INDUSTRIAL TRIBUNAL HEARING

Case No. 22/2002

Edward Perez

Complainant

and

Calypso Tours Limited

Respondent

J Bossano for the Complainant
C Rocca for the Respondent

JUDGEMENT

Mr Edward Perez ("the Complainant") was on the 13th November 1995, employed on a full time basis as a Driver/Guide by Calypso Tours Limited ("the Respondent"); prior to this the Complainant had been working for the Respondent on a part time basis for approximately three years. On the 25th October 2002, the Complainant was summoned to the office of Mr Roy Ballestero, a director at the time of the Respondent, and informed that his employment with the company was being terminated. The Respondent was at that time handed a letter dated 25th October 2002 (Exhibit GG6), which after referring to previous written warnings, provided that the reason for the termination was that the Respondent was *"simply no longer able to tolerate your continuous improper behaviour which puts passenger safety, comfort and the company's general customer service record in jeopardy"*. In the ETB Termination of Employment form dated 31st October 2002, filed by the Respondent, and which is unsigned by the Complainant, the reason for the termination is given as "Misconduct".

On the 13th November 2002, the Transport and General Workers Union ("the Union") acting on behalf of the Complainant filed an Originating Application claiming unfair dismissal on the grounds that:-

(i) *"it is not true that I have received three written warnings prior to my dismissal";* and

(ii) *"the employer did not have good and sufficient cause to dismiss me and did not follow a reasonable procedure".*

On the 29th November 2002, the Respondent filed a Notice of Appearance in which the reason for dismissal was given as *"repeated misconduct"* and provided, by way of explanation to such a phrase, that *"despite repeated verbal and written warnings, the Complainant continued to conduct himself in an unacceptable manner".*

By the time the case came before this tribunal the Complainant was no longer represented by the Union but rather by Mr Bossano. Moreover, Mr Bossano had changed the emphasis of the Complainant's case since it was alleged that the decision to dismiss the Complainant without notice was not an action brought about by virtue of persistent misconduct by the Complainant but rather the first step in a programme of reduction of the company's labour costs, and that rather than have to pay the Complainant what he would lawfully have been entitled to they trumped up the dismissal on the grounds of misconduct. Needless to say such an allegation is denied by the Respondent but due to such an allegation having been made this case, with the consent of both parties, was heard together with Industrial Tribunal case 24/2002.

This, then is the background to the case.

In the course of the hearings for Case 24/2002 and the present one the following persons gave evidence:- George Gaggero, Roy Ballestero, Clive Moberley, Rafael De La Chica, Robert Porro, Alison Gabay, Elisa Galan, Francis C Martinez, Hector Cortes and the Complainant. If one puts aside for the time being, Mr Bossano's allegation that the real reason for the dismissal was a desire on the Respondents' behalf to reduce its wages cost base and proceeds to consider the case on the basis that the dismissal was in fact on the grounds of misconduct, then the only relevant witnesses are Messrs. Gaggero, Ballestero and Perez. Turning then to consider the case on the basis as it was originally put by both the Complainant and the Respondent in the Originating Application and Notice of Appearance respectively.

The Three Written Warnings

In the Respondents' letter to the Complainant dated 25th October 2002, (Exhibit GG6) reference is made to the Complainant having *"already received three written warnings".*

In the Respondent's letter to the Union also dated the 25th October 2002 (Exhibit GG8), Mr Ballestero refers to Mr Perez having been warned *"at least four times in written form".*

So what then is the evidence in relation to these written warnings.

The first so-called written warning is contained in Exhibit GG1. It is a letter dated 28th August 1997, addressed to the Complainant in which it is alleged that the Complainant *"showed lack of respect and countermanded the authority of your immediate superior"*. The letter, written by Mr Ballestero, refers to the Respondent wishing to put matters in writing for the purposes of *"clarifying for your information, your position"* and to *"the Company having to take steps to protect its interests"* should the Complainant not elicit *"co-operative supportive and respectful behaviour"*.

