IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

Ind Tri 16 of 1999

B E T W E E N:

ALAN J KELLY

Applicant

and

CAMMELL LAIRD (GIBRALTAR) LIMITED

Respondent

Mr D J V Dumas, Chairman

Mr J Bossano for the Applicant
Mr D Bossino for the Respondent

## FURTHER DECISION

1. My Further Decision is as to the Orders which should follow the Decision dated 12th January 2001 in which I determined that Mr Kelly had been unfairly dismissed by Cammell Laird (Gibraltar) Limited. It follows a further oral hearing that took place on 15th and 16th March 2001.

### Re-engagement

2. The first consideration which the Tribunal must give is whether or not to recommend re-engagement of the Applicant by the Respondent, by virtue of sec.70(2) of the Employment Ordinance. The Applicant made no submissions and although the Respondent did in writing, when I probed this issue, both sides were wary of the prospect. More significantly, when I put the matter to Mr Kelly in the course of his examination, he said he had not given any thought to it and would not consider it now given that, in his view, Cammell Laird is not doing well and its workload is diminishing and, also, that he could be dismissed with 24 hours' notice. He said his brother-in-law had been out of work since two months

prior to Christmas and was still waiting for a call to re-join the Company, although no details were given.

3. The guidance to be sought from English practice on re-engagement, according to the Encyclopaedia of Employment Law (Sweet & Maxwell) which I refer to as the EEL, at para 1.6404 shows that the following factors should be taken into account, namely, the Applicant's wishes, the practicability for the employer complying with the order and, where the Applicant caused or contributed to some extent to the dismissal, whether it would just to order re-engagement.

4. On that last question, the failure to keep record cards contributed to the dismissal (a matter that I deal with in more detail below). However, the Company was prepared to take him on the next day so, that on this third ground alone, I would not consider it unjust to order re-engagement.

5. However, re-engagement must be in employment comparable to that from which he was dismissed (see EEL para: 1.6404). There is no evidence that a job in stores or in a comparable post is available so that it would not be practicable for the Respondent to fulfill such an order. Instead the assumption by both sides was that the only possible option was as a casual labourer. That is not a comparable job either in nature or its terms, particularly as to laying-off to which the labourer is susceptible. Even if such a post were comparable, the Applicant has stated his unwillingness. For all these reasons I have come to the conclusion that this is not a proper case in which to order re-engagement.

## Compensation

6. Accordingly, I must now consider the compensation that should be awarded for the dismissal, as required by sec. 70(3). Sec 71(1) as read with Sec 72(1)&(2) provide for two distinct awards, namely, a basic award and a compensatory award.

**Basic Award**

7. Where the Tribunal has decided that compensation is to be awarded, the Tribunal *"shall award a basic payment of the prescribed amount"*(Sec 72(1)). The first payment is therefore a mandatory one.

8 The prescribed amount is *"not less than £2,200"*,by virtue of regulation 2 of the Industrial Tribunal (Calculation of Compensation) Regulations 1992.

9. Although it is expressed to be in these terms, there is no guidance in the Ordinance, which creates this award, to indicate in what circumstances the award could be increased and no submission to that effect has been made. The Respondent's submissions that the amount should not be greater than £2,200 are based on reasons, namely mitigation and contributory fault, which are relevant under the Ordinance to the assessment of loss.

10. Such assessment of loss relates to the compensatory award and not the basic award, on a proper construction of

10.1 Sec. 71(1) which states that the amount of compensation *"shall be calculated in accordance with the provision of sec. 72 and in relation to payments provided for in sub-section (2) of the section shall be such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party...and insofar as that loss is attributable to action taken by or on behalf of the party in default"*, (my underlining) and

10.2 Sec 72(2) which states where a tribunal has determined that the basic payment shall be awarded, *"that tribunal may award a amount in compensation of any loss suffered....and in determining such loss in accordance with the relevant provisions of Sec 71, no account shall be taken of the (basic payment)."*(my underlining).

11. For these reasons I hold that under this head the Applicant is entitled to no more or less than the basic award of £2,200.

