IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

No. 4 of 2004

BETWEEN

GINO OLIVARES

Applicant

and

ROTARY (GIBRALTAR) LIMITED

Respondent

Mr J Bossano for the Applicant
Mr C Salter for the Respondent

# DECISION

## Employment Background

1. On 9 January 2001 the Respondent, a local electrical & mechanical contractor, appointed the Applicant as a plumber stating "*The position shall generally entail but shall not be restricted to:- General plumbing installations commercially and domestic. Carrying out works within the scope of employment and general operative duties*".

2. On 22 January 2001, the Applicant accepted the conditions of employment on offer, which were, in addition, reflected in a Notice of Engagement Form filed with the Employment Service. The Agreement between the Construction & Allied Trades Association & the Transport & General Workers' Union (the "CATA Agreement"), as varied from time to time, underpinned this employment contract.

3. During the course of the Applicant's employment, a total of four Notices of Variation of Terms of Engagement Forms were filed with the Employment Service increasing his hourly rate. On 1 June 2001, the variation included the Applicant's job description "*From Plumber to Plumbing Site Supervisor*", which promotion he did not take.

4. The last variation was on 11 September 2003. In the Respondent's letter of that date, the Applicant is described as a "*Mechanical Operative*" and the hourly rate was set at £7.30 per hour for a 39 hour week plus a bonus of £1.00 per hour payable based on "*Productivity (agreed & approved by Site Foreman); Performance (agreed & approved by Site Foreman); Attendance (Complete the full week site working hours); Willingness (agreed & approved by Site Foreman); and, Ability (agreed & approved by Site Foreman).*

**Employment Dispute**

5. On 7 November 2003, the Applicant was handed a letter making him redundant with immediate effect. On 14 November 2003, a Termination of Employment Notice to this effect was filed with the Employment Service.

6. In his Originating Application, dated 18 February 2004, the Applicant claimed he was unfairly dismissed, namely: "*Unfairly selected for dismissal if reason is redundancy*", describing himself as a "*Plumber/Mechanical Operative*", giving the date of actual termination as 7 November 2003 and claiming he did not know the principal reason for his dismissal.

7. In its Notice of Appearance, dated 14 March 2004, the Respondent admitted the dismissal, giving as the reason for dismissal "*Completion of plumbing works on contracts. No further work available at time*" and asserting the termination date was 14 November 2003. The brief grounds relied upon resisting the claim state: "*Employee was terminated/made redundant as per contract signed with us. No works available on plumbing section at time. No private or Government works available for employee to work on. Presently pricing MoD works, employee unable to obtain MoD clearance due to previous history unknown to us*". There is a letter dated 30 July 2001 from Hyder, Works Services Manager for the MoD, to the Respondent confirming the Applicant had not been granted MoD clearance.

8. The Respondent conceded through its counsel that the proper date of termination, in view of the notice period (two weeks) required under the CATA Agreement, should have been 21 November 2003 and not 14 November 2003. The Respondent agreed to pay the Applicant an extra week's wages in lieu of notice.

9. I pause briefly to deal with this point, which arose *ex improviso* at the hearing. Establishing "*the effective date of termination*", pursuant to section 64 (5) of the Employment Ordinance ("the Ordinance"), is important for the purposes of establishing, *inter alia*, whether an application for unfair dismissal is brought within the three-month period required under section 70 (4) of the Ordinance. Counsel for the Respondent properly, in my view, conceded this point when this issue arose because on a proper construction of paragraph 1 of the Respondent's letter of 7 November 2003 clearly dismisses the Applicant with notice but is given a payment in lieu of working out that notice:

"*Unfortunately, we are sorry to have to inform you that we are making you redundant. We hereby give you one week's notice in accordance with your contract signed with us on the 22nd January 2001 but we will not require your services next week but for which you will be paid a basic 39 hours, this giving you time to find alternative employment*".

