the particular facts of a case/reasonableness (i.e. differences in decisions are for this reason rather than a lack of consistency).

8. Suggest that cases generally involve fundamental failures of employers to observe basic principles of fairness, rather than dealing with minor failures in procedure (e.g. the frequency of on-the-spot dismissals).

9. Show that cases were predominantly against small and medium sized businesses, many of which have no formal human resources function. It may be that larger employers are more likely to agree a settlement.

10. Show that, whilst fair procedure is expected, the Tribunal will overlook procedural failings when the basis for dismissal is sound and the employer is a small business (and suggests that the Tribunal is more willing than UK tribunals to overlook such procedural failings).

11. Provide no basis for a conclusion that employers are being forced to defend hopeless (frivolous or vexatious) cases. It is possible that vexatious or frivolous complaints are made but are withdrawn or settled before they reach the Tribunal. If that is the case, then it is perhaps evidence that the system works.

12. Provide little basis for any complaints that the Tribunal is too formal, expensive, inconsistent and unpredictable.

Matters identified

The following matters were identified in the report;

1. It is efficient to include provision in the Employment Law that fixes the amount of unfair dismissal awards, as this means that the Tribunal can often decide the merits of the case and remedy at the same time, without the need for a separate remedies hearing. However, fixing the award of compensation in this way can sometimes appear unfair in specific cases.

2. In some cases, the Tribunal has declined to reduce compensation for unfair dismissal. Article 77F(10) of the Employment Law allows the Tribunal to reduce the amount of compensation to take into account any circumstances that it considers would be ‘just and equitable’. While this power might be wide enough to allow a Tribunal to make what is known in the UK as a ‘Polkey’ deduction - to reflect the extent to which the employee would have been dismissed even if the employer had behaved reasonably - in practice the Tribunal has not yet considered such a reduction to be ‘just and equitable’.

3. The Tribunal should always include in the written decision -

    a. A record of when employers are represented at hearings and the types of representative.

    b. A summary of the outcome of the hearing at the start of each written decision.

    c. Clear reasons why an unfair dismissal award has not been reduced.

4. A small number of cases illustrate that some employers (mostly small owner-managed businesses) are unaware of, or are prepared to disregard,

fundamental requirements of the Employment Law. The report suggests that further efforts might be targeted to small employers, via the Jersey Advisory and Conciliation Service (JACS), to ensure that there is awareness of the need to provide fair warning of dismissal or redundancy.

The Minister will consider these matters in conjunction with stakeholders, in particular with the Chairman of the Employment Tribunal and the Director of JACS, to decide what, if any, further action is required to address them and with a view to making any improvements that may be required.

Jersey Employment Tribunal

Review

Darren Newman LLB

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Foreword

To: Senator Francis Le Gresley M.B.E
Minister for Social Security

Dear Minister,

I have pleasure in submitting the report which you asked me to write on the decisions reached by the Jersey Employment Tribunal in 2012. Compiling the report has been an interesting and enlightening task and has afforded considerable insight into the challenges faced by employers in Jersey in difficult economic times.

I believe that this report gives a fair reflection of the issues that are being placed before the Jersey Employment Tribunal and the approach that it takes in seeking to resolve those issues. I have found nothing to indicate that there is any fundamental problem with the way in which the Tribunal goes about its task. As I believe the summaries of the individual cases show, the reasons for a particular party losing a case are usually clear – and in some cases overwhelmingly so. There is nothing to indicate a general bias in the Tribunal's approach either towards the employer or the employee side. Of course, this is just what one would expect given the tripartite constitution of the Tribunal.

On the other hand, it is clear that some small employers in particular are struggling with (or ignoring altogether) some of the basic principles of employment law. Whether anything can be done to improve their capacity or awareness in this area is beyond the scope of this report, but obviously the advice and support available from JACS is key.

I do hope that this report helps to put to rest some of the myths that abound in the field of employment law. Chief amongst these is that employers are forced to defend hopeless cases brought by employees with nothing to lose. The cases show clearly that this is not a significant problem. Even unsuccessful Applicants were usually found to have at least some valid ground for complaint. Of course some vexatious complaints may be brought and then withdrawn or settled, but then that surely is evidence of a system which works well rather than one which is dysfunctional?

Getting the balance right between the rights of employees to be treated fairly and the rights of employers to manage their business effectively is never easy. Where that balance lies is of course a policy matter and I have tried in this report not to stray too far into it. This report is intended to provide some factual background to that on-going debate.

Darren Newman LLB
Cambridge

March 2013

Terms of Reference

To review each of the Jersey Employment Tribunal's decisions in the 2012 calendar year and report to the Minister for Social Security on the following:

- The result in each case
- The reasons given by the Tribunal for reaching that decision
- Whether the decision of the Tribunal suggests that the complaint could be described as wholly without merit.

To identify in the decisions of the Tribunal:

- Any patterns or precedents
- Any areas of the Jersey Employment Law that appear to be a source of confusion or particular difficulty.

Introduction

This report is based on an analysis of the decisions of the Jersey Employment Tribunal in 2012. The transcripts were all taken from the Jersey Law online database[1].

The relatively small number of decisions means that averages and statistics are not a good way of assessing how the Tribunal is working in practice. A small number of unusual cases could have a disproportionate effect on the overall picture. This report therefore is intended to provide a complete picture of individual decisions, looking at the different situations that the Tribunal is asked to deal with and assessing how it goes about making its decisions.

The nature of litigation is such that the losing party is often dissatisfied with the outcome and believes that the law (or the Tribunal) favours the other side. This report is intended to form the basis of a more objective approach where the actual facts of the cases and the reasons for the Tribunal's findings are set out.

The picture that emerges is a complicated one. It is certainly not possible to say that the law favours either the employee or the employer - although the representatives of both sides are unlikely to change their view. What we see in the Tribunal's decisions in 2012 is an attempt to balance the rights of the employee with the business needs of the employer. In that balance must be weighed the resources at the employer's disposal and the business conditions in which they operate, but also the right of individuals to be treated reasonably and to receive the remuneration to which they are entitled under the law and their contracts of employment. It is the premise of this report that the debate around that issue will be more fruitful if based on a sound understanding of what is actually happening in the Jersey Employment Tribunal.

[1] http://www.jerseylaw.je

1. Overview

In 2012 the Jersey Employment Tribunal decided 48 cases. Each is summarised in Chapter 5 this report[2].

Most of the Applications raised more than one cause of action and some as many as four. Adding all of the claims together, therefore we find the Tribunal deciding the following:

- 30 Unfair Dismissal complaints
- 19 claims for notice pay
- 8 claims for unpaid wages
- 16 claims for holiday pay
- 1 claim for breach of contract (and one counterclaim)
- 2 claims for a redundancy payment
- 1 claim that the employer has failed to pay the minimum wage
- 1 claim for a written statement of terms and conditions
- 1 claim for failure to allow representation at a disciplinary hearing

It is worth noting that none of the unfair dismissal cases involved a dismissal for one of the automatically unfair reasons. The most common reasons for dismissal were conduct and redundancy. An analysis of those decisions is set out in Chapter 2.

Representation

Jersey Employment Tribunal proceedings are intended to be more informal than court cases and it is a striking feature of the cases heard in 2012 that in the overwhelming majority of them the Applicant appeared in person and in a clear majority the employer was represented by a director of the company rather than a professional lawyer. This is of course just what was intended when the system was set up. In the UK, employers at least are much more likely to be represented by solicitors and the cost of defending Tribunal cases is accordingly a major problem for employers. In 2012 at least there was little sign of this trend taking hold in Jersey.

The Applicant appeared 'in person' in 42 of the 49 claims considered. Of the 7 cases in which a representative was identified by the Tribunal, two were solicitors, one was the Applicant's interpreter, one was a union representative, one was the Applicant's father and two were lay representatives.

