

INDUSTRIAL TRIBUNAL GIBRALTAR

CASE NO. IND TRI 9/2003

BETWEEN:

ROSE OLIVARES (COMPLAINANT)

v

ELDERLY CARE AGENCY (RESPONDENT)

JUDGEMENT

Counsel for the Complainant – Fabian Picardo, Esq
Counsel for the Respondent – Kevin Colombo, Esq

1. BRIEF SUMMARY OF FACTS

- 1.1 The Complainant started work as a Trainee Nursing Assistant at Mount Alvernia for a 6 month period in May 1997;
- 1.2 On 5th January 1998 she began employment as a Nursing Assistant at The Jewish Home (“the Home”);
- 1.3 Both Homes (Mount Alvernia and the Home) were then run by the Board of Governors of the John Mackinstosh Trust;
- 1.4 On or around 4th January 2000 the Elderly Care Agency (“ECA”) came into being pursuant to the Elderly Care Agency Act and the ECA took over management of both Mount Alvernia and the Home;
- 1.5 When the Complainant begun work at the Home she worked day shifts only. However, she assisted by also working night shifts as and when required;
- 1.6 When the management of both Homes was transferred to the ECA, the Complainant insisted that she had been employed to work permanent night shifts. The ECA allowed her to work two nights at Mount Alvernia. The ECA submitted that this was a temporary measure, allowing the Complainant time to prove her alleged permanent status as a night shift worker. The Complainant argued inter alia that by allowing her to work night shifts at Mount Alvernia this acknowledged her status as a night shift worker and further and in the alternative

that she had been working or promised such night shifts by the Warden or others representing the Home;

- 1.7 The Complainant submitted that the ECA's later refusal to acknowledge her right or status as permanent night staff took its toll on her health, which prevented her from continuing to work, which in turn led to her being dismissed by the ECA;
- 1.8 Up to the date of her dismissal the Complainant submitted medical certificates to justify her continued absence from work;
- 1.9 The ECA's final act was to request a medical report, which the Complainant submitted she personally hand delivered and which the ECA denied ever having received;
- 1.10 The ECA terminated the Complainant's employment citing her continued absence from work without explanation and as a consequence of her not having provided the requested medical report.

2. ISSUES

2.1 The main issues around which this Complaint revolves, are as follows:-

(a) The Complainant alleged that she was accepted as or contractually working night shifts at the time the ECA took control of the Home;

(b) The Complainant alleged that she had been offered two night shifts by Mr James Levy or Mr Solomon Levy or Mrs Doreen Belillo in their various capacities as Governors or representatives of the Home; in the case of Mrs Belillo in her capacity as Warden of the Home;

(c) When the ECA took over control of the Home, the ECA insisted that the Complainant should provide evidence that she had been employed as a permanent night shift worker, or had been contractually offered such a position. However, it seemed to the Complainant that satisfying these conditions of proof was rendered difficult, as the ECA's requirements kept seemingly being changed by the ECA, or so it seemed to the Complainant and her representatives;

(d) When the ECA argued that no day/night duty staff would exist in the future, as it was imposing a rota system on all staff, this was untrue as preferential treatment had been given to some members of staff;

(e) By allowing the Complainant to work night shifts at Mount Alvernia, the Complainant argued that she had acquired the status of a permanent night shift employee;

