INDUSTRIAL TRIBUNAL GIBRALTAR

CASE NO.12/2001

BETWEEN

ANTONIO GUERRERO VERA Complainant

AND

OVERSEAS MOTORS (GIBRALTAR) LIMITED Respondent

JUDGEMENT

FACTS

The Respondent is a long established motor car dealer in Gibraltar. Mr David Benaim is the Managing Director of the Company.

The Complainant was employed by the Respondent as a panel beater/painter. He commenced his employment with the Respondent on 3rd November 1997. The sole terms of employment were those set out in the Employment and Training Board Notice of Terms of Engagement Form. Until the incident in question the Respondent had no complaints as to the Complainant's work.

In July or August 1991 a Citroen Xsara Picasso was being repaired at the Complainant's work shop following an accident involving a front impact (to the same) (Licence Plate Number G97605) ("the Vehicle"). The work required inter alia panel beating which was undertaken by the Complainant. The panel beating necessitated the removal of the front wheels of the Vehicle. In the first instance and possibly on further instances, the wheels were removed by a Mechanic called Ahmed Akodad (also referred to as Hammed). The mechanic Akodad was, according to the Respondent, supposed to be the

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sole person employed by the Respondent to undertake the removal and replacement of wheels.

As the work to the Vehicle was not deemed to be a priority, it was put to one side as and when more urgent work came into the Respondent's Garage. Each time another vehicle entered the Respondent's Garage the Vehicle's wheels were replaced and the Vehicle was moved to one side until the Complainant had time to return to the same. This method of working on the Vehicle involved replacing and removing the Vehicle's wheels on a number of occasions. Whilst the removal of wheels was in fact the mechanic Akodad's job, nevertheless the Complainant confirmed that he removed and replaced the Vehicle's wheels from time to time because the mechanic Akodad was often busy doing something else.

Once the work to the Vehicle was completed on 3rd August 2001, Mr Benaim took the Vehicle and with his family in the same drove to Torremolinos. During this drive to Torremolinos Mr Benaim heard a noise coming from the front left side of the Vehicle.

On 5th August 2001 Mr Benaim drove the Vehicle to Fuengirola. After approximately 20kms the noise became louder.

On 6th August 2001 Mr Benaim took the Vehicle to the official Citroen Dealers in Fuengirola. After a road test it was pointed out that the retaining bolts to the wheels had been working themselves loose. This was the cause of the noise. It was also pointed out that had the wheel bolts worked themselves completely loose, there would have been a possibility of the wheels detaching themselves from the Vehicle - which may have caused serious injury or worse to the occupants of the Vehicle.

After leaving the Fuengirola Citroen Dealer Mr Benaim telephoned Mr José Munoz Pena the Respondent's Service Manager and asked him to investigate the matter. Mr Munoz Pena made enquiries in the Respondent's Garage as to who had been the last person working on the wheels of the Vehicle. This investigation led him to the mechanic Akodad, whose responsibility it was to remove, replace and tighten bolts to wheels. Mr Akodad initially accepted responsibility and Mr Benaim's immediate reaction was to dismiss Mr Akodad. However, after further enquiry Mr Munoz Pena discovered that it had in fact been the Complainant who had replaced the wheels and also failed to adequately tighten bolts. This omission was admitted by the Complainant.

Mr Munoz Pena told Mr Benaim that the Complainant had admitted that he may have been the person responsible for replacing the wheels and failing to tighten the bolts to the vehicle. On the strength of this admission Mr Benaim told Mr Munoz to dismiss the Complainant.

EVIDENCE BROUGHT BEFORE TRIBUNAL

During the course of his examination Mr Munoz Pena explained that whereas his role was to check repairs and road test the vehicles that came into the Respondent's Garage, his job did not require him to check every bolt and screw removed or replaced during the course of repairs, as this would be impractical due to the sheer number of bolts and screws involved.

Mr Munoz Pena also stated that whoever did work in the Garage needed to make sure that all bolts and screws affected by the repair were properly tightened. Therefore, Mr Munoz Pena asserted that it was each workman's responsibility to ensure that he tightened whatever was made loose.

