

IN THE INDUSTRIAL TRIBUNAL

Case No.13/1997

BETWEEN

JOHN HENRY GOMEZ

Complainant

AND

GIBRALTAR INFORMATION BUREAU LIMITED

Respondent

JUDGMENT

Background

1. On the 27th of June 1997 Mr Gomez completed and submitted to the Tribunal an Originating Application citing the following six grounds in support of his contention that his dismissal as HEO Procurement Section on the 24th of May 1997 was unfair:
 - (a) *The Complainant's dismissal was connected to the transfer of part of the trade or business of the Respondent to the Gibraltar Government. Dismissal is consequently unfair as provided in Section 78(b) of the Employment Ordinance.*
 - (b) *The Respondent's decision to dismiss the Complainant was based in whole or in part on what was described by the Chief Minister as the Complainant's "private commercial activity". This is not a valid ground for dismissal and the Respondent acted unfairly and unreasonably in taking this into account.*
 - (c) *The Respondent failed to consult the Complainant or his Trade Union adequately or at all in relation to the transfer of part of the*

trade or business of the Respondent to the Gibraltar Government and in relation to the dismissal.

- (d) *The selection criteria adopted by the Respondent for the Complainant's dismissal was not based on objectively justifiable grounds.*
- (e) *The Respondent failed to consider adequately or at all the possibility of transferring the Complainant to another department or position.*
- (f) *In all the circumstances of the case the Respondent acted unfairly and unreasonably in dismissing the Complainant.*

- 2. The Complaint was received by the Industrial Tribunal on the 30th of June 1997.
- 3. On the 16th of July 1997 or thereabouts the Respondent entered an appearance through its Solicitors Messrs Triay & Triay accepting that the Complainant had been dismissed and stating the reason for dismissal was redundancy; it was intended to resist the claim by the Complainant.

Hearings/Transcript

- 4. The Tribunal sat from April 2000 onwards on various dates. Thereafter there was some delay in the obtention of transcripts of the hearing. The need for a transcript was brought about by the misplacement of some of my own notes and the incompatibility of the Tribunal recorded tapes with available audio equipment. The transcript was not made available to me until March of 2004. It is clear from quotations in this judgment the transcript has its shortcomings. Notwithstanding the difficulties I very much regret the delay and any inconvenience to the parties in delivering this judgment so tardily.

Formalities

5. Mr Gomez' complaint (pages 9 to 11 of the Complainant's bundle) is that he was unfairly dismissed on the 24th of April 1997 – this may in fact be a slip for the 25th. His position was HEO (Higher Executive Officer) Procurement Section. That application is dated the 27th of June 1997 and filed within time.
6. The Respondent's Form IT3 is dated the 16th of July 1997 (in the same bundle page 12). It admits the dismissal and gives as the sole reason for it "REDUNDANCY". Paragraph 3 adds: "*Dismissal was, inter alia, fair*". In this context "*inter alia*" is an expression which is not capable of being understood. Certainly the Complainant's Solicitors Messrs J A Hassan & Partners could not understand it and wrote to Messrs Triay & Triay for the Respondent on the 23rd of September 1997 (page 31 of the same bundle) seeking an explanation. It was seven months before the Respondent replied on the 16th of April 1998 (page 34-35 bundle) and even then there was no explanation.
7. There followed a Directions Hearing before me on the 21st of April 1998 when I ordered that:
 - (i) *The Respondent do furnish the Complainant with Further and Better Particulars of the grounds on which the Respondent relies in support of its contention that the Complainant's dismissal was fair within 14 days of the date hereof.*
 - (ii) *The Respondent do furnish the Complainant with a list of the witnesses it intends calling at the hearing of the Complainant's claim for unfair dismissal within 14 days from the date hereof.*