[2] This number includes a number of 'interim' rulings for which full reasons were given

It is not quite so obvious who represented employers. The Tribunal often identified the individual who appeared on behalf of the employer but did not always indicate the capacity in which he or she appeared. Often an individual was named as a representative but it was clear from the judgement that he or she was an owner or director of the employer. However, taking this into account, it appears that the employer was represented either by the owner or by a member of its own management team in 27 of the cases and in one case by a member of the employer's family. In a further four cases, there was no appearance by or on behalf of the employer. Of the cases where a representative was identified, two were lawyers from the Law Officer's Department representing the States Employment Board, four were solicitors and four were barristers or advocates. The remainder were HR consultants or other representatives whose status was not made clear.

Tribunal decisions and the problem of 'legalism'

Tribunal decisions are generally divided into sections: the facts, the law, and the Tribunal's decision. Although the section on the law frequently cites statutory references and case law, it tends to do so only briefly. Tribunal decisions are not lengthy (rarely more than 6 pages in all) and the legal directions rarely take up more than about a page.

The key test of the adequacy of a Tribunal's decision is that both sides understand why they have either won or lost. That test would appear to be satisfied – at least as far as liability is concerned – in all of the cases covered by this report. However, any criticism that either the Tribunal process or the decisions of tribunals have become overly formal, legalistic or complex would be difficult to sustain on the basis of the decisions in 2012. Very few turned on a point of law and only one case appeared to take more than one day for the Tribunal to consider liability.

Tribunal decisions are, on the whole, easy to understand and follow. However, it might be helpful for the Tribunal to provide a summary of the outcome at the beginning of its Decision rather than reveal its conclusions for the first time in the main body of the text.

Respondents by sector

The Tribunal does not always refer in its decisions to the size of the employer or the sector in which it operates – although this is often clear from the context or when the Tribunal directs itself to take account of the fact that the Respondent is a very small business or employer.

The States Employment Board was the Respondent in six of the cases. In two, the Tribunal was merely asked to determine the date of termination of employment. Of the remaining four there was one breach of contract claim relating to a collective agreement, two claims for notice pay and one claim of constructive unfair dismissal. All four claims were unsuccessful.

Of the remaining cases, the most commonly represented sectors were

Bar/restaurant/café: 6 cases
This involved three cases of alleged unfair dismissal on the grounds of redundancy, two of which were dismissed and one upheld; one allegation of unfair dismissal based on misconduct which was dismissed, a minimum wage claim which was upheld and one case determining the date of dismissal

Construction: 7 cases
The cases concerning employers in the construction industry involved three allegations of unfair dismissal based on conduct, two of which were dismissed and one upheld and one allegation of unfair dismissal based on redundancy which was dismissed. There were also three cases based on a failure to pay holiday pay, all of which were upheld.

Retail: 7 cases
In retail there were two cases concerned with length of service or a redundancy claim, two cases of constructive dismissal one of which was dismissed and one upheld; two cases of unfair dismissal based on conduct both of which were upheld; one successful claim for notice pay and one successful claim for holiday pay.

These numbers are too small to draw any conclusions about the difficulties any particular sector is experiencing in complying with employment law. However the fact that no particular pattern emerges suggests that there is no particular adverse impact suffered by any one sector in the economy.

Size of employer

The Tribunal does not formally record the size of the employers who come before it. However it is clear from reading the cases that small and medium sized businesses predominate. Very few recognisably large employers appeared before the Tribunal (two that stand out are the States Employment Board and G4S Aviation Services (UK) Ltd) and reading through the facts of the various cases it is noticeable how many of the employers have no formal HR function within the business.

It should be borne in mind, however, that this report is concerned with cases determined by the Tribunal rather than cases actually brought. It may be that larger employers are simply more likely to agree a settlement of their case than smaller employers.

It is often a feature of very small employers that their relationships with staff are essentially personal and so when those relationships break down the employer struggles to follow a recognisably fair procedure. Disciplinary investigations and hearings can appear to owner-managers to be unnecessarily legalistic or bureaucratic. Balancing this reality with the right of

employees to be treated reasonably is a difficult task for employment law to perform.

There are several examples in the cases of 2012 in which the Tribunal specifically made allowances for the fact that the respondent was a small employer with little in the way of HR support. Nevertheless, employment law is designed to protect all employees and the fact that an individual happens to be employed by a small business should not make him or her more vulnerable to unfair treatment. Small employers need to be aware of the minimum standards that apply in the workplace. This report is not the place to consider what more needs to be done to increase knowledge of employment law in the business community but clearly JACS has an important role to play.

2. Unfair Dismissal

The Tribunal's workload in 2012 was dominated by claims of unfair dismissal. This is entirely to be expected. An employee is more likely to go to law over the termination of the employment relationship than over any dispute that has arisen in the course of it.

Thirty claims were decided in 2012. Of these, 17 were successful and 13 failed. It is worth noting at this point, that while it may be possible to pick holes in Tribunal reasoning, I cannot say that I have found any unfair dismissal decision where the outcome was clearly wrong or unfair on the losing party, at least as far as the finding of liability is concerned.

In Chapter 5 the full range of the claims determined by the Tribunal will be seen, but in this chapter the focus is on the two most common grounds for dismissal considered by the Tribunal – redundancy and conduct.

Redundancy

Of the 31 unfair dismissal cases decided, Redundancy was the reason for dismissal in 7 cases. Four of those were upheld and three dismissed.

In dealing with redundancy cases, the Tribunal seems to have adopted a 'standard direction' based on the 2006 case of **Goguelin v Stewart Banks Carpenters & Builders Ltd**. This case was cited by the Tribunal in six of the seven redundancy cases. The exception was the case of **Haggar v Salty Dog Bar and Bistro Ltd** where the case actually turned on the employment status of the Applicant. His claim for unfair dismissal was unsuccessful because the Tribunal held that he was not an employee.

In the other six cases the Tribunal decision contains the following two paragraphs[3]:

> *"It has established in the Jersey Employment Tribunal since Goguelin v Stuart Banks (Carpenters & Builders) Ltd (2006) that there are four principles of fairness which should always be considered in situations of redundancy:*

[3] The wording is altered slightly in Se v Los Gavina's t/a St Aubin's Steak House, but not to any material extent.

(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 employee for redundancy;

(iv) The employer's duty to explore alternatives to redundancy with the employee.

To this test must be added a further level of consideration of the situation: whether the employer acted reasonably in his actions, in other words, were his actions or decisions within the band of reasonable decisions by a reasonable employer (Voisin v Brown, Feb 2007, Royal Court). This is particularly relevant when considering whether an employer has followed all the procedural steps set out in Goguelin above. As the (then) Deputy Bailiff said in Voisin v Brown, "The Tribunal must....concentrate not on whether the employer's decision or the procedure adopted by him was wrong but on whether it was so wrong as to fall outside the band of reasonable actions on the part of a reasonable employer".

It is perfectly sensible for the Tribunal to adopt standard directions in this sort of case and the four points listed should be a useful checklist for employers.

However, the Tribunal retains flexibility in dealing with individual cases. Small employers in particular are less likely to adopt formal procedures for redundancy selection and consultation – indeed these concepts may not have much meaning in very small workforces of just a handful of employees.

The four findings of unfair dismissal in relation to redundancy were

- **Le Se v Los Gavina's t/a St Aubin's Steak House**. Here the Tribunal found that the employee was not warned that his job was at risk of redundancy although there had been meetings discussing the downturn in the business. There was no consideration of alternatives such as a reduction in pay or hours. The tribunal found that the employer could easily have explored these alternatives despite the small size of the business.

- **Pack v CTS Ltd (In liquidation)**. In this case the employer (who did not appear and was not represented at the hearing) followed the form of a fair dismissal with consultation and clear selection criteria. However the Tribunal found that the application of this process was 'a sham'. The Tribunal found that emails between the managers of the company and its HR consultants showed that they had made a settled decision to dismiss the Applicant before the selection criteria were actually applied to him. This was enough to make the dismissal unfair.