In evidence, Mr Gaggero stated that he did not specifically remember this letter or the incident to which it refers, whilst Mr Ballestero could only recall that the supervisor in question and the Complainant had "disrespected each other" and that the Complainant had not followed the instructions given to him by the supervisor.

In evidence the Complainant admitted to having an argument with the supervisor but denied having received the letter even though he agreed that the address on it was his own. In my view, the Complainant did receive the letter.

The second so-called written warning is contained in Exhibit GG2. It is a letter dated 9th February 1998, addressed to the Complainant in which reference is made to an incident on the previous day in which as a result of the Complainant's negligence, the rear window of the coach was broken. The letter ends up by warning the Complainant that *"any further complaint against you, your next or any future letter will be one of dismissal"*.

In evidence the Complainant admitted the incident and that it was his fault it had occurred. The Complainant whilst admitting the letter was properly addressed to him nevertheless denied having received it but accepted that he had spoken to Mr Ballestero with reference the incident.

In my view, the Complainant was in February 1998, clearly aware of the seriousness with which the Respondent viewed the incident irrespective of whether or not he received the letter.

In this letter reference is made to another letter dated 17th December 1997, which has not been produced and which neither Messrs. Gaggero or Ballestero could either recollect its contents or the incident to which it purported to refer. Moreover, the Complainant denied all knowledge of such a letter. I therefore completely disregard the reference to such a letter.

The third written warning is contained in Exhibit GG3. It is a letter dated 25th June 2001, directed to the Complainant in which reference is made to a previous meeting held with regard to problems encountered between Mr Carreras and the Complainant, that further encounters had occurred between both of them and

that the Complainant had insulted Mr Carreras, thereby aggravating the situation. The letter ends up informing the Complainant that the Respondent could not tolerate or accept such undisciplined and uneducated behaviour from one of its supervisors.

In evidence, Mr Gaggero stated that he did not know the details of the clash of characters between Carraras and the Complainant, whilst Mr Ballestero stated that he did not recall what the actual problem was, other than that Carraras and the Complainant had had words and that Carraras had also been sent a warning letter (Exhibit GG12) dated 21st June 2001.

In evidence the Complainant admitted to having received and thrown away the letter as well as having spoken to Mr Ballestero about the incidents; the Complainant's view was that as he had done nothing wrong he did not have to pay any attention to the contents of the letter.

These then are the three so-called written warnings to which the Respondent has referred the tribunal in support of its case.

Mr Rocca, on behalf of the Respondent, has submitted that the Respondent was justified and entitled to take into account all past warnings issued to the Complainant, and that the incidents which lead to said past warnings, when taken together with the incidents of October 2002, showed not only that the Complainant had received sufficient warnings of his past misconduct but also that all said past misconduct amounted to gross misconduct.

Mr Bossano's retort to this is that prior to October 2002, the Complainant had not been issued with any verbal and/or written warnings and that even if one or more written warnings had been issued it had elapsed and could not be taken into account.

With regard to the written and verbal warnings alleged, two questions arise; (i) was the Complainant issued with any warning and (2) if so, should it or they be considered to have elapsed by October 2002.

Whilst the ACAS Code of Practice suggests that a warning should be oral for relatively minor infringements but written for more serious contraventions the Courts appear to be relatively unconcerned about the form a warning should take. So what constitutes a *"warning"*. In my view a warning is any written or verbal statement made to an employee which clearly communicates to that employee that his employment is in jeopardy if in future he does not mend his ways and/or fulfil his contractual obligations to his employer. This being the case, can it be said that any one or all of Exhibits GG1 to GG3 are warning letters. In considering such a question I bear in mind that warning notices should be construed strictly against the person drafting it and should specify in

clear terms the time, day and date on which the warning is to commence and cease (Bevan Ashford v Malin 1995 IRLR 360).

The subject matter of Exhibits GG1 and GG3 are roughly the same but completely different to Exhibit GG2.

