IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

No. 6 of 2003

BETWEEN:

MANUEL PEREZ GARCIA

Applicant

and

A & M SCAFFOLDING & CRADLES LIMITED

Respondent

Miss A Turner for the Applicant
Mr G Licudi for the Respondent

DECISION

The Parties

1. The Applicant, a 38-year-old Spanish national and family man, worked for the Respondent until 1 April 2003. Initially, he was employed as a scaffold labourer and subsequently as a foreman. He was in charge of one of the Respondent's contingent of Spanish workers undertaking mainly the construction of the 'quick fix' type of scaffolds on various sites around Gibraltar.

2. The Respondent is a busy local scaffolding company. Mr. Cross is the Managing director and Mr. Delo its Technical Director. Both are equal partners in the business. The Respondent employed a mixture of Spanish and English nationals in roughly equal proportions (with one Irishman) and had up to 18 employees at the time. The Respondent tried to keep the groups separate for operational convenience, although there was overlap, and the work divided between the 'quick fix' type of scaffolds and 'tube and fittings' type. Qualifications and experience are required for the latter and this was the main domain of the English workers albeit there was some overlap.

The Central Issue

3. There was one fundamentally disputed issue in this case despite many other disputed matters.

4. Did the Respondent dismiss the Applicant on 1 April 2003?

5. In other words, was the contract under which the Applicant was employed by the Respondent terminated by the Respondent – see Section 64 (2) (a) of the Employment Ordinance ("the Ordinance")?

6. The onus of proof is on the Applicant to satisfy this Tribunal, on a balance of probabilities, that this was indeed the case. Otherwise, his claim for unfair dismissal must fail and this Tribunal is not obliged to consider any other issue.

7. In determining this issue, upon which this case really stands or falls, the Tribunal is obliged to consider the totality of the evidence.

The Proceedings

8. This matter came before me for trial on 30 March 2004. I saw and heard a total of seven witnesses over two days: the Applicant and his three witnesses and three witnesses for the Respondent. I did not permit the Applicants' Witness statements to stand as evidence in chief. Despite all four being Spanish nationals with little or no knowledge of the English language, as anticipated by the Respondent's Counsel, their Statements were all in English and did not contain a proper translation attestation clause by the person who drafted these. I ruled in favour of Mr. Licudi's objection to them prior to the hearing. I have not taken their contents into account.

9. The Respondent's Witness statements stood in as evidence in chief although all three witnesses gave extensive live evidence.

10. On 2 April 2004 Counsel made their final submissions and I reserved judgment.

The Pleadings

11. The Applicant, in his Originating Application of 25 June 2003, claims against the Respondent exactly as follows:

"The grounds upon which it is claimed that the dismissal is unfair:

4.1 The Applicant commenced employment with the Respondent on the 9th June 2000 and at the time of his dismissal was employed as a foreman.

4.2 On the 27th of March 2003 the Respondent informed the Applicant during the course of a meeting that his existing contract of employment as a foreman and at an hourly rate of £8.00 per hour was terminated but that he would be kept on as a labourer at a reduced rate of pay of £6.00 per hour.

4.3 The proposed new terms and conditions were substantially less favourable that those to which the Applicant was working and in particular with respect to the demotion from foreman to labourer and reduction in pay from £8.00 per hour to £6.00 per hour. The Applicant could not accept the proposed new terms as they were unjustified and unreasonable, and would impose financial hardship on him and also difficulties in working

alongside other employees as a labourer when he had previously enjoyed the position of foreman.

4.4 On the Applicant's refusal to accept such unilateral changes without notice or proper consultation, Richard Mr Cross, the managing director of the Respondent, stated that the Applicant had voluntarily dismissed himself, with immediate effect due to his refusal to accept the new terms and conditions but that he would be paid one weeks' wages.

4.5 In the circumstances, the Applicant considers his dismissal to have been unfair. In particular, the Applicant will rely on the fact that:-

4.5.1 The Respondent's unilateral decision to change his terms and conditions of employment was unreasonable in all the circumstances of the case and in particular:-

4.5.1.1 The degree of change proposed was not necessitated by the needs of the business; and

4.5.1.2 It was not unreasonable to expect the Applicant to expect to accept the proposed changes in the light of the circumstances;

4.5.2 The Respondent failed to give any or any adequate warning of the proposed change;

4.5.3 The Respondent failed to properly consult with the Applicant about the changes proposed and the timing of their introduction and their effect;

4.5.4 The Respondent failed to consider alternatives to the proposed changes and to consult with the Applicant about the same or to otherwise give the Applicant warning of the Respondent's intention and the reasons behind those intentions;

4.5.5 The dismissal was otherwise unfair and unreasonable and contrary to good industrial and fair practice;

4.5.6 The Respondent failed to repay to the Applicant the one weeks' deposit of wages deducted at the outset of the employment for the Company, two weeks' notice and all accrued holiday entitlement and other contractual benefits.

12. The Respondent, in its Notice of Appearance of 11 July 2003, in resisting the claim states exactly as follows:

"*i)* *The Applicant terminated his employment with the Respondent by resigning on the 1st April 2003.*

ii) *The Respondent commenced employment with the Respondent on 9th June 2000 as an Improver. He acted as foreman since about October/November 2000 although he was never formally appointed to his post.*

iii) *Following a discussion on 1st April 2003 between the Applicant and the Respondent's managing director, the Applicant was informed that he could no longer be entrusted with the responsibility of a foreman but would continue to work as an improver. The Respondent's actions were justified and reasonable in all the circumstances. The Applicant responded that he did not wish to work as an improver and would resign from his post.*

iv) *Further or in the alternative, if the Applicant was dismissed, the Applicant's refusal or failure to properly undertake the duties of foreman constituted a sufficient reason for the Applicant's dismissal. The Respondent discussed with the Applicant the possibility of an alternative position which the Applicant declined. In the circumstances, the Respondent acted fairly and reasonably at all times.*

v) *The Applicant was paid on the termination of his employment all amounts to which he was entitled either by contract or statute.*"

Exchange of Correspondence

13. On 9 June 2003, the Applicant's solicitors wrote to the Respondent directly on exactly the following terms:

"*We are instructed to act on behalf of Mr Manuel Perez Garcia in respect of his unfair dismissal from your employment on 28th March 2003.*

We refer to the Notice of termination filed with the Employment Service dated 10th April 2003 and would be grateful if you could confirm the circumstances in which you allege that our client resigned. We note at paragraphs 10 and 11 of the said Notice of Termination that the date on which notice of termination was given by you and our client is the same. Would you please clarify this?

Would you please provide us with a copy of your terms and conditions of employment?

We look forward to receiving a reply to our letter within seven days failing which we will issue proceedings for unfair dismissal."

14. On 10 June 2003, Mr Cross replied in writing exactly as follows:

"With reference to Applicant's claim of "unfair dismissal", we would like to inform you of the sequence of events which terminated in his resignation.

25th March 2003
Applicant was always very keen to work overtime so when an opportunity came up for a few hours extra work on the front elevation at the House of Assembly. Applicant was sent to this job with 2 other workers Mr Bruce Setter and Mr Salvador Guerrero. This was an urgent job which should have been completed by 7 pm. At 4.45 pm Applicant downed tools and said he was going home – Mr Setter (who was the labourer on the job) said that the job needed urgently finishing. To which Applicant replied that he was not finishing anything, he was going home. Applicant was the foreman & Mr Setter the labourer.

