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IN THE INDUSTRIAL TRIBUNAL

Case No. 1/2001

KENNETH CORNELIO

Complainant

- v -

TERMINAL MANAGEMENT LIMITED

Respondent

DECISION

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1. **The Background Evidence**

1.1. The Complainant was employed by the Respondent as a serviceman/car park attendant on 15th August 1992 and remained in its employ until he was dismissed by the Respondent on 4th October 2000.

1.2. On 17th May 2000, the Complainant received a written warning from his duty officer for breach of Rule 204.2.5 for using objectionable and/or insulting behaviour and was warned that if there was any further breach of discipline within the following six months, it would result in further disciplinary action. Subsequently, on 25th June 2000, he was reprimanded by his supervisor for malingering and bad workmanship, but no further action was taken since according to Mr. James Hernandez he did not find the incident sufficiently serious to warrant any further action.

1.3. On the next day, namely 26th June 2000, the Complainant failed to attend at work and a medical certificate was produced stating that he would be unfit to return to work due to depression until 29th June 2000. Further medical certificates were adduced on his behalf confirming that he was unfit for work until 10th August 2000 for the same reason and were signed by Dr. Jones of the Health Centre.

1.4. According to the Complainant's evidence, and this was not disputed, he was suffering from depression prior to the incident on 17th May 2000 but was trying to fight it by keeping it quiet and going to work. He had been suffering from insomnia, high levels of stress and hyperactivity which he attributed to the problems he was having with his supervisor. According to his evidence, following

the incident on 25th June 2000, he could endure remaining at work no longer and a medical certificate was adduced the following day stating what his medical condition was.

1.5. Some time after, it is not clear when, the Complainant discussed the matter with his wife as the problems he was experiencing were surfacing at home in the form of aggressive behaviour in front of not only his wife, but also his three young children. He decided he needed help and sought medical assistance.

1.6. Some time in mid to late July 2000, the Complainant's wife went to see Mr. John Goncalves to hand in a letter from Dr. Jones dated 27th June 2000 and which Mr. Goncalves acknowledged having seen. The letter from Dr. S. Jones of the Gibraltar Health Authority to Mr. Goncalves stated, as follows:-

> "I am writing on behalf of Mr. Cornelio who attended the health centre as a patient. I am writing to confirm that he has suffered with depression for some time, attending doctors in the health centre and in Spain. He is at present taking anti-depressant medication. He tells me today that he has been suffering a lot of friction at work and this seems to be contributing to his nervous condition. He has asked me to write to you firstly to confirm his condition and secondly to ask that this could be borne in mind when dealing with him at work".

1.7. A further letter dated 6th July 2000 addressed "To whom it may concern" by a Dr. J.M. Sanchez-Moyano Lea (Psychiatrist) practising in Algeciras, Spain was alleged to have been handed to Mr. Hernandez by the Complainant's wife at the same meeting. Mr. Goncalves stated that he has never seen that letter and that the only letter he had seen was the letter from Dr. Jones dated 27th June 2000. As the Complainant's wife never gave evidence during the hearing, I accept Mr. Goncalves's evidence that he never had sight of this letter.

1.8. Mr. Goncalves's evidence was that the Complainant's wife had explained to him that her husband was feeling very ill due partly to the problems he was experiencing at work. Mr. Goncalves told her that she should ask her husband to come and see him and that they could arrange a change in shifts to avoid these problems. Mr. Goncalves was of the view that if the difficulties being experienced were to do with the supervisor on the Complainant's shift, this problem could be resolved by changing the Complainant's shift. The Complainant admitted knowing of this offer by Mr. Goncalves, but explained that he trembled whenever he went near the Terminal, and could not breathe. Nevertheless, he did go down to the Terminal and asked Mr. Michael Baldachino to inform Mr. Goncalves to contact him. He went a second time, and was seen crying inside the Terminal by several employees, and told to go home by Mr. Dalli who said he would sort out everything and see when he could be interviewed. He subsequently received a call from a Mrs. Bossino not to return to the Terminal until something was arranged. Shortly after this, he was accepted into KGV Hospital as a voluntary patient. He did not thereafter attempt to contact Mr. Goncalves, which failure he attributed to

his condition. Mr. Goncalves had no knowledge or recollection of the Complainant ever having attempted to contact him.

1.9. On 17th August 2000, a further medical certificate was adduced from KGV Hospital giving the Complainant's address as c/o and stating that he was suffering from Bi-polar Affective Disorder and was unfit to work until 24th August 2000. The medical certificate was signed by Mr. Jeffrey Marks. Mr. Goncalves stated in paragraph 12 of his statement that he understood, it is not clear when, that the Complainant had voluntarily admitted himself to KGV.

1.10. On 24th August 2000, a further medical certificate was adduced stating that the Complainant would be unfit to work until 28th September 2000 and which was signed by Mr. Jeffrey Marks ("the August Medical Certificate").

1.11. Whilst Mr. Goncalves had his reservations as to the manner in which these medical certificates were being issued for the week the Complainant was on shift and not for the week thereafter, and discussed this matter with Dr. Jones as well as his qualifications for issuing certificates of this nature, he was categorical in his evidence that he did not question the validity of these medical certificates nor seek to assert that they were issued on an erroneous basis. He accepted that these medical certificates were valid and did not seek to question the medical diagnosis contained in them that the Complainant was suffering from depression. He stated on cross-examination that whilst the manner the medical certificates were issued was unusual, he did not question nor doubt that between 26th June 2000 to 28th September 2000 the Complainant was ill and that he was absent from work as a result of that illness. In this context, he emphasised that the Complainant was dismissed for being absent for five days without producing any evidence that he was ill within that time, and not for actually being ill.

