

**IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR**

**Case No.2/2003**

**BRENDAN JAMES GOLT**

*Complainant*

**and**

**CROWN RESOURCES AG**

*Respondent*

**J U D G M E N T**

INDUSTRIAL TRIBUNAL  
- 2 FEB 2005  
RECEIVED TODAY

# INDEX

<u>HEADING</u>	<u>PAGE</u>
THE FACTS	1 - 4
THE PLEADINGS	4 - 5
BASIC CASE FOR RESPONDENT	5 - 6
EVIDENCE OF JOSEPH MOSS	6 - 10
BASIC CASE FOR COMPLAINANT	10
EVIDENCE OF COMPLAINANT	11 - 16
THE LAW	16
CASE LAW	16 - 17
RULING ON PROCEDURAL POINT	17
CLOSING SUBMISSIONS FOR COMPLAINANT	17 - 18
CLOSING SUBMISSIONS FOR RESPONDENT	18 - 20
DECISION	20 - 24

**IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR**

**Case No.2/2003**

**BRENDAN JAMES GOLT**

*Complainant*

**and**

**CROWN RESOURCES AG**

*Respondent*

Stephen Bossino Esq., instructed by Messrs Stephen Bossino, Solicitors for the Complainant

Mark Isola Esq., instructed by Messrs Triay & Triay, Solicitors for the Respondent

Before Eric C Ellul, Esq MBE Chairman

Hearing during Wednesday, Thursday and Friday the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> days of November 2004 and final speeches on 21st January 2005.

**J U D G M E N T**

**THE FACTS**

The Complainant was employed by the Respondent on or about 19<sup>th</sup> March 1997 as an Operations Manager. At the time the Respondent had about 20 employees working in Gibraltar. The duties of the Complainant during the first year involved preparing contracts, invoices, cargo insurances, freight calculations, the monitoring of the movement of vessels, dealing with letters of indemnity and other relevant work relating to the movement of cargo for the oil products department of the Respondent. About a year and a half after joining, his job specification and responsibilities changed and as from then on his duties entailed distribution of vessel documents, operating the telex machine for forwarding contracts and invoices and reconciling these.

The Respondent was an international company registered in Switzerland and its primary purpose was to act in Gibraltar as a service company to the head office in Zug. It was engaged in trading in oil and oil products. During the years 1999 and 2000 it started trading in hedges and in futures. This led, according to the General Manager of the Respondent, Mr Joseph Moss, to the downfall of the Respondent.

About a year and a half after the Complainant joined the Respondent, most of the workforce of the Respondent in Gibraltar moved to London. The remaining workforce numbered eight employees, namely, Elena Plouzhnikova, Renata Azopardi, Aranzazu Medina Lorenzo, Margarita Gazina, Charles Cruz and Teresa Gonçalves, Zilla del Agua, Mr Moss and the Complainant. As a direct result, the volume of work of the Respondent diminished considerably as did the duties of the Complainant which, according to his evidence, were reduced by between 70% and 80%. In the year 2000 the Respondent moved its offices to Irish Place and, shortly after this, operations were transferred to Zug. This resulted in a further reduction of work which the Complainant described as between a 20% and 30% reduction. Following the terrorist attack on the Twin Towers in New York on 11th September 2001, there was an even further reduction in the workload of the Respondent although the Complainant described this in his evidence as an "insignificant reduction".

In or about July 2002 an audit was carried out of the Respondent by the group Chief Financial Controller with a view to cutting costs. Following this, according to the evidence, the Complainant had one informal meeting with Mr Moss. On 31<sup>st</sup> October 2002 Mr Moss received an E Mail from the head office informing him that, in order to cut down on costs, the staff in Gibraltar was to be reduced to one person, namely, himself. All other members of staff were to be made redundant. Mr Moss called a meeting of the staff that same afternoon and informed them that, as a consequence of the significant decrease in business the Respondent had experienced worldwide, It would carry out a restructuring and reduce its complement of staff in Gibraltar to one person, namely, himself, pending an upturn in business fortunes. He further explained that the Respondent had been suffering from a serious financial downturn in its business fortunes since September 2001 and that it was not possible to sustain the existing level of staff in Gibraltar. He informed them that the new management which had been appointed had decided to reduce the staff in Gibraltar to one person alone, namely, himself, pending an upturn in business. It was hoped that, by doing this, the shareholders of the Respondent would be encouraged to inject additional finance into the Respondent to enable it to continue. He informed them that they would be made redundant and that the redundancies would be phased in although he gave no more detailed information on this. During his evidence Mr Moss said that at the time he held little personal hope, if any that the Respondent would in the immediate future continue with its operations in Gibraltar.

On 1<sup>st</sup> November 2002 letters were written to all the employees by Mr Moss informing them that, as a result of the restructuring plans for the Respondent which had by then been completed, their employment with the Respondent was to be terminated by 1<sup>st</sup> December of that same year. The Complainant said in his evidence that he had not read this letter. There were two exceptions to the date when the employment of the employees was to terminate. Firstly, Renata Azopardi, who, because of the terms of her contract with the Respondent, would stay a further 3 months until the end of February of the following year. The second exception was in the case of another employee, namely, Charles Cruz. His term of employment would terminate on 31<sup>st</sup> December and not on the 1<sup>st</sup> as in the case of the others. Mr Moss explained that the reason for this was that he wanted to retain Mr Cruz, who was the IT operator, for an additional month to allow the Respondent to maintain operational efficiency until the last day on which the office would be expected to be manned to deal with contracts. At this time the duties of the Complainant frequently took him only about 10 minutes to discharge although there were days when he was engaged for one or two hours. Indeed, there was very little work to be done at this time by all members of staff.

Mr Moss was cross examined about the retention by him of Mr Cruz for a further month beyond the period when the employment of the other employees, including that of the Complainant, would terminate. It was put to him variously that this was as a result of favouritism, given that Mr Cruz was Mr Moss's brother in law and that Mr Cruz would be taking over the duties of the Complainant so that the redundancy of the Complainant would thus not be justified or, at best, manifestly unfair. The Complainant also said that Mr Cruz had been kept on to help him financially. Mr Moss denied all these allegations.

However, at the time, the Complainant did not raise any objections on this particular point. Following the said meeting of 31<sup>st</sup> October 2002, the Complainant had a number of conversations with Mr Moss during which the possibility of the Complainant leaving early and before 1<sup>st</sup> December was discussed. During these conversations the Complainant alleges that Mr Moss actively encouraged him to leave early, that is, before 1<sup>st</sup> December, and look elsewhere for employment. Mr Moss denies such active encouragement or invitation and explained that he was merely acting as a responsible employer and friend of the Complainant advising that, if he found alternative employment, it would be in his interests to leave early. The Complainant left the employment of the Respondent on 11<sup>th</sup> November when he received his salary until 1<sup>st</sup> December and his redundancy payment.