**Compensatory award**

12. The basis for assessment of compensation is provided by sec. 71(1) set out above.

13. As to the "loss sustained by the aggrieved party" Sec. 71(2) provides that such loss "*shall be taken to include-*

*(a) any expenses incurred by him in consequence of the matters to which the complaint relates; and*

*(b) loss of any benefit which he might reasonably be expected to have had but for those matters,*

*subject, however, to the application of the same rule concerning the duty of a person to mitigate his loss as applies in relation to damages recoverable under the common law."*

14. Sub-section 71(3) makes provision for reducing the award for contributory fault of the Applicant "*Where the tribunal finds that the matters to which the complaint relates were to any extent caused or contributed to by any action of the aggrieved party...the tribunal shall reduce its assessment of his loss to such extent as, having regard to that finding, the tribunal considers just and equitable."*

15. The tribunal shall disregard the amount of the basic award in calculating the compensatory award(Sec 72(2)).

16. The compensatory award is limited to the lower of the two amounts:

(a) the amount equivalent to 104 weeks' pay, and

(b) the amount equivalent to 104 times twice the amount specified as weekly remuneration in the Schedule to the Conditions of Employment (Standard Minimum Wage) Order, 1989, which at present is £127.14.

It is agreed by the parties that the lesser sum is the latter, namely, £26,445.12 and that is therefore maximum that could be awarded in this case by way of the compensatory award.

17. The issues before me related to:

(1) loss of earnings;
(2) mitigation; and
(3) contributory fault.

**Loss of Earnings**

18. This was split into two parts, namely loss of earnings to date of hearing and future loss of earnings. The Respondent submitted and the Applicant did not contend, that the calculation of loss of earnings should be on the basis of net take-home pay after deduction of tax and social insurance contributions, namely, at the rate of £929.55 per month.

19. The general rule is that loss of earnings should be assessed from date of dismissal to the date of the hearing with a deduction of any earnings received in that period(EEL para 1.6415).

20. The Respondent has submitted that the assessment terminate on an earlier date for various reasons. I reject the submission that the calculation of loss of earnings should be up to and not beyond April 2000 which was put forward on the basis of the Applicant's request for an adjournment at the time because the adjournment was not contested and, more importantly, because I find that a

reasonable period for securing permanent employment would have taken the Applicant beyond April 2000.

21. I also reject the submission that the assessment should not go beyond 6th March 2000 on the start of the Applicant's employment with Atlas Building Merchant because, although the Applicant in evidence said that he would have stayed beyond the six months as far as he knew, the contract was not for permanent employment and the Tribunal is aware of that at the date of this decision (Courtaulds Northern Spinning Ltd v Moosa (1984)ICR 218 at 227C). I therefore find that that new employment did not, of itself, break the chain of causation.

22. A further submission by the Respondent was that the dismissal from Atlas Building Merchants broke the chain of causation so that no loss after 14th July 2000 could be awarded or, if not, that the loss should be assessed as the difference between the wages earned at the Respondent's and that earned with Atlas Building Merchants, had his employment continued. I have had regard to the arguments, the passage in the EEL para 1.6415, Mabey Plant Hire Ltd v Richens (CA 6th May 1993 IDS brief 495) and the other authorities referred to. It is difficult to discern a guiding principle and, in fact the above passage of the EEL reminds us that tribunals should not be bound by formulae of previous case-law but rather should come to a conclusion which is just and equitable having regard to the loss insofar as it is attributable to the employer.

23. It seems to me that the overriding factor which triggers a break in the chain and the consequences argued by Mr Bossino for the Respondent, is where the second employment is or could have been permanent. As such I do not accept the Respondent's arguments. Also, although the Applicant was dismissed from the second employment prior to the six months of its duration (for reasons which were not entirely clear), I find that he should account for his earnings from that job during the period that he was actually employed there.

24. However, I do not ignore the fact that this case has taken a long time to come before the Tribunal and, for the reasons that I explain below, in finding that no loss should be awarded after 12 months from the date of dismissal, I find that no future loss of earnings should be awarded.

**Mitigation**

25. There were two factors raised as to which the burden of proof lay with the Respondent. The first was whether the Applicant unreasonably refused the offer of alternative employment made to him the day after the dismissal. As I have said above, the offer was not strictly an offer of re-engagement and even if it had been, the Applicant did not act unreasonably in refusing it, applying common sense and fairness to this issue.

26. The second issue was whether the Applicant had done everything reasonably possible to find alternative employment and, if not, to fix a date by which he ought to have done so, disregarding all losses after that date.

27. The arguments centred largely around the number of jobs that have been available for those unemployed in the period since September 1999 when the Applicant was dismissed. This exercise, whilst providing some background against which to take a decision was of limited help. What was important was the evidence as to the attempts that were or could have been made by the Applicant in finding an alternative job.