1.12. Whilst Mr. Goncalves was categorical in his evidence in this respect, and it is clear that he did propose a perfectly reasonable and sensible solution to the Complainant's wife in July 2000 to deal with the perceived problem the Complainant had with his immediate supervisor by proposing a change of shifts to deal with this clash of personalities, there does appear to have been a lingering suspicion on the part of the Respondent that the Complainant was to some extent malingering in that in paragraph 10 of his witness statement, Mr. Goncalves stated the following:-

> "I would also like to add at this stage that throughout the time that Mr. Cornelio was certified as unfit for work, he was regularly seen by members of my staff crossing the frontier on his motorcycle. I was informed that he was holidaying at a camp site in Spain."

He also confirmed in evidence that reports had been received by Mr. Hernandez that there was nothing wrong with the Complainant, although he did not dispute the fact the Complainant was ill.

Given that his earlier reprimand on 25th June 2000 had been for malingering, the facts stated in paragraph 10 of Mr. Goncalves' witness statement are indicative of a certain underlying suspicion on the part of the Respondent as to the continued absence from work of the Complainant. This underlying suspicion is further evidenced in Mr. Hernandez's evidence in that he stated that people were telling him that the Complainant was crossing the frontier whilst on a medical certificate. Mr. Hernandez's personal opinion was that this was not normal but as the Complainant had a medical certificate for depression, he was probably going to the beach on the advice of his general practitioner.

1.13 Mr. Goncalves states in paragraph 14 of his statement that he was aware that the Complainant had discharged himself from KGV Hospital and was leaving for the United Kingdom on 15th September 2000. He further adds that on his departure, the Complainant told a co-employee, Mr. Schembri, that he was leaving his wife and going to the UK to live with his girlfriend. This was repeated to Mr. Goncalves, which surprised him as the Complainant had not given notice of his resignation. However, the Complainant was covered by the August Medical Certificate until 28th September 2000 according to Mr. Goncalves. On cross-examination, Mr. Goncalves stated that his impression on 15th September 2000 was that the Complainant was leaving Gibraltar and would not be returning to work. He assumed the Complainant was well and had fully recovered as otherwise he would not be travelling to the United Kingdom on his own.

Mr. Hernandez was also aware of the conversation between the Complainant and Mr. Schembri. Mr. Hernandez saw no reason why he should enquire from the Complainant why he was travelling to the United Kingdom, or any reason why he should inform the Complainant's family. Mr. Goncalves also thought it was strange that the Complainant would be going to the United Kingdom, but did not consider it the Respondent's obligation to contact either the hospital or his family.

1.14 On Saturday 30th September 2000, the Complainant returned to Gibraltar, two days after the August Medical Certificate had elapsed. Mr. Hernandez actually saw him as he was in the Departure Lounge of the Terminal at the time about to depart to the United Kingdom for medical treatment. He did not tell Mr. Goncalves that the Complainant was back in Gibraltar, but other employees of the Respondent saw him at the time. Mr. Hernandez stated that it was impossible for him to speak to anyone as he was already in the Departure Lounge and did not see it as his duty to inform anyone as to the Complainants arrival back in Gibraltar as the obligation lay on the Complainant to inform the Respondent and not vice versa. Likewise, whilst Mr. Goncalves knew prior to the dismissal that the Complainant had returned to Gibraltar on 30th September 2000, he did not see it as his duty to make enquiries of the Complainant and it was for the Complainant to contact the Duty Officer of the Respondent as to when he would be returning to work.

2. Disputed Evidence on the Reason for Dismissal

2.1. At this stage, there is a substantial divergence between the evidence of the Complainant and that of the Respondent as follows:-

2.1.1. The Respondent contends that on the expiry of the August Medical Certificate on 28th September 2000, and on the Complainant having failed to produce any further medical certificates for a period of five consecutive working days without notice or valid reason contrary to Rule 203.2 of the Disciplinary Code of the Respondent, the Respondent proceeded to dismiss the Complainant by letter dated 4th October 2000 with immediate effect in accordance with Rule 203.2 of the Disciplinary Code which provided for "automatic dismissal". The Respondent interpreted this to mean without the necessity of a hearing or affording the Complainant an opportunity to be heard.

2.1.2. The Complainant maintains that on being discharged from KGV Hospital on 13th September 2000 a medical certificate was issued on 13th September 2000 for the period 15th August 2000 to an unspecified future date ("the September Medical Certificate") which was collected by his father who in turn instructed his daughter to deliver it to the Respondent which he was told she did that very afternoon or the next day and which stated that the Complainant would be unfit for work indefinitely. The Complainant contends that if the September Medical Certificate had been received prior to the dismissal by the Respondent, then the Respondent could not have dismissed the Complainant for the reasons stated which the Respondent concedes, whilst denying ever having received the September Medical Certificate on the date stated by the Complainant and those witnesses called on his behalf. Mr. Goncalves states that if he had received the September Medical Certificate on or about 15th September 2000, he would not have dismissed the Complainant for the reasons given in the letter dated 4th October 2000, but would most certainly have investigated and raised queries on the September Medical Certificate.