Of the other 7 employees, including Mr Moss, the position was as follows : Zilla del Agua terminated her employment with the Respondent on 9<sup>th</sup> July 2002. Aranzazu Medina Lorenzo terminated her employment on 1<sup>st</sup> December 2002. Elena Plouzhnikova and Margarita Gazina also terminated their employment with the

Respondent on the same day although they remained but were henceforth employed and were paid their wages by another company. Renata Azopardi remained a further 3 months under the terms of her contract with the Respondent. Teresa Gonçalves' contract terminated on 14<sup>th</sup> December 2002, having received one month's notice. Charles Cruz was retained, for the reasons stated above and, according to Mr Moss, "...because of the needs of the Respondent and his particular skills".

A new management was put in place on 22 December 2002 and they put a freeze on the entire restructuring plan for the Respondent which was already in the course of implementation. The Respondent was thus allowed to continue with its operations in Gibraltar beyond the anticipated end of that year. The direct result of this was that the employees who had not yet left their employment with the Respondent by that date stayed on. However, in February 2003 it was decided that the Respondent should close down. Of the remaining employees, Charles Cruz was given notice on 20<sup>th</sup> February 2003 terminating his employment on 21<sup>st</sup> March 2003, Renata Azopardi was given notice on 30<sup>th</sup> June 2003 terminating her employment on 31<sup>st</sup> July 2003 and on 30<sup>th</sup> June 2003 Margarita Gazina and Elena Plouzhnikova terminated their employment with the other Respondent by which they were now employed and which was paying their wages. On 31<sup>st</sup> July 2003 the Respondent finally closed down its operations in Gibraltar.

In mid January of that same year, 2003, the Complainant discovered that the employees who had been allowed to remain beyond 1<sup>st</sup> December 2002, namely, Charles Cruz, Renata Azopardi, Rita and Elena Plouzhnikova were still working for the Respondent and that the Respondent was still actively pursuing its operations in Gibraltar.

THE PLEADINGS

An Originating application for unfair dismissal was issued on behalf of the Complainant on 7<sup>th</sup> February 2003. The reasons given by him for wrongful dismissal were that the Respondent claimed it was cutting down costs, eventually closing down its Gibraltar office. The Respondent had cut down costs but had not closed down and he had been wrongfully selected for dismissal since other employees closely connected to the Respondent had not been dismissed. Some of them were conducting his job.

A Notice of Appearance was filed on behalf of the Respondent on 10<sup>th</sup> November 2004. The reason given therein for dismissing the Complainant was redundancy as a consequence of the significant decrease in business the Respondent had experienced worldwide when it had decided to reduce its complement of staff in Gibraltar to its General Manager only, Mr Joseph Moss. The employees were informed of this decision on 31<sup>st</sup> October 2002 and that the

redundancies would be phased in although no details were given of this at that stage. The Complainant was subsequently informed as to the manner in which the Respondent intended to phase in the redundancies and he raised no objection and decided to leave early on 11<sup>th</sup> November 2002. Any question as to selection for redundancy on 31<sup>st</sup> October 2002 related to retaining only essential staff for the minimum period of time and for the period it would take for their contracts of employment to be lawfully terminated.

A material change of circumstances took place on 22<sup>nd</sup> December 2002 which led to the suspension of the Respondent's restructuring plans. Those employees who had not yet left were retained until June/July 2003 following a final decision in February 2003 to revert to the original restructuring plans. The Respondent finally terminated its operations in Gibraltar in July 2003.

An agreed bundle of documents was filed containing the pleadings, Witness Statements of both the Complainant and the Respondent, a supplemental Witness Statement of Mr Moss attaching E Mail correspondence and a letter Paul Maxwell, Chief Financial Officer, Mr Ron Cox, Finance Manager and Mr Steven Rudofsky, Chief Executive Officer, copies of letters to employees from the Respondent of termination of their employment, copy of the Complainant's Notice of Engagement and Variation of Terms of Engagement, employees' Termination Forms and the Complainant's wage slips.

It was agreed between Counsel that, since dismissal was not an issue, the Respondent would give his evidence first. The only issue was whether such dismissal was fair or not.

THE BASIC CASE FOR THE RESPONDENT

The Complainant had been employed by the Respondent on or about 19<sup>th</sup> March 1997. Following a series of events and circumstances and for the reasons set out above, all members of staff were informed on 31<sup>st</sup> October 2002 that, with the exception of Mr Moss, they would all be made redundant by 1<sup>st</sup> December of that year with the exception of Mr Cruz, whose employment would terminate on 31<sup>st</sup> December and Renata Azopardi, who would end her employment at the end of February 2003. The Complainant expressed a wish to Mr Moss to leave early in order to look for another job. Since there was little work for the Complainant, Mr Moss agreed. The Complainant left on 11<sup>th</sup> November.

A new management was put in place and, on 22<sup>nd</sup> December, they decided to freeze the restructuring plans. Those members of staff, which included Mr Cruz, who had not left by that date, were thus allowed to stay. The termination of the Complainant's employment,

together with that of other members of staff, was a genuine case of redundancy. Mr Cruz was retained for one further month for the reasons given above and to carry out the duties previously carried out by the Complainant. The decision of the new management on 22<sup>nd</sup> December to continue was not foreseen on 31<sup>st</sup> October. The redundancies had been implemented in a fair manner and there was no question of favouritism nor had there been any sinister motive in Mr Cruz having been kept on for a further month.

### THE EVIDENCE OF JOSEPH MOSS

Evidence was given on behalf of the Respondent by Mr Joseph Moss, who was the General Manager of the Respondent.

Mr Moss was taken by his Counsel through his Witness Statement.

Mr Moss introduced 5 exhibits as follows :

1. His Witness Statement dated 10<sup>th</sup> November 2004
2. Supplemental Witness Statement dated 15<sup>th</sup> November 2004
3. Letter dated 21<sup>st</sup> June 2002 from Mr Moss to Zillah del Agua
4. Letter dated 9<sup>th</sup> July from Mr Moss to Zillah del Agua
5. Copy of an Order of this Tribunal dated 3<sup>rd</sup> June 2003

In the course of his evidence in chief Mr Moss explained that he was the General Manager of the Respondent in Gibraltar, The Respondent was an international company registered in Switzerland and its primary purpose was to act as a service company to the Head Office in Zug. It employed 8 persons in Gibraltar,

The Respondent suffered from the terrorist attack in New York on 11<sup>th</sup> September 2001 when it lost its entire profits. This weakened the Respondent's ability to take on new business in Gibraltar. Traders moved to London 6 months after the Complainant joined. The work load decreased and some of the Complainant's duties disappeared. The Complainant used to support the traders and this was a major component of his work.

