

IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

CASE NO. 7 OF 1999

BETWEEN

ABDELKADER BOUMEHIDI

Complainant

AND

GREENARC LIMITED

Respondent

Mr J L Nuza an officer of the Transport and General Workers Union for the Complainant.

Paul Nunez Esq. Barrister-at-Law for the Respondent.

DECISION

1. The Complainant Abdelkader Boumehidi was employed by the Respondent Greenarc Limited as a gardener between the 1st April 1992 and the 19th February 1999.
2. In these proceedings by Originating Application the Complainant complained that he was Unfairly Dismissed. The Complainant went on to state in his Originating Application in reply to question 4 The grounds on which it is claimed that the dismissal is unfair: "My supposed 'Absenteeism' was in fact certified sick leave arising from major heart surgery in the U.K. The employer has failed to act reasonably given all the circumstances of the case".
3. The Respondent in their Notice of Appearance state that the Complainant was dismissed, that the reason for dismissal was poor attendance record/absenteeism from work, that the dates given by the Complainant as

to his period of employment are correct and that the Complainant's claim is resisted on the grounds that: -

- (i) Pursuant to the provisions of section 60(1)(b) of the Employment Ordinance the Applicant is not entitled to claim unfair dismissal.
  - (ii) Poor attendance record/absenteeism amounting to misconduct and/or incapability as provided for by Section 65 of the Employment Ordinance.
4. Before I refer to the conflicting versions of what occurred between the end of November 1998 and February 1999, I will deal with the question of poor attendance record/absenteeism by the Complainant during his employment with the Respondent and the Respondent's response to this.

**THE COMPLAINANT'S POOR ATTENDANCE RECORD/ABSENTEEISM DURING HIS EMPLOYMENT WITH THE RESPONDENT.**

5. During the time just prior to and whilst the Complainant was employed by the Respondent, the Respondent sent five letters to the Complainant which are relevant to these proceedings.
6. The first was a letter dated the 5th February 1992 where Tyrone Serra and Alan Brownbridge directors of the Respondent wrote to the Complainant which letter is also signed by Jose Netto District Officer TGWU, which reads as follows:

*Mr A A Boumedi*

*5 February 1992*

*This is to certify that on your taking up employment with GREENARC LTD, a company which would be working under contract to local Government, we will guarantee to maintain you in employment until you wish to terminate such employment within the allocated contract period.*

*This guarantee would however, not cover any abuse of sick leave or breach of working conditions as laid out in the company's job description/agreement.*

*Yours sincerely*

*TYRONE SERRA*

*ALAN BROWNBIDGE*

*JOSE NETTO  
DISTRICT OFFICER TGWU*

7. Also relevant are Greenarc Ltd's Job Description/Conditions Of Service for Gardeners which the Respondent produced to the Tribunal.

*GREENARC LTD  
GIBRALTAR  
HORTICULTURAL CONTRACTORS*

*JOB DESCRIPTION/CONDITIONS OF SERVICE  
GARDENERS*

1. *General gardening duties including tree pruning and tree felling as required.*
2. *Gardeners may be required to assist with removal of litter from flower beds and planted areas.*
3. *Gardeners will be required to operate power-driven tools and machinery when necessary. i.e. chainsaws, lawnmowers, sprayers etc.*
4. *Safety equipment and clothing will be issued and will be used by persons handling any potentially dangerous tools or machinery.*
5. *Gardeners holding a valid driving licence may be required to drive the company's vehicles when necessary.*
6. *A bonus/allowance will be paid to persons engaged in tree-surgery work at height.*
- 7.a. *Wages will be £175 per week (£9100 per annum) with a yearly increase at inflation rate.*
- b. *A work-performance bonus will be paid at the company's discretion.*
- c. *Any overtime worked will be paid at time and a half weekdays and Saturdays.  
Sundays and public holidays will be paid at double time.*
- d. *The post is pensionable.*

- e. *Contracts of employment will be issued on a yearly basis.*
8. *Paid annual leave entitlement... 23 days.*
9. *Certified sick leave entitlement shall be three weeks on full pay followed by three weeks at half pay.*
10. *Unpaid leave may be granted on exceptional circumstances at the company's discretion.*
11. *Medical certificates will only be accepted from Gibraltar Health Authority general practitioners and specialists.*