I do not consider the letter of the 28th August 1997 (Exhibit GG1) to have been a warning letter. It does not seem to me to be a letter which clearly communicates to an employee that his job is in jeopardy. It is a letter *"clarifying, for your information, your position"*.

However, Exhibit GG2, the letter dated 9th February 1998, is clearly a warning letter even though it omits reference to the date when the warning commences or is to cease.

With reference the letter of the 25th June 2001 (Exhibit GG3) , and whilst conceding that this is more of a boundary line case, it does not seem to me that this letter can be characterised as a warning letter. The letter does warn the Complainant that management will not tolerate or accept undisciplined and uneducated behaviour from one of its supervisors but it does not state or clearly communicate to the employee that his job is in jeopardy if there is a repetition of the incident(s) with Mr Carreras or anyone else; similarly it is with respect to the letter sent to Mr Carreras dated 21st June 2001 (Exhibit GG12), who after all was perceived to be the greater offender of the two employees insofar as the incident therein referred to is concerned.

In the case of Exhibit GG2, and assuming that I am wrong and that Exhibits GG1 and GG3 are warning letters, I am of the opinion that the warning provided in said letter, as indeed the others, had expired by October 2002. As previously mentioned none of the letters in question provided for a date on which the warning was to commence or end. Notwithstanding this, it seems to me that one has to infer from the circumstances of the case whether it is reasonable to consider that irrespective of whether an employer may not have taken previous action against an employee, on a particular date a warning previously given should be considered to have lapsed. (Kraft Foods Ltd v Fox (1977) IRLR 431). It does seem to me to be equitable and fair for warnings to be removed/cancelled from an employee's file after a particular period. As far as I am aware, this is the procedure implemented in England.

In this case, the first letter was issued over 5 years before the incidents of October 2002, whilst the second letter was issued over 4 years previously and the last letter over 1 year previously. The lengthy period involved together with the relatively minor nature of the breaches, the different subject matter of the various infringements referred to therein, the fact that the Complainant was made a joint supervisor after two of the incidents and that the Complainant was never disciplined or suspended, indeed was thanked on the 12th April 2002

(Exhibit GG11), all leads me to the conclusion that I should not, and do not, give any, weight to the contents or issue of any of the three said letters.

The Verbal Warnings

Whilst no reference is made to it in the letter of dismissal dated the 25th October 2002, (Exhibit GG6) to the Complainant, Mr Ballestero in his letter of the same date to the Union (Exhibit GG8) refers to *"the Complainant having been warned verbally on several occasions"*. In the course of the evidence Messrs. Gaggero and Ballestero repeatedly came back to the issue of repeated verbal warnings.

In evidence Mr Gaggero stated that whilst he did not deal with the Complainant himself he was given continuous reports by Mr Ballestero with regard to the Complainant's behaviour; some of which behaviour he might have witnessed himself. However, Mr Gaggero was unable to relate to any specific instances or incidents.

In evidence Mr Ballestero stated that apart from the incidents leading to the three written warnings there had been other issues which he had dealt with verbally with the Complainant because he felt they did not merit a warning; little things. Mr Ballestero further stated that it was normal for the Complainant to be explosive and upset whenever any incident was discussed with him and indeed that it was impossible to discuss anything with him. Mr Ballestero further stated that the Complainant was always abusive, shouting and insulting when confronted with anything or spoken to.

The impression which Messrs. Gaggero and Ballestero have sought to portray is that the Complainant was continually being given verbal warnings about his behaviour. Whilst I do not doubt that on occasions the Complainant's attention was drawn to things, and that his first reaction was one of over reacting, I do not accept the veracity of the impression sought to be portrayed for a whole variety of reasons including the following:-

(a) if there had been such continuous and daily incidents, I would have expected to see some written note or record of them especially in the light of the accepted fact that the Complainant had a very low boiling point when confronted with an accusation (who in management would want to put up with such daily confrontations);

(b) neither Messrs. Gaggero or Ballestero can recollect any particular incident which led to a verbal warning – they make the general accusation but cannot recall any specifics;

(c) it does not seem to me that Mr Gaggero would have put up with the Complainant in his employ for so many years if he had been receiving daily or continuous reports of the Complainant being abusive, aggressive,

insulting etc., especially without having issued to the Complainant written warnings that such daily/continuous incidents could not be tolerated.