- (iii) *The Complainant do serve on the Respondent a list of the witnesses he intends calling at the hearing of his claim for unfair dismissal within 7 days after the Respondent has served its list of witnesses.*
- (iv) *The Respondent do furnish the Complainant within 14 days from the date hereof with the names of employees of clerical grade employed by the Respondent for the period 24th October 1996 to the date of his dismissal and any new employees of clerical grade employed by the Respondent after the dismissal of the Complainant by the Respondent.*
- (v) *The Complainant do furnish the Respondent within 14 days of the date hereof with Further and Better Particulars of which of the trade or business of Complainant is being referred to in numbered paragraph 4 of the Originating Application.*
- (vi) *The Complainant do disclose to the Respondent within 14 days from the date of the Order each written contract of employment entered into with any third parties since the termination of his contract of employment by the Respondent without prejudice to the generality of the foregoing with copies of the Employment & Training Board Notice of Terms of Engagement in respect of each such engagement since the Complainant's dismissal by the Respondent."*

8. The parties could not agree that the Order as drawn up was an accurate reflection of what had been agreed and accordingly in September of 1998 I was asked to adjudicate. I did so by letter of the 21st of September 1998.

9. Further Particulars of the Respondent's grounds were given on the 19th of July 1999 more than two years after the dismissal. The Particulars (page 59 of the same bundle) read:

"The ground on which our client company will rely in support of its contention that your client's dismissal was fair are as follows:-

- (a) *The Complainant was redundant following the revocation of the company's authorisation to perform the duties imposed on the Commissioner of Income Tax under Part V of the Income Tax Ordinance by the Commissioner of Income Tax.*
- (b) *The said revocation of the company's powers under Part V of the Income Tax Ordinance did not constitute a relevant transfer for the purposes of Section 78 of the Employment Ordinance or otherwise."*

10. There followed a further Order for Particulars which I made on the 27th of July 1999 when it was clear there were still difficulties about compliance with the Order of the 21st of April 1998. The fresh Order read as follows:

- "(i) The time for compliance by the Respondent with paragraph 2 of the Order herein of 21st April 1998 be extended to 5.00 p.m. on 3rd August 1999.*
- (ii) The Respondent do provide the Complainant by 5.00 p.m. on 3rd August 1999 the Further and Better Particulars requested in a letter from Messrs J A Hassan & Partners to Messrs Triay & Triay dated 22nd July 1999.*
- (iii) The Complainant do provide the Respondent by 10th August 1999 a list of the witnesses he proposes to call.*

- (iv) *Witness statements and bundles of documents to be exchanged by the parties on or before 5.00 p.m. on 13th August 1999.*
- (v) *Skeleton authorities and bundle of authorities to be exchanged by the parties on or before 5.00 p.m. on 1st September 1999."*

11. Further amplification came from the Respondent in Triay & Triay's letter of the 3rd of August 1999 (pages 114 to 115 of the bundle) wherein it was said:

"2. In reply to the Further and Better Particulars requested in your letter of 22 July 1999, we would confirm as follows:-

- (a) the Respondent proposes relying on economic, technical and/or organisational reasons.*
- (b) the Respondent will aver that the economic, technical and/or organisational reasons related to the policy of the Government, given the high instance of unemployment, not to maintain in employment at taxpayer's expense employees who had significant commercial interests especially if they were involved in the running thereof.*
- (c) the said economic, technical and/or organisational reasons entailed changes in the workforce in that anyone with a significant commercial interest, especially if they were involved in the running thereof, would have their contracts of employment terminated and the Complainant was affected by these reasons which required a change in the workforce, if such criteria applied."*

- 12. Pausing there the Respondent's case has moved or developed from "he was redundant" simpliciter to the addition of "he was dismissed for technical etc reasons" and "there was no alternative work" to "those reasons related to Government of Gibraltar policy" in which event of course "no other work" would be an irrelevance.
- 13. This was amplified by the evidence of Mr Hook (transcript page 17). He agrees that he signed the letter DH.19 dated 25th April 1997. He said (page 17) that he signed that letter on instructions from: "the Government of the day in the person of the Chief Minister".
- 14. The final evolution of the Respondent's position can be seen in the evidence of Mr Montado at paragraph 13 of his witness statement of the 10th of May 1999 (later adopted as his evidence-in-chief at the hearing) in which he said that there was a "reorganisation" of the Respondent during which the Government of Gibraltar adopted a policy of not employing as employees of the Respondent those who had significant outside commercial interests and this was irrespective of the fact that the Respondent had lost the task of collecting PAYE arrears rendering the Complainant redundant.
- 15. The Complainant has interests in The Cool Blues Café & Nightclub and The Piazza Bar & Restaurant both in Main Street, Gibraltar.
- 16. Dismissal not being in issue evidence was heard from the Respondent first.

