16 pages.

ROYAL COURT
(Samedi Division)

206.

4th November, 1996

P.R. Le Cras, Esq., Lieutenant Bailiff, and
Jurats Myles and Potter

Between:	Helier Philip Warder	First Plaintiff
	Bryan Joe Whitworth	Second Plaintiff
	John Frederick Michael Harris	Third Plaintiff
	Dennis Byrne	Fourth Plaintiff
	Geoffrey Gordon Aubert	Fifth Plaintiff
	Michael John James Gill	Sixth Plaintiff
	Alan Hedges	Seventh Plaintiff
And:	George Troy & Sons Limited	Defendant

Question before the Court: whether the Plaintiffs were dismissed from their employment because they were redundant; and if so, did such dismissal constitute a breach of contract.

Advocate D.F. Le Quesne for the Plaintiffs.
Advocate B.E. Troy for the Defendant.

JUDGMENT

THE LIEUTENANT BAILIFF: The Plaintiffs were all dock workers employed by the Defendant. They were all members of the Transport and General Workers' Union. Each of them claimed damages on the ground of constructive dismissal due to redundancy by the Defendant, contrary to the terms of their contract of employment.

The terms of the contract are those set out in two agreements between the Union and the Defendant.

The first agreement ("the first agreement") is that signed on 1st February, 1990, and was to run from that date until 31st January, 1992, and the second ("the second agreement") is stated to have affect from 1st February, 1992, until 30th September, 1993. The two agreements are conjoined in that the second agreement provides that *"All other terms and conditions of Employment remain as per current agreements...."*

The second agreement, whilst clearly maintaining a distinction between two grades of dockers contains two clauses which should be set out here. The first is the first paragraph which reads:

> *"The Company agrees to the continued employment of existing dock workers and crane operators* ***WITH NO REDUNDANCIES*** *under the following rates of pay and Conditions of Service:-"*

And the second is the fourth paragraph which reads:

> *"Dock workers employed on the Car Ferries will be expected to perform the full range of duties i.e. Tugmasters, Forklifts and Trade Cars, etc."*

It is on account, the Plaintiffs claim, of a breach of the first paragraph that this action is brought. The first agreement contains a paragraph headed "THE AIMS" which reads:

> *"The Aims of this Agreement are as follows:-*
>
> *(a) To promote the efficiency of the port and companies concerned, thereby increasing the standard of service to the client of each company.*
>
> *(b) To facilitate the introduction and operation of improved working methods of cargo handling, including mechanisation.*
>
> *(c) To improve progressively the wage structure and conditions of employment of the employees".*

Although the agreement is a collective one signed by the Union it is accepted by the Defendant, quite properly, that each employee did have a contract of employment and that this contract is evidenced by the two agreements.

It was common ground that on 16th December, 1991, that is, some six weeks before the coming into force of the second agreement, Mr. R.J. Shenton, the then Managing Director of the Defendant had written to Mr. M. Kavanagh the Jersey official of the Union in the following terms:

> *"I write to advise you that I intend to terminate our Dock Workers and Crane Operators' Agreements effective from January 31st, 1992. For some years now I have worked very hard in trying to keep the firm together but it has become obvious to me that I have not been able to break down the pre-historic thinking of some of our older employees who are still living in the past.*
>
> *I enclose correspondence from which you will see the difficulties which I have faced and the parlous state the Company has been in, and whilst we have struggled to work with inadequate equipment, we have at all times paid the full wages and benefits to which we agreed. The men's earnings are far out of scale with the hours they put in, and as we cannot spirit shipping out of the air we have for some time been faced with the knowledge that we are over-manned and under-worked.*

As you will see from the earnings and the hours of actual employment this had to come to an end and we have unfortunately reached a stage where the Shipping Companies are forcing this decision upon us. Contrary to their reports in the media when I took them on, there is still much pressure to do the work cheaper than we can. I must therefore bow to the inevitable and must change work practices arbitrarily, and I am sorry but those people who find it difficult to work under these conditions will need to decide upon their own futures.

Being honourable to the last I shall stick to the 1991 Agreement until the end of January when in actual fact I should bring the changes in immediately. I enclose a new Agreement which I would like you to put to the Crane Operators and Dock Workers at the earliest opportunity and advise me of those employees who wish to stay with this Company and those who wish to leave. Please note that I am available to meet with you at any time to explain the situation in more detail but I am no longer in any position to bargain".