26th March 2003
In the morning, with the help of Mr Miguel Olivero who I used to translate, I asked Applicant why he was always asking for overtime when he was not prepared to do it, he replied that at the weekend I had had the English men working overtime and not him, he then went on to say that I only asked the men to do overtime when it suited me. I am the managing director of a very busy scaffolding company – overtime is allocated when we have too much work to do during a normal working week and the men are picked to do this on their suitability to the job not their nationality. His attitude on that morning was very dismissive and on that day I sent him to work with another foreman as at this point I did not feel he had the interest of the company at heart.

27th March 2003
Applicant was put back to work in his normal capacity but it rained on and off most of the day. They were sent home with pay at 2.30 pm.

28th March 2003
Applicant was sent to work on a tower at Town Range. The job had been started the day before with two men who had no problems. Applicant said it was not possible with only two men, so a third man was sent for at which point Applicant said he was not going to do the job as he did not feel well. Applicant did not telephone the office nor inform any of the other foremen that he was leaving..... we did not hear from or see Applicant again until 1st April 2003.

1st April 2003

Applicant arrived at work that morning and did not speak or acknowledge me. Mr Olivero (who I used to translate) informed me that Applicant wished to speak to me, I replied that I also wanted to speak to him and for Applicant to come to my office at 9am – Applicant replied "I want to speak to you now" I repeated to him to come to the office at 9am. In the office I used Mr Wayne Mr Estella as interpreter and asked him what his problem was. Manuel replied he had worked for A & M for a long time and I said that it didn't matter how long he had worked for us I could not have him being in charge of men with his current attitude to work and his employers. I continued to say that he could carry on working but not as a foreman as a labourer. He stated that he did not want to do that so I asked him what he wanted to do and he said he would resign from his post. I thanked him for all his work, shook hands with him and off he went.

You refer in your letter to the Notice of Termination and yes, unfortunately, it was filled out incorrectly and should say on point 11 date on which notice of termination given by worker 1st April 2003 – we enclose a copy of our terms of engagement contract for Applicant.

We hope that all of the above helps to clarify the situation. On a personal note I would like to say that Applicant has always been treated extremely well by A & M Scaffolding and has had several loans from us totalling £860.00 over the 2 years which he worked for us, we have always had a good working relationship apart from those few final days.

The Applicant's Evidence

The Applicant

15. He was employed between March 2000 and April 2003. He started as a labourer at £6.00 an hour. In January 2001, Mr. Cross promoted him to foreman at 'Casa Antonio' in the presence of his work colleagues. At the time he was working at harbour views and his new duties entailed being in charge of the works and personnel. He was a foreman until he was dismissed. He was paid £8.00 an hour from the moment he was promoted. He was not an acting/provisional foreman because that only happened when a foreman was on vacation or other temporary absences from work because of an accident. He was a full-time foreman working weekdays and weekends.

16. On 18 March 2003 at 4.45 p.m. Mr. Peter Mr Delo, came to where he was working and spoke to Mr. Setter, who in turn advised him that they had to work overtime until 7.00 p.m. and finish the job. He advised Mr. Setter that he could not stay that evening because he had a prior commitment to take his wife to a dental appointment in San Roque. He was not told the job was urgent, although it was in part. They had been there a long time and apparently finished the following morning.

17. The following day he told Mr. Cross and was told the job was urgent and he should have stayed insinuating that his excuse was not true. The following day he was moved to the Main Street site by Mr Delo and placed under Mr. Robin Phillips, another foreman, notwithstanding he was a foreman. He did not know the reasons for this and claims that other people working under him could have been taken instead.

18. The following week, he was suffering from diarrhoea and there were no toilet facilities whilst working outside the building opposite the TGWU's building. He could not carry on and needed a toilet. He asked two colleagues, Fernando Soto and Daniel Olivero, to report his absence. He did not consider there was anything wrong in not personally reporting it, there were witnesses to him not being well and other colleagues had done the same before. They had gone and not reported it themselves. This was on a Friday and, he was still suffering the after-effects on Monday. The day before he left ill, three men had been working at this site.

19. He went home looking for a toilet and did not go to a doctor. He returned to work on Tuesday having been away from work for 1-½ days. He arrived at 7.40 a.m. as normal everyday. It was clear he was no longer foreman. Mr Cross did not approach him. Mr. Cross and Mr Delo would assign the jobs, and he was asked to go to the office at 9.00 a.m. To his surprise Mr. Contreras had been asked to take his post. Mr Cross directed other workers to the sites including Mr. Contreras. He had a coffee and went to the office.

20. Whilst in talk and discussion in the office with Mr. Cross and Mr. Estella, he was told he would be downgraded and his pay decreased. This had never happened before. He supposed that he would be paid £6.00 an hour as labourer, although that contract said £5.50 an hour. He was not interested in that and not in agreement with it. He also says that Mr. Cross told him that if he did not accept those terms he had dismissed himself. Mr. Garcia says he left and went to the Union and to find a lawyer. He denied leaving because he was unhappy over the overtime issue. He had not seen the Agreement between the Construction & Allied Workers Association & the TGWU before ("CATA"). He did not go back to work because the conditions were not logical and he had never been warned about his conduct or performance at work; had never received any letters to that effect and was not consulted about demotion.

Salvador Guerrero Cortes

21. He worked for the Respondent as a labourer for 2 years. The exact dates he could not recall. He worked initially for 11 months and was dismissed, and after 24 days of unemployment, he was asked to work for the Respondent for another 8 to 9 months. As a labourer he worked from 8 am to 5 pm at an hourly rate of £6.50. There were differences in wages between the Spanish and English workers in that

the latter earned more for exactly the same work. With overtime he had not had any problems. He had worked on and off in the scaffolding sector.

22. He did not know any English and did not know what "CATA" was.

23. As to the sick leave procedures, he explained that one would mainly call on the phone to advise the Respondent depending on how sick one was. He further said that between colleagues they had always notified the employer. Also, he would go to a doctor and get a certificate in order not to lose his pay and that it had only happened twice to him.

24. He was at the Piazza with Mr. Setter and the Applicant, whom he described as "jefe de equipo de los espanoles" – which I understood to mean the foreman of the Spanish workers. Between 4.20 pm and 4.30 pm Mr. Delo arrived at the site. Mr. Setter went to speak to him whilst he was still up on the scaffold. Mr. Setter told them they had to stay because the job had to be done quickly. The job could not have been finished between two people and the Applicant informed Mr. Setter he could not stay that evening. He had been told before of the Applicant's wife's appointment. He mentioned that he had worked well with the Applicant during his two years of employment with the Respondent.

25. On 19 March 2003, Mr Contreras took over as foreman at the Varyl Begg site and that Mr Cross advised them at 11.00 am that Mr Contreras would be their new foreman. He could not remember the date.

26. He could not recall the dates of his employment with the Respondent but accepted that his first contract was for 11 months and that he had been laid off because the work at Harbour Views had been completed. He explained that 6 workers, in total had been laid off, but that Mr. Cross had called him, not the others, three weeks later and re-engaged. He accepted having left the second time for personal reasons and family problems.

27. He described his job as assembling and dismantling scaffolds and loading and unloading of the same and that he was paid £6.50 an hour. He agreed that the normal procedure when he was off sick was to advise the Respondent and bring in a sick note.