2.2. This is an important issue of fact for the reasons stated, and I have no hesitation in finding that the Respondent's version of events is more credible and consistent for the following reasons:-

2.2.1. <u>The evidence of Sabrina Carrara.</u>

Ms. Carrara was an Information Officer of the Respondent and her job entailed dealing with enquiries at the Terminal, answering the telephone and responsibility for those who entered and exited into the office block. Whilst she could not recall the date on which the Complainant's sister had handed an envelope to her at the information desk, nor made any entry in any record book or otherwise as to the date, it was on a date after Mr. Goncalves had informed her that the Complainant had been dismissed. She would have been informed of this by Mr. Goncalves as the Complainant had not yet handed in his pass despite having been dismissed. She would be notified of any dismissals as she controlled the buzzer for allowing persons authorised into the secured part of the building. Whilst she cannot recall the date on which Mr. Goncalves informed her that the Complainant

had been dismissed, nor the exact date on which she had been handed this envelope, nor whether the envelope was sealed or any other details pertaining to the envelope nor kept a record of the date it was received, she was clear in her recollection that as soon as she received it she handed it to Mr. Hernandez and would not have forgotten to do so, as she does not have that many things to do. She would have done it immediately and did not forget to hand it to Mr. Hernandez as soon as it was received. She explained that she had a very organised office and she would not have left an envelope lying in the office in relation to someone who had already been dismissed for a period of one month, namely from 14th September to 13th October. I found her evidence to be credible and truthful.

2.2.2. The evidence of James Hernandez

Mr. Hernandez stated that on 13th October 2000 he was called by Ms Carrera who said she had just received an envelope from the Complainant's sister with a medical certificate for the Complainant. When he checked the medical certificate, he noted that it was dated 13th September 2000 and certain anomalies in the certificate which I have set out in 2.2.3. (a) – (d) below. He did not retain the envelope containing the September Medical Certificate nor did he know if it was sealed or marked. He was sure of the date when he received the envelope as he made a note in his diary to this effect. He did not see the envelope being handed to Ms Carrera but she informed him at the time that it had just been handed in. I found his evidence to be credible, frank and truthful.

2.2.3. The evidence of Mr. Goncalves

He first saw the September Medical Certificate on 13th October 2000 when Mr. Hernandez handed it to him and told him that the Complainant's sister had just handed it in at the Information Desk. He could not say when it had been handed in to the Information Desk. If he had received this certificate prior to 4th October 2000, and on 15th September 2000 as alleged by the Complainant, he would not have proceeded to dismiss the Complainant on 4th October 2000 but would have queried the medical certificate for the reasons set out in 2.2.3. (a) – (d) below. Both Mr. Goncalves and Mr. Hernandez found the September Medical Certificate to be very unusual and Mr. Hernandez went as far as to describe is as a "dodgy certificate". Their reasons for querying this certificate are the following:-

(a) There was already the August Medical Certificate issued up to and including 28th September 2000;

(b) The date on the September Medical Certificate had been altered without the medical officer placing his initials next to the alterations namely from 13th August 2000 to 13th September 2000, the date on which the Complainant discharged himself from KGV Hospital;

(c) The September Medical Certificate was, unlike the earlier medical certificates, for an unspecified and indeterminate period of time which was not usual;

(d) The name of the medical officer on that certificate was not clearly legible.

Consequently, Mr. Goncalves, in the presence of Mr. Hernandez, telephoned KGV Hospital to speak to the Chief Warden and spoke to someone in charge. Having explained his reservations on the September Medical Certificate, he was asked to return it as it had been issued by mistake but he did not do so as he suspected something was amiss. He could not recall the name of the person he has spoken to and he decided not to following this line of inquiry further nor to report the matter to the Royal Gibraltar Police for possible fraud. Mr. Hernandez was present during the course of this telephone conversation, but did not hear what the other person was saying to Mr. Goncalves, except that immediately after the telephone conversation ended, Mr. Goncalves informed him that the person had asked for the September Medical Certificate to be returned as it had been issued by mistake.

Further medical certificates were adduced by Mr. K. Avellano, a nurse at KGV Hospital on 20th October 2000 and which were dated 3rd October 2000 and covered the period 29th September 2000 to 17th October 2000. A further medical certificate covered the period 17th October 2000 to 24th October 2000. These certificates were received by Mr. Hernandez on 20th October 2000. On 26th October 2000 a further certificate was adduced dated 26th October 2000 and stating that the Complainant was unfit for work for the period 17th October 2000 to 30th October 2000. Again, Mr. Hernandez found this unusual as the earlier medical certificate already covered the Complainant for part of that period. He could not make out the name of the medical officer on the last medical certificate.

Again, I found Mr. Gonzalvez's evidence to be consistent, frank and truthful.

2.2.4 <u>The Complainant's Evidence</u>

The Complainant stated that as he had been voluntarily admitted to KGV, he was quite entitled to sign himself out without being examined by a medical practitioner and which he did on 13th September 2000. He had become emotionally attached to a lady whilst in KGV Hospital and they had been helping one another to recover from their respective illnesses. She was leaving for the United Kingdom, and he decided to accompany her. He purchased a single ticket only because it was cheaper, and he would have more money to spend when he arrived in the United Kingdom. The plan was apparently to help one another to recover from their illness within a short period of time. On the date of his departure, 15th September 2000, he

told a fellow employee, Mr. Schembri, to tell Mr. Hernandez that he would be returning within three weeks. He also spoke to Dr. Hussein who confirmed he would issue another certificate and that they would call "home" when it was ready to collect. He could not say when the Respondent received that medical certificate, but his sister had informed him that it was delivered the next day. On 30th September 2000, he returned to Gibraltar, having asked his cousin who works at the Terminal to send him a ticket by computer. When he returned to Gibraltar, he could not stop crying and did not realise the medical certificate had lapsed. He was not concerned about this on 30th September 2000 because he had too many things in his mind, and was trying to convince his wife that he had not had an affair with this lady. When he arrived back in Gibraltar he was not thinking about medical certificates. When he realised he had been dismissed, he did not ring Mr. Goncalves as he was in a state of shock and disbelief. He went to the Union, but they were unable to see him. He was still suffering from depression and apologising to his wife. He had, in his own words, "too many things in (his) head".