- 2.2 Was the Complainant working night shifts at the time of the transfer of the Home to the ECA?
- 2.2.1 One of the documents adduced was a letter from the Government's Personnel Department dated 30th April 1997, which offered the Complainant a position as Trainee Assistant in Mount Alvernia. This letter stated that she would be employed to work 18 hours a week. The letter did not, however, specify whether the work was to take place during the day, night or a combination of the two;
- 2.2.2 The Employment & Training Board Notice of Terms of Engagement likewise adduced did not specify whether night duty was included in the Complainant's contractual terms. It was, of course, pointed out that night work was paid at a higher rate which, in theory, would have been indicated on the Form if it had applied in the Complainant's case.
- 2.2.3 When the Complainant transferred to the Home another Employment and Training Board Form was completed, which did differentiate between night and day remuneration;
- 2.2.4 The letter from the Board of Governors dated 17th December 1997 offering the Complainant employment at the Home however, in contrast to the Employment and Training Board Form, failed to refer or differentiate between night or day duty;
- 2.2.5 Evidence was, however, adduced that the Complainant had been employed at the Home as a part of its day staff, which did involve working night shifts when required. It was the norm for day staff to be asked to work nights at the Home whenever an absence occurred amongst the permanent night staff. When asked to work nights the Complainant was, or other day staff agreeing to work this shift were, then paid at the relevant night duty rate;
- 2.2.6 Mrs Doreen Belillo, the Warden at the Home explained that staff at the Home had been divided between "Day Staff" working during the day and "Night Staff" working at night. Mrs Olivares was employed as one of her Day Staff, as such she was officially supposed to work days but could when asked, or by arrangement with permanent night staff, also work night shifts;
- 2.2.7 Mrs Belillo further confirmed that the Complainant had wanted to work nights, so as to better complement her husband's night shifts and improve her married life. Mrs Belillo also stated that some night duty would have normally only been available as and when permanent Night Staff fell sick or were unable to work, but this was on a temporary and not a permanent basis. Furthermore, there was no permanent night duty work available, capable of being offered to Mrs Olivares or any other member of staff on a permanent to holder basis. Mrs Belillo also stated that she could not have dismissed permanent Night Staff simply to assist Mrs

- Olivares. Mrs Belillo did say that she had told the Complainant that, perhaps in a few months or a year, someone might leave and Mrs Olivares could then apply.
- 2.2.8 It must be logically follow that if one has to apply for something this does not make it an automatic appointment. Mrs Belillo could not have made a promise or an offer if such a post had to be opened up to general application within the Home;
- 2.2.9 Reference was also made to a letter from Mrs Olivares applying for a night shift position. Whilst this does not of itself prove anything, it does show that even Mrs Olivares had some doubt at that time as to the permanency of her night shift work and status;
- 2.2.10 At the time of the conversation between Mrs Belillo and Mrs Olivares, the Home was independent and therefore, Mrs Belillo could employ staff without the need to refer the matter to anyone else. Mrs Belillo stated that Mrs Olivares had not been employed to work night shifts and that no permanent night shifts had been offered to her;
- 2.2.11 On the basis of the foregoing testimony, therefore, one must conclude that at the time the ECA took over control of the Home, Mrs Olivares was not working permanent night shifts or even recognised as such. Mrs Olivares was officially still working a day shift, whilst also able to voluntarily rotate with Night Staff when required, or filling in when absences allowed;
- 2.3 Was the Complainant offered a job to work night duty by Doreen Bellilo, James Levy QC or Solomon Levy?
- 2.3.1 The Complainant alleged that she had been offered two permanent night shifts by Mrs Doreen Belillo. She also alleged that these two permanent night shifts had also been offered to her or at the very least promised to her by Mr James Levy QC and/or Mr Solomon Levy;
- 2.3.2 It has already been concluded that whilst Mrs Belillo wanted to assist the Complainant, she testified that there were no night shifts available to accommodate Mrs Olivares' wishes. Mrs Belillo's evidence was that she could not, at the time, offer permanent night shift duty work because (inter alia) (a) there were no permanent night shifts available or later (b) she was later precluded from doing so by the new ECA procedures and rules;
- 2.3.3 Mrs Belillo explained that the Home employed three permanent Night Staff Nurses. Before the ECA took over, when one member of her Night Staff was sick or left employment, then Day Staff would be given the opportunity of temporarily "filling in" or applying for the vacancy as relevant. Mrs Belillo assured the Tribunal that the Complainant was not one of the three permanent Night Staff employed at the Home, at the time of the ECA takeover;