28. He maintained that it was between 4.20 pm and 4.30 pm that Mr. Delo arrived at the Piazza, more or less, but not earlier. He said that had it been earlier, the Respondent could have brought in two other substitute workers. Mr Setter was a bit annoyed. Although not a foreman, Mr Setter had more standing than him. Mr. Setter and him could not do the job, that they were three and given that the Applicant could not stay because he was taking his wife to a dental appointment that afternoon, he did not stay. The job could have been finished that evening and he would have stayed if they had had to rush to finish it rather than lose his job. As a bachelor, he did not like having to work overtime during weekdays because

of the amount of tax deducted, but would have come in on the Saturdays. He said that if required to he would have worked overtime because if there was no work, he was of the view that those who worked less would be the ones to be more likely to be discharged.

29. He accepted that Mr Delo and Mr Cross did not speak Spanish and that they used an interpreter to communicate with the workers.

30. In re-examination, he explained that he would normally get a medical certificate when off sick in order not to lose a day of pay and that during his two years he had lost a few days.

Pedro Pablo Pietro Contreras

31. He started working for the Respondent three years ago. Initially as a labourer and then as foreman from 8 am to 5 pm. His initial salary was £7.50 an hour and when promoted was paid £8.00 an hour. He would work overtime on Saturdays.

32. He did not know what CATA was and when shown, he had never seen it before. There was a difference in pay between Spanish and English workers (for the same jobs) and had heard said that in Spain they earned less than locally. He had not been an acting foreman and was promoted as a result of the Applicant's dismissal.

33. He explained that the Applicant left ill on the Friday. That Mr Cross had gone to where he was working and took him to one side. Mr Cross told him that he was going to discharge the Applicant and referred to the latter as "Fucking Manolo" several times. Mr Contreras explained how another of the Respondent's employees by the name of Antonio, had gone to Mr Cross saying that the Applicant did not work and that he was earning more locally than he would in Spain. Mr Contreras says that he was told that as from Monday he would be taking over the position of foreman and he went back to his work.

34. He explained that Antonio Gaspar Soto, the person referred to by Mr Cross, was a scaffold labourer. He knew him and there was a bit of jealousy by Mr Soto towards the Applicant.

35. Once he was appointed as foreman he was never demoted and his pay was not reduced during the duration of his employment.

36. He thought it was Friday 28 March 2003 when Mr Cross told him he would get the job and that on the following Monday, Mr Cross went to the Varyl Begg site and through Daniel Olivero, who was the translator, communicated to the other workers who were there that he would be their new foreman.

37. On Tuesday morning, everyone was sent to work and the Applicant was told to have a coffee and to be at the office at 8.30 am. Mr Delo and Mr Cross were there.

38. He explained that he had hurt his back, a displaced disc hernia, and that he was waiting for an operation. He further said that the Applicant had a good reputation with the workers.

39. In cross-examination, Mr Contreras maintained that Mr Cross spoke a bit of Spanish. He confirmed that he had worked for the Respondent for three years as a labourer and then as foreman earning £7.50 and then £8.00. He accepted not having worked for the Respondent continuously for three years. He confirmed having worked for two years and then worked again for a further year. He started with £6.00 an hour and after some time increased to £7.00.

40. He explained how Mr Cross took him to one side, with no one else present and no translator, by Leanse Place and that he was told half in English and half in Spanish. He was adamant that Mr Cross had explained the work to the workers before and spoke a bit of Spanish. As far as he was concerned, Mr Cross communicated directly with him for him to be able to understand.

41. Counsel suggested to him that that conversation had never happened and was not true. Counsel suggested that the reason why he was asked to be a foreman on Monday was because there were 4 labourers and no foreman at the Varyl Begg site. He retorted that there was nothing wrong with that. However, he maintained that Mr Cross had already said so the previous Friday. On the Monday, he says that Mr Cross had told the workers that he would be the new foreman and if anyone had any problems to say so then.

42. When challenged again, Mr Contreras confirmed he had his pay increased that day.

43. In re-examination, Mr Contreras explained Mr Cross words as "Forme, Spanish menos dinero", (Foreman Spanish less money) "Manolo finito, (Monolo finished) fuera" (out), plenty of "Fucking Manolo" and "Antonio, todo morning, talking badly" (Antonio talking badly all morning") gesticulating with his hands making himself understood. He said he did not know of any complaints against the Applicant. All he knew was that the Applicant had left unfinished work and gone home. He was not told personally but knew because he had been brought out from another job and told.

Manuel Olivero

44. He worked as a scaffold labourer for the Respondent for roughly 4 years. His normal working hours were from 8 am to 5 pm. He started on £8.00 an hour this was raised to £8.50 several months before.

45. He confirmed having heard of CATA but was not familiar with it. Mr Olivero's understanding of "Acting foreman" was when someone had gone on holiday or was sick for 1 or 2 weeks and needed to be replaced temporarily. A foreman was someone who supervised full-time.

46. He confirmed having acted as translator sometimes. He explained they would congregate at Casa Antonio at 7.40 am every working morning. On the 1 April 2003, he confirmed that Mr Cross had said that the Applicant should go to the office at 9.00 am. He found this unusual. Mr Olivero says that the Applicant was shocked and stunned. He did not see Mr. Contreras there.

47. Mr Olivero explained that the procedure when off sick depended on the circumstances. One could go home and let someone at work know and for them to tell either Mr Delo, who was around the sites, or Mr Cross who was in the office.

48. Mr Olivero explained that the Applicant had a good reputation and was punctual. He explained his employment with the Respondent had finished 2/3 weeks before the hearing having been forced to take redundancy. He no longer worked for the Respondent.

49. In Mr Cross-examination, Mr Olivero stated he did not know the details of CATA. He was aware of this Agreement because it was referred to in the ETB notices. Although the agreement referred to notifying the employer, it would normally be enough to tell a worker who in turn notified the Respondent. If a worker did not come in to work, it would be normal either to call or bring a medical certificate. Mr Olivero stated there were two alternatives when off work for sickness. Bringing a medical certificate or use holiday leave or not get paid for those missed days.

50. Mr Olivero stated it was suspicious to be called into the office and thought the Applicant would be warned. It was convenient to meet at Casa Antonio and there would be no reason to be called to the office. When challenged that he had commented adversely to Mr Cross about the Applicant's attitude that morning he retorted that that was wrong and did not recall having told Mr Cross that the Applicant wanted to see him.

51. Mr Olivero explained that he had gone to the Respondent's solicitors and could not confirm what Mr Cross had said since he was not a grass. He explained what he meant by this. He was not prepared to give false evidence in favour of either side and denied having made any such comment about the Applicant's attitude that morning. He could not comment about the Applicant's attitude at work since he had not worked with him.

The Respondent's Evidence

Richard Mr Cross

52. He explained that the Applicant was an Acting foreman under the direct instructions of Mr Delo, who would be on the sites every one or two hours checking. The Respondent company would normally have two permanent foremen, who were CITB qualified and had undertaken a 5-year apprenticeship in England.

53. The Applicant could only do certain jobs related to 'quick-fix' scaffolding, which he says were easy to do and very basic as opposed to 'tubes and fittings' that required CITB qualification and 3 years' experience. In England, a labourer would not be allowed to be the foreman under Health & Safety laws but in Gibraltar it was more lax. Otherwise, he said, anyone could erect scaffolds.

54. The Spanish lads were used for the 'quick-fix' scaffolds and within the dockyard for which no qualifications or paperwork was required.