The Respondent's business since 1996 in Gibraltar has been trading in oil and oil products. In 1999/2000 the Respondent started trading in hedges and futures. This led to the downfall of the Respondent.

Because of the deteriorating financial position of the Respondent an audit was carried of the Respondent by the Chief Financial Officer of the group and as a result it was decided to reduce the staff to one person,



namely, himself in order to cut costs and to encourage shareholders to inject further capital into the Respondent. Mr Moss was informed of this on 31<sup>st</sup> October 2002.

Later that day Mr Moss called a meeting of the staff and informed them that as a result of the deteriorating financial position it had been decided that it was not possible to sustain the existing level of staff in Gibraltar. Severe cuts had been implemented in London and in Zug. The Complainant was present at the meeting. This was the only official meeting Mr Moss had with the staff although at the meeting they were all invited to see Mr Moss and discuss matters further with him.

By this time the Complainant's duties took him about 10 minutes each day although on some days he worked for longer periods. This had nothing to do with the Complainant but rather with the decrease in business.

On 1<sup>st</sup> November 2002 letters were sent out by Mr Moss to all the employees giving them notice of termination of their employment by 1<sup>st</sup> December 2002. Ms Azopardi's contract of employment required that she be given three months' notice. She had to be retained to assist Mr Moss in winding up the business of the Respondent. Mr Cruz was given notice of termination of employment on 31<sup>st</sup> December as opposed to 1<sup>st</sup> December since he was needed to deal with day to day IT duties. When Mr Cruz was taken in, he was good with computers. This was a saving for the Respondent as it did not have to call in a local company to look after the computers. He was later sent to the UK for a course on IT. His salary was less than that of the previous qualified person.

Mr Moss said he had had several conversations with the Complainant after the meeting of 31<sup>st</sup> October. He informed him of the fact that he was retaining both Mrs Azopardi and Mr Cruz. The Complainant made no objection to this. Everyone was given the opportunity to find alternative employment whilst still employed and to leave early if such employment was found.

Some time after the meeting of 31<sup>st</sup> October the Complainant spoke to Mr Moss and expressed a wish to leave early in order to look for other employment. Since there was little work for the Complainant to do Mr Moss agreed that he should leave early. The Complainant informed Mr Moss that he was considering employment with a shipping company. The Complainant left his employment with the Respondent on 11<sup>th</sup> November.

On 22<sup>nd</sup> December the Chief Financial Officer of the Respondent resigned following a rejection by the shareholders of the Respondent of the restructuring plans and a new management was out in place. The new management put a freeze on the restructuring plan. The result was that the employees who were still working with the Respondent

continued to be so employed. If the Complainant had still been employed with the Respondent at that stage, he would have remained for a few more months.

In February 2003 it was decided to close the Respondent's operation in Gibraltar and the remaining employees were given notice. The Gibraltar operation finally closed down in July 2003.

In cross examination Mr Moss referred to an E Mail he had received from his superiors on 31<sup>st</sup> October 2002 in which he was informed of the decision of the board to reduce the Gibraltar operation to one person, namely, himself. He expressed a personal view at the time that the Respondent was closing down altogether. He said that, as friend of the Complainant, he informed him of this view and as manager of the Respondent he told him the staff was going to be reduced to just one person, namely, himself. Although the office never closed down, Mr Moss expressed surprise that the Complainant should feel aggrieved because he had told him as a friend that he thought the office was going to close. The Complainant was on notice to leave by the end of November and told Mr Moss that he was going to leave and look for a job. There had been speculation for months as to how long the company could carry on like this.

The staff had been consulted. The trade union was not involved. Legal advice was taken and there were no problems. The meeting of 31<sup>st</sup> October was not full. Some employees were not present. They all knew they could discuss matters with him. He explained that at the meeting he said that the redundancies would be phased and that some employees would need to stay on until the end of the year. He said he gave no particulars although everyone knew who was leaving and who would be staying. The Complainant was present at the meeting. He admitted that it would have been a good idea to have mentioned at the meeting who was going and who was staying.

The audit in Gibraltar was carried out by Maxwell and Alexandrov. Mr Moss said he had met someone from the board in August. The board mentioned cuts but not swingeing cuts. He said he assumed they had the consent of the shareholders. By December 2002 the final restructuring was not settled. This required an injection of capital by the shareholders. They were not willing to do so. The gloomy picture was not that settled. The new management tried to carry on but did not keep him informed. He was not informed of the restructuring of the whole group. He said he was an outsider looking in as regards the operation in Gibraltar and did not know whether the new management was chaotic or disorganised.

The company changed its name to FRC and after July 2003 he lost his job with Crown. Had the Complainant stayed on he would have remained in employment. Mr Moss explained that on 23<sup>rd</sup> December he had asked whether those who had left should be taken back. The

Complainant would not have stayed on until 31<sup>st</sup> July 2003 had he still been employed on 23<sup>rd</sup> December. In February Mr Moss was informed that the Respondent would be closing down permanently. Between 21<sup>st</sup> December 2002 and July 2003 the last four members of staff were winding down business.

The Complainant left of his own volition. He would not have stayed until 31<sup>st</sup> July. He would not have stayed beyond that. The Complainant could not have done the job of Cruz. Cruz was fixing computers back up and the problems with the telex and electronic equipment. Mr Moss said that they were told they had to reduce by 31<sup>st</sup> December. The Complainant at this time was doing about 10 minutes' work a day. After December, there was no further trading and his duties had virtually disappeared. He explained that he had known of the business and restructuring plans to be put to shareholders by 9<sup>th</sup> December and not as early as 1<sup>st</sup> October. After June 2003 there was very little to do in the office.

All the employees knew who was staying and who was leaving. No questions were asked at the meeting. The Complainant was employed in 1997. He was the longest serving member other than himself in Gibraltar. Mr Moss said in answer to a question put to him that he had not invited the Complainant to leave. He had asked.

In re-examination Mr Moss said that he had had no hand in deciding on the redundancies. On 31<sup>st</sup> October he had not told the Complainant the Respondent would close down, only that the staff would be reduced to one, himself. He had not invited the Complainant to leave. Whether the Respondent closed or reduced its staff would make no difference to the Complainant. Only Mr Moss was to be retained.

On 31<sup>st</sup> October Mr Moss had received instructions to reduce the number of employees. The primary reason for this was twofold. Firstly to try and cut down costs and secondly to seek an injection of capital by the shareholders. There was no need for the shareholders to approve the redundancies. These had already occurred in London and in Zug. Without funds, the Respondent's position was untenable. The directors wanted to show the shareholders that with cuts in overheads and staff and an injection of capital, the Respondent could succeed.