*Tyrone Serra*

8. The second was a warning letter dated the 29th August 1996 where the Respondent wrote to the Complainant as follows:

*29th August, 1996*

*Mr. A. Boumehidi,  
C/o Greenarc Ltd.,  
Convent Garden,  
Convent Ramp,  
Gibraltar.*

*Dear Mr Boumehidi*

*I am afraid I must write this letter as a warning concerning your absences without leave.*

*To date your absences without leave amount to 39 days.*

*I have repeatedly informed you that the Company does not accept these unpredictable leaves. It not only affects the remaining workforce, who have to over-exert themselves to cover for your absences, it also affects the Company as we cannot aspire to achieve our high standards of work with a reduced work force.*

*I understand everyone's desire to visit their families but nevertheless the Company also demands your loyalty and it can no longer accept these absences.*

*I do hope this situation does not repeat itself, otherwise we will be unable to continue to employ you. This situation will be constantly reviewed.*

*Yours sincerely*

*A. BROWNBRIDGE  
GREENARC LTD.*

*T. SERRA*

9. The third was also a warning letter dated the 17th February 1997 where the Respondent wrote to the Complainant as follows:

*17th February, 1997*

*Dear Mr. Boumehidi,*

*The Company is very concerned about the continuous absences without leave. It not only affects the remaining workforce, who have to over-exert themselves to cover for these absences, it also affects the Company, as we cannot aspire to achieve our high standards of work with a reduced workforce.*

*We understand that workers with families abroad desire to visit them, and sometimes special leave is granted in certain situations which may arise, but the Company will no longer accept these absences without prior consent by the Company.*

*Therefore any worker absent for more than three days without the Company's prior consent to leave, will be automatically dismissed.*

*We hope all concerned take heed of this warning.*

*DIRECTOR*

*DIRECTOR*

*C.C. MR M FATHI, MR M MESTOUR, MR M BAKAALI, MR M ROUBIO*

10. On the 18th May 1998, the Respondent again gave a warning letter to the Complainant as follows:

*18<sup>th</sup> May, 1998*

*Mr A. Boumedhi,  
C/o Greenarc Limited,  
Convent Ramp,  
Gibraltar*

*Dear Mr Boumedhi,*

*We refer to your continuous absences from work in connection with your illness. We realise you have genuine reason for being away, and although we receive your medical certificates from Tangier and accept them, nevertheless we need to know whether you will be able to continue working with us. Unfortunately we cannot continue to hold your position in the Company due to the existing workload at this time of the year and we would therefore like to know what your intentions are before any action is taken by the Company. If you decide to return the Company will require that you attend a Medical Examination to assess whether or not you will be able to continue working with us in a normal capacity.*

*We take this opportunity to enquire about your health and wish you well.*

*Yours sincerely*

*MR T. SERRA  
GREENARC LTD.*

11. Finally the Respondent in their letter dated 25th January 1999 gave Notice of Termination to the Complainant, as follows:

*25th January 1999*

*Mr M Boumedhi,  
C/o Greenarc Limited.*

*Dear Mr Boumedhi,*

*RE: NOTICE OF TERMINATION*

*We hereby give you 1 month's notice of the termination of your employment, which will take effect once you return to work i.e. your notice will begin on the first day of your return.*

*We take this opportunity to thank you for your many years services and wish you a happy retirement.*

*Yours sincerely*

*DIRECTORS  
GREENARC LTD*

12. With regard to the letters dated 29th August 1996, 17th February 1997 and 18th May 1998 the Respondent was providing the Complainant with clear and sufficient warnings of his dissatisfaction with the Complainant's absenteeism and of the consequences that flowed or were likely to follow from such absenteeism if continued.
13. Apart from the above letters the Respondent also relied on the evidence of its 2 witnesses in support of its allegations of persistent absenteeism on the part of the Complainant. These were Mr Tyrone Serra and Mr Alan Brownbridge Directors of the Respondent.
14. These two witnesses provided witness statements, were examined-in-chief, were then cross-examined and finally re-examined.
15. The Complainant also provided a witness statement, was examined-in-chief, then cross-examined and finally re-examined. His oral evidence being given through an interpreter.
16. Because, therefore, much of the evidence was given orally over various days, I had ample opportunity of hearing and observing the various witnesses and forming a view as to their credibility.

