IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

Ind/Tri Claim N°, 8/2002

BETWEEN:

JOSEPH GARCIA

Complainant

and

EUROCITY MANAGEMENT LIMITED

Respondent

Ruling

The opening address by counsel for the Respondent, Mr. Nicholas Caetano, at the hearing of this application brought to the surface the existence of a latent preliminary point, namely:

> *if dismissal is by way of notice but that notice is subesequently shown to be defective, by virtue of the period of employment and as stipulated by statute, is such dismissal thereby, ipso facto, unfair, as to immediately call into play the full consequences of the law, without regard to further consideration; or, is the Respondent, in such circumstances, nevertheless, able to avoid such a consequence, by requesting the Tribunal to disregard the defective notice and proceed to press ahead with a full hearing of the application, so as to decide the matter upon its merits, simply upon the allegation that the Respondent would be able to prove the Complainant's conduct was such as to have justified a summary dismissal, which, in turn, would not have required the service of a notice of dismissal and so, in such circumstances, the issue of notice, defective or otherwise and the consideration of the issues arising therefrom are rendered irrelevant, given summary dismissal without notice would have been an option open to the Respondent and, moreover, would have been found to have been fair ?*

What did Mr. Caetano say to bring this issue to light, so late in the day ?

Well, in his opening address, Mr. Caetano commenced by saying the Complainant was dismissed on grounds of misconduct and it was up to the Respondent to prove the dismissal had not been unfair.

So far so good.

However, in support thereof and in pursuance to Section 54(1) (2) of the Employment Ordinance, he added sufficient notice had been given and according to the relevant section only two weeks notice was required, given the period of employment had been less than five years.

Whereupon, Mr. Nuza, the Complainant's T.G.W.U. representative, erupted and strenuously objected, submitting that for the purposes in hand the Complainant had to be deemed to have been employed since May 1992, when he started working with the Respondent's predecessor-in-title, Europroperty Management Ltd and not 1999.

Having embarked, Mr. Nuza continued with full force, adding that in 1999, the Respondent had purchased the business of Europroperty Management Ltd, the Respondent's predecessor in title of the business, which carried with it the assests and employees of the latter. As such, Mr. Nuza was not shy in emphasizing, a 'transfer of undertaking' had occurred, as defined by Sections 78A to 78K of the Employment Ordinance, as to, in turn, result, by virtue of the provisions of Section 78(A)(1), in the Complainant's employment with the Respondent having the effect as if originally made between the Complaninant and the Respondent's predecessor-in -title, as a result of which, the Complainant was deemed to have been employed with the Respondent since 1992 and not 1999. All of which meant that under the provisions of Section 54(1)(v) of the Employment Ordinance, the Respondent was entitled to thirteen weeks notice, as a result of having been in employment for 10 years, and not the paltry two weeks given.

Mr. Nuza ably referred the Tribunal to Section 78J of the Employment Ordinance, wherein it stated that, inter alia, a 'relevant transfer' to which the previously mentioned Sections 78A to 78H related, referred to a transfer from one person to another, of an undertaking situated immediately before the transfer in Gibraltar, whether effected by sale or other disposition, including two or more transactions, whether or not any property is transferred and 'undertaking' included any trade or business but not the transfer of a ship, without more.

In the circumstances, since it appeared there was some substance in the objection, which, if correct, might mean the dismissal - (which had been effected under cover of letter dated the 5th April, 2002 issued to the Complainant by Mark P. Makey, for and on behalf of the Respondent, upon the basis of two weeks notice, arising as a result of the Complainant's alleged conduct) - was, 'ab initio', unfair, by reason of the Respondent's failure to give the Complainant adequate notice, according to the statutory requirements, the hearing was adjourned, in order to give the parties an opportunity to consider the matter and, in particular, whether a 'relevant transfer' existed.

At the resumed hearing Mr. Caetano conceded that if a 'transfer of undertaking' existed a longer period of notice should have been given. He had reviewed the law and if a 'transfer' did occur, Mr. Nuza would have been correct on the issue of notice.

However, having had the opportunity of the adjournment to consider matters, Mr. Caetano stated the case had been wrongly approached by all parties. In particular, his own skeletal arguments referred to the period of notice, when it should not have done so. He submitted it was a well established principle of Labour Law that alleged misconduct of an employee justified an employer in terminating the contract summarily and without notice and referred the Tribunal to Harvey's Industrial Law, at paragraph A/445. He stated the alleged misconduct had been brought to the attention of the employee prior to his dismissal and as long as the employer held a reasonable belief in the misconduct and in the reason for dismissal, the dismissal would not be found to be unfair.

Arising from that, a reason relating to the conduct of the employee is a fair reason and Mr. Caetano referred to Section 65(2)(b) of the Employment Ordinance, which states ".. the reference to a reason falling within this subsection is a reference to a reason which .. related to the conduct of the employee .."