Political

- 17. There is a considerable political background to this case. It is not within my remit to probe but I mention it only insofar as it is necessary for me to make findings of fact. I emphasise that I need to make findings of reasons for dismissal but not the motives behind those reasons.

The Facts in more detail

- 18. The essential facts are set out in the witness statement of Mr Gomez dated the 14th of September 1999 and appearing at pages 1 to 4 of his bundle. I would summarise the opening eight paragraphs as follows:

Mr Gomez was engaged on the 1st of April 1992 and given the task of collecting arrears of PAYE owed by companies to the Government of Gibraltar. He received instructions from the Personal Assistant to the then Chief Minister to collect outstanding PAYE from specific companies. If it or they did not do so he would instruct Solicitors to take appropriate action. By a Legal Notice No.37 of 1992 dated the 12th of March 1992 the Commissioner of Income Tax appointed Gibraltar Procurement Limited to perform the duties of collection of income tax under Part V of the Income Tax Ordinance. Myra Rolls joined Gibraltar Procurement Limited and was assigned as Mr Gomez' secretary. Subsequently responsibility for collection of arrears of PAYE was transferred from Gibraltar Procurement Limited to Gibraltar Information Bureau Limited ("GIB"). Mr Gomez was transferred to GIB together with Myra Rolls. By Legal Notice No.124 of 1994 GIB was appointed to perform the duties under Parts I to VI of the Income Tax Ordinance save for powers with which we are not concerned. GIB would be paid for this service ten percent of the sums collected by Mr Gomez' unit. In about 1995 James Wahnnon was assigned to Mr Gomez' unit and they were together tasked to deal with arrears of Social Security. Mr Wahnnon was later transferred to another department of GIB.

- 19 A letter from Mr Chichon the Commissioner of Income Tax dated the 29th of November 1996 (page 16 of the Complainant's bundle) reads as follows:

"COLLECTION OF PAYE ARREARS

The current arrangement between this office and the Gibraltar Information Bureau concerning the collection of PAYE arrears has been the subject of review. I wish to inform you that the arrangement will cease with effect from Monday 2nd December 1996. A Legal Notice revoking the delegation of powers, as provided for by Legal Notice 124 of 1994, will be issued shortly. In the meantime, I would be grateful if you could arrange for all documentation which you currently hold on income tax matters to be duly returned to me as soon as possible."

- 20. In fact the letter was not received until the 3rd of December 1996 being the day after it took effect.
- 21. The letter provoked an immediate response from Louis Montiel the District Officer of the T&GWU Gibraltar. He wrote to Messrs Hook and Flower the Directors of GIB on the 4th of December 1996 saying:

"I wish to remind you that as long as you remain directors of the GIB you have the obligation to assume your responsibilities and enter into consultations with union representatives before any transfer of undertakings take place.

Given the above, therefore, please indicate what arrangements have been made to inform the employees concerned of the proposed transfer and what consultations you are intending to carry out in relation to their jobs within GIB."

- 22. These then are the battle lines. In my assessment the crucial period of time is from the 2nd of December 1996 to the 24th (or 25th) of April 1997.

23. Before I move on to the evidence in any detail I should say that the Respondent was not clear as to the principle reason for Mr Gomez' dismissal more than halfway through the hearing. There is a telling passage at page 58 of the transcript which reads in part as follows:

"Mr Licudi – Originally we were told redundancy, then we are told redundancy alternatively authority and then we are told mixed reasons, leaving a bit in the air and we want to know exactly what reason is being relied on....."

Mr Isola - Well Mr Chairman on the reasons being given for redundancy there is I've got various authorities that have been put through and I think the record speaks for itself what the Complainant..... but there is a question of the legality and what there was authority concerning the question of the Applicant or the Complainant having other commercial interests.....

Mr Licudi – The question is still what is relied on as the principal reason?

Mr Isola - Well!

Mr Licudi -Is it redundancy or possible a mixed reason as the principal reason?

Mr Isola – Gentlemen there is various authorities, questions being raised of, I would like to upon that I think it's a restated of....."