- 2.3.4 Mr James Levy QC confirmed that he had never been in possession of the administrative power necessary to hire or fire staff at the Home. Mr James Levy QC also confirmed that the Board of Governors, of which he was for a time a member, would not intervene in the day to day running of the Home, which was delegated to the Warden;
- 2.3.5 It had also been alleged that Mrs Olivares' night shift employment had been discussed at Board of Governors Level, but neither Mr James Levy QC or his successor in office Mr Solomon Levy could recollect what had been discussed, or if indeed it had been discussed. Mr James Levy QC admitted that Governors meetings were not always minuted or accurately recorded. Furthermore, he admitted that he doubted that an issue such as this would have been discussed at Board Level. It was Mr James Levy's view that this type of discussion and decision would have been left to the Warden or Mr Pitaluga, as Administrator;
- 2.3.6 Mr Pitaluga, however, denied that Mrs Olivares' employment had ever been discussed. He stated that, generally speaking, matters of employment were never discussed at Board Level;
- 2.3.7 Mr James Levy confirmed that he had been aware of Mrs Olivares' claim but had no recollection as to whether he had simply been told of it by Mrs Olivares or someone else. He also confirmed that he could not recall if he had been told who had offered her such a position. This was reflected in his letter of 6th October 2000 addressed to Mrs Vinales;
- 2.3.8 What then can one make of Mr Solomon Levy's letter of 26th February 2001? This would seem to be an official letter confirming that the Complainant had been offered "2 night duty shifts" in May 1999? On the one hand, it seems that Mr Solomon Levy confirmed in writing something that in evidence before this Tribunal he then denied. As had Mr James Levy QC in his letter and his evidence, Mr Solomon Levy testified that it was not he who had made the offer. Mr Solomon Levy, to his credit, admitted that he had simply been told by someone else that an offer had been made;
- 2.3.9 In any event, neither of them could recollect who it was who had made the offer, if indeed an offer had ever been made. On this basis one has to question and doubt whether an offer had ever been made. It was agreed by both, however, that the only person actually empowered to employ new staff was Mrs Doreen Belillo and she testified that she had never made such an offer;
- 2.3.10 One has to conclude by the sheer weight of evidence of denial, that the Complainant was not formally offered night shift employment. Or if she had been offered employment, this offer had not been made by one vested with the power to do so. It is more than possible that Mrs Olivares may have discussed night duty shifts with Mrs Belillo, Mr James Levy QC and Mr Solomon Levy and/or

others. Perhaps Mrs Olivares had even been very loosely “promised” in some shape or form that this form of employment could be available at some indefinite time in the future. There can be no doubt from the evidence that they all considered Mrs Olivares to be an asset they did not want to lose and it is possible that without commitment, they made soothing remarks to keep Mrs Olivares at the Home. However, nothing has been heard to allow this Tribunal to conclude that permanent night work had been “promised” or “offered” to Mrs Olivares, by someone capable of doing so and by this it is meant, someone with the lawful power and binding capacity to do so. It is also doubted that any of them would have “promised” or “offered” to do something, which was not only beyond their power but which needed to be advertised and applied for in any event;

2.4 Were impossible conditions set by the ECA to prove her status and right as a night shift worker?

2.4.1 There is no doubt that Mrs Olivares was working temporary night shifts, in that she was filling in for other sick or absent staff at the Home, when the ECA took over. This statement is made on the basis that sufficient evidence was adduced to show that the Complainant regularly filled in for one or all of the 3 permanent Night Staff, when absent or ill. But such an officially temporary activity does not create a permanent position of employment of itself;

2.4.2 The ECA gave Mrs Olivares the benefit of the doubt, when they also tried to unravel the confusion regarding Mrs Olivares’ employment. However, this also seems to have been a temporary measure;

2.4.3 The ECA had every right to ask the Complainant for proof as to her permanent night shift status, as there was some doubt. Indeed, at first the ECA asked for written proof (ECA’s letter of 1st March 2001). This proof had earlier been inconclusively provided by Mr James Levy in his letter of 6th October 2000 and was then again provided by a letter from Mr Solomon Levy dated 26th February 2001. This letter also confirmed the offer of night employment, albeit we now know that Mr Solomon Levy had no administrative power to make such an offer and further that not only did he not make any such offer, but that he did not know who had made the offer. But this written proof was seemingly not seen, or it was actually lost or mislaid by the ECA;