In determining the question of reason, Mr. Caetanon continued, the employer does not have to establish that the reason did indeed justify the dismissal, merely that it was the reason relied upon and that it was capable of justifying the dismissal. However, whether in fact it did so justify the dismissal would depend upon whether the Tribunal was convinced the employer acted reasonably in all the circumstances, which would be a question of fact for the Tribunal to consider upon the evidence of the case.

In closing, Mr. Caetano quoted from the dictum of Cairns L.J., in the case of Abernethy V Mott Hay and Anderson 1974 1 CR 323:

> *".. the 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 ... the employer will sometimes be able to establish that he has dismissed for a reason that is at least capable of being fair, provided he can show genuine belief that he dismissed for that reason. The fact belief may be mistaken is irrelevant .."*

In his reply, Mr, Nuza stated there was no doubt a 'relevant transfer of undertaking' had taken place at the time of the transfer of the undertaking of Europroperty Management Limited to Eurocity Management Limited and hence the reason for the completion of Section 8 of the Originating Application in terms which clearly stated that the date of commencement of employment had been May 1992, with Europroperty Management Ltd.

Mr. Caetano interjected to re-emphasize the Complainant was dismissed for misconduct and therefore the notice period was not a relevant issue. Mr. Nuza disagreed and rebuffed the interruption with the retort that summary dismissal was only available for gross misconduct, emphasizing 'gross' in the base tenor of his booming voice, at a high crescendo.

Having so silenced Mr. Caetano, Mr. Nuza continued unabated by referring the Tribunal to Section 78D of the Employment Ordinance, which guaranteed the right of continuity of employment upon a tansfer and so he submitted the Complainant's period of service dated from 1992 and whilst he agreed employees were capable of being summarily dismissed, the Complainant's dismissal letter of the 5th April, 2002 specifically mentioned he was dismissed upon two weeks notice and not summarily.

Mr. Nuza added there was no mention of gross misconduct, nor could it be argued the Complainant had repudiated his contract of employment by undertaking private work, as alleged in the letter of dismissal, because there was no restriction in the employee's contract of employment, in respect of private work. Mr. Nuza continued by referring the Tribunal to the Notice of Terms of Engagement dated '6-10-99', completed in pursuance to the provisions of the Employment Ordinance and the Employment (Workers Contractual Terms) (Information) Regulations, 1991, which was included amongst the papers submitted to the Tribunal, signed by both the Complainant and a Director of the Respondent, and being a document served upon the Employment Board by the Respondent, in pursuance to statutory requirement and which was silent on the question of restrictions, in respect of the employee's terms and conditions of employment.

Mr. Nuza also referred the Tribunal to the Termination of Employment Notice, also completed in pursuance to the provisions of the Employment Ordinance and the Employment (Workers Contractual Terms) (Information) Regulations, 1991, and similarly included amongst the papers submitted to the Tribunal and also signed by both the Complainant and a Director of the Respondent, being a further statutory requirement served upon the Employment Board by the Respondent, in which the reason stated for the

termination of the employment was said to be 'as per termination letter'. Mr. Nuza reminded the Tribunal the latter letter was silent in respect of gross misconduct or summary dismissal and in all the circumstances, Mr. Nuza did not think it legitimate to subsequently argue it was not a question of notice, because no notice need to have been given.

Mr. Nuza emphasized the statutory notice requirement was 13 weeks after 10 or more years of employment. The Complainant had only been given 2 weeks notice and he had not been permitted to work the period but given payment in lieu.

Furthermore, Mr. Nuza compared those facts with the situation when an employer is summarily dismissed and their is no obligation to render any payment. Indeed, he went further and stated that under the provisions of the Employment Annual and Public Holiday Order being 122/1999, even accrued holiday payment is forfeited, if dismissal is for misconduct. All of which, in his opinion, reinforced and confirmed his argument that, in fact, it was never contemplated to dismiss the Complainant summarily for gross misconduct.

With regard to the allegation that the Complainant had been given a warning, Mr. Nuza stated there was no record of a written warning having been given, as was required by the Disciplinary Code of Conduct for longstanding employees, with the onus being on the employer to record the issuance of the written warning.

With regard to the 'relevant transfer of undertaking' issue, Mr. Nuza was in no doubt a relevant transfer had taken place. The fact of the matter was Eurocity Management Ltd rented and sold apartments in Euro Towers, at Europort, Gibraltar and provided a service to private owners and tenants of Euro Towers. All of which was undertaken as a business and not as a charitable institution and all of that very same activity, in respect of the very same building, in the very same place and for renumeration was now undertaken by the Respondent.

Mr. Caetano interjected and referred the Tribunal to Brookes and Bowrough Care Services 1988 1RLR 636, where it was stated that a transfer of undertaking from one company to another did not amount to a transfer of shares. He also referred the Tribunal to the case of Doctor Sophie Richmond Stiching - Bartol (1992) 1 RLR 366, ECJ, which seemed to indicate the need for a unit to retain its identity if a relevant transfer was to have taken place. Mr. Nuza replied that the undertaking at Eurotowers had retained its identity and continued with all its former activities.