[I referred earlier to the poor quality of parts of the transcript from which I have quoted literally. Both Mr Isola and Mr Licudi presented their cases in a lucid and articulate fashion. The transposition of the tape

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recording does not appear to have done both of them justice though the thrust of their positions is clear.]

Dennis Hook

24. Dennis Hook's evidence was that he signed the dismissal letter of the 25th of April 1997 on instructions from the Government of Gibraltar (transcript page 17). He did not even draft it (page 26) the Chief Minister's office did. It is highly significant that this letter makes no mention whatever about Government "policy".
25. Being a director to Mr Hook meant someone saying "sign here", obeying Government instructions and never consulting other directors (page 21-22). He said "*there's no such thing as board meetings*" (page 31). He was never consulted about the removal from the company of which he was a director of the arrears-collecting function (page 24). He seemingly gave no thought at all to the effect on Mr Gomez of the transfer back to the Government of Gibraltar of arrears collecting (page 25) and made no effort to find out.
26. I consider that the passage in his cross-examination at pages 29-30 of the transcript is highly significant:

"Mr Licudi - Prior to 26th of April which was the first time that you became involved on seeing the draft. Well sorry or maybe just before the 25th you would have seen the first draft?"

Mr Hook - Yes.

Mr Licudi - So before that time were you aware of this policy of the Government in relation to people having business interests and that that was being used as one of the reasons for dismissing Mr Gomez?"

Mr Hook - No.

Mr Licudi - Were you consulted about that at all?

Mr Hook - No.

Mr Licudi - Were you asked to ascertain what business interests Mr Gomez may have?

Mr Hook - I just said that I was not consulted at all.

Mr Licudi - So specifically you were not asked to ascertain what business interests Mr Gomez may have had, and presumably you were also not asked to enquire whether Mr Gomez was willing to give up any business interests to do the job?

Mr Hook - No.

Mr Licudi - Do you have any idea how much that weighed in the minds of whoever made the decision?

Mr Hook - No idea, neither way."

27. From Mr Hook's evidence I conclude that:

- (i) Mr Gomez was an employee of the Respondent.
- (ii) He was dismissed but his employer gave no thought to the reasons for his dismissal. His employer simply obeyed instructions from the Government of Gibraltar.

(iii) It is highly likely that no "decision" as such was ever taken since the Board of Directors of the Respondent was a fiction and never met even in the most cursory of ways.

28. This is sufficient to decide the case in favour of the Complainant. The Respondent has failed to discharge the burden imposed by Section 65(1). That a person was obeying orders is not a "reason" at all for dismissal.

29. However in deference to the arguments which were advanced over many hours I will consider the further evidence.

Francis Posso

30. Mr Posso deals mainly with the establishment of the Central Arrears Unit the replacement operation. He gave evidence in cross-examination (page 47-48 of the transcript).

"Mr Posso - Eventually [Myra Rolls] was seconded to Central Arrears Unit ["CAU"], my recollection.....

Mr Licudi - Can you recall why that happened?

Mr Posso - No.

Mr Licudi - Was it not to carry on the work that she had been doing?

Mr Posso - Obviously..... she might have been an asset because she worked with GIB and she definitely knew what was happening or how things, businesses were conducted but

Mr Licudi - Is it your recollection that she carried on working in the collection of PAYE?

Mr Posso – I wouldn't be able to say."

31. In re-examination (page 51) he added:

"Mr Isola – Now, do you know why Ms Rolls was seconded to Central Arrears Unit in May straight to June 97. The main reason.

Mr Posso – The main reason I can think of is because she was an asset to the unit. Obviously having worked for GIB and knew sort of the ropes, I think that would have been the main reason why she was seconded."

Ernest Montado

32. Mr Montado added to the evidence of Mr Hook. He said (page 64) that employees of GIB were essentially employees of the Government of Gibraltar; that they were employed on the instructions of Government (page 65). Later he accepted the description of "outsourcing" when it was put to him by Mr Licudi (page 75).

33. Mr Montado said (page 64):

"I would say the essential difference [between GIB employees and civil servants] would be pensionability, employees of Government companies were not covered by the pension scheme, other conditions of work I think those two are the most important differences"

34. Mr Montado confirmed the evidence of Mr Hook; that he had had no option but to obey instructions and to dismiss Mr Gomez (page 67).

