

IN THE INDUSTRIAL TRIBUNAL

Case No. 13/2001

**BETWEEN**

**MANOUCHER RASSA**

Complainant

-and-

**H. M. ATTORNEY GENERAL FOR GIBRALTAR**

Respondent

Nicholas Cruz, Esq., for the Complainant

Gilbert Licudi, Esq., for the Respondent

DECISION

Dr Manoucher Rassa is a Consultant Radiologist, having graduated from Tehran Medical School in 1964. In 1972 he migrated to the United Kingdom where he started his training in Radiology. In July 1977 he was appointed Consultant Radiologist in the Hillingdon Health Area and paragraphs 1 to 4 of his witness statement dated the 12<sup>th</sup> September 2001 evidence the high degree of expertise and experience acquired by Dr Rassa over the years.

Gibraltar Health Authority (“GHA”) is a statutory body charged with the responsibility for operating the Health Centre (now Primary Care

Centre) and St. Bernard's Hospital from which medical and health services are provided to members of the public in Gibraltar.

Until June 1998 the Radiology Department at St. Bernard's was staffed by four radiographers (of whom one was an ultrasonographer), one clerk and one darkroom technician. The expertise of two UK based radiologists (mainly Doctors James Hinton and J.J. Negrette) was available about once a month for two days or so – often at weekends – as visiting consultants who would report on radiological examinations as and when required. The Department was *de facto* headed by Mrs. Annie Teuma, Chief Radiographer, and by all accounts it worked well, providing an adequate diagnostic service.

The government (upon whom the ultimate political responsibility for medical and health services in Gibraltar lies) elected in May 1996, however, decided that a full time radiologist is what the health service in Gibraltar required and the post of consultant radiologist was advertised in the British Medical Journal in June 1998 as a vacancy at St. Bernard's. Dr Rassa was among those who responded to the advertisement and was invited to come out to Gibraltar where he met the late Mr Gavin Jackson, then Chief Executive of GHA and of whom Dr. Rassa spoke very warmly, Dr. Vijay Kumar, Director of Public Health, Dr. Michael Maskill, Medical Director, and other consultants and general practitioners.

Before coming out to Gibraltar during August/September 1998, he had been supplied with a document dated June 1998 setting out the job description for the post, which described the set up at St. Bernard's as being along the lines of a UK NHS hospital, a scenario which was confirmed to Dr Rassa by Mr Jackson.

Dr Rassa described his meeting with Dr Maskill as both friendly and helpful (as he found it to be at the time), although with hindsight he attributed to Dr Maskill an ulterior motive (or “alternative agenda”, as he called it) in drawing to his attention the negative aspects (e.g. the high rate of taxation in Gibraltar) of what was on offer. Dr. Maskill, on the other hand, made no apology for telling Dr. Rassa everything he needed to know – “warts and all”, as he put it.

By way of an aside, I should record that there were five applicants for the post and three were invited to an interview. Two of the invitees withdrew their applications and as a result only Dr. Rassa was interviewed by the Advisory Appointment Panel set up for the purpose of interviewing the candidates. Dr. Maskill thought that the post should be re-advertised (perhaps, accompanied by improved terms) in order to attract a wider candidature.

In any event, Dr. Rassa (whose application was supported by glowing references from colleagues at Mount Vernon Hospital who testified to his fine professional and personal attributes) was offered the post by a letter addressed to him on the 15<sup>th</sup> September 1999 by the Assistant Personnel Officer (Ag) of GHA enclosing a copy of the contract to be signed by the parties. Dr Rassa replied with an undated letter to Mr Jackson (which was received by GHA on the 25<sup>th</sup> September) stating that he was happy to accept the offer, although there were certain technical and personal matters which needed resolving prior to the commencement of his duties.

Of particular relevance to this case was Dr. Rassa’s insistence on “... the right to charge a fee to those patients who are attending the X-Ray Department privately, exactly the same way as is the practise (sic) the UK’s NHS hospital.” Mr Jackson replied on the 6<sup>th</sup> October confirming that Dr.

Rassa "... would have the right to private practise (sic). Charges would be organised through the Radiology and Accounts Departments of GHA with you receiving the amount due to you for professional services." Although GHA was unable to accede to some of Dr. Rassa's other requirements, he wrote to the Personnel Officer on the 12<sup>th</sup> November unconditionally accepting the offer of employment.

On the 30<sup>th</sup> March 1999 Dr Rassa arrived in Gibraltar and the following day signed a contract with the Government of Gibraltar on the terms set out therein. I quote only those provisions which are of particular relevance to these proceedings:-

- "1. [Dr Rassa] undertakes that he will diligently and faithfully perform the duties of Consultant Radiologist in the Gibraltar Health Authority, during the term of service specified in this Agreement and will act in all respects in accordance with all-lawful (sic) instructions and directions given to him by the Government through the Head of the Gibraltar Health Authority or through any other duly authorised officer.
- 3.(i) This Agreement is subject to the conditions specified in the Schedule to this Agreement.

#### Schedule

- 1.(i) Subject to other provisions of this Agreement, the engagement of [Dr Rassa] is for one term of 36 months continuous residential service in Gibraltar, commencing on 1 of April 1999.

2. The duties of [Dr Rassa] shall include the usual duties of the office for which he is engaged and any other suitable duties which the Government may call upon him to perform. [Dr Rassa] is allowed to undertake work privately in those circumstances where his work is previously agreed with the employer. He shall devote the whole of his time and attention to the service of the Government. He shall conform to the Government Security Instructions, Accounting Instructions, Stores Regulation, Departmental instructions and General Orders of the Government and, shall be subject to the Colonial Regulations for the time being in force in so far as same are applicable, and or any other conditions appertaining to the grade of Consultant Radiologist.
- 6.(i) If [Dr Rassa] at any time during the term of service specified in this Agreement neglects or refuses or from any cause (excepting infirmity not caused by his own misconduct, as provided for in clause 5 of this Schedule) becomes unable to perform any of his duties or to comply with any instruction, regulation or order specified in clause 2 of this Schedule, or any Departmental instructions or improperly discloses any information respecting the affairs of the Government to any unauthorised person, or in any other manner misconducts himself the Government may forthwith determine the engagement of [Dr Rassa] under this Agreement, and thereupon all rights and advantages reserved to him by this Agreement shall cease...”

Unfortunately, Dr Rassa's tenure at St. Bernard's was not a very happy one and was brought to an end on the 13<sup>th</sup> October 2000 with a letter addressed to him that day by GHA setting out the reasons for the termination of his employment.

By originating application issued on the 5<sup>th</sup> January 2001 and amended on the 18<sup>th</sup> July 2001 Dr. Rassa complained to this Tribunal pursuant to section 70 of the Employment Ordinance that he was unfairly dismissed contrary to section 59 thereof.

Dr. Rassa alleges that he "was dismissed unfairly on the 13<sup>th</sup> October 2000 by letter for reasons which cannot be properly or justifiably substantiated as the Complainant's actions did not constitute misconduct and/or breach of his contract and were at all times in the public health and interest of the people of Gibraltar." (Paragraph 3 of Attachment A to the originating application)

He sets out other grounds in paragraphs 4 to 6 of Attachment A as follows:-

- “4. Further and/or alternatively [if] (which is not accepted) the Complainant's actions did constitute a breach of his contract the circumstances in which that breach was committed were such that they did not constitute serious misconduct or any reason that would have justified a dismissal.
5. Further or alternatively the dismissal of the Complainant was unfair as the reasons given by the employer were in direct contravention of the Complainant's constitutional rights including the Right of Protection of Freedom of Expression

as enshrined in the 1969 Gibraltar Constitution Order Section 10 and the Common Law of England and Wales directly applicable to Gibraltar related directly and indirectly to the Right to Freedom of Expression and Public Interest Disclosure.

6. Further if (which is not accepted) the Complainant's actions did constitute a breach of contract the employer failed to warn the Complainant clearly, properly or at all of the consequences of his action and moreover the employer failed to employ any fair procedures in dismissing the Complainant."

At the hearing of the originating application Dr. Rassa did not pursue the claim set out in paragraph 5 and, accordingly, I need not delve into the matter.

Most of the evidence adduced by Dr. Rassa and substantially the whole of his cross-examination of the Respondent's witnesses, however, was aimed at the matters set out in paragraphs 1 and 2 of Attachment A (i.e. issues within the ambit of constructive dismissal) which, although the Court of Appeal held (in **H.M. Attorney-General for Gibraltar –v- Rassa Civil Appeal No 12 of 2002**) does not apply to the law of unfair dismissal in Gibraltar, were admissible in the consideration of this particular case (*vide* paragraph 15 of Neill J.A.'s judgment).

By section 65(1) the onus is on the employer to show what was the reason or, if there was more than one, the principal reason for the dismissal and that it was a reason falling within sub-section (2).

The Respondent filed a notice of appearance on or about the 2<sup>nd</sup> February 2001 and, after amendment on the 23<sup>rd</sup> July, the grounds upon which he resisted Dr. Rassa's claim read:

“(1) The Applicant alleges at paragraph 1 of Attachment “A” of his Originating Application that he was constructively dismissed on or about 11 October 2000. In essence, the Applicant is alleging that he terminated his contract of employment in response to a breach of contract by the Respondent and that he communicated to the Respondent that he was treating the contract as repudiated. In this regard, the Respondent will contend as follows:

- (1.1) The Respondent denies having dismissed the Applicant on 11 October 2000.
- (1.2) There was no breach of contract, repudiatory or otherwise, by the Respondent. Further, there was no breach by the Respondent of any implied term of trust and confidence as alleged in paragraphs 2(A) – (B) of Attachment “A”...
- (1.3) The allegations made at paragraph 1(A) – (E) and 2 (A) – (B) of Attachment “A”... are denied. In any event, such allegations do not amount to a breach of contract, repudiatory or otherwise, by the Respondent.
- (1.4) At no time did the Applicant communicate to the Respondent that he was terminating his contract of employment in response to a repudiatory breach by the Respondent.
- (1.5) If, in fact, the Applicant resigned or terminated his contract of employment on or about the 11 October 2000, this was not in response to any repudiatory breach by the Respondent. In the circumstances, the Applicant cannot be regarded as having



been dismissed by the Respondent and he is not entitled to bring a claim for compensation for unfair dismissal.

(2) Further or in the alternative, the Respondent will contend that the dismissal of the Applicant on 11 October 2000, which is denied, or by letter to the Applicant dated 13 October 2000 was fair in that:

(2.1) The Respondent was entitled to treat the Applicant's misconduct as a sufficient reason for dismissing him based on the reports and recommendations made to the Respondent by the Gibraltar Health Authority. Moreover, the decision to dismiss the Applicant without notice or without a disciplinary or other form of hearing was, in all the circumstances, within the band of reasonable responses which the Respondent could take in relation to the relevant misconduct.

