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**IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR**

**CASE No. 13/2003**

Between

**AHMED LAGHDAS**

Complainant

and

**CEPRANO LIMITED**

Respondent

**INDUSTRIAL TRIBUNAL**  
**- 3 DEC 2004**  
**RECEIVED TODAY**

**JUDGMENT**

J Nuza for the Complainant.  
S Figueras for the Respondent.

The Complainant commenced employment with the Respondent in 1997. The Notice of Terms of Engagement delivered to the Employment and Training Board in 1997 described the employment as "Building Contractors (Labourer) (Mosque Operative)" (sic). A subsequent Notice of Terms of Engagement delivered to the ETB in 2002 described the employment as "Cleaner". By letter dated 31<sup>st</sup> July 2003, the Respondent terminated the Complainant's employment with immediate effect and paid the Complainant £523.56 in lieu of notice and for unpaid holiday entitlement.

In the said letter the Respondent's director, Mr Cholli referred to an earlier meeting "regarding the problem I have encountered with your performance at work". He then went on to say "I have considered everything you said at that meeting, but must inform you that I have lost faith in your ability to carry out your job properly. In the circumstances, I am terminating your employment forthwith".

The Complainant filed an Originating Summons dated 15 October 2003, in which he stated that "the allegations of the Employer of Misconduct on my part are untrue".

The Notice of Appearance of the Respondent, stamped as received on 4 November 2003, gives as the reason for dismissal "Repeated misconduct and failure to obey lawful instructions". The onus is on the Respondent to show that the reason for the termination of employment was one of those reasons set out in Sub-sections 65 (1) (b) and 65 (2) of the Employment Ordinance. The Respondent gives the reason as being that in Section 65 (2) (b), namely "a reason which related to the conduct of the employee". As well as the failure to obey lawful instructions, the Respondent relied on the following further allegations of misconduct:

- a) That the Complainant shirked work during working hours by sleeping, praying and painting his bicycle.
- b) That he threatened Mr Cholli.
- c) That he did not perform his work diligently, by taking excessively long to carry out his cleaning and minor masonry work.

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- d) That he deliberately dirtied rather than cleaned the premises.

The Tribunal heard the evidence viva voce of Mr Cholli, the sole director of the Respondent, for the Respondent; for the Complainant, the Tribunal heard the evidence of the Complainant in person and of Mr Sarsri. Because of a reluctance of other witnesses to appear and give evidence which might go against their employer or their former work colleague, other than for Mr Sarsri, the Tribunal had the benefit of hearing evidence only from the two protagonists themselves as to their relationship and actions.

Evidence was given as follows:

1. The Complainant was well known in the local Moroccan community. He had lived in Gibraltar many years. Whilst he was unemployed, for a number of years he formed part of a permanent demonstration in front of the Governor's residence claiming improved rights for Moroccan nationals in Gibraltar. He and his fellow demonstrators received financial and other support from other Moroccans in Gibraltar.
2. When the King Fayd Mosque was nearing completion in 1997, certain staff had to be engaged to work at the Mosque. It appears that at first it was intended that the authorities in charge of the Mosque would employ staff directly. Naturally, such staff were intended to be of the Moslem faith, and more particularly consideration was to be given to the unemployed Moroccans in Gibraltar. Mr Sarsri said that the Complainant's name was discussed as meeting this criteria. In addition the Complainant could assist also in a religious capacity since he had a grounding in the Islamic faith.
3. It transpires that the decision was eventually taken by the Mosque authorities not to employ workers directly but instead to engage contractors to provide necessary services for the running and maintenance of the Mosque. It was expected that the contractors would also meet the same criteria, namely engage persons of Moslem faith to work at the Mosque. The Respondent company was approached and a contract was signed.
4. There was a conflict in the evidence as to whether it was a condition of the contract that the Complainant be employed. The contract was not adduced in evidence before the Tribunal. Mr Cholli maintained that there was no such condition whilst Mr Sarsri maintained that it was definitely expected of the Respondent that the Complainant and a colleague of the Complainant also be engaged. I hold that this matter has no bearing on my decision; the result was that the Complainant was employed by the Respondent and I do not need to consider what lead to this result.
5. What is significant is that the Complainant was employed originally as a "Mosque Operative". This expression has not been defined. In my view it shows that the Complainant was originally employed, whatever other duties he might have to perform, to assist in the performance of religious functions in the Mosque. The evidence given, which was not contested, was that the Complainant did in fact perform a religious function. It is further significant that subsequently, the later ETB form "Notice of Terms of Engagement" changed the description to that of "Cleaner" and nothing else. The problems which arose between the Complainant and Mr Cholli may well have originated in the ambiguity in the original job description.
6. Mr Cholli stated that at first, relations between the Complainant and himself were good. Because the work took place at the Mosque it was understood that employer and employee had to treat each other well.
7. In the result, in the course of his employment the Complainant acted as a prayer leader at the Mosque. He was close to the Spiritual Leader at the Mosque, a Mr Ouwach, and was often seen conversing with and taking meals with him. The evidence given was that Mr Ouwach was not an Imam but in the absence of an Imam permanently in

Gibraltar, Mr Ouwach was seen as a spiritual leader of Moslems in Gibraltar. The Tribunal heard evidence that Mr Ouwach was controversial in his views, which some saw as conflictive and radical. A rift developed in the local Moroccan community between those who supported Mr Ouwach and those who did not. An important number of Moroccans wanted Mr Ouwach to be the head of the Moroccan community in Gibraltar. Furthermore, Mr Ouwach was seen by some to be creating bad relations between the local Moslem community and the wider community.

