



**EMPLOYMENT AND DISCRIMINATION TRIBUNAL:  
NOTIFICATION OF TRIBUNAL'S DECISION**

On a complaint made to the Employment and Discrimination Tribunal, as specified below.

**Hearing held on 19 and 20 June 2007**

**between**

**Applicant: Mr Albert Good and Respondent: Credit Suisse (Guernsey) Limited**

**Tribunal Chairman: Mr Peter Woodward**

**Side Members: Mr Stephen Jones and Ms Caroline Latham**

**Nature of Dispute:**

During the period August 1994 to 8 September 2006, Mr Albert Good was employed, initially as an Executive Director and then subsequently Chief Executive Officer, Managing Director and Country Manager, for the Respondent. Mr Good was dismissed on 8 September 2006, without any prior formal process and without an admitted explanation. Subsequently, on 22 December 2006, the company confirmed in a formal submission to the Employment and Discrimination Tribunal that the dismissal was admitted and that it had been procedurally unfair.

At the commencement of this Hearing the Respondent confirmed that they wished to offer no testimony in justification of the admitted dismissal and would not seek any reduction in the award to be made by the Applicant. The Applicant confirmed that he was content that the Hearing should consider the one remaining issue, which was the determination of the quantum of the award to Mr Good.

**Tribunal Decision:**

The Tribunal accepts the Respondent's admission that this dismissal was unfair within the meaning of section 5(2)(a) of the Employment Protection (Guernsey) Law, 1998, as amended.

**Amount of Award:**

The Tribunal has determined that, under the provisions of section 22(2)(b) of the Employment Protection (Guernsey) Law, 1998, as amended, the award made to Mr Good is in the amount of £242,307.30.

**NOTE:** Any award made by a Tribunal may be liable to Income Tax

Any costs relating to the recovery of this award are to be borne by the Employer

**Signature of Tribunal Chairman:**

**Mr Peter Woodward**

**Date: 10 July 2007**



## REASONS FOR TRIBUNAL'S DECISION

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended.

### 1. Representatives

- 1.1 Advocates Paul Richardson represented Mr Good, Advocate Simon Geall was also in attendance
- 1.2 Advocates Jessica Roland and Robert Shepherd represented Credit Suisse (Guernsey) Limited (Credit Suisse).

### 2. Witnesses

- 2.1 For the Applicant  
Mr Albert Good
- 2.2 For the Respondent  
Ms Helen Martin, Director of Human Resources – Credit Suisse (Guernsey) Limited  
Mr Ken Wallbridge, Chief Operations Officer - Credit Suisse (Guernsey) Limited

### 3.0 Documents

- 3.1 For the Applicant  
A Bundle of documents referred to as EE1  
A Document referred to as EE2
- 3.2 For the Respondent  
A Bundle of documents referred to as ER1  
A number of additional documents referred to as EE2 through to EE9

### 4.0 Background

The Chairman introduced the Tribunal members to the hearing and gained confirmation that the parties were now content that none of the members were conflicted by either personal or professional relationships and were content that the panel so composed should conduct this Hearing.

At the outset of the Hearing the parties were reminded of the Directions Hearings held on 20 March 2007 and 30 May 2007, which had assisted in the definition of the issues to be resolved by the Tribunal as detailed below.

The Chairman informed the Hearing that as the Respondent did not contest that a dismissal had taken place and had admitted that the dismissal was procedurally unfair, it had been agreed that no testimony relating to these aspects of the complaint would be given by either party.

At the commencement of this Hearing, the Respondent confirmed this agreement and further that they did not wish to seek any reduction in the award made to the Applicant.

The Applicant also confirmed this agreement and further that he was content that the Tribunal should consider the one remaining issue, which was the determination of the quantum of the award.

It was agreed that the parties would review each element of the claim (listed in Appendix A of EE1) in turn; commencing with testimony as to level and method of payment and then followed by legal submissions by both parties. Wherever possible similar items were grouped such that arguments for or against admitting them to the Award would not result in needless repetition of the same principles or contentions from parties.

## **5.0 Issues to be determined by the Tribunal**

The issue, to be determined by the Tribunal, was the determination of the quantum of the award under section 22 (1) (a) of the Law.

- 5.1 The Applicant claimed the award, equating to six month's pay, should be £399,106.61 composed of some 35 elements of his remuneration and a further element of "Grossed up Fringe Benefit Tax". (Appendix A - EE1 refers).
- 5.2 The Respondent asserted in the ET2 dated 22 December 2006 that the correct computation of the Award should be £81,771.15; however, by the opening of the Tribunal Hearing, this computation had changed to £80,210 (Appendix A in EE1 refers).
- 5.3 Several of the disputed elements were paid in Swiss Francs (CHF); the parties confirmed that, irrespective of whether there remained dispute between the parties as to whether or not a particular element of the claim should be deemed to be 'pay' for the purposes of determining the award, they would try to agree a CHF to Sterling conversion rate. In the absence of a rate agreed between the parties, the Tribunal would determine what it felt was a just and equitable conversion rate to assign to any such element that it determined should be included in the quantum of the Award.
- 5.4 Finally, the Applicant raised the issue of his 'loss of office', in that his dismissal involved not only the loss of his employment with the Respondent but also the requirement to resign from his role as Director of 43 entities.