In the circumstances and pending a decision, the Tribunal took the opportunity to examine the question of possible compensation and the parties were invited to address the issue and cross examine the Respondent.

Mr. Nuza stated that at the time of his dismissal, the Complainant was earning £6.75 gross per hour, which translated to £240.00 nett per week. He had been unemployed for about one year and half, during which time he had only obtained casual employment earning £600.00. He had also received unemployment benefit of £487.50. To those figures Mr. Nuza submitted the need to add £1,472.00 in respect of lost employer's social contributions, which Mr. Nuza stated the Respondent should not have the benefit of retaining. As a result the Complainant sought a Compensatory Award of £19,104.50, exclusive of the Basic Award, the minimum of which was to be £2,200.00, although the maximum was up to the discretion of the Chairman, and in the words of Mr. Nuza: "the sky was the limit". The figure of £19,104.50 was made up as to: £240.00 x 78 resulting in £18,720.00, to which he added £1,472.00 of Employers Social Insurance (£18.87 x 78) and from which he deducted £487.50 'dole' and £600.00 casual labour receipts.

The Complainant was called to give evidence. He said he lived at 1/3, Tarik Road, was married with two grown up children, aged 25 and 28 years, respectively, who lived with him.

Since being dismissed he had applied for six jobs in his trade of Mechanical Fitter, which was his official trade. In 1991, he had been made redundant from the MOD and joined the Respondent's predeccessor in title. When he was dismissed by the Respondent he was only able to obtain a job as a labourer for three days a week with Rotary. He found the situation 'really hard'. He did not keep a record of his work with them. He visited the ETB almost weekly for six months.

During most of his unemployed time he had been supported by his wife and children. The latter paid for the running costs of the house and the former paid for the food etc. Their matrimonial house was a Council Apartment, for which they paid £12.00 a week in rent. He did not own a car. His wife did, which she had bought new, about two years previously. Prior to his dismissal, he had run up a Credit Card debt of some £8,000.00 and his dismissal, in those circumstances, had proved a double blow. In the event, the debt had been paid off by his wife and sons, at the rate of £205 per month. His wife run a small nursery play group: 'Mikey's Play Group'. However, he did not know his wife's salary, neither her takings nor profits from that activity. He held a joint account with her at Barclays, which was credited with some £1,000.00. He did not go on holidays and although he at times visited 'Pryca' in the neighbouring town of La Linea de la Concepcion, he certainly did not visit the 'Corte Ingles' Departmental Store in either Algeciras or Puerto Banus, in Spain. He undertook odd repair jobs for Bentley Properties Limited (hereinafter referred to as 'Bentley'), which owned apartments in Eurotowers, however he was not renumerated. Instead, he was provided with free parking in the car park, which Bentley had at Eurotowers. He had so worked for Bentley since "day one". He enjoyed a close relationship with one of the managers of Bentley, by the name of Ernest Collado.

In reply to Mr. Caetano's cross examination, the Complainant stated Bentley could not employ him until they had settled their problem with Professor Kislov, the other owner of Eurotowers. However, Bentley had promised to do so if they took over the management of Eurotowers. In addition to his car the Complainant also admitted keeping tools in a store room at Eurotowers, which he used in his work with Bentley.

In response to a question from the Tribunal, Mr. Nuza interjected to submit that the Complainant's failure to find permanent employment given his trade, may well have been due to his age of 58, given it was a well known fact that those over 50 did not find it easy to obtain alternative employment; most especially, mechanics. In Mr. Nuza's opinion, it might have been different, if the Complainant had been in the building trade.

In the circumstances, a further adjournment was granted to enable Mr. Caetano to address the Tribunal on whether or not a 'transfer of undertaking' had taken place.

In the event, Mr. Caetano addressed a five page letter to the Secretary of the Tribunal, Mr. Paul Llanelo, for the attention of the Tribunal, in which he dedicated four pages to the rehersal of his arguments, as to the disregard which should be given to the notice issue and regrettably only half a page to the matter of the 'transfer', in respect of which the adjournment had been granted and Mr. Caetano had been requested to specifically address.

In dealing with 'relevant transfers' issue, Mr. Caetano highlighted that according to Harvey's, Industrial Law (hereinafter referred to as "Harvey's") at HEC/3302, the following items must be considered:

1. the type of undertaking or business;

2. whether or not its tangible assets, such as buildings are transferred;

3. the value of its intangible assets at the time of transfer;

4. whether or not the majority of its employees are taken over by the new employer;

5. whether or not its customers are transferred;

6. the degree of similarity between the activities carried on before and after the transfer; and the period, if any, for which those activities were suspended.