(2.2) The misconduct on the part of the Applicant which led to his dismissal consisted, in particular, of the following wrongful acts and/or breaches of contract on his part:

(a) Declaring on, *inter alia*, 11<sup>th</sup> October 2000 that he would not be performing his contractual duties unless and until certain terms imposed by him were met, which terms he was not entitled to impose as a condition for performing his contractual duties;

(b) Repeatedly absenting himself from his place of work at St. Bernard's Hospital without the authority or consent of his employer and/or the Gibraltar Health Authority, neglecting his work and/or his patients on various occasions in the process;

- (c) Repeatedly refusing to accept and/or defying the managerial authority of the Medical Director at St. Bernard's Hospital over the Applicant and over other consultants at St. Bernard's Hospital;
- (d) Giving a television interview to GBC on 10<sup>th</sup> October 2000 concerning affairs at St. Bernard's Hospital, members of its staff and patients and publicly disclosing internal correspondence to GBC without the consent of his employer and/or the Gibraltar Health Authority; During the said interview, the Applicant showed GBC the X-rays of a patient and commented on that patient's case without the consent of his employer and/or the Gibraltar Health Authority and/or the patient concerned; Further, part of the said interview was conducted within the hospital precincts and in the knowledge that the prior consent of the Gibraltar Health Authority was required; Moreover, the Applicant proceeded with the said interview despite having been expressly instructed not to do so by the Hospital Administration Officer on behalf of the Gibraltar Health Authority;
- (e) Behaving in an unethical manner by openly making serious and/or unsubstantiated allegations of malpractice and negligence against professional colleagues and staff at St. Bernard's Hospital during such interview, with the intention of and/or reckless as to (a) bringing them and the Gibraltar Health Authority

into disrepute and/or (b) undermining public confidence in the same;

(f) The Applicant's history of repeated misconduct generally, in respect of which he had been previously warned, both orally and in writing. This history of misconduct included, *inter alia*, the following:

- (i) Behaving in a disrespectful and/or offensive manner towards other members of staff and patients at St. Bernard's Hospital on various occasions;
- (ii) Refusing to adhere to established working practices at St. Bernard's Hospital, in particular as to giving due notice of intended leave of absence and filling in the standard request for leave forms, contrary to repeated requests that he adhere to those practices;
- (iii) Refusing, on various occasions, to treat or see patients for unjustified and/or irrelevant reasons;
- (iv) Improperly claiming reimbursement of costs of study leave which had not been authorised and where the relevant leave of absence was taken on the pretext of being sick leave;
- (v) Refusing to report on X-ray images that had been taken during that period of absence; and

(vi) Interfering with clinicians' relationships with patients. In particular, usurping the roles of other consultants in relation to patients and expressing opinions to patients on matters which were not his responsibility but that of other consultants.

(2.3) In all the circumstances, the Respondent acted fairly and reasonably.

(3) For the avoidance of doubt, the allegations contained at paragraphs 1 to 5 of Attachment "A" ... are denied."

As the evidence unfolded during hearing of this matter which lasted 15 days, I had to remind the parties (and myself) more than once that I was not conducting an inquiry into St. Bernard's or the health service in Gibraltar nor, for that matter, was I trying a case of clinical negligence alleged against one or more of the medical practitioners at St. Bernard's. All I am concerned with are issues connected with Dr. Rassa's employment by GHA and the termination thereof.

Dr. Rassa began working at St. Bernard's on the 1<sup>st</sup> April 1999 and within a few weeks his relationship with his employer deteriorated. On the very first day that he started work he had what he described as a "peculiar" conversation with Dr. Maskill who made it clear to him that "we" (by which Dr. Rassa understood him to mean the consultants or the hospital generally) were not in favour of his appointment because the radiological needs of the Hospital had been satisfactorily catered by the previous set up. Dr. Maskill made no secret of the fact that, given the choice of a

consultant, he would have much preferred the appointment of a Geriatrician or a third Anaesthetist over a Radiologist because the quality of the existing radiology service was very good. However, the consultants did not have a say in the field in which a consultant was to be appointed and he insisted that his views were not aimed at Dr. Rassa personally.

### **Direct access by GPs to Radiology**

On the 26<sup>th</sup> April Dr. Rassa met Dr. William Fitzpatrick, GP Co-ordinator, and some of his colleagues at the Health Centre (or Primary Care Centre, as it is now known) and appears to have been enthusiastically received by them for the improvements he was proposing to introduce in the services they were to receive from the Radiology Department. He wrote to Dr. Fitzpatrick on the 6<sup>th</sup> May setting out his suggested protocols for referral by GPs to Radiology.

Dr. Rassa showed a copy of his letter to Dr. Maskill who voiced the consultants' disquiet at the possibility of CTs, MRIs and most Isotopes scans being requested directly by GPs and his reservations on the effect such requests would have on costs. Dr. Maskill wrote to Dr. Rassa on the 19<sup>th</sup> May suggesting a meeting (upon his return from leave) between the body of consultants and Dr. Rassa at which the consultants could "explain the difficulties which (they) feel that the system will produce for (them)." He requested that "no further requests for the above are processed until (the consultants) have had the chance to fully explain (their) view."

Dr. Rassa replied on the 22<sup>nd</sup> May reiterating an earlier explanation that GPs did not send their requests direct to Spain but to him and he decided whether an examination as requested was appropriate or whether the matter should be dealt with in some other manner first. He did not

comment on Dr. Maskill's suggested meeting with the consultants or his request that no further requests by GPs be processed in the meantime.

On the 8<sup>th</sup> June Dr. Rassa wrote to Dr. Maskill complaining that his letter of the 15<sup>th</sup> April (which does not appear to have been included in the bundle of documents) had been ignored. He thought it strange that experienced GPs were being discouraged from using scan facilities while, on the other hand, a number of investigations were being requested by "less experienced junior doctors" and not always justifiably. He demanded Dr. Maskill's full co-operation in stopping this practice at once and copied his letter to Messrs. Ernest Lima and Joe Catania, Chief Executive and Director of Operational Services respectively of GHA.

On the 9<sup>th</sup> June Dr. Rassa wrote to Mr. Lima (referring to an earlier meeting he had had with him and Mr. Catania) on the same subject and copied this letter to Mr. Catania and Dr. Maskill. Mr. Lima replied on the 18<sup>th</sup> June indicating that Mr. Catania had been discussing the matter with Dr. Maskill and would be discussing it with Dr. Rassa on the latter's return from leave and that he (Mr. Lima) would deal with the matter upon his return to Gibraltar the following week when he looked forward to seeing Dr. Rassa.

Dr. Rassa replied on the 28<sup>th</sup> June pointing out that he was the Consultant Radiologist and dismissed Mr. Lima's offer of discussions: "I am afraid this is not up to discussion and will repeat my request and appreciate your direct instruction to Hospital Administration as stated in my previous letter."

Dr. Rassa's attitude was unhelpful and it is not clear whether he participated in the discussions referred to by Mr. Lima but on the 14<sup>th</sup> July

Mr Catania wrote to Dr. Rassa with the outcome of his discussions with Dr. Maskill, the upshot of which was to accede to Dr. Rassa's requirements.

### **Conflict between Dr. Rassa and Mrs. Annie Teuma**

During the summer Dr. Rassa set about trying to implement an effective system for the collection of fees for X-rays due from private patients not only to himself but also for scans undertaken in Spain. To that end, on the 29<sup>th</sup> September he circulated to all hospital consultants and to GPs at the Health Centre a letter which he copied to Messrs. Lima and Catania and to Dr. Kumar enclosing a form of request to be filled in and sent to the Radiology Department by those requiring imaging services.

Mrs Teuma took umbrage at the fact that she had not been copied that circular and so informed Mr Catania in a note indorsed on a copy of the letter which had come into her possession. Her wording reveals the existence of a simmering 'turf war' between herself and Dr. Rassa which erupted into an unhappy incident on the 29<sup>th</sup> September. It appears that on the previous day Dr. Rassa performed an intravenous urography and had not reported on it by the time he left the Department that afternoon, intending to do so the following day. On the 29<sup>th</sup> September, at the insistence of Mr Sene (who had requested the examination and required the X-rays urgently as he was due to see the patient that morning) Mrs Teuma removed the X-rays from Dr. Rassa's desk in his absence and sent them on to Mr Sene.

On discovering that the X-rays were not on his desk when he arrived at the Department that morning, Dr. Rassa was very annoyed and, Mrs Teuma alleged, became very aggressive to the extent that she feared for her physical safety because she believed he was about to assault her. According

to Mrs Teuma, Dr. Rassa stormed out of the office, abandoning the patients who had been booked for his attention that morning, whose appointments then had to be re-scheduled.

Mrs Teuma reported the incident to Mr Lima who convened a meeting that afternoon to deal with Mrs Teuma's complaint against Dr. Rassa at which Mr Catania and Dr. Maskill were also present. Mr Lima heard allegations and counter-allegations from both as to the other's behaviour. No conclusions appear to have been reached at this meeting but a further meeting was scheduled for the following Monday (at which Dr. Kumar would be present) to deal with managerial issues at Radiology.

On the 30<sup>th</sup> September Dr. Rassa addressed a letter to Mr Lima (which he had copied to the Minister for Health, Dr. Maskill, Dr. Fitzpatrick, Dr. Kumar and Mr Catania) complaining about the "un-organised, badly managed X-ray Department, which was functioning in a very dangerous level for many years without supervision of a Consultant Radiologist" and appearing to attribute that state of affairs to Mrs Teuma. He went on to demand that Mrs. Teuma had to accept that she was acting under his supervision and was answerable to him, failing which it would be impossible for him to perform his duties and he would have to reconsider his position at St. Bernard's.

Mr. Lima replied on the 3<sup>rd</sup> October in terms which indicated a desire on the part of GHA to address Dr. Rassa's complaints, inviting him to make further representations as a matter of urgency.

Two meetings were held on the 4<sup>th</sup> October: one between Dr. Rassa, Mr. Lima, Mr. Catania, Dr. Kumar and the Personnel Officer, at which Mr. Lima re-iterated that he was awaiting details from Dr. Rassa as to why he



considered GHA to be in breach of the contract of employment. It appears to have been resolved to draw up policy statements and guidelines. At the other Mr. Lima, Mr Catania and Dr. Kumar were present and heard Mrs. Teuma, Ms. Maria Smith and Ms. Caroline Vinent set out their complaints about Dr. Rassa's behaviour in general. Dr. Rassa was not present.

In an attempt to restore order within the Department and without ruling on the allegations and counter-allegations he had heard during the three meetings, Mr Lima wrote to both Dr. Rassa and Mrs Teuma on the 4<sup>th</sup> October setting out a *modus operandi*, the overriding objective of which was to ensure co-operation through communication between them rather than confrontation.

Mrs Teuma readily agreed to Mr Lima's suggestions although she continued to nurse her grievances against Dr. Rassa from whom she expected a written apology. Dr. Rassa, however, sought legal advice in respect of Mr Lima's letter (as he was perfectly entitled to do) and on the 6<sup>th</sup> October wrote to Mr Lima indicating that he was willing to resume his duties "after considerable discussion with colleagues and tremendous encouragement that (he had) received from General Practitioners..."

There was a further meeting between Dr. Rassa and Mr Lima on the 13<sup>th</sup> October which appears to have gone some way towards defusing the situation but in his letter dated the 15<sup>th</sup> October Dr. Rassa indicated that he was not entirely happy with Mr Lima's suggestions of the 4<sup>th</sup> October and he sought a further meeting of the Radiology Department with a view to clarifying the respective roles of the various members of staff within the Department.

In a continuing attempt to address the issues raised by Dr. Rassa in his letter of the 30<sup>th</sup> September, Mr. Lima wrote to Dr. Rassa on the 18<sup>th</sup> November with comments he had received from Doctors Hinton and Negrette and inviting his input for the future of radiology services in Gibraltar. I should record that neither doctor shared Dr. Rassa's view of the state of the Department or of Mrs Teuma's competence.

Meanwhile, in a continuing endeavour to conclude the incident of the 29<sup>th</sup> September of which Mrs. Teuma had complained, there appears to have been a meeting on the 28<sup>th</sup> October between Messrs. Lima and Catania and Dr. Rassa at which it was agreed that Dr. Rassa would in consultation with Mrs. Teuma draw up protocols/policies to cover all areas of radiographic service. Mr. Catania wrote to Dr. Rassa on the 6<sup>th</sup> December to remind him that he was awaiting news of progress on that front.

On the 10<sup>th</sup> January 2000, Mr. Lima sent Dr. Rassa a reminder to follow up his letter of the 18<sup>th</sup> November. Dr. Rassa's rather dismissive reply on the 11<sup>th</sup> January ending with the words "I have nothing else to add." suggests that he had by then lost his enthusiasm for or, perhaps, his patience with the exercise of drawing up protocols/policies for the better running of the Department.

By the 25<sup>th</sup> February, however, Dr. Rassa was able to report in a letter to Mr. Lima that the differences of views within Radiology had largely been resolved and that "a good working relationship has once again been established." What is more, a protocol along the guidelines of the Royal College of Radiologists had been introduced.