(d) at no time did anyone state that the Complainant had been verbally warned that he would be dismissed unless he mended his ways or attitude. Indeed Mr Ballestero specifically stated that he had verbally dealt with the Complainant on little things that did not merit a warning. I have little doubt that Mr Ballestero in his conversations with the Complainant never informed the Complainant that unless he mended his ways he would be out of a job on the next occasion an incident arose. The fact that the Complainant was never charged with an offence or disciplined lends support to such a view.

In conclusion, I hold that the Complainant was not given any verbal warnings in the sense of the interpretation to be given to the word *"warning"*.

Report of the 12th October 2001

In his witness statement Mr Gaggero refers to this report (Exhibit GG4) as being a complaint received regarding the Complainant's conduct on the said date.

In his evidence Mr Gaggero stated that the report had been given to him by Mr Ballestero and therefore he knew nothing of its contents. In evidence Mr Ballestero stated, and insisted, that the report had been prepared by him from what Mr Perez and only Mr Perez had told him had occurred. Mr Ballestero confirmed that no complaint had been received from the security guard or anyone else against the Complainant and that it was a report supportive of the Complainant.

I have no doubt that this report was neither intended to be a complaint nor was it taken into account at the time consideration was given by Mr Gaggero as to whether or not to dismiss the Complainant. I therefore disregard this incident for the purposes of the determination to be made.

The Europort Incident

Whilst no reference to this incident is made in the Complainant's letter of dismissal (Exhibit GG6), it purportedly was one of the matters that was considered when the issue of the Complainant's dismissal was discussed. An incident which, in the Respondent's view, was material because of the organisational problems a banning would bring to the Respondent rather than because it was another example of the Complainant having words. It was referred to as the incident that broke the camel's back and the one which made the Respondent consider the Complainant's future with them.

In evidence Mr Ballestero stated that on the morning of the 24th October 2002, he had been telephoned by the chief of the security guards at Europort and told that the Complainant had been banned from entering the Europort garage as a result of an incident that had occurred. Mr Ballestero further stated that he did not recall when he had gone to Europort to speak to and receive the report (Exhibit GG5) from said security guard; that it would have been the 25th October at the earliest and possibly later than that. Mr Ballestero further started that he had assumed that the Complainant had been banned since he neither questioned whether such a ban could be effected or checked whether a ban had actually been implemented either then or at any time after. Mr Ballestero further stated that he had informed Mr Gaggero about the Complainant being banned to which Mr Gaggero had stated that the Respondent could not tolerate this any more and that this was the last straw. Mr Ballestero admitted that he was unaware that the Complainant had returned to the garage on finishing his shift on the 24th October and/or had entered the garage without problems on commencing his shift on the 25th October 2002. It follows from this that Mr Gaggero must likewise have been ignorant of such facts. Moreover, no letter or other document was produced by the Respondent confirming the Complainant's banning from the garage.

In evidence the Complainant admitted that there had been an incident with one of the guards at Europort as a result of which he had received a phone call from Mr Ballestero on the 24th October informing him of the complaint made. The Complainant further stated that at no time had Mr Ballestero referred to the Complainant being banned, and indeed that at the end of his shift on the 24th October and the commencement of his shift on the 25th October, he had entered the garage for the purposes of depositing and collecting respectively his coach without the guard on duty preventing or saying anything to him.

On the evidence heard I have no doubt that (1) the Complainant was at no time banned from entering the Europort garage (2) the Respondent made no attempt whatsoever to ascertain either whether in point of fact the Complainant was banned and/or conducting any meaningful enquiries to ascertain the veracity of either what Mr Ballestero had been told on the telephone by the security guard and/or what was subsequently included in Exhibit GG5 by a security guard and (3) in the light that no organisational problems had been reported to Mr Ballestero at the end of the Complainants shift and/or the next morning such a fact should have put the Respondent on notice that there was a possibility that the Complainant had not been banned as might previously have been thought.