Mr Moss said that he had a good relationship with the Complainant. He had had lunch with the Complainant afterwards. The Complainant had sought his advice. He had spent one New Year's Eve together with him. He would not have done anything prejudicial to his interests. He said that after 31<sup>st</sup> December he had had a drink with him and told him about matters in the office. He told him that on 22<sup>nd</sup> December Maxwell and Rudosky had been sacked and that remaining staff had been asked to stay and that they were still in a form of limbo.

He said that the Complainant was present at the meeting of 31<sup>st</sup> October and that he had left on 11<sup>th</sup> November. After 31<sup>st</sup> October he would have discussed the matter of the redundancies on a daily basis. He would have mentioned to the Complainant that Renata Azopardi was staying and that Charles Cruz was staying until 31<sup>st</sup> December. The Complainant's reaction was neither positive nor negative.

Mr Moss said that between 31<sup>st</sup> October and 11<sup>th</sup> November the Complainant had never told him he was objecting to his keeping Cruz and letting him go.

### THE BASIC CASE FOR THE COMPLAINANT

The case for the Complainant is that he was unfairly dismissed in that, because another employee, namely, Charles Cruz, was retained after he left to do his job, this was not a proper case of redundancy or, at best, redundancy was implemented unfairly. The reasons given to him by Mr Moss, acting on behalf of the Respondent, for terminating his employment was that the Respondent was going to be restructured and would be reducing its staff to just one employee, namely, Mr Moss himself, pending an upturn in business. All employees would thus be made redundant.

The Complainant was given notice on 1<sup>st</sup> November 2002 that his employment with the Respondent would terminate on 1<sup>st</sup> December 2002. Following conversations with Mr Moss, when the Complainant says Mr Moss invited and encouraged him to leave early, the Complainant left his employment before 1<sup>st</sup> December, that is, on 11<sup>th</sup> November 2002. The Complainant claims that Mr Moss expressed a personal opinion to him that the Respondent would close down its operations in Gibraltar and that its business would be moved elsewhere.

It then transpired that Charles Cruz had been kept on beyond 1<sup>st</sup> December 2002 until 21<sup>st</sup> March 2003, during which time he was doing the work which had been previously done by the Complainant. In those circumstances, there were no grounds for terminating his employment on grounds of redundancy since the work the Complainant had been doing continued to be done by another person. The work the Complainant had been doing for the Respondent was of vital importance to it. In his own words under cross-examination the Complainant put it as follows "...Redundancy is unfair if someone is dismissed and someone else carries on doing his job...".

## THE EVIDENCE OF THE COMPLAINANT

The Complainant introduced 2 exhibits as follows :

1. His undated Witness Statement
2. His pay slip from his place of work at Los Barrios for the period June, July and August 2004

The Complainant was employed by the Respondent on or about 19<sup>th</sup> March 1997 as an Operations Manager. At the time the Respondent had about 20 employees. His duties during the first year, according to paragraph 4 of his undated Witness Statement which he produced at the hearing and is exhibited as Exhibit 6, involved preparing contracts, invoices, cargo insurances, freight calculations, distributing documents and other relevant work relating to the movement of cargo for the oil products department of the Respondent. In his evidence in chief and in cross examination he included as his duties the monitoring of the movement of vessels and dealing with letters of indemnity. At paragraph 6 he goes on to say that after the move of most of the workforce to London, which at paragraph 5 of his Witness Statement he stated as occurring about a year and a half after he joined the Respondent, his job specification and responsibilities changed and as from then entailed distribution of vessel documents, operating the telex machine for forwarding contracts and invoices and reconciling these.

At this time he said that his duties diminished considerably; by about 70% or 80%. Notwithstanding the diminution of his duties, the Complainant's salary was not reduced. In the year 2000 the Respondent moved its offices to Irish Place and, shortly after this, operations were transferred to Zug. This resulted in what the Complainant described as "a small reduction in work". When pressed under cross examination he placed this reduction in work at between 20% and 30%. Following the terrorist attack on the Twin Towers in New York on 11<sup>th</sup> September 2002 the Complainant, when pressed in cross examination, said that there was "insignificant reduction" in work between 11<sup>th</sup> September 2001 and the date when he left his employment with the Respondent on 11<sup>th</sup> November 2002.

At paragraph 16 of his Witness Statement, the Complainant says that "...in or about July 2002 alarm bells began to ring...". The Complainant and other members of staff were informed by Mr Moss that a Chief Financial Controller had been appointed to come to Gibraltar for an audit and to cut costs. Sometime after this the Controller came to Gibraltar. During one of his conversations with Mr Moss in July 2002, the Complainant said that he informed him that if he were made redundant, he would take legal action against the Respondent. On 31 October a meeting was called by Mr Moss of the employees. At the time there were 8 employees in all, including the Complainant and Mr

Moss. They were : Elena Plouzhnikova – Renata Azopardi – Arazazu Medina Lorenzo - Margarita Gazina – Charles Cruz – Teresa Gonçalves – Mr Moss and the Complainant. Absent from this meeting were Elena Plouzhnikova, Renata Azopardi and Charles Cruz.

At the meeting Mr Moss informed them that they would be made redundant before 31<sup>st</sup> December with the exception of Renata Azopardi who would stay a further 3 months because of the terms and conditions of her contract with the Respondent. The reason for this was the reduction of work available for the Respondent.

The Complainant says that Mr Moss encouraged him to leave early. He put it this way "...I would have waited until the end of my notice (1<sup>st</sup> December 2002) but he encouraged me on two occasions to leave early so I decided I might as well leave." The Complainant finally left on 11<sup>th</sup> November.

Towards the end the Complainant said that "generally speaking, there was little work...". He said that some days he would do as little as 10 or 20 minutes of work in a day and that on other days he might do 1 or 2 hours. The Complainant stressed that his job with the Respondent was of "vital importance to the Respondent" and that this view was shared by Mr Moss. He trained Renata Azopardi and Charles Cruz, two other employees, in the use of the telex machine so that they could operate it in his absence. The Complainant said in his evidence that he was not aware whether Charles Cruz, who he alleged had taken over his responsibilities after he had left the Respondent on 11<sup>th</sup> November 2003, had any qualifications or training on computers.

In the course of his examination in chief he said that his duties had been described by Mr Moss, the General Manager of the Respondent, as vital to the Respondent and that these included work dealing with contracts which he would move on to the London office as if they had been prepared in Gibraltar, invoicing and stamping documents from Russia and London and signing certain documents on behalf of Mr Moss whenever he might be away from the office. In reply to my question during the hearing, he explained that the main object of the Respondent was to establish that the Respondent was being managed from Gibraltar for tax reasons.

The Complainant explained during his evidence in chief that he had often been told by Mr Moss that his job with the Respondent was of vital importance to it and that his job was the main reason why it was there.. This is the way he put it, "...If your boss tells you on several occasions your job is of vital importance, you believe him." "...Because my position was vital, my being made redundant and replaced by someone else would be more serious than if the tea boy is dismissed and replaced."