35. As far as the re-deployed staff are concerned Mr Montado was unclear on what duties were undertaken by the employees re-deployed away

from GIB (page 78) but believed that most of the employees were still doing the same work although under a different umbrella.

- 36. On the 16th of December 1996 Mr Gomez wrote directly to the Chief Minister using GIB headed notepaper. This document appears at page 54 of the Respondent's bundle. He says:

"It is now two weeks since the Commissioner of Income Tax informed me of the decision that the collection of PAYE tax arrears was no longer going to be undertaken by my office.

To date no other information has been forthcoming as to what other tasks will be entrusted to this unit nor whether it is the Government's intention to re-allocate Ms Rolls, Mr Cruz and me elsewhere.

I would be grateful if you would advise me further."

- 37. No reply to that letter (which is date stamped as having been received on the day it was written) has been produced on behalf of the Respondent. The next that was heard was the Chief Minister's letter to the Union of the 9th of February 1997. It is hard to understand why Mr Gomez was kept on the Government payroll for almost two months without communication.

- 38. Following that letter there was an ill tempered exchange of correspondence between Louis Montiel and the Chief Minister over the use of the word "allegedly" in the Union's letter of the 20th of February 1997 in relation to the existence or otherwise of a Government policy – see the Chief Minister's letter of the 5th of February 1997. Mr Montiel had complained that Mr Gomez was being victimised and was also addressing the question whether any such policy, at that time, existed. What is clearly missing from the evidence before me is any assertion on

the part of the Respondent of when this policy came into existence. If it was already in place before the 29th of November 1996 one would have expected Mr Gomez to be told at once or at latest in response to his written enquiry in December. The implication is that this policy evolved at some later date and possibly around the 5th of February 1997. Certainly the Chief Minister described this policy in his letter of the 5th of February 1997 and simultaneously announced GIB's "intention" to make Mr Gomez redundant. It is notable that Mr Montiel, the man most likely to know of any Government of Gibraltar employment policy by reason of his Union role, queried the existence and application as soon as it was mentioned to him..

39. Taking stock, the Respondent had called three witnesses to discharge its burden: the first (Mr Hook) said he did not turn his mind to the issue at all, merely obeying orders; the second and third (Mr Montado and Mr Posso) knew nothing. Mr Montado explicitly said that he was not the decision-maker (page 84) and was not aware of any policy in respect of Mr Gomez.

40. I find as a fact that the Respondent has failed to discharge the burden to establish what was the reason (let alone the principal reason) for Mr Gomez' dismissal.

41. I was helpfully referred to Boulting v Association of Cinematographic, Television and Allied Technicians [1963] 2 Q.B. 606 at 626 per Lord Denning MR :

“Or take a nominee director, that is, a director of a company who is nominated by a large shareholder to represent his interests. There is nothing wrong in it. It is done every day. Nothing wrong, that is, so long as the director is left free to exercise his best judgment in the interests of the company which he serves. But if he is put on terms that he is bound to act in the affairs of the company

in accordance with the directions of his patron, it is beyond doubt unlawful (see Kregor v Hollins (1913) 109 L.T. 225, 228, CA, by Avory J.), or if he agrees to subordinate the interests of the company to the interests of his patron, it is conduct oppressive to the other shareholders for which the patron can be brought to book: see Scottish Co-Operative Wholesale Society Limited v Meyer [1959] A.C. 324, 341, 363, 366, 367."

The context of the quotation is different but the statement of legal principle is clear.

- 42. I consider that the Respondent and the Government of Gibraltar have wholly overlooked the consequences of the "change" referred to by Mr Montado (at page 65) when he said: *"Most companies [like GIB] initially were managed by Ministers, the Ministers were initially appointed as directors and this changed in the early 90's and civil servants were then largely used for nomination to directorships"*.
- 43. It is one thing for Ministers to apply Government policy via captive companies of which they are directors; but quite another for Ministers to require civil servant directors to act as they are bid in their capacity as board members.
- 44. Furthermore the Respondent's case contains an inherent contradiction; on the one hand it is said the companies were an extension of Government; on the other that Mr Gomez was redundant once GIB lost the arrears collecting function, but since the Government continued to collect arrears by using CAU the propositions cannot co-exist.
- 45. In the light of the findings of fact which I have already made it is unnecessary for me to embark upon a detailed examination of the procedure adopted in this case in accordance with Polkey v A E Dayton Services Limited [1988] A.C. 344, HL (E). Nevertheless I mention that