- **Wood v James Ransom Tradings Ltd t/a Postal Worlds Direct**. This was another case in which the employee was not warned that his or her job as at risk – although there was a conversation about difficult trading conditions. Nor was there any consultation. While the selection of the Applicant was reasonable, she was not told about her impending redundancy until 10 minutes before she was actually dismissed and the Tribunal found this to be unfair.

- **Vincent v Central Plumbing Supplies Ltd.** Again in this case the employee was given no specific warning that she was about to lose her job. There was no issue of selection as the Applicant was the only employee who could be made redundant, but the Tribunal held that it was unfair of the employer to inform her of her redundancy on the same day as her dismissal.

I do not consider that the finding of unfair dismissal in any of these four cases could be said to be controversial. Pack is clearly an unusual case and it is worth noting that the employer did not appear in that case because it was in liquidation. In the other three cases the employee was essentially dismissed without any consultation or warning. Although we are dealing here with only a small number of cases, this does suggest that small employers in particular are unaware of the requirement to ensure that employees who are made redundant are given fair warning that this is likely to happen and an opportunity to discuss alternatives. The law on this is clear and the Tribunal's approach to it is consistent.

The three cases in which the claim for unfair dismissal failed are also instructive. In **Haggar v Salty Dog Bar & Bistro Ltd** the Applicant was found to be a self-employed consultant rather than an employee and so his claim was dismissed. The other two cases can be briefly summarised:

- **Colligny v Peter Green Builders Ltd** the Tribunal were critical of the employer for a lack of consultation but found that there had been a clear warning given to staff that job cuts were likely. There had also been a careful selection process based on fair criteria. The Tribunal found that the failure to consult did not make the dismissal unfair. They accepted that the Applicant was a difficult person to talk to and noted that there had been a history of a lack of communication between him and the Directors. On balance they held that the failure to consult was not sufficient to render the dismissal unfair.

- **Makariou v Dagilan**. Here the dismissal took place following an extended period of reduced hours and pay brought about by difficult trading conditions. The employee was eventually dismissed when he refused to sign a new 'zero-hours' contract. The employer was very small with just two employees and the Tribunal accepted that of those two, the employer was entitled to select the Applicant who was overqualified for the work that was actually available and too expensive. There was a failure to consult over the redundancy but redundancy was inevitable and the employer kept the employee on for as long as he could. While describing it as a 'difficult case' the Tribunal concluded that the dismissal was fair.

In both of these cases therefore there was a failure to consult, and yet the tribunal found the dismissal to be fair. In Makariou, the Tribunal made allowances for the size of the employer and the very difficult trading conditions it faced. In Colligny, the Tribunal focussed on the fact that there was a clear warning of redundancy and a fair selection process. In both cases it would clearly have been open to the Tribunal to make a finding of unfair dismissal. These outcomes do not show a lack of consistency from the Tribunal however, but rather a sensitivity to the facts of a particular case. This is in the nature of unfair dismissal law which focusses on reasonableness rather than compliance with a rigid legalistic procedure.

Unfair Dismissal: Conduct

Conduct was the reason for dismissal in 16 cases. Of those, 10 were successful and 6 were dismissed.

It is worth remembering that in a conduct case it is not the employee's guilt or innocence of any accusation that is being tried but whether the employer has behaved reasonably. In the UK most unfair dismissal claims focus on the procedure adopted by the employer. The complaint is sometimes made that the requirements of a fair disciplinary procedure have become overly technical with the danger that even a minor breach of procedure can be sufficient to render a dismissal unfair.

However valid these concerns, the cases dealt with by the Jersey Employment Tribunal do not involve minor or arcane matters of procedure. Much more common is a fundamental failure to observe basic principles of fairness, for example:

- In **Hawkins v JSPCA**, the disciplinary hearing was conducted by the main witness to the alleged misconduct and the Tribunal also found that no investigation was carried out into any conflicting accounts of what happened despite the fact that witnesses were available.

- In **Romeril v Perkins t/a Perkins Motors** the employee made a serious mistake at work but was dismissed over the telephone that

evening and the Tribunal found that he was given no opportunity to state his case.

- In **Maguire v CTS Ltd** the Applicant said that he was not allowed to speak at the disciplinary meeting (although in that case the employer was in liquidation and did not appear to contest the evidence) and the Tribunal accepted his evidence.

- In **Tomkins v Les Amis Inc** the Tribunal found that key procedural flaw was that the disciplinary hearing was conducted by the employer's solicitor which the Tribunal held led to issues of apparent bias given that the solicitor had been advising the employer in the run up to the dismissal.

- In **Gomes v Ramon Lopes Pinto** the employee allegedly left work early but was simply dismissed the next day when she came into work. The Tribunal noted that the employer had not followed 'the most elementary disciplinary procedures'.

- In **Nascimento v Spellbound Holdings Ltd** the Tribunal found that the employee was dismissed on the spot without a disciplinary hearing after he refused (reasonably as the Tribunal found) to participate in an investigatory meeting without the presence of an interpreter.

There are occasions when the Tribunal finds that the substantive grounds for the dismissal were not sufficient. In **Birch v English & Mulley (Opticians) Ltd** the employee had allegedly rolled her eyes behind her employers back after being told-off. The subsequent dismissal for gross misconduct was held to be unfair. The Tribunal also held that the grounds of dismissal were insufficient in Gomes (above). At most the employee had left a few minutes early and the work that she had left undone could not have been finished by her normal finish time in any event.

While procedures are important in the law of unfair dismissal, the Tribunal has been prepared to make exceptions in cases where it thinks that is appropriate. For example in **Vechiu v Pepper Ltd t/a Pizza Quarter** the Tribunal accepted that the employee was off sick but asked his employer to pay him 'off the books' in order to boost his social security benefit. The Tribunal held that the dismissal was fair despite the lack of a formal disciplinary process because the misconduct was so serious and was directly experienced by the principal of the business. An 'on the spot' dismissal was also found to be fair in **Coelho v Castle Cleaning Services** because the Tribunal accepted that the employee was so aggressive and argumentative when called in to discuss alleged misconduct that the employer felt it had no choice. The Tribunal found the case difficult as most employers would have allowed a cooling off period, but on balance decided that the dismissal was fair. The case contrasts somewhat with the decision in Nascimento (above) but in that case the employee was found to have a valid reason for refusing to take part in the meeting so there is no real contradiction.

In **Speak v DH Sutherland Ltd** the Tribunal held that a dismissal was fair despite the fact that no formal disciplinary procedure was followed. The Tribunal found that there was sufficient evidence of dishonesty on the Applicant's part to justify dismissal given the small size of the employer's undertaking and the importance of maintaining good relationships with its customer base. It is worth noting that in the UK these facts would almost certainly have led to a finding of unfair dismissal. The Jersey Employment Tribunal, however, seems prepared to make more allowances for a small employer without HR support.

Similar allowances were made in the case of **Comacho v Joao Marques t/a Joao Marques Landscaping** where a number of conduct issues led to the employer dismissing the employee while they were both sitting in a van. Despite the complete lack of any formal disciplinary procedure the Tribunal held that the dismissal was fair taking into account the employer's lack of HR support, business difficulties, and the deteriorating relationship between employer and employee.

How the Tribunal handles procedural failings

Overall it is clear that, while the Tribunal expects employers to follow a fair procedure before dismissing for misconduct or redundancy, they are often willing to overlook procedural failings when the basis for dismissal is sound overall and the employer is a small business without any HR support.

In the UK many of these cases would have resulted in a finding of unfair dismissal accompanied by a substantial (or indeed total) reduction in compensation either on the basis of contributory fault or because dismissal was inevitable. I discuss below the fact that the Jersey Employment Tribunal is less eager than UK Tribunals to reduce compensation once a finding of unfair dismissal has been made. It is important to note however, that they are also more willing to look behind procedural failings at the substantial grounds for dismissal in deciding the issue of fairness.