The Complainant went to see about a job with a shipping company in Main Street, possibly before he left the Respondent on 11<sup>th</sup> November. However, he was told he was over qualified and that his wages would be considerably less than the £21,000 a year which he had asked for. He said he had worked for an advertising company in Spain for a time and that he had looked for employment but had found nothing suitable. He had not applied for unemployment benefits.

In his cross examination the Complainant said that he had had a private meeting with Mr Moss after meeting with the CFO. Mr Moss said there would be severe cuts. This was weeks before 31<sup>st</sup> October. The Complainant was told his job was the most vital job and not to worry. At the meeting of 31<sup>st</sup> October everyone was present except Mr Cruz, Ms Plouzhnikova and Ms Gonçalves. Mr Moss informed them everyone would be made redundant except Renata who would stay another 3 months because of her contract. The Complainant was depressed and he said he would take legal action if made redundant. Mr Moss told him the Respondent would very soon close and he would lose his job himself. The Complainant asked who would do his job if he was made redundant. He said Mr Moss asked him who had advised him on that and that he would not get anywhere. He was also told he might as well look for another job.

On 1<sup>st</sup> November the Complainant received a letter informing him that he would be made redundant as from 1<sup>st</sup> December. The Complainant went to see about a job with a shipping company in Main Street but was told he was overqualified and that he would get much lower wages than the £21,000 a year he was getting at the time. He left his employment with the Respondent on 11<sup>th</sup> November. The Complainant thought the meeting with the shipping company took place before 11<sup>th</sup> November. He said Mr Moss had told him that he might as well leave and that he could get his redundancy payment. The Complainant said that he would have waited until the end of his notice but that he was encouraged on two occasions to leave early. He then decided he might as well leave.

In 1997 the Respondent had about 20 employees in Gibraltar. The Complainant started as operations manager dealing with movement of vessels, insurance, letters of indemnity. On movements of vessels he would spend about 1 or 2 hours a day. If there were problems, this would take him most of the day.

In 1998/1999 the traders moved to London. The Complainant's duties diminished by 70/80%. One of his main duties was to support the traders. His wages were not reduced nor was his job description changed. He was still operations manager. His job was of vital importance and only he had the expertise and only he knew how to do that job. He did not then do reconciliation of invoices and contracts. He took on new duties such as rubber stamping documents when Mr Moss was not there.

In 2000 the Respondent moved to Irish Place and the offices were refurbished at a great expense. Later, operations were moved to Zug. There was less work. The Complainant was dealing with powers of attorney. The loss of work was about 20/30%. He said that, after 11<sup>th</sup> September, there were further reductions. Mr Moss had given him authority to sign contracts by fax. If he was in the office he would sign, if not, he would sign with a rubber stamp having his signature.

Following 11<sup>th</sup> September there was no considerable reduction in the work load. This was insignificant. Between his starting work and leaving there was a reduction of about 70/80%. There were further small reductions. The Complainant said he was left with between 20% and 25% of the work he had originally been doing. He said that Mr Moss had explained that he, the Complainant, was doing about 10 minutes' work each day. He said that he and the others were often not doing even that. On some days they had nothing to do. Some days he would do 10/20 minutes of work. On other days he would do 1 or 2 hours. Generally speaking there was little work. Whatever role he took on in 1997 he was not doing in October 2002. There was a significant reduction of work.

Elena was taught how to use the telex, but not Renata. He also had taught Mr Cruz. They could cover for him. By the time he had left, Mr Cruz could do his job. By 31<sup>st</sup> October Mr Cruz was not computer illiterate. The Complainant explained that he had threatened to take legal action since he knew how vital his job was. He said he was sure he had been made redundant for unfair reasons. His job was of vital importance. Redundancy is unfair if someone is dismissed and someone else carries on doing his job. In July 2003 his job was of vital importance to the Respondent.

He said that if your boss tells you on several occasions your job is of vital importance, you believe him. His job was the main reason why the Respondent was there. Because his position was vital, his being made redundant and replaced by someone else would be more serious than if the tea boy is dismissed and replaced.

In reply to questions put to him, he said he did not know what qualifications Mr Cruz had on computers in October/November 2002. He might have had some after attending a course in the UK. Mr Cruz used to come to the Complainant's room for fragmentation (cleaning) of the computer of files not needed. Sometimes he would go into the Complainant's office to look busy or for a chat. He did not do computer work, although he had the time, because Mr Cruz used to do that. He was bored, but happy. The Complainant said that Mr Moss was inconsistent in what he said to him. Why did he have to employ more people? Some days he would discuss new ventures and say that things would change. On other days he would change and say that things were not looking good.



He said he could do on the computer all that Mr Cruz could do. On 31<sup>st</sup> October Mr Moss said to all the employees that they would all be made redundant. After the CFC came to Gibraltar, the Complainant said Mr Moss told them at an informal meeting that they would all be made redundant. Mr Cruz and Ellen were not present at the meeting of 31<sup>st</sup> October, nor was Mr Gonçalves.

The Complainant spoke about the first meeting he had with Mr Moss in July 2002 when he said Mr Moss told him the Respondent was in crisis. It was then that the Complainant told him he would take legal action. At the second meeting of 31<sup>st</sup> October the staff were present. Mr Moss told them they would all be made redundant, except for Ms Azopardi. She would stay another three months. He had said on other occasions he might end up leaving himself. The Complainant said he was feeling pretty low when he was told he would be made redundant. He did not recall having read the letter of dismissal of 1<sup>st</sup> November. He said that maybe he had received it but had not read it. Those were the meetings of importance. He had had hundreds of conversations with Mr Moss.

The Complainant said Mr Moss had told him Mr Cruz would be staying longer, although he did not say for how long. Mr Cruz could stay as a favour to him. The Complainant said he was not amused. It struck him most when he saw Mr Moss come into the Clipper with Mr Cruz. After the encouragement he had had from Mr Moss, the Complainant said it was logical that he should want to leave as soon as possible.

The Complainant said he married in June 2003 and bought a house the next month. He worked for an advertising company in Spain during January, February and March. During December and between January and March he attended interviews for jobs. One of them was for a job which involved his having to drive too far. He could find nothing suitable.

The Complainant said that it was unfair that Renata had stayed a further three months and that he was unhappy about this. If Mr Cruz had left on 31<sup>st</sup> December, Renata in February and Mr Moss had stayed on and if no one had been doing his job, he would have had no complaint, but if he knew Mr Cruz was doing his job he would object. Anyone staying longer than him, except Mr Moss, would be unfair on him. It would not be unfair for Mr Moss to stay if his duties were not being carried out. To the question put to him as to whether he was annoyed because others were staying longer, for example, the two Russians, he replied no. He said the Respondent was still functioning and without him. What made him sue was that he was told in July that he would be made redundant and that the office was carrying on without him. He had had it in his mind since July to bring a claim for unfair dismissal.