Mr. Caetano concluded that in the case of the sale of Europroperty Management Limited to Eurocity Management Limtied the nature and geography of the business obviously remained unchange. However, only a limited number of employees were offered jobs with the new company and, in those circumstances, whether or not a transfer took place was arguable.

Those are the issues and submissions, what is the Law ? Well, I believe it is as follows, namely:

1. At Common Law a contract of employment for an indefinite period is terminable by notice given by either party to the other. The length of notice required depends upon what was agreed expressly or implied. In the absence of any indication to the contrary, the Court will infer that the contract is terminable by 'reasonable' notice. What is reasonable is to be assessed by reference to all the circumstances of the case: security, length of service, nature of employment, frequency of pay days etc.

2. Notwithstanding the above, in the United Kingdom, at Common Law, the master is also entitled to dismiss his servant on the spot, without notice, in certain circumstances. The cases typically involve dishonesty, disobedience or incompetence on the part of the servant. The right of summary dismissal therefore arises when the servant commits a repudiatory breach of contract. In those circumstances, the master has the option of waiving the breach or of treating the contract as discharged by the breach. Summary dismissal of the servant demonstrates that the master has exercised his right to treat the contract as repudiated by the servant's breach (see generally Harvey's 847 page A 445 and Denmark Productions Ltd v Boschobel Productions Ltd 1968 3 AER 513);

3. The above has led to the question being asked: can an employee break his contract in such a way that the breach itself discharges the contract without any need of acceptance on the part of the employer, so that the employee dismisses himself by his breach ? It would appear not, given, on the whole, the authorities are against the doctrine of self dismissal (see Thomas Marshall v Guinle 1978 1 CR 905; London Transport Executive v Clarke 1981 1CR 355; Pendlebury v Christian Schools North West Ltd 1985 1CR 174);

4. The common view in the United Kingdom would seem to be that in accepting a repudiatory breach, the party accepting the breach is terminating the contract. Consequently, when the employer accepts a fundamental breach by the employee it is the employer who is thereby choosing to terminate under Section 55 (2) of the Employment Protection (Consolidation) Act 1978 (hereinafter referred to as "EP(C)A").

5. Whatever the precise scope of the doctrine on self dismissal, the perceived view is that it is extremely limited and certainly does not justify a Court in treating repudiatory breaches in general as self dismissal (see Harvey's 305, D/229);

6. Be that as it may, in both the United Kingdom and in Gibraltar, in addition to the Common Law, statute has now intervened and in Gibraltar, according to Section 64(2)(a) of the Employment Ordinance: ".. an employee shall be taken to be dismissed by his employer if, but only if ... the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice .. ". Furthermore and more importantly, statue now also grants employees a right not to be unfairly dismissed (see Section 59 of the Employment Ordinance and Section 55 of the EP(C)A).

7. In addition, both English and Gibraltarian statutes stipulate certain minimum periods of notice for dismissal, which take effect as implied terms in the contract (see Section 54 of the Employment Ordinance and Section 49 of the EP(C)A).

8. However, in Gibraltar, by virtue of Section 56 of the Employment Ordinance there are certain exceptions to Section 55, whereby for "good and sufficient cause" an employer may dismiss an employee - (subject to certain limitations, which need not detain us). A provision with similar result is found in Section 49(5) of the EP(C)A.

9. However, comparing those two provisions, their seems to me to be a difference, perhaps a fundamental difference, in that: whereas Section 49(5) of the EP(C)A expressly preserves the right to summary dismissal by stating in a proviso:

"It is hereby declared that this section does not affefct any right of either party to treat the contract as terminable without notice by reason of such conduct by the other party as would have enabled him so to treat it before the passing of this Act" - (that is under the Common Law rules).

Section 54 of the Employment Ordinance does not and in order to find an exception to the minima periods of notice, we have to look at Section 56 of the latter Ordinance, which states:

> "Nothwithstanding the provisions of Sections 54 ... an employer may dismiss an employee and an employee may abandon the service of an employer, without giving notice and without any liability to make payment ... if there is good and sufficient cause for such dismissal or abandonment of service .."

10. Be that as it may, a Court will not imply a shorter period of notice than that required by the statute but it may imply a longer period (see Harvey, para 829 page A 443, Volume 1 and Hill v C. A. Parsons & Co. Limited 1971 3 AER 1345 C.A.);

11. It is now well established that in order to constitute a notice of dismissal, the notice must specify a particular ascertainable date (see Harvey's D 252 page D 222);

12. Accordingly, it can be said that in Gibraltar, 'subject to good and sufficient cause', every employee is entitled to a minimum period of notice of dismissal from his employer (generally see also Harvey's A 1203 page A 535). The right is a right to a minimum period of notice of termination of contract of employment and the statutory minima apply only where notice is necessary, lawfully to terminate the contract, that is to say: where there is no good and sufficient cause for dismissal without notice;

That is the law, as I understand it to be and applying that to the facts and submission of the latent preliminary point, I resolve as follows, namely, in order to resolve, in turn, whether or not an unfair dismissal has taken place, namely:

A. Transfer of Undertaking:

I find on the evidence available before me that a transfer of undertaking occurred, when, in 1999, the Respondent purchased the business of Europroperty Management Ltd, as defined by Sections 78A to 78K of the Employment Ordinance.