## Absenteeism

On the 27<sup>th</sup> October 1999 Mrs. Teuma wrote to Mr. Lima (with copies to Mr. Catania and the then Minister of Health, Mr. Keith Azzopardi) about the four-week waiting list for ultrasound scans and attributed it to the hours that Dr. Rassa worked. Mr Lima testified to complaints he had already been receiving from Mrs. Teuma about Dr. Rassa regularly absenting himself work, usually after midday on Fridays, without letting staff know and often to the detriment of patients. He said Dr. Maskill was monitoring the situation but Dr. Maskill did not testify to what exactly he was doing by way of monitoring the situation. On the 28<sup>th</sup> September 2000 Dr. Maskill wrote to Mrs. Teuma and requested her to "... continue to record the time which (Dr. Rassa) leaves on a daily basis and more particularly on Fridays." Apparently, she had "... been until recently recording the times that Dr. Rassa (was) present in the Department."

If Dr. Rassa's alleged absenteeism was causing concern to the employer, it is odd, to say the least, that no one seems to have thought it appropriate to take the matter up with Dr. Rassa personally and sort it out sooner. Even as late as the 7<sup>th</sup> September 2000 after Dr. Maskill may have been monitoring Dr. Rassa's absences for almost 11 months, he wrote to Dr. Rassa about the difficulty his SHO had contacting him the previous afternoon and goes no further than refer to Dr. Rassa's "unavailability during working hours."

Whether this is an instance of bad management on the part of GHA or a case of insufficient evidence to substantiate the allegation of absenteeism, I find there is no merit in absenteeism as a ground for Dr. Rassa's dismissal.

## **Unauthorised residence outside Gibraltar**

Although it is not stated to be a ground for Dr. Rassa's dismissal, I mention in passing the matter of his taking up residence in Sotogrande without prior approval of the employer because mention was made in evidence (see for example Dr. Maskill's letter of the 7<sup>th</sup> September 2000) of that fact as another instance of Dr. Rassa's breach of contract or misconduct. It appears from Mr. Lima's letter to Mr. Catania of the 3<sup>rd</sup> July 2000 that there had been some correspondence between Dr. Rassa and the Personnel Officer regarding the residency requirement which had been brought to the attention of the Minister but nothing appears to have been done by GHA to resolve the matter although Mr. Lima accepted in cross examination that he would have been aware in June or July 2000 that Dr. Rassa was living in Sotogrande.

## **Conflicts between Dr. Rassa and other medical practitioners**

Unconnected with the incident with Mrs Teuma, Dr. Rassa came into conflict with a number of his colleagues. I list some of these hereunder:-

- July 1999 – Mr. P. Armon regarding Obstetric Ultrasound service
- October 1999 – Mr. A. Sene regarding IVPs and Ultrasounds which resulted in permanent damage to their professional relationship and a protracted 'feud' between the two
- January 2000 – Dr. T. Moeser regarding MRI scan of lumbar spine for Patient E
- January 2000 – Dr. A. Correa regarding a requested scan
- February 2000 – Doctor Moeser and Mr. Sene regarding the treatment of a patient with deep vein thrombosis
- April 2000 – Dr. S. Benady regarding CT scans requested by GPs

In most cases, what appear to have started off as differences of opinion on medical issues between professionals rapidly deteriorated into unnecessary and prolonged correspondence involving the use of intemperate language by either or both of the correspondents. It is not for me to judge who was in the wrong in each of the cases but suffice to say that the patient certainly did not benefit from the acrimonious exchanges.

Although the employer was aware of these incidents because the management of GHA was usually copied the letters exchanged between Dr. Rassa and the other protagonists, GHA appears to have failed to get to grips with the problem and to impress on all concerned the need to tone down the language and to co-operate in the interests of the patient. For example, see the outcome (below) of the hostility over Patient I.

Dr. Rassa's part in this conflict is cited by the Respondent as one of the instances of his misconduct justifying his dismissal but I do not accept that Dr. Rassa was wholly to blame for this hostility. Had the employer dealt with the complaints which were brought to its attention firmly from the very outset much of the hostilities may well have been avoided.

### **Private practice**

I have referred earlier in this decision to the correspondence exchanged between Dr. Rassa and Mr. Jackson on the subject of Dr. Rassa's right to carry on private practice. Fees from his private practice in the UK formed a significant part of Dr. Rassa's income and Mr. Jackson's confirmation that Dr. Rassa would have the right to private practice and to charge private patients fees in exactly the same way as in UK NHS hospitals induced him to accept the offer of employment by GHA.

Paragraph 2 of the Schedule to his contract of employment (which I have previously quoted) confirms Dr. Rassa's right "... to undertake work privately in those circumstances where his work is previously agreed with the employer." [My emphasis] While the circumstances in which Dr. Rassa could undertake private work were clearly a matter for mutual discussion and agreement between the parties from time to time as and when circumstances changed, the issue between GHA and Dr. Rassa in these proceedings really was one of definition of private patient and of Dr. Rassa's right to expect payment from such patients.

Not long after Dr. Rassa assumed his duties, he discovered that the private practice system that prevailed at St. Bernard's was far from satisfactory because of its hitherto unregulated nature. He was assured by Messrs. Lima and Catania that it was only a matter of time before a protocol regulating private practice would be put in place by the Government.

The issue came to the fore as a result of a letter published in "Panorama" by an aggrieved individual who complained that private patients who required X-rays were being charged – apart from the usual X-ray fee – a fee for the radiologist, whose services the author thought were not necessary when the patient was being dealt with by a doctor privately.

Mr. Lima wrote to Dr. Rassa on the 3<sup>rd</sup> December 1999 inviting him to state whether there was a "... practice of rendering unsolicited report for a fee? – and if so why?" and whether "... X-rays are withheld unless there is payment for those reports?"

Dr. Rassa replied on the 8<sup>th</sup> December quoting the Royal College of Radiologists' view that "... a request for a radiological examination is a request for an opinion from a Clinical Radiologist in the form of a report to

assist in the management of a clinical problem.”: **“Making the best use of a Department of Clinical Radiology”**, 3<sup>rd</sup> Edition, page 13.

He stated that as a consultant radiologist he was following the practice recommended by the College and reporting on all X-rays regardless of whether the patient was private or not. In answer to the second question, he stated that he had not withheld any X-rays and accompanying reports pending payment.

GHA did not agree with Dr. Rassa’s stance on the first matter and sought to distinguish between privately and publicly funded patients. In a letter to Dr. Rassa dated the 23<sup>rd</sup> December, Mr. Lima agreed that as an employee of GHA and a radiologist Dr. Rassa was under a duty to report on all X-rays of publicly funded patients. However, a private patient was entitled to choose whether and to what extent he required the radiologist’s services.

In his exposition of the private patient’s contractual rights, Mr Lima went on to distinguish between the purchase by that patient of a film and the purchase of an opinion. He argued that “... when a patient is referred by a medical practitioner for a private X-ray, he effectively enters into a contract with GHA (not Dr. Rassa) for the use of GHA’s equipment and purchase of the film. The film on which the X-ray produced is GHA’s property until it is sold by GHA. Once purchased it becomes the person’s private property. Withholding an X-ray (another party’s property) for the purpose of providing a private report interferes with that contract. Indeed, it can be perceived as a transparent act to force the private person to purchase the service from (Dr. Rassa).”

He went on to say that GHA “... agrees that (Dr. Rassa) should be allowed to provide private reports but this should only be done after express

agreement with the private patient or referring practitioner...However the patient should not be forced to pay for unsolicited reports.”

Dr. Rassa replied on the 10<sup>th</sup> January 2000 referring to his correspondence with Mr Jackson. He did not agree with Mr Lima and ended with the words “...the way I conduct my private practice is not subject for negotiation.” Mr Lima was not moved by Dr. Rassa’s letter but by his letter of the 13<sup>th</sup> January agreed with Dr. Rassa that “...this is not a matter for negotiation.”

The Personnel Officer also wrote to Dr. Rassa on the 11<sup>th</sup> January not in reply to Dr. Rassa’s letter of the 10<sup>th</sup> January but to inform him that “Following discussions between the Government and BMA (Gibraltar Branch), it has been agreed that (his) Letter of Appointment/Contract, be amended to reflect the outcome of these discussions.”

His attention was drawn to Clause 3 of the Principles of Private Practice (“PPP”) (which she enclosed with her letter) setting out the amount of time that he and other consultants would be permitted to dedicate to private practice. In the case of radiology, this was limited to 4 hours a week and Clause 4 went on to provide that private consultations could be undertaken only between the hours of 3 and 8 p.m. subject to any emergency that might arise in respect of a publicly funded patient. Clause 5, however, made allowances for emergencies arising in respect of private patients who would be admitted at all times based on clinical need. Had Dr. Rassa agreed to these terms, Clauses 3, 4 and 5 would be what, in my view, was envisaged by the words “... in those circumstances where his work is previously agreed with the employer ...” in paragraph 2 of the Schedule to the contract of employment.



The Personnel Officer ended her letter with an invitation to Dr. Rassa to signify his acceptance of those principles by Friday the 28<sup>th</sup> January 2000.

By letter dated the 18<sup>th</sup> January Dr. Rassa pointed out to the Personnel Officer that his contract was subject to the collateral correspondence he had had with Mr. Jackson dealing specifically with his private practice and that he considered PPP not relevant to him.

On the 20<sup>th</sup> January Dr. Rassa wrote to the then Minister for Health, Mr Keith Azopardi, expressing surprise at having been informed by the Personnel Officer of an amendment to his contract to reflect discussions which had taken place between GHA and third parties without consultation with himself as the interested party. He reiterated his view that his contract was governed by the correspondence he had exchanged with Mr Jackson and he was not prepared to accept any variation or amendment to his contract of employment.

The aspect of PPP with which he most disagreed was contained in Clause 19 which read -

“Entitled patients may transfer freely between private and public clinics but will be seen as extra to the normal clinic numbers. The Consultants guarantee that this will not detrimentally affect waiting lists for public patients.”

That provision, according to Dr. Rassa, did not reflect the practice in UK NHS hospitals (which, as far as he was concerned, was the governing criterion of his entitlement to private practice). In the UK, the patient elects either to await his turn as a publicly funded patient or to ‘jump the queue’, so to speak, as a private patient. There is no question of any patient

being allowed to 'enter the system' as a private patient and then, having gained a degree of priority, to opt to receive the remainder of his treatment as a publicly funded patient. According to Dr. Rassa, 'lane hopping' along the lines proposed to be permitted by Clause 19 would simply facilitate 'queue jumping' by patients. He believed that he and consultants in some other fields (such as pathology) would be unfairly prejudiced by this proposal.

Dr. Rassa copied that letter to all consultants and GPs and I would simply record that he found some support for his views from other practitioners.

Dr. Rassa and Mr Lima continued to correspond for the next few months largely reiterating their respective positions in this regard. By the 1<sup>st</sup> June Dr. Rassa had taken legal advice which, according to him, confirmed the stance he had adopted all along and, after stating in a letter the various courses of action open to him, he suggested a meeting with the Minister.

On the 17<sup>th</sup> July Dr. Rassa's solicitors, Messrs. Cruz & Co., wrote to Mr Lima lamenting the fact that neither GHA nor the Minister had taken up Dr. Rassa's offer of a meeting and indicated that legal proceedings would be issued on behalf of Dr. Rassa claiming damages for breach of contract unless they heard from Mr Lima within the next 14 days.

GHA referred the matter to the Attorney General's chambers and, with someone or the other on either side away on holiday or otherwise during the summer, nothing was resolved by the time Dr. Rassa was dismissed. It was not clear from the evidence at the hearing whether Dr. Rassa still intends to pursue a claim against the Government for breach of contract and, accordingly, I must refrain from making findings in respect of this particular grievance of Dr. Rassa's. I do, however, find that he had a

genuine dispute with his employer about his entitlement to carry on private practice and that, as between employer and employee, he aired his differences with GHA in a reasonable manner. While these differences were undoubtedly a source of some irritation to the employer, I do not believe they played any part in the decision to dismiss Dr. Rassa.

### **Leave and *locum* cover**

Meanwhile, another seemingly non-controversial matter was giving rise to considerable difficulty between Dr. Rassa and the GHA Management and that was the matter of Dr. Rassa's leave and locum cover during his absences.