In re-examination the Complaint said that no phasing in of the redundancies was mentioned at the meeting of 31<sup>st</sup> October. In July

2002, when Mr Moss mentioned there would be cuts, the Complainant said he was expressing his objections knowing how important his job was. He should have been one of the last to go. Between 1<sup>st</sup> November and 11<sup>th</sup> November he said he was not fully appraised and it depended on what Mr Moss said to him. Mr Cruz was kept on to help him financially. If he had known Mr Cruz had been kept on to do his job, he would have been furious and would have kept on with his claim for unfair dismissal. If anyone else had been kept on to do his job he would have objected and carried on with his claim for unfair dismissal.

He discussed with Mr Moss after July matters on redundancy every now and then. In July 2002 he was informed of the audit to be carried and the cut in costs. When the CFO came he had an informal meeting with Mr Moss and some members of staff. At the meeting of 31<sup>st</sup> October, neither Mr Cruz, Ms Poulzchnikova nor Ms Gonçalves were present. At the informal meeting Aranzazu, Mr Moss, another person and the Complainant were present.

The Complainant then chose to make a statement as follows:

"What has been said about Mr Moss being a friend – who makes you redundant and never later enquires?" "I have told the truth. Mr Moss has said that he has a better memory than me. His memory cannot be that good."

### THE LAW

This case does not fall within Sections 74, 75 and 76 of the Employment Ordinance by virtue of the amendments provided by Council 92/56/EEC and Article 1(a) of Council Directive No.98/59/EC of 20th July 1998 as the ingredients necessary to make such redundancies "collective redundancies" as contemplated by the said sections and directives do not exist. The obligations thus placed upon an employer in such circumstances on an employer contained in Sections 75 and 76 of the Ordinance do not apply to the Respondent in this case.

### CASE LAW

The Tribunal was referred by Counsel for the Complainant to the two consolidated cases of *Edward Perez v Calypso Tours Ind. Trib. No.22 of 2002* and *Peter Martinez, Mario Sanchez, Hector Cortes, Elisa Galan and Francis Clive Martinez v Calypso Toiurs Imnd. Trib No. 24 of 21002* and read several passages from the judgment in that case. A number of cases were referred to in the written closing submissions by Counsel

on behalf of the Respondent although the Tribunal was not addressed on any specific point other than from the case of *Polkey v AE Dayton (1988) ICR 142 HL* relating to a reduction from any award which a Tribunal might make in favour of a dismissed employee in circumstances where he would have, in the normal sequence of events, ultimately probably been dismissed.

### RULING ON PROCEDURAL POINT

The point was taken by Mr Bossino on behalf of the Complainant that he was entitled to address the Tribunal with a closing statement but that Mr Isola, on behalf of the employer, had no right of reply. Mr Isola objected to this.

By section 65 of the Employment Ordinance, the onus of proof in showing whether dismissal was fair or unfair is on the employer. He is required to show what the reason for dismissal was and whether such reason was such as to justify the dismissal. The Industrial Tribunal Rules are silent as to the precise procedure to be followed regarding the order in which closing submissions are to be made. Rule 13 provides for opening statements to be made by the parties, for witnesses to be called and cross examined and for the parties to address the Tribunal. This last right presumably refers to closing statements, although it does not say in which order they shall be made.

It was agreed between Counsel at the beginning of the hearing that dismissal was not an issue and that the only matter in question was whether the dismissal of the Complainant was fair or unfair.

In normal circumstances, the Respondent in this case, as the employer, would have had the duty to first address the Tribunal with his closing submission since the onus of proof is on him under Section 65 of the Ordinance and the Complainant would have had a right of reply.

Since it was agreed at the beginning of the hearing between Counsel that dismissal was not an issue and, in the absence of any strict procedure provided for under the Rules, I ruled that the Tribunal had no objection to being addressed with a closing submission on behalf of the Complainant in the first place if this was agreed between Counsel, but that, in those circumstances, Counsel for the Respondent should have a right of reply.

### CLOSING SUBMISSIONS ON BEHALF OF THE COMPLAINANT

The Complainant was aggrieved, His role with the Respondent was vital. Mr Moss had said to the Complainant that "...it would be better if you leave early." At best Mr Moss was giving confusing signals. The Complainant had threatened legal action. Mr Moss must have thought

"...The sooner I get rid of him the better." Everyone was given notice of termination, except Renata. The Complainant was the longest serving employee. There was a discrepancy. The Complainant had been truthful.

The keeping back of Mr Cruz was not revealed to the Complainant or anyone else. There was no consultation. Mr Moss said he had had a meeting with the entire staff. This was not true. At that meeting he had not given details of how the redundancies were to be phased in. At the meeting of 31<sup>st</sup> October Mr Moss informed the employees of the redundancies. It was coincidental that Mr Cruz, Mr Moss's brother in law, should remain. Mr Cruz was having financial problems. If Mr Cruz was vital IT man for the Respondent, Mr Moss did not tell the Complainant.

If the Complainant had not been encouraged to leave he would have benefited and would have stayed on until June of the following year.

#### REPLY & CLOSING SUBMISSIONS ON BEHALF OF THE RESPONDENT

Mr Isola on behalf of the Respondent produced written submissions and highlighted certain areas of it to the Tribunal.

His written submissions dealt firstly with the background of the Respondent leading to the reduction of employees in the different areas of its operation.

The second paragraph, under the heading "Warning" deals with the warnings given beginning with September 2002 when the staff were informed that an audit was being carried out to reduce costs, discussions Mr Moss had had with the Complainant and the meeting Mr Moss had had with the employees on 31<sup>st</sup> October when he informed them of the proposed reduction of staff to just one member, namely, himself. Mr Moss admits not having given any details as to the phasing in of such redundancies during the meeting.

The fact of the redundancy having been agreed, the question was, "Was it fair?" Since July 2002 the Respondent was anticipating closing down its operation in Gibraltar. When Mr Moss informed the Complainant of this he threatened legal action. There were warnings as to redundancy and dismissals.

At paragraph 3 of the written submissions, under the heading "Consultation", Mr Isola deals with the consultation there had been between Mr Moss and the employees and he highlights what he considers as the inconsistent version by the Complainant as to what was said at the meeting of 31<sup>st</sup> October. Mr Moss told the

Complainant immediately after the meeting that he would be retaining Ms Azopardi and Mr Cruz and rejected any suggestion by the Complainant that he had made any misrepresentations. The Complainant never raised any objection to the decision to retain Ms Azopadi and Mr Cruz.