10. Such a notice, in my view, falls within section 64 (5) (a) of the Ordinance "*In this Part "the effective date of termination -...in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which that notice expires*". The effective date of termination in this case could only have been 21 November 2003 – **Adams v GKN Sankey Ltd [1980] IRLR 416**. Therefore, this Originating Application was not out of

time and, albeit I was not asked to decide the point, having heard some of the background I would have been inclined to exercise my discretion under section 70 (4) of the Ordinance subject to further arguments from both sides, if any.

**The Evidence**

***Mr Letts – Contracts Manager of the Respondent***

11. Mr Lett's Witness Statement of 31 March 2005 was admitted as his evidence in chief. He also gave further live evidence and I shall set out the salient points.

12. The Respondent 'started up' in Gibraltar in 2001 with 8 employees. The Applicant was one of them. At its peak, it had a work force of around 40 employees but at the time of the Applicant's redundancy there were 20 employees – strictly its own – and the rest were on the books.

13. The Respondent enjoyed a private arrangement with Rotary (International) Limited, recognised and accepted by the Employment & Training Board and Government, that for an administrative fee, detached workers (EU and non EU citizens) would be on the Respondent's payroll but actually work for Rotary (International) Limited on the conversion of the new St. Bernard's Hospital premises at Europort. I indicated to the parties on 17 February 2006 that I would not regard them as the Respondent's employees for the purposes of this case – they were only employees on paper and the test to be applied involves other considerations, which favour the view I have taken.

14. The workforce numbers varied depending on the work available, which the Respondent obtained by tendering, and it changed either way from day to day.

15. By November 2003, the Respondent had completed several projects and its last plumbing contract was at New Harbours, which was nearing completion, and some final plumbing works arising during the hand over of the flats at the Old Naval Hospital.

16. The Respondent was tendering for MoD work and in the above state of affairs took the decision on 7 November 2003 to make the Applicant redundant. The whole construction industry went through a very quiet period and for the Respondent there was little prospect of improvement at that stage.

17. The Respondent produced a list of 14 employees, as a result of discovery, it had made redundant between 7 November 2003 and 20 December 2003 (TAB5). A second list of its own workers, 7 in total, (TAB 4) of plumbers and plumbers' mate (with one mechanical fitter) showed the different dates of termination with the exception of Mr Charles Halliday – who continues in the Respondent's employment.

18. The decision was made to keep Charles Halliday and Fred Pascual in preference to the Respondent. The former had MoD clearance to work at the MoD tendered works and the latter had intimate knowledge of the works at the Old Naval Hospital. The Applicant had not obtained his MoD clearance in July 2001 and Mr

Pascual, as a Spanish national, had only partial clearance. Apart from this, these three plumbers were as good as each other.

19. This was the situation then facing the Respondent and a decision was made for purely commercial reasons and based on the work the Respondent had. Government work went to Amey Construction & JBS making it a difficult industry within which to operate competitively.

20. The Respondent adhered to the 'LIFO' policy unless circumstances dictated otherwise and referred to its own policy document at paragraph 1.1.16, which are part of the terms and conditions of its employees' contracts of employment.

21. The Respondent had not taken into account performance or record (paragraph 1.1.16 (b) (i)). Unless they stood out as bad performance or record, it would not be taken into account in its decision over redundancy. There was no consultation with the men as to who might be made redundant and no indication given to anyone because of potential problems on work sites – some tended to behave badly and got very upset.

22. Through his experience in the construction industry since 1983, Mr Lett believed that this policy was right for the Respondent's business and operations. It avoided the potential deliberate damaging of installations and tools going missing if those made redundant were not put on notice beforehand of their impending redundancy and required to work out their notice period. In the construction industry the turn over in the numbers of employments and redundancies was a normal everyday occurrence – otherwise it could mean bankruptcy for the employer.

23. Mr Lett explained, in cross-examination, the MoD's security vetting procedures and the uncertainty with which, he found, clearance was given in different cases where the individuals had previous convictions. In the Applicant's case he could not remember when he was advised to re-apply but he had not done so a second time. The clearance process could take between 3 to 6 months.

