

**IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR**

CASE No. 2/2001

Between

**MARILOU ALVEZ**

Complainant

and

**GIBUNCO MANAGEMENT LIMITED**

Respondent

**JUDGMENT**

G Licudi for the Complainant.  
JJ Neish QC for the Respondent.

The Complainant had been employed by the Respondent on the 12th December 1994. With effect from the 1 June 2000, her Terms of Engagement were varied in that her wages were increased from £15,041 per annum to £15,221.52 per annum. In late August 2000 she was informed verbally by Mr Juan Ruiz Vasquez, the Respondent's Manager at the Respondent's Petrol Station at Winston Churchill Avenue, that her wages were to be reduced to £11,000 per annum and that she was being transferred to the Respondent's head office at Europort to carry out receptionist duties. The wage reduction was subsequently confirmed verbally to the Complainant by Mr J Bassadone, a Director of the Respondent. On the 9 October 2000, the Complainant's employment with the Respondent was terminated.

The above facts are common ground between the parties. The Notice of Appearance of the Respondent raised as a defence to the Originating Application that the Complainant "was changed to a different job as she was not discharging her job (or previous ones) competently. The new job entailed a salary reduction and was an alternative to dismissal". At the hearing, the Respondent did not pursue this line of defence but relied on the other defences raised in its Notice of Appearance. By agreement of both Counsel, these issues were heard as a preliminary point to determine liability in this case.

The preliminary point to be determined is whether the Complainant's employment was terminated by agreement reached between the parties or their representatives on the 9th October 2000, or alternatively, if there was no such agreement, whether any claim of the Complainant against the Respondent for unfair dismissal was compromised. As a result of the Respondent conceding the point, the Tribunal has not heard any evidence as to whether the sequence

of events leading to the 9 October 2000 constituted a constructive dismissal by the Respondent of the Complainant.

The onus of establishing that there has been a dismissal of the Complainant lies on the Complainant. Once the Complainant has discharged this onus, it is then for the Respondent to satisfy the Tribunal that the claim of the Complainant was compromised, it being conceded that the dismissal was unfair.

For the Respondent, the Tribunal heard the evidence of Mr Stephen Serrano, the Respondent's accountant. Mr Serrano's evidence was as follows.

Mr Serrano was present at three meetings which took place at the Respondent's offices on the 9 October 2000. The first meeting took place at about 4.00 pm and present, as well as himself, were Mr Anthony Morillo, Senior Labour Inspector, and Ms Hazel Cumbo and Mr Daniel Golding, the two latter being Labour Inspectors. Hereafter I refer to Mr Morillo, Ms Cumbo and Mr Golding collectively as "the Labour Inspectors". Mr Serrano stated that the Labour Inspectors had attended at the Respondent's premises without an appointment and Mr Morillo had told the receptionist that he had to speak to Mr Charles Patron, the Respondent's Financial and Administration Manager. On being told that Mr Patron was unavailable, Mr Morillo continued to insist on a Meeting. He was not to be put off. To deal with this situation, Mr Serrano met the Labour Inspectors. He described how he was harangued by Mr Morillo over the way the Respondent had treated the Complainant and a co-worker, a Ms Tina Bird. It must be stated that Mr Morillo in his evidence denied that this had been the tone of the meeting and described it instead as a friendly meeting. At that meeting, Mr Serrano informed Mr Morillo that he did not have the authority to deal with the matter raised and invited him to return at 5.00 pm to meet Mr Bassadone.

The second meeting took place at 5.00 pm the same day at the same premises. Present were the Labour Inspectors, Mr John Bassadone, Ms Michelle Bassadone and Mr Serrano. Mr Serrano alleged that Mr Morillo again harangued the Respondent's representatives over the way the Complainant and Ms Bird had been treated. According to Mr Serrano, Mr Morillo stated that the Labour Inspectors were there to try to resolve the dispute between the Complainant and the Respondent and that one way of resolving the dispute was by the Respondent making a payment to the Complainant. Though this was not a case of redundancy, Mr Serrano said that Mr Morillo tabled the statutory formula for arriving at a redundancy payment and said that the Complainant and Ms Bird were prepared to settle on these redundancy terms. Mr Serrano said that Mr Bassadone agreed to consider this offer to settle on redundancy terms and at that the meeting ended.