In this respect it is pertinent to note that in Exhibit GG8, Mr Ballestero refers to the Respondent still gathering information on the incident; a statement made after the decision had been taken to dismiss the Complainant , and which according to Messrs. Gaggero and Ballestero's evidence, had already been implemented.

The Further Complaints

In the Respondent's letter of dismissal of the 25th October 2002 (Exhibit GG6), reference is made to four further complaints regarding the Complainant's conduct. It is accepted by both parties that these four complaints relate to three incidents; the evidence in respect of which is as follows:-

(a) Jews Gate – The letter refers to the Tourist Board having claimed and substantiated that the Complainant had damaged the barrier at Jews Gate. According to the evidence of both Messrs. Gaggero and Ballestero the allegation against the Complainant had been that he had literally driven the bus through the barrier at Jews Gate; a version which if correct would lead one to believe that a good deal of damage would be caused to the bus and the barrier. In actual fact, according to Mr Ballestero's evidence, prior to the 25th October 2002, the Tourist Office had not only refused to make a written complaint but had also never filed a claim for any damage to the barrier. Neither the damage to the barrier or the bus appears to have been of any great extent. It seems to me that these factors together with what on the face of it appears to be a reasonable explanation given by the Complainant to Mr Ballestero about the incident, should have led the Respondent to conduct further enquiries into the verbal allegation made by an employee of the Tourist Office, who had not been present at the scene and who refused to make a written complaint, before simply deciding that the Complainant was in the wrong.

(b) The School Party incident – The letter refers to the late pick-up of a school party and the fact that as a result thereof the Respondent had had to incur a higher fuel bill. In evidence Mr Ballestero stated that a school teacher had repeatedly phoned him asking where the coach was but interestingly enough, it was never said that an actual complaint had been made by either the school or the education department. The Complainant admits both of these allegations but points out that he was 15 minutes and not an hour late, and that whilst the Respondent had to pay 11 Euros more in fuel it had, by way of compensation, saved itself the lunch bill which the Complainant had forgone; both of which points were not denied by the Respondent.

(c) The TUI Complaint – The letter refers to the written complaint of an important customer with regard to the Complainant's refusal to follow the set itinerary for the tour and the Complainant's arguments with the representative of said customer. In evidence Mr Ballestero stated that TUI had submitted a written complaint (although none was produced to the tribunal) and summoned him to their offices in Spain at which it had been made clear to the Respondent that changes to the itinerary of tours would

not be tolerated. Mr Ballestero further stated that he had asked the Complainant for an explanation and the Complainant had stated that the road had been closed which was not correct. In evidence the Complainant insisted that Mr Ballestero had not spoken to him about the incident but that he knew a complaint had been made from Mr Rodriguez. This is clearly the most serious of the matters referred to in the letter in question and yet the Respondent by the 24th October, seems to have carried out no investigation whatsoever as to what had actually happened; a fact which tends to suggest either that the Respondent did not view the matter seriously or that it considered that TUI was in the wrong.

That then is the evidence with regard to the various strands that make up the Respondent's assertion that the Complainant was fairly dismissed for repeated misconduct amounting to gross misconduct. The gross misconduct being the sum of all the incidents referred to above since the Respondent concedes that with two exceptions (the TUI incident and the Europort incident) none of the said incidents could in themselves amount to gross misconduct.