24. When asked whether he was familiar with the provisions in the law over collective redundancies, he replied that he had not read it entirely. He confirmed that there was no consultation with the unions because the majority of redundancies were detached workers.

25. The list of 300 employees provided by the Respondent on discovery was misleading and it was the first time that any such distinction had been made.

26. Mr Lett explained that it was always the case that detached workers would be released before local workers. These detached workers, he explained, would not be redundant because they continued to work within the Rotary International Group and simply returned to their original place of employment.

27. Mr Lett agreed that at least 5 of the Respondent's local employees were being made redundant over a period of 60 days and that the Respondent had not followed the Collective Redundancy provisions.

28. Mr Lett accepted that despite its own written policy of consultation with the Union, part of its employees' terms and conditions, this was not done. He explained that it was very difficult and, with resignation, stated that work goes and men are released and he did not know where consultation would take the Respondent.

29. Mr Lett frankly admitted that there had been no consultation with the union since the Respondent started in business and saw no need for the union's involvement notwithstanding the flow of employees in and out of its services. The Respondent had never had any problems with labour. He concluded that the Respondent was not dissatisfied with the Applicant's performance accepting he was the first plumber to join them and lasted the longest. He maintained that his redundancy had been driven purely by the work available.

***Mr Olivares – The Applicant***

30. Likewise, his Witness Statement (undated) was admitted as his evidence in chief and he was tendered for cross-examination. The Applicant stated that he had not been pre-warned of his redundancy, not consulted (nor the union), no explanation given for his selection for redundancy and not offered alternative work on any other site.

31. There was no indication given that works were winding down and thought to the contrary because at New Harbours there was quite an amount of work to be carried out and workers were employed after him.

32. He expressed the strong view, when asked who should have been dismissed, that it should certainly not have been him and that there was plenty of work at New Harbours. He was surprised that it had been him because he was more on the job than others.

33. When asked to comment on the reasons why Messrs Halliday and Pascual were kept on, the Applicant did not accept Mr Pascual would be better placed to do the remaining snagging jobs. He asserted being a major part of the team or so he had been made to believe.

34. He accepted the reality of redundancies but did not really understand why Mr Pascual was kept on. He disagreed with Mr Lett's statement over the new hospital because he was offered the supervisor's job, had been employed longer and was not less associated with what was required at the Old Naval Hospital. The Applicant stated that Mr Pascual was not a qualified plumber and had learnt on the job, from colleagues and him. Mr Pascual's wages, he said, had been lowered. He pointed out his greater involvement at the sites with Quantity Surveyors and Architects and how his decisions would be taken into greater account.

35. When it was suggested that his previous employment was simply that of a store man, he retorted that Mr Pascual had been a cook for 5 years whereas he had started as a plumber in 1982 and that he did some plumbing works for his former employers, who were plumbing fittings merchants.

36. When asked to confirm that there was no bad reason for his selection for redundancy not disclosed to the tribunal, the Applicant stated it was not for him to comment and that he was not suggesting any, having previously stated that he would have liked to have known the real reason for his selection.

37. Although the New Harbour's contract might be nearing completion, the Applicant stated that plumbing or associated works were being kept. He stated that in the construction industry, employees had to be flexible with their job descriptions and how they must do other work.

38. After his dismissal, the Applicant was unemployed until mid-March 2005 when General Contracting & Maintenance Services Ltd engaged his services as a plumber.

39. Two letters from the Ministry of Social Affairs were produced in evidence showing the amounts of unemployment benefit and social assistance payments received during his unemployment period together with the Applicant's pay slips.

**Findings & the Law**

40. Having heard these two witnesses give live evidence and taking into account their respective representatives' submissions, there are three main issues I must address.