In October 1999 Dr. Rassa wrote to Mr Lima on the subject of locum cover and copied his letter to Doctors Maskill and Fitzpatrick and Mr Catania. In short, Dr. Rassa wanted to ensure that his absences on leave for 4 days or more would be covered by a locum so that he did not have to attend to an inordinate amount of backlog of work on his return. Dr. Rassa was unanimously supported by the GP's in his requirements and Dr. Maskill was asked by Mr Lima to follow the matter up with Dr. Rassa.

There appears to have been no issue at this stage - and, indeed, for a while thereafter - on the matter of Dr. Rassa's leave whether for study purposes or part of his annual leave until Dr. Maskill wrote to Dr. Rassa on the 1<sup>st</sup> June 2000 seeking an explanation for his absence over a 11 day period between the afternoon of Thursday the 23<sup>rd</sup> December 1999 and the afternoon of Tuesday the 4<sup>th</sup> January 2000.

In February 1999, because of the hype about the 'millennium bug' to which all of us had been subjected at that time, a circular had been sent to all

GHA staff by Mr Lima to the effect that requests for approval of leave which included the period 30<sup>th</sup> December 1999 to 7<sup>th</sup> January 2000 (“the Millennium period”) would be centralised and requests for leave had to be submitted “in the normal way via heads of section to the relevant member of the Management Board.”

Dr. Rassa never provided an explanation to his employer but at the hearing he stated in his evidence that that the circular, having been issued some time before he commenced employment, had not been drawn to his attention specifically and, accordingly, he was not aware of those arrangements but that, in any event, he was not absent for 4 working days or more during the period referred to by Dr. Maskill. He contended that he was absent from work on the 24<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> December and the morning of the 4<sup>th</sup> January - the remaining days of his absence being public holidays and weekends.

In reply to Dr. Maskill’s other request that Dr. Rassa complete, sign and forward to him a fresh set of leave forms setting out his leave requirements – an earlier set which had been presented to Dr. Rassa having been torn up and discarded by him – Dr. Rassa replied on the 5<sup>th</sup> June that he had during the first week of April 2000 given full details of his annual leave for the whole year to the responsible officer and accused Dr. Maskill of behaving in an “unprofessional” and “distasteful” manner.

Dr. Maskill replied on the same day indicating that he would accede to Dr. Rassa’s request for leave between the 19<sup>th</sup> and the 30<sup>th</sup> June since Dr. Hinton, who had been engaged as Dr. Rassa’s locum for that period, had already booked his leave and Dr. Maskill would “therefore honour that commitment.” However, Dr. Maskill reiterated his request for Dr. Rassa’s explanation regarding his unauthorised leave during the Millennium period.

Dr. Maskill issued a reminder on the 7<sup>th</sup> July and on the 21<sup>st</sup> Dr. Rassa replied that he had already given details of his annual leave “to the person who is dealing with these matters” at the beginning of April 2000 and that Dr. Maskill should address the matters that he had raised in his letter to the Chief Executive.

In the face of Dr. Rassa’s refusal to recognise Dr. Maskill’s authority, the latter turned to Mr. Lima who urged Dr. Rassa to respond to Dr. Maskill’s letters. Dr. Rassa refused to relent. He wrote to Mr. Lima on the 8<sup>th</sup> August accusing Dr. Maskill of being “unethical and unprofessional and under no circumstances (was he) prepared to reply to his letter.” He was not aware before April 2000, he said, of the need to fill in forms and he thought notifying Mrs. Teuma of his intended absences as he had done during his first year was sufficient but when the Personnel Officer had explained to him the need to do so for the purpose of arranging locum cover he had completed and handed over the forms in April 2000.

By letter dated the 10<sup>th</sup> August Dr. Maskill persisted with his request for an explanation from Dr. Rassa for his absence without leave during the Millennium period and the return of leave forms for the year between April 1999 and April 2000. By letter dated the 22<sup>nd</sup> August Mr. Lima again urged Dr. Rassa to comply with Dr. Maskill’s request.

While I do not condone Dr. Rassa’s stance in the matter, I can understand his annoyance at being subjected to what he clearly regarded as a vendetta by his employer. In my view, it was unquestionably late in the day for Dr. Maskill to ask in June 2000 for an explanation for Dr. Rassa’s unauthorised absence during the Millennium period. Having persuaded Dr. Rassa of the need for him to complete application forms for leave so that locum cover

could be arranged and having obtained his compliance with the procedure in April 2000, I cannot help wondering what was the purpose of insisting that he filled in forms for the earlier year.

Unfortunately, that was not to be the end of the conflict over Dr. Rassa's leave because, although his next period of authorised leave (for which he had duly completed and handed in a request form) was due to commence on Monday the 14<sup>th</sup> August, Dr. Rassa left the Department at 11 a.m. on Friday the 11<sup>th</sup> August and, according to Dr. Maskill's letter of the 24<sup>th</sup> August, was not available to report on at least two matters on which his expert radiological opinion was required that day.

Dr. Rassa did not provide Dr. Maskill with the explanation he sought but the evidence at the hearing and in his witness statement was that from the very outset of his employment Dr. Rassa informed Mrs. Teuma that he would not be available in the Department on Friday afternoons as he proposed to spend that time reading up books and journals as part of his continuing professional education. He did not at any time during his employment at St. Bernard's work on Friday afternoons and this was never objected to by the employer.

In refuting the employer's allegation of absenteeism, he explained to the Tribunal that he put in more than the hours required of him because, apart from his duties as consultant radiologist, he held regular teaching clinics (after 5 p.m.) for GPs on radiology related matters. He did not take lunch or tea/coffee breaks and worked on Sundays if the need arose. If he was not to be found in his Department at times, it was because he often called upon GPs and others to discuss work related matters. GHA had provided him with a mobile telephone in order to be able to reach him when

required but he was not to blame, he said, if the signal reception sometimes proved to be inadequate.

There is no evidence of Dr. Rassa having been specifically informed earlier of the need for his opinion as a matter of urgency in the afternoon of that Friday the 11<sup>th</sup> August and, accordingly, Dr. Rassa was, effectively, absent from the Department without leave for about two hours.

It is regrettable that Dr. Rassa chose to ignore Dr. Maskill's letter when he could have given him the explanation that was provided to the Tribunal (at great expense to both parties, I might add) since that might have altered in some manner the course of subsequent events. Instead, Dr. Rassa took issue with Mr. Lima at the failure of the employer to arrange locum cover during his intended absences on study leave from the 13<sup>th</sup> to the 16<sup>th</sup> and from the 25<sup>th</sup> to the 28<sup>th</sup> September.

Dr. Maskill, in turn, continued to press for answers to his letter of the 1<sup>st</sup> June and by his letter of the 5<sup>th</sup> September warned Dr. Rassa that he would not sanction any further leave or locum cover until the matter had been resolved. What is more he threatened disciplinary action against Dr. Rassa were he to absent himself without approval.

Dr. Rassa stood his ground: he challenged Dr. Maskill's authority (or, as he put it in his letter to Mr. Lima of the 6<sup>th</sup> September which he copied to all and sundry, "managerial role" over himself), accused Dr. Maskill of failing in his duties as Medical Director and expressed no confidence in Dr. Maskill. He ended his letter by urging "fellow Consultants and General Practitioners to do the same." I take this to mean to rebel against Dr. Maskill.

I have already criticised Dr. Maskill for persisting with his demands for an explanation for Dr. Rassa's unauthorised absence during the Millennium period and for insisting on completed leave forms for the year preceding April 2000 but Dr. Rassa is not entirely without blame in his continuing refusal to recognise Dr. Maskill's authority. He was under a contractual duty to comply with all lawful instructions and directions given to him by the employer through the Chief Executive of GHA or through any other duly authorised officer. However much he may have disliked Dr. Maskill for the motives he attributed to him, Dr. Rassa was wrong to disregard Dr. Maskill's requests and his failure to comply with Mr. Lima's repeated requests that he provide Dr. Maskill with the information he sought amounted to a breach of contract. The explanations which Dr. Rassa provided to the Tribunal could have been provided to Dr. Maskill and should, at the very least, have been given to Mr. Lima even as late as the 27<sup>th</sup> September when Mr. Lima wrote to him reminding him of his contractual obligations and the consequences of their breach.

Instead, Dr. Rassa wrote to Mr. Lima on the 27<sup>th</sup> September to complain about the number of X-rays that had been performed during his absence and "dumped" on his desk for reporting. He offered, however, to report on them if he was paid reasonable overtime.

### **Study leave or sick leave?**

The absence to which this letter referred occurred from the 6<sup>th</sup> September onwards when Dr. Joan Miles of The College Clinic certified that she had examined Dr. Rassa that day and diagnosed that he was suffering from acute anxiety. She certified that he would be fit to return to work on the 27<sup>th</sup> September. Dr. Rassa did, however, travel to London for his studies as he had intended to all along and on his return sought to be reimbursed for



the expenses he had incurred. The Respondent argued that Dr. Rassa had produced the sick note from Dr. Miles merely to cover his back for his absence on study leave without authorisation and that the true nature of Dr. Rassa's absence had been further complicated by his solicitors' letter to Crown Counsel dated the 27<sup>th</sup> September which refers to Dr. Rassa's return "from his holiday."

Dr. Rassa, in cross examination, insisted that he had not faked an illness in order to obtain "a bogus certificate" from Dr. Miles as alleged by counsel for the Respondent but he admitted that no medication had been prescribed to him for his condition. He was not able to state, however, what was the purpose of producing the medical certificate given that he made no secret of the fact that he was determined to take his study leave in any event.

The stress (albeit due in no small measure to Dr. Rassa's own attitude towards his employer) of the events that summer took a toll on Dr. Rassa's health and he, quite properly, saw Dr. Miles on the 6<sup>th</sup> September. On hearing from Dr. Rassa of the symptoms, which I have no doubt were honestly and fairly put to her, she diagnosed acute anxiety which even I as a layman would readily conclude Dr. Rassa might have experienced and, not surprisingly, she prescribed respite from his work environment. That does not necessarily mean that Dr. Rassa would not have been fit to attend to the relative calm of a refresher course spanning two three-day periods ten days apart.

Given that Dr. Rassa was entitled to time off for health reasons, he was not in breach of contract if he chose to spend his time productively by attending a refresher course instead of staying at home.

## **Matters come to a head**

Dr. Rassa reacted to Mr Lima's letter of the 27th September by writing and faxing to the Minister for Health and Education, Dr. Bernard Linares, on the 2<sup>nd</sup> October a letter complaining about Dr. Maskill's behaviour which, he said, prevented him from continuing with this work and demanded that the threat by Mr Lima to terminate his contract be withdrawn immediately. He copied the letter to Dr. Fitzpatrick, Mr Lima and Mrs Teuma.

The following day he addressed another letter to Dr. Linares (and sent it by telefax at 10.37 a.m.) couched in language which, in my view, was uncalled for. He treated the absence of a response from Dr. Linares over a 24 hour period as "a sign of guilt" and challenged the Minister to "either terminate (his) contract as stated in the Chief Executive's letter or tell him to shut up and do not threaten (him)." He went on to demand that the Minister order Mr Lima "to investigate the issues that (he had) raised in (his) correspondence with him concerning the negligence, mismanagement and misconduct of certain hospital's consultant." Dr. Rassa appears to have copied this second letter to all hospital consultants, GP's and junior doctors.

Dr. Linares immediately passed these letters to Mr Lima with instructions to reply thereto and on the same day (3<sup>rd</sup> October) Mr Lima wrote and personally delivered to Dr. Rassa a letter informing him that the Minister would be discussing the matters relating to that correspondence with the Chief Minister following the return to Gibraltar of both Ministers on Friday the 6<sup>th</sup> October.

Dr. Rassa was expressly informed that in the meantime he should continue with his work, attending to patients and complying fully with his contracted

duties which were stated to include the pending reports which formed part of the backlog accumulated during Dr. Rassa's recent absence.