In essence, there is no direct evidence from the Complainant as to whether the September Medical Certificate was obtained or served on the Respondent prior to 4th October 2000, and he was no doubt in a confused state of mind in September/October 2000.

2.2.5. <u>The Evidence of Edward Cornelio</u>

I disregard the evidence of Mr. Cornelio, as it was both confused and contradictory, and he was not specifically able to confirm if the September Medical Certificate had been handed to the Respondent on or about 15th September 2000.

2.2.6. <u>The Evidence of Abigail Busutil</u>

Whilst her evidence was not contradictory, it did directly conflict with the evidence of Ms. Sabrina Carrara.

For the reasons stated in 2.2.3 (a) – (d), and taking the evidence as a whole, above, I find the evidence of the Respondent more credible and consistent as to when the September Medical Certificate was received by it. Moreover, whilst Ms. Busutil was able to go and pick up the September Medical Certificate to hand it to the Respondent on the day she received it, she was unable to see her brother off at the airport because she had two young children. Nor was her father able to deliver the September Medical Certificate because he was not feeling well and felt ill because his son should not have discharged himself from hospital. I believe that the Complainant not only left the hospital of his own volition, but also left Gibraltar, his wife and children, without consulting his family properly, against its wishes and without any immediate intention of returning to Gibraltar as evidenced by the purchase of a one way ticket to the United

Kingdom, and what Mr. Goncalves and Mr. Hernandez allege he informed Mr. Schembri of on the date of his departure. Given the nature and haste of his departure, the last thing on his mind at that point was probably the question of a medical certificate for the period after 28th September 2000. This only became an issue on receipt of the dismissal letter after 4th October 2000.

3. Reason for Dismissal

3.1. By virtue of Section 65 (1) of the Employment Ordinance, the onus is on the employer to show that the reason for dismissal is a potentially fair reason and falls within one of the categories mentioned in that section. If the employer is unable to discharge that burden, then the dismissal is automatically unfair, without the tribunal needing to consider the fairness or otherwise of the reason for dismissal.

3.2. For the reasons stated above, I find that the Respondent has discharged this onus, and that the reason falls within Section 65 (1) (b) in that it relates a dismissal for the reasons stated in Rule 203.2 relating to the conduct of the employee.

4. The Disciplinary Procedure – A Term of the Contract?

4.1. The Complainant stated that he was fully aware of his terms and conditions of employment, including the Disciplinary Procedure and, although he could not recall having received a copy, he had read it. He was aware that if he was absent for five days without cause he would be automatically dismissed. He knew he had to produce a medical certificate as this was his "bread and butter". On cross-examination, it was apparent that the Complainant had not only read the terms and conditions, but acknowledged receipt of the Handbook, in an undated letter from Mr. Goncalves to him.

4.2. Mr. Goncalves explained that the terms and conditions had been agreed with the TGWU in August 1992 and that all amendments effected to it had been carried out in consultation with the TGWU. Each original employee had a copy of those terms, and a copy was also kept in the duty room. He understood that if an employee did not attend for five days, he would be automatically dismissed without a hearing. He would also hear any appeals against any such dismissal, and the Complainant could have appealed against the decision to dismiss.

4.3. Mr. Hernandez's evidence was to the effect that there was no right of appeal against the decision to dismiss under paragraph 208.1. His reasoning was that if there was a disciplinary hearing, there was a right to an appeal. If there was no disciplinary hearing, there was no such right. This was the reason why the letter dated 4th October 2000 did not inform the Complainant he had a right of appeal against the decision to dismiss. Mr. Hernandez stated that he would have informed Mr. Goncalves that there has been a breach of rule 203.2 and consulted with him on the matter, although he cannot now recall the exact contents of that conversation. If there was a breach of this rule, all one could do is automatically dismiss the employee. Mr. Goncalves would in any event have had the final say in

any disciplinary matter. If nothing was produced to show why the Complainant had not attended at work, one would assume he had no valid reason for not attending.

4.4. Mr. Hernandez further stated on cross-examination that there were eight directors in the Respondent, with Mr. Hernandez dealing with all disciplinary matters and Mr. Goncalves dealing with all appeals. Mr. Hernandez dealt with the first stages. None of the other directors were normally involved except for minor matters of discipline.

4.5. I find on the evidence that the disciplinary procedure was incorporated as part of the Complainant's terms and conditions of employment, agreed with the Union and that the Complainant was aware of its contents.

5. **Construction of the Disciplinary Procedure**

5.1. Rule 203.2 states the following:-

> **"Five consecutive working days absence from work without notice or a valid reason shall result in automatic dismissal".**

5.2. The Respondent contends that Rule 203.2 allows it to dismiss an employee automatically, and without a disciplinary hearing, if the employee was absent from work without notice for 5 days, even if the employee could subsequently give a "valid reason" and the use of the word "or" should be construed accordingly. The Respondent further contended that a breach of this rule was not a case of gross misconduct, which explicitly provided in Rule 203 for a disciplinary hearing. It did not provide for any "stages" and was not mentioned at all in Rule 203 which sets out disciplinary stages for each type of offence. I do not agree with the Respondent's contentions in this respect.