He had followed this up with a further letter, on 8th January, 1992, that is some three weeks after the first, to each of the Defendant's employees, enclosing a new agreement to be effective from 1st February, 1992.

The Court heard from the evidence of Mr. W. Hibbs, the Chairman of the Docks Branch of the Union and a docker then working for the Defendant, that the letter and proposed contract was considered at a branch meeting; that it was felt not to be right for an individual to sign, and so was returned unsigned to the Defendant.

This was then followed by the second agreement (see above) which was duly signed on 21st January, 1992, and was to expire, as we have said, on 30th September, 1993.

However, on 16th September, 1992, the Defendant wrote to, *inter alia*, six of the seven Plaintiffs in the following terms:

"As you are aware the Company continues to face difficulties with regard to the manpower requirements of the shipping companies. Last year we had to take drastic steps to remain in business, and we thought at the time that our staff would recognise the seriousness of the situation and do something towards helping this Company to survive. The majority of our employees have responded but in your particular case there has been no attempt to meet the changes in working practices now demanded by the customer.

At the present time we employ 41 registered dockers and have 6 of that number off sick. Of the remaining 35 men, 20 are capable of carrying out the full range of duties required in a modern port, and 15 who cannot fulfil their role and in fact are non-productive as far as this Company is concerned. Some of that number are over the age of 60 years; we feel a responsibility towards them and hope to be able to employ them until their normal retirement date. However 11 employees of which you are one are unable to carry out their full range of

duties which must include ramp work, and we must advise you that you will be required to have driving tuition in order to support your colleagues who are carrying you. Failure to do so will mean we will have to replace you with workers who can carry out every function of the docker's role.

In order to give you time to secure your position we now give you three months' notice of termination of employment effective from today's date. Naturally should you see your way clear to assisting your fellow dockers and the Company by taking steps to fulfil all your duties, then your employment is secure. The choice is entirely with you. I am sorry I have had to bring this matter to your attention as I feel you should before now have realised the serious nature of the problems this Company is facing".

Mr. Warder appears to have been left out, having been sick for some time. It was, it is claimed, as a result of that letter and what transpired thereafter that the Plaintiffs claim that they were made redundant.

The principal witness for the Plaintiffs was Mr. W. Hibbs. Now aged 48 he had worked for the Defendant for 22 years before he left its employment two years ago. He had been the Chairman of the Docks branch of the Union.

The "no redundancy" provision in the agreement had been there for many years. It was simply carried forward, from a time before he had become branch Chairman. There had never been any redundancies before; this was something on which Mr. Shenton prided himself. Mr. Shenton was, he agreed in cross-examination, a fair man and employer. During the time he was employed there had been a very considerable change in the method of discharging ships. Formerly it had been lift on/lift off, i.e. ships were discharged by lifting their contents, generally from a hold.

About 20 years ago the first roll on/roll off ferry came in and by the time he had left the Defendant's employment this had increased from one ship and 3 or 4 trailers a day to perhaps 90% of all incoming cargoes. In his view Mr. Shenton had never thought that roll on/roll off would take over as it did.

In order to unload the containers, it was necessary to use articulated lorries, and to operate these in Jersey it was necessary to have an HGV licence, category R. Dockers themselves were, apart from crane drivers and casuals, divided into two groups, A & B. A dockers formerly did all types of stevedoring and were now effectively all articulated lorry drivers. B dockers, originally, were those who, if over 50, could come off heavy work, or, more recently, did not have the requisite HGV licence.

Between 1990 and 1992 there were a lot of changes in the docks. The amount of cargo coming in on roll on/roll offs was increasing and cargo, instead of being paid by tonnage was being paid by units, regardless of weight. Often the Union would make suggestions to change practices.

As a result, the Union Committee had agreed, before the end of 1991, to negotiate a reduction in wages, the *quid pro quo* being that jobs were safe, this latter point being his main concern. He knew that the firm was under pressure to reduce dockers; each time he had negotiated with Mr. Shenton the latter had told him so. This was, not surprisingly, not very popular and certainly some of the older dockers did believe that there was a bottomless pit when it came to money.