The questions which this Tribunal has therefore to determine are:-

(a) what was the reason or principal reason for the dismissal; and

(b) if the reason or principal reason was misconduct on the part of the Complainant whether:-

(i) the Respondent did in fact believe the Complainant to be guilty of that misconduct;
(ii) there were reasonable grounds for holding that belief; and
(iii) at the stage that the Respondent formed that belief on those grounds, that it had carried out as much investigation into the matter as was reasonable in the circumstances of the case.
(British Homes Stores v Burchell 1980 ICR 303)

Mr Bossano has strongly argued that the fact that (1) the dismissal occurred just five or six days before the Respondent decided to make three persons redundant (2) the dismissal was decided on at a time when the Respondent was considering who and how many to make redundant (3) the Respondent had admitted that it had no intention to replace the Complainant with another driver (4) no notice of dismissal was given to the Complainant and (5) no opportunity was given to the Complainant to defend himself in a disciplinary hearing all indicated, if not proved, that the real reason for the dismissal was the Respondent's desire to save money rather than that the Complainant was guilty of gross misconduct. Having seen the witnesses, heard the evidence and looked at the documents, I have formed the view on the evidence that the principal reason for the dismissal was one of misconduct.

Turning then to the questions of whether the Respondent had reasonable grounds for holding that there had been misconduct on the Complainant's part and whether such a belief was based on the reasonable investigations conducted of the incidents.

As stated above with reference the Europort incident, I am of the opinion, on the evidence heard, that the decision to dismiss the Complainant was made by Mr Gaggero on the 24th October on being informed by Mr Ballestero of the contents of his telephone conversation with the security guard. I am also of the opinion that had it not been for the Europort incident the Respondent would not have been dismissed for misconduct. Such an incident coming on top of the other October incidents, and possibly influenced by the Respondent's need to cut its wages cost base, made Mr Gaggero overreact prematurely. As both Messrs. Gaggero and Ballestero stated, the Europort incident was the straw that broke the camel's back for them because Mr Gaggero felt that *"there was no possibility of our being able to control him"*. It is clear that in coming to their decision neither director attempted or even thought of carrying out any investigations or enquiries into either the veracity of the allegations of the security guard or whether the Complainant had been banned from entering the garage. Without such enquiries being conducted they could not know whether the organisational difficulties to the Respondent which Mr Gaggero inferred, and which was what concerned Mr Gaggero with reference the incident, had in fact occurred. Support for such a view is contained in the Respondent's letter to the Union of the 25th October (Exhibit GG8) in which reference is made to the Respondent conducting further enquiries into the matter; a statement which was palpably untrue since as was conceded by Mr Ballestero there was no intention of doing so – indeed one of various made in that particular letter.

It is clear to me that the Respondent acted hastily with regard to the Europort incident, and took into account other matters on which it had scant or incomplete information, and that consequently its belief of the Complainant's misconduct was not based on reasonable grounds. An error that was compounded by its refusal to agree to the Union's request to be allowed to put the Complainant's case forward.

As Stephenson L.J. stated in W Devis & Sons Limited v Atkins (1977 1RLR):

> *"If employers form their belief hastily and act hastily upon it, without making the appropriate inquiries 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".*

If I am wrong on the above, the next question that would arise was whether the Complainant's dismissal was a fair sanction in the circumstances of the case. In determining such an issue it is not for the tribunal to substitute its own view of the appropriate penalty for that of the employer.

(Trust Houses Forte Leisure Limited v Aguilar 1976 IRLR 251)

Mr Rocca has submitted that on the facts of this case, the Respondents' dismissal of the Complainant was a sanction, and the only sanction which the Respondent could take, which fell within the band of reasonable responses/sanctions which a reasonable employer would adopt. In making such a submission, Mr Rocca has pointed to (1) the verbal and written warnings given to the Complainant, or, in the alternative, the fact that any warning given would have been futile in the light of the persistent attitude and stance adopted by the Complainant (2) the fact that in such a small company in the business that it transacted there was no alternative employment that could be offered to the Complainant (3) that after each incident the Complainant was requested to explain his actions and (4) that the incidents in question were serious.