2.4.4 The ECA, in the absence of the above mis-laid or lost letter, continued to press the Complainant’s representatives for proof. This proof was provided in a form of another letter, this time from Mr Richard Pitaluga dated 25th March 2001, in his capacity as Administrator of the Home. Mr Pitaluga’s letter confirmed that what Mr Solomon Levy had said in his letter had to be true. Albeit Mr Pitaluga’s letter merely gave his opinion as to Mr Levy’s truthfulness rather than making a comment as to the topic under discussion. All things being equal, this should have been the end of the matter. From Mrs Olivares’ point of view proof had been requested three times and obtained from Mr James Levy QC Mr Solomon

Levy and then Mr Pitaluga. The ECA, however, or so it turned out never realised that they had not actually seen Mr Solomon Levy's letter;

- 2.4.5 Mrs Carmen Maskill, Elderly Care Manager, was very helpful and forthright by admitting that Mr Solomon Levy's letter had not been brought to her attention at the time, whilst it must have been received. Mrs Maskill commented that there was a possibility that because Mr Solomon Levy's letter was addressed "To whom it may concern", it may have been misfiled or that it did not come to her attention. Perhaps and this is pure conjecture, had the ECA's filing system been able to correctly classify the letter, the Tribunal might never have become involved. However, this did not occur, the letter was mis-filed or lost and the ECA continued to request further evidence;
- 2.4.6 Reference was also made to Mrs Vinales' leading role in dealing with Mrs Olivares' case on behalf of ECA, however, due to ill health it was not possible to obtain Mrs Vinales' evidence. Therefore, much of what was brought before the Tribunal by Mrs Maskill and Ms Patricia Brooks on behalf of the ECA has to be taken and read in this context. We do not know whether Mrs Vinales ever accepted Mrs Olivares' status. We do not know if Mrs Vinales ever received Mr Solomon Levy's letter;
- 2.4.7 The Union's letter of 29th March 2001 also referred to Mr Solomon Levy's letter but as Mrs Vinales was directly dealing with the matter, Mrs Maskill could not comment. Without any acceptable degree or certainty as to whether Mr Solomon Levy's letter or the many references to it had been considered or noticed one has to conclude that Mr Solomon Levy's letter was never considered;
- 2.4.8 It was noted by Mrs Maskill in her evidence that Mr Solomon Levy's letter said that she "was offered" but not by whom. However, the Tribunal feels that this might have been over zealousness on the ECA's part 'after the event'. One does not usually ask for a letter of confirmation, receive two (both confirming something) and then cross examine the writer as to the nature of this confirmation. This is more pertinent when one considers that Mrs Maskill admitted that Mr Solomon Levy's letter had not "been brought to her attention";
- 2.4.9 Without Mr Solomon Levy's letter it is logical that Mr Pitalgua's letter was read in isolation and considered meaningless and worthless. Why, when receiving Mr Pitaluga's letter the ECA did not ask for a copy of Mr Solomon Levy's letter, which they obviously did not have on their file, is worrying as it perpetuated the dispute and caused Mrs Olivares unnecessary anguish. Had the ECA rejected it out of hand as being vague, then one could justify such an argument; but to state that it was never brought to Mrs Maskill's attention is tantamount to indirectly admitting to an administrative blunder;
- 2.4.10 That the ECA gave Mrs Olivares 9 months to prove her case is of merit. However their lack of analysis of one of the letters received and ability to

misperceive it is not. It may be that, given that Mrs Belillo had already confirmed that Mrs Olivares was not permanent Night Staff, the ECA had already arrived at a conclusion and was waiting for Mrs Olivares to run out of options and accept what was, as far as the ECA was concerned, fact. It may also be that the ECA felt that it would be appropriate at that juncture to allow Mrs Olivares the opportunity of working some night shifts, in view of the fact that they would soon be implementing a new policy of general rotation, which meant that there would no longer be room for permanent Day or Night Staff. However, no firm conclusions can be arrived at as to the reason for allowing such a long drawn out period;