Finally, the letter warned Dr. Rassa that "failure to do so, however, will be seen as a grave neglect of a legal and moral duty on (his) part, and the Government will reserve its position entirely as to further action."

They had what one might describe as a constructive chat when Mr. Lima delivered the letter to Dr. Rassa who testified to seeing some "light at the end of the tunnel."

The following day Dr. Rassa addressed a letter to all GP's and Consultants to inform them that he would continue with his clinical work and apologised for the inconvenience that had been caused to them.

On the 5<sup>th</sup> October Dr. Rassa wrote to Mr Lima to inform him that he had cleared the pile of X-rays requiring his reports which had accumulated during the last 2 days but it is not clear to me what he meant by "and have managed to deal with all the cancellations as an extra within next few days."

Unfortunately, Dr. Rassa appears to have been unable to refrain from having a go at the employer and Dr. Maskill in the two concluding paragraphs of his letter.

I make this observation because, although at paragraph 86 of his witness statement Dr. Rassa says that his letter to Mr Lima of the 5<sup>th</sup> October called for "major changes...to enable (him) to carry out the job of Consultant Radiology at St. Bernard's Hospital and that these changes could not be carried out under the threat of legal action..." that is not how I interpret Dr. Rassa's letter.

On Tuesday the 10<sup>th</sup> October Dr. Rassa telephoned Mr Lima to enquire about the outcome of the discussions with the Chief Minister and was informed that the Chief Minister had asked GHA to consider the matter and make recommendations to him. Mr Lima also informed Dr. Rassa that GHA would be meeting that afternoon.

Dr. Rassa reacted by writing and faxing to Dr. Linares a letter dated the 10<sup>th</sup> October at 10.54 a.m. stating that "...because there has been no change in the condition of work and **further threat of legal action against me** [my emphasis because I have come across no evidence of any further threats in the week since the 3<sup>rd</sup> October], I will have no alternative but to reiterate the content of my letters and inform you that I will discontinue my daily work...from next Monday 16 October until you address all matters related to the recent correspondence without further delay and before any further escalations of problems in this hospital."

### **GHA meeting**

The meeting of GHA that afternoon had before it a paper (which was in evidence before the Tribunal at page 364 of the bundle) prepared by Mr Lima, setting out briefly the various issues concerning Dr. Rassa.

The Tribunal also had the benefit of the Minutes of that meeting, appendix A of which (at pages 367 to 372 of the bundle) records the meeting's discussion relating to Dr. Rassa. The meeting was chaired by Dr. Linares and Messrs. Lima, Armon, E. Reyes and J. Cortes and Dr. A. Soler were present. Also in attendance was Dr. Kumar. Apologies were received from Messrs. C. Lavarello and J. Catania and Mrs Cathy Teuma.

The Minutes show that Dr. Rassa was discussed by those present at some length with a diversity of views being expressed.

The meeting was interrupted by a telephone call to Mr Lima from Mrs Evelyn Cervan, Hospital Administration Officer and Assistant Facilities Manager, to inform him that Dr. Rassa was being interviewed by GBC in his Department at the Hospital. Mr Lima instructed Mrs Cervan in terms decided by GHA, that is to say the GBC personnel should be asked to leave the premises and that Dr. Rassa be informed that he should not conduct interviews without first obtaining his approval. Mrs Cervan went with Mrs Teuma to Dr. Rassa's office and put an end to the interview. Mrs Cervan further testified to having told Mr James Neish of GBC who was conducting the interview that nothing that had been filmed within the Hospital should be broadcast on GBC and Mr Neish uttered words to the effect that he understood.

The GHA meeting concluded with Dr. Linares' decision (with which all the members present concurred) that he would ask Doctors Kumar and Maskill together with a representative of the GP's to draw up a protocol of good service which should include a requirement of respect for the authority of Dr. Rassa's seniors and that if he had any grievance he should write to Dr. Linares personally with his concerns. If Dr. Rassa did not wish to abide by these requirements he was free to resign. Dr. Linares instructed Mr Lima to meet Dr. Rassa to provide him with a copy of the protocol unaccompanied by any condition or threat but to impress upon Dr. Rassa that this was an opportunity for him to demonstrate that the events of the past were left behind.

Whether or not the matters alleged against Dr. Rassa up to this point in time (either individually or collectively) merited, in GHA's view, the

termination of his employment, GHA was intent upon retaining his services and to restore a good working relationship with Dr. Rassa. Indeed, by the next day Dr. Kumar had prepared and forwarded to Dr. Linares a statement of good practice which he had compiled with the assistance of Messrs. Lima and Armon and Dr. Nerney, basing himself on the General Medical Council's guidelines for all doctors.

### **GBC interview**

Those present at the meeting, however, were not aware that, having left the hospital building, Dr. Rassa continued with his interview by GBC outside the Hospital which was broadcast on its news bulletins that evening nor were they aware of what was said and disclosed during the interview.

Apart from the fact that Dr. Rassa had gone ahead and continued with the interview notwithstanding Mr Lima's instructions which were conveyed to him by Mrs Cervan, the employer took a very serious view of the substance of Dr. Rassa's statements during the interview and the fact that he had shown to the GBC personnel conducting and filming the interview X-rays of a patient and permitted GBC to film and subsequently broadcast those X-rays. For the avoidance of repetition I will henceforth refer to Dr. Rassa's actions regarding the X-rays as their publication.

Dr. Rassa stated that he was not aware of any restriction on his right to discuss matters with the media and he had not understood Mrs Cervan's communication to him of Mr Lima's instructions as an absolute prohibition on being interviewed but only as a restriction on interviews being conducted within Hospital premises. For that reason, he considered himself at liberty to continue with this interview outside the Hospital. Mrs. Teuma's evidence does not take the matter further because at paragraph 36

of her witness statement she says that Mrs. Cervan "... in my presence told Dr. Rassa and GBC to stop the interview..."

I give Dr. Rassa the benefit of the doubt as to what precisely Mrs Cervan may or may not have told him because Mrs Cervan is not quite accurate on another aspect of her evidence in respect of the interview. She states at paragraph 43 of her witness statement "In the **morning** of 10<sup>th</sup> October 2000 ... I heard...that a GBC camera crew was in the Hospital with Dr. Rassa." At paragraph 44 she says, "Within a few minutes, Mrs Teuma informed me that there was an interview going on in Dr. Rassa's office." At paragraph 45 she says "I immediately telephoned the Chief Executive who was then attending a meeting of the GHA..."

The GHA meeting which Mrs Cervan interrupted, however, started at 4 p.m. on the 10<sup>th</sup> October and not in the morning.

I now turn to the substance of Dr. Rassa's interview, a video recording of which was seen by the Tribunal several times during the hearing and a transcript of which was available in evidence.

The employer took exception to Dr. Rassa's statements that he had drawn to the attention of the Ministers (for Health) before the present incumbent three or four months ago several problems within St. Bernard's but he had had no reply from them to his letters and that he was very concerned about the instances of "misdiagnosis and mistreatment and certainly of negligence by certain number of the people..."

Another of Dr. Rassa's statements which offended the employer was his expression of "concern about certain degree of incompetence of the Gibraltar Health Authority." He went on to say "I am afraid they know

nothing about nowadays Health Authority and the way they perform and they working as a people without any decision and in fact decision making people are some where else lying in the Hospital whatever they say they have to do it and they will do it.”

When invited by the interviewer to prove his allegations, Dr. Rassa related by way of example the case of a patient (without disclosing her identity) who had cancer of the kidney.

In addition, for effect rather than to make the point about that particular patient, Dr. Rassa published by displaying on the equipment in his office X-rays belonging to another patient altogether (whose identity was not disclosed either) and permitting GBC to film those X-rays.

In reply to the interviewer’s question “Can you confirm to us that you have not yet received any replies?” Dr. Rassa said “I have not raised this particular issue with Dr. Linares but I have raised this issue in detail with Mr Lima and the doctor involved in that one but am yet waiting for a response.”

### **Patient H**

The patient with cancer of the kidney who Dr. Rassa was referring to (and was referred to as Patient H at the hearing in order to protect her anonymity) was a female aged about 70 in respect of whose chest X-ray Dr. Rassa first reported on the 8<sup>th</sup> April 1999. His report indicated some abnormality and set out his diagnosis. When Dr. Rassa had occasion to report on a further X-ray on that patient in December 1999, he observed that her condition had worsened and was surprised to learn from the patient that no treatment had been prescribed to her since the previous X-



ray although Dr. Rassa's report had been forwarded to Mr Sene by Dr. Thompson under cover of his letter of the 17<sup>th</sup> April 1999.

On the 10<sup>th</sup> January 2000 Mr. Sene requested Dr. Rassa to carry out a CT scan on Patient H who was then referred for a scan in Algeciras and reported on on the 17<sup>th</sup> January.

On the 27<sup>th</sup> January Mr Sene wrote to Mr C. Harmer, Consultant Oncologist and Radiotherapist at Royal Marsden Hospital, to arrange for Patient H to be seen by him in the light of the revelations of the examinations carried out on her in December and January.

From a letter addressed by Dr. Thompson to Dr. Rassa on the 7<sup>th</sup> February it would appear that the patient's husband saw Mr Sene (but it is not apparent when) and, if Dr. Thompson remembers rightly, he was told that there was little to be done and a decision was taken "not to pursue things..." It appears that Patient H was not aware of the diagnosis, the information having been kept from her upon the insistence of her family.

Dr. Rassa took the view that this revealed a serious mismanagement and negligent treatment of Patient H and brought it to the attention of Mr Lima as soon as he had the opportunity to do so. Subsequently, on the 7<sup>th</sup> February Dr. Rassa wrote to Mr Sene accusing him of a "great degree of mis-management and...negligence" and copied the letter to Mr Lima and Dr. Thompson.

Mr Sene replied on the 9<sup>th</sup> February seeking Dr. Rassa's confirmation that he had discussed his management of this patient with others and, if so, whom. Dr. Rassa replied on the 10<sup>th</sup> February to say he had discussed this

and other cases in the Radiological Club on his last trip to London and with Mr Lima.

There was some controversy at the hearing about when exactly it was that Mr Sene referred Patient H to the Royal Marsden, Dr. Rassa insisting (in furtherance of his allegation of mismanagement and negligence on Mr Sene's part) that it was only after he had written to Mr Sene on the 7<sup>th</sup> February with his accusations did Mr Sene appreciate the gravity of Patient H's condition.

Mr Sene was not called by either side to give evidence but included in the bundle was a letter from the Royal Marsden to Patient H dated the 8<sup>th</sup> February to inform her that an outpatient appointment had been made for her at Dr. Harmer's clinic in the Radiotherapy Department of the Hospital on Monday the 14<sup>th</sup> February and a letter from the Hospital Services Manager at St. Bernard's to the Administrator at Royal Marsden dated the 9<sup>th</sup> February to confirm that Patient H would attend on the 14<sup>th</sup> February.

Finally, the Respondent produced at the hearing a letter dated the 10<sup>th</sup> February 2004 from Dr. Harmer's secretary to Ms. Carmen Macias of GHA confirming that they had "received the original letter dated the 27.1.00 from Gibraltar referring (Patient H) on the 7<sup>th</sup> February 00." It is not at all clear whether the word "original" refers to the hard copy of a letter which may have been faxed earlier when it was written, i.e. 27<sup>th</sup> January 2000, in which case the hard copy could well have been received on the 7<sup>th</sup> February in the post or whether the word "original" was intended to mean 'initial' as the commencement of the brief correspondence which I have referred to.

However, although he had firmly believed that Patient H had been sent to England only as a result of his letter of the 7<sup>th</sup> February, in cross

examination Dr. Rassa accepted with hindsight that arrangements for her to be sent to England were in hand before the 7<sup>th</sup> February and that Mr. Sene's letter to the Royal Marsden of the 27<sup>th</sup> January had not been backdated.

On the 15<sup>th</sup> February Dr. K.C. Lim, Specialist Registrar to Dr. Harmer, wrote to Mr Sene with the outcome of Patient H's examination the day before, setting out the patient's medical condition and indicating that he would discuss her case with Dr. Martin Gore the Royal Marsden Consultant Medical Oncologist with an interest in renal cancer.

