INDUSTRIAL TRIBUNAL GIBRALTAR

CASE NO.16/2001

BETWEEN

AHMED BENAYAD Complainant

AND

BAHIA CATERERS LIMITED Respondent

JUDGEMENT

1. FACTS

1.1 The Respondent owns a catering/bar establishment known as Casa Antonio in Gibraltar. Mrs Hernandez is the principal proprietor of the Respondent company.

1.2 The Complainant was employed by the Respondent initially as a cleaner/assistant cook when the business also operated a restaurant, and latterly as a barman. The exact designation of the Compainant's employment was never agreed or established by the parties but this has little or no bearing on the facts. The Complainant's employment with the Respondent began in 1985. The only terms of employment are those set out in the Employment Service 'Notice of Terms of Engagement' Form.

1.3 Over the 18 years of employment the Complainant has received two (perhaps three) written warnings. Two were received in 2001. The first was addressed to the Respondent and read as follows:-

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"Mrs H Hernances has asked me to warn you once again for your bad behaviour and lack of cleanliness. We have no proof but I believe that at time money has been short in the till. I hope you amend yourself as Mrs Hernandez will terminate your employment".

1.4 The third written warning was issued on 6th August 2001 and reads as follows:-

"Dear Mr Benayad

Subject: Official Third Warning

It is with deep regret that we have to inform you that since you decided unilaterally to take three days off work (that is as barman) - you have left us with little option but to give you an official warning regarding this unfortunate incident.

You have already taken five weeks holiday this year and you have unheeded our request that you could not take any extra days off without reasonable notice in advance. Particularly, since we have no member of staff to cover for you. Despite this and the fact that you have repeatedly told, you chose not to turn up to work from the 3rd to the 6th of August 2001. Therefore we wish to inform you that your conduct, attitude and lack of responsibility are completely unacceptable. This is your third warning and you seem unconcerned about your continued employment. Hence, since we find your disregard and conduct completely unreliable to enable you to work effectively as a team within our company, as Directors, you leave us with no option but to "consider" termination of your working contract.

Continued.....

Respectfully yours

Bahia Caterers Limited
Managing Director".

1.5 According to Mrs Hernandez there was another warning issued prior to the letter dated 6th August 2001, which was along the same lines of the letter dated 6th August 0201. However, there is no concrete evidence to support its issue. Furthermore, its existence was disputed by the Complainant as was the fact that a warning had been given at all.

1.6 On 31st July 2001 the Complainant's brother-in-law passed away in Gibraltar. This event forced the Complainant to organise the transfer of his brother in law's body back to Morocco as well as other related arrangements. The Respondent asked Mrs Hernandez for two or three days compassionate leave, which was refused. On 2nd August 2001 Mr Charles Sisarello, Branch Officer of the Transport and General Workers Union interceded on the Complainant's behalf. Mr Sisarello also failed to convince Mrs Hernandez to allow the Complainant compassionate leave. Later that day the Complainant advised Mrs Hernandez that he would be travelling to Tangier, Morocco without her permission.

1.7 The Complainant travelled to Tangier on Friday 3rd August 2001 and returned to Gibraltar on Sunday 5th August 2001. He returned to work the following day. It is to this incident that the written warning of 6th August 2001 related.

1.8 On 29th August 2001 Mrs Hernandez allowed the Complainant to attend the Health Centre as he was feeling unwell. The Complainant

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was then conveyed to St Bernard's Hospital and admitted to Napier Ward. The Complainant was visited that same day by Mrs Hernandez and by a Mrs Gonzalez who also frequented Casa Antonio, and who was a personal friend of Mrs Hernandez. During this visit Mrs Hernandez, Mrs Gonzalez or both, allegedly rebuked the Complainant for his alcohol abuse. It was both Mrs Hernandez' and Mrs Gonzalez' belief that the Complainant's admission to Hospital was a consequence of his constant drinking. The Respondent denied that his admission was caused by an alcohol problem. That same evening the Complainant was moved to the Intensive Care Unit of St Bernard's Hospital where he remained for the next 5 days. On 31st August and 3rd September the Complainant was taken to La Linea for dialysis treatment.

1.9 On 12th September 2001 the Complainant was discharged from Hospital. The Complainant had been given a medical certificate which certified him as unfit for work until 23rd September 2001. On 13th September 2001 the Complainant went to his place of work and was given some money, being unpaid salary. He told Mrs Hernandez of his intention of travelling to Morocco for two weeks, which time off formed part of the period he was certified as being unfit for work.