According to Mr. Nuza, Europroperty Management Ltd rented and sold apartments in Euro Towers at Europort, Gibraltar and provided a service to private owners and tenants of Euro Towers, all of which was undertaken as a business and not as a charitable institution and all of that very same activity, in respect of the very same building, in the very same place and for renumeration was undertaken by the Respondent from 1999 up to the present day.

According to Mr. Caetano, whilst conceding that the nature and geography of the business remained the same - (thereby fulfilling most of the six matters which Harvey's suggested should be taken into account in considering the matter) - only a number of employees were taken over and since that did not constitute the majority, as stipulated in Harvey's fourth condition, it rendered the matter of whether or not a transfer had, in fact, taken place, a moot point.

With respect, I beg to differ. I believe, given the circumstances and on a balance of probabilities being the burden of proof I must apply, a transfer of undertaking took place and the fact that the majority of the employees were not retained was not, in my opinion, sufficient or cogent reason to prevent a transfer from taking place, when, in the words of Mr. Nuza, with which Mr. Caetano did not disagree: 'the Respondent's successor-in-title undertook all of the very same activity as the Respondent, in respect of the very same building, in the very same place and for renumeration', thereby fulfilling the majority of the matters, which Harvey suggests should be taken into account in considering whether or not a transfer has taken place.

B. Notice.

It follows from the above and I so further find that according to Section 54(1)(1)(v) of the Employment Ordinance, the Complainant should have been given 13 weeks Notice prior to dismissal and not, in the words of Mr. Nuza 'the paltry 2 weeks' actually given.

In the circumstances of the actual Notice issued by the Respondent to the Complainant, I further find that the former dismissed the latter specifically upon Notice - (that is to say: 2 weeks Notice) - and not summarily, as may have been open to him to so pursue, by virtue of the provisions of Section 56 of the Employment Ordinance, provided he believed he enjoyed 'good and sufficient cause' to so act, a course of action he clearly did not chose to follow, given the terms of Dismissal Letter issued by the Respondent to the Complainant, which clearly proves the latter's alleged misconduct was most certainly in the contemplation of the Respondent, at the time of the dismissal but which the Respondent did not seek to use as 'good and sufficient cause' to enable the Respondent to dismiss without Notice.

Accordingly, having so elected that course of action and proceeded upon Notice, albeit a defective period of Notice, it is not, in my opinion, now open to the Respondent, at this very late stage, to seek to justify that breach of statue and therefore unfair dismissal - (in an attempt to render those actions as falling within the exception provided by Section 56 of the Employment Ordinance and thus convert the dismissal retrospectively fair) - to allege the Complainant's action or conduct was sufficiently repudiatory of itself, as to have released the Respondent from the obligation to give any Notice or sufficient Notice in the amount stipulated by statue, so as to, in turn, give the Respondent restrospective 'good and sufficient cause', not to have given the Complainant the requisite statutory Notice, even though, at the pertinent and relevant time, the Respondent omitted to take advantage of the same, as to enable these proceedings to proceed because it had not been necessary to issue the requisite or any notice, given the reasons

for the dismissal justified the absence of Notice and, indeed, no Notice had been issued.

In short, at the material time, the Respondent did not dismiss the Complainant without Notice, or with defective Notice, because it claimed it had 'good and sufficient cause' to do so. Quite the contrary. The Respondent dismissed the Complainant specifically upon Notice, which, I believe, it thought was the correct amount it had to tender the Complainant and so, as a matter of fact and, indeed, as I understoond Mr. Caetano accepted and did not seek to dispute, the Complainant was not dismissed without Notice or insufficient Notice due to good and sufficient cause but rather upon a specific period of notice, which, as it turns out, was far from sufficient, in the circumstances.

Accordingly, having dismissed the Complainant upon insufficient Notice, in the circumstances and for the reasons explained above, the Respondent acted contrary to the provisions of Section 54 of the Employment Ordinance and, to that end, illegally. As a result, it must, of necessity and automatically, follow, such dismissal must and is illegal and therefore unfair *'ab initio'* and *'ipso facto'*, that is: from the very moment it occurred and automatically - (and by way of analogy with the Criminal Law. I would venture to say identical to what occurs when an absolute offence is committed) - and therefore in contravention of the Law and thereby prevents any further consideration of other matters, for example the matters stated in Section 65 of the Employment Ordinance and, in particular, the allegation as to the Complainant's undertaking of private work, matters which, in different circumstances, might have had to be considered at length and then the issue decided upon its merits.