5.3. Rule 201 states, inter alia, that "all conduct in breach of these rules ... shall constitute an offence rendering the employee liable to disciplinary action. Such action, in respect of the conduct of an employee will only take place after the disciplinary procedures have been put in place".

5.4. The broad objectives of the "disciplinary procedures" referred to in Rule 201 are defined in Rule 202 to be the following:-

5.4.1. To ensure fairness and order in treatment of employees;

5.4.2. To ensure that there is uniformity and consistency in disciplinary action taken by the employer by providing "for careful investigation of the facts, whilst enabling the employees to present their case;

5.4.3. To provide the means for dealing with cases of serious misconduct;

5.4.4. To provide for the right of appeal against all disciplinary action taken by the company.

5.5. Having set out the broad objectives of the disciplinary procedures, Rule 203 then sets out the "disciplinary stages" depending on the type of offence referred to.

5.6. In the case of absenteeism, the disciplinary procedure provides for various alternatives:-

5.6.1. Rule 203.1 states that for unsatisfactory attendance as a result of frequent absences due to minor ailments one should refer to the "Unsatisfactory Attendance Procedure", specifically referred to in Rule 203 and dealt with in Rule 209. Rule 209.1 states inter alia that unsatisfactory attendance in the form of absence without leave is a disciplinary offence and to be dealt with under the disciplinary procedures provided for in Rule 202. Rule 202 only refers to the general objectives of the disciplinary procedures, and this may have been a mistaken reference to Rule 203, which does in fact provide specifically for the disciplinary stages for unsatisfactory attendance record (absenteeism) and which provides for written warnings, followed by a final warning and then dismissal. The Respondent does not rely on this as being a ground for dismissal.

5.6.2. Rule 204 gives a non-exhaustive list of examples of what would constitute misconduct and result in disciplinary action being taken, and in Rule 204.1.1 gives as an example of "unsatisfactory conduct" "unauthorised absences from place of work". The disciplinary stages provided for in Rule 203 for "unsatisfactory conduct" provide for a written warning and final warning before dismissal can ensue. The Respondent does not rely on this as being the ground for dismissal.

5.6.3. In light of the rules relating to absenteeism and referred to in 5.6.1 and 5.6.2 above, the introduction of Rule 203.2 appears to have been introduced to provide for cases involving unauthorised absences from work for periods in excess of four consecutive working days as opposed to intermittent and non-consecutive unauthorised absences. In such cases, Rule 203.2 provided for one specific penalty, namely dismissal, and did not allow for any form of warning procedure as provided for under unsatisfactory attendance records/unsatisfactory conduct or, as in the case of gross misconduct, for the three different penalties referred to therein.

5.6.4. However, the fact that Rule 203.2 specified the penalty, is not determinative of what disciplinary procedure should be followed as the mere fact that a breach of a particular provision in the disciplinary procedure would result in the automatic penalty of dismissal does not seek to prescribe that procedure. I construe and interpret the word "or" in Rule 203.2 to allow an employee who is unable to attend at work for five consecutive days and has failed to give notice, an opportunity to put forward a valid reason for his absence during that period. If valid, it would not result in his dismissal, but might

result in some other form of disciplinary action being taken against him as per the provisions in Rule 203 for unsatisfactory attendance record/unsatisfactory conduct. Any other construction would render the word "or" in the context of an employment domestic disciplinary procedure superfluous and nonsensical, and not allow for the employee to put forward any extenuating or mitigating circumstances to explain his absence, which the words "valid reason" allow for even if an employee has been absent "without notice". Likewise, and conversely, an employee might give notice of his absence, but the employer may not accept the reason given for such absence to be a "valid reason".

5.6.5. In stating in Rule 202.2 that "guidelines exist for careful investigation of the facts, whilst enabling the employees to present their case" and Rule 202.3 that the disciplinary procedures provide the means "for dealing with cases of serious misconduct" I would construe a breach of Rule 203.2 to fall within the description of serious misconduct, and for it to fall within the disciplinary stage of "gross misconduct" in Rule 203, the only difference being that in relation to the penalty, the penalty is fixed and automatic, namely dismissal, and would not also include any question of suspension or "revoked" (whatever that might mean) in addition to dismissal as prescribed in Rule 203 for cases of gross misconduct.

5.6.6. Had a disciplinary hearing been called, then the disciplinary procedure provided for in Rule 207 would have been implemented, with a thorough investigation into the facts, and the Complainant would have been given an opportunity to state anything he considered relevant to the offence or the penalty.

5.6.7. Whilst I have construed the disciplinary procedure in the manner stated above, I have no doubt that the Respondent genuinely believed that absence from work for five days without notice entitled the Respondent to summarily dismiss the Complainant without the requirement for a hearing.

6. <u>Provision for a right of appeal against dismissal</u>

6.1. There is conflicting evidence on the part of Mr. Goncalves and Mr. Hernandez as to whether or not the Complainant could appeal against the decision to dismiss him for a breach of Rule 202.3 as set out in 4.2 and 4.3 above. Whilst Mr. Goncalves would have had the final say in any disciplinary matter, it seems that he relied on Mr. Hernandez's advice, and it is probably for that reason that the dismissal letter did not notify the Complainant of his right to appeal against the decision to dismiss. Mr. Hernandez confirms this in my mind when he stated that as the Complainant had not notified the Respondent of his sickness for a period of five consecutive days, one could "assume" he had no valid reason for not attending at work and he would have so advised Mr. Goncalves, even though he could not at the hearing of this matter recall the exact contents of that conversation.