1.10 On 14th September 2001 the Complainant was advised that he was dismissed.

2. EVIDENCE BROUGHT BEFORE TRIBUNAL

2.1 The Respondent's case was based on the Complainant's alleged misconduct and alcohol problem. Mrs Hernandez went to great lengths to portray herself as a caring, responsible and model employer.

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2.2 In her evidence Mrs Hernandez made submissions as to the Complainant's lack of cleanliness, rudeness to customers, slovenliness, lack of discipline, constant drinking behind the bar, undercharging of fellow Moroccan Customers, overcharging of others, poor time keeping etc. Indeed, the Complainant was portrayed as the archetypal "employer's nightmare".

2.3 Mrs Hernandez also gave evidence that she had been looking after the Complainant by trying to stop him from drinking. She also said that she had overlooked his drinking problems over the years because she had taken pity on him, an act of charity.

2.4 Mrs Hernandez and her supporting witnesses alleged that the Complainant's hospitalisation was due to alcohol abuse. However, the medical evidence was not concrete enough to support these submissions. A great deal of Mrs Hernandez' testimony sought to paint the Complaint as a chronic alcoholic. Mrs Hernandez stated in re-examination that the main reason for dismissing the Complainant was due to his constant drinking.

2.5 Mrs Maria Gonzalez was called to substantiate Mrs Hernandez' claims of alcohol abuse and rudeness. Mrs Gonzalez went with Mrs Hernandez to visit the Complainant in hospital. Mrs Gonzalez was allegedly advised by a nurse that the "Complainant's body was intoxicated". It was admitted by Mrs Gonzalez that she had a personal friendship with Mrs Hernandez.

2.6 Mr John Harris, a 15 year frequenter of Casa Antonio, was also called. Mr Harris also sought to substantiate the Respondent's claim that the Complainant drank whilst he worked.

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2.7 The Complainant on the other hand disputed the evidence brought by the Respondent which is commented on later.

2.8 During cross examination Mrs Hernandez stated that she had told the Complainant that if he travelled to Morocco *instead of returning back to work*, he should not come back. This statement in the Tribunal's opinion is the key to the entire case.

3. LAW

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

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

3.3 The Respondent dismissed the Complainant for "unreasonable bad conduct" as set out in the Termination of Employment Form. This reason falls within Section 65(2) of the Ordinance.

3.4 The next issue to consider is whether in the circumstances the dismissal was fair or unfair.

3.5 In showing their reason for dismissal, employers must prove the question of fact. The fact to be proved is the employer's motivation for the dismissal. As Cairns AJ put it in Abernethy v Mott, Hay and Anderson [1974] ICR323:-

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"A reason for the dismissal of an employee is a set of facts known to the Employer, or it may be of beliefs held by him, which caused him to dismiss the employee."

As Lord Denning MR said in the same case "the reason shown for dismissal must be the principal reason which operated in the employer's mind".

It follows from this that the reason shown for dismissal "must be in existence at the time when "the employee is given notice". (W Devis & Sons Limited [1977] AC 31). Thus, any matters which occur or are discovered subsequent to the dismissal will normally have no relevance in operating the reason for dismissal, since they were not known to the employer and could not have provided a motivation for it. A tribunal must judge matters as they stand at the date of the dismissal and upon information known or available to the employer at the time. This Statutory test is laid down by Section 65(2) of the Ordinance, which is similar to Section 98(4) of the English Employment Rights Act 1996.

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

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

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

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

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

(3) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the Employer;

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

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

3.7 This approach was considered anew by the Court of Appeal in Foley v Post Office [2000] ICR 1283. As a result of the decision of the Employment Tribunal in Hatton v Van den Bergh Foods Limited [1999] ICR 1150 suggesting that the approach was misconceived Mummery LJ endorsed the Iceland Frozen Foods approach saying the decision itself, which had been approved and applied by the Court of Appeal "remains binding on this Court, as well as the Employment Tribunals and the Employment Appeal Tribunal". He described the disapproval by the Employment Appeal Tribunal of that approach as "an unwarranted departure from authority".

3.8 Therefore, the Tribunal must not substitute its own view for that of the employer. This has been emphasised by the Employment Appeal Tribunal in Beedell v West Ferry Printers Limited [2000] ICR 1263 and the Court of Appeal in Foley and Post Office [Supra]. If, however, the subjective view of the employer were the sole determining factor, the Tribunal's ability to consider the reasonableness of the action would

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be eliminated. Equally, to say that the Tribunal would be able to review every case and apply its own views to the facts (and thus substitute its own views for those of the employer) is also not accepted. The correct approach is a mixture of the two. Thus it is permissible for the Tribunal to look at the employer's honest and genuine belief, however, that belief must be upon reasonable grounds.