- 2.4.11 It is also possible that the ECA was so busy in dealing with the hand-over that they did not actually sit down and properly read Mr Pitaluga's or the Union letters they received and properly consider what was on their files. However, as both Mr James Levy QC and Mr Solomon Levy denied when giving evidence that either had directly offered or promised night time employment to Mrs Olivares, it would be wrong to totally blame the ECA for not asking for a copy of Mr Solomon Levy's letter;
- 2.4.12 Had Mrs Vinales received and discounted Mr Solomon Levy's letter why was no specific reference made of the content? Why did the ECA not contact Mr Solomon Levy direct, if it had received his letter, for further information? That he was not contacted at all leads the Tribunal to conclude that either the ECA did not receive the letter and therefore, failed later on, when the letter was referred to in other correspondence to request a copy, or it was just too busy to properly deal with individual staffing matters;
- 2.4.13 Reference was also made to other employees and mistakes made by the ECA, however, one cannot use them to prove permanent rights of employment in this case. That an error was made with another employee does not necessarily mean that an error was made with Mrs Olivares' position as a "day" worker. No one in a position of authority came forward to confirm that he or she had employed Mrs Olivares or offered her permanent night duty;
- 2.5 All of the representations, discussions and correspondence entered into between the T & G and the ECA as well as Lady Hassan's steadfast support of Mrs Olivares' case was also noted. However, none of them were in a position of actual knowledge. They all relied on Mrs Olivares for factual information. Therefore, what they had to say was, in this instance, whilst very useful, of secondary importance to the case;
- 2.5.1 There is no doubt, from all the witness testimony and evidence adduced, including that of Lady Hassan, that Rose Olivares was a charismatic Elderly Care Worker and an active asset. Had Mrs Olivares been allowed to continue her employment, she would no doubt have continued to be an asset to Elderly Care in Gibraltar;

- 2.6 The argument was also advanced that by allowing Mrs Olivares to work as a Night Staff at Mount Alvernia, a tacit recognition of her status had been made. This has to be discounted, as the ECA continuously asked Mrs Olivares to prove that she had been employed or offered permanent night work at the Home. Had the ECA accepted Mrs Olivares absolutely and without conditions they would not have doggedly sought such proof. One has to accept that they allowed Mrs Olivares to work night shifts in order to give her the benefit of the doubt. However, this work being at all times subject to a condition of proof, which Mrs Olivares ultimately failed to provide.

3. THE TERMINATION

- 3.1 Pursuant to Section 59 of the Employment Act (“the Act”) every employee has the right not to be unfairly dismissed by his or her employer;
- 3.2 Pursuant to Section 65 (1) of the Act the employer has made submissions as to the reason for the dismissal and must show that such reason falls within the parameters set out at Section 65 (2) of the Act;
- 3.3 The ECA dismissed the Complainant for failing to attend to her duties “by virtue of her prolonged illness”. This reason is valid for the purpose of Section 65 (2);
- 3.4 The next issue to be considered is whether in the circumstances the dismissal was fair or unfair;
- 3.5 In showing their reason for dismissal employers must prove the question of fact, being the employer’s motivation for the dismissal. As Cairns AJ put it in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323:-
- “A reason for the dismissal of an employee is a set of facts known to the Employer, or it may be of beliefs held by him, which caused him to dismiss the employee.”
- 3.6 A Tribunal must judge matters as they stand at the date of dismissal and upon information known or available to the employer at the time, this statutory test is laid down by Section 65 (2) of the Act;
- 3.7 The question the Tribunal must ask itself is whether it was reasonable for the employer to dismiss the employee?
- 3.8 Mrs Olivares’ employment was terminated by letter dated 26th June 2003, when the ECA wrote to Mrs Olivares informing her that by virtue of her prolonged illness they had no alternative but to terminate her employment . The ECA argued that Mrs Olivares had been on continuous sick leave for 2 ½ years;