6.2. Rule 203.2 does not state that there is no right of appeal against a dismissal resulting from a breach of its provisions. It does not seek to deal with the question of an employee's right to appeal against such a decision, but simply what penalty is prescribed in such a situation.

6.3. Rule 202.3 states that one of the objectives of the disciplinary procedure is to "provide for the right of appeal against all disciplinary action taken by the company". The mere fact that Rule 208.1 states that the right of appeal follows "a disciplinary hearing or any form of warning" does not to my mind override Rule 202.3 or my construction of these provisions.

7. **Was the dismissal fair or unfair**

7.1. The Respondent, having discharged the burden imposed upon it to show that the reason for dismissal was a potentially fair reason for dismissal, has no burden upon it with respect to showing whether it was fair or unfair for it to have dismissed for that reason, which is a matter for me to determine on the evidence before me and base on the criteria set out in Section 65 (6) of the Employment Ordinance, namely:-

> "Subject to sub-sections (4) and (5) the determination of the question of whether the dismissal was fair or unfair having regard to the reasons shown by the employer shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case".

7.2. I agree with the principle which has been applied in construing Section 65 (6) of the Employment Ordinance, namely that it is not for the tribunal simply to substitute its own opinion for that of an employer as to whether certain conduct is reasonable or not but to determine whether the employer has acted in a manner which a reasonable employer might have acted, even though the tribunal, left to itself, would have acted differently.

7.3. Before dealing with my determination on the issue of fairness, as well as the effect of any failure by the Respondent to comply with its own contractual procedure for dealing with disciplinary offences, I would refer to the following extract from the Judgment of Browne-Wilkinson J in the case of **Sillifant v. Powell Duffryn Timber Limited (1983) IRLR 91** which was cited with approval in the judgment of Lord Mackay in the leading case of **Polkey v. AE Dayton Services Limited (1987) 3 All ER 974**:-

> "*Apart therefore from recent Court of Appeal authority and the Lowndes case, the British Labour Pump principle appears to have become established in practice without it being appreciated that it represented a fundamental departure from both basic principle and the earlier decisions. If we felt able to do so we would hold that it is wrong in principle and undesirable in its practical effect. It introduces just that confusion which*

Devis v. Atkins was concerned to avoid between the fairness of the dismissal (which depends solely upon the reasonableness of the employer's conduct) and the compensation payable to the employee (which takes into account the conduct of the employee whether known to the employer or not). In our judgment, apart from the authority to which we are about to refer, the correct approach to such a case would be as follows. The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An industrial tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the industrial tribunal in deciding whether or not the dismissal was reasonable within [s 98 (4)]. The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal, not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an industrial tribunal would be likely to hold that the lack of "equity" inherent in the failure would render the dismissal unfair. But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advances it would make no difference: see the example referred to by Lawton LJ in Bailey v. BP Oil (Kent Refinery) Ltd [1980] ICR 642. Where, in the circumstances known at the time of dismissal, it was not reasonable for the employer to dismiss without giving an opportunity to explain but facts subsequently discovered or proved before the industrial tribunal show that the dismissal was in fact merited, compensation would be reduced to nil. Such an approach ensures that an employee who could have been fairly dismissed does not get compensation but would prevent the suggestion of "double standards" inherent in the British Labour Pump principle. An employee dismissed for suspected dishonesty who is in fact innocent has no redress: if the employer acted fairly in dismissing him on the facts and in the circumstances known to him at the time of dismissal the employee's innocence is irrelevant. Why should an employer be entitled to a finding that he acted fairly when, on the facts known and in the circumstances existing at the time of dismissal, his actions were unfair but which facts subsequently coming to light show did not cause any injustice? The choice in dealing with [s 98 (4)] is between looking at the reasonableness of the employer or justice to the employee. Devis v Atkins shows that the correct test is the reasonableness of the employer; the British Labour Pump principle confuses the two approaches".

7.4. I have found that there have been procedural failures in the disciplinary process, in that no disciplinary hearing was convened in which the Complainant would be afforded an opportunity to explain his absence, and nor was he afforded, or

informed, of his right to appeal against the decision to dismiss. I find such procedural failures to render the dismissal unfair for the following reasons:-

(a) At the time of the dismissal, the Respondent was aware of the fact that the Complainant had been suffering from depression since 27th June 2000, and was in possession of several medical certificates to this effect covering the period up to and including 28th September 2000, and never sought to dispute that medical evidence which it accepted as valid, and did not exercise its rights under Rule 114 of the disciplinary rules to have the Complainant medically examined;

(b) The Respondent was aware that the Complainant had been admitted voluntarily to KGV hospital for treatment of his condition;

(c) The Respondent was aware that the Complainant had discharged himself from hospital and that he was leaving for the United Kingdom on 15th September 2000 with a girlfriend, and had by implication abandoned his wife and children . By informing Mr. Schembri that he was going to the United Kingdom to live with his girlfriend, the Respondent took this to mean that he would not be returning to work;

