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IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

CASE No. 14/2001

Between

CHARLES FERRARY

Complainant

and

CALPE ROWING CLUB

Respondent

JUDGMENT

J Nuza for the Complainant.
E Ellul for the Respondent.

The Complainant was employed by the Respondent as its Manager. Although the Originating Application states that the date of commencement of employment was the 15th March 1998, the Notice of Terms of Engagement filed with the Employment and Training Board and the oral evidence given at the hearing before the Tribunal are to the effect that the date of commencement of employment was in fact the 15th March 1999. The manner the employment was terminated and exact moment of termination are issues over which the parties are in dispute and which it falls to the Tribunal to determine.

The Complainant in his Originating Application alleges, firstly, that the Respondent gave the Complainant neither the Notice of Termination of Employment as required by Section 54 of the Employment Ordinance nor payment in lieu of said Notice and, secondly, that the Employer failed to act reasonably.

Mr Nuza submitted on behalf of the Complainant that the Respondent owed the Complainant one month's salary, one month being the length of notice required to be given to the Complainant under Section 54 of the Employment Ordinance, and/or the redundancy payment pursuant to the Conditions of Employment (Redundancy Pay) Order 2001. The powers of the Industrial Tribunal relevant to this case are found in Section 70 of the Employment Ordinance, namely to adjudicate on the complaint for unfair dismissal presented by the Complainant. This Tribunal has no jurisdiction to hear the Complainant's claim for the month's salary or redundancy pay which are based on rights conferred by legislation and ought properly to be brought by civil proceedings.

Accordingly, the only claim of the Complainant which falls to be determined by this Tribunal is his complaint for unfair dismissal.

The onus of establishing that there has been a dismissal by the Respondent of the Complainant from his employment lies on the Complainant. Once the Complainant has discharged this onus, it is then for the Respondent to show that the reason for the dismissal was one of those reasons set out in Sub-sections 65 (1) (b) and 65 (2) of the Employment Ordinance. In the present case the Respondent submits firstly that the employment had been terminated on terms agreed between the Complainant and the Respondent and secondly that the employee was redundant.

For the Respondent, Mr Richard Labrador gave evidence. He was at the relevant time the Secretary of the Respondent Club, having been elected in November 2000. He described the uncertainty prevailing amongst the members of the Committee as to whether the Respondent needed a Manager or, in place of a Manager, a caretaker/handyman. The Committee felt that the Complainant was not pulling his weight and it was decided that Mr Labrador should write to him. He did so by letter dated the 2nd May 2001. The letter required the Complainant to improve his performance noticeably by the 15th May 2001, failing which the Committee would give him one month's notice of termination of employment. On the 26th May 2001, the Complainant wrote to Mr Labrador acknowledging that the Committee wished to make the post of Club Manager redundant and offered the Respondent his terms for the termination of employment by mutual consent. These terms were:

"1. One month's pay to cover notice period.

2. One month's severance pay.

3. Two weeks for being over the age of 41 years.

4. 9 + 1 days holiday pay.

5. $5\ ^{1}/_{2}$ days of overtime worked."

Mr Labrador met with the Complainant on the 28th May 2001. In his evidence Mr Labrador stated that he had no doubt that at the conclusion of that meeting an agreement had been reached between the Complainant and himself for the termination of the Complainant's employment. The Complainant had stated that he wanted to finish on amicable terms and, this being what the Respondent also wanted, an agreement to part amicably was reached. This agreement, according to Mr Labrador, was to the effect that the Complainant's employment would be terminated with immediate effect and that the Respondent would pay to the Complainant the total sum of £1,800 'in full and final settlement'. Mr Labrador could not remember how the figure of £1,800 was arrived at.

Immediately after the meeting, Mr Labrador said that he spoke to Mr Manito, the Respondent's Treasurer, who at once wrote out a cheque for £1,800 and gave it to the Complainant. The Complainant then said good-bye to Mr Labrador, to Mr Manito and to the barman, collected his personal belongings and left. He said that he would return the next day to collect more of his belongings. Mr Labrador says he had no doubt that the Complainant had agreed to the terms of termination and that the termination had immediate effect. Neither at nor immediately after their meeting had the Complainant given any indication that an agreement had not been reached nor that he was in dispute with the Respondent over the termination of his employment nor that he wanted to think things over or consult others. On the 29th May 2001 Mr Labrador wrote to the Complainant to set out in writing the agreement reached regarding the termination of employment. Although he requested the Complainant to sign and return a copy of the letter in acknowledgement of acceptance of the conditions of termination, in fact this was never received.

Mr Labrador says that he then reported to the Committee that the matter had been terminated. He says he did not see the Complainant's letter of 4th June 2001 and he disputes that the Respondent has ever received this letter. He did receive the Complainant's letter of 11th June 2001 but this made no reference to the earlier letter of 4th June 2001.

According to Mr Labrador the Respondent's letters of 2nd and 15th May 2001 were overtaken by the discussion which took place on 28th May 2001. Having reached agreement as to termination of employment, the matters raised in the said letters had become irrelevant.