Remedies for unfair dismissal

The aspect of Jersey Employment Law that differs most from the equivalent provisions in the UK is the method of calculating compensation. In the UK, unfair dismissal compensation is, in the main, based on the loss the employee has suffered as a result of being dismissed. In Jersey, however, the calculation of compensation is based on a formula derived from the employee's length of service and the amount of a week's pay.

The amount of compensation awarded therefore varies greatly. In 2012 the lowest award was £1,249 and the highest was £19,524.

The advantage of this approach is that once liability has been decided, there is no need for a further complicated enquiry into the remedy due. In the UK it is common for remedy to have to be determined at a future hearing because the issues are so complex and contentious. In Jersey, however, this almost never happens. In all but one[4] of the 2012 cases the Tribunal was able to make an award of remedy at the same time as making a finding of unfair dismissal.

This approach does however mean that the amount of compensation awarded to the employee can appear to be unfair. An employee who has just over one year's service will receive just eight week's pay, no matter how unfair the decision to dismiss and no matter how long he or she remains unemployed as a result of the dismissal. On the other hand, an employee with more than five years' service will receive 26 weeks' pay even if he or she was able to walk straight into a high paying job immediately after dismissal.

Reductions in Compensation

Since 2010, the Jersey Employment Tribunal has had the power to reduce compensation for unfair dismissal in certain circumstances. These are set out in Article 77F of the Jersey Employment Law as follows:

> (4) The Tribunal finds the complainant has either –
>
> (a) unreasonably refused an offer by the employer which, if accepted, would have had the effect of reinstating the complainant in the complainant's former employment; or
>
> (b) accepted such offer as is described in sub-paragraph (a) in circumstances where the Tribunal may reasonably conclude that at the time the offer was accepted the complainant intended to terminate the employment as soon as reasonably practicable.
>
> (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.
>
> (6) For the purposes of paragraph (5), the Tribunal may take into account conduct committed whilst in employment which came to light after notice was given or the act of dismissal occurred.
>
> (7) The complainant has agreed to receive a payment by way of settlement of the complaint (whether or not the dismissal is related to redundancy).
>
> (8) The complainant has been awarded a redundancy payment under any enactment or is entitled to a redundancy payment under his or her contract of employment.

[4] The exception was Tomkins v Les Amis Ltd where the amount of a week's pay was in dispute and a separate remedies hearing was held

(9) The complainant has refused an offer by the employer made before commencement of proceedings before the Tribunal for an amount equal to the maximum award that the Tribunal could award in respect of the complainant under Article 77(2) or Article 77E(3)(a) (as the case requires).

(10) Any circumstances that the Tribunal considers would be just and equitable to take into account.

In 2012 the Tribunal exercised its discretion to reduce unfair dismissal compensation in accordance with these provisions on just three occasions. These were:

- **Hawkins v Trustees of JSPCA Animals' Shelter** where the Tribunal found that the Applicant was rude and intemperate in the language she used to her employer while in a public place (50 per cent reduction)

- **Romeril v Perkins Motors** in which the Tribunal found that the Applicant had made serious errors in his work, taken a lunch break without completing key tasks and shown a lack of support for his employer (25 per cent reduction)

- **Tomkins v Les Amis** in which the Tribunal found the Applicant to have been argumentative and rude in responding to the employer's complaints (20 per cent reduction)

In most of the other cases there is no detailed discussion of any potential reduction in compensation although the Tribunal frequently refers to the possibility of a reduction only to find that there are 'no grounds' for making a reduction in a particular case.

It should be noted that in the case of **Fontes v G4S Aviation Services Ltd** the employer submitted that compensation should be reduced to reflect the conduct of the employee. The Tribunal rejected this application without giving clear reasons other than to say 'the Tribunal does not consider that in this case there would be justification for making a reduction'. Parties are entitled to know why they have won or lost a case and this principle should extend to applications and submission that are made in the course of the case itself.

It is clear that the Tribunal have not seen their new power to make reductions in compensation as the basis for what in the UK is known as the 'Polkey deduction'[5]. This is a reduction in compensation to reflect the extent to which it can be said that the employee would have been dismissed even if the employer had behaved reasonably.

In a case involving a lack of consultation prior to redundancy for example, an Employment Tribunal in the UK will, having made a finding of unfair dismissal, go on to consider the percentage chance that redundancy would have been the outcome even with a fair process of consultation. If the Tribunal were to

[5] Derived from the case of ***Polkey v A E Dayton Services Ltd*** [1987] IRLR 503

find that there was a 75 per cent chance that dismissal would have occurred in any event then the compensation will be reduced by 75 per cent to reflect this fact.

In theory, Article 77F is wide enough to give the Tribunal power to go down this route also. However it is clear that so far at least they have not considered such a reduction to be 'just and equitable'. For example:

> In **Wood v James Ransom Tradings Ltd t/a Postal Worlds Direct** the Tribunal found that the dismissal of the employee was unfair because there was no warning of her impending redundancy. Her compensation was assessed at £2,100 and the Tribunal declined to make any reduction in her award on the ground that it would be just and equitable to do so. This was despite the Tribunal finding that 'the Respondent had no other choice but to make Miss Wood's position redundant in order to preserve the viability of its business'[6]
>
> In **Carratu v United Fashions Ltd** an unfair constructive dismissal arose from the employer's persistent failure to pay wages. Compensation of £16,900 was awarded. However it was clear that the employer was struggling to keep the Applicant employed. Rather than fail to pay wages the employer could have made the employee redundant. This possibility was not taken into account by the Tribunal.

In neither case can it be said that the Tribunal's approach was wrong. It is just that it is noticeably different from the approach to compensation in the UK.

Only in one case did the Tribunal expressly consider the scope of its power to reduce compensation and its conclusions on this point are illuminating.

In **McGarry v Milan Ltd** the employer conceded that there had been an unfair constructive dismissal but argued that compensation should be reduced to reflect the fact that the employee had obtained new employment within days of his resignation. The Tribunal rejected this argument. In doing so they said:

> 'Article 77F sets out the circumstances where a reduction of that award can be made. The Tribunal notes that all of the circumstances listed in paragraphs (4), (5), (7), (8) and (9) of that Article refer to some act or omission of the employee which is relevant to that employee's dismissal or the terms of it, and which, objectively, should be noted by the Tribunal as having a bearing on the circumstances of the dismissal such that it would not be fair (or 'just and equitable') for that employee to receive 100% of the award calculated as being payable as compensation for unfair dismissal. Article 77(F)(10) does not refer to any particular act or omission of the employee but it does direct the Tribunal to take into account "any circumstances" which it considers would be just and equitable to take into account when reviewing the dismissal as a whole. Logically, these "circumstances" must be

[6] Case 186/2011 Paragraph 20

> concerned with some other contributory fault, negative act or blameworthiness of an employee in order to fit in with the tone of Article 77(F) that is not already covered by the foregoing paragraphs of that Article… Mr Thomas submitted that the Tribunal must take into account the "just and equitable" fact that Mr McGarry found a job almost immediately and thus lost nothing by leaving the employ of the Respondent. However, if the Tribunal were to follow that reasoning, it would miss the point of the award for unfair dismissal because in fact Mr McGarry lost a job he said he loved and that he said he worked hard at… Faced with the prospect of unemployment Mr McGarry did what any respectable, conscientious person would do – he looked for and obtained, another job as soon as he could. If the Tribunal were to take this action into account as a 'just and equitable circumstance' relevant to reducing Mr McGarry's award, it would be indeed punishing Mr McGarry for his focus and organisation and in turn rewarding the Respondent for Mr McGarry's prescience. Article 77 is about compensation for loss of expectation and loyalty with sufficient safeguards built in, at Article 77F, to ensure that a just and equitable level of compensation is awarded. No evidence was heard regarding Mr McGarry's conduct as an employee and the Tribunal considers it entirely reasonable for an employee to seek to find other employment as soon as possible. Accordingly, the Respondent's application to reduce the amount of Mr McGarry's award for compensation for unfair dismissal on the basis that his financial loss was minimal does not succeed.'[7]

What lies at the heart of the Tribunal's refusal to reduce compensation in this case is the fact that In Jersey, compensation for unfair dismissal is not based on loss. Nowhere does the law require the Tribunal to have regard to the loss caused to the employee as a result of the dismissal. There is therefore no reason to suppose that the Tribunal would regard the mere fact that the employee's loss is minimal as a ground for reducing compensation.