41. Firstly, and it is not in dispute, the Applicant was dismissed – section 59 (1) and (2) of the Ordinance. I am not concerned with the exclusions in sections 60 to 63 *sic.*

42. Secondly, whether or not the Applicant's right not to be unfairly dismissed was breached and to answer this question, I must revert to section 65 of the Ordinance.

43. The onus is on the Respondent to show, in turn, the reason for the dismissal (section 65 (1) (a) and that it falls within section 65 (2) and I am not concerned with the remainder of section 65 (1) (b).

44. I hold that the Respondent has satisfied the burden upon it – section 65 (7) (c) (ii) on either alternative situation there envisaged. Although Mr Bossano suggested that the statistics showed that the construction industry was booming at the time, I accept the Respondent's contention that there was a genuine need to make redundancies and that its true requirement for plumbers was for one only but that it had decided to keep a further plumber to complete the works at the Old Naval Hospital. Therefore, I find that by 7 November 2003, the Respondent contemplated making redundant a total of 8 of its employees within the description of Mechanical Operatives, namely: Aceve, Fadda, the Applicant, Cotham, Bueno, Williams, Hernandez and Pascual.

45. Thirdly, under section 65 (3), I am obliged to consider the test at section 65 (6), which imposes no particular burden on either of the parties. The Applicant has not

argued that the deeming provisions of section 65 (5) (b) make his dismissal for redundancy automatically unfair.

46. The only authority cited before me by the parties in their respective submissions was the House of Lords judgment in **Polkey v A. E. Dayton Services Ltd [1988] A.C. 344**. I remind myself of the basic principles, namely:

"*...the subject matter for the tribunal's consideration is the employer's action in treating the reason as a sufficient reason for dismissing the employee. It is that action only that the tribunal is required to characterise as reasonable or unreasonable. That leaves no scope for the tribunal considering whether, if the employer had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done. On the other hand, in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as a consequence of not consulting or not warning.*

*If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the Code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the Industrial Tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee*" per Lord Mackay at page 354 and 355 and see further at pages 357 and 358 adopting the analysis of Browne-Wilkinson J in **Sillifant v Powell Duffryn Timber Ltd [1983] I.R.L.R 91**.

47. Furthermore, this Tribunal finds the observations of Lord Bridge, at pages 364 and 365, instructive:

"*But an employer having prima facie grounds to dismiss for one of these reasons* [which included redundancy] *will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action...in the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the tribunal is not permitted to ask in applying the test of reasonableness posed by section 57 (3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57 (3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore*

*could be dispensed with. In such a case the test of reasonableness under section 57 (3) may be satisfied.*

48. The issue is different, of course, in considering any aspect of compensation. As Lord Bridge makes unequivocally clear, at page 364, "*If it is that taking the appropriate steps which the employer failed to take before dismissing the employee would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment.* Such a hypothetical question can only be answered on a balance of probabilities, quoting from Browne-Wilkinson J. "*There is no need for 'an all or nothing' decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment*" and this "*second consideration is perhaps of particular importance in redundancy cases*".

49. I have been referred to the Redundancy Policy at paragraph 1.1.16 of the CATA Agreement and I need only refer to the opening sentence *"When a redundancy situation occurs, a selection for redundancy will be based on the following principles* [my underlining]. There are two. The Respondent has not made clear whether or not it relied on the first principle or policy (a). That principle seems to be aimed at protecting the employer's work set up but the Respondent, in this Tribunal's view, has failed to apply and implement the second principle or policy, which is directed to ensuring fairness in its decisions. The words "*subject to the above*" in sub-paragraph (b) does not, in this Tribunal's view, constrain in any way the application of the factors there enumerated to a strict subjugation in favour of sub-paragraph (a) and merely indicates that (a) is only one a starting position.