However, in the circumstances and in my opinion, none of that is available to me in considering this matter, given the Complainant was dismissed upon Notice, albeit for certain reasons, and, in the circumstances of that Notice, the latter was of an insufficient period as required by Law, given the length of the Complainant's period of Employment and, as such, the procedure which led to the termination of

his employment and dismissal was contrary to Law and so was illegal and therefore unfair.

I appreciate it may be considered simply a technicality but, if so - (and I am not so sure) - it is, nevertheless, a technicality from which rights arise and consequences flow, both beneficial and adverse, depending upon the vantage from which it is viewed and, in those circumstances, I do not believe the matter can be simply dismissed on that basis.

I further appreciate the Respondent may have acted in ignorance of the fact that it should have given the Complainant 13 weeks Notice and, indeed, believing it was following the provisions of the Law in giving just 2 weeks Notice. However, the fact of the matter is, it was not acting within the Law in so doing and, as is well known, 'ignorance of the Law is no excuse'. Accordingly, the Respondent must face the consequences of its action.

I am encouraged in my decision by the case of Bayo v Lambeth Borough Council 1994 1 C.R. 727 C.A., as referred to in Harvey's at A/445, page 847. Briefly, the facts fo the case involved an Accountant employed by the Council who was accused of offences involving consipiracy to defraud. Following a period of suspension, the Accountant was written to indicating that he was no longer employed. It was accepted the Council's actions constituted a dismissal in respect off which the normal disciplinary procedures had not been followed. The employee maintained he had not accepted the Council's repudiation and sought payment of wages to the year 2000. The Court upheld the Judge's ruling that the employee was entitled to one month's notice together with his wages for the five months it was estimated the disciplinary proceedings, had they been properly followed, would have taken place.

Accordingly, in the present case, the Respondent having elected to dismiss the Complainant upon Notice and not summarily, I am of the view and so find the Respondent was bound by the statutory periods and, in failing to follow them, I find the Complainant was dismissed contrary to

Law and therefore unfairly, which, as a result, calls into immediate play the full consequences of the Law, without further regard or other consideration.

It follows from the above and in reply to the preliminary point with which this Ruling opened that, in the circumstances of this particular case, I am of the opinion the Respondent is not able to avoid such consequences - (and, in effect, deprive the Complainant of the rights he has thereby acquired), by requesting the Tribunal to disregard the defective Notice and proceed to press ahead with a full hearing of the application, so as to decide the matter on its merits, simply upon the allegation that the Respondent would be able to prove the Complainant's conduct was such as to have justified a summary dismissal, which, in turn, would not have required the service of a Notice of dismissal and so, in such circumstances, the issue of Notice, defective or otherwise and the consideration of the issues arising thereunder are rendered irrelevant, given summary dismissal without Notice would have been an option open to the Respondent and would have been found to have been fair and thus not constitute an unfair dismissal.

In my view, in order to have been able to so argue, the Respondent should have dismissed summarily and not upon Notice, most especially since he was aware of the existance of grounds which might have qualified as 'good and sufficient cause' to so act. However, the Respondent did not and suffice to say, I am of the firm opinion, that having decided to dismiss upon Notice and proceeded to do so upon written Notice, the correctness or defects of that Notice and the issues arising thereunder are rendered of primary fundamental importance and enjoy prior rank in considering the matter of the fairness or otherwise of the dismissal. It seems to me, it cannot be otherwise, if only in the interests of certainty and the correct and proper application of the Law. Any other interpretation would render the statute and the stipulations and rights therein contained and arising null and void and that cannot be so.

If I may be permitted an analogy with ancient history, like Julius Ceasar when he crossed the Rubicon, the Respondent having dismissed upon Notice, stands or falls by that Notice and, I fear, in this instance, he must fall. There is no turning back from those consequences.

It must be said that in reaching this decision, I have laboured with the provisions of the EP(C)A and the commentary found in Harvey, in respct of the same. As mentioned before, the EP(C)A is an English Act, which, inter alia, deals with employees rights during the period of notice. The difficulty with the EPC(A), as far as I am aware, is that neither those nor, indeed, any of the EP(C)A's provisions are applicable in Gibraltar, nor are there any identical provisions in the Laws of Gibraltar, as to in either case render the EP(C)A or the cases decided in interpretation of its provisions, or the commentary from authorative authors in respect of the same of binding authority in Gibraltar.

Nevertheless, in respect of employees rights during the period of Notice, the EP(C)A states that if during that period the employee is guilty of a repudiatory breach of contract and the employer summarily dismisses him for it, the employer is not liable under Paragraph 7(2) of Schedule 3 of the EP(C)A for the remainder of the period of Notice.

However, at paragraph A 1248 of Harvey's, the learned author goes further and suggests a similar result would follow where the breach was committed before (my underlining) Notice was given but was not discovered until afterwards (my underlining).