The fact, therefore, that some Applicants are receiving full compensation when they would still have been dismissed even if the employer had behaved reasonably cannot be seen as an error or failure to apply the law correctly. It may, however, not be what was intended when the power to reduce compensation was introduced. If this is the case, then consideration needs to be given to either clarifying the circumstances in which compensation can be reduced or changing the basis of compensation so that it is designed to reflect the loss caused. A change to reflect losses, however, would certainly increase the complexity of Tribunal cases and may well lead to separate remedy hearings becoming a standard part of Tribunal procedure.

[7] Case 104/2011 paragraph 9

3. Other jurisdictions

Most of the other claims dealt with by the Tribunal involve an alleged failure to make a payment required either under Jersey law or under the contract of employment. In most of the cases the issue was simply whether the payment had been made or not. There was no legal complexity to the claims and the Tribunal's task was largely a mathematical rather than a legal one.

Given that fact it is perhaps surprising that so many of these issues made it as far as the Tribunal without being settled. However, they were very often associated with unfair dismissal claims and it is understandable that employers are unwilling to settle even the non-contentious parts of a claim if the main question before the Tribunal has not been resolved.

Holiday pay

An applicant alleged a failure to provide paid holidays or holiday pay on termination in 16 cases. The claim was upheld in 13 of those cases. This is obviously a high success rate, but it is to be expected that relatively few applicants would claim holiday pay if they had actually received it. Unlike unfair dismissal where perceptions of reasonableness can vary, this should be a straightforward factual matter.

Nevertheless it is striking how many times the Tribunal is asked to adjudicate on the issue. The cases in question do not involve complicated matters of law (as they often do in the UK) but generally a straightforward failure to include holiday pay in the employee's final payment.

It is clear that for some employers, the concept of paying for holiday accrued but not taken when an employee is dismissed is still a novel one.

Notice pay

A failure to pay notice pay was alleged in 18 of the cases and upheld in 11.

In all but 5 of the cases, the Applicant was also claiming unfair dismissal and 9 of the successful claims for notice pay were accompanied by unfair dismissal findings. This reflects the frequency of 'on the spot' dismissals in the cases brought before the Tribunal and discussed above.

There were two cases in which a failure to pay notice was found even though the dismissal was held to be fair. In **Comacho v Joao Marques t/a Joao Marques Landscapes** the Tribunal dismissed the claim of unfair dismissal but upheld the claim for notice pay. However the grounds for this were simply that the employer (who was legally represented) had failed to make any representations that the employee was guilty of gross misconduct and the Tribunal held that notice was accordingly due, even though the dismissal for misconduct was fair.

In **Speak v DH Sutherland** the Tribunal found that a dismissal for misconduct was fair but (by a majority) held that there was no gross misconduct so notice pay was due. As I noted above, Speak is a case in which a Tribunal in the UK might have found the dismissal unfair, and so it may be that the Tribunal is seeking to do justice between the parties by ensuring that employee is not left completely without a remedy.

Unpaid Wages

Unpaid wages were alleged in 8 cases and the claim was upheld in 6. Only two of those cases went hand in hand with a finding of unfair dismissal. The other four were either stand-alone claims or accompanied by other monetary claims such as holiday pay or notice.

To give an idea of the sums involved the awards made by the Tribunal for unpaid wages were as follows:

- **Carratu v United Fashions Ltd:** £2,600
- **Chatfield v Helm Trust Company Ltd:** £3,692.30[8]
- **Da Costa v Gnomes t/a Continental Services:** £1,312
- **Ford v Les Roches Spa Ltd:** £100
- **Hawkins v The Trustees of JSPCA Animals' Shelter:** £723
- **Southam v FORM (CI) Ltd:** £1,730

[8] Described in the case as a breach of contract claim, but it has been dealt with here as an unpaid wages claim as, in this context, there is little difference between the two.

4. Cases 'wholly without merit'

One concern often raised in relation to Employment Tribunal cases in the UK is that the lack of Tribunal fees or any meaningful filter system means that employers are forced to defend vexatious or hopeless cases, often at considerable cost. The difficulty in assessing the extent of this problem is identifying those cases which are vexatious or hopeless and distinguishing them from cases which are merely unsuccessful.

There were only 11 claims in which the Applicant failed on all counts because many of the claims that failed on, say, unfair dismissal did include a valid claim for notice pay, holiday pay or unpaid wages. The 11 cases which failed completely were:

Beillard v States Employment Board. Tribunal rejects a constructive dismissal claim based on alleged lack of support for a nurse following an assault from a patient.

Bisson v States Employment Board. Dispute about notice pay based on interpretation of 'status quo' provisions in agreed disputes procedure

Bisson v States Employment Board[9]. Employee resigns after receiving a Final Written Warning. Tribunal rejects constructive dismissal claim despite procedural errors.

Coelho v Castle Cleaning Services Ltd. Employee fairly dismissed on the spot because he was so argumentative and aggressive in an investigation meeting

De Sousa v ARC Carpets Ltd. The employee was unable to return to work following a heart attack. Tribunal held he was not dismissed.

Fraser v Columbia Estates. An unfair dismissal claim in which the employee was guilty of making serious errors and withholding information about them from the employer

[9] There are two separate cases against the States Employment Board involving an Applicant called Bisson – but they are not the same person.

Haggar v Salty Dog Bar & Bistro Ltd. The Applicant was held not to be an employee and so the Tribunal had no jurisdiction

Hetherington v Quennevais Ltd t/a Les Ormes Golf & Leisure Club. An employee was fairly dismissed for refusing to agree to a minor change in his job description.

Holgate-Smith v States Employment Board. A constructive dismissal case arising from allegations about the way in which the employer dealt with allegations of bullying and harassment

Jardim v Bob Le Neveu Ltd. Dismissal followed a 'heated confrontation' between two employees. Applicant was not the aggressor but dismissal was held to be fair.

Maindonald v States Employment Board. A collective dispute held to be outside the Tribunal's jurisdiction

None of these cases could fairly be described as frivolous or vexatious. In several (such as Coelho De Sousa and Haggar) the issues were finely balanced and a finding of unfair dismissal was clearly open to the Tribunal. Even in cases such as Jardim or Hetherington where the outcome can be seen as inevitable from a legal point of view, it cannot be said that the employee was vexatious or irrational in believing that there was a serious case to be argued.

The only fair conclusion is that there is no basis for concluding that employers are being forced to defend hopeless cases in the Jersey Employment Tribunal. If such cases do arise it is clear that they are dealt with before they get to the Tribunal.

5. Jersey Employment Tribunal Cases 2012

This chapter sets out a brief summary of each of the decisions made by the Tribunal in 2012. The summaries focus on the main issue before the Tribunal and are designed to be an indication of the sort of cases coming before the Tribunal and the approach that the Tribunal takes in coming to its decision.

Baal v Pound Magic Ltd (NL1506-90/11)

Date: 24/1/2012 **Chairman:** David Le Quesne

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £1,249.52

Employee has row with manager and leaves work 20 minutes early in tears. Employer treats this as a resignation and refuses to let her return. Tribunal holds it was a dismissal. Conduct did not justify dismissal and no disciplinary procedure was followed so the dismissal was unfair.