55. The Respondent's foreman at Harbour Views had left, and it was the biggest job that they had. The Applicant was the biggest physically, very loud, the workers looked up to him and probably the best team leader. He was big and strong. At the time, they had introduced a bonus scheme for the employees. The Applicant had approached him and offered to get the work done provided he got extra money. The Applicant spent most of his time at Harbour Views, which was a large job, for probably for 18 months but was not 100% sure he spent all his time there. Mr Delo would be there every morning. The scaffolding at Harbour Views was the quick-fix type, which was repetitive work.

56. Health & Safety issues were taken very seriously and played a massive part in the Respondent's business in training and qualifications, first-aid, qualified foremen, upgrading their safety procedures e.g. harnesses until the introduction of hand rails which were only available at the time on certain jobs.

57. The Applicant had not been properly promoted because there was no change in the type of people they had.

58. They would meet the employees at Casa Antonio because he could not be sure of who would turn up for work from a total of 18 employees. This was a convenient way of arranging the Respondent's work every morning. Six workers, he said, had not turned up the morning of the hearing.

59. He completed the ETB Notice of Engagement form. He explained that initially the Applicant was to be employed as a labourer but because the ETB would not allow it because of local lads, the only way to register him was to describe him as an improver because of the previous experience he had.

60. Mr Cross explained that being a scaffolding labourer is not a nice job. It was hard work and was considered to be the hardest in the building trade. He stated he had never had any problems or issues with the Applicant. Pay was determined on the basis of ability and length of employment. Mr Olivero was a scaffolder and a very good friend, and had been with them for a long time and he got £8 and then £8.50 an hour on a bonus related scheme.

61. He emphasised that pay was related to ability and drew attention to the CATA rates and how the Respondent was paying too much money out and the vast differences in rates. He drew attention to the "Semi-skilled" in 2003 earning £5.69 an hour whereas in the Applicant's contract in 2000 he was earning £5.50 and contrasted that the finest carpenter or mason would earn £6.36 an hour. The Applicant was earning £8.00 and other men with more qualifications were earning more. He said the Applicant's brother was still working for the Respondent.

62. Mr Cross stated that if the Applicant had not been an acting foreman he would not have earned £8.00 an hour, but that he would not have reduced his pay.

63. Mr Cross explained there were different gangs within the work force and that the Respondent was asked for another pay rise of £1.00, a large per cent above CATA rates. All he wanted was the work done and efficiency had never been an issue with the Applicant until the last week of his employment.

64. Mr Cross described as absolute rubbish the suggestion that overtime was not fairly distributed between the English and Spanish workers. The Applicant was one who wanted most overtime. It was not compulsory. Saturdays would be 4 hrs' work only, paid at double time and making the men work for 8 hours was not really productive explaining that he himself had been a bricklayer and knew for himself, after thirty years of experience. The Applicant, he says, was moaning about the previous Saturday's overtime at the hospital that he had not been given. Using this system, the job was done quicker and worked very well.

65. As to the Piazza incident, Mr Cross says that at 2.00 pm he asked that Mr Setter be contacted and ask the others to work overtime that Friday. Mr Setter had his own mobile and became very angry that night – he was a labourer as opposed to an acting foreman.

66. Mr Cross explained that the contractors wanted the scaffold completed so that workers could go up the following morning. He took this request very seriously, having had 28 workers at one stage, and would worry very much but since had been winding down somewhat. He explained that there were two other scaffolding companies in competition and it was very important to get the job done.

67. Mr Cross explained that on Tuesday morning, in the presence of other workers, the Applicant demanded to see him there and then pointing at him and the Applicant was told to be at the office at 9.00am. He felt the Applicant was not

interested in the work and dismissive of him and did not have the Respondent's interests at heart. He took the view that he needed to have all the workers in line and they should be keen to work quickly and as efficiently as possible. He felt the Applicant, as an acting foreman, was not towing the line and had an attitude. In such cases, he would call in who ever and talk to them to find out the problem.

68. On the Friday Mr Cross heard from Daniel Olivero that the Applicant had left sick. He would have expected a phone call or the Applicant to be back at work or a sick note. This would be normal company practice. Mr Cross said the Applicant did not do any of this. There was no apology and the Applicant had a bad attitude that morning.

69. Mr Cross denied having spoken on the Friday with Mr Contreras at Town Range. He insisted that he did not take him to one side and speak to him at all. He said he had not told anyone and had no intention of dismissing the Applicant. In any event, Mr Cross stated that that conversation could not have happened because he did not speak Spanish and that is why he had Daniel Olivero. Miguel Olivero would also be an interpreter. He would otherwise only point at the scaffolds in a self-explanatory manner when he wanted something done.

70. He went around the sites on the Monday and saw Mr Contreras. Through Daniel Olivero, although he could not be sure because it was a long time ago, told the workers that Pablo was now going to be the Acting Foreman and to find out whether anyone had any problems. Mr Cross said that Applicant would have continued as Acting foreman on the Monday without any problems if he had turned up to work. He would have been asked about Friday and everything would have been back to normal.

71. Mr Cross explained that he had six men on site on the Monday and required a team leader in order to tell them what to do. He said the job of an acting foreman was a difficult one requiring a lot of trust, hands on approach and directing from the ground. An easy way of determining efficiency was whether the work was getting done. This was an important issue for the Respondent.

72. Mr Cross said that the Applicant was called to the office on the Tuesday to find out what his problem was. When asked for an explanation, the Applicant raised the overtime issue again. He asked what he wanted to do about it. The explanations given about his absences, says Mr Cross, were not satisfactory. Mr Cross says that the Applicant worked for the Company, that he was not silly either, and that the Applicant knew he could not carry on as acting foreman with his attitude.

73. Mr Cross insisted he had never formed the intention of dismissing the Applicant on the Friday. He needed someone on Monday to be acting foreman, someone to lead the men but without any intention of dismissing the Applicant on Monday. Mr Cross repeated that the Applicant was very good at his job. He had never had

any problems with him. He further denied having had any intention of dismissing him on the Tuesday. Mr Cross says the Applicant was simply going to work with another foreman, in another gang, for a while as a temporary measure only but denying that he had been removed as foreman. It was meant, he said, for a couple of days so that he could buck his ideas up and then return to his normal position and would have been paid the same salary. He said that he was not prepared to pay the Applicant £9.00 an hour, which is what the Applicant wanted. Mr Cross says that at that meeting on Tuesday, he never communicated to the Applicant any prospect of having his wages reduced. He reiterated that the Applicant gave no problems and was very good for the company. He said that he was very flexible with his workers and with overtime.

74. He confirmed the contents of his letter and that the Applicant did not want to work anymore, he could not do it and was waving his arms. According to Mr Cross, the Applicant had 'jacked it' in. This was in the heat of the moment, and Mr Cross says he gave the Applicant a chance to reconsider because he wanted him to work for him. He says he felt sure that he would be back to the office but not to fill in the ETB form. Mr Cross says he knew what the work situation was in Spain and the Applicant would come back. He said things got out of hand.

75. Mr Cross said that no one would seriously think that there had been unfair dismissal. He said that he had no problems in giving Mr Cortes another job and, likewise, with Mr Contreras. Mr Cross confirmed that Mr Estella had filled in the ETB form confirming that paragraph 11 of the ETB form "resigned" was absolutely correct and that he should not have filled in paragraph 10 and 11. That he says was a mistake because it was on the 1 April. Friday was impossible because he did not see the Applicant and the last day he worked was on the 28th.

76. In Mr Cross-examination, Mr Cross explained that Mr Delo was an equal partner to him in the business and its technical director. They had 18 employees. He explained difference between an improver and a labourer.