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

3.10 Mrs Hernandez based her explanation of the Complainant's dismissal on "undesirable bad conduct" being both past and present conduct. The past conduct is on the basis of incidences of alcohol intake, rudeness to customers and unkempt appearance, but principally on the alcohol element, perhaps being the catalyst for the other alleged behaviour. However, there was no warning ever issued for alcohol intake or drunkenness. Certainly, one would have expected a bar to have been extremely concerned when one of its employees was drinking whilst at work! However, there is no documentary evidence to show that this was of any great concern up to the date of dismissal. We only have Mrs Hernandez' assurance that Mr Benayad was an alcoholic whom she was seeking to "care for" as an act of charity. The Tribunal does not accept that a businesswoman would allow such an employee, with an alleged known alcohl problem, the independence given to Mr Benayad at Casa Antonio.

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3.11 It is accepted that a history of alcohol abuse, being drunk or slightly so at work, could allow an employer to submit that a final act involving alcohol would allow the employer to regard it as the "last straw" in a series of acts of misconduct. But even then the employer's actions would need to be reasonable in the light of all of the past history between the employer and the employee. For example, in Siverstone v ECI (Midlands) Limited [1976] IRLR7IT an electrician's failure to turn up at a site when a foreman had cancelled unofficial transport arrangements was found by an Employment Tribunal to be an unreasonable final incident in an accumulation of complaints.

3.12 However, it was Mrs Hernandez' primary submission that the Complainant's dismissal was due to the Complainant, or at least having an alcohol problem, being an alcoholic, which in turn gave rise to "gross misconduct". Yet, despite this there is no written proof of Mrs Hernandez ever being worried as to the Complainant's alcoholic intake or state. There is no concern in either of the two written warnings that Mrs Hernandez had any cause for concern as to Mr Benayad's alcoholic intake,state or consequential behaviour. Certainly, this would lead one to believe that Mrs Hernandez was quite happy, in her mind, to allow an alleged alcoholic to be in full charge of a bar for 9 or so years with very little (if any) minute by minute supervision. The only two warnings in evidence relate to "bad behaviour", "lack of cleanliness" and possible "loss of money" and "taking days off without consent". There is no mention of alcohol. Yet "alcohol" is central to Mrs Hernandez' submissions. One cannot accept that over the period of 18 years, (8 or so as barman) something so major, so important, can be tolerated for so long.

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3.13 Mrs Hernandez also made submissions, which were corroborated by Mrs Gonzalez as to Mr Benayad being rude to customers. After 18 years, again it does seem rather strange that very little, if anything, had been done to discipline Mr Benayad. 18 years is a very long time for anyone to allow a bad tempered, rude, alcoholic employee to remain in charge of a bar.

3.14 The medical evidence of both Doctor Borge and Doctor Sayed, to whom the Tribunal is indebted for their clear testimony, showed that the Complainant's illness was due to "acute renal failure with hypertension, hematuria and Proteinuria". Could this have been caused by alcohol or alcohol abuse? These were questions put to the doctors by Mr Feetham and which could not be answered with any certainty. Indeed, there is more doubt than certainty cast on the submission that Mr Benayad's admission to hospital had been caused by his alcohol intake.

3.15 Given that the Respondent believed the Complainant's hospital admission to be due to alcohol, was Mrs Hernandez correct and acting reasonably by summarily dismissing the Complainant? Could the Respondent's action to summary dismissal fall within the band of reasonable responses? As Donaldson LJ (as he then was) put it in Union of Construction, Allied Trades and Technicians v Brain [1981] IRLR 224 @ 227, CA "this involves the Tribunal asking has the Employer...acted reasonably in treating this conduct as a sufficient reason for dismissing the employee".

3.16 In the Tribunal's view, the Respondent did not take all relevant circumstances into account. Mrs Hernandez, or Mrs Gonzalez, allegedly spoke to a nurse who quite unprofessionally (and as it turned

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out incorrectly) advised them that "the Complainant's body was intoxicated". Given that the nurse was not called to give evidence, or at least was reluctant to do so, it is clear that Mrs Hernandez should have spoken to "qualified" medical staff for a correct diagnosis. The Tribunal would comment that it is highly unprofessional for information, (incorrect information as it turned out) such as that given by the nurse, to have been given to complete strangers. The consequences, as has been proved in this case, can be quite severe.