The third meeting took place at 6.00 pm the same day at the same premises. Present were Mr John Bassadone, Mr Serrano, the Complainant and Ms Bird. Mr Serrano said that Mr Bassadone asked the Complainant and Ms Bird

whether they would continue to work under the new terms and they both replied that they would not. Then Mr Serrano said, and on this hinges the case of the Respondent, that Mr Bassadone accepted the offer of Mr Morillo to settle the matter by making the Complainant and Ms Bird redundant and making them a redundancy payment on terms prescribed by law. A schedule was provided to them setting out the payment the Respondent would make to them. Neither the Complainant nor Ms Bird said anything and they both left the meeting with the schedule.

For the Complainant, the Complainant and the Labour Inspectors gave evidence.

The Complainant said in evidence that after being told by Mr Vasquez about the reduction in wages in late August 2000, she had gone to see Mr Bassadone to complain of this. She had left that meeting thinking that Mr Bassadone would re-consider his decision. In mid-September 2000, she went to see Mr Morillo and explained to him what had happened. Mr Morillo was said to have advised that this was a clear case of constructive dismissal but that any action would have to be deferred until the wage reduction was confirmed.

The Complainant received her wage slip on or about the 26 September 2000 and this confirmed the wage reduction. She was also shown a Notice of Variation of Terms of Engagement which had been signed by Mr Patron. She was asked to sign this form but refused to do so.

The Complainant and Ms Bird returned to see Mr Morillo. According to the Complainant, she wanted Mr Morillo to see Mr Bassadone to let him know that what he was doing was wrong. She says she did not authorise Mr Morillo to negotiate or reach any agreement on her behalf.

At the 6.00 pm meeting of the 9<sup>th</sup> October 2000, she and Ms Bird attended on Mr Bassadone at his office. She was very shaken by the events that had taken place. She was asked whether she would return to work on the new conditions, to which both Ms Bird and she replied that they would not. Mr Bassadone then gave them each a single sheet of paper. The Complainant folded the sheet given to her without saying anything and at that the meeting ended.

The Complainant denied that she ever made an offer, by herself or through any of the Labour Inspectors, to the Respondent to terminate her employment on redundancy terms or to compromise any claim of hers against the Respondent. Instead she alleged that it was the Respondent who made an offer to her to terminate her employment by mutual accord upon the payment to her of a sum of money or otherwise to compromise her claim with such a payment. This offer, she stated, she never accepted.

The three Labour Inspectors gave evidence. Mr Morillo stated that he had seen the Complainant and Ms Bird and had taken note of their grievances. He was of

the view that the actions of the Respondent constituted constructive dismissal. He consulted the Attorney General's Chambers for their advice on the law of constructive dismissal in order to check that he was correct and his opinion was confirmed. He proposed that the two ladies return to him once they had written evidence of the proposed reduction in wages. Without this written evidence he was of the view that it was premature to take any action. He saw this as a minor labour dispute.

The ladies did meet with Mr Morillo again and Mr Morillo proposed to meet the representatives of the Respondent. There is evidence that telephone calls were made to the Respondent's office but, there being no follow up from the Respondent, Mr Morillo attended personally at the Respondent's premises together with Ms Cumbo and Mr Golding. Mr Morillo met Mr Serrano first in what he described as a friendly meeting. On being told that Mr Serrano did not have the authority to deal with the matter, he insisted on a meeting with Mr Bassadone. The meeting was arranged for 5.00 pm that same day.

At the 5.00 pm meeting, Mr Morillo put across to Mr Bassadone his view that the Respondent had acted illegally in relation to the Complainant and Ms Bird. According to Mr Morillo, Mr Bassadone admitted that this was a case of constructive dismissal. After this admission Mr Morillo said that the meeting moved towards discussing a solution to the problem. As part of what he perceived to be his role in resolving the dispute, Mr Morillo tabled possible solutions to the problem. These included a payment by the Respondent to the Complainant on some form of redundancy terms. Mr Morillo explained the statutory formula that would apply if this had been a redundancy situation. Mr Morillo said that Mr Bassadone agreed to consider the matter and make an offer to the two ladies.

Mr Morillo was adamant that he did not attend the meeting as the representative of the Complainant and Ms Bird and that he did not make an offer of settlement to the Respondent. He was there to resolve a minor labour dispute and did not take sides. His object was to get the Respondent to make a proposal to settle the dispute but he had no authority to make or accept any offer on behalf of the Complainant. Once Mr Bassadone confirmed that he would make an offer to the Complainant and Ms Bird, Mr Morillo felt he had achieved what he had set out to do in resolving this minor labour dispute.