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There were certain minor discrepancies in the Respondent's testimony as to which side of the Vehicle the noise was emanating from. However, it is felt that this detail has no effect on the main issues of the case, given that both parties accept that a wheel was involved and that the bolts to this wheel had come loose. Evidence was also provided by Mr Manuel Cassino Jimenez, the Fuengirola mechanic in charge of the mechanical team in the Fuengirola Citroen Dealership, as to the fact that wheel bolts had been seen to be loose.

Mr Benaim considered the incident to be potentially life threatening. The dismissal was made as a consequence of what Mr Benaim termed his "responsibility to my clients and myself...I cannot keep someone who is guilty of gross negligence".

The Complainant asserted that the Respondent's safety and work procedures were flawed and unsafe. The Complainant said that the Manager should have had final responsibility for the quality of all work, inclusive of ensuring the tightness of all nuts and bolts. Further, the lack of such final check rendered all work unsafe - due to the ever present possibility of human error. The error was, seemingly, the Complainant's first whilst working for the Respondent. The Complainant's submission that the tightening of bolts should be the responsibility of the Service Manager is noted. However, I also accept Mr Jose Munoz Pena's assetion that it may be an impossible task for a service manager to check every nut, bolt and screw in a busy garage. Therefore, it must be right to say that every workman should stand-up and accept responsibility for the standard and quality of his own work.

A great deal of emphasis was made by both sides as to the advantages or disadvantages of mechanical tightening devices. However, I do not believe that this is of any great relevance given that such devices are, what I would term, "labour saving". Tightening bolts by hand cannot be easy, but a skilled

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mechanic/workman should know how to tighten a bolt and also when a bolt is tight.

Mr Benaim stated that this was the first time in 30 years that an incident of this nature had occurred. Mr Benaim also pointed out that his Company had a good employer track record and that the average duration of employment with the Respondent's Company was 15 years or so.

The Complainant is by his own admission a panel beater. He was employed as a panel beater by the Respondent. He said that he was helping out by removing and replacing wheels because the man responsible for doing this was busy. The Complainant had no business to be helping out. His job was panel beating. By "helping out" he had stepped outside the boundaries of his responsibilities and employment. It concerns me that the management can allow this to occur. However, I have no remit to discuss the Respondent's internal work practices.

LAW

Pursuant to Section 59 of the Employment Ordinance ("the Ordinance") every employee has the right not to be unfairly dismissed by his employer.

Pursuant to Section 65 (1) of the Ordinance the employer has to make submissions as to the reason for the dismissal and that such reason falls within the parameters set out at Section 65 (2) of the Ordinance.

It is clear that the Respondent (as employer) contends that the reason for the Complainant's dismissal, was on the grounds of negligence because he failed to tighten the Vehicle's wheel bolts. This reason falls within Section 65 (2) of the Ordinance.

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Was the dismissal fair or unfair? The Statutory test is laid down by Section 65 (2) of the Ordinance, which is similar to Section 98 (4) of the English Employment Rights Act 1996. There are a number of guidelines developed by the English legal system to aid Industrial Tribunals in applying this test, which I set out below:-

1. The "reasonable decision" approach was summarised by Browne-Wilkinson J in Iceland Frozen Foods Limited v Jones [1983] ICR 17@pp 24-25 in words quoted with approval by the Court of Appeal in Neale v Hereford and Worcester County Council [1986] ICR 471:

"The correct approach... is as follows:-

(1) The starting point should always be the words of Section 98 (4) themselves;

(2) In applying the Section the Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they "the members of the Tribunal" consider the dismissal to be fair;

(3) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what

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was the right course to adopt for that of the Employer;

(4) In many, although not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another;

(5) The function of the Employment Tribunal, as an Industrial Jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: If the dismissal falls outside the band, it is unfair."

1.1 This approach was considered anew by the Court of Appeal in Foley v Post Office [2000] ICR 1283. As a result of the decision of the Employment Tribunal in Hatton v Van den Bergh Foods Limited [1999] ICR 1150 suggesting that the approach was misconceived Mummery LJ endorsed the Iceland Frozen Foods approach saying the decision itself, which had been approved and applied by the Court of

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Appeal "remains binding on this Court, as well as the Employment Tribunals and the Employment Apeal Tribunal". He described the disapproval by the Employment Appeal Tribunal of that approach as "an unwarranted departure from authority".