The Complainant had left voluntarily. He was annoyed at the events of 22<sup>nd</sup> December when the Respondent was directed to suspend its redundancy restructuring and existing employees were kept on.

Under paragraph 4 of the written submissions, Mr Isola deals with the criteria applied by Mr Moss and refers to the gradual diminution in the duties of the Complainant with the Respondent and comments that his job "...could not by any stretch of the imagination be described as one of vital importance." Mr Cruz had an aptitude for computers and had attended a course in the United Kingdom. He says that the Complainant alleged that Mr Cruz was kept on for personal reasons of Mr Moss in order to assist Mr Cruz with his personal circumstances and that the Complainant did not mind this as long as he did not do his job.

Mr Isola comments on the fact that the Complainant had never said he could do Mr Cruz's job and that it was "...natural, appropriate and fair..." for the Respondent to retain Mr Cruz as IT operator so as to maintain operational efficiency until 31<sup>st</sup> December.

At paragraph 5 of his written submissions headed "Alternative Employment", Mr Isola comments on the different versions given by Mr Moss and the Complainant relating to the circumstances under which the Complainant left the employment of the Respondent early on 11<sup>th</sup> November and before the date of the termination of his employment on 1<sup>st</sup> December. He says that Mr Moss admits to advising the Complainant to start looking for a job and that he could leave before 1<sup>st</sup> December 2002 if he wished, but that he did not encourage him to leave early. Mr Moss recalls the Complainant saying he wanted to leave as soon as possible and look for alternative employment. Mr Moss's advice was that of a good and prudent employer in the circumstances. He comments that it is clear on the facts that the Complainant had found another job and wanted to leave as soon as possible. The Complainant had not been encouraged to leave nor was there any sinister agenda on the part of the Respondent as the Complainant had alleged.

Under paragraph 6 of the written submissions headed "Change of Events", Mr Isola comments that the restructuring plans were made with a view to management securing the agreement of shareholders to inject funds into "...this ailing company". Such injection of funds would not occur unless the Respondent was on a sound financial footing. Management was not seeking the approval of the shareholders to the redundancies and these had already been

decided on by them. When that management was dismissed and a new management put in its place, the new management decided to put a freeze on further redundancies and those employees still retained by the company were kept on. This change of events was not foreseeable as the Complainant alleges in his Particulars of Claim.

Mr Isola ends this paragraph by submitting that "The fairness or otherwise of the Complainant's dismissal should be judged on the knowledge the employer had as on the 31<sup>st</sup> October 2002 and not on subsequent events and, in particular the suspension of management's plans on the 23<sup>rd</sup> December 2002. The Complainant's real gripe is what happened on 22 December 2002 and not on 31st October 2002."

The remaining paragraphs 7, 8 and 9 deal with compensatory awards, the consequence of contributory fault and the duty an employee has to mitigate his loss.

### DECISION

The parties have agreed at the beginning of the hearing that the fact of dismissal is not an issue. It had occurred. The question which remains is whether such dismissal was fair or unfair, that is, whether the redundancy of the Complainant by the Respondent which had taken place was implemented in a fair or unfair manner.

The history of this matter is well documented above as taken from the evidence given by both the Respondent and the Complainant and the subsequent submissions made by both Counsel to the Tribunal. There is no need to repeat this here except for the salient milestones.

The Complainant was employed by the Respondent on or about 19<sup>th</sup> March 1997 as an Operations Manager with certain specific duties to perform. It is important to mention those duties as it is in issue whether such duties were taken over by another employee, Mr Cruz, once the Complainant had left the Respondent's employment on 11<sup>th</sup> November 2003.

During his first year his duties involved preparing contracts, invoices, cargo insurances, freight calculations, the monitoring of the movement of vessels, dealing with letters of indemnity and other relevant work relating to the movement of cargo for the oil products department of the Respondent.

About a year and a half after starting his employment, following the move of most of the workforce to London, there was a reduction in the volume of work resulting in a considerable diminution of the Complainant's duties in the order of, according to his own estimate, 70/80%. His job specification and responsibilities changed and as from then on entailed distribution of vessel documents, operating the

telex machine for forwarding contracts and invoices and reconciling these. In the year 2000 operations were transferred to Zug. This resulted in a further loss of work of, according to the Complainant, about 20/30%. The terrorist attack on the Twin Towers in New York of 11<sup>th</sup> September 2001 further reduced the workload of the Respondent. This all affected the Complainant's duties. Towards the end of his employment, the Complainant was doing about 10 or 20 minutes of work a day although on some days there was work for 1 or 2 hours.

Following an audit of July 2002, it was decided by management to reduce the staff in Gibraltar to one person, namely, Mr Moss, the General Manager. On 31<sup>st</sup> October of that same year he was instructed to implement such decision. That same day he informed members of staff, including the Complainant, of this. On 1<sup>st</sup> November he wrote to all members of staff informing them that they would be made redundant as from 1<sup>st</sup> December. Ms Renata Azopardi could stay a further three months because of the particular terms of her employment and Mr Charles Cruz could stay until 31<sup>st</sup> December as he was needed as the IT operator to allow the Respondent to maintain operational efficiency until the last day on which the office was expected to be manned. He would also be carrying out the duties of the Complainant during that extra month.

Not surprisingly, the Complainant took his redundancy badly. Following the meeting of 31<sup>st</sup> October 2002 he has said he had a number of discussions with Mr Moss who both invited and encouraged him to leave early and look for alternative work. Mr Moss has denied this and has explained that he was merely acting as a friend of the Complainant and responsible employer advising that, if he found alternative employment, it would be in his interests to leave early. He explained that it was the Complainant who had told him he was going to leave and look for a job.

When both versions of what is alleged to have been said during these conversations are considered carefully and objectively, one comes to the inevitable conclusion that there is very little difference in the effect either version would have had upon the mind of the Complainant. Whether Mr Moss had said "You can leave early in order to find another job" or "If you find another job, you can leave early", either version, in my view, would have been seen by the Complainant as an invitation not to remain with the Respondent until 1<sup>st</sup> December wasting his time and to actively look for another job.

Mr Bossino for the Complainant commented during his closing submissions that at best, Mr Moss having said to the Complainant "...better if you leave early", sent confusing signals to the Complainant or that, since the Complainant had threatened legal action he must have thought to himself "The sooner I get rid of him the better".

I do not agree with either proposition. Whatever was said by Mr Moss to the Complainant in this respect would have had the same and clear effect on the Complainant's mind, that is, that he should seek alternative employment and not waste any further time with the Respondent. There has been no evidence to suggest, nor have I detected, any malice or ulterior motive on the part of Mr Moss against the Complainant. I thus hold on this issue that the Complainant left his employment with the Respondent early entirely of his own volition and for his own benefit and that Mr Moss in no way acted reprehensibly or unfairly and unduly influenced him to do so.