Mr Labrador denied in cross-examination that since being elected to his position in the Respondent Club he had always wanted to get rid of the Complainant. He admitted though that he had doubted the need for a Manager at the Respondent Club. He felt that what it needed was a caretaker/handyman.

Mr Manito confirmed to the Tribunal that the cheque for £1,800 had been cashed.

The Complainant gave evidence. He said that prior to the election of Mr Labrador in November 2000, there had been no indication that the Respondent was unhappy with his performance. Only four days after Mr Labrador's election he first become aware of unhappiness.

The Complainant had checked the minutes of the Committee meetings up to May 2001 and these had only stated that the Committee was not satisfied with his performance. These minutes did not state that the post of Manager was not required. In April 2001 the President had suggested that that there should be a meeting to air grievances and try to reach an agreement. The Complainant said that he had been presented with a list of duties and his role had been extended to that of a handyman as well.

The letter of the 2nd May 2001 was left for him at his desk at the Respondent's premises whilst he was on leave. He only saw the letter on his return to work on 12th May 2001 and this letter gave him until 15th May 2001 to achieve a noticeable improvement in the performance of his duties. If not, he would be given one month's notice of termination of employment. This he argued was unreasonable.

After his return to work, the Complainant and Mr Labrador spoke . The Complainant was told that the Committee had decided to make the post of Manager redundant and that they should get together to reach an amicable solution. Mr Labrador asked him to give some thought to this.

At this stage the Complainant went to see the Employment and Training Board and the Chamber of Commerce. He was given some information relating to redundancy and termination of employment and based on this he sent the letter of 26th May 2001 to Mr Labrador setting out his terms for the termination of his employment.

On 28th May 2001 he met Mr Labrador at the Respondent's premises to discuss matters. He was told by Mr Labrador that the terms he had proposed in his letter of 26th May 2001 were not acceptable to the Respondent. According to him, Mr Labrador then made a counter-offer. The Complainant understood this counter-offer as being framed in a manner that the payment he would receive would not be subject to tax or social insurance. After this meeting, he left the room. A short time later that same day and still at the Respondent's premises Mr Manito came to him with two cheques. A few days after receiving these cheques, the Complainant spoke to someone who told him that the payment was illegal since tax had not been paid. The Complainant's letter to Mr Labrador of 11th June 2001 stated that this amounted to tax evasion.

The Complainant's evidence was that Mr Labrador had made him a counter-offer which he had not accepted. His letter to Mr Labrador of 4th June 2001 made it clear that he had not accepted the counter-offer. This letter had been left for Mr Labrador with the barman at the Respondent's premises. His letter to Mr Labrador of 11th June 2001 was also left with the barman and it made it clear that he rejected the counter-offer and required the Respondent either to dismiss him or make him redundant.

Since he claimed still to be employed as at 11th June 2001, the Complainant argued that he had rights under the new Conditions of Employment (Redundancy Pay) Order 2001 which came into force on 7th June 2001.

The Complainant had applied for a course at Ladbrokes but had not been taken on. He nevertheless received some remuneration in June 2001 from Ladbrokes. He had also done casual labour on board a ship for the Admiralty Marshal. Because of his age he had been unable to find other work. He had been advised to register for Community Care.

Mr Ellul submitted that an Agreement representing a full and final settlement had been reached by the parties on 28th May 2001. It was not 'one-sided' nor 'abusive'. It was only after learning of the new legislation that the Complainant tried to renege on the agreement reached. The payment was a global payment. Since there was an agreement for termination of the Complainant's employment, there had been no dismissal and the Complainant's letter of 11th June 2001 could not repudiate this agreement. The termination had occurred before the new law came into force and the new law therefore conferred no rights on the Complainant. Conclusive evidence of the agreement was the fact that the cheque had been accepted and cashed by the Complainant.

Mr Nuza argued that there was no redundancy payment since the letter of 29th May 2001 referred to 'outstanding fees'. The Respondent had acted with indecent haste and the termination of employment had nothing to do with redundancy. The previous letters from the Respondent showed this to be the case. In effect Mr Labrador had devised a short-cut, that of describing the termination as a case of redundancy, which he sold to the Complainant as 'saving face' by avoiding dismissal.

My findings on the evidence are as follows:

1. I am satisfied that an agreement was reached between Mr Labrador and the Complainant on 28th May 2001 for the termination on the Complainant's employment. The conduct of the Complainant immediately thereafter satisfies me that he did not consider himself to be any longer an employee of the Respondent. He bid farewell to at least two officers of the respondent and to the barman and did not return to the Respondent's premises to work any more. He also tried to obtain other employment during the month of June 2001 and actually received some remuneration from Ladbrokes. If his employment had been terminated against his will, an immediate reaction asserting his rights and alleging that he had been dismissed was to have been expected. The payment made by the Respondent was in excess of his monthly salary and must be taken to have included an amount by way of payment in lieu of notice as well as accrued holiday pay.

2. I find that the employment of the Complainant was terminated by mutual consent on 28th May 2001 and consequently, I find that the Complainant was not unfairly dismissed.

P X Nuñez
Chairman

26th August 2003.