28. His evidence was that he attended the ETB once a week, on the fixed day, Wednesday, for his fixed appointment. He said he would look at the board and would apply for those "you think you can do". He said these would include minor plumbing or minor tradesman's work or labouring and that he would not apply for a job which paid less than what he is receiving as supplementary benefit. He agreed that he had only made four submissions through the ETB to

be considered for a post. Some of these submissions were made after fairly lengthy periods. In particular, after termination of his employment with Atlas Building Merchants on 14th July 2000, the next submission was not until 10th January 2001, for the Hire-U Shop. The other submissions were for St John's Ambulance on 3rd November 1999, for Simon Bold (Gibraltar) Ltd on 8th December 1999, and for Atlas Building Merchants on 2nd March 2000 (which resulted in the job which he got).

29. Mr Robert Recagno of the ETB gave evidence to explain the reams of statistics that had been provided at the Respondent's request in response to the Applicant's arguments, Mr Recagno said he would be surprised that there should only be four submissions between October 1999 and January 2001.

30. The Applicant also referred to other enquiries he had made "by word of mouth" listed in his written representations and it appeared that, therefore, the total number of jobs applied for was nine together with one made the day before the hearing to Cisarego's which was also turned down.

31. Mr Recagno also said in his evidence that, although appointments with the ETB officers are fixed to take place once a week, the persons concerned can and do attend as often as they want. They have free access to view the vacancies on the notice boards in the vacancies room. If they are interested in any particular post they could fill in a slip and would be seen privately by an employment officer. He said that no record was kept of the number of enquiries that a person might make but which did not go forward as a formal submission.

32. I note that the Applicant only attends weekly and would therefore miss any opportunity of a vacancy that might arise on a Wednesday afternoon or Thursday morning and might be taken up by the following Tuesday, before he attended again.

33. Also, whilst I accept that the statistics show that only a small proportion of the vacancies which are registered are open to be filled in the above manner, the Applicant only called in once a week for a period of five to fifteen minutes.

34. Taking everything into account I take the view that the Complainant did not do as much as he could reasonably have done to look for another job and that therefore the compensatory award should be reduced for failure to mitigate. I find as I am bound to (EEL para. 1.6422) that the Applicant should have found work within twelve months from the date of dismissal and, therefore, by 16th September 2000.

**Contributory Fault**

35. Lastly, I come to consider whether or not the dismissal was caused or contributed to by any action on the part of the Applicant. The Respondent specifically referred to the reference in my decision of 12th January 2001 at paragraph 63, that the failure to keep record cards tended to justify the action which the Respondent took and that they could not prove that they had worked long hours.

36. Mr Bossano for the Applicant contends that the Respondent's evidence was to the effect that they would have dismissed the Applicant regardless of whether or not he had kept the note. That was not my understanding of the evidence given on behalf of the Respondent. As I understood it, whilst they took a very serious view and would dismiss an employee who was unwilling to comply with orders or directions, the position of the company was that they would have acted in the same way regardless of the CEPSA warnings and that their actions were not coloured by those warnings.

37. I am satisfied from the evidence that I have heard that the Applicant's conduct in not keeping a record of hours was conduct which was "foolish or unreasonable; that the dismissal was caused or contributed to some extent by that conduct and

that it is just and equitable, having regard to the findings, to reduce the employer's loss", (EEL 1.6423), in this case by 10%.

**Calculation**

38. The calculation of the compensatory award is therefore as follows:

| | |
|---|---|
| (a) loss of earnings - 12 months from date of dismissal X £929.55pm | £11,155.00 |
| (b) less the payment of 1 months' salary in lieu of notice | 929.55 |
| (c) less difference between £929.55 and £750 earned at ABM from 6thMarch to 17th July, say 4 months X £179.55 | 718.20 |
| | £9,507.00 |
| (d) less 10% contributory fault | 950.70 |
| | **£ 8,556.33** |

39. Taking everything into account and particularly that the award must be just and equitable in all the circumstances, I order that £8,556.33 be paid by the Respondent to the Applicant by way of compensatory award. That is to be paid in addition to the basic award of £2,200.

40. Lastly, I had been asked in writing by the Applicant to order the production of daily registration of vacancies up to the date of the further hearing that was proposed for 27th April 2001. Having reviewed the matter I took the view that there would not be a further hearing and so no order is made on the application. In any event, in light of my findings as to the calculation of loss of earnings and mitigation, I would not have acceded to the order sought had there been a further hearing.

David J V Dumas
Chairman
10th April 2001