Bator v The Bonnie Beverage Company Ltd (185/11)

Date: 11/1/2012 **Chairman:** David Le Quesne

Claim 1: Date of Termination **Result**: **Award**:

Tribunal concludes that EDT (efective date of termination) is the day on which contractual notice would have expired if properly given. Bases that on Article 56(7) which provides that contract may provide for longer periods of notice than minimum. (*NB Royal Court disapprove this test in* ***Hughes v Helm Trust***)

Beillard v States Employment Board (NL1005-67/11)

Date: 30/1/2012 **Chairman:** David Le Quesne

Claim 1: Unfair Dismissal **Result**: Dismissed

Two day hearing. Employee off sick for extended period following assault from patient. Resigns claiming that employer failed to provide adequate support. Tribunal reject that. Employer had provided reasonable support in the circumstances. No breach of contract. No constructive dismissal.

Berghouse v States Employment Board (65/11)

Date: 19/1/2012 **Chairman:** David Le Quesne

Claim 1: Date of Termination **Result**: **Award**:

Tribunal concludes that employee was engaged under a series of fixed term contracts which ended in November 2010. Not clear what actual claim was being made.

Birch v English & Mulley (Opticians) Ltd (NL2208-124/11)

Date: 22/2/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £2,220
Claim 2: Notice Pay **Result**: Upheld **Award**: £1,202.50
Claim 3: Holiday Pay **Result**: Upheld **Award**: £166.50

Employee dismissed for allegedly ‘rolling her eyes’ behind her employer's back and for wearing a skirt that was too short when her boss was away. Tribunal finds dismissal excessive and also procedurally flawed. Employer did not have an open mind in approaching the disciplinary hearing which was organised too quickly. Also, employee was not given appropriate information about allegations.

Bisson v States Employment Board (44/2011)

Date: 9/1/2012 **Chairman:** Nicola Santos Costa

Claim 1: Notice Pay **Result**: Dismissed

Employee dismissed with 8 weeks’ notice but then pursues an appeal during which he is paid under the 'status quo' provisions of the disputes procedure. Tribunal finds that eventual failure of the appeal meant that the original dismissal was activated. EDT was when original notice period expired. No notice pay due.

Bisson v States Employment Board (NL0306-81/11)

Date: 30/4/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Dismissed

Employee given Final Written Warning after breach of medical procedures. She appeals against the warning but is unsuccessful and then resigns. Tribunal finds that there were some administrative errors in the disciplinary process, but after a detailed consideration decides that there was no fundamental breach of contract and no constructive dismissal.

Carratu v United Fashions Ltd (NL0307-110/11)

Date: 19/6/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal	**Result**: Upheld	**Award**: £16,900
Claim 2: Notice pay	**Result**: Upheld	**Award**: £3,250
Claim 3: Holiday Pay	**Result**: Upheld	**Award**: £910
Claim 4: Wages	**Result**: Upheld	**Award**: £2,600

Employee resigns in response to a persistent failure to pay wages. This was due to employer's financial difficulties but still amounted to a fundamental breach of contract. Tribunal upholds complaint of constructive dismissal. Employer had not taken its obligation to pay wages on time sufficiently seriously and had behaved unreasonably.

Chatfield v Helm Trust Company Ltd (NL1312-198/11)

Date: 9/10/2012 **Chairman:** Nicola Santos Costa

Claim 1: Breach of Contract **Result**: Upheld **Award**: £3,692.30

Employer failed to make it clear that they were dismissing the employee and failed to give the required 3 months' notice. However, the Applicant was aware that he was being dismissed and from the date of what was clearly a dismissal, his pay only fell short by 12 days

Coelho v Castle Cleaning Services Ltd (NL3006-102/11)

Date: 15/2/2012 **Chairman:** David Le Quesne

Claim1: Unfair Dismissal **Result**: Dismissed

Employee was seen in a café when he should have been at work. He was called into a meeting with the MD. The Tribunal found he was so argumentative and aggressive that he was dismissed on the

spot.Tribunal finds case difficult because most employers would have adjourned to allow cooling-off, but on balance finds dismissal fair.

Colligny v Peter Green Builders Ltd (NL1310-154/11)

Date: 30/7/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Dismissed
Claim 2: Notice pay **Result**: Dismissed
Claim 3: Holiday Pay **Result**: Dismissed
Claim 4: Redundancy Pay **Result**: Upheld **Award**: £1,296.32

Dismissal for redundancy held to be fair despite an absence of consultation. Applicant was difficult to work with and overall selection for redundancy was fair. Employer had underpaid redundancy payment.

Comacho v Joao Marques t/a Joao Marques Landscapes (NL2909-144/11)

Date: 31/5/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Dismissed **Award**:
Claim 2: Notice pay **Result**: Upheld **Award**: £3,060

Employee's relationship with owner deteriorated after he was found shoplifting in work uniform and refused to discuss the allegations. Also he used a company van in breach of clear instructions. Tribunal apply BHS v Burchell and find dismissal fair despite the fact that no formal procedures were followed. Employer was small and had no HR support. However employer fails to defend Wrongful Dismissal claim and so notice pay is awarded.

Cooney v Ogier Group Services Ltd (NL2401-08/12)

Date: 25/10/2012 **Chairman:** Claire Davies

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £8,307.72

Employer concerned with poor performance from employee but failed to follow its own performance improvement process and rendered her continued employment untenable by expressing the view that 'there appear to be no circumstances in which your continued employment can prevail' and by sending her home on 'garden leave'. Her resignation amounted to an unfair constructive dismissal.

Da Costa v Gomes t/a G Continental Services (NL2405-61/12)

Date: 20/9/2012 **Chairman:** Claire Davies

Claim 1: Unpaid wages **Result**: Upheld **Award**: £1,312

Employer did not respond to claim for unpaid wages and Applicant's evidence for underpayment was not contested. Given leave to submit a calculation in relation to unpaid holiday

De Sousa v ARC Carpets Ltd (NL0507-107/11)

Date: 22/5/2012 **Chairman:** David Le Quesne

Claim 1: Notice Pay **Result**: Dismissed

Employee stopped work for health reasons after a heart attack. Told employer he would be unable to return. Given an ex gratia payment of 2 week's pay. Held he was not dismissed and was not due notice pay.

Fontes v G4S Aviation Services (UK) Ltd (NL0211-174/11)

Date: 31/7/2012 **Chairman:** Claire Davies

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £6,742.72
Claim 2: Notice pay **Result**: Upheld **Award**: £1,685.69

Applicant was dismissed for breach of procedures in searching employees passing through airport security. After being told she was to be dismissed she was allowed to resign, losing right to appeal. ET held there was a dismissal which was unfair. Not clear that operational breaches of this sort would lead to summary dismissal. Also numerous instances of procedural unfairness. Tribunal refuses to make any reduction in award.

Ford v Les Roches Spa Ltd (NL1906-69/12)

Date: 18/9/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unpaid wages **Result**: Upheld **Award**: £100.10

Employee resigned and negotiated an immediate leaving date, waiving her right to notice. Employer then deducted excess holiday and training costs. Employee had understood that they were being ‘waived’ as part of a clean break. Employer’s letter confirming telephone conversation did not indicate intention to make deduction. Claim upheld.

Fraser v Columbia Estates (CI) Ltd (NL0510-152/11)

Date: 17/9/2012 **Chairman:** Claire Davies

Claim 1: Unfair Dismissal **Result**: Dismissed **Award**:
Claim 2: Unpaid wages **Result**: Dismissed **Award**:

Employee dismissed for serious errors and withholding information about them from the company with the result that financial loss was suffered. Small employer had no written procedures, but Tribunal finds that overall process was fair - although a lack of clarity about whether the employee would be offered a lesser job was regrettable. Tribunal also refused to consider a counterclaim brought by the employer for the losses caused by the employee's errors.