3.17 Mrs Hernandez did not make a reasonable assessment of the circumstances. The Complainant had been employed for 18 years. Two or even three written warnings over a such a long period of time is indicative of a fairly good employment record. Indeed, the only two warnings of which there is documentary evidence do not even relate to alcohol. In King v Motorway Tyres and Accessories Limited [1975] IRLR 51 IT an employee's six year long service with a satisfactory record including a promotion was successfully used to make a dismissal too severe a penalty for an employee who had used improper and abusive language to another manager - the Tribunal held that a severe reprimand and a final warning were the only reasonable penalty in the circumstances.

3.18 Notwithstanding all the foregoing, the key to the entire case was contained in the conversation held between Mrs Hernandez and Mr Benayad the day after he was discharged from hospital.

Mrs Hernandez confirmed during cross examination, that when the Complainant returned to work following his discharge from hospital, she had told the Complainant that if he went to Morocco (as he was advising her that he intended to do, during his official medical

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certificate period) he should not return to work. If one intended to summarily dismiss an employee, surely one would not make such a statement? Either he was dismissed then and there or he was not. In this case Mrs Hernandez was threatening the Complainant with dismissal if he continued being unwell. Hardly good employer-employee practice. This Statement was a threat. It seems patently obvious that Mrs Hernandez had no intention of dismissing the Complainant at that time. It was only when the Complainant advised her that he intended using his sick leave to travel to Morocco rather than resume work that Mrs Hernandez then decided to dismiss the Complainant. It is the Tribunal's view, that it was not the alleged misconduct, supposed alcohol intake etc that was the reason for dismissal, but the Complainant's decision to use his "sick leave period" to travel to Morocco when Mrs Hernandez had wanted him to work over that period.

3.19 This, in the Tribunal's view is an unreasonable response to an employee's illness. At that precise moment in time the Respondent via Mrs Hernandez quite obviously had no thought of dismissing the Complainant for misconduct of any sort. The dismissal only came about when the Complainant insisted on travelling to Morocco, which he was quite entitled to do. So long as he returned to work on the day immediately after the expiry of the medical certificate period Mr Benayad was entirely in his right to recuperate during his official sanctioned 'sick leave'. Whilst Mr Feetham attempted to undo the damage made by Mrs Hernandez' evidence, there is little doubt that the Complainant would still be working at the Respondent's premises today had he not decided to travel to Morocco.

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3.20 It is, therefore, the Tribunal's finding that the Complainant was unfairly dismissed for the reasons given above.

AWARD

The following sums are awarded to the Complainant:

1. Basic award - £2,200.00
2. Compensatory Award (104 weeks x £140.00) - £14,560.00
3. The Respondent is also to add missing social security stamps. Submissions were made, by the Complainant that 133 social security stamps were missing, having been unpaid by the Respondent. Written submissions are to be made by the Complainant in respect of the period to which these relate and the sums due in respect of each period. In the event of these submissions being disputed by the Respondent oral submissions can be made at a Hearing.

No order as to costs is made given that that neither party made any submissions in respect thereof.

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ISAAC C MASSIAS LL B

CHAIRMAN

1st September 2003

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INDUSTRIAL TRIBUNAL GIBRALTAR

BETWEEN **CASE NO.16/2001**

AHMED BENAYAD

Complainant

and

BAHIA CATERERS LIMITED

Respondent

JUDGEMENT

The matter of the determination of the compensatory award has been referred to this Tribunal for reconsideration by virtue of an undated Consent Order, unsigned by the Registrar of the Supreme Court (Civil Appeal 5 of 2003).

1. The facts are as stated in my original judgment dated 1st September 2003.

2. Following a full re-consideration of the grounds of the appeal as pertaining to my original judgement I advise that the following sums are awarded to the Complainant:-

2.1 Basic Award

£2,200.00 (s.72(i) - Regulation 2, Industrial Tribunal (Calculation of Compensation) Regulations 1992).

2. 2 Compensatory Award

2.2.1 Although the Tribunal has a wide discretion under s.72 to determine the amount of the compensatory award, the loss to which the compensatory award is designed to apply is financial in nature. The financial element being the financial loss to the employee insofar as that loss is caused by the employer. This clearly includes expenses incurred and loss of financial benefits caused by the dismissal, particularly loss of income. However, what it does not include is compensation for non-pecuniary loss such as unpleasantness and inconvenience, injured feelings, or loss of face, unless these are capable of being translated into calculable financial loss.

2.2.2 There can be no element of exemplary or punitive damages contained within the calculation of compensatory award. The principle that the purpose of compensation is only to compensate for financial loss and not to express disapproval of a Respondent's behaviour has until recently been widely followed, at least in the ground rules governing the compensatory award.