Mr Neish was severely critical of the involvement of Mr Morillo and the other Labour Inspectors. According to Mr Neish, they were not acting as impartial mediators but had clearly taken the employees' side in the dispute against the Respondent. None of the Labour Inspectors had sought to hear the Respondent's view of what had occurred prior to reaching the conclusion that this was a case of constructive and unfair dismissal. They had advised the Complainant and Ms Bird of the necessity of obtaining documentary evidence of the constructive dismissal, thereby assisting the two ladies in building their case against the Respondent. They, as public servants, had used their public

office and the public resources of their office and the office of the Attorney General to assist members of the public in a private dispute with their employers. They had taken the role which a legal advisor would and should have assumed in these circumstances. They had met the two ladies in the Duck & Firkin Bar at Europort, not an appropriate location for public officers to carry out their public duties. At the request of the two ladies, they had made use of what they perceived were their powers under the Employment Ordinance to enter the premises of the Respondent and to impose their demands for a meeting on the Respondent. As a means of pressuring the Respondent they had subjected the Respondent and group companies of the Respondent to an investigation of their employment records, which, I would add, they found in order. Mr Morillo referred to the Complainant as a "Client", explaining that this was the expression habitually used when referring to a member of the public who approached them with a complaint.

Mr Morillo countered these criticisms by stating that the Labour Inspectors carried out their duties without the benefit of a legal training nor a training in the processes of mediation. In essence, they acted in good faith in the manner they perceived would resolve such disputes. They genuinely attempted not to take sides. They were on a constant learning curve, learning about aspects of mediation from every case, including the present. But, most important for the present case, Mr Morillo insisted that he had no authority and had in fact made no offer to the Respondent on the Complainant's behalf. He had left the 5.00 pm meeting with Mr Bassadone believing that the Respondent had understood that they were to make an offer to the Complainant and Ms Bird, which the latter were free to accept or reject.

Ms Hazel Cumbo and Mr Daniel Golding, the other two of the Labour Inspectors also gave evidence. They both supported the evidence of Mr Morillo to the effect that they had not at the said 5.00 pm meeting or otherwise made any offer to the Respondent on behalf of the Complainant. It was up to the Respondent to put an offer to the employees and then for the employees to accept or reject such an offer. It was not up to the Labour Inspectors to make or accept any offer and in fact neither had they accepted any offer on behalf of the Complainant, or Ms Bird, nor concluded any settlement. In their experience they had never in the past made such offers of behalf of employees.

My conclusions on the evidence and the submissions of Counsel are as follows:

1. Mr Neish presents a very forceful argument in relation to the involvement of the Labour Inspectors in this case. His criticism of the Labour Inspectors is directed against their perceived role as mediators. He submits that, for the reasons given in his cross-examination of the Labour Inspectors and set out above, their involvement in the present case could not be described as that of mediators. But the argument fails for the reason that, although the Labour Inspectors said in evidence that their intention was to mediate between the parties, they were not mediators, in the true

meaning of the term, in this dispute. In my view, the process of mediation must start of with all the parties agreeing to submit to mediation. Mediation must be by consent. It cannot be imposed on any party. If any party does not submit to mediation, they are free to rely on their rights at law.

2. Mr Morillo saw the Complainant and Ms Bird and took a view that this was a clear case of constructive dismissal. It cannot be denied that Mr Morillo reached this conclusion prior to the meeting of the 9th October 2000 without hearing the Respondent's version of events. As Mr Neish submitted, in my view correctly, a position of impartiality would have required Mr Morillo to have made some attempt to hear the Respondent's version of events. However, I find that this point has no bearing on the issue to be decided. It is not contested by the Respondent that, if my ruling is that there was no agreement to terminate the Complainant's employment, this was a case of constructive dismissal which was unfair. The fact that the Labour Inspectors arrived at a conclusion precipitously which the Respondent has later not contested as the correct conclusion, cannot influence my decision in this case.
3. Similarly, the exercise of the powers by the Labour Inspectors leading to the meetings of the 9th October 2000 is not in my view relevant to my decision. The Record of Minor Labour Dispute produced in evidence suggests a hint of obstructionism by the Respondent in that there was no adequate response to telephone messages from the Labour Inspectors. This led to the Labour Inspectors attending in person at the Respondent's premises where on arrival they did not succeed in speaking to a manager with responsibility on this issue. This may have prompted them to threaten the Respondent with the exercise of their actual or perceived powers under the Employment Ordinance.
4. Mr Serrano says he had been harangued by Mr Morillo but I am not satisfied that the Respondent was compelled by the Labour Inspectors to take any action or decision which was not taken freely. There was sufficient time for the Respondent to seek legal advice on what had happened and, if need be, to have their legal representatives present if they so wished. As it was, the meetings were not imposed on the Respondent, whose representatives could have declined to meet the Labour Inspectors, but were held by mutual accord. Only Mr Serrano gave evidence for the Respondent and from the way he answered the questions put to him in cross-examination, I find that Mr Serrano had sufficient experience not to be intimidated, and was unlikely to have been intimidated, by anything the Labour Inspectors may have said.