As to the letter of 8th January, 1992, offering individual contracts, this had indeed been sent back to the Defendant unsigned, as it was not felt right that individuals should sign it. It was, of course, shortly followed by the second agreement.

He had seen the letter of 16th September, 1992, and read it as meaning "take tuition or else", although he was quite definite that he thought it was a threat which would not be carried out. He thought Mr. Shenton was trying to force dockers to drive though some had previously been taken off driving. In this instance he could not understand why Mr. Shenton wished to get rid of these men. In passing, ramp work was driving articulated lorries and at that time the firm was short of drivers, which slowed the turn round of the roll on/roll off ferries.

When the Plaintiffs finally left they, or some of them at least, had told him that Messrs. Shenton and D. Troy had told them that if they went to the Union, they would lose money. The men, he thought, were frightened. He, himself, had been to Mr. Kavanagh as he believed that these problems were always settled by negotiation.

As to particular Plaintiffs, Messrs. Byrne and Aubert had HGV licences; both on receipt of the letter had said they would apply to go back on the list; and the next he knew was that both had been dismissed. Regardless of the request to the Plaintiffs there were, so far as he knew, B men still working on the docks, as there were not enough articulated vehicles for all to drive. He accepted though that two of the recipients of the letter, Messrs. Le Geyt and G. Whitworth, had obtained licences and were still employed, as had been a third man, now no longer there.

Mr. M.B. Kavanagh, the Jersey District Secretary and a full time official of the Union was called. He had not been involved in the negotiations which led to the signing of the agreements, as these had been done "in house". He had received the letter of 16th December, 1991, and had passed it to the docks workers. He had understood that they had discussed it with Management.

The clause relating to no redundancies was not new. If there were to be redundancies then any problem arising was, in his view, to be dealt with by negotiation and agreement with the Union i.e the Shop Stewards.

When the Plaintiffs left their employment he was not involved, although again in his view he should have been under the terms of the agreement. Indeed the Plaintiffs had been emphatic when he spoke to them that they did not want the Union involved in case the Defendant Company reduced the offer it had made to the bare eight weeks required by law. Despite his view that the Plaintiffs were being made redundant he had agreed not to publicise the Defendant's actions although he had

been to see Mr. Shenton who had told him that he had signed them off individually. The Union, he said, had only become involved after the General Secretary, Mr. Morris, had come over to the Island with the Regional Secretary and had told him to take all seven cases to the Union's legal advisers. Last, he too, was asked his opinion of the reputation of the Defendant as an employer. He agreed that it was good and added that this was especially so in cases of need, hardship or injury.

The Court then heard evidence from each of the Plaintiffs. The evidence of each of them formed to some extent a similar pattern and without disrespect to them may perhaps be summarised.

The first was Mr. H.P. Warder, now aged 63, who had worked on the docks, first for Huelins, since 1961. He was a B docker, and had been offered the choice of being sacked or resigning. He had never held an HGV licence, and when he received the letter of 16th September, 1992, could not get into a cab or even drive a car on account of a hip operation which he had undergone in the summer of 1992. After he had received the letter he went alone to see Mr. Shenton, who had told him that he would have to get a licence within three months. He had replied that he could not, but that he would in due course. Mr. Shenton replied that he was not giving him any time, to which the witness replied that this was not fair, the response from Mr. Shenton being that it was not fair on the rest of them.

Although he thought he was dismissed, he signed the form saying that he had resigned. If he were going for another job, he would rather resign than have the sack. He did not think it fair. What upset him was the unfairness of losing his job. He thought he could have passed the HGV test, but he had suffered bad health before he had the hip operation in July, 1992, was able to drive his car in perhaps October, 1992, and that for about a year before he had more hip trouble, culminating in a second hip operation in April, 1994. The impression left on the Court was that of a man who, at the time, and thereafter, was suffering very severe physical disability.

Last, he did not recall meeting Mr. Kavanagh to discuss what had happened, nor did he complain to anyone.

Next was Mr. B.J. Whitworth, now aged 58 who worked for the Defendant from 1957 until November, 1992. Like the others, he, too, had received the letter of 16th November, 1992, and had understood from it that if he did not get the licence he would get the sack. In his case, when called in to sign the letter of resignation against sixteen weeks pay, he refused to sign it and instead engaged in an argument with Mr. Shenton which, as he put it, became heated, and as a result of which he was immediately dismissed without notice.