On the 21<sup>st</sup> February Dr. Gore wrote to Mr Sene setting out his opinion on Patient H's condition and the treatment therefor.

On the 2<sup>nd</sup> March Mr Sene wrote to Dr. Gore setting out briefly the manner in which he had managed Patient H since he became aware of her condition in April 1999 and invited his opinion whether "this has been a reasonable approach."

On the 6<sup>th</sup> March Dr. Gore replied to Mr Sene to say that his "approach to this lady's management has been perfectly reasonable and in fact the way we would have approached the situation here." He went on to state "the only time I treat patients with low volume stable renal cell metastases is if they are very young and fit and even then I usually wait for two or three months to judge the pace of the disease."

On receipt of the copy of Dr. Rassa's letter Mr. Lima asked Dr. Maskill and Mr. Catania to look into the matter. They reported to him that Patient H's family had been appraised of her condition by Mr. Sene and that the patient had been seen at the Royal Marsden. Dr. Maskill verbally expressed the

opinion that the case had been reasonably managed by Mr. Sene but suggested for the avoidance of doubt that the case could be referred to an outside specialist for an independent opinion. Finally, Mr. Lima had had a verbal explanation from Mr. Sene of his management of the patient and his intimation of Dr. Gore's opinion in his letter of the 6<sup>th</sup> March. The dates of these events were not in evidence and for that reason I have been unable to place them in their proper sequence of events between the 7<sup>th</sup> February and the 6<sup>th</sup> March. Be that as it may, Mr. Lima concluded that there was no merit in Dr. Rassa's complaint.

On the 2<sup>nd</sup> June Mr Sene wrote to Mr Lima and referred to Dr. Gore's letter of the 6<sup>th</sup> March. He accused Dr. Rassa of professional misconduct by reason of his breach of patient confidentiality when he discussed this case with others. It appears from Mr Lima's letter to Mr Sene dated the 21<sup>st</sup> June that he had not then seen Dr. Gore's letter of the 6<sup>th</sup> March nor did he have anything on file regarding Dr. Rassa's alleged professional misconduct. On the 26<sup>th</sup> June Mr. Sene made copies of the relevant correspondence available to Mr. Lima.

Mr. Lima wrote to Dr. Kumar on the 3<sup>rd</sup> July in his capacity as Chairman of the Medical Registration Board to bring to his attention Mr Sene's allegation of professional misconduct on Dr. Rassa's part. He also brought this allegation to the attention of Dr. Maskill and Mr Catania as Medical Director and Director of Operational Services respectively.

On the 1<sup>st</sup> August Dr. Maskill formally brought to Dr. Rassa's attention Mr Sene's complaint against him, setting out the substance of the allegations made by Mr Sene and inviting him to respond. On the 4<sup>th</sup> August, in response to Dr. Rassa's request, Dr. Maskill sent Dr. Rassa a copy of Mr Sene's letter of complaint.

On the 8<sup>th</sup> August Dr. Rassa wrote to Mr Lima because he "...no longer (had) confidence in ability and suitability of Dr. Maskill to act as Medical Director..." expressing delight (somewhat sarcastically, I believe) that Mr Sene's complaints were to be investigated and set out his justification for dealing with Patient H's X-rays in manner that he had.

He then went on to repeat and particularise his accusation of "mismanagement, misconduct and negligence" on Mr Sene's part. He copied that letter to Doctors Kumar and Thompson and Messrs. Sene and Catania, deliberately omitting Dr. Maskill.

Mr Lima copied Dr. Rassa's letter to Dr. Maskill and replied on the 22<sup>nd</sup> August dealing largely with the broader issues pending between Dr. Rassa and the employer which I have dealt with earlier in this decision.

Mr. Sene's complaint against Dr. Rassa did not get very far because, according to Mr. Lima, he was advised by the Medical Registration Board that "the matter had become *sub judice*". I cannot help observing, however, the sharp contrast in the treatment by Mr. Lima of the two complaints. He formally set in motion an investigative procedure by writing to Doctors Kumar and Maskill and Mr. Catania and Dr. Maskill, in turn, wrote to Dr. Rassa inviting his response to the complaint. Dr. Rassa's allegations against Mr. Sene, on the other hand, were informally (almost casually) passed on by Mr. Lima to Dr. Maskill with a verbal request for him to look into and there is no record of Mr. Sene being formally invited to respond. He was permitted to deal with the matter in his own way and to report on the outcome thereof in his own time.

## **Patient B**

Dr. Rassa's allegation in a letter to Mr. Lima on the 9<sup>th</sup> December 1999 that Mr. Sene had failed to correctly interpret the X-rays of a patient (who was referred to at the hearing as Patient B) and had as a result requested him to perform an ultrasound scan, on the other hand, was dealt with more satisfactorily. Mr. Lima copied the letter to Mr. Sene and invited him to respond. He copied the correspondence to Dr. Kumar, Mr. Catania and Mrs. Carmen Lia, Hospital Services Manager. The allegations were duly investigated, Dr. Kumar spoke to Mr. Sene and Dr. Rassa separately and reported to Mr. Lima in writing on the 4<sup>th</sup> January 2000. Mr. Lima, in turn, copied Dr. Kumar's report to Dr. Rassa on the 13<sup>th</sup> January.

Dr. Rassa did not at the time or subsequently, until these proceedings, express dissatisfaction with the outcome of his allegations but he now challenges Dr. Kumar's findings. What is more, he says Dr. Kumar did not discuss the matter with him before arriving at his conclusions and, when asked in cross examination why had he not previously disputed Dr. Kumar's statement that he had "... discuss(ed) the issues with the two consultants ...", Dr. Rassa replied that he had not wanted to prolong the matter. I believe that Dr. Kumar did discuss Dr. Rassa's allegations with him in the course of his investigations. It is not for me to decide whether or not Dr. Kumar reached the correct conclusions but it is sufficient for the purpose of deciding this case to record that, in his cross examination, Dr. Rassa accepted that his allegations against Mr. Sene had been properly investigated.

## Communication to Dr. Rassa of outcome of Patient H 'investigation'

In contrast, there is some confusion as to the communication to Dr. Rassa of the outcome of his allegations against Mr. Sene in respect of Patient H. In his evidence under cross examination on the 9<sup>th</sup> February 2004, Dr. Rassa maintained that he was not aware that Patient H had been seen at the Royal Marsden or of the correspondence with Dr. Gore who had validated Mr. Sene's management of the patient until he heard Dr. Linares' interview on GBC on the 11<sup>th</sup> October 2000 in response to his own the previous day.

About Dr. Rassa's allegation of mismanagement of Patient H, Dr. Linares said: " This has been thoroughly investigated by the administration ... and let me say that the management and treatment by the local consultant of that particular cancer condition of this patient has been validated by the Royal Marsden consultant ... and Dr. Gore who is the consultant cancer physician in the Royal Marsden has totally approved and validated the management and treatment by our own consultant of that particular patient."

Dr. Rassa maintained that he had not seen Mr. Sene's letter to Mr. Lima of the 2<sup>nd</sup> June at the time and was not aware of the Royal Marsden's involvement in the matter before he heard of it in Dr. Linares' interview. He had asked Dr. Maskill on the 4<sup>th</sup> August to let him have a copy of Mr. Sene's letter but he had not been given one. In his letter of the 8<sup>th</sup> August to Mr. Lima, however, Dr. Rassa refers in the penultimate paragraph of the second page to "... the first sentence of Mr. Sene's complaint ..." and that, in my view, (despite Dr. Rassa's insistence to the contrary) could only refer to Mr. Sene's letter of the 2<sup>nd</sup> June.

At the resumption of the hearing on the 10<sup>th</sup> February 2004, Dr. Rassa stated that due to inadvertence he had not during his cross examination the previous day appreciated the connection between Mr. Sene's letter of the 2<sup>nd</sup> June and Dr. Gore's letter of the 6<sup>th</sup> March until after the end of the day's proceedings. While denying that he had been untruthful, he admitted he had made a mistake in stating that he had not been aware of the Royal Marsden's involvement in the matter.

I have related the evidence on this aspect of the case at some length in order to record my finding that GHA failed not only to conduct a formal investigation of Dr. Rassa's allegations against Mr. Sene but also to formally notify him of the outcome of such investigation as had been made. There is no evidence of Dr. Gore's letter of the 6<sup>th</sup> March having been copied or even shown to Dr. Rassa.

### **Patient I**

Mr. Sene referred to Dr. Moeser a 39 year old man (referred to at the hearing as Patient I) who was admitted to St. Bernard's in mid-February 2000 with deep vein thrombosis ("DVT") of the left leg which was confirmed by Doppler Scan. It appears that he was treated with streptokinase which proved to be ineffective after two days.

Dr. Rassa then received a further request from Dr. Moeser for a venography on the patient but he refused to carry out the examination requested and reported back to Dr. Moeser to the effect that he was not at all surprised that intravenous Streptokinase therapy had been ineffective, adding "I think you better refer this patient for treatment to the expert. I have discussed the details with Dr. Borge."



Dr. Moeser was offended by what he regarded as Dr. Rassa's "... assaulting (sic) and unqualified comments about treatment and myself ..." and wrote to Messrs. Lima and Catania complaining that not only had Dr. Rassa acted unprofessionally but he had also delayed necessary treatment to the patient in question.

In the meantime, Dr. Rassa wrote on the 17<sup>th</sup> February to Mr Peter Mitchenere, Consultant Surgeon at Hillingdon Hospital, seeking his opinion as to the appropriateness of the use of streptokinase for venous thrombosis and on the 20<sup>th</sup> February Mr Mitchenere replied to say that "streptokinase is not used in clinical practice...in England for deep vein thrombosis. Its use is confined to arterial occlusion with embolic and thrombotic disease...Its only use in venous disease in the UK is if there is a life threatening occlusion to a limb."

On the 21<sup>st</sup> February Mr. Lima brought Dr. Moeser's complaint to Dr. Rassa's attention, pointing out that this was not the first complaint he had received of this kind, and invited him to discuss the matter with himself. He also requested Dr. Rassa to respond in writing to the issues raised by Dr. Moeser.

On the 28<sup>th</sup> February Dr. Rassa replied with an account of how he had dealt with the matter and pointed to the error on Dr. Moeser's part. He questioned the appropriateness of referring a patient with DVT to an anaesthetist rather than a physician.

Mr. Lima passed the correspondence to Mr. Catania for him to follow up the matter together with Doctors Kumar and Maskill in order to resolve the issues and reconcile the parties. That is where the matter appears to have remained. In cross examination, Mr. Lima stated that he did not understand

Dr. Rassa's letter of the 28<sup>th</sup> February to be a formal complaint against Dr. Moeser requiring investigation and for that reason none was embarked upon.

My own reading of that correspondence confirms Mr. Lima's view and, accordingly, I must exclude Patient I from Dr. Rassa's list of uninvestigated complaints. I should record, however, that Dr. Rassa was unduly contemptuous of Dr. Moeser in that letter, persistently referring to him as "this Anaesthetist" and accusing him of "illiteracy and arrogance."

### **The aftermath of the interview**

On Wednesday the 11<sup>th</sup> October Dr. Rassa did not turn up for work at the Hospital but privately reported on two X-rays for Dr. Shelley from whose clinic he faxed a letter to Mr. Lima at 2.10 p.m. with the reason for his absence and his conditions for resuming his duties. Dr. Rassa had understood that the Minister was not prepared to discuss the issues he had raised and had left it to GHA and the management board to deal with the matter.

In his letter (which Dr. Rassa copied to Dr. Fitzpatrick, Mrs Teuma, Dr. Linares and all Consultants) he indicated that he would not be able to perform his duties unless:-

- “1. The threat of dismissal is **publicly** [my emphasis] removed immediately.
2. The expenses for study leaves that I had to pay long time ago, when I submitted my application form in April 2000 and GHA failed to respond to my request for provision of the locum cover.