- 8. The result of the above circumstances was that the Complainant was close to a figure who was controversial and, as Mr Cholli saw it, that the Complainant was involving himself in politics. Because the Complainant was employed by the Respondent, the latter was drawn into the controversy and the politics. It was clear from Mr Cholli's evidence that he was not comfortable being in this position.
- 9. Mr Cholli stated that he noticed a change in the attitude of the Complainant in 1999. He said that at that time the Complainant started to get himself involved with many things. In particular he mixed with a group of people who were activists in claiming rights. Mr Cholli tried to impress on the Complainant that the Respondent company had nothing to do with these issues. Mr Cholli was concerned that the Saudi owners of the Mosque would not approve of these activists, that they would identify the Complainant as a leader of these and signify their disapproval by cancelling the Respondent's contract.
- 10. Mr Cholli in his evidence stated that the Complainant did not agree with Mr Cholli's views on the issue. According to Mr Cholli, the Complainant was unconditionally behind Mr Ouwach and would not compromise. At times, the arguments between them were heated and according to Mr Cholli, the Complainant insulted and threatened Mr Cholli, allegations which were denied by the Complainant.
- 11. Mr Cholli's evidence was that the arrangements at work at the Mosque were flexible throughout the entire period of the Complainant's employment. Although officially, his contract stated that the Complainant should work 39 hours a week, in fact he worked many more. According to Mr Cholli, the Complainant, supported by Mr Ouwach, asked Mr Cholli to allow the Complainant to work seven days a week. The Mosque was open seven days a week from very early in the morning to late at night and it was necessary to have staff at the Mosque at all times. The Complainant appeared to be content to be at the Mosque virtually at all hours.
- 12. I find that one consequence of the above working arrangements was that it would be impossible to identify what part of the time spent by the Complainant at the Mosque was in performance of his employment duties as assistant to religious functions or as cleaner on the one hand and as part of the Complainant's legitimate leisure or free time on the other hand. The Complainant according to the evidence was almost all of the time at the Mosque. Contrary to the norm, this employee wanted to be at all hours at his place of work. He arrived at the Mosque at 6.00 am every morning for prayers. With the arrangements in place, I cannot determine exactly when his employment duties as Mosque Operative or as cleaner commenced and when they ended.

Accordingly, I find that there is no merit in Mr Cholli's evidence that the Complainant was in breach of his duties as employee when Mr Cholli found him sleeping or praying at the Mosque or even painting his bicycle. I am not satisfied that in the context of the arrangements on working hours, that these instances took place in such manner that the Complainant had not worked the contracted number of hours. The working arrangements described above had been agreed and there is no indication that the Complainant did not work the contracted 39 hours. Furthermore, the Respondent had agreed with the Complainant informally that the Complainant would be paid an additional £25 a day for working on Saturdays and Sundays. If the Respondent was of

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the view that the Complainant was not working all the hours he should, it would surely have discounted the remuneration for the unworked hours from these extra payments.

13. Two further factors are in my view important. The first is that Mr Cholli stated in his evidence that the cleaning work which the Complainant was required to perform at the exterior of the Mosque should have taken him about one hour each day. According to Mr Cholli once the exterior work was done, the Complainant should have assisted the other cleaner who cleaned the interior of the Mosque. In fact Mr Cholli said that the Complainant did no cleaning inside the Mosque.

That the Complainant's primary responsibility, that of the cleaning the exterior of the Mosque, would take up about an hour each day, reinforces my view that the Complainant was employed also to perform other duties at the Mosque, if only as a member of staff to supervise the Mosque during the hours it was open.

14. Secondly, the Complainant developed a heart condition in 1999. He was in the Intensive Care Unit at St Bernard's Hospital for 10 days and the condition kept him off work on sick leave for a while. But it also meant that he could not carry out strenuous physical work, as a medical note dated 25 June 2002 stated. The Respondent does not appear to have taken the Complainant's heart condition into account in the events leading to the termination of employment.
15. A further allegation of misconduct made by Mr Cholli related to the Complainant's refusal to carry out his instructions. In particular Mr Cholli wanted the Complainant to carry out minor masonry works and tried to move the Complainant to a different site, the Alameda Gardens, at which the Respondent was engaged. The Complainant took exception to any attempt to oblige him to work at any location other than the Mosque. Furthermore, he objected to carrying out mason's work since he alleged that he was not paid at the agreed rate of pay for a mason as set out in the Construction and Allied Trades Association Agreement with the Transport and General Workers Union, which Mr Cholli admitted applied to the Respondent. Although Mr Cholli complained that the masonry work done by the Complainant took excessive time to perform and was poor, these complaints were groundless since he could not compel an employee who was paid as a cleaner to do this masonry work.