He had had trouble with his right eye, and more recently has had a cataract operation. He had not driven a mile in the last four years. He did not, however, recall going to see Mr. Shenton to say he could not because of his eye. To his mind, the statement that the Company was in difficulties was simply an excuse. In his view there was still adequate work to keep him employed.

He was followed by Mr. J.F.M. Harris, now aged 51 who had worked for the Defendant for 28 years. After receiving the letter of September, 1992, he did not seek to get an HGV licence as he thought that he was not capable of doing the job. He had had a bad accident (which was confirmed by Mr. D. Troy) some years ago and it had affected his nerve. After the second letter in October, he had not called on Mr. Shenton. He did not know why he had not, he just thought he would get the sack anyway. He agreed that Mr. D. Troy had pleaded with him to get an HGV licence, but he had simply refused. He has since found regular work. In his view, he was not resigning but being sacked.

Mr. D. Byrne, now aged 62, had worked for the Defendant for 32 years, was the possessor of an HGV licence and in earlier days had offered his services in that regard. By 1992 his eyes were bad. He had, he claimed, developed diabetes and glaucoma, though he had obtained no medical certificate for his eyes. He had done some practising but thought his judgment would not be good enough. He had told Mr. D. Troy, and had met Mr. Shenton who had said that he was not to worry about it. He, too, thought he had been sacked, which he found hard after 32 years.

Mr. G.G. Aubert, now aged 59, had worked for the Defendant for three years as a casual docker and then a further 32 years as a registered docker. He had ceased to drive articulated vehicles about one year before his dismissal on account of his eyesight becoming weaker and the effect of rain on his glasses when he had to lean out of the cab. He, too, had not shown the letter of September, 1992, to anyone and he, too, reckoned he was sacked under duress. He had wanted to continue working. It was put to him that he drank at work, which he denied.

Mr. M.J.J. Gill, now aged 59, who had worked for the Defendant for 31 years, had never driven in his life, had no intention of learning and resolved to take whatever was coming. He could not remember to whom he had spoken. He was very upset that the firm no longer wanted him.

Last of the Plaintiffs was Mr. A. Hedges, now aged 53, who had worked for the Defendant for some 20 or 21 years. He was, he said, willing to comply, and had started to learn, but found he had insufficient time. In any case, this came to an end when he had a collapse in about November, 1992, and had gone into hospital. He was not willing to learn when he came out of hospital and duly lost his job. He had thought he would be made redundant before he went into hospital.

This, therefore, ended the evidence for the Plaintiffs. The Defendant called two witnesses. The first was Mr. D.K. Troy now and since 1995, the Managing Director. In 1991 he had been the Assistant Managing Director. Now aged 56, he has been with the Company for 38 years.

The second witness was Mr. R.J. Shenton, the then Managing Director, who had had 45 years association with the port, with a break of six years on the Vancouver waterfront where he served as a senior shop steward.

To a large extent their evidence complemented each others, and to a great extent that of the witnesses for the Plaintiffs. Both confirmed that the work on the docks has changed dramatically in recent years.

Formerly there was the heavy gang, who could do anything, the members of which became subsequently A dockers. They were paid more as they worked harder; but provision was made to become a B docker doing less heavy work, so long as they had been an A docker, after a certain age (50) or if incapacitated. It was, confirmed Mr. Shenton, to provide for injury and age to Company employees to allow them to opt out of heavy work.

Mr. Shenton gave evidence of the regularisation of the original unsatisfactory conditions of employment. His problem was that those employed early on - and some had followed their fathers - got old. This long service exacerbated the problem. He had never had to get rid of a man, even if he had more than he required except by natural wastage. He had always been overmanned, but found redundancy offensive. Indeed, he had, together with Mr. R. Liron (Mr. Kavanagh's predecessor) been instrumental in inserting the no redundancy clause in the agreement. He was determined not to go that way, he said. Referring to the dismissals, he stated that he felt sick about them. In his view, it was not for the Court to sort out.