- 3.9 On 26th February 2001 a meeting had been held between the Complainant, her Union representative, an ECA representative and Mr James Levy QC. At this meeting, Mrs Olivares was then informed that she had been on sick leave since 5th February 2001 and had during this time been submitting Medical Certificates. The ECA and Mr Levy asked Mrs Olivares to return to work, which she failed to do;
- 3.10 Every 14 days the Complainant submitted a Medical Certificate issued by Dr Valerino;
- 3.11 On 28th February 2002 the ECA wrote to Mrs Olivares requesting a medical report. On 8th March 2002 the ECA sent a chaser, as no report had yet been received;
- 3.11.1 Mrs Olivares continued to submit Medical Certificates. On 25th April 2002 Mrs Olivares' legal representative wrote to the ECA advising that a medical report was being prepared;
- 3.11.2 On 1st July 2002 the ECA sent another chaser as no report had yet been received;
- 3.11.3 Mrs Olivares testified that she had personally hand delivered the Medical Report, which seemingly never reached her file. Mrs Maskill could not absolutely confirm it had not been handed in. However, it had to have been obvious to Mrs Olivares and her representatives that something had gone wrong with its delivery, as the ECA continued asking for it. However, this was the second document to disappear at the ECA. Given the loss of Mr Solomon Levy's letter and the lack of follow ups by the ECA, when they failed to request a copy of that letter when it was referred to in Mr Pitaluga's letter, the Tribunal has to err on the side of caution and accept the possibility that the ECA's administrative side was not very efficient. A possibility, therefore, exists that the Medical Report was delivered, lost or mislaid and like Mr Solomon Levy's letter, is yet to be found;
- 3.11.4 Why did Mrs Olivares' representatives not write to the ECA confirming that the Medical Report had been delivered? Why did her representatives not even reply to the ECA's chaser letters? Just one letter might have prevented the ECA from acting to terminate her employment - at that point in time. Both failures (the loss of the Medical Report and the failure to reply to the ECA's letters) led to Mrs Olivares losing her employment;
- 3.11.5 In the end the ECA, with no evidence on its files whether lost or mislaid and with no replies from Mrs Olivares' representatives proceeded to terminate Mrs Olivares' employment. The seeming failure to receive the medical report triggered the termination of Mrs Olivares' employment;

3.12 The basic obligation of the employer in long term ill health cases is to make a reasonable effort to inform itself of the true position of the employee's health. As per PATTERSON v MESSRS BRACKETTS [1977] IRLR 137:

“what is required in a particular case as far as the employer informing himself about the employee's health is concerned will depend on the circumstances of the case. But the principle is twofold: First there should be the consultation or discussion with the employee; and secondly such other steps as are necessary should be taken to enable the employer to form a balanced view about the employee's health. In some cases that will require consultation with the doctors; in other cases it will not.”

3.12.1 Consultation with a physician is always considered reasonable. An employer who dismisses an employee without obtaining a medical opinion runs the risk of having a dismissal found to be unfair. In *David Sherratt Ltd v Williams* (1976) EAT 573/76 a dismissal had not been preceded by consultation or warning. Nor had a medical report been obtained prior to the decision to dismiss. It was held “...Where appropriate - and in most cases it will be appropriate in one way or another – the employer ought to seek, with the assistance of the employee and his co-operation where necessary, to find out what is the medical position. It may be that the employee knows because he has consulted his doctor and he can tell the employers; or he may give permission to the employer to consult his General Practitioner and so on”;

3.12.2 That the ECA requested a medical report was correct. However, was a reasonable effort to ascertain the medical position of the Complainant made and was this coupled with adequate communication between employer and employee?

3.12.3 In this area the ECA fails. The Tribunal accepts that there is an argument for concluding that the Medical Report was delivered and lost. It is accepted that two letters were sent to Mrs Olivares' representatives, but none of these letters gave a deadline or threatened dismissal for failing to deliver the Medical Report. This is technically tantamount to a dismissal out of hand;

3.13 A Tribunal in deciding whether the ECA's decision to dismiss was a reasonable reaction needs to consider the possible responses. Given the ECA's failure to obtain the medical report, the ECA's response should have been to give a final warning coupled with a statement as to the consequence of failure to provide a medical report. The ECA's letters of 28th January 2002 and 8th March 2002 failed to give any warning as to the consequences of her failure to provide the medical report. Why did the ECA not give a warning? Why did the ECA not insist on being given permission to consult Dr Valarino? The Tribunal does not consider two letters over a period of just one month simply requesting a medical report and nothing more, an adequate response. Certainly, the ECA did not have sufficient information to really judge and decide whether Mrs Olivares was malingering or was really unwell;

- 3.14 The ECA argued that they had been sympathetic and patient throughout. Mrs Olivares argued that the ECA's attitude and behaviour had caused her to become ill through the stress;