case for two reasons: first it establishes the proposition that I must consider whether the employer had been reasonable or unreasonable in deciding that his reason for dismissing the employee was a sufficient reason not whether the employee would nevertheless have been dismissed even if there had been prior consultation. In other words I am not to engage on a "what if?" expedition. Secondly as will become clear when I turn to the evidence of Mr Gomez himself I do not accept the contention that the procedure adopted was a lawful one – although this is not a necessary element of my decision.

Mr Gomez

46. An obvious notable feature of the evidence of Mr Gomez is that he was cross-examined about numerous propositions on which the Respondent could have called evidence, but did not.

47. I note in particular:

(i) Mr Gomez' claim that he was confirmed in office by the Chief Minister after the election was derided, but no contrary evidence was called (page 104). He was himself moved to say (page 130) "*It would be brilliant to have the Chief Minister here to answer these same questions*".

(ii) Mr Gomez was cross-examined to suggest that he should never have been appointed in the first place (page 104-112).

48. As to business interests Mr Gomez said that he had 25% in two businesses but neither produced income at the relevant time (page 134 ff). The description "significant interest" caused some confusion, as to Mr Gomez the significance of an interest was directly related to any income which it produced.

49. I myself questioned Mr Gomez on this point (page 142-143):

“ *Am I right in saying your position in respect of Everleigh and Pejojo is that during the period from April 97 to May 98, there were no drawings, no dividends, no salary of any description?* ”

Mr Gomez - Not in my name certainly.....”

Mr Gomez went on to explain that he had received income from these companies after he had lost his post with GIB.

50. Mr Gomez gave evidence that he would have given up his business interests in order to preserve his job (page 116).

51. I find as a fact that Mr Gomez “interests” have not been proved by the Respondent in the sense that it has not been shown that they played any part in the decision by GIB to dispense with his services. The only evidence concerning those interests is that of Mr Gomez himself to which I have referred above. It is significant that during the critical window of time Mr Gomez was not invited to enumerate his business interests nor to consider giving them up.

52. Any suggestion that these interests of Mr Gomez constituted a conflict of interest such as to cause either the appearance or the actuality of bias in the exercise of what were in reality public duties may be obvious to some but it was not supported by any evidence.

53. That much is plain from the Chief Minister’s letter of the 5th of February 1997 reading as follows:

“Given the high instance of unemployment it is the policy of the Government not to maintain in employment at taxpayer’s

expense individuals who have significant commercial interests, especially if they are involved in the running thereof. Mr John Gomez is redundant following the loss by the company of its arrangement with the Commissioner of Income Tax for the collection of PAYE arrears. In these circumstances and in the light of the above policy, it is the intention of Gibraltar Information Bureau Limited to make Mr Gomez redundant."

It was no doubt this letter which led to the questioning of the meaning of "significant" commercial interests. The Chief Minister realistically does not suggest that GIB is doing anything other than obeying instructions given by him or on his behalf. It is plain from this letter, although never made explicit, that the relevance of "interests" is that they supply income not that they cause a perceived or actual conflict of interest. It is equally plain that no-one ever attempted to find out what income, if any, Mr Gomez' interests provided for him.

- 54. I do not overlook "*especially if they are involved in the running thereof*" in that portion of the Chief Minister's letter but as I have already made clear it has not been suggested that Mr Gomez' completion of his duties was anything other than efficient. Furthermore there is no evidence to suggest that practical involvement in the operation of those businesses in any way distracted Mr Gomez from his public duties.
- 55. I reject the contention which was put to Mr Gomez that there had been "consultation" and in particular I reject the suggestion that the letter of the 5th of February 1997 to Louis Montiel indicated any provisional or reversible intention to make Mr Gomez redundant.
- 56. In that connection I note in the letter of the 5th of February 1997:
 - (i) "*Now that the Government has finalised.....*".