In the present case, Mr. D. Troy stated that no negotiation was sought by the Union except for a meeting regarding Mr. B. Whitworth *(vide infra.)* Mr. Shenton stated in cross-examination that the letter of 16th September, 1992, was to give the men notice with the intention to get things moving and get them round a table. He had never discouraged them from going to the Union, he would have expected them to come and talk. He was certainly not anti-union. Mr. D. Troy, too, found the lack of representation from the Union quite strange.

The whole problem had arisen in this way, that the method of unloading and loading ships had changed, and changed moreover with startling rapidity. Cargo had changed from loose to pallets, to units (in lift on/lift off) to Lancashire flats, to large containers, to (the latest and most vital change) the roll on/roll off system. This had necessitated many changes in working practices, but by means of co-operation with Mr. Liron the difficulties had been overcome. However, it was quite clear from the evidence of both Mr. Shenton and Mr. D. Troy that the scale and speed of the change took them by surprise.

The first agreement, dated 1st February, 1990, to run to 31st January, 1992, had maintained the distinction between A and B dockers.

However, during 1991 the situation, so far as employment on the docks went, began to deteriorate to such an extent, according to Mr. Shenton, that the Company needed to look for work outside the docks. The shipping companies indeed wanted to do the work themselves, and, not unnaturally, complained when dockers clearing roll on/roll off decks could not drive. The lift on/lift off work was reduced to one boat three times per week and Mr. Shenton could no longer find employment for uncomplicated menial work, although he could for a competent driver. Indeed, the situation had become so serious that in November, 1991, Mr. Shenton sent around a circular asking in terms for those employees who did not drive articulated vehicles to do so. He wanted, he said, volunteers and did not obtain enough, which saddened him.

On 16th December, 1991, he had written to Mr. Kavanagh *(vide supra)* and it will be recalled that it was this letter which the latter had passed to Mr. Hibbs' Committee.

By January, 1992, 90% of all work was, Mr. Shenton agreed, roll on/roll off and in the second agreement signed on 21st January, 1992, to cover the period 1st February, 1992, to 30th September, 1993, Mr. Shenton deliberately changed the wording of the agreement from that in the first agreement, to the following:

> *"Dock workers employed on the Car Ferries will be expected to perform the full range of duties i.e. Tugmasters, Forklifts and Trade Cars etc.".* (see above).

This agreement also involved a reduction in wages. Mr. Shenton accepted that any failure to make it clear in the agreement that there was to be a reduction in the B category would have been a failure on his part. In negotiating this agreement he accepted that Mr. Hibbs knew the firm was under pressure and that there would have to be a reduction in wages but that the main thing for him (Mr. Hibbs) would have been that there were no redundancies. Notwithstanding the agreement, the situation continued to deteriorate as we have stated and on 16th September, 1992, Mr. Shenton wrote to a number of the Company's employees *(vide supra)*. The letter was not written to anyone aged over 60.

The exceptions formerly made for people requiring to be treated compassionately on account of age or illness were being abused; a registered docker should be able to do a full range of duties.

There was little response to the letter which came, he said, as a bitter blow to him and on 16th October, 1992, he sent a further letter to *inter alia* the same six Plaintiffs as the earlier one. At the same time, in passing, the Court notes that the letter was also sent to Messrs. G. Whitworth, M. Le Geyt and L. Stanton. The position of Mr. Stanton was not entirely clear to the Court, but with regard to Messrs. G. Whitworth and M. Le Geyt, Mr. D. Troy stated that they had come to see him, had told him that they were not prepared to lose their jobs and had requested to stay until they got their licences, to which he had agreed. They had failed the HGV test three or four times, had got them perhaps three or four months later and are still working for the Company today. As to the Plaintiffs, had they got licences, then whether there was work or not the Company would have kept them on.

Since then the Defendant has employed three men with the requisite HGV licences within the last two years and some casual workers during the summer. The firm, Mr. Shenton stated, still has problems.

Turning now to the individual cases, Mr. D. Troy stated that Mr. Harris had been to see him and that he had indeed pleaded with him (Mr. Harris) to obtain his licence, which Mr. Harris had refused to do. After that he felt he could do nothing with him. He gave no reason except the accident: but he drove everything else. As to the money and the letter (giving 16 weeks money i.e. 8 weeks more than the statutory minimum and stating that the employee was resigning) he explained this and told him that it was to help him.