50. The Respondent has not sought to argue to the contrary. Otherwise, and it operates both ways, an employer would be forced to dismiss an employee under sub-paragraph (a) because his work has diminished or ceased notwithstanding that he could be its best employee and the employer wrongly denied the opportunity of keeping the former by the strict inapplicability of sub paragraph (b). Such a construction of this policy provision could operate prejudicially for employers and employees alike and could not have been intended to have such an effect. The employer is entitled to apply the agreed policy criteria referred to but equally obliged to apply them properly before implementing redundancies.

51. I cannot accept the Respondent's contention that its operation of a blanket policy of non-consultation and failure to warn in redundancy cases is acceptable. Firstly, the employer is entitled to protect itself from vandalism from its own employees in cases of redundancy and where the employer has reasonable grounds to suspect that an employee or certain employees could clearly be predisposed to behaving in this fashion, it may well be justified albeit there are other measures that could be taken (including proper consultation) that could well avoid or minimise any such perceived risk in most cases. It is perilous for an employer to seek to protect its position entirely on such a policy as a justification in law.

52. The Respondent has not alleged nor produced any evidence that the Applicant could have been such a problem candidate and, furthermore, it had not applied or even considered the issue correctly under its own policy provisions. I find it affords no excuse or justification in this particular case.

53. I hold that these significant failures make this dismissal unfair and in breach of the Applicant's legal right not to be unfairly dismissed. There was no appropriate warning, consultation with the Applicant or appropriate trade union official and the selection criteria in sub paragraph (b) not considered or applied and the issue of redeployment within the Respondent's organisation not wholeheartedly entertained.

54. I also find that this dismissal was unfair because this Respondent failed to comply with the Collective Redundancy provisions contained in sections 74 to 77 of the Ordinance.

55. This ground is in addition to the above or as a stand-alone ground for the reasons I now set out below.

56. I had reservations over whether the Respondent acted in complete ignorance of these provisions partly because of Mr Lett's reply during cross examination that he had not read them entirely and because he has taken part in the CATA Board. However, both parties have proceeded in their submissions on the basis that Mr Lett acted in total ignorance of these provisions. I feel obliged to accept that premise but ignorance of the law is no excuse. In cases of doubt, employers would be well advised to comply, in order to avoid falling foul of the law.

57. Failure to comply with these all-important statutory provisions does not make a dismissal automatically unfair, as a matter of strict law, under the deeming provisions of Section 65(5)(b) of the Ordinance, because such an eventuality has not been expressly legislated for in that section. We are not dealing with a "*customary arrangement*" or "*agreed procedure*" but a procedure dictated in law. However, as I will attempt to illustrate, this apparent omission is indicative of something far more significant and its non-inclusion in the deeming provisions does not in any way relegate it in importance but puts its compliance well above the deeming provisions themselves in cases of <u>total</u> non-compliance such as the present one.

58. I referred the parties to some authorities and EU Directives after I reserved judgment for their comments.

59. It is this Tribunal's view that <u>total</u> non-compliance with the Collective Redundancy provisions, where they are applicable, renders dismissal for redundancy unfair even though the consequences are not spelt out in the letter of the law. On this Tribunal's analysis, it is a necessary consequence of the proper application of the law and, with respect, I find it is illusory and wrong in law to say that it is simply a factor this Tribunal is obliged to consider as part of the ultimate test in section 65 (6) of the Ordinance. I accept it would only be a factor in cases of partial, incomplete or late compliance.

60. Firstly, the Legislature's failure to include the provisions on collective redundancies within the deeming provisions of section 65 (5) of the Ordinance has

two significant but married effects. There is no deeming effect but also "*no special reasons justifying a departure*" that can be relied upon.

61. Secondly, it is noteworthy that there is no possible derogation from actual compliance as a matter of law unless the exemptions provided for in section 74 (2) apply – see sections 75 (8) and 76 (8) of the Ordinance. To hold it is simply a factor in the equation in cases of total non-compliance would, in effect, permit this Tribunal to create derogations and exceptions in a statutory provision that does not contain any and in the absence of any discretion to do so. If that were so, this Tribunal would consider itself acting *ultra vires* in the context of what I set out below.