(d) Having assumed that the Complainant had left his employ by reason of the fact that he had notified another co-employee that he was going to the United Kingdom to live with his girlfriend, the Respondent then became aware of the return of the Complainant to Gibraltar after the expiry of the August Medical Certificate, but before he had been absent from work for five consecutive days. Whilst Mr. Hernandez did not feel it necessary for him to notify anyone on 30th September 2000, the employee was seen by other fellow employees and by the time the letter of dismissal was prepared, Mr. Hernandez had discussed the matter with Mr. Goncalves, who would no doubt have been aware of the Complainant's return to Gibraltar;

(e) Mr. Goncalves confirmed that had he received the September Medical Certificate prior to 4th October 2000, he would not have proceeded to dismiss the Complainant but would have queried it for the reasons set out in 2.2.3 (a) to (d) above and investigations would have ensued for the reasons stated in 2.2.3 (a) to (d) above;

(f) The Respondent never gave any consideration as to whether the Complainant should be given an opportunity to explain whether he had "a valid reason" for his breach of Rule 203.2 of the disciplinary rules, and cannot therefore contend that on the facts known to it at the time of dismissal, it had properly formed the view that no explanation or mitigation could alter its decision to dismiss.

(g) I cannot see how the Respondent could contend on the facts known to it at the time of dismissal that no valid excuse could be put forward by the Complainant in these circumstances for not having attended his place of

work in the circumstances known to the Respondent at the time. An employer who fails to investigate an employee's conduct has difficulty in establishing that it has acted reasonably and in assuming that an employee had no valid reason for his absence, must have reasonable grounds for so holding and not make assumptions in disregard of the facts known to it at the time of dismissal. I am not persuaded that having failed to afford the Complainant an opportunity to be heard and to state what valid reasons (if any) he had for not notifying the Respondent for a consecutive period of five days of his absence, is the action of a reasonable employer.

(h) Even an employer who provides for a specific penalty on the breach of a certain rule, namely instant dismissal, must still show that he has acted reasonably in all the circumstances and in particular with respect to the application of that penalty to the particular facts: **Ladbroke Racing Ltd v. Arnott [1983] IRLR 154**. It was held in that case that even the mandatory terms of the rules did not enable the employer to dispense with the obligation to act reasonably in all the circumstances. This was taken further in the case of **Taylor v. Parsons Peebles NEI Bruce Peebles Ltd [1981] IRLR 119** where the rules specifically provided for automatic dismissal for an employee who deliberately struck another, and the EAT found the dismissal to be unfair with Lord McDonald stating the following:-

> *"The tribunal have expressly stated they were satisfied that the policy of the Respondents was that in such circumstances the only possible penalty was dismissal and that this penalty was justly enforced when they dismissed both men. So expressed this does not in our view state the proper test. The proper test is not what the policy of the Respondents as employers was but what the reaction of a reasonable employer would have been in the circumstances. That reaction would have taken into account the long period of service and good conduct which the Appellant was in a position to claim. It is not to the point that the employer's code of disciplinary conduct may or may not contain a provision to the effect that anyone striking a blow would be instantly dismissed. Such a provision no matter how positively expressed must always be considered in the light of how it would be applied by a reasonable employer having regard to the circumstances of equity and the substantial merits of the case."*

(i) Whilst an employer can properly take the view that no mitigating circumstances can justify departure from a rule that prescribed misconduct will result in instant dismissal, the above extract from the case of Taylor emphasises that the important test is what the reaction of a reasonable employer would have been in the circumstances. The Complainant had been employed by the Respondent since August 1992, and whilst he had received a number of warnings, his overall record of service for the period of 8 years he had been in the Respondent's employ, could be described as good. With the knowledge of his condition, and of other facts referred to in

7.4 (a) – (f) above, even if the Respondent had found that the Complainant had no valid reason for being absent for five consecutive days, it could have still taken these matters into account.

7.5. The need to provide a right of appeal is an important one and one that should be brought to the attention of an employee: **Tesco Group of Companies (Holdings) Limited v. Hill [1977] IRLR 63.** Even if the employer's disciplinary procedure does not provide for a right of appeal, one should be given where possible: **Davison v. Kent Meters Limited [1975] IRLR 145.**

7.6. I have already found that I believe the Complainant should have been provided with a right of appeal in accordance with disciplinary procedure and find no reasons why this was not practicable, given Mr. Hernandez's evidence to the effect that he dealt with all disciplinary matters, and Mr. Goncalves dealt with all appeals. This is in fact what was prescribed by Rule 208.1, which stipulated that the Managing Director, Mr. Goncalves would hear any appeals against disciplinary action.

7.7. The right of an appeal is an important one, and as was stated in the case of Tesco (supra) the attention of an employee should be drawn to that right, especially in circumstances such as this, where an employee has been summarily dismissed without a hearing, had no representative acting for him and was suffering from depression and had been recently hospitalised in KGV.

7.8. Had the Complainant been informed of his right of appeal, then the Complainant could have appealed.

8. **Compensation**

8.1. Basic award: £2,200. This is a fixed award and in respect of which I am not empowered to make any deductions.

8.2. Compensatory award:

8.2.1. In paragraph 10 of his statement, the Complainant states that from 4th October 2000 to 2nd April 2001 he was unemployed and was looking for a job, but could not find one or even get an interview for a job, and laid part of the blame for this on not having obtained a character reference from the Respondent, although it was not clear on his evidence whether he had requested one. In paragraph 11 of his statement he confirms that he found employment with Helm Marine on 2nd April 2001, although he continued with his medication and had not had a relapse since October 2000 and had resumed normal family life. He explained in evidence that once he found employment, the road to recovery was accelerated. He was earning £193.63 in basic pay with the Respondent, and whilst he was earning an additional but unspecified amount for shift work, no evidence was given in this effect and I will therefore treat his basic loss of pay as £193.63 per week gross.