## **6.0 Findings of Fact**

During the period August 1994 to 8 September 2006, Mr Albert Good was employed initially as an Executive Director and then subsequently Chief Executive Officer, Managing Director and Country Manager for the Respondent.

Mr Good was unfairly dismissed on 8 September, 2006.

At the time of Mr Good's dismissal, he was paid an annual basic salary of £148,000; and he asserted, in uncontested testimony, that he had not received a pay increase for approximately ten years, an assertion that was at least partially supported by documentation to be found in EE1 Tab 4 dating back to January 2001.

Mr Good received an annual bonus payment, of varying amounts.

During his employment with the Respondent Company, Mr Good received a number of other benefits, including: annual expense allowance; travel allowance; health insurance; pension; housing and related allowances.

## **7.0 Summary of Evidence**

During the course of the hearing the Tribunal heard arguments and some testimony on the varying elements, some of which were a matter of dispute between the parties, but which the Applicant believed should be included in the Tribunal's determination of the quantum of the award.

In order to facilitate the process, these elements were categorised under the following headings:

### **7.1 Annual Salary, Travel Allowance and Car Allowance**

- (a) Mr Good was in receipt of a travel allowance and a car allowance referenced 3 and 6 in the Appendix A - EE1.
- (b) Mr Good was in receipt of his annual salary.

#### Legal Submissions on Annual Salary, Travel Allowance and Car Allowance

In her submission at Tab 1 of ER1, Advocate Roland stated, on behalf of the Respondent, that 'pay' for the purposes of the award should pass three "mandatory tests" in that it should be:

- a monetary benefit
  - paid directly to the claimant
  - paid in cash form
- i. As the payments relating to these elements met these three "mandatory tests" and had been paid to the Applicant in the six months immediately preceding the date of dismissal (*section 22(2)(a) of the Law*), these elements of the claim were not contested by the Respondent.

### **7.2 Annual Bonus Payments**

In evidence, Mr Good:

- (a) testified that he had been promoted to the Chief Executive role in 1995 and that from then, until 2006, he had regularly been in receipt of a yearly bonus and that he had still received such a bonus even in 2003, when the parent Corporation had declared very significant losses and Guernsey had been the only operating division worldwide to make a profit.
- (b) drew attention to clause 9 of his contract of employment, dated 25 April 1994, which stated: "We confirm that you will be entitled to a special performance bonus paid annually in April based on the Banks annual results, including the performance of Credit Suisse Guernsey, and your individual contribution".
- (c) could not point to any document, which indicated how his bonus was determined over the previous twelve years, and neither was testimony on this issue given by the Respondent.
- (d) testified that he had only received one bonus payment each calendar year during his employment with the Respondent.
- (e) confirmed that the format of the bonus letter had changed several times over his total period of employment, and that some had been signed and others not.
- (f) testified that at the time of his dismissal, the Respondent was on track to exceed 2005 financial results by a margin of some 20%; but, as he did not have access to end of year

2006 results, he could not confirm if this financial progress had been maintained.

- (g) confirmed, in testimony and relevant documentation that, typically, bonus payments were made to him either in February or March of each calendar year, and that his payment in 2006, £374,780 was made to him in the week ending 18 February 2006.
- (h) confirmed that there was a regular accrual each year in the Guernsey Credit Suisse accounts for bonus payments and that the rate of accrual was typically set for any given period by reference to the Swiss parent company.
- (i) confirmed that, in determining bonus payments for his subordinates whilst in employment with the Respondent, he based these on individual performance, attainment of objectives and overall commitment to the company.

Documentation relating to bonus payments was submitted in the Applicant's bundle for bonuses paid in the years 2001 to 2006 (EE1 tabs 4, 5, 6, 7, 8 and 9 refer).

Using the submission, ER2, and adjusting for normal monthly salary pay, the Tribunal noted the bonus payments paid for previous years were as follows:

- 2005 - £328,947.00
- 2004 - £272,726.82
- 2003 - £364,810.00
- 2002 - £555,555.00
- 2001 - £592,885.00

**Legal Submissions on Annual Bonus Payments**

**Advocate Roland, on behalf of the Respondent, argued that:**

- i. As the Applicant had already received the benefit of the 2005 bonus that it would be inequitable for him to receive all or part of this bonus twice and that the bonus for 2006 would have been payable in 2007 (ER1 Page 4 refers).
- ii. It was beyond the powers of the Tribunal to deem or assume what the value of the 2006 bonus would have been for the claimant.
- iii. Advocate Roland conceded that the bonus passed the three "mandatory tests", already alluded to in the submissions on annual salary, however, the bonus payment in 2006 was made on 12 February of that year and therefore was prior to the six-month period immediately preceding the effective date of termination (EDT) and thus should not be included, in compliance with section 22 (2) (a) of the Law.

**Advocate Richardson, on behalf of the Applicant, argued that:**

- i. It was simply not acceptable to state that, if an annual bonus fell outside the six-month period immediately preceding the effective date of dismissal, it was just "bad luck", surely the recently amended provision in Section 22 (2) (b) of the Law, introduced by the Employment Protection (Guernsey) (Amendment) Law, 2005, was included to deal with just such an anomaly. Advocate Richardson asked the Tribunal to reflect on how this section might operate in other circumstances, e.g. if an employee was dismissed through ill health after a period of six months without salary, did this mean that the Award, if the dismissal was found to be unfair, would be zero? In his opinion, this section of the law gave the Tribunal discretion to consider payments outside the immediate six-month period preceding the date of termination.

- ii. Advocate Richardson also made reference to Mr Good's salary being unchanged for ten years. It was inconceivable in his opinion that Mr Good would have stayed on such a salary for so senior a role, unless he was in receipt of regular and substantial bonus payments.
- iii. Advocate Richardson drew attention to the fact that the Respondent had offered no challenge as to the assumed continuing excellent performance by Mr Good in the discharge of his duties until his employment was ended by the act of unfair dismissal.

### **7.3 Pension Payments**

#### **Credit Suisse Pension Scheme**

- (a) The Applicant claimed that six month's payments made on his behalf by Credit Suisse to the Credit Suisse Pension scheme should be counted as pecuniary benefit and should, therefore, be included in the calculation of any award made by the Tribunal (Item 16 of Appendix A EE1 refers).
- (b) The Applicant stated there might be two possible calculations, i.e.
  - CHF 93,730.50 - on the basis of an annualised calculation divided by two and relying on section 22 (2) (b)) of the Law, or
  - CHF 138,730.50, if the Tribunal applies section 22(2)(a) of the Law, as the CHF 90,000 lump sum was actually paid at the end of March or April.
- (c) The Respondent argued that:
  - If any amount was admitted it should be calculated as six monthly payments of CHF 8,121.75 totalling CHF 48,730.50 and that The CHF 90,000 lump sum had accrued in February and should be excluded, as this lump sum was paid more than six months prior to the EDT.

#### **Swiss Federal Pension Fund**

- (a) The Applicant claimed that six month's of payments made to a Swiss Federal Pension fund should be counted as pecuniary benefit and should be included in the calculation of any award. From testimony it became apparent that this was a voluntary scheme in terms of the Applicant's membership and that payments were normally made at two-year intervals, with the Applicant paying the total sum and then claiming reimbursement for the employer contribution afterwards. In respect of the 2006 contributions, the Applicant testified they were made after his dismissal.

#### **Legal Submissions on Pension Contributions**

##### **Advocate Roland, on behalf of the Respondent:**

- i. Drew the attention of the Tribunal to section 34 of the Law, and asserted that as the payments to the Credit Suisse Pension Scheme were not paid to the claimant directly and the benefit was not in cash form, they did not meet the legal definition of pay.
- ii. Referring to the payments to the Swiss Federal scheme, stated that these were by way of a reimbursement for the element normally paid by the employer and also these payments did not fall into the six-month period immediately preceding the EDT.
- iii. Argued that, further, there was no provision in the current law for a Tribunal to try to calculate "value" and only provided for pecuniary benefit paid to the Applicant in cash.

**Advocate Richardson, on behalf of the Applicant:**

- i. Advocate Richardson argued that the term “pecuniary” in the Law should have a broader interpretation and that pension payments made on behalf of the Applicant by the Respondent were part of his “total compensation” for his employment and thus part of his pay package. The Applicant accepted that the payment into the Swiss federal scheme fell outside the six-month period immediately preceding the EDT, however it had been a regular element of the Applicant’s compensation over many years and, if it was accepted in principle that the reimbursement was pay, then it should be taken into account in a just and equitable Award determined under section 22(2) (b) of the Law.

**7.4 Annual Expense Allowance**

- (a) The Applicant testified that he had received a yearly Expense Allowance of £8,000 (item 7 in Appendix A of EE1) paid on a yearly basis each January. The purpose of this expense allowance was to provide him with an appropriate sum for expenses related to travel and entertaining clients where typically the amount expended might not exceed £25 and would otherwise require the submission of detailed and overly complex expense claims. It was a provision made to him due to the requirements of his role. The Applicant claimed that half of this amount (£4,000) should be included in the determination of the Award. He asserted he had total discretion to spend this sum as he wished.

Legal Submissions on Annual Expense Allowance

**Advocate Roland, on behalf of the Respondent argued that:**

- i. The purpose of this allowance was to cover the Applicant’s business expenses and thus was a payment on account and therefore did not constitute a pecuniary benefit to the Claimant within the definition of pay.
- ii. But for the provision of this money, the Applicant would have submitted expense claims for reimbursement of expenses.
- iii. Further, this item was paid to the claimant in January each year and therefore was paid outside of the six-month period immediately preceding the EDT.

**Advocate Richardson, on behalf of the Applicant, argued that:**

- i. The allowance was paid in cash, that the Applicant had total discretion as to the disposition of this sum and that it should be taken into account in a just and equitable Award determined under section 22(2) (b) of the Law.

**7.5 Health Insurance**

- (a) Mr Good testified, with reference to his contract of employment, (EE1 Tab 3, clause 7 and item 10 on the Appendix A schedule in EE1 refer) that payments were paid into this scheme on his behalf amounting to CHF 21,531 for the six-month period up to his EDT. He asserted that this amount should be counted as pecuniary benefit and should be included in the calculation of any award.
- (b) Mr Good contended that whilst these payments were paid by his employer, he could equally have been paid them directly and then sought cash reimbursement from his employer.

#### Legal Submissions on Health Insurance

**Advocate Roland, on behalf of the Respondent argued that:**

- i. The Law could not comprehend some hypothetical payment and she drew the attention of the Tribunal to section 34 of the Law, as amended and asserted that as the payments to the Health Insurance Scheme were not paid to the claimant directly and the benefit was not in cash form they did not meet the legal definition of pay.

**Advocate Richardson, on behalf of the Applicant, argued that:**

- i. The cost of the benefit could have been paid in cash, and thus should be taken into account in a just and equitable Award, and again challenged the narrow view of pecuniary gain advocated by the Respondent.

### **7.6 Life Insurance Policy**

- (a) Mr Good testified with reference to his contract of employment, EE1 Tab 3, clause 10 and item 34 on the Appendix A schedule in EE1, refer, that his contract provided him with cover of four times his annual salary and that he estimated that this had a monetary value estimated at £6000 per year and thus £3,000 for a half year.
- (b) Mr Wallbridge, on behalf of the Respondent, testified that there was no policy in force at the time of the Applicant's dismissal, he was above the upper age limit for the Credit Suisse Group Life Assurance plan, and even if a theoretical calculation could be made for the cost of cover - it would not be £3,000 for the half year, rather it would be £704 plus some amount of uplift as the Applicant was aged 61.

#### Legal Submissions on Life Insurance Policy

**Advocate Roland, on behalf of the Respondent argued that:**

- i. The Law could not comprehend some hypothetical payment and Advocate Roland again drew the attention of the Tribunal to section 34 of the 1998 Law as amended.

**Advocate Richardson, on behalf of the Applicant:**

- i. Argued against this narrow view of pecuniary gain, advocated by the Respondent, and asserted that this contractual commitment did have a value that could be expressed in cash terms and should be taken into account, under section 22(2) (b) of the Law, in a just and equitable Award.

### **7.7 Provision of Housing and Related Expenses**

- (a) Mr Good testified with reference to his contract of employment EE1 Tab 3, clause 4 that Credit Suisse was contracted to provide him with a "Bank House" free of charge and to meet the cost of all utilities. With reference to Appendix A, the schedule, the items included were as follows:
  - Item 8: Rent
  - Item 12: Electricity
  - Item 13: Gardener
  - Item 14: Window Cleaner
  - Item 15: Contents Insurance
  - Item 26: TV Licence
  - Item 29: Heating Oil
  - Item 32: Occupiers Rate
  - Item 35: Maintenance of Boiler



- (b) Mr Good confirmed that he had been in receipt of all the above elements from 1995 up to his EDT with the exception of the rent which was a notional figure that had been set for the property by the Royal Court earlier this year, whilst dealing with a separate matter.
- (c) In response to a question by Advocate Shepherd, Mr Good confirmed that all of the above nine elements were normally paid directly by the bank, however he could recall exceptions where he had paid the cost of the utility and had then been reimbursed.
- (d) Mr Good conceded that several of the items listed in the Contents Insurance schedule did include items held by members of his family in other locations, but in his opinion the inclusion of these items had not materially altered the premium paid by the Respondent.

Legal Submissions on Provision of Housing and Related Expenses

**Advocate Roland, on behalf of the Respondent argued that:**

- i. These items were received by the Applicant "free of charge" and all flowed from the provision of free housing under the contract of employment. The benefit of accommodation could not be considered as falling within the definition of Pay in the Law and thus cannot form any basis for calculating an award.

**Advocate Richardson, on behalf of the Applicant, argued that:**

- i. All of these items could be specified as a pecuniary benefit and all were reducible to a cash value.

**7.8 Car Related Expenses**

- (a) The Applicant testified that in addition to the provision of a Car Allowance the Respondent provided additional benefits as follows:
  - Item 22: AA Membership
  - Item 24: Car Service and Car Repairs
  - Item 27: Car Insurance
  - Item 28: Road Tax
- (b) The Applicant testified that payment for these benefits was either made directly to the service provider by the Respondent or reimbursed by the Respondent on production of receipts.

Legal Submissions on Car Related Expenses

**Advocate Roland, on behalf of the Respondent argued that:**

- i. Regardless as to whether paid directly by the Respondent, or whether reimbursed after payment had been made by the Applicant, all of these items were enjoyed by the Applicant as specific benefits and not as money.

**Advocate Richardson, on behalf of the Applicant, argued that:**

- i. All of these items could be specified as a pecuniary benefit and all were reducible to a cash value.

## **7.9 (Company Paid) Membership of Golf Club and Grand Mare Corporate Membership.**

- (a) The Applicant referred to the cash value of each of these items (4 and 5 in Appendix A EE1) and claimed they should form part of the basis of the calculation of Award.
- (b) The Tribunal was informed that the payment for the Golf Club had been paid in January 2006.

### Legal Submissions on Company Paid Membership of Golf Club and Grand Mare Corporate Membership

**Advocate Roland, on behalf of the Respondent argued that:**

- i. Regardless as to whether paid directly by the Respondent, or whether reimbursed after payment had been made by the Applicant, all of these items were enjoyed by the Applicant as specific benefits and not as money. Additionally such fees were paid by the Respondent to assist the Applicant in widening his network of business contacts.

**Advocate Richardson, on behalf of the Applicant, argued that:**

- i. All of these items could be specified as a pecuniary benefit and all were reducible to a cash value.

## **7.10 Furniture Storage Costs**

- (a) With reference to item 11 in Appendix A, the Applicant testified that as a result of the company relocating him from Switzerland at the commencement his employment he had to leave some items of furniture in long term storage whilst in residence in Guernsey, and this storage was paid for by the Respondent.

### Legal submissions on Furniture Storage Costs

**Advocate Roland argued that** this was the benefit of a provision for storage, not a cash payment.

**Advocate Richardson** argued that this item could be specified as a pecuniary benefit and reducible to a cash value.

## **7.11 Membership of Professional Organisations**

- (a) With reference to Appendix A, in EE1, the Applicant testified that the Respondent had paid for his membership in the following organisations:
  - Item 17: International Tax Practitioners Association
  - Item 18: Chain De Rotisseur
  - Item 19: United Club
  - Item 20: Certified Public Accountants of Australia
  - Item 21: The Society of Trustee and Estate Practitioners
  - Item 23: IoD
  - Item 25: City Swiss Club
  - Item 30: Swiss Chamber of Commerce

### Legal Submissions on Membership of Professional Organisations

**Advocate Roland argued that** all of these payments related to membership of a third party and were not as such a cash payment to the Applicant.

**Advocate Richardson argued that** all of these items could be specified as a pecuniary benefit and all were reducible to a cash value.

#### **7.12 Free Tax Advice by Ernst & Young**

- (a) The Applicant testified that in accordance with clause 4 of his employment contract (EE1 tab 3 refers) he was entitled to receive free personal tax advice. Item 31 on Appendix A refers.

### Legal Submissions on Membership of Professional Organisations

**Advocate Roland argued that** this payment was for a benefit and however reimbursed was not as such a cash payment to the Applicant.

**Advocate Richardson argued that** this item could be specified as a pecuniary benefit and was reducible to a cash value.

#### **7.13 Social Security Tax and Grossed Up Fringe Benefit Tax**

- (a) The Applicant testified that the Respondent had made Employer Contributions to the Guernsey Social Security Authority (Item 33 Appendix A EE1 refers) and that these should be included in the calculation base for any Award.
- (b) Similarly the "Grossed up fringe benefit tax" paid by the employer to the tax authorities on items 3, 6, 7, 8, 10-15, 22, 24, 26-29, 31, 32, and 35 as listed in Appendix A EE1, should also be included in the calculation of the Award.

### Legal Submissions on Social Security Tax and Grossed Up Fringe Benefit Tax

**Advocate Roland argued that** the Employer's Social Security contributions were never an entitlement paid to the Applicant nor would he have ever received the tax payment. In her opinion they could never be defined as pay under the Law.

**Advocate Richardson argued that** these were payments attributable to the employment of the Applicant and should be considered as part of the calculation base for the determination of an Award. He asked the Tribunal "Could not these payments be construed as pecuniary benefit?"

#### **8.0 The Law**

- 8.1 The sole issue to be determined is the quantum of the award, with reference to the provisions The Employment Protection (Guernsey) Law, 1998, as amended, and specifically to section 22 (2) of the Law.

- 8.2 This section states:

*'For the purposes of subsection (1), the amount of a month's pay or (as the case may be) a week's pay -*

- (a) *shall be an amount equal to the complainant's average monthly pay during the six month period immediately preceding the effective date of termination or (where the complainant was paid on a weekly basis) his average weekly pay during the 26 week period immediately preceding that date, or*
- (b) *in a case where, in the opinion of the Tribunal, the basis set out in paragraph (a) for calculating the amount of a month's pay or (as the case may be) a week's pay is inappropriate, shall be calculated on such other basis as the Tribunal may consider to be just and equitable in the circumstances of the case.'*

8.3 There is no precedent as to how the Tribunal might seek to exercise the discretion inherent in section 22 (2) (b) as this provision has not been tested, since its introduction in March 2006, as one of the amendments to the 1998 Law in accordance with the Employment Protection (Guernsey) (Amendment) Law, 2005.

8.4 Finally, whilst there is provision for a Reduction of Award, under section 23 of the Law, the Respondent declared they would not argue for such a reduction.

## 9.0 Closing Statements

### Advocate Roland

- 9.1 In resisting the case put by the Applicant, Advocate Roland first gave attention to the "Authority" entered by Advocate Richardson (EE2), this being the Royal Court Judgement in Garenne Group Limited-v-Falla, in June 2001. It was, in her opinion, hardly relevant, to the current Hearing; in that the case dealt with an issue of 'Continuity of Employment' and is only notable for the fact that it led to an amendment to the Schedule of the 1998 Employment Protection Law, whereby a definition of 'Continuous Employment' was introduced by the 2005 Amendment Law; whereas, the States having a similar opportunity at that time to amend the definition of pay laid down in the original 1998 Law, chose not to do so.
- 9.2 Advocate Roland then introduced ER8, The Billet D'Etat, dated 27 October 2004. She drew the attention of the Tribunal to page 1960 and that it introduced proposed amendments to increase the Awards that might be made by a Tribunal.
- 9.3 However, the Tribunal might note that on page 1963, the concept of "proportionality" was addressed and on page 1964, there could be found five principles and amongst them, a rejection of the complicated UK compensatory framework for such Awards, this approach being further developed on pages 1968 and 1969, where it was accepted that the Award process did not attempt to include actual loss suffered. Page 1970 illustrates that the States did not intend the Law to cover Pension rights and records the opinions of the then current Adjudicators that a simple award scheme should be maintained, as originally introduced when the Law came into force.
- 9.4 Finally, the Billet on page 1972 confirms that any Applicant has a remedy in the Royal Court for any alleged loss of earnings or any other breach of contract by pursuing a claim for Wrongful dismissal. The Tribunal was also given a copy of the Billet D'Etat of the 31 May 1995 (ER9 refers), which contained earlier States' deliberations on employment-related issues.
- 9.5 Given the above analysis of the Billet, the Tribunal should appreciate they have no discretion in determining what is pay.
- 9.6 Advocate Roland argued that the true sense of "pecuniary" in the Law was that it should be monetary, financial and paid to the Applicant in cash. If a benefit is not paid to the Applicant in money or cash then it cannot be pay.

- 9.7 Advocate Roland argued the claims for statutory employer social security contributions cannot be realistic in the view of the Respondent nor the grossed up payments made to the tax authorities given the provision of benefits to the Applicant and surely the Tax office does not regard representational costs as a benefit to an employee.
- 9.8 The Applicant had a generous benefit package whilst in employment with the Respondent but he cannot under the law claim the value of these benefits.
- 9.9 Turning to the expense allowance it should be accepted that this was an advance on expenses not a payment of cash, which the Applicant could use for any purpose.
- 9.10 In considering the issue of the bonus the Respondent is firmly of the opinion that it is not within the Tribunal's powers to "guestimate" a bonus for the financial year 2006.
- 9.11 Finally, Advocate Roland reminded the Tribunal that with reference to the schedule found in Appendix A that some of the items were not only denied in principle but were paid more than six months prior to the EDT and could not be included in any calculation of the award.
- 9.12 There was no evidence of payment for any employment related to Directorships and the Tribunal should set the issue of "loss of office" aside.

#### **10.0 Advocate Richardson**

- 10.1 Advocate Richardson commenced his closing statement by reminding the Tribunal that, despite the agreement by both parties to set aside substantive testimony on the cause of the dismissal, the Applicant had been unfairly dismissed and had good reason to hold a grievance against his former Employer.
- 10.2 Advocate Richardson asserted that the content of Billet D'Etat (ER8 refers) was not that significant, in contrast with the rulings by the Royal Court contained in the Garenne-v-Falla judgement, which gives guidance as to how the Tribunal should approach their task. The Bailiff had referred to page 520 in this Billet (ER9 refer) and the need to provide some form of redress "in a typical Guernsey fashion" which can be interpreted as providing a fair balance between the competing interests of employer and employee. Also contained in this judgement the reasoning that employees "generally earn entitlement such as holidays, sickness pay, bonuses and pensions through length of service".
- 10.3 Turning to the Employment Protection Law, Advocate Richardson drew the attention of the Tribunal to section 30 (EE1 Tab A page 28 refers), which indicates that there can be an overlap of penalties between those awarded via an Employment Tribunal Award and a judgement made in favour of a Wrongful Dismissal claim, heard in the Royal Court.
- 10.4 Advocate Richardson also reminded the Tribunal that each case before them was fact specific and that in this case it was appropriate to use a broad interpretation of the items that might be included as "pecuniary benefit".
- 10.5 The Tribunal was reminded of the contents of the Applicant's contract and that in particular clauses 4, 5, 6 and 7 could all be considered as "pecuniary". Also notable was the use of the word "entitlement" in relation to the Bonus Plan, it should not be seen as "some gratuitous benefit" bestowed on the Applicant. This was a regular, if variable, element paid each year of his employment.
- 10.6 The Tribunal was advised to be cautious with the "hard cash" arguments deployed by Advocate Roland, and also that the pension contributions, described in the claim, are precise

amounts, they do not require a complex actuarial exercise to determine them.

- 10.7 The obligation of the Respondent to provide accommodation can be easily translated into a cash amount, and Advocate Richardson argued this can be very easily described as a pecuniary benefit.
- 10.8 Turning to the issue of Bonus, Advocate Richardson reminded the Tribunal that the basic salary of the Applicant had remained unchanged for ten years, and the Tribunal must ask itself why would he tolerate such a static salary for so long? Advocate Richardson asserted the answer must be that the Bonus combined with his benefit package provided the difference.
- 10.9 Advocate Richardson drew the attention of the Tribunal to the following, that the Respondent had chosen to dismiss the Applicant some six months and three weeks after his last bonus payment and that this effectively denied the Applicant the ability to have his bonus payment included in the basis for determining any award. Advocate Richardson asserted that this might have been a conscious decision by the Respondent, in order that any award made by the Employment Tribunal would be lower.
- 10.10 Finally, Advocate Richardson reminded the Tribunal, the only substantive testimony on pay and his overall package had come from the Applicant.

#### **11.0 Advocate Shepherd**

- 11.1 Advocate Shepherd reminded the Tribunal in a final additional statement from the Respondent that the Tribunal should remember that the Garenne-v-Falla judgement was on the issue of continuity of employment and not on the issue of pay.
- 11.2 The Tribunal should also remember, in formulating a judgement, that it was not its role to make a compensatory Award.

*Note: It was agreed by both parties' Advocates, that a final version of the schedule A- to be found in EE1- would be sent to the Tribunal summarising where agreement had been reached by the parties and this would provide a working document to aid the Tribunal in the production of its judgement.*

#### **12.0 Conclusions**

- 12.1 In determining the Award, the Tribunal notes that there was no contest over the basic salary being admitted as the basis of the Award, nor the car allowance, nor the travel allowance, amounting, after agreement, in total to £79,565. The Tribunal is in agreement with these amounts and that each of these payments were in the form of cash, with the Applicant having total discretion as to how he could use such payments.
- 12.2 Turning to the Expense Allowance, the Tribunal is not persuaded that the Applicant had total discretion as to how this sum could be spent. The Tribunal is persuaded that this should be viewed as a payment on account of business expenses on behalf of the bank and it would have probably been a normal expectation of such a senior executive of a large bank to spend such sums in this manner.

Turning to the Bonus the Tribunal has deliberated as follows: -

- 12.3 The Tribunal considers that the inclusion of section 22(2) (b) in the Law, as amended, was an attempt by the legislators to ensure that, if the application of section 22 (2) (a) seemed to provide a seemingly unjust or inequitable Award, there could be an alternative remedy. Section 22(2) (b) provides a Tribunal with the power to exercise some discretion, such that it could decide what it considers to be a just and equitable Award.

- 12.4 The Tribunal has taken account of the example given by Advocate Richardson where he posited the example of a long serving employee, unfairly dismissed, who due to ill health in the final six months of employment received only a small proportion of his wages. If a Tribunal could only use those final six months as a basis for an award the pay, then many would argue this would result in an unjustly low Award.
- 12.5 In the case of the Applicant, his pay was highly geared to a single annual bonus; indeed in two of the years preceding his dismissal his basic pay struggled to attain 25% of the bonus payments made to him. The Tribunal is not surprised that, at such a senior level, so much of his regular remuneration was in the form of bonus payments over his twelve years of employment with the Respondent. The Tribunal also notes that, given the testimony of the Applicant, he still received a considerable bonus in 2003, when his employer worldwide had suffered heavy losses. This confirms a continuing regularity of bonus payments over the entire period of his employment with the Respondent.
- 12.6 The Tribunal also notes the wording of the contract of employment (EE1 Tab 3 refers), in which it states that the Applicant was entitled to a special performance bonus paid annually, and that there is no qualification in the contractual wording that such bonuses are discretionary. The Tribunal does note that individual notifications of yearly bonuses to be found in ER1 do refer to bonuses being non-recurring and that their payment did not guarantee payment in future years; however the practice of the Employer was to pay a bonus every year, without exception, to the Applicant. Finally, the Respondent did not apparently amend or update the Applicant's Contract of Employment during his total period of employment. The overall impression gained by the Tribunal is one of regular payments, albeit in varying amounts, made to the Applicant every year.
- 12.7 The Tribunal also takes account of the fact that in the ten years preceding his dismissal, the salary of the Applicant remained totally static. The Tribunal is persuaded that, unless he had a regular expectation of bonuses each year, it would have been highly likely that his base salary would have progressed in line with market movements and/or cost of living.
- 12.8 The Tribunal accepts the assertion by the Respondent that it would be ill advised to imagine from the limited testimony given by the Applicant, and no testimony on company results from the Respondent, that it could formulate what might have been paid as bonus in early 2007, if the Applicant had remained in post. However, it is noted by the Tribunal that the Respondent offered no explanation, when it was asserted by the Applicant that the date of dismissal might have been chosen to avoid the annual bonus being considered as part of the last six months salary leading up to the EDT.
- 12.9 The Tribunal is not persuaded by the argument of the Respondent that by including bonus to determine the level of the Award that this involves a double payment of the bonus. Rather it is a determination of which elements of pay should be included to provide a just and equitable basis for the calculation of the Award.
- 12.10 Finally, the Tribunal has formed a view that a senior executive is typically employed by a large employer such as CS to define long-term strategies and plans. Such a role may well make a decision which only bears profitable fruit some two to three years after the decision is made; whilst testimony was not given on this subject the Tribunal would be surprised if the Applicant was not involved in plans with horizons considerably longer than six months. This further reinforces the view taken by the Tribunal that Mr Good was remunerated for the long run and that the paying of an annual bonus was a normal reward process for such a role.

12.11 The above considerations lead the Tribunal to conclude that it would be unjust and inequitable to exclude bonus payments in considering the Award.

12.12 There is no prior precedent or guideline as to what might be paid on the basis of is what is just and equitable in such a case, however, given the rationale described above, the Tribunal has formed the view that it should use the historical bonuses for the three years previous to the dismissal i.e. those paid in 2006, 2005 and 2004 and average them to determine a "typical yearly bonus based on actual payments made". The Tribunal consciously rejected the use of the bonus payment in 2006 as the only basis. It is clear from the evidence presented by the Applicant that the bonus payments did vary year to year; and it was deemed more equitable to average the final three years payments. Using this formula and then dividing by two in order to arrive at an appropriate amount the calculation would be £162,742.30.

12.13 The Tribunal has not been persuaded by the arguments of the Applicant to include any other element of compensation, whilst the Tribunal accepts that they are part of a total package to attract and retain a senior executive, each of these elements was a clearly defined benefit, which the Applicant had no ability to convert into cash at the time of payment, nor indeed ever at all e.g. Life Insurance Cover.

The Tribunal does not seek to differentiate between such benefits where the payment was made direct to a third party and where the Applicant paid for the benefit and then subsequently sought reimbursement.

The Tribunal, in coming to this conclusion, has been persuaded by the Respondent that the definitions of pay defined in the Law (Section 34), and in particular the definition of pecuniary benefit were not an invitation by the legislators for a Tribunal to attempt to value benefits and treat them as pay.

The Law provides for a Tribunal to determine an award of compensation for unfair dismissal, it is not for the Tribunal to include, in an Award, any consideration of damages incurred by an individual as a result of that unfair dismissal.

12.14 The Tribunal has concluded that the Applicant was not paid by the Respondent for conduct of any 'Office', held as a result of the role undertaken whilst in its employment. Thus, the Tribunal does not need to consider whether the Law could have accommodated an Award that included the loss of Directors fees paid as a direct consequence of an employment contract.

### **13.0 Decision**

13.1 Tribunal accepts the Respondent's admission that this dismissal was unfair within the meaning of section 5(2)(a) of the Employment Protection (Guernsey) Law, 1998 as amended.

13.2 An Award of £242,307.30 been determined, under the provisions of section 22(2)(b) of the Employment Protection (Guernsey) Law, 1998, as amended.

**Signature of Tribunal Chair:**

**Mr Peter Woodward**

**Date: 10 July 2007**