77. He confirmed that the Applicant was promoted albeit temporarily and that he had a pay rise as an acting foreman. He accepted no one was on leave at the time but could not remember dates or whether it was January 2001.

78. Mr Cross was referred to the Notice of Termination and the three dates appearing on this document. He could not recall whether the Applicant had started working for the Respondent two weeks before 9 June 2000, saying it was four years ago. Mr Cross accepted that a foreman carried more responsibility than an improver and required negotiating skills, which he did not dispute the Applicant had.

79. Mr Cross was shown his letter of 10 June 2003, which he was given a chance to read, and confirmed when asked that he made no mention of the word "acting" in it. Mr Cross was further asked whether he had recorded a variation of the terms of engagement with the ETB and he replied that he had not because it was only

temporary. In relation to the pay rise, he referred to it as bonus related pay, but could not identify it as such on the face of the Applicant's pay slips.

80. Mr. Cross confirmed that the Applicant had worked before with tube and fitting type of scaffolding but on minor jobs and that there was a difference with small towers and big buildings. He could not accept that his workers did not have all the safety equipment that they required.

81. As to the Termination Notice, he confirmed that Wayne Mr Estella had filled it in and filed it. He was referred to the date of filing, which is recorded as 14 April 2003, and said he was familiar with the Regulations and that the same had not been filed before hoping that the Applicant would return to work. He confirmed that the Applicant was always keen to work overtime.

82. Mr Cross said they did not get notice that the works at the Piazza had to be finished that day until 1.30 pm or 2.30 pm.

83. Mr Cross stated that there were lots of arguments involving Antonio (Gaspar Soto), who would moan about the Applicant on the allegation that he was doing the Applicant's work. Mr Cross said he had never really seen the Applicant about these allegations or approached him about it. Mr Cross said he never acted upon them and would not really listen to third parties because it was not necessary and had no intention of doing so and, because the Applicant was a good worker. He confirmed never having spoken to or discussed with the Applicant any of these allegations. He knew that he was having problems but preferred to let the Applicant sort them out for himself. This was a few weeks before.

84. Mr Cross rejected having given 'Antonio' a pay rise or having connected the two things. Mr Cross did not accept that it was impossible to do the Town Range job without three men. He confirmed that Pietro Contreras was the third man called in to that job. He says that when he arrived at the site, the Applicant had gone and that he tried not to get upset but was not over the moon about it. He confirmed having been told by Daniel Olivero what had happened to the Applicant but again denied having had that conversation with Mr Contreras. He insisted that Mr Contreras was only going to be foreman on the Monday only because the six men could not be left without a foreman.

85. He accepted, saying that he was not silly, that he understood the word "finito" (finished) but that he had never lived in Gibraltar and did not understand the word "tu" (you).

86. On Monday, at the Varyl Begg Estate, Mr Cross said that not all workers were scaffolders – it was a mixture. He denied the alleged conversation with Mr Contreras on Friday and said he chose him because he was a scaffolder. However, he could not recall whether the others were scaffolders and denied having told the

workers in pigeon Spanish and gesturing that Mr Contreras was their new foreman.

87. Mr Cross was referred to paragraph 15 (c) of CATA "Washing facilities should be provided on sites and employers should ensure that adequate toilet facilities are available" and how he had not pointed this out when previously relying on it. Mr Cross retorted that this was not feasible and but had overlooked it but that he would do so in the future. He said it was a matter of common sense and that the Applicant knew that there were toilets in the office.

88. Mr Cross accepted that if an employee was that ill, despite not being the practice, that he could inform a colleague or foreman or acting foreman and if the office was closed, there was no choice. Without proof of illness, he did not believe the Applicant. He accepted he made no reference to a "few days" in his letter of 10 July 03 when he said that he could carry on working but not as a foreman as a labourer.

89. Mr Cross confirmed Mr Guerrero's interpretation on absence from work. Pay would be docked and it had happened in the past. Also, depending on the situation the employee could use his leave. The issue was not that flexible. He said the Applicant did not ask nor was it offered.

Bruce Setter

90. He confirmed his signature on the Witness statement of 17 March 2004. He worked as an improver for the Respondent for over 6 ½ years and had known the Applicant since June 2000 having worked with him a number of occasions.

91. On 25 March 2003, Mr Setter received a phone call in the afternoon and could not recall whether it was Mr Delo or Mr Cross. They could have been there.

92. He asked the Applicant whether he wanted to stay or not at approximately 3.00 pm but could not say the exact time. He was quite assertive that by 4.45 pm the Spanish workers would normally be in Spain and it would have been before then that he asked because they would have been "down and gone" by that time. He said he spoke a little bit of Spanish, enough to be understood.

93. In Mr Cross-examination, Mr Setter denied having discussed the case with anyone and that he had not been told much about it, only a few things.

94. When pressed as to the time he had received instructions, he could not say it was 3.30 pm but said it was a couple of hours after lunch. He could not swear as to the time but thought it could have been between 4 and 5 pm. He confirmed that Mr. Guerrero was there. He could not remember whether Mr Delo had been at the Piazza, because he was busy and getting on with it. He says he was asked to stay on to get the job done. He agreed and assumed his colleagues would also stay but

did not ask them. He was told it was an important job and had to be finished that night. He said that with 3 or 4 workers the job could have been finished in a couple of hours.

95. He explained that the Applicant was on the ground and others working on a lower level of the scaffold. He says that he shouted from three floors up, 20 feet, from where the Applicant was and was told by the Applicant that he could not stay that night but does not recall why the Applicant could not stay.

96. He admitted that he did not tell Mr Delo that the Applicant could not stay. He says that he was the only one who stayed and that his colleagues all left and could not understand why because normally they would want to do overtime.

97. Mr Setter accepted that even if Mr Guerrero had stayed, the job required more than two men but he did not tell Mr Delo. It took an extra hour to finish on the Saturday because he had worked like mad that afternoon.

98. Mr Setter stated that it was incorrect, contrary to what he said at paragraph 4 of his Witness statement, that Peter Mr Delo had asked "all the workers on the site to stay" and could not remember Mr Delo being there at all. Likewise, he also stated that the Applicant had not said he would do the work at first. He said that his paragraph 4 was not taken down accurately.

Wayne Estella

99. Mr Estella was a student, who at the time of the hearing, was undertaking a master's degree in health and safety. He confirmed his signature on his Witness statement of 17 March 2004 and that he had not really discussed the case with anyone other than with his lawyer. He had been out in England and it was difficult to do so.

100. Mr Estella worked as a trainee Quantity Surveyor, for approximately 18 months, and had been sent to some courses by the Respondent who, he said, had been very kind to him. He had no plans other than to apply to Government for a job.

100. He described his former job primarily taking measurements for scaffolds and tube requirements, cost estimates and administrative work. His work was divided 60/70% in administration and 30/40% at the sites.

101. He said it was common knowledge within the construction industry that an improver was a trainee and that an acting foreman was a transitory position and that it depended on performance and attendance and communication skills. He did not know how long the Applicant had been in charge of the Spanish workers or foreman.

102. He said he never visited Casa Antonio where the tasks of the day where allocated. He said Mr Cross did not understand Spanish at all.

103. At the meeting of 1 April 2003, he said that Mr Cross was seated and the Applicant standing although there was a free chair and when offered he refused. He said that it was difficult to translate. The only explanation given by the Applicant was that he was ill. If it was more than one day off sick, it was the practice to notify the office and bring a medical certificate. There is an answer phone at the office and Mr Cross, his wife and himself were mostly there.