I do not agree with Mr Rocca that summary dismissal of the Complainant for all or any one of the four incidents mentioned in the Respondents' letter of the 25th October 2002, and/or the Europort incident, was within the band of reasonable responses which a reasonable employer would adopt. As previously stated the Respondent had not given the Complainant any prior verbal or written warnings or, if given, said warnings had elapsed and should have been disregarded and consequently it was good sense and reasonable not to dismiss a person on the instant without any warning. Moreover, I do not accept that the Complainant's character was such that it could be said that giving him a warning was futile because he would not change his ways and nor do I accept that the incidents were sufficiently serious to merit the employer in taking immediate action to protect its commercial interests. The inadequacy of the Complainant's performance, even accepting in full the allegations of misconduct made against him, was not so extreme and/or of such a nature as to make a reasonable employer believe that unless there was summary dismissal the Complainant's continued retention would damage the Respondents' commercial interests or that there was an irredeemable capability on the part of the Complainant.

For all the reasons set out above, I have come to the determination that the Complainant was unfairly dismissed. The tribunal will now proceed to hear both parties on the issue of the amount of compensation to be granted to the Complainant. It is to be hoped that the parties will come to the tribunal with a more or less agreed figure.

Joseph Nuñez
Chairman
13th December 2004.

INDUSTRIAL TRIBUNAL HEARING

Case No.22 of 2002

Edward Perez

Complainant

- v -

Calypso Tours Limited

Respondent

AWARD

In a judgement dated the 13th day of December 2004, I set out the reasons why I had come to the determination that the Complainant had been unfairly dismissed. The parties have been unable to come to any agreement as to the amount which should be awarded as compensation to the Complainant for his dismissal and therefore it is up to this Tribunal to determine the amount.

The parties are in agreement as to the following facts. The Complainant was unemployed following his dismissal for the period 25th October 2002 to the 12th January 2003; a total of 11 weeks.

At the time of his dismissal the Complainant was earning the sum of £194.72 per week and consequently the gross amount he would have earned during the afore-said period of unemployment amounts to £194.72 x 11 = £2,141.92. From this amount the parties accept that the sum of £548 should be deducted since this was the amount received by the Complainant in unemployment benefit.

The Complainant therefore seeks an award of £2,200 as the basic award and an award of £1,593.92 by way of compensation.

Mr Rocca does not dispute the figures put forward by the Complainant but submits that the basic and compensatory awards should be reduced by as much as 50% on the basis that the Tribunal had found that the Complainant had contributed to his dismissal because of his conduct throughout the period of his employment with the Respondent.

I do not agree with Mr Rocca's submissions on this point for the following reasons.

With regard to the basic award it does not seem to me that the Tribunal has the power to order an award of less than the £2,200 provided for by Rule 2 of the Industrial (Calculation of Compensation) Regulations 1992 as read with Section 72 of the Employment Ordinance. This being the case and as the Complainant has not sought a basic award of more than the minimum amount, and if sought it would not have been granted, it follows that the basic award of £2,200 cannot be reduced no matter how culpable one might think the Respondent to have been in his behaviour leading to dismissal.

With reference the compensatory aspect of the award, I take into account the provisions of Section 71(3) of the Employment Ordinance which provide as follows:-

> *Where a tribunal finds that the matters to which the complaint relates were to any extent caused or contributed to by any action of the aggrieved party in connection with those matters the tribunal shall reduce its assessment of his loss to such extent as, having regard to that finding, the tribunal considers just and equitable".*

Consequently, in order for Mr Rocca's submission to succeed it must be shown that the Complainant's conduct caused or contributed to the dismissal itself. Mr Rocca has submitted that in deciding whether the Complainant has caused or contributed to his dismissal the Tribunal should take into account his entire employment history with the Respondent. With all due respect to Mr Rocca, this seems to me to be far too wide an interpretation of Section 71(3) of the Employment Ordinance. In my opinion the sub-section must be more narrowly interpreted so that in order to justify a reduction the employee's own conduct in the circumstances surrounding his dismissal must have contributed or caused the dismissal.

There is nothing in the judgement of the 31st December 2004 which states or implies that I had found that the Complainant's conduct in the circumstances surrounding his dismissal had caused or contributed to his dismissal.

I award the Complainant £2,200 by way of basic award and £1,593.92 by way of compensatory award making a total of £3,793.92.

Joseph Nuñez
Chairman
16th June 2005.