The giving of notices of redundancy to all members of staff on 1<sup>st</sup> November 2002 was the unavoidable result of the diminution of the work available to the Respondent for the several reasons stated above. The Complainant was not selected unfairly for this. The reasons why Ms Azopardi was allowed to remain for an extra 3 months and Mr Cruz for an extra month have been given by Mr Moss.

Mr Moss in his evidence and in cross examination explained that Mr Cruz was required to stay on until 31<sup>st</sup> December as he was needed to deal with day to day IT duties. He was good with computers. He was needed for an additional month to allow the Respondent to maintain operational efficiency until the last day on which the office would be expected to be manned to deal with contracts.

When cross examined, it was variously put to Mr Moss that Mr Cruz was allowed to stay for an extra month because of favouritism, given that he was Mr Moss's brother in law and that Mr Cruz would be taking over the duties of the Complainant so that the redundancy of the Complainant was thus not justified or, at best, manifestly unfair. It was also put to him that Mr Cruz had been kept on to help him financially.

Mr Moss denied all these allegations and there has been no evidence produced on behalf of the Complainant in support of any suggestion as to favouritism or a desire to help Mr Cruz financially. Mr Moss has said that Mr Cruz, during his extra month with the Respondent, would be carrying out, apart from his own duties, the duties of the Complainant. I thus hold that in keeping Mr Cruz for an extra month there was no unfairness nor any sinister or ulterior motive on the part of Mr Moss.

At the time that the Complainant left the employment of the Respondent on 11<sup>th</sup> November 2002, he was doing, on his own evidence, about 10 or 20 minutes' work a day although on some days he might do about 1 or 2 hours work. Although the Complainant has described his work as "of vital importance" to the Respondent and he has said that Mr Moss had himself confirmed this to him, it is difficult to equate this with the reality of what was happening and the amount



of work available to the Complainant and the time he spent on it. This was a company which was being run down. There was very little work for anyone to do. Redundancies were being phased in. The Complainant spent some time each day on the telex machine and doing other minor work such as rubber stamping some documents with Mr Moss's signature if he happened to be out of the office. He had trained both Ms Azopardi and Mr Cruz to use the telex machine.

On 22<sup>nd</sup> December 2002 a new management was put in place and they decided to freeze the restructuring which had begun on 1<sup>st</sup> November with the issue of the redundancy notices. It has been said by Mr Moss that this decision was not foreseeable and no evidence has been adduced on behalf of the Complainant to put this in doubt.

The result of such decision was that those members of staff who had not already left, were allowed to stay on. Since the Complainant had by this time left, this unexpected opportunity was not available to him.

It is important to note that the Complainant did not raise any objection when he was informed that Mr Cruz would be staying an extra month. He did say, though, that if he had been kept on to do his job then he would have objected. There has been little specific evidence on the work which Mr Cruz continued to do after the Complainant left on 11<sup>th</sup> November. Mr Moss has said in his evidence that he was fixing computers and providing a back-up service for these and that he was dealing with the telex and electronic equipment. There has been little, if anything, said on whether Mr Cruz actually did carry out any of the duties of the Complainant.

The official duties of the Complainant prior to his leaving were concerned in the main with operating the telex machine for forwarding contracts and invoices and reconciling these. He also used to rubber stamp documents with the signature of Mr Moss whenever Mr Moss might be out of the office.

However, the reality was, as the Complainant has himself candidly admitted, that there was hardly any work for him to do or, indeed, by any of the others. It does not strike me as realistic or commercially viable or prudent that Mr Cruz should have been retained in order to carry out the very limited and ever diminishing duties of the Complainant nor, for that matter, that any other employee might have been retained in order to carry out the fast disappearing work of any other employee.

Undoubtedly, Mr Cruz will have, in the course of his own duties of maintaining the computers and telex and other electronic equipment, operated the telex machine from time to time as the Complainant had been doing. Indeed, at paragraph 8 of his Witness Statement Mr Moss says as follows, "...Charles Cruz would deal with his normal day to day IT duties and also fulfil the duties of Mr Golt, a role with which

he was familiar". These duties were minimal and destined to decrease with every passing day. At the time when this arrangement was devised, it was intended to cover a very limited interim period of one month, that is, from 1<sup>st</sup> to 31<sup>st</sup> December 2002 and this was probably the reason why the Complainant did not object at the time. I hold that this arrangement was made in good faith by Mr Moss in pursuance of his instructions and obligations and that the Complainant was aware of this and did not object. Had Mr Moss known at the time that the restructuring plans would be reversed on 22<sup>nd</sup> December and that the Respondent would carry on indefinitely operating as from that date, the matter would have been different. But that was not the case and Mr Moss has said in his evidence that the cancellation of the restructuring plane on 22<sup>nd</sup> December was not foreseen on 31<sup>st</sup> October nor on 11<sup>th</sup> November when the Complainant left.

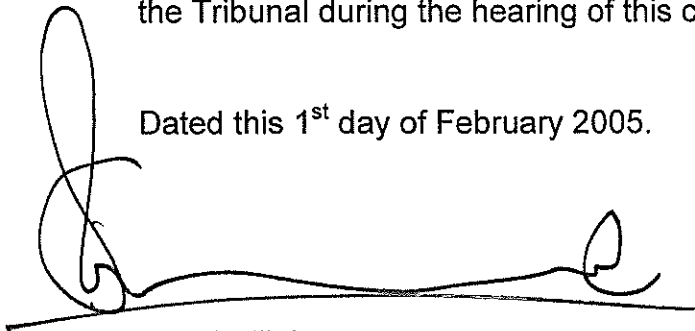
I have commented before on the fact that the Complainant did not object when he was informed of the impending redundancies nor when he was sent the letter on this on 1st November. The evidence of Mr Moss has been that he told the Complainant that both Ms Azopardi and Mr Cruz would be kept on for a period beyond 1st December. It seems to me that if the Complainant had had any objections, he would have raised such objections to the manner in which the redundancies were being phased in and the interim arrangements which were being made for the winding down of the Respondent to a one man operation either on 31<sup>st</sup> October or, at least, before he left on 11<sup>th</sup> November.

His objection appears to have arisen in mid January 2003 when he learnt that Mr Cruz and others were still working for the Respondent after 31<sup>st</sup> December of the previous year and that the Respondent was still operational. Mr Isola for the Respondent put it rather succinctly in his written closing submissions, "...The Complainant's real gripe is what happened on 22<sup>nd</sup> December 2002 and not on 31<sup>st</sup> October 2002".

For all the reasons stated above, my decision is that the Complainant was not unfairly dismissed by the Respondent.

I wish to thank both Counsel for their very considerable assistance to the Tribunal during the hearing of this case.

Dated this 1<sup>st</sup> day of February 2005.



Eric C Ellul  
Chairman