17. In summary the salient points of the Respondent's evidence about the Complainant's conduct during his employment given by Mr Serra and Mr Brownbridge were that although the Complainant was a good gardener he was often absent from work without good reason. That the trend was that this absenteeism followed annual leave. Furthermore that in the absences there was no contact by the Complainant with the Respondent. Whenever this happened, the Respondent had to deploy other employees to cover the Complainant, often at short notice and great inconvenience to the business and its employees. That as a result of the Complainant's absenteeism on quite a few occasions he had been called in to the Respondent's office to explain his absence. That in the vast majority of occasions the Complainant never had a valid or convincing reason for his non-attendance. This would invariably result in the Complainant being given a verbal warning. Additionally the Complainant was given 3 written warnings in letters dated 29th August 1996, 17th February 1997 and 18th May 1998 which were handed to him personally. The Complainant however took no notice of these warnings and continued with his practice of absenteeism.
18. In summary the salient points of the Complainant's evidence were that prior to agreeing to transfer to the Respondent, he had been given a letter dated 5th February 1992 under which he was given a written guarantee of 10 years employment with the Respondent. When he was referred to the second paragraph of this letter which stated that this guarantee would however not cover any abuse of sick leave or breach of working conditions, the Complainant stated that he had never been told about this paragraph only about the good things. The Complainant said that Mr Brownbridge who was his friend never explained the full implications of this paragraph but stated that Mr Brownbridge told him sometimes when he went sick not to go sick so often. In examination-in-chief the Complainant was asked if he was in the habit of being absent without leave to which the Complainant replied that he was never absent without leave since the Respondent had told him that he couldn't be. The Complainant went on to state that if he stayed away in Morocco it was because he was ill and there was no one to take care of him in Gibraltar. If he was sick in Gibraltar he would get Gibraltar medical certificates but that if he was sick in Morocco he got Moroccan medical certificates. The Complainant agreed that he received the Respondent's letters dated 17th February 1997 and 18th May 1998 but that he never received the Respondent's letter dated 29th August 1996. In cross-examination the Complainant explained that he understood abuse of sick leave to mean



when you go sick and you are not sick and pretending to be sick when not sick. He then went on to state that in his previous employment in government service it was common for people to report sick with medical certificates even if they were not sick but that personally he had never abused sick leave. In cross-examination the Complainant confirmed that he had never been absent without leave in the Respondent's employment and that when he started with the Respondent he was told that he could not do that. He maintained that he was never away without leave. The Complainant did not accept that he was given any verbal warnings after being absent since he never took any unauthorised leave.

19. The Respondent also produced to the Tribunal a List of Absences of Complainant between 1st January 1994 and 26th February 1999 as well as copies of the pertinent weekly time sheets from the Attendance Record Book from which this List was produced. It reads as follows:

List of Absences of Complainant (from 1 Jan 1994)

1.	Absent 10 Jan 1994 to 14 Jan 1994	4 days
2.	Absent 21 Mar 1994 to 28 Mar 1994	6 days
3.	Absent 1 Aug 1994 to 12 Aug 1994	10 days
4.	Absent 16 Sep 1994 to 22 Sep 1994	5 days
5.	Absent 6 Mar 1995 to 10 Mar 1995	5 days
6.	Absent 24 Jul 1995 to 28 Jul 1995	5 days
7.	Absent 16 Oct 1995 to 27 Oct 1995	10 days
8.	Absent 2 Jan 1996 to 12 Jan 1996	9 days
9.	Absent 26 Feb 1996 to 15 Mar 1996	15 days
10.	Absent 12 Aug 1996 to 5 Sep 1996	18 days
11.	Absent 6 Jan 1997 to 17 Jan 1997	10 days
12.	Absent 17 Feb 1997 to 21 Feb 1997	5 days
13.	Absent 28 Jul 1997 to 8 Aug 1997	10 days
14.	Absent 1 Sep 1997 to 12 Sep 1997	10 days
15.	Absent 2 Jan 1998 to 16 Jan 1998	11 days
16.	Absent 10 Feb 1998 to 12 Feb 1998	3 days
17.	Absent 6 Apr 1998 to 18 Jun 1998	52 days
18.	Absent 26 Jun 1998 to 3 Jul 1998	6 days
19.	Absent 4 Jan 1999 to 26 Feb 1999	