1.2 Therefore, the Tribunal must not substitute its own view for that of the employer. This has been emphasised by the Employment Appeal Tribunal in Beedell v West Ferry Printers Limited [2000] ICR 1263 and the Court of Appeal in Foley and Post Office [Supra]. If, however, the subjective view of the employer were the sole determining factor, the Tribunal's ability to consider the reasonableness of the action would be eliminated. Equally, to say that the Tribunal would be able to review every case and apply its own views to the facts (and thus substitute its own views for those of the employer) is also not accepted. The correct approach is a mixture of the two. Thus it is permissible for the Tribunal to look at the employer's honest and genuine belief, however, that belief must be upon reasonable grounds.

1.4 The question the Tribunal must ask is whether it was reasonable for the employer to dismiss the employee? There may be a range of courses of action open to the employer, all of which fall within the band of reasonableness. For an Industrial Tribunal to prefer one course of action to another would cause it to apply the test of what it would have done itself and not the test of what a reasonable employer would have done.

In answering this question I accept that Mr Benaim would have dismissed any person guilty of having failed to tighten the bolts to the wheels of any car. Furthermore, it is noted that Mr Benaim considered that such a failure to

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tighten bolts on wheels could have put the lives of customers at risk and was therefore unacceptable.

Both Mr Benaim and Mr Munoz Pena both asserted that whoever was working on the Vehicle should have automatically made sure that he tightened whatever he was working on. Mr Benaim said that the tightening of wheel bolts was something one should take for granted. The Complainant sought to shift the responsibility of checking his work on to the Service Manager. It does seem common sense and reasonable to say that whoever is undertaking work on wheels (or anything else for that matter) should make sure that he completes his job and not leave it for someone else to do.

The risk that the Vehicle may have been removed from the Complainant's work schedule in an unsafe state, or the Complainant taken ill leaving the Vehicle in this same unsafe state, should have ensured that the Complainant acted responsibly every time he worked on the Vehicle - by tightening the bolts each time that he was moved to other work. That he did not do so, because of his assertion that the constant interruptions stopped him from working on the Vehicle, cannot be seen to be a valid excuse, if any were required.

Was it reasonable for the employer in this case to dismiss the employee? On the facts it would seem that it was the employer's honest and genuine belief that the Complainant's failure was a dismissible offence. Mr Benaim clearly believed that the error was the worst possible omission any car mechanic/workman could make. To Mr Benaim, the Complainant was no longer worthy of trust.

Was this view reasonably held?

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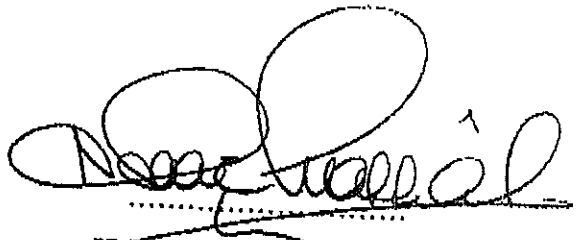
To have permitted the Complainant to continue with his employment after such an act or error, would be a great and continuing concern to the Respondent. Mr Benaim stated that this was his "responsibility to my clients and myself...I cannot keep someone who is guilty of gross negligence". To Mr Benaim this was a grave error which could have led to personal injury or death.

Should the Complainant have been given a second chance and been merely reprimanded? The Respondent ultimately deals with the lives of the drivers and occupants who use its services. In a Garage such as the Respondent's each workman is, rightly or wrongly, ultimately responsible for his own actions. Each workman's actions can hold in the balance the life or lives of car occupants. Trust in any workman at the Respondent's Garage is essential. Therefore, it seems correct to say that the Respondent's act of dismissal was based on reasonable grounds.

With regard to procedural fairness, the Complainant admitted that he was at fault - and he has not retracted this admission - this limb has therefore been satisfied.

As a consequence of the foregoing I believe that the dismissal was fair and so dismiss the Complainant's application. No order as to costs is made given that neither party made any submissions in respect thereof.



~~ISAAC~~ C MASSIAS LL B

CHAIRMAN

~~20TH MAY 2002~~

24th March 2003