- (ii) The references to unfinished business none of which include Mr Gomez.
- (iii) References to employees being relocated but without a destination for them: in other words responsibility is accepted for them.
- (iv) In this letter of the 5th of February 1997 from the Chief Minister to the Union there is expressed the "intention" of GIB; GIB had no intentions, this is an expression of the direction that the Chief Minister proposed to give to GIB.
- (v) The Chief Minister's later letter of the 1st of April 1997 drops whatever remains of the veil and indicates "the Government's opinion" on re-employment whilst maintaining the fig leaf that the decision to make Mr Gomez redundant was that of GIB.

Louis Montiel

57. Mr Montiel's evidence is adequately covered in the paragraph above.

Law

58. A great deal of law was canvassed during the hearing and this is reflected in the substantial skeleton arguments which I considered. This is however a case essentially on its facts. For that reason I do not intend to deal with more of the law than is necessary to my decision.
59. One issue which needs to be dealt with is this: Mr Isola for the Respondent introduced a very late argument that the Respondent was an agent, the Government being its principal, and bound to act according to its principal's instruction (page 201). Mr Licudi reasonably objected to an argument propounded after his own final submissions and contrary to the skeleton argument already advanced by the Respondent. He might

have added that it threatened a whole new vista of submissions on the subject of inducing a breach of contract especially in the light of the observations of Lord Denning in Boulting to which I have referred above.

- 60. In the event I reject that submission for reasons which I have already given. As late as the 1st of April 1997 the Chief Minister of Gibraltar was maintaining that GIB had an autonomy to make decisions of its own motion. In any case it was not until the Tribunal heard from Messrs Hook and Montado that the Respondent resiled from its position that GIB enjoyed freedom of action. No doubt this was engendered in part by Mr Hook's somewhat endearing candour, but the inference that it was even more as a result of the Chief Minister's letter of the 5th of February 1997 coming to light is irresistible.

Conclusions

- 61. I conclude that:
 - (i) The Respondent has failed to establish the reason for Mr Gomez' dismissal.
 - (ii) Accordingly there is no decision for this Tribunal to make on whether the reason was a fair one – see Smith v Glasgow CDC [1987] ICR 796.
 - (iii) In the event that I am wrong in (i) the overwhelming reason for Mr Gomez' dismissal was a direction from the Government to dismiss him which was:
 - (a) personal to him.

(b) not the subject of any consultation with Mr Gomez or his Union.

and the Government's reasons for giving that direction were not given to GIB nor confirmed, adopted or ratified by GIB.

(iv) Accordingly it was unfair.

(v) I do not need to make a finding on whether there was a transfer of undertaking within Section 78D of the Ordinance.

(vi) However if there was such a transfer then I reject the contention that Mr Gomez' dismissal was for an "economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee" within Section 78D(2). This is because:

(a) These "reasons" if they existed at all were not the Respondent's reasons but those of the Government of Gibraltar.


(b) To be admissible such reasons must concern the running of the business or relevant undertaking – see *Wheeler v Patel [1987] IRLR 631, EAT*. The application of a Government change of policy is not within sight of this.

62. The Respondent was unfairly dismissed

Quantum

63. The Complainant is entitled to a basic award of £2,200.00.

- 64. The Complainant was employed at £18,250 when he was dismissed in April 1997. He received a redundancy payment of £2,801.85.
- 65. The Complainant's evidence was that he eventually obtained employment in May 1998 with Everleigh Limited at £250 per week (see the ETB Form in his statement bundle at page 58). His evidence was that he received free meals as well. This is the company in which he had a 25% capital interest but claims it produced no income whilst he was unemployed (page 143). During part of that time he received statutory benefits (page 136).
- 66. It was put to the Complainant (see page 138) that he was not in reality seeking employment – I consider that this places it too high but find that he could have been more energetic and proactive.
- 67. Balancing all the above considerations I award to the Complainant a compensatory payment of £8,000.00 making the total payable to the Complainant of £10,200.00. I have taken into account in my calculations the redundancy payment made to him.



Ray Pilley
Chairman

28 July 2004

- TO: The Industrial Tribunal
Duke of Kent House
Cathedral Square
Gibraltar
- AND: Messrs Hassans
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Gibraltar
Solicitors for the Complainant
- AND: Messrs Triay & Triay
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