Gomes v Ramon Lopes Pinto (NL2306-100/11)

Date: 20/2/2012 **Chairman:** David Le Quesne

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £1,386

Employee dismissed after going home at just before her allotted finish time, refusing to stay late to finish work on a jacket. Clear that it could not have been done within her normal hours. Dismissal too harsh and elementary failings in the disciplinary process – no notice of hearing or chance to prepare.

Gouveia v R G Buesnel Ltd (NL0206-82/11)

Date: 15/3/2012 **Chairman:** David Le Quesne

Claim 1: Holiday pay **Result**: Upheld **Award**: £3,314

Similar facts to Silva v RG Buesnal (below). Tribunal rejects employer's claim that holiday was incorporated in hourly rate on grounds that contract clearly provided otherwise.

Haggar v Salty Dog Bar & Bistro Ltd (38/2012)

Date: 26/7/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Dismissed **Award**:

Applicant held not to be an employee. He was a self-employed bookkeeper who was given a contract of employment purely in order to avoid attracting attention in a social security inspection. Ultimately the employer did not have sufficient control over his work and his working

environment in order to meet the irreducible minimum of a contract of employment.

Hawkins v The Trustees of the Jersey Society for the Prevention of Cruelty to Animals Animals' Shelter (191/2011)

Date: 26/11/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £2169.60
Claim 2: Wages **Result**: Upheld **Award**: £723

Employee dismissed for the rude and aggressive way in which she allegedly spoke to the Chief Executive about a bedsit that she believed she should have been offered. Disciplinary hearing held by Chief Executive himself despite being the main witness to alleged misconduct. Disciplinary hearing assumed his account was true and made no investigation of conflicting accounts despite availability of witnesses. Compensation reduced by 50% to reflect Applicant's conduct.

Hetherington v Quennevais Ltd t/a Les Ormes Golf and Leisure Club (NL0710-155/11)

Date: 07/08/2012 **Chairman:** Claire R Davies

Claim 1: Unfair Dismissal **Result:** Dismissed

Employee dismissed after he persitently refused to accept minor changes to his job description. Tribunal finds dismissal to be fair – the changes were necessary to the business and the employee's grievance was properly considered. Although he was offered no opportunity to appeal, he did not actively seek one and it would have served no real purpose.

Holgate-Smith v States Employment Board (NL0108-116/11)

Date: 2/10/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Dismissed **Award**:

Employee resigned when her complaints of bullying and harassment following the raising of a health and safety concern were rejected. Tribunal finds some poor management and miscommunication. An allegation of racism was not proceeded with by the employer at the express request of the Applicant. On the whole, the employer had taken complaints seriously and supported her throughout the process. No fundamental breach of contract and no constructive dismissal.

Jardim v Bob Le Neveu Ltd (NL1609-139/11)

Date: 21/2/2012 **Chairman:** David Le Quesne

Claim 1: Unfair Dismissal **Result**: Dismissed

Employee dismissed for being involved in a heated confrontation on client's premises. Although he claimed to be the innocent party of the two, Tribunal satisfied that he was actively engaged in the confrontation and the employer was entitled to dismiss him for gross misconduct

Le Feuvre v Charles Le Quesne (1956) Ltd (NL2006-94/11)

Date: 6/3/2012 **Chairman:** David Le Quesne

Claim 1: Unfair Dismissal	**Result**: Upheld	**Award**: £19,524.44
Claim 2:Notice pay	**Result**: Upheld	**Award**: £9,011.28

Employee dismissed for alleged failure to comply with health and safety requirements. No evidence from employer but seems these were very minor. 'Highly truncated' disciplinary process was clearly unfair.

Maguire v CTS Ltd (in liquidation) (NL2402-23/12)

Date: 11/10/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal	**Result**: Upheld	**Award**: £7,431.32
Claim 2: Notice Pay	**Result**: Upheld	**Award**: £1,429.10
Claim 3: Right to rep.	**Result**: Upheld	**Award**: £571.64

Print cartridges were misplaced and subsequently found. Employer alleged that employee had lied about their whereabouts. Employee not allowed to put his side of the story at disciplinary hearing, nor was he allowed a representative at the hearing. Flaws in disciplinary process meant that the dismissal was unfair. Note that employer was in liquidation and did not appear at the hearing.

Maindonald v States Employment Board (NL1611-147/10)

Date: 26/10/2012 **Chairman:** Nicola Santos Costa

Claim 1: Breach of Contract **Result**: Dismissed

No jurisdiction as matter was a collective employment dispute and necessary conditions not met to give Tribunal jurisdiction.

Makariou v Dagilan (NL1609-141/11)

Date: 17/4/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal	**Result**: Dismissed	
Claim 2: Wages	**Result**: Dismissed	
Claim 3: Holiday Pay	**Result**: Upheld	**Award**: £192
Claim 4: Notice pay	**Result**: Dismissed	

Employee was a chef for small sandwich business. When part of business was sold and there was a downturn in business his hours were reduced, and his pay cut. Eventually he was dismissed. No formal consultation but redundancy was inevitable and business was very small. Tribunal finds decision to be fair.

Marinel v Hammonds Furniture Ltd (157/2011)

Date: 2/3/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Interim

Interim hearing to determine length of service. JET holds that Article 58 of law applies to preserve continuity despite details of the sale agreement stating that it was only a sale of assets - not of the business. In reality the business carried on with very little change and Article 58 did apply.

McGarry v Milan Ltd (NL2706-104/11)

Date: 2/2/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal	**Result**: Upheld	**Award**: £5,692.40
Claim 2: Notice pay	**Result**: Upheld	**Award**: 0
Claim 3: Holiday pay	**Result**: Dismissed	

Employer conceded constructive dismissal but sought to argue that compensation should be reduced to reflect the fact that the employee obtained new employment within days of his resignation. Tribunal refuse, saying that such a reduction would not be just and equitable as it had nothing to do with the circumstances of the dismissal.

Mendes v F&F Cleaning Services Ltd (NL2504-48/12)

Date: 30/8/2012 **Chairman:** Claire Davies

Claim 1: Notice Pay	**Result**: Dismissed	
Claim 2: Redundancy	**Result**: Upheld	**Award**: £520
Claim 3: Holiday Pay	**Result**: Upheld	**Award**: 130

Tribunal accepts evidence of employer that oral notice was given to employee, although she said that she was simply told that the business had been sold. No notice pay due but she was still owed redundancy and holiday.

Nascimento v Spellbound Holdings Ltd (NL2305-75/11)

Date: 24/1/2012 **Chairman:** David Le Quesne

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £5,593.60

Employee dismissed when he refused to participate in an 'informal' investigatory meeting without an interpreter. Tribunal says his refusal was fair given the importance of the meeting and the number of senior management present. His conduct was not such as to render dismissal fair. Especially as he was dismissed on the spot with no disciplinary process followed.

Ozouf v Trek Plus (CI) Ltd (NL1203-29/12)

Date: 23/10/2012 **Chairman:** Claire Davies

Claim 1: Unfair Dismissal **Result**: Dismissed **Award**:

No fundamental breach of contract from the employer despite issuing warnings prior to rather than after a disciplinary hearing. ET accepted that advertising for Applicant's job during his sickness was for cover, not replacement

Pack v CTS Ltd (in liquidation) (NL0912-196/11)

Date: 11/10/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £16,542.24

Clear communication between employer and consultant showed that decision to dismiss applicant was taken before the application of selection criteria. Redundancy process was found by the Tribunal to be "a sham" and therefore unfair.

Pestana v McCreery Enterprises Ltd, t/a Roseville Street Launderette (NL1010-154/11)

Date: 24/7/2012 **Chairman:** Nicola Santos Costa

Claim 1: Holiday pay	**Result**: Upheld	**Award**: £280
Claim 2: Bank Holidays	**Result**: Upheld	**Award**: £65
Counterclaim: Contract	**Result**: Upheld	**Award**: £560

Claims for holiday pay upheld, but Tribunal also upholds a counterclaim based on Applicant leaving without notice and awards two weeks' pay to the employer as damages.