According to Harvey's, on discovery, the employer is entitled to treat himself as discharged from the contract forthwith and the employee cannot therefore sue for breach of contract and he has no other remedy, all of which may appear, at first brush, to lend support to Mr. Caetano's contention that even if the Notice is defective, a Tribunal may disregard that defect and press ahead to decide the matter on the merits and thus deprieve the Complainant of the immediate fruits of such a defective Notice, which must be an unfair dismissal ruling.

Accordingly, in considering this matter, I have asked myself: could a similar line of thought, as expanded by Harvey and mentioned above, be applied to this case, by way of analogy, in support of Mr. Caetano's contention, as to lead to a totally different decision to that reached by me ?

In the end, after much consideration, I have come to the conclusion it cannot, inter alia, because:

(i) the provision in question is an English Act relating specifically to employees rights whilst under Notice, without any comparable provision existing in Gibraltar and, in those circumstances, it can be of little real assistance to the case in hand;

(ii) Harvey's opinion is a personal speculative interpretation, in respect of matters arising outwith the procedure stipulated by that legislation and to apply such a view, albeit from an authoritative author, in respect of a procedure outwith a specific English statute, which, in any event, is different from our own and which would, in effect, result in the dilution of the protection our statute affords employees, cannot be correct;

(iii) Section 56(2) of the Employment Ordinance states that an employer who has given an employer the apporiate Notice required by Section 54 may still be liable to compensate the employee for unfair dismissal. Note the words: 'may still'. It follows an employer who has not given the appropriate Notice must surely be liable for an unfair dismissal, when even one that does give Notice may nevertheless be liable for an unfair dismissal; most especially, in circumstances in which the employer alleges having had good and sufficient cause to summarily dismiss but does not do so, and dismisses upon an inappropriate Notice;

(iv) The result of the decision in the Boyo v Lambeth Borough Council, referred to before, which was issued in 1994, after 1978, would seem to run contrary to the opinion of Harvey in respect of legislation which was passed in 1978 which it is reasonable to suppose must have been in the contemplation of the Court in 1994, when deliberating upon the case.

(v) Lastly, the provision of the EP(C)A in question and Harvey's commentary is based upon a dismissal being initially summarily effected and not upon Notice, as in the case in hand.

Accordingly, I maintain my decision and having found the Complainant was unfairly dismissed in not having been given the appropriate and statutory requisite period of Notice, I must now consider the matter of compensation.

The facts of this case are somewhat unusual, in that the Complainant has not been able to find fresh employment. According to Mr. Nuza, the Complaiant's age is against him. It would appear our society is 'ageist'. I was not aware of the same but am guided by Mr. Nuza's greater experience. Moreover, my general reading would seem to support that submission, in that, I recently came across an article by the English Journalist David Thomas, entitled 'The Bald Truth about my mid-life crisis .. ', which appeared in the Daily Mail Newspaper of Thursday April 22nd, 2004, page 13, a relevant part of which stated:

> "... The employment market is grotesquely prejudiced against middle-aged men. Just try getting work as a 50 year old. You can have all the qualifications in the world. You can have a terrific CV. You can be reliable, trustworth and mature. However, the job will be given to a 28 year old ... "

That it should be so is, indeed, a matter of regret.

By virtue of Section 70 of the Employment Ordinance there are two courses open to me, that is: either recommend re-engagement or award

compensation. Specifically, according to Section 70(2)(b), I have to consider whether it would be practical and in accordance with equity for the complainant to be so re-engaged. I must confess, in the circumstances of both the Applicant's age, his inability to find work and the allegation as to the reasons for the dismissal, being the Complainant's acceptance of private work contrary to his employers instructions and not his inability to undertake his work, etc., I am tempted to recommend a re-engagement, in the hope the 'status quo' may return and the parties placed in their original position, when hopefully sense would prevail and a modus vivendi found, upon which they could embark upon a mutually beneficial work relationship.

However, upon further reflection, much as I might have wished to achieve such a situation, I fear, with the passage of time, both parties have moved on and re-engagement is no longer a realistic proposition. It would appear the parties no longer enjoy each other's confidence and in such a situation, I have come to the conclusion it would be impossible to expect the resurgence of an employer / employee relationship.

Accordingly, I have reluctantly discarded the possibility and proceed to consider the provisions of Section 72 of the Employment Ordinance and the Industrial Tribunal (Calculation of Compensation) Regulations 1992, which deals with both the Basic Award and the Compensatory Awards, as prescribed by the Regulation, which I must decree, when deciding to grant compensation.

If I may, I should wish to deal with the Compensatory Awards first. As to the latter, it is a relatively simple and straight forward matter, namely: I must award the lesser of either:

104 week's pay of the Complainant,

or

104 times twice the amount specified as the weekly renumeration in the Schedule to the Conditions of Employment (Standard Minimum Wage) Order 1989.