8.2.2. Even if the Respondent had acted fairly by applying the procedural safeguards of a disciplinary hearing, the chances of the Respondent accepting the Complainant's reasons for not attending at work for five days without a medical certificate must be taken into account by me, and I am not satisfied it would necessarily have done so. Rule 106 specifically provided that it was the Complainant's responsibility to keep the Respondent advised of the circumstances in which they are prevented from attending work, and of their likely return date, and which the Respondent's witnesses insisted was their prerogative. The Complainant was fully aware of this for the reasons given in 4.1 above. Had the Complainant adduced the September Medical Certificate at that hearing, and sought to argue that it had been left with the Respondent on 15th September 2000, the Respondent would have taken a very serious view of this after investigating the matter as Mr. Goncalves said he would have done had he received it prior to 4th October 2000, and consequently might also have considered whether there were alternative grounds for dismissal. The Complainant could simply have attended a disciplinary hearing and sought to explain his absence, and the failure to produce a medical certificate for the period of 28th September 2000 onwards by reason of forgetfulness, and to emphasise that his valid reason for being absent is that he was still sick. However, the Complainant could have sought to explain his absence in the manner he actually did, namely by adducing the September Medical Certificate and arguing that he had furnished it to the Respondent prior to 28th September 2000, and I am in no doubt that the Respondent would after investigating that explanation, as it subsequently did, have taken a very serious view of what the Complainant was purporting to allege had actually transpired. Accordingly, there was only at best a 50% prospect of the Complainant keeping his job. Compensation payable under this head must be "just and equitable" in accordance with Section 71 (1) of the Employment Ordinance, and I find that the award should be reduced by 50% to take into account the fact that the prospects of the Complainant keeping his job were not absolute, but at best only equal. In reaching this decision, I emphasise what Lord Bridge said in the case of Polkey (supra):-

> *"There is no need for an "all or nothing" decision. If the Industrial Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment".*

8.2.3. I am of the view that the likelihood that the employee would have been dismissed even if a fair procedure would have been complied with would have been 50% and I therefore reduce the award accordingly on the grounds that this would be just and equitable.

8.2.4. Section 71 (3) of the Employment Ordinance provides as follows:-

> ***"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 in connection with those matters the tribunal***

shall reduce its assessment of his loss to such extent as, having regard to that finding, the tribunal considers just and equitable".

8.2.5. It is appropriate that before I consider making any deduction from the compensatory award for contributory negligence, I must give the Complainant, and the Respondent, the opportunity to give evidence on the matter although I would indicate that the behaviour, action or conduct of the Complainant which gives me cause to consider a reduction pursuant to Section 71 (3) of the Ordinance, are the following:-

(a) It was his duty to keep his employer informed as to his continued absence, and the reasons for that absence. He failed to do so.

(b) Whilst the Complainant had received a copy of the booklet, he did not admit to knowing of his right of appeal against the decision, and had not been notified of that right in the letter of dismissal. Subject to any arguments or submissions, I do not consider this to be a ground for reducing the compensation I have awarded for having failed to mitigate his loss by lodging an appeal. In any event, and given the Respondent's own failure of notification, the subsequent receipts of medical certificates for the period of the five consecutive days, could have been taken by the Respondent to constitute an appeal from an otherwise ill-informed employee and dealt with accordingly.

8.2.6. Whilst the Complainant did not cause the procedural defect to which I have referred, his conduct can be taken into account when assessing the compensation to which he is entitled.

8.2.7. The award of compensation will be based on a gross weekly salary of £193.63.

8.2.8. On the evidence before me, the only loss I will be awarding compensation for will be for the period from the date of the employee's dismissal until he found re-employment on 2nd April 2001, and I will be making no award for loss from the period thereafter as there is no evidence before me of any such loss. I will also be making an award of compensation for the loss of the statutory right of protection for unfair dismissal in the sum of £100.00.

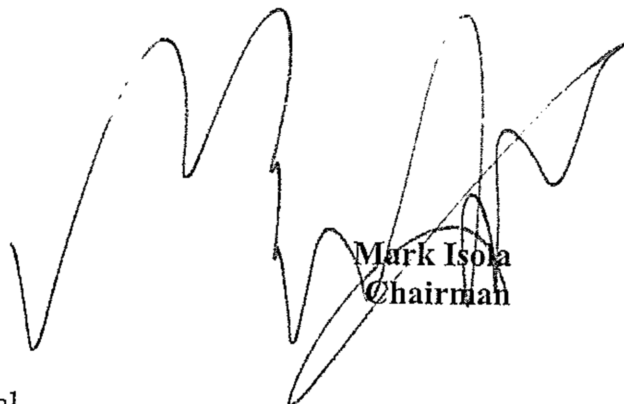
8.2.9. In accordance with Rule 15 (1) of the Industrial Tribunal Rules, I will be asking the Secretary of the Industrial Tribunal to set aside a hearing date for the following purposes:-

(a) To determine the amount of the compensatory award;

(b) To give the parties the opportunity to give evidence or put forward any submissions with respect to whether there should be any further reduction from

the compensatory award for contributory negligence on the part of the Complainant.

Dated this 1ST day of July 2002



Mark Isola
Chairman

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