Proffitt v Hammonds Furniture Ltd (170/2011)

Date: 2/3/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Interim **Award**:

Interim hearing to determine length of service. Decision essentially in the same terms as for **Marinel v Hammonds Furniture** on essentially the same facts.

Romeril v Perkins t/a Perkins Motors (NL1707-84/12)

Date: 22/11/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal	**Result**: Upheld	**Award**: £11,368.50
Claim 2: Notice pay	**Result**: Upheld	**Award**: £6,413
Claim 3: Holiday Pay	**Result**: Upheld	**Award**: £291.5
Claim 4: Statement/terms	**Result**: Dismissed	

Dismissal for serious mistakes by the employee in the work he did on a customer's car. Tribunal found no inquiry was made into the reasons for the mistake or opportunity given for employee to explain. Previous serious mistakes had not resulted in formal disciplinary action and little feedback had been given to employee about poor performance in the past. Dismissal was carried out by telephone with no disciplinary procedure. Tribunal held it was unfair but reduced compensation by 25%.

Se v Los Gavina's t/a St Aubin's Steak House (013/2012)

Date: 23/7/2012 **Chairman:** Claire Davies

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £3,440
Claim 2: Holiday Pay **Result**: Upheld **Award**: £1,446.35

Dismissal was unfair because of a lack of consultation or any consideration of alternatives to selection. It was possible that redundancy could have been avoided if reasonable discussions had taken place.

Silva v R G Buesnel Ltd (NL0206-83/11)

Date: 16/3/2012 **Chairman:** David Le Quesne

Claim 1: Holiday pay **Result**: Upheld **Award**: £2,224

Contract of employment stated that the employer 'does not pay holiday pay'. Employer claimed that holiday was rolled up into hourly rate but Tribunal rejects this. Claim upheld.

Southam v FORM (CI) Ltd (NL1808-122/11)

Date: 20/4/2012 **Chairman:** Nicola Santos Costa

Claim 1: Holiday pay **Result**: Upheld **Award**: £865.35
Claim 2: Wages **Result**: Upheld **Award**: £1,730.70
Claim 3: Notice pay **Result**: Dismissed

Employee was dismissed for diverting work to his own business in breach of contract of employment. Tribunal held that summary dismissal was appropriate but upheld claims for accrued holiday and unpaid wages. Unfair dismissal claim had been rejected as out of time.

Speak v D H Sutherland Ltd (NL1209-135/11)

Date: 10/5/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Dismissed
Claim 2: Notice pay **Result**: Upheld **Award**: £1,040
Claim 3: Holiday Pay **Result**: Upheld **Award**: £624

Employee dismissed when he lied about the fact that he had left a client's home without tidying up afterwards. Although tribunal held (by a majority) that this did not amount to gross misconduct, it came soon after other serious misconduct and the dismissal was justified. No

formal procedure followed but employer was very small with no support.

Tomkins v Les Amis Inc (NL2704-60/11)

Date: 15/5/2012 **Chairman:** David Le Quesne

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £13,966

Employee dismissed for abusive behaviour at a meeting intended to deal with a complaint concerning two of his colleagues. Tribunal finds his misconduct was not serious enough to warrant dismissal and that the hearing was unfair because it was conducted by the employer's solicitor. Furthermore, the stated reason for dismissal differed from that later described by that solicitor in her evidence to the Tribunal.

Vechiu v Pepper Ltd t/a Pizza quarter (NL2202-19/12)

Date: 10/9/2012 **Chairman:** Claire Davies

Claim 1: Unfair Dismissal **Result**: Dismissed
Claim 2: Notice pay **Result**: Dismissed
Claim 3: Holiday Pay **Result**: Upheld **Award**: £150
Claim 4: Pay slips **Result**: Dismissed

Employee was signed off sick but asked his employer to pay him ‘off the books’ because his social security benefit was low. Employer regarded this as an attempt to break the law and summarily dismissed employee. Dismissal was fair despite lack of investigation and formal disciplinary process because the misconduct was directly experienced by the principal of the business.

Vincent v Central Plumbing Supplies Ltd (89/2011)

Date: 14/2/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal **Result**: Upheld **Award**: £1,700
Claim 2: Notice pay **Result**: Upheld **Award**: £425
Claim 3: Holiday Pay **Result**: Dismissed

Redundancy as a result of business closing. No warning given or consultation. Employer said financial situation was obvious, but Tribunal rule it is not for the employee to pick up the 'vibe'.

Wasiela v Atlantique Seafood Ltd (NL0108-117/11)

Date: 21/3/2012 **Chairman:** Nicola Santos Costa

Claim 1: Minimum wage	**Result**: Upheld	**Award**: £372.80
Claim 2: Holiday pay	**Result**: Upheld	**Award**: £91
Claim 3: Notice pay	**Result**: Upheld	**Award**: £98.59

Employee taken on as a chef and paid £265 per week. He claimed he worked 60 hours but Tribunal finds he was pnly contracted for 45 hours per week. Employer did not keep written records of hours worked. Tribunal uphold claims for outstanding sums.

Wood v James Ransom Tradings Ltd t/a Postal Worlds Direct (NL1011-186/11)

Date: 29/5/2012 **Chairman:** Nicola Santos Costa

Claim 1: Unfair Dismissal	**Result**: Upheld	**Award**: £2,100
Claim 2: Notice pay	**Result**: Dismissed	**Award**:

Employee made redundant - which the tribunal found to be inevitable and unavoidable. However, Employee was only told of redundancy 10 minutes before dismissal. No notice or consultation so dismissal was held to be unfair

X v Y (11/2012)

Date: 2/8/2012 **Chairman:** Claire Davies

Claim1: Time Limit	**Result**: Upheld	**Award**:

Application submitted several days late. ET allows claim to go ahead because Applicant's serious illness prevented her from claiming in time.

6. Conclusion

I believe that this report paints a picture of a Tribunal seeking to do justice between the parties and uphold the standards of fairness provided for in the Jersey Employment Law. It is in the nature of an adversarial system that about half of all litigants feel dissatisfied with the outcome. But looking at the cases objectively I cannot say that I have found any unfair dismissal decision where the outcome was clearly wrong or unfair on the losing party.

Critics of employment tribunals often make two complaints. First, they complain that the process has become too formal and expensive – too much like a normal civil court. Second, they complain that Tribunal outcomes are inconsistent or unpredictable. In Jersey there would be very little basis for either complaint. However it is important to understand that there is always a trade-off between legal formality and consistency of outcome. The way to ensure absolute consistency is to apply rigid rules. That is not easy with a test of reasonableness which depends on 'all the circumstances of the case'. No two cases will be entirely alike because there will always be unique circumstances for the Tribunal to take into account.

Despite this flexibility, however, there are clear principles of fairness to be applied in any dismissal situation. Broadly they can be described as clearly explaining the grounds on which dismissal is contemplated, listening to the employee's side of the story, and reaching a considered view, taking into account what the employee has said. While the details of disciplinary procedures will vary, even very small employers should be able to apply those basic principles in some way.

A number of cases in 2012 illustrate that some employers – mostly small, owner-managed businesses - are either unaware of, or prepared to disregard, these fundamental requirements. There were a number of examples of 'on the spot' dismissals or cases where there was no attempt to follow anything approaching a disciplinary procedure. Not all of these cases resulted in a finding of unfair dismissal, but clearly an employer who dismisses an employee in this way is running a serious risk of ending up in the Tribunal. This risk is all the greater if the employer has failed to pay the correct amount to an employee on termination – a situation which arose regularly in the 2012 cases. Perhaps more effort can be targeted at small employers so that they are aware of their legal obligations and the consequences of failing to meet them.