Asked whether the Plaintiffs were threatened with less money if they went to the Union, Mr. D. Troy replied that this was absolutely untrue. He added that Mr. Kavanagh did not come to the meetings despite

the fact that the docks were the first place where the Union intervened. He added that there was no animosity when Mr. Harris left. Mr. Shenton simply described him as being very nice.

As to Mr. Byrne, Mr. Troy was not aware that he had an HGV licence, although he accepted what he said. He was of a very nervous disposition. He had not told him of his glaucoma nor had he produced a certificate. Mr. Shenton equally stated that he had not been told that his eyes were bad. He knew he had an HGV licence and added that he knew he had domestic problems. He was given the opportunity but just said he would rather not.

With regard to Mr. Aubert, Mr. D. Troy knew that he had had an HGV licence. He was an excellent worker, although he was not well. Neither he nor Mr. Shenton were anxious to discuss his problems nor how they dealt with them. The upshot was though that he also refused to drive the articulated vehicles and accepted the sixteen weeks payment.

Mr. D. Troy confirmed that Mr. Gill had never driven anything in his life and had always refused to drive at all. Mr. Shenton added that he was a non co-operator.

So far as concerned Mr. Hedges, Mr. D. Troy stated that he was given time and he remembered asking him. Mr. Hedges had said not to worry and he (Mr. D. Troy) had understood he was not concerned as he could get another job. He did not know he had gone into hospital. Mr. Shenton added that he knew he had a problem, but he did not fire him for that; he had made himself unemployable.

Asked about Mr. Whitworth, Mr. D. Troy told the Court that he did not know about his eye: he thought he had not been told. He accepted that he could not drive if he said so: that was exactly the problem. He was present at the row, and would have sacked him as Mr. Shenton did. Mr. Shenton equally did not know about his bad eye. He confirmed in terms Mr. Whitworth's account of the row, that he had sacked him and had demanded an apology (in private, in front only of those present) before he would pay him out. This had not been received. He had been telephoned by Mr. Kavanagh and had repeated his demand for an apology, and there the matter had rested.

This left only Mr. Warder, who had been ill for so long, said Mr. D. Troy, that he had been, in effect, forgotten, for which he in terms apologised. He had called him in and told him the same as the others. He was not fit for work at the time. Mr. Shenton put it in this way, that he had called him in, asked what he could do, he said he could not, and that was it.

Both Mr. D. Troy and Mr. Shenton stated that they had been concerned to get the men to drive, or at least to try to do so. As to the method of dismissal, Mr. D. Troy stated that the Plaintiffs had been asked to sign the letters to help them get further employment. They need not have signed had they not wished to do so. He agreed that it was better than if they were simply sacked. It was, confirmed Mr. Shenton, to help them, even though the letter was not perhaps entirely honest.

The Defendant had always thought that they had dismissed themselves because of their failure to take articulated vehicle licences. It was their refusal to comply with the letter of the 16th September, 1992, which had led to the parting of the ways. He flatly declined to accept that the Plaintiffs had been made redundant. They could not, he said, have been made redundant when he had offered them jobs and two of them were still working. 95% of the men now working had articulated vehicle licences, the exception or exceptions being old B men over 60 who are about to retire, figures which were in terms confirmed by Mr. Shenton.

Asked what he meant by redundancy, Mr. Shenton replied that in his view it was when there was no longer a job available, or it had changed to such a degree that the work-force could no longer fulfil the role. Had they obtained their licences he was confident he could have found employment for them. It was never his intention to dismiss them. He could have carried one or two, but not a whole group and had been asking for co-operation without a time limit.

At the close of the evidence, counsel for the Defendant made certain concessions, to which he had clearly given considerable thought.

First, the defence withdrew the allegation that by accepting money (except of course in the case of Mr. Whitworth) over and above the amount to which they were legally entitled, the Plaintiffs had thereby settled.

Second, he reconfirmed his earlier statement to the effect that although the Defendant took the view that the agreement between the Company and the Union was unenforceable and intended to be so, as being one which was not normally intended to create legal relations, nonetheless it was incorporated into individual contracts of employment under which the Plaintiffs are entitled to sue.

Third, the Defendant did not seek to argue that the men had resigned voluntarily.