I am also satisfied that the Complainant could refuse the transfer since if he worked outside the Mosque he would be unable to perform his religious duties.

Counsel for the Respondent submitted that the dismissal of the Complainant was fair in that the Respondent had acted reasonably. He referred to the misconduct of the Complainant, in particular that the Complainant was found sleeping during working hours, he failed to adhere or completely ignored instructions and that he was insubordinate in that he failed to obey orders, such as the order to attend work at the Alameda Gardens.

My conclusions are that the Respondent did not have proper regard for the special circumstances of the Complainant's employment. I find that the Complainant cannot be accused of sleeping during working hours (an allegation which in any case was denied) when he worked flexible hours every day of the week, and may have worked in excess of his contracted 39 hours. Even when the Respondent was so accusing the Complainant, it still continued with the voluntary arrangement to pay the Complainant a sum in addition to his wage for additional hours worked during Saturday and Sunday.

Further I find that the Complainant was justified in refusing a transfer to another place of work. He had been engaged as a "Mosque Operative", he was engaged in the religious life at the Mosque as part of his employment and in my view he was entitled to refuse to a transfer which would impede this function.

I have some sympathy for Mr Cholli who had a difficult situation to deal with. The Respondent had been granted a desirable contract by the Saudi owners of the Mosque which, unfortunately from his point of view, had some inconveniences. One of these was that, because the contract was granted by a religious body for the upkeep of a place of worship, it was at least an expectation that the Respondent accept certain impositions which would not have been acceptable in an ordinary commercial contract. The Complainant was such an imposition from the Respondent's point of view. Mr Cholli did not get on at all with the Complainant. The Complainant treated Mr Ouwach as the person who gave him instructions and appears to have paid little attention to what Mr Cholli directed him to do. Naturally this undermining of Mr Cholli's authority and unconcealed defiance only increased Mr Cholli's difficulty in dealing with this awkward employee. In what I accept to be an honest belief that he was right to stick to his position, the Complainant adopted an uncompromising stand towards any request of Mr Cholli. The result was a total breakdown in relations.

However, in my view the Respondent acted unfairly in dismissing the Complainant. Although, the personal relations between Mr Cholli and the Complainant were poor, the circumstances were not such as to justify the Complainant's dismissal. I do not find that the Complainant was not performing his job as a cleaner and Mosque Operative. I do not accept Mr Cholli's evidence that the Complainant actually dirtied the location rather than clean the same. I reject the notion that the Complainant did not clean to the best of his ability the place of worship where he served, bearing in mind his age, religious beliefs and heart condition. Further there is no evidence that the Complainant did not properly fulfil his function as Mosque Operative to assist in the religious activities at the Mosque.

It was suggested by the Complainant that his dismissal was a form of reprisal by the Respondent after the Complainant had made allegations that the Respondent had not paid his Social Insurance contributions as due. I do not accept that this was the reason for the dismissal.

Mr Cholli followed a procedure of issuing written warnings and holding a hearing before the final decision to dismiss the Complainant was communicated by letter of 31 July 2003. Notwithstanding the procedure followed, I find that the basis on which the Respondent acted was not justified and hence the fact of having followed a proper procedure does not affect my decision that the dismissal was unfair.

Turning to the matter of compensation, the amount of the award is to be such as is considered by the Tribunal to be "just and equitable in all the circumstances..." (Section 71 (1) of the Employment Ordinance). Section 72 (1) provides that where compensation is ordered to be paid to a complainant, the tribunal shall award a basic payment of the prescribed amount, in this case not less than £2,200. Additionally, pursuant to Section 72 (2) and (3), the tribunal may award compensation for any loss suffered by the Complainant not exceeding the prescribed amount. Section 71 (3) provides that the tribunal, where it finds that the matters to which the complaint relates were to any extent caused or contributed by the complainant, shall reduce its assessment of his loss as it finds just and equitable.

The Complainant was dismissed on 31 July 2003 and received 4 weeks' wages. He obtained employment on 15 March 2004. During the period of his unemployment the tribunal was informed he received unemployment benefit of £84 each fortnight.

I find that the Complainant in part contributed to the poor relations which led to the dismissal. The Respondent is a small company and in effect for all material purposes was represented by Mr Cholli. The difficulties in this case arose as a result of the ill-will between the Complainant and Mr Cholli. The Complainant was inflexible in his attitude towards his work and refused to try to find a way of diffusing the tension. This may have come from his belief that he would never be dismissed because of the religious position he held. This brinkmanship only made matters worse.

Having regard to all the circumstances, this Tribunal finds that it is just and equitable to award the Complainant the total sum of £2,500 to be paid by the Respondent. This total sum comprises an amount of £2,200 in respect of the Basic Award awarded under Rule 2 of the Industrial Tribunal (Calculation of Compensation) Regulations 1992 and an amount of £300 in respect of the Compensatory Award awarded under Rule 3 of the said Regulations.



**P X Nuñez**  
Chairman

2<sup>nd</sup> December 2004.