In order to ascertain which of those two is less, I must proceed to calculate both.

Accordingly, as to the Complainant's pay, the latter's gross pay was stated as being £6.75, per hour. Moreover, he worked a 39 hour week, so: £6.75 x 39 x 104 = £27,378.00. In addition, Mr. Nuza stated I should include £1,472.00 in respect of lost employer's social contributions. Furthermore, as I understand Section 55(1) of the Employment Ordinance the Respondent is also bound to pay the Complainant for the period of Notice he was entitled to receive payment but did not do so, because of the shortness of the same, which I estimate at £2,895.75, being made up as to £6.75 x 39 x 11 weeks, the latter being the balance outstanding from 13 of the 2 weeks notice which he was actually given.

The £27,378.00, plus the £1,472.00, plus the £2,895.75 amounts to £31,745.75, from which total I deduct the £483.60 unemployment benefit paid to the Complainant, plus the £600.00 in respect of casual earnings plus £960.00 in respect of the value of the car parking space at Eurotowers, received in exchange for the odd jobs undertaken by the Complainant for Bentley Properties Limited, as admitted by the Complainant and which I deem as a benefit-in-kind and equivalent to a monetary payment and estimate at £40 per month for 24 months (40 x 24 = 960). The sum total of all of which comes to £29,702.15.

Before proceeding, I should explain that in his address Mr. Nuza suggested I might wish to base that part of an Award (that is: the Compensatory Award) upon the net weekly salary, as opposed to the gross, further suggesting a different view should be taken between tax payments and social security payments and that, therefore, the former might be deducted but the latter added to the compensation figure, on the basis the Complainant apparently benefitted from one, but not from the other.

With respect to Mr. Nuza, who is always both erudite and lucid, not to mention forceful, in his addresses and submissions, I fear, I was unable to follow his line of argument. I do not see any difference between those figures, as to allow the latter but not the former. After all, the former is part and parcel of the Complainant's salary, just as much as the net figure, albeit, it is automatically paid to the Income Tax Department by the employer, for and on behalf of the employee, in satisfaction of the employee's contribution to the maintenance and support of this community from which we all benefit. It follows, I cannot understand why, in a compensation Award, the employee should be denied that part of his salary and moreover, the employer should be absolved from that same part of the salary, without the same being paid to the Income Tax Department, on behalf of the Complainant either. In effect, to so proceed, is to proceed to calculate the compensation upon a reduced and incorrect salary and not the proper salary. It cannot be right to do so and so, wtih respect, beg to differ with Mr. Nuza and base the compensation upon the gross figure, which was the totality of the hourly salary received by the Complainant.

As to the Minimum Wage, that was set on the 21st August, 1989 at £97.50 and so 104 times twice that amount comes to £20,280.00 (97.50 x 2 x 104 = 20,280.00).

Accordingly, given the provisions of the Law, I must award the lesser of the figures of £29,702.15 and £20,280.00, as the Prescribed Amount and thus Order the Respondent to pay the Complainant the said sum of £20,280.00 as the Prescribed Amount for the Compensatory Award.

As to the Basic Award, I must award not less than £2,200.00. Mr. Nuza, in his address, firmly emphasized the 'not less' element of the wording, no doubt, lest I forgot the same. I am grateful to him for reminding me. Indeed, he went further and urged me, in equally firm terms, to be bold, adding: "the sky was the limit".

However, he will forgive me for declining, with respect, to venture into the stratosphere. A sense of proportion must be maintained. Moreover, I

understand the norm in this Tribunal has, hitherto, been to award the £2,200.00, almost as if it were manadatory at that level.

Nevertheless, having dwelt upon the matter and although I have respectfully declined Mr. Nuza's invitation, I concede the £2,200.00 figure was not set in stone; at least, as to its upper limits. Moreover, that figure was legislated 12 years ago and, as such, its value has been reduced by the considerable increases in the costs of living, since then, not to mention the increment in property costs etc. I also agree recognition should be paid to the words 'not less' and this Tribunal should not necessarily accept the figure of £2,200.00, as the figure to award in that respect; most especially, when so many years have elapsed since it was first legislated and, I presume, the Legislature intended Tribunals to enjoy a discretion in the maximum level of the same, so as to meet the eventualities posed by the passage of time, increases in cost of living, etc.

In saying all this, I, of course, do not bind the Tribunal, as to the future, given the level of other awards will depend upon their particular circumstances and merits and remain at the discretion of presiding Chairmen, who may in their wisdom decide to retain the figure at £2,200.00 or increase it. However, in this instance and in the light of the circumstances of this particular application, I exercise the discretion vested in me by virtue of the phrase 'not less than' and Order a Basic Award in the sum of £6,000.00.

Accordingly, for the avoidance of any doubt, I confirm the total sum of compensations awarded amounts to £26,280.00.

Anthony J. P. Lombard

Chairman,

April 28th, 2004.