Both counsel therefore agreed that the issues before the Court were:

1. Were the Plaintiffs dismissed due to redundancy?

2. Were "The Aims" in the first agreement part of the contract and, if so, were the Plaintiffs in breach of them? And, if so,

3. Was the Defendant entitled to dismiss the Plaintiffs?

On the first point, that is whether the Plaintiffs were dismissed for redundancy, both parties agreed to accept the definition contained in the Employment Protection (Consolidation) Act 1978. The Court was referred to the passage in Chitty, the relevant part of which reads:

> ***"...by s.81(2) of the 1978 Act a dismissal is by reason of redundancy if the dismissal is wholly or mainly attributable to:***
>
> ...

(b) the diminution or expected diminution of the requirements of that business for employees to carry out work of a particular kind either generally or in the place where the employee was employed".

The Plaintiffs thus rely on the second agreement *(vide supra)* that the employment of existing dock workers will be continued with no redundancies.

So far as "The Aims" contained in the first agreement (again, *vide supra)* are concerned, the Plaintiffs claim that they are a mere preamble, a point strongly contested by the Defendant.

The passage in Odgers' Construction of Deeds and Statutes (5th Ed'n) at p.149 was cited to the Court. It reads:

> *"It is common to find recitals even in less formal documents than the conveyance, e.g., commercial contracts. These are introductory or a narrative of what had led up to the necessity or desirability of executing the deed or document. Hence the familiar opening "Whereas" the parties are desirous of or have agreed on some particular course of action, etc. Or the recitals may detail a long history of title to land designed to show that, e.g., the grantor is entitled to make the disposition he is about to make by the deed, or the recitals may be, in the words of Lord Halsbury L.C. "a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made". The recitals must of course be carefully distinguished from the operative part of the deed - the words that actually effect the transfer of the property or the interest therein or declare the parties bound by some agreement or covenant. In 1693 Lord Holt declared that "the reciting part of a deed is not at all a necessary part either in law or equity ... it hath no effect or operation"."*

In the view of the Court "The Aims" are indeed a mere recital of the general background and the aspirations of the parties, which might just as well be prefaced with the word "whereas".

The Court therefore finds that the aims do not form part of the contract, and (see the passage in Odgers *op. cit.* p.152), it is only necessary to refer to it in such cases as the following statement provides:- *"if the operative part of a deed be doubtfully expressed, there the recital may safely be referred to as a key to the intention of the parties".*

The contract appears to the Court to be quite clear and there is thus no reason to refer to "The Aims" in its construction.

It was clear beyond a peradventure, from the evidence before the Court, that although the Defendant was still in the business of stevedoring, the methods of loading and unloading ships had changed dramatically, and were changing during the period of the agreement.

The speed of the change had clearly taken the Defendant by surprise and clearly placed the Defendant, who it was conceded was a good, indeed

paternalistic, employer, under very considerable pressure, with the result that it came to the conclusion that it could not continue to employ anyone, save out of kindness, who could not drive an articulated vehicle. It was this consideration that led to the very different requirements of the second agreement relating to the employment of workers on the car ferries which now constituted some 90% of the work available. This was known to the men, including the Plaintiffs, although some quite clearly would not accept it.

It was contended by Mr. Le Quesne for the Plaintiffs that the letter of 16th September, 1992, was in fact a notice of dismissal on the grounds of redundancy.

Although it was taken as such by the Plaintiffs who refused to co-operate, the Court is unable to construe it in that way. It was in our view intended as a warning and a request to take tuition. The Plaintiffs were dismissed when they were paid off and signed the letter of "resignation", the exception being of course Mr. Whitworth who was dismissed following the row with Mr. Shenton.

Those who did take tuition and passed their HGV test, albeit some time after the expiration of the three month period stayed; and the Court has no hesitation in accepting the evidence tendered for the Defendant that continued employment was offered to any of the Plaintiffs who obtained such a licence regardless of the work available.

Turning now to the agreement, the Court notes that the agreement stipulates that all those working on the ferries should have an HGV licence. What the agreement does not stipulate is that all dockers must be able to work on the ferries. It is also to be noted that provision is still made for dock workers unable to perform the full range of duties who are to be paid at lower rates than the car ferry gangs.

It is quite clear from the evidence that the requests for the obtention of HGV licences came about on account of the diminution of the load on/load off work and the pressure put on the Defendant by the ferry companies.