2.2.3 In W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] ICR 662, HL the House of Lords, per Viscount Dilhorne, agreed that an award of nil compensation was appropriate [under s .123(1) Employment Rights Act 1996] where evidence satisfied an industrial tribunal that the employee had not suffered any injustice:

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"s.123(1) does not... provide that regard should be had only to the loss resulting from the dismissal being unfair. Regard must be had to that, but the award must be just and equitable in all circumstances and it cannot be just and equitable that a sum should be awarded in compensation when in fact that employee has suffered no injustice by being dismissed."

In that case, the employee was found to be unfairly dismissed because the employers had no valid reason, but compensation was addressed at nil because evidence of misconduct coming to light after the dismissal indicated that the employee had been behaving fraudulently towards his employer during his employment.

2.2.4 Whilst arguments were made in this case as to misconduct and alcohol abuse as justifying the dismissal, none of these arguments were proved to any degree of satisfaction. The accusations were made as a seeming attempt at finding an excuse, any excuse, for the dismissal - after the event. No recent written warnings had been given, if indeed such behaviour was the true reason for the dismissal after Mrs Hernandez's damning confirmation that she would not have dismissed Mr Benayad had he not insisted on using his sick leave period to travel to Morocco. As mentioned in my original judgement, there was no question in Mrs Hernandez' mind of dismissing Mr Benayad up to the point that he insisted on using his medically certified leave to travel to Morocco. Obviously, his behaviour was deemed to be perfectly acceptable to Mrs Hernandez up to that point in time otherwise she would have issued written warnings. Mrs Hernandez' attempt at proving that verbal warnings had been given, by bringing witnesses who seemed on examination to be friendly with Mrs Hernandez and not wholly independent, did little to prove that any warnings had in reality been given. As set out in the previous Judgement, on the facts brought before the Tribunal there can be no doubt that Mr Benayad was unfairly dismissed. For the avoidance of any doubt, the mere fact that Mrs Hernandez confirmed that she would not have dismissed Mr Benayad had he not decided to go to Morocco during his sick leave proves that her decision was not based on fault but on emotion. Even a sick employee, with a medical certificate has a right to recuperate during that period of time and Mrs Hernandez dismissed on the spur of the moment not because of past conduct, but simply because a sick employee required to use his 'sick leave' and she did not want him to have this time, even though he was entitled to it. Employment does not equate to slavery. Had Mr Benayad decided to work he would not have been dismissed. Consequently, Mrs Henandez did not dismiss Mr Benayad because of alcohol abuse or bad behaviour, but for doing what he was legally entitled to do...take sick leave. This equates to unfair dismissal. This one act speaks for itself as to the fact of the matter.

2.2.5 In the Tribunal's view, if Mr Benayad's behaviour was so bad or becoming so bad as to threaten his employment he should have been given a written warning as to his alleged alcoholic based (or other) behaviour, all of which behaviour was raised but not proved at the hearing.

Mr Benayad was, unemployed for 59 ½ weeks. Had he been employed he would have received £140.00 net pay x 59.5 weeks = £8330.00 net.

This sum of £8330.00 is also awarded as the employer must take the employee as he or she finds him. This loss consists of the financial loss suffered by Mr Benayad during a period, which he could have been expected to be employed by the Respondent. The Tribunal has little doubt that Mr Benayad was a good worker, actually valued by the Respondent and had Mr Benayad remained in Gibraltar as opposed to using his sick leave as it was intended to be used, he would still be employed by the Respondent to this day. Where an employer unfairly dismisses an employee, whether or not in poor health then the loss occurring from prolonged

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unemployment has been held to be attributable to the dismissal, that is "action taken by or on behalf of the party in default". per Fougere v Phoenix Motor Co.Ltd [1976] ICR 495, [1976] IRLR 259, EAT.]. Mr Benayad's unfair dismissal resulted in a protracted period of unemployment, caused by the employer's default. Mr Benayad is therefore entitled to be compensated for this loss, caused by the employer's unfair dismissal.

2.2.9 In conclusion, under this Compensatory heading this Tribunal awards a total sum of £8,330.00 made up of the foregoing amounts

Loss of Net Salary 59½ weeks	-	£ 8,330.00
		£ 8,330.00

From this Compensatory Award the sum of £1802.00 is deducted, being for sums of unemployment benefit and other monies received, as follows:-

Unemployment and other benefits	-	£1,872.00
Cash received	-	£ 730.00
		£1,802.00

Therefore, the total amount ordered under this Compensatory Award heading is £6,528.00. This sum should be added to the Basic Award.

ISAAC C MASSIAS LL B
CHAIRMAN
21st September 2004