20. I am of the view that this List accurately reflects the extent of the Complainant's unauthorised absences from work. In coming to this conclusion I have taken into account condition 11 of the Respondent's conditions of service for gardeners, namely that medical certificates will

only be accepted from Gibraltar Health Authority general practitioners and specialists, as well as the Employment (Sick Pay) Order, 3(1)(b) under which an employee should report his illness to his employer within three days of his absence from employment on account of such illness, and 3(1)(c) under which the employee should supply to the employer a certificate of illness from any medical practitioner registered in any member state of the European Community.

#### THE COMPLAINANT'S AND RESPONDENT'S VERSIONS OF EVENTS BETWEEN END NOVEMBER 1998 AND FEBRUARY 1999 WHEN THE CLAIMANT WAS DISMISSED.

21. In summary the salient points of the Respondent's evidence in this regard were that the Complainant absented himself without telling the Respondent on the 30th November 1998 without submitting any medical certificate. Nothing more was heard of the Complainant until he finally turned up to see Mr Serra on the 25th February 1999 (Mr Serra when he gave evidence stated this date to be the 25th February 1999 whereas in his witness statement the date he gave was the 19th February 1999). During all this time the Complainant had no contact with the Respondent, he never telephoned or came round to the workplace. Mr Serra stated that he did not know how long the Complainant would be away from work or even whether he was alive. That he did not know what was going on and that the Respondent just could not carry on in this way due to financial and other strains. Faced with this dilemma Mr Serra and Mr Brownbridge finally decided that they would dismiss the Complainant because of his poor attendance record and absenteeism and the fact that they could not carry on without a worker. Mr Serra and Mr Brownbridge considered this a reasonable decision to take in all the circumstances of the case. Mr Serra's evidence was that when the Complainant appeared at the office on the 25th February 1999 he had not seen him prior to then for about three months and that when he was handed his notice of termination in the letter dated 25th January 1999 the Complainant was taken slightly aback and disappointed but seemed to accept it. Mr Serra said that on the 25th February 1999 the Complainant had with him a bunch of medical certificates namely those 3 medical certificates contained in exhibit AB5 which the Complainant then handed to Mr Serra when he had already been recorded absent. Mr Brownbridge in his evidence stated that he was completely sure that when the notice of termination letter dated 25th January 1999 was written and signed he had not received any of the medical certificates contained in exhibits AB4 and AB5 and furthermore

that neither the Complainant nor anyone on his behalf had at any time between November 1998 and February 1999 spoken to him about the Complainant's situation.

22. In summary the salient points of the Complainant's evidence in this regard were that the Complainant went on leave in November 1998. That just before November 1998 he had been waiting for an operation in the United Kingdom. That a Gibraltar Group Practice Medical Scheme Doctor had given him medical certificate exhibit AB4 dated 30th November 1998 (covering period 30/11/98 - 31/12/98) which he had at the time shown to Mr Serra who didn't take this medical certificate since he told the Complainant that he was on leave. The Complainant further stated that following his operation in the United Kingdom he returned to Gibraltar on the 23rd December 1998, that he left for Morocco on 24th December 1998 and that he returned to Gibraltar on various occasions up to the 1st March 1999. That with regard to exhibit AB5 consisting of three further Gibraltar Group Practice Medical Scheme certificates dated 1st January 1999 (covering period 1/1/99 - 11/1/99), 11th January 1999 (covering period 11/1/99 - 11/2/99) and 11th February 1999 (covering period 11/2/99 - 1/3/99) he was certain that he had handed the medical certificate dated 1st January 1999 to the Respondent's secretary at work on or about the 4th January 1999. He also stated that he had also handed the medical certificate dated 11th January 1999 to the Respondent's secretary at work. With regard to the medical certificate dated 11th February 1999 he had handed this certificate to Mr Serra on or about the 1st March 1999 when he had been told that he had been dismissed and had been handed his letter dated the 25th January 1999 containing his notice of termination.