104. He accepted he was not a qualified translator but had a degree in Spanish (minor) and sociology. He said that Mr Cross was seeking an explanation and the Applicant's motives.

105. He also said that there were no foremen in their company and they were all acting foremen. They always needed someone in charge of the men. There was no mention of pay or figures. He said that it was only until the Applicant improved that he would not be an acting foreman. He honestly thought the Applicant would come back.

106. He said the Applicant had said he could not work like that and that he resigned "que el resignaba, resignacion". Mr Cross stood up and shook hands with the Applicant and asked him to reconsider. The Applicant had not been dismissed and no one was demoted. There was always tension between the workers. He said that the Applicant had "jacked it in" and had misinterpreted the situation.

107. He knew that the Applicant had resigned because he was present.

108. He made a mistake in the form by writing the 28 March 2003 at paragraph 8 of the Termination Form. He gave no particular reason for this mistake.

109. He said the Applicant had given no notice. He took the blame for this mistake and this was not authorised by Mr Cross. He was not told by the ETB it was out of time nor was the form returned. He said he filled in the form on 4 April, after Manolo came up, and had made a mistake (seriously he pleaded). He filled in the form from memory and did not check any documents.

110. No mention of dismissal was made in front of the Applicant or otherwise that he was going to be dismissed. No such words were mentioned.

111. All he recalls was Mr Cross saying to let him cool down and that he would come back. He said again that the Applicant had jacked it in.

The Submissions

112. Counsel for the Applicant submitted that the Applicant's contract of employment was wholly withdrawn and, a new contract of employment offered on substantially less favourable terms, which he could not accept.

113. The Respondent's counsel, on the other hand, submitted that the Applicant was never dismissed. He said the Applicant voluntarily resigned and left his job as a result of a temporary measure to ensure he pulled his weight as foreman, which he did not accept, and that there was no question of a dismissal.

The Law

114. As the law stood in Gibraltar on 1st April 2003, the first legal hurdle for the Applicant arises under section 59 (1) of the Ordinance as read in conjunction with Section 64 (2) (a). The Applicant must satisfy this Tribunal, on a balance of probabilities, that the Respondent terminated his contract of employment.

115. As from 19th August 2004, the law was brought into line with employment law in the UK by an amendment to Section 64 (2) of the Ordinance – Ordinance 18 of 2004. If the employee terminates his contract of employment, with or without notice, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct, he is to be treated as dismissed – constructive dismissal. The Applicant cannot argue constructive dismissal in this case – see *Her Majesty's Attorney General for Gibraltar v Manoucher Rassa* – Civil Appeal No. 12 of 2002 CA ("*Rassa*").

116. *Hogg v Dover College* [1990] I.C.R. 39 EAT ("*Hogg*") and *Alcan Extrusions v Yates & Others* [1996] IRLR 327 ("*Alcan*") are the two guiding authorities on the approach to follow in deciding this specific issue.

117. In *Hogg* the headmaster's letter to a full-time teacher, who had been absent through ill health and had returned to work part-time, was held (unanimously by the Employment Appeal Tribunal) to terminate the contract of employment. The letter expressed the view that it was impossible for the teacher to continue as head of department and offering fewer teaching periods and at a considerably reduced salary.

118. Mr. Justice Garland, at page 42 paragraph E to F, said the following: "*Up to 31 July, the applicant, who was well and sympathetically treated by the employers, was head of history; he was employed to teach full-time at a full salary plus such allowances to which he was entitled. On 31 July, he was told that he was no longer head of history; that he would not be employed full-time and he would come down to eight periods a week plus general studies and religious education; that the salary he would receive would be exactly half the new scale which superseded the Burnham scale.*

It seems to us, both as a matter of law and commonsense, that he was being told that his former contract was from that moment gone. There was no question of any continued performance of it. It is suggested, on behalf of the employers, that there was a variation, but again, it seems to us quite elementary, that you can vary by consent terms of a

contract, but you simply cannot hold a pistol to somebody's head and say: "henceforth your are to be employed on wholly different terms which are in fact less than 50 per cent. of your previous contract." We come unhesitatingly to the conclusion that there was a dismissal on 31 July; the applicant's contract having been wholly withdrawn from him".

119. At page 43 paragraph G it was further said: "*The question is not whether the relationship between the parties has ceased; the question is not whether there was any contract between the parties; the question is whether the particular contract under which the employee was employed by the employer at the relevant time was terminated by the employer. That seems to us to encapsulate the principle to be applied here*" and in referring to Morgan v Wolverhampton Borough Council *(Unreported), 20 February 1980* Garland J continued: "*That of course was a more extreme case because the entire job had gone, but it is a matter of degree; and as was observed in argument, we took the view here that at 31 July, the applicant's job was effectively withdrawn from him and given to somebody else.*"

120. The *Hogg* principle was considered and applied in *Alcan*. In Alcan, the employer unilaterally introduced a fundamentally new system of work that changed the hours of work and adversely affected its employees' overtime, shift premiums and other benefits. They worked with the new system in protest. They reserved their position and it was held that it was tantamount to dismissal.

121. At page 327, paragraph 23, Judge C Smith QC, said "*We entirely agree with counsel for the appellants that it is only where, on an objective construction of the relevant letters or other conduct on the part of an employer, it is plain that an employer must be taken to be saying, 'Your former contract has, from this moment, gone' or 'Your former contract is being wholly withdrawn from you' that there can be a dismissal under s. 55(2)(a) other than, of course, in simple cases of direct termination of the contract of employment by such words as 'You are sacked'. Otherwise, we agree with him the case must stand or fall within s.55(2)(c).*

However, in our judgment, it does not follow from that that very substantial departures by an employer from the terms of an existing contract can only qualify as a potential dismissal under s.55(2)(c). In our judgment, the departure may, in any given case, be so substantial as to amount to the withdrawal of the whole contract. In our judgment, with respect him, the learned judge in Hogg was quite correct in saying that whether a letter or letters or other conduct of an employer has such an effect is a matter of degree and, we would hold accordingly, a question of fact for the industrial tribunal to decide.....provided always they ask themselves the correct question, namely, was the old contract being withdrawn or removed from the employee?

122. Most importantly, at page 330 paragraph 28, Judge C Smith QC said "*In our judgment, it is neither practicable nor appropriate to lay down any hard and fast rule as to when such conduct on the part of an employer will have such an effect and when it will not, provided the principle is understood, namely that the conduct must amount to the withdrawal or removal of the old contract. We respectfully adopt the trenchant views of*

Lord Justice Lawson in Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 p.30, 26 to the effect that much must be left to the common sense of the industrial tribunal to reach the just conclusion in all the circumstances".

123. In *Rassa*, in referring to *Marriot v Oxford & District Co-operative Society Ltd* [1969] 3 ALL ER 1126 C.A. ("*Marriot*"), Sir Brian Neill JA said "*The classic example is an outright dismissal where the employer says "You must go". But there are other examples, such as the Marriot case, where the employer terminated Mr Marriot's employment as a foreman at a foreman's wage and proposed that he could be employed thereafter as a supervisor at a different and lower wage. Mr Marriot could have accepted that new position but it would have been pursuant to a new contract. Mr Marriot's existing contract as a foreman was terminated by the employer. In effect Mr Marriot was told "your existing contract of employment is terminated forthwith. You are fired as foreman.*"

124. *Marriot*, although a case under the Redundancy Payments Act 1965 s.3 (1), still holds as good law albeit some doubt seems to have been thrown on the matter by Lord Denning himself in *Western Excavating (ECC) Ltd v Sharp* [1978] when he said in that case about Marriot "*It was not really an (a) case; but we had to stretch it a bit. It was not the employer who terminated the employment. It was the employee; and he was entitled to do so by reason of the employer's conduct*" – this is referred to by Sir Brian Neill JA in *Rassa* at p.12 para. 32.