62. Thirdly, there is a new EU Council Directive 98/59/EC of 20 July 1998 which consolidates the Directives referred to in section 74 (5) (a) (ii) and (b) of the Ordinance. It has not yet found its way into our local legislation and it ought to be considered by the relevant authorities if they have not already done so. I find that there is likewise no such derogation possible under any of the Directives.

63. Fourthly, Article 5 of the 98/59/EC directive states: "*This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers*". Such was EU law on 24 June 1992 with Directive 92/56/EEC, which amended Directive 75/129/EEC. This is what the local legislature has done in sections 74 to 77 of the Ordinance and adopted a model locally that is distinct from the UK statutory provisions - see sections 188 to 198 of the Trade Union and Labour Relations (Consolidation) Act 1992.

64. Fifthly, In England & Wales, "*It is settled law that if statutes enacted to give effect to the United Kingdom's obligations under European Union Directives can reasonably be construed so as to achieve the result pursued by the Directives, the statute must be so construed*" – per Mr Justice Mitting, at paragraph 10, in **GMB v Amicus & Ors: Amicus v Beloit Walmsley Ltd & Ors [2004] IRLR 18 EAT** - see also paragraph 32, per Judge McMullen QC in **Leicestershire County Council v Unison [2005] IRLR 920** ("**the Unison case**"). This principle must be equally applicable in Gibraltar and I rely upon it in interpreting our Ordinance.

65. Sixthly, there is a judgment of the European Court of Justice (Second Chamber) that specifically deals with the interpretation of this new directive in **Irmtraud Junk v Wolfgang Kunhel C-188/03 [2005] IRLR 310** ("Junk v Kunhel"). In addition, **the Unison case** is the first Employment Appeals Tribunal ("EAT") case to consider the implications of this European Court's landmark redundancy consultation decision under English Law as recently as December 2005. These are considerably relevant decisions for the proper application of our law.

66. The expression "an *employer contemplating*" collective redundancies (within the meaning of the Ordinance) means that the obligation to consult and to notify arise prior to any decision by the employer to terminate contracts of employment. It is something less than a decision that dismissals are to be made and more than a possibility that they might occur. It is not a one off state of mind either. Consultation is with a view to reaching an agreement and must, at least, cover ways and means of

avoiding collective redundancies or reducing the number affected and of mitigating the consequence by recourse to accompanying social measures" - it is an obligation to negotiate. It is irrelevant that an employee is not a member of a trade union provided there is a recognised trade union by the employer - see definition in Section 75(1) of the Ordinance - "Trade Union Official" which exists in this case by virtue of the CATA agreement. Otherwise, section 74(5) applies. Section 77 prohibits any agreement that purports to dilute these provisions in any way; and, Section 78 makes failure to comply a summary offence.

67. Seventhly, the objectives of the Directives and our legislation have not been met in this case. Simply looking at the monetary considerations arising in this case, to the Applicant, the Respondent and Government purse, it cannot be in the public interest to hold that total non-compliance with the provisions of Collective Redundancies is merely a factor.

68. I find there is absolutely no conflict, taking all of the above into account, when this Tribunal applies section 65 (6) of the Ordinance: "*...the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case.*" I am satisfied that EU law and our legislation provides the minimum standard of fairness and protection in redundancy situations in Gibraltar and a total failure to comply with them, locally at least, is incompatible with the employer acting reasonably in any case.

69. This Respondent acted unfairly and in breach of the Applicant's right not to be unfairly dismissed for the two main grounds stated above, taken together or separately, without respecting the procedural fairness that the law (1) looks for as a minimum standard (as in the case of Polkey) and which may be departed from only in exceptional cases and (2) imposes as duties in the collective redundancies provisions. I am not satisfied in view of the evidence that the Respondent was entitled in the circumstances of this case to treat it as a sufficient reason for dismissing the Applicant when it did. Congruously, or putting it another way, this Respondent unfairly deprived this Applicant of the opportunity of relying upon the protection of the law to save his job and livelihood.