#### PROOF OF ABSENTEEISM AND SUFFICIENCY OF WARNINGS GIVEN.

23. I am more inclined to believe the Respondent's witnesses than the Complainant both with regard to the period when the Complainant was employed with the Respondent generally and also in relation to their versions of events between November 1998 and February 1999 when the Complainant was dismissed. Having considered the evidence on both sides, there is no doubt in my mind that the Complainant has been guilty of repeated unjustified absenteeism. I fully accept the evidence of Mr Serra and of Mr Brownbridge that the Complainant was warned on numerous occasions about his absenteeism and about the fact that this was unacceptable. I have not been given details of the precise warnings given

or the dates when the verbal warnings were given but I do not consider that the Respondent can be faulted for not keeping a record of these, especially if, as I believe, the verbal warnings were given on a regular basis. There is also the evidence provided by the 3 warning letters dated 29th August 1996, 17th February 1997 and 18th May 1998.

24. Additionally, from the evidence I make the following findings of fact with regard to events between the end of November 1998 and February 1999, firstly that the Complainant never showed or attempted to hand in the medical certificate exhibit AB4 to the Respondent or any representative of the Respondent, and secondly that the Complainant did not hand in the medical certificates exhibit AB5 to the Respondent or any representative of the Respondent until he went to see Mr Serra on the 25th of February 1999 when he was told that he was being dismissed and was handed his letter dated 25th January 1999 containing the notice of termination.

## CONCLUSION

25. I have decided that the Complainant's claim for unfair dismissal fails. In summary, I find that the reason for the dismissal "poor attendance record/absenteeism from work" related to the Complainant's conduct. Having regard to the facts of the case as I have found them, the Respondent was justified in treating the Complainant's poor attendance record/absenteeism as a sufficient reason for dismissing the Complainant and that the Respondent's decision to dismiss was reasonable in the circumstances. The Respondent genuinely believed that given the Complainant's history of poor attendance record/absenteeism and the facts with regard to the events between the end of November 1998 and February 1999 as the Respondent understood them to be, there were sufficient grounds for dismissal. That belief was, in my view, based on reasonable grounds.

The decision to dismiss was therefore well within the permissible range of decisions which a reasonable employer might have taken on the facts of this case.

26. Additionally, evidence has been given by both the Complainant and the Respondent that the Complainant was in receipt of a work pension from

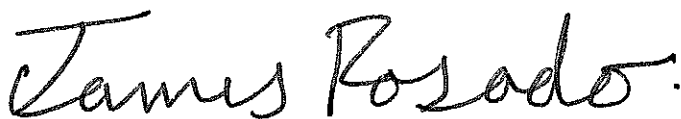
Clerical Medical and that the pensionable age for this pension was 55 years. The Respondent in the Notice of Appearance also resisted the Complainant's claim on the ground that pursuant to the provisions of section 60(1)(b) of the Employment Ordinance the Applicant is not entitled to claim unfair dismissal.

Section 60(1)(b) of the Employment Ordinance states in essence that an employee is not entitled to claim unfair dismissal if on or before the effective date of termination he attained the age which, in the undertaking in which he was employed, was the normal retiring age for an employee holding the position which he held.

Although the receipt by the Complainant of a work pension from Clerical Medical as from the age of 55 would indicate that that might be regarded as the retiring age, there was no evidence from the Respondent that the normal retirement age in the employment of the Respondent was 55 years. Accordingly I am unable to accept the Respondent's argument that section 60(1)(b) of the Employment Ordinance is applicable in the circumstances.

27. For the reasons I have already given I hold that the Complainant was not unfairly dismissed. The application of the Complainant is therefore dismissed.

Dated the 27th day of February 2004



JAMES D ROSADO LL.B. A.K.C.  
Barrister-at-Law  
Chairman