125. Although perhaps a largely academic question, I am of the view that Lord Denning was simply referring to the employee's conduct after receiving the employer's notification by staying on, and was not referring to the effect of the employer's notification *per se*. Three passages in *Marriot*, I think, demonstrate this.

126. At p.1128, Lord Denning said: "*This letter in effect told the appellant: 'We are not going to perform our existing contract with you. We are going to reduce your grading as foreman and we are going to pay you £1 a week less, whether you like it or not'. That statement was a breach of contract. See Withers v Reynolds and Hochster v De La Tour. It was what lawyers call a repudiation of the contract. It evinced an intention no longer to be bound by the contract. If the appellant had accepted the repudiation and said 'I will not agree to this reduction in my wages', and left at the end of the week, the contract would clearly have been terminated by the respondents, and he would have been entitled to redundancy payment. There can be no doubt about it. Does he lose his redundancy payment simply because he stayed on for three or four weeks whilst he got another job? I think not. He never agreed to the dictated terms. He protested against them. He submitted to them because he did not want to be out of employment. By insisting on new terms to which he never agreed, the respondent did, I think, terminate the old contract of employment……*"

"He should not be deprived of it, seeing that he only stayed on for three or four weeks whilst he found another job".

127. And at page 1131, Lord Mr Cross said: *"The letter says, in effect, "You will have to leave our employment at the end of the month unless you accept the reduction of £1 a week". So it can be argued that it would only have operated as a termination by the respondents if the appellant had not accepted the terms. But in all the circumstances of this case, including the fact that the appellant continued to protest about the reduction even after he received the letter, I think it would be wrong to treat the fact that he went on working and put up with the reduction for a few weeks as showing that agreement was reached without a previous termination of the contract by the Respondents. If one looks at the realities of the case, the contract was terminated by the respondents by that letter".*

Findings of Fact

128. Having considered the pleadings, all the documentary evidence and having heard and seen the witnesses, I find as follows:

1. The Applicant was registered with the ETB as an employee of the Respondent with effect from 9th June 2000. I have some doubt as to whether the Applicant started working for the Respondent before this date, around March 2000, but make no specific finding on this point for insufficiency of evidence.

2. I reject the contention of Mr. Cross and Mr. Estella that the Applicant started simply as an improver and the connotations associated with that position which they gave the Tribunal to understand. Mr Cross explained that it was a ruse in order to be able to employ the Applicant directly and thus avoiding opening up a vacancy of labourer for which potential local labourers would have been available. On the form itself, the word "labourer" has been Mr Crossed out and written next to it is the word "Improver". The Respondent managed to employ someone it wanted and must have therefore been well satisfied that the Applicant had the necessary skills and experience in scaffolding having gone to go to this extent at the time of registration.

3. The Applicant was promoted sometime in January 2001 to the post of foreman and his hourly rate increased from £6.00 an hour (despite the ETB form stating £5.50) to £8.00 an hour commensurate with the responsibility of his new post. I reject Mr Cross' contention, supported by Mr Estella, that the Applicant was an "acting" foreman and that the increase in pay was simply a bonus. It is an undisputable fact that Mr. Cross did not use the words "acting foreman" in his letter of 10 June 2003, and quite remarkably too, is their conspicuous absence from the Respondent's Notice of Appearance of 14 July 2003. This is not an inconsequential fact that Mr. Cross, in my view of his performance as a witness, would have simply overlooked twice over if he had genuinely believed to be true. The Respondent's contention that this variation, claimed by the Applicant, was not registered with the ETB does not assist the Respondent evidentially or, indeed the Applicant.

4. I found Mr Estella an unsatisfactory witness in many of his assertions, e.g. that there were "no foreman in our company" and "they were all acting foreman".

5. The fact that the Applicant was promoted within 6 months to this post is indicative that he must have been very good at his job and, as Mr Cross himself recognised, the Applicant was looked up to by his work colleagues, and being big, loud and strong was probably the best team leader to replace the Respondent's foreman at Harbour Views who had left. A post he held for over two years and for which he was recognised by his work colleagues and, Mr Olivero having clearly explained his understanding of an acting foreman, quite inconsistent with the Respondent's contention.

6. The Respondent's wage slips simply reflect wages and there is nothing in them that supports Mr Cross' contention that this was a bonus related pay increase.

7. A lot has been made by the Respondent of Mr Cross' inability to speak or understand any Spanish and his use of an interpreter. In fact, some of the witnesses have said he does not speak any Spanish. Whilst I accept that Mr. Cross is unable to have a fluent conversation in Spanish, I do not accept that he is unable to communicate simple things at all using basic words in Spanish, hand gestures and using English words likely to be known to local Spanish workers.

8. Mr Cross has been in Gibraltar since May 1997 but has never lived in Gibraltar. However, Counsel for the Applicant pointed out that Mr Cross' address did not appear in his witness statement but he did not expressly say he was living in Spain either. There is force to this submission for what appears to be lack of openness. I am further reinforced in my finding by the fact that it is virtually inevitable, in this Tribunal's experience of Gibraltar, that English speaking citizens who live in Gibraltar or Campo area and, through work or otherwise, mix with Gibraltarians or Spaniards gain some understanding of the language and are able to get points across clearly even with a stilted accent. It is also true of Spanish workers that they get to understand some English. The language barriers, which may actually exist in other circumstances locally, are not as stark as they have been suggested and quite removed from what is very likely in the case of Mr Cross. Mr Cross admitted knowing what "fuera" (out) meant.

9. I find Mr Cross' assertion that he did not understand the word "tu" in Spanish ("you") as not credible after being around this part of the world for 7 years. When question by counsel about this, Mr Cross gestured with two fingers, in the victory sign, indicating a number two in what I can only describe as an attempt to feign ignorance and mockery of counsel.

10. Mr Cross spoke to Mr Contreras on Friday 28th March 2003 taking him to one side and telling him that he was going to discharge "fucking Manolo" several times and that he was going to be the new foreman on Monday. Both were at the Town Range site. Although Counsel for the Respondent valiantly attempted to

discredit this witness, he still came across as truthful and withstood the attack on his version of events and credibility. In fact, it became apparent to me that this witness also understood some English. In re-examination, Mr Contreras' explained again the extent of what he was told to the effect that Manolo was 'finito' (finished) and 'fuera' (out) and that there were lots of 'Fucking Manolo' and that "Antonio, todo morning talking badly" (Antonio was talking badly all morning). Antonio Gaspar Soto, to whom reference is being made, was the person that had been feeding Mr Cross with negative comments about the Applicant out of possible jealousy and which Mr Cross says he never heeded or acted upon).

11. On Monday 31st March 2003, Mr Cross announced at the Varyl Begg Estate that Mr Contreras was their new foreman. He did not say to the workers that Mr Contreras was going to be their foreman until Manolo returned to work or that he was going to be an acting foreman. This is inconsistent with a temporary measure required by the Applicant's absence and Mr Cross gave an unsatisfactory explanation as to why he had then chosen Mr. Contreras on the Monday unless he had done so on the previous Friday.