4 CONCLUSIONS

- 4.1 Mrs Olivares was not working at the Home as permanent Night Staff at the time of the ECA takeover;
- 4.2 No proof was adduced that Mrs Olivares was formally offered or "promised" two permanent night shifts. The letters produced in respect of Messrs Levy, Pitaluga and others turned out merely to confirm that they had heard, but did not know who had offered the two night shifts to Mrs Olivares. Simply put, no one stood up and said "I made the offer and I had the power to do so". By Mr James Levy's own admission only Mrs Belillo had the administrative power to employ staff. However, it seems natural in the event of a dispute that the Board could overrule Messrs Belillo, however, no proof was brought to show that this had happened in Mrs Olivares' case, nor was this even suggested by the evidence;
- 4.2.1 The only person who everyone agreed did have the power to hire and fire was Mrs Belillo. Mrs Belillo denied that she had ever promised, employed or offered Mrs Olivares any permanent night duty work. Was a statement of intent ever made? Did Mrs Belillo ever make a promise to hire Mrs Olivares? Mrs Belillo said that she did not and that if she did it would have been on the basis of replacing existing permanent staff which she could not do. The Tribunal has to accept that Mrs Belillo did not make any such offer;
- 4.3 The ECA whilst professing fairness, seems to have been over zealous and by way of contradiction also lax in its analysis and systems. It is a shame that in granting Mrs Olivares time to provide documentary evidence, the ECA did not properly read what they were being given, or ask for letters referred to but not in their possession. That they failed to note the existence of a letter from Mr Solomon Levy and possibly lost the Medical Report is of note. Of course, this is a conclusion arrived at without the benefit of Mrs Vinales' evidence. What she could have added and clarified we do not know? But likewise, Mrs Olivares and her representatives' silence when pressed for a medical report already hand delivered, balances the blame factor. Furthermore, had a copy of Mr Solomon Levy's letter been requested by the ECA, whilst arriving at a legally incorrect decision, this might have ended the matter. This first administrative lapse on ECA's part adversely affected Mrs Olivares' position and health, but had they been comprehensive in their work it might have led to a wrong decision. The loss or mislaying of the Medical Report and failure by her representatives to reply to the ECA's letters on the other hand, also did not help Mrs Olivares. The ECA and Mrs Olivares representatives jointly contributed to Mrs Olivares loss of employment at that particular point in time;

4.4 The ECA did not make a reasonable effort to inform itself as to the true position of the Complainant's health; nor did they communicate sufficiently with Mr Olivares or her representatives as to alternative methods of making such a medical assessment. The ECA also did not properly communicate the consequence of failing to provide the requested medical evidence;

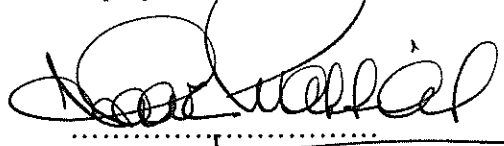
5. DECISION

5.1 The Tribunal therefore feels that the Complainant's claim for unfair dismissal can only partially succeed as whilst some of the blame lies with the ECA, the eventual dismissal was also partly caused inter alia by the Complainant, or her representatives failure to reply to the ECA's letters. The Tribunal, therefore, makes the following Orders:-

5.1.1 It is recommended that it would be equitable in the circumstances for the Complainant to be re-engaged by the ECA, should Mrs Olivares so wish. The terms are to be on a rotating night-day shift rota testified by the ECA as applying now to all employees, Mrs Olivares will have 30 days from the date of this Judgement in which to decide whether or not to take up this employment;

5.1.2 Additionally the Tribunal orders that the ECA pay Mrs Olivares a basic award of £3,600.00;

5.1.3 It is not felt that it would be equitable to award any further sums to Mrs Olivares. It is this Tribunal's opinion that had the ECA's administrative facilities been more efficient Mrs Olivares would not have been dismissed at that specific moment in time. However, because the Tribunal does not feel that Mrs Olivares was entitled to permanent night duty employment and considers that Mrs Olivares obdurate attitude regarding her employment status led to her health issues and long absences from employment, it is believed that Mrs Olivares would have eventually lost her employment with the ECA.


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CHAIRMAN
13th March 2007