5. It is evident that no agreement was reached at the 4.00 pm meeting.

The case revolves around what occurred at the 5.00 pm meeting. As stated above, present were the three Labour Inspectors, Mr John Bassadone, Ms Michelle Bassadone and Mr Serrano. I have heard the evidence of the three Labour Inspectors and of Mr Serrano. No notes of the meeting appear to have been taken by any of those present. The evidence of Mr Serrano is that Mr Morillo told Mr Bassadone that the Complainant and Ms Bird would settle on the basis of a payment made according to the formula for redundancy. The three Labour Inspectors deny that this was said at the meeting. They say that first they made the Respondent realise that a claim arising from the constructive dismissal could lie and then various possible resolutions to the dispute, including such a payment, were discussed. They say that these possible solutions were tabled but that it was for the Respondent to decide what offer to make to the Complainant and Ms Bird, if any. Such an offer would then have to be accepted or rejected by the Complainant and Ms Bird.

There is a fine distinction between the Labour Inspectors proposing to the Respondent to make an offer to the Complainant and Ms Bird, which is the case for the Complainant, and the Labour Inspectors making an offer to the Respondent, which is the case for the Respondent. In the course of a meeting said to have lasted 15 minutes, the distinction may easily have been blurred. Having reviewed the evidence, I am of the view that the Labour Inspectors did not make such an offer. I accept their version of what transpired at that meeting. Furthermore, the evidence of all three of them, which I accept as truthful, that as a matter of course in similar cases they had always acted in the same manner by inviting the employer to make an offer to an employee supports this finding.

6. As a further ground for my decision and accepting only for the sake of argument that the Labour Inspectors made an offer to the Respondent to settle on behalf of the Complainant and Ms Bird, the question is whether they had authority to make such an offer. There is no evidence of express authority conferred by the Complainant. There is also no evidence that the Labour Inspectors had usual or customary authority to make any such offer. For the Labour Inspectors to have had apparent authority to act on behalf of the Complainant, there must have been a representation from the Complainant to the person relying on such representation such as to make it appear that the Labour Inspectors had authority. There is no evidence of any such representation.

Accordingly I find that even if the Labour Inspectors had made an offer to the Respondent on behalf of the Complainant, they had no authority in law to make an offer so as to bind the Complainant.

7. Neither Mr John Bassadone nor Ms Michelle Bassadone have given evidence to the Tribunal, notwithstanding that they were important participants in the meetings. The Tribunal has been deprived of their evidence as to whether Mr Serrano's understanding of what had been the outcome of the critical meetings was in fact also that of Mr Bassadone or Ms Bassadone. Crucially, the Tribunal does not have evidence as to their state of mind at the time of the meetings.
8. Furthermore, what transpired at the 6.00 pm meeting supports the case of the Complainant. According to Mr Serrano, that meeting started with Mr Bassadone asking the ladies whether they would accept to continue at work under the new conditions. This question would be inconsistent with the offer alleged by the Respondent to have been made by Mr Morillo at the 5.00 pm meeting unless that alleged offer of Mr Morillo were to be construed as a conditional offer. On the balance of probability, I find that an offer to settle on redundancy terms conditional on the refusal of the Complainant to continue in her employment was not made at that meeting by Mr Morillo to the Respondent.
9. Additionally, the Respondent sought to have the Complainant sign a discharge on receipt of the payment tendered to her. This also suggests that the Respondent understood that, notwithstanding what had transpired earlier, any agreement would be closed and that the Respondent would be discharged from its obligations to the Complainant upon signature of the letter of discharge by the Complainant and not earlier. This letter of discharge was never signed by the Complainant.

I find that the employment of the Complainant was not terminated by mutual consent and that the claim of the Complainant was not compromised. Consequently, on the basis that the Respondent has not tendered any reasons to justify the dismissal of the Complainant as fair, I find that the Complainant was unfairly dismissed by the Respondent.



P X Nuñez  
Chairman

25<sup>th</sup> March 2002.