12. Although the Applicant advised his colleagues to tell the Respondent that he was going away ill, it seems unsatisfactory on his part, at first blush, that when he requested further assistance for an extra hand to help with the tower at Town Range, he failed to disclose at that stage that he was ill or, as Counsel for the Respondent pointed out to him, on his way to the frontier when he was driven home he could have asked for a brief stop at the Respondent's office to say so. This certainly attracts some suspicion. In any event, the message was filtered through to the Respondent on that day. However, this is something that called for further investigation from the workers who took him home and said he was ill. No evidence of any further enquiries was tendered and it may well have been the case that the Applicant was so ill that he was unable to think or function properly thus explaining the manner in which he left work.

13. Also, it seems unsatisfactory, at first blush, that the Applicant did not notify any of his colleagues or the Respondent that he would not be coming to work on the Monday. He did not produce a medical certificate nor did he go to the doctor. This certainly attracts some suspicion. However, it was the evidence of the workers that missing workdays would either result in the loss of holiday pay or loss of pay if no medical certificate was produced and, therefore, the Applicant may have thought that this was available to him. The Respondent seems to operate a flexible policy in this regard evidenced by the fact that the workers are required to congregate at Casa Antonio in order to see who turns up for work and to issue them instructions, according to Mr. Mr Cross. I imagine that if a very strict policy were applied, the Respondent would probably not have a sufficient pool of workers to cover the various tasks of the day. The Applicant, in view of this practice, and absence of one day only, cannot now attract serious criticism for his conduct as a one-off and in the context of this case, not a fatal matter.

14. At the meeting of 1 April 2003 between the Applicant, Mr. Cross and Mr Estella the words dismissal or dismissed were never used. I reject Mr. Cross' contention and that of Mr Estella in evidence that this was a temporary measure to ensure that the Applicant pulled his weight – a temporary sanction. Again, this assertion is inconsistent with Mr. Cross' letter of 10 July 2003 and the Respondent's Notice of 14 July 2003. And for the same reasons given before, I do not accept the Respondent's evidence. Although there was no mention of the amount he was to be paid as a labourer, I accept that there was reference made to a reduction in pay or, at least, reference to a lower pay. The Applicant's reaction, in view of the fact that a pay increase of £1.00 an hour in December had been requested, is understandable in that not only was he not getting a pay rise, but was given to understand that his wages were to be reduced and, in addition, demoted to labourer.

15. I do not accept the evidence of Mr Estella when he says he made a mistake when completing the ETB Termination Form. He gave no possible explanation as to how that mistake could have happened and, it is not credible that a person who has undertaken two degrees is not able to remember April's fools' day as the date of the meeting with the Applicant, but chose to record 28 March 2000 as the date when the Respondent alleges the Applicant resigned and without reference to any records. I am satisfied that either Mr Estella knew that the Applicant's last working day was the 28th or was told that it was – he may or may not have known prior to the 1st April but that is not critical for it was certainly not his decision.

16. The Respondent dismissed the Applicant on Tuesday 1 April 2003. Although he was not told "You have to leave", the circumstances leave me in little doubt that Mr Cross intended to dismiss the Applicant and that short of saying it openly, he had clearly done so by his actions from the Friday onwards, and with the offer of new employment on different and inferior terms. By presenting the Applicant unilaterally with the only prospect of a demotion and pay decrease, he effectively withdrew his contract, which repudiation the Applicant accepted immediately and effectively rejected Mr Cross' new offer of employment as a labourer.

Reason for Dismissal

129. The onus is on the Respondent to show, on a balance of probabilities, that the reason for the Applicant's dismissal was a potentially fair reason falling within one of the categories within section 65 (1) of the Ordinance. If the employer fails to do so, the dismissal is automatically unfair, without the Tribunal having to consider the fairness or otherwise of the reason for dismissal.

130. I find that the Respondent has failed to meet this burden. Mr. Cross' evidence was to the effect that it was not his intention to dismiss the Applicant at all. That it was a temporary measure 'of a few days' to ensure his pulled his weight as foreman. Therefore, if the Respondent did not treat the Applicant's alleged attitude and conduct as a sufficient

reason for dismissing him, this Tribunal cannot logically say so given that the Respondent did not itself do so according to Mr. Cross' evidence.

Was the dismissal fair or unfair

131. Even if wrong on the above point, I would still hold that the dismissal was unfair. There is no burden on either party and it is a matter for this Tribunal to determine on the evidence and based on the criteria set out in Section 65 (6) of the Ordinance. It is not for this Tribunal simply to substitute its own opinion for that of an employer as to whether certain conduct is reasonable or not. This Tribunal has to determine whether the employer has acted in a manner, which a reasonable employer might have acted, even if the Tribunal, left to itself would have acted differently.

I find as follows:

(1) Mr. Cross stated he never listened to or acted upon what he was told by Antonio Gaspar Soto about the Applicant but he probably did to some significant extent.

(2) He never confronted the Applicant about these allegations nor did he, according to his evidence, make any enquiries whatsoever to determine whether they could be true or not. This is particularly relevant because Gaspar Soto was working with the Applicant on Friday 28 March. Mr. Salvador Guerrero was also with the Applicant and testified that the Applicant was ill when they took him home. He was not challenged about this in cross-examination. A mere suspicion that he may not have been ill on that Friday is not enough.

(3) Mr. Cross did not make any enquiries from other workers, or if he did he never said, about the Applicant's state of health on the Friday he went home. There was no enquiry as to other alleged incidents, on the evidence before me, which would have reasonably permitted Mr. Cross to take an informed view of the true situation and act accordingly.

(4) No advance warning was given to the Applicant about the new proposal but presented him with it that morning of 1 April 2003.

(5) The Applicant was never formally warned about his alleged attitude or other conduct despite being a good worker with whom the Respondent had never had any problems.

(6) And to sum it all up, I find that these failings only reflect the fact that the Applicant was to be removed as foreman irrespective and that the Applicant was cornered.

Compensation

Basic award: **£2200.00**.

Loss of statutory right of protection for unfair dismissal: **£100.00**.

Compensatory award:

The evidence of the Applicant, insofar as his claim for compensation was concerned, I viewed with some reservation. I formed the initial view that the claim for compensation was incoherent and perhaps inflated, although counsel tried to correct it in submitting new figures. The Applicant must be commended for all his efforts in mitigating, at every reasonable opportunity, his losses and this is to his credit.

In determining what he would have earned from the time of dismissal to the hearing, less the Applicant's earnings and using July 2003 as the cut off point given in August, the Applicant was earning more money, Mr. Licudi suggested the maximum figure of £4173.87 as the worst possible scenario case for the Respondent. The Applicant's losses should be assessed from the date of dismissal up to the start of the new employment and any loss in income during that employment. Losses caused by events after the Applicant started his first employment are irrelevant. I accept Mr. Licudi's submissions on this point that there was no evidence suggesting that this employment was only temporary. However, the compensation must be just and equitable in all the circumstances.

I find, on the figures provided by his counsel, that the Applicant ('s):

(1) was unemployed from 28.03.03 to 6.5.03
(2) average net weekly wage before dismissal was £266.16
(3) actual loss during this period was **£1330.80**
(4) worked in Spain from 6.5.03 to 5.12.03 and suffered some loss in income of approximately **£90.42**.
(5) losses thereafter are too remote to be recoverable.

The total amount payable by the Respondent to the Applicant in compensation is **£3721.22**.

Dated this 1st November 2004.

S.R.B.

Stephen R Bossino
Chairman