3. Extra sessional payment for the reports on the x-rays which were taken on the month of September if you so wish, if not the Hospital Doctors and GP's must be informed the reason for not providing reports for those x-rays.
4. Finally and above all you must recognise and inform me in writing that Clinical Director has no managerial role on the other Consultants and I refer you to my letter of the 6<sup>th</sup> September 2000."

Mr. Lima drafted a letter in reply (which was included at page 382A of the bundle) but was not sent because of rapidly evolving events. He insisted in evidence, however, that he had not told Dr. Rassa that the Minister was not willing to discuss Dr. Rassa's grievances but that the matter had been discussed with the Chief Minister who asked for the matter to be discussed in depth by GHA and that the Authority would be submitting a recommendation to the Government. He did not mention the Management Board.

I believe there had been a genuine misunderstanding of the precise gist of the conversation between the two but whether or not Dr. Rassa was entitled to withhold his services until his conditions had been met calls for an examination of those conditions.

There had been no **public** threat by the employer to dismiss Dr. Rassa, Mr Lima's letters of the 27<sup>th</sup> September and the 3<sup>rd</sup> October having been addressed to Dr. Rassa personally. If anyone, it was Dr. Rassa who publicised whatever threats one might glean from those letters by copying correspondence emanating from him to all and sundry. In the circumstances, his demand that the threat of dismissal be **publicly**

withdrawn was ludicrous since it would have had the very opposite effect of giving publicity, where none previously existed, to the perceived threat.

While Dr. Rassa's claim for reimbursement of the expenses incurred by him in attending the refresher courses in September 2000 and his entitlement or otherwise to extra sessional payments for reporting on the X-rays carried out during his absence that month could and should have been the matter of discussion between the parties without the need for Dr. Rassa to withhold his services, he was not, in my view, entitled to demand the redefinition of Dr. Maskill's position as Medical Director. Whatever grievances Dr. Rassa might have had about Dr. Maskill's performance of his duties, he was not entitled to require the employer to relieve him of his "managerial role (over) the other consultants."

Dr. Linares telephoned Mr Lima at about 11 p.m. that night to tell him that he had been discussing the matter with the Chief Minister and that the Government took a very serious view of Dr. Rassa's behaviour. He asked Mr Lima to sound out the members of GHA Board and to revert to him with their recommendation.

Mr Lima spent the next 30 or 40 minutes speaking to the members individually over the telephone when he related to each the Chief Minister's view that Dr. Rassa should be dismissed but sought their recommendation.

Mr. Lima exhibited a copy of the notes he had made of the comments of each individual (and a transcript thereof) and a copy of the letter he addressed to Dr. Linares the next day. He reported that Messrs. Ernest Montado, Edwin Reyes, John Cortes, Peter Armon and Charles Lavarello had recommended that Dr. Rassa's employment be terminated. Ms. Cathy Teuma had abstained and he had not spoken to Dr. Soler who was on

leave. He enclosed with that letter a list of Dr. Rassa's 'misdemeanours' and a draft letter of dismissal which he testified to having drafted before Dr. Rassa's interview had been broadcast by GBC.

On Friday the 13<sup>th</sup> October 2000, Dr. Rassa was dismissed.

In my view, Dr. Rassa was dismissed because he allowed himself to be interviewed by GBC and because of the substance of his remarks and the fact that he exhibited to the GBC team a patient's X-rays and allowed the X-rays to be filmed in the knowledge that they would be broadcast.

Having found as I have done that Mrs Cervan may not have been entirely clear in her instructions to Dr. Rassa about the need to obtain permission from Mr Lima in order to give interviews, there is nevertheless the matter of Dr. Rassa's contract of employment which by paragraph 2 of the schedule thereto expressly required him to conform to General Orders. Although Dr. Rassa testified to never having read the General Orders and, therefore, not to be familiar with them, he was supplied with a draft contract at least six months before he signed his contract of employment and could have enquired further about the General Orders. In any event, he signed a contract which specifically incorporates the General Orders into its terms and he could have sought legal advice in respect thereof when he consulted Messrs. Cruz & Co. on or about the 1<sup>st</sup> June 2000. In the circumstances, I take the view that it is not good enough for Dr. Rassa to say he was not aware of the need for him to obtain the prior approval of his employer before allowing himself to be interviewed by GBC.

In so far as Dr. Rassa is in breach of contract by his failure to comply with General Orders, in my view Dr. Rassa was liable to the sanctions prescribed by General Orders following disciplinary procedures set out therein. I do

not accept the Respondent's contention that Clause 6(i) of the contract of employment entitles the employer to "forthwith determine the engagement" of the offending employee to the exclusion of the disciplinary procedures prescribed by General Orders.

In this particular case, however, there are two other matters regarding the GBC interview with which the employer took issue and they were the substance of Dr. Rassa's remarks and the exhibition of a patient's X-rays for broadcasting.

While it is true that Dr. Rassa had drawn to the Minister's attention some months previously what he considered to be "problems within St. Bernard's", it was not true to say that he had received no reply to his letters. While he may not have always received the response which he sought or expected, there was in evidence at the hearing a vast amount of documentation comprising largely letters exchanged between Dr. Rassa and the Chief Executive of GHA. On more than one occasion Dr. Rassa was invited to supply further information or to put forward suggestions as to how matters could be improved but quite often Dr. Rassa does not appear to have taken up these invitations.

His allegation of a "certain degree of incompetence" on the part of GHA and its lack of knowledge about how health authorities operate these days were not statements likely to inspire public confidence in the health service of Gibraltar. However, I see it as an expression of Dr. Rassa's opinion to which he is entitled subject, of course, to his contractual obligations and General Orders.

His allegation of "... misdiagnosis and mistreatment and certainly of negligence by certain number of the people ...", he should have known,

was bound to undermine public confidence in the health service and should not have been made in an interview which he knew was to be broadcast to the public at large. Although he said in evidence that he had the cases of Patients B, H and I in mind, Dr. Rassa went on to cite the case of Patient H by way of example, whose case he said he had raised in detail with Mr Lima and the doctor involved but he was still waiting for a response.

In defence of his decision to 'go public' Dr. Rassa invoked the General Medical Council's guidelines published as **Good Medical Practice** (Geranium Edition, July 1998) and drew to the Tribunal's attention a number of propositions in addition to the general duty of doctors registered with the GMC to "act quickly to protect patients from risk if (they) have good reason to believe that (they) or a colleague may not be fit to practice."

I quote some of the more pertinent propositions –

- “23. You must protect patients when you believe that a doctor's or other colleague's health, conduct or performance is a threat to them.
24. Before taking action, you should do your best to find out the facts. Then, if necessary, you must follow your employer's procedures or tell an appropriate person from the employing authority, such as the director of public health, medical director, nursing director or chief executive, or an officer of your local medical committee, or your regulatory body. Your comments about colleagues must be honest. If you are not sure what to do, ask an experienced colleague or contact the GMC for advice. The safety of patients must come first at all times.”

The May 2001 edition of the same publication elaborates those propositions in the following terms –

- “26. You must protect patients from risk of harm posed by another doctor’s or other health care professional’s, conduct, performance or health, including problems arising from alcohol or other substance abuse. The safety of patients must come first at all times. Where there are serious concerns about a colleague’s performance, health or conduct, it is essential that steps are taken without delay to investigate the concerns, to establish whether they are well founded, and to protect patients.
27. If you have grounds to believe that a doctor or other health care professional may be putting patients at risk, you must give an honest explanation of your concerns to an appropriate person from the employing authority, such as the medical director, nursing director or chief executive, or the director public health, or an officer of your local medical committee, following any procedures set by the employer. If there are no appropriate local systems, or local systems cannot resolve the problem, and you remain concerned about the safety of patients, you should inform the relevant regulatory body. If you are not sure what to do, discuss your concerns with an impartial colleague or contact your defence body, a professional organisation or the GMC for advice.”

I note that none of the propositions which were drawn to my attention suggests that the doctor in question should ‘go public’ although I accept that there may be some very extreme cases where a doctor, having



exhausted all the possibilities suggested by the guidelines, may take the view that he has no alternative but to 'go public' but such cases, I imagine, would be rare.

While I have expressed a view on the manner in which the employer dealt with Dr. Rassa's allegations about Mr Sene's handling of the case and of the oblique manner in which Dr. Gore's opinion of Mr Sene's management of Patient H was brought to Dr. Rassa's attention, there is no escaping from the fact that Mr Sene's letter to Mr Lima of the 2<sup>nd</sup> June in which he states "... the letter dated 6<sup>th</sup> March 2000 from the Royal Marsden Hospital confirms that the management of this patient was correct." was copied to Dr. Rassa by Dr. Maskill on the 4<sup>th</sup> August 2000.

I believe Dr. Rassa when he stated in cross-examination that he had not appreciated the significance of the letter from the Royal Marsden – and this is apparent from the fact that in his letter to Mr Lima dated the 8<sup>th</sup> August Dr. Rassa re-states and particularises his allegations of mismanagement, misconduct and negligence on Mr Sene's part. However, when making allegations 'on air' as serious as those made by Dr. Rassa, it was incumbent on him to ascertain the facts in every detail before making such allegations. It is not good enough for Dr. Rassa to say he had not appreciated the connection between what Mr Sene wrote about the Royal Marsden and his allegations against Mr Sene's management of the case.

Dr. Rassa argued that Dr. Gore's letter of the 6<sup>th</sup> March (which, incidentally, he had not seen previously) was not the result of a formal investigation into his allegations against Mr Sene and that, in any event, it had been procured by Mr Sene himself based on insufficient and self-serving information conveyed by Mr Sene to Dr. Gore.

The points which Dr. Rassa made do have some merit as a matter of form but these should have been communicated by him to Mr Lima or the Minister upon receipt of a copy of Mr Sene's letter. However, for the reason that Dr. Rassa testified to, he did not do so. Furthermore, he accepted in cross-examination that he was not in a position to challenge Dr. Gore's opinion of Mr Sene's management of Patient H.

In the circumstances, not only was Dr. Rassa's allegation in respect of Mr Sene's management of Patient H unjustified but it was also not entirely accurate for him to state that he was still waiting for a response to his allegations. It was there had he looked. He failed to heed the GMC guideline which required him to do his best to find out the facts before taking action. In my view, the more drastic the action contemplated by a medical practitioner (such as 'going public') the greater the duty to thoroughly ascertain the facts. What is more, he had not exhausted all the possibilities suggested by the GMC before 'going public'.

The publication of a patient's X-rays raises issues of confidentiality and professional conduct and the attention of the Tribunal was drawn to guidelines issued by the General Medical Council. I quote certain extracts from its booklet entitled **Confidentiality: Protecting and Providing Information** (Belladonna Edition):

#### General proposition

"Doctors hold information about patients which is private and sensitive. This information must not be given to others unless the patient consents or you can justify the disclosure.

"Section 1 – Patients' right to confidentiality

1. Patients have a right to expect that information about them will be held in confidence by their doctors...If you are asked to provide information about patients you should:
  - Seek patients' consent to disclosure of information wherever possible, whether or not you judge that patients can be identified from the disclosure.
  - Anonymise data where unidentifiable data will serve the purpose.
  - Keep disclosures to the minimum necessary.

“Section 3 – Disclosure of information

15. Disclosure of information about patients for purposes such as epidemiology, public health safety, or the administration of health services, or for use in education or training, clinical or medical audit, or research, is unlikely to have personal consequences for the patient. In these circumstances you should still obtain patients' express consent to the use of identifiable data or arrange for members of the health care team to anonymise records.
16. However, where information is needed for the purposes of the kind set out in paragraph 15, and you are satisfied that it is not practicable either to obtain express consent to disclosure, nor for a member of the health care team to anonymise records, data may be disclosed without express consent. Usually such disclosures will be made to allow a person outside the health care team to anonymise the records. Only where it is essential for the purpose may identifiable records be disclosed. Such disclosure must be kept to the minimum

necessary for the purpose. In all such cases you must be satisfied that patients have been told, or have had access to written material informing them:

- That their records may be disclosed to persons outside the team which provided their care.
- Of the purpose and extent of the disclosure, for example, to produce anonymised data for use in education, administration, research or audit.
- That the person given access to records will be subject to a duty of confidentiality.
- That they have a right to object to such a process, and that the objection will be respected, except where the disclosure is essential to protect the patient, or someone else, from risk of death or serious harm.