**Compensation**

70. This leads me to the final question of compensation.

71. I award the Applicant the statutory award of £2200.00. I considered three decisions of the Industrial Tribunal with different Chairman in each. **Joseph Garcia v Eurocity Management Limited - I/T No. 8 of 2002; Peter Martinez & Others v Calypso Tours Limited - I/T No. 24 of 2002; Sandra Thorn v Group V - I/T No.1 of 2005.**

72. The upshot is that the Tribunal has jurisdiction to increase the statutory award and it is a matter of discretion. I do not consider that there are punitive grounds for doing so over and above the inherent punitive element in the statutory minimum for

breach of an employee's statutory right not to be unfairly dismissed in this particular case. I accept the Respondent acted in ignorance of the law and do not doubt that if Mr Lett had been fully aware of the Collective Redundancy provisions and the effect of non-compliance, he would have taken steps to comply with it because this was my impression of his performance as a witness.

73. However, I am persuaded that inflation is a factor that must be taken into account in order to keep the inherent punitive element of the award relevant in today's circumstances. I invite the parties to provide this Tribunal with the average inflation figure for the last 14 years before I exercise my discretion to increase it.

74. Finally, I must consider compensation for the direct losses suffered by the Applicant under section 72 (2) of the Ordinance subject to the maximum amount permitted by law. For this purpose, as I have said before, this Tribunal must consider the hypothetical question: If this Respondent had been procedurally fair to this Applicant, and the Applicant had taken advantage of the opportunities that warning, consultation, proper application of selection criteria etc, would have offered him, what would have been his likely chances of still being made redundant? This question must be answered in relation to the two plumbers that were kept on by the Respondent: Pascual and Halliday.

75. I find that the Applicant had the same chances as Fred Pascual to remain in employment until 4 June 2004. Therefore, he will have his loss of net wages until Fred Pascual was made redundant. I am unconvinced that Fred Pascual was better placed, in qualifications or experience, than the Applicant to finish off the snagging list jobs or that the Applicant's ability to familiarise himself with the demands of that job from plans, drawings or otherwise of the installations at the Old Naval Hospital was in any doubt.

76. In relation, however, to Charles Halliday the issue is different. The Applicant had a major difficulty on this issue and on the evidence I have heard, I am of the view that his chances were substantially diminished and would not put it greater than a 30 per cent chance. Therefore, the Applicant shall have his loss of net wages for the remaining period at 30%. The critical neutral factor here, to this Tribunal's mind, is the question of timing. How soon would the Applicant have obtained MoD clearance, if at all, back in 2003/04? It seems to me that it may have taken at least 3 to 6 months which is a delay that the employer cannot reasonably be expected to have shouldered in the context of its business operations at the time. It is only through an urgent or expedited formal request that this Applicant [with the effective assistance of the Respondent] would have been in a realistic position obtain his MoD security clearance and thus avoid redundancy and continue working for the Respondent but MoD contracts without detriment to the Respondent's business operations at the time. In such circumstances, the Respondent's LIFO policy would have assisted the Applicant.

77. I shall give the parties the opportunity of submitting a consent order for my approval stating the final amount of compensation due to the Applicant in view of my findings. In addition, the redundancy payment, the unemployment benefit, social assistance payments and rent relief, which the Applicant accepted in cross-examination he either received or should have received shall be deducted from the full

compensation claimed by the Applicant, to which the percentages I have stated should be applied. The Respondent has not alleged or argued that the Applicant failed to mitigate his loss other than to refer to the rent relief point. The parties will now be in a better position to provide this Tribunal with an accurate final amount by agreement.

78. I take this opportunity of thanking the parties for the courtesy and respect shown to this Tribunal and to each other. In particular, I thank their representatives for the helpful way they have conducted these proceedings before me.

**Stephen Bossino**
**Chairman**

**31st March 2