It is equally clear that the Plaintiffs were dismissed for failure to adjust to new working practices which were perfectly reasonable *per se*, but which in the view of the Court were not so in respect of the Plaintiffs, conditioned as they were by many years of previous employment, albeit that they were being kept on when work was short by a kindly and indeed generous employer.

The defence made considerable submissions to the effect that the Plaintiffs had repudiated their contracts. Given the facts, the Court finds no evidence to support this contention.

For the Plaintiffs, whose position had been sufficiently preserved by the second agreement, the change was a big one, coming as it did late in life and after so many years.

Although the Court is satisfied that the Plaintiffs would have been kept on had they co-operated, they were not immediately replaced; and even now have not been replaced by an equivalent number of registered dockers.

This case is close to the borderline, and, as with all these cases, must turn on its particular facts.

Although the Plaintiffs had no right to insist on a continuation of load on/load off work, the change which was required of them, during the currency of the second agreement was, on the facts, so great as to be unreasonable and one which went beyond a normal and reasonable change in working practices, notwithstanding the difficult position in which the Defendant found itself.

The Court finds that the Plaintiffs were dismissed for redundancy and that the requirements of s.81(2)(b) of the 1978 Act have been met and that in consequence the Defendant is in breach of its contract.

The Court has been asked to deal with the question of liability only. If the claim for any damages is to come before the Court, it should return to the Court as presently constituted.

Authorities

Chitty on Contracts (27th Ed'n) (1994) pp.152-153.
Chitty: Ibid: paras: 37-037 to 37-041.
Chitty: Ibid: paras: 37-177 to 37-179.
Chitty: Ibid: paras: 7-042 to 7-047.

Billins: Agency Law (1994): paras: A1/1 to A1/7.

Wallis -v- Taylor [1965] JJ 455.

Edwards -v- Skyways Ltd [1964] 1 WLR 349.

Ford Motor Co Ltd -v- AUEFW & Ors. [1969] QBD 481.

Robertson & Jackson -v- British Gas Corp [1983] IRLR 302.

Marley -v- Forward Trust Group Ltd [1986] IRLR 369.

NCB -v- NUM [1986] IRLR 439.

UCW -v- Richard F Le Maistre (30th November, 1992) Jersey Unreported.

4 Halsbury 16 para. 412.

Selwyn: "Law of Employment" (8th Ed'n) pp.379-393.

Selwyn: Ibid: pp.285-297.

FR Batt: "The Law of Master and Servant" (4th Ed'n) (1950) p.205.

North Ocean Shipping -v- Hyundai Corp [1978] 3 All ER 1170.

Mahoney -v- Purnell [1996] 3 All ER 61.

Ballard -v- Lumb [1968] JJ 923.

Ferbrache -v- Bisson [1981] JJ 103.

Leigh -v- McLinton [1991] JLR 274.

Code Civil des Français (1804): Livre III: section 1ere: p.270.

Hauser: "Les Contrats" (Que sais-je?): pp.26-37.

Nicholas: "The French Law of Contract" (2nd Ed'n): pp.106-113.

Dickson: "Introduction to French Law": pp.144 et seq.

Pothier (1818 Ed'n): Tome III: "Traité des Obligations": pp.15-35.

Le Geyt: "Constitution, Lois et Usages de cette Ile" (Jersey, 1846): Tome I: pp.297-298; 403-421.

Lee & Ors -v- GEC Plessey Telecommunications (1993) IRLR p.383.

Johnson -v- Nottinghamshire Combined Police Authority
Dutton -v- Nottinghamshire Combined Police Authority [1974] 1 All ER p.1082.

Chapman & Ors -v- Goonvean & Rostowrack China Clay Co Ltd [1973] 2 All ER 1063.

Hindle -v- Percival Boats Ltd [1969] 1 All ER 836.

North Riding Garages Ltd -v- Butterwick [1967] 1 All ER 644.

Cresswell & Ors -v- Board of Inland Revenue [1984] 2 All ER 713.

(1991) JLR Notes: 8 Employment: Termination.

Odgers' Construction of Deeds and Statutes (5th Ed'n): pp.149-157.

The Shorter Oxford English Dictionary (3rd Ed'n) p.169.

Lord Chorley & OC Giles: Shipping Law (6th Ed'n) pp.246-248.