17. Where you have control of personal information about patients, you must not allow anyone access to them for purposes of the kind set out in paragraph 15, unless the person has been properly trained and authorised by the health authority, NHS Trust or comparable body and is subject to a duty of confidentiality in their employment, or because of their registration with a statutory regulatory body.
18. In cases where you have considered all the available means of obtaining consent, but you are satisfied that it is not practicable to do so, or that patients are not competent to give consent, or exceptionally, in cases where patients withhold consent, personal information may be disclosed in the public interest where the benefits to an individual or to society of the

disclosure outweigh the public and the patients' interest in keeping the information confidential.

32. You must obtain express consent from patients before publishing personal information about them as individuals in media to which the public has access, for example in journals or text books, whether or not you believe the patient can be identified. Express consent must therefore be sought to the publication of, for example, case histories about, or photographs of, patients.
36. Disclosure of personal information without consent may be justified where failure to do so may expose the patient or others to risk of death or serious harm. Where third parties are exposed to a risk so serious that it outweighs the patients' privacy interest, you should seek consent to disclosure where practicable. If it is not practicable, you should disclose information promptly to an appropriate person or authority. You should generally inform the patient before disclosing the information."

The first observation that I would make is that it was not at all necessary for Dr. Rassa to have published the anonymous patient's X-rays. It was not clear from the evidence whether Dr. Rassa volunteered those X-rays or brought them out in response to a request by the interviewer but, as I have previously stated, they were published for effect rather than the clinical point which Dr. Rassa sought to make. He accepted that he had not obtained the consent of the patient concerned to the disclosure of his/her X-rays not only to the GBC crew but, indeed, to their publication to the entire population of Gibraltar and elsewhere capable of receiving GBC television signals.

Dr. Rassa was in breach of the third bullet point in paragraph 1 of the guidelines which I have quoted above because disclosure of that patient's X-rays was not at all necessary. I do not see how the purposes set out in paragraph 15 for disclosure of information about patients were served by Dr. Rassa exhibiting this particular patient's X-rays.

In the circumstances, Dr. Rassa offended against not only paragraph 15 but also paragraph 16 of the guidelines. What is more, Dr. Rassa could not have been satisfied that the patient concerned had been told or had access to written material informing him/her of the four matters set out in the bullet points at the end of that paragraph.

Paragraph 17 of the guidelines was also breached by Dr. Rassa's publication of those X-rays.

Dr. Rassa admitted that he had not considered the need (let alone attempted) to obtain that patient's consent and, accordingly, he was in breach of paragraph 18. What is more, having regard to the purpose for which those X-rays were published, I do not believe that there were any benefits to an individual or to society from such disclosure which outweighed the public and the patient's interest in keeping the information confidential.

Dr. Rassa was also in breach of paragraph 32 which requires express consent to be obtained from patients before publishing personal information (e.g. X-rays) about them whether or not he believed the patient could be identified from the published material. Dr. Rassa was also in breach of paragraph 32 by publishing (albeit briefly) Patient H's case history without her express consent.

Dr. Rassa did not seek to argue that his failure to disclose the anonymous patient's X-rays may have exposed that patient or others to risk of death or serious harm and, accordingly, he is unable to rely upon the limited protection offered to him by paragraph 36 either.

The guidelines end the section headed "Patients' right to confidentiality" (which I have referred to above) with the warning: "You must always be prepared to justify your decisions in accordance with this guidance." That, indeed, was the advice Dr. Rassa received (somewhat belatedly) from the General Medical Council by its letter dated the 20<sup>th</sup> October 2000 in reply to Dr. Rassa's dated the 27<sup>th</sup> September. He was told that if he decided to disclose confidential information he must be prepared to explain and justify his decision. No such explanation or justification was forthcoming from Dr. Rassa for his publication of the X-rays. In short, Dr. Rassa was guilty of professional misconduct and, in my view, his dismissal on that ground falls within the ambit of Section 65(2)(b).

### **Was the dismissal fair or unfair?**

Section 65(6) reads –

“Subject to sub-sections (4) and (5) the determination of the question 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.”

Sub-sections (4) and (5) are not relevant to this case and, accordingly, I need only consider whether the employer acted reasonably or unreasonably in treating Dr. Rassa's professional misconduct as a sufficient reason for dismissing him, a question which I must determine in accordance with equity and the substantial merits of the case.

In deciding the matter the Tribunal must not substitute its own view for that of the employer: **Beedell -v- West Ferry Printers Ltd. [2000] ICR 1263** and **Foley -v- Post Office [2000] ICR 1283**. The burden of satisfying the Tribunal as to the reasonableness of the dismissal is a neutral one and the question for the Tribunal to decide is whether the dismissal fell within the range of reasonable responses of a reasonable employer.

At the conclusion of the GHA meeting on the 10<sup>th</sup> October the employer was clearly not minded to terminate Dr. Rassa's employment but to make an attempt to mend fences with him. Dr. Rassa obviously did not know what was going on at the meeting when he allowed himself to be interviewed by GBC – indeed, he did not even know that the Board of GHA was meeting because he understood Mr Lima to refer to the Management Board of the Hospital.

While allowing himself to be interviewed by GBC without prior permission from his employer might have been treated as an infringement of General Orders to be dealt with in accordance with the procedures and sanctions thereby prescribed, Dr. Rassa was, in my view, guilty of serious professional misconduct (a) by making allegations against a professional colleague which, on the face of it, were unfounded but, at the very least, merited careful investigation of the facts by Dr. Rassa before 'going public' and (b) by publishing a patient's X-rays when it was not at all necessary for him to



do so and certainly without making any attempt to obtain that patient's consent.

On that professional misconduct alone it was not unreasonable for the employer to terminate Dr. Rassa's employment summarily. His remarks about the hospital administration clearly brought GHA into disrepute and were likely to undermine public confidence in the health service of Gibraltar. By his remarks he breached the duty (which is implied into all contracts of employment) of mutual trust and confidence that is owed by both employer and employee to one another and is regarded as the cornerstone of the relationship of employment.

Viewed against the background of the ongoing difficulties which both parties had been experiencing (not all, I hasten to add, attributable to Dr. Rassa) for virtually the entirety of the year and a half that he had been in employment, it was not unreasonable for the employer to take the view that "enough is enough" and to bring his employment to an end.

### **Procedural fairness**

Dr. Rassa argues that assuming, without conceding, that the employer had good grounds to dismiss him, the employer failed to undertake any or any reasonable investigation into the circumstances of the alleged misconduct in that no attempt was made to procure an explanation from Dr. Rassa nor had there been prior to or after the GBC interview a reasonable and proper investigation of the many serious issues Dr. Rassa had raised to see if they had substance.

In support of his contention, his Counsel cited dicta of Stephenson LJ in *W Weddel & Co. Ltd. -v- Tepper* [1980] IRLR 96, 101:

“... [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the Industrial Tribunal in this case, ‘gathered further evidence’ or, in the words of Arnold J. in the Burchell ... case ‘carried out as much investigation into the matter as was reasonable in all the circumstances of the case.’ That that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably”

He also cited dicta of Lord Bridge in **Polkey –v- A.E. Dayton Services Ltd.** [1987] 3 All ER:

“... an employer having *prima facie* grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken steps, conveniently classified in most of the authorities as ‘procedural’, which are necessary in the circumstances of the case to justify the action.”

Dr. Rassa contended that the decision to dismiss him was taken by the Chief Minister without prior warning or any reasonable investigation having been carried out into his grievances. The procedures prescribed by Section 7.1.9 of General Orders for disciplinary action were not followed and, in all

the circumstances, the decision to terminate his employment was not taken fairly.

Counsel for the Respondent countered with the approval by Lord Mackay, LC in **Polkey** (with whom Lord Bridge agreed) of the analysis by Browne-Wilkinson J. in **Sillifant -v- Powell Duffryn Timber Ltd.** [1983] I.R.L.R. 91 of the correct approach -

“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 Section [65 (6)]. 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 employer advanced it would make no difference...”

The employer is the Government of Gibraltar, at the head of which is the Chief Minister. Some time between the 6<sup>th</sup> and the 10<sup>th</sup> October he was

appraised by the Minister for Health, Dr. Linares, of the issues regarding Dr. Rassa and it appears from the letter which Mr Lima had drafted on the 11<sup>th</sup> October (but not sent) that the Chief Minister had asked for the matter to be discussed in depth by GHA with a view to submitting a recommendation to the Government. It was not clear from the evidence whether the outcome of the GHA meeting of the 10<sup>th</sup> October was communicated to the Chief Minister but late on the night of the 11<sup>th</sup> October Dr. Linares telephoned Mr Lima and intimated to him that the Chief Minister, having become aware of the GBC interview, was minded to terminate Dr. Rassa's employment and wanted to hear the views of the members of the GHA Board.

Those views were ascertained by Mr Lima and communicated to Dr. Linares who, no doubt, advised the Chief Minister accordingly.

The Chief Minister may well have taken the decision to dismiss Dr. Rassa but, being the elected head of the employer, he is entitled to take such a decision provided, of course, that the provisions of the Employment Ordinance are complied with.

It is true that Dr. Rassa was not invited to explain his conduct in relation to the GBC interview nor was any other form of disciplinary procedure embarked upon. While ordinarily such omissions might result in a finding of unfair dismissal, it was, in my view, not unreasonable for the employer to take the view that on the facts known to it at the time of dismissal no explanation or mitigation could alter the decision. In this case, the interview broadcast by GBC was there for all to see and, accordingly, there was no need for any investigation of the facts. I can conceive of no mitigating circumstances for Dr. Rassa's professional misconduct in unnecessarily publishing a patient's X-rays and, indeed, none was offered

by Dr. Rassa to the Tribunal at the hearing. In the circumstances, it was not unreasonable for the employer to take the view that there were no mitigating circumstances as far as the X-rays were concerned. While Dr. Rassa might well have explained that his allegations regarding Mr Sene's mismanagement of Patient H were based on his failure to appreciate the significance of the reference to the Royal Marsden in Mr Sene's letter to Mr Lima of the 2<sup>nd</sup> June, what explanation could he have offered for making very serious allegations about a medical practitioner without having fully investigated the facts? In my view, on this aspect too of the GBC interview, the employer could reasonably conclude that no explanation would alter the decision to dismiss.

In my view, Dr. Rassa's professional misconduct and his refusal to perform his duties unless the demands set out in his letter of the 11<sup>th</sup> October were met made his position quite untenable and, in the circumstances, the decision to dismiss was reasonable.

### **Conclusion**

I have considerable sympathy for Dr. Rassa who took up employment at St. Bernard's as Consultant Radiologist, intending to devote all of his skills and the experience he had acquired over several years in a major hospital in the United Kingdom for the benefit of his patients in Gibraltar. In this aim he was frustrated by what he perceived as the lack of recognition by GHA of his status as leader of the health care team which makes up the Radiology Department, the reluctance of some of his fellow consultants to appreciate his role in the vital diagnostic tool that radiology now is and the failure of his employer to properly address his concerns as to the mismanagement by some of his fellow medical practitioners of the care of certain patients.

In his increasing frustration at this state of affairs, he lost regard for some of his colleagues to the point that he felt unable to recognise Dr. Maskill's authority as Medical Director. His communications with some of his colleagues and, later, with the Minister for Health were couched in increasingly intemperate language, ending with what I consider to be unjustified demands in support of the stance he had adopted by withholding his services on the 11<sup>th</sup> October. On a number of issues Dr. Rassa adopted an uncompromising position which, in my view, made it difficult for his employer to address some of his concerns properly.

While all these may be put down to human failings in the face of the conditions he was confronted with, Dr. Rassa was not justified in allowing his judgement to be clouded during his interview by GBC to the extent that he disregarded the rules of professional conduct to which he was subject. In the circumstances, Dr. Rassa was not unfairly dismissed.

28<sup>th</sup> September 2004

  
Haresh K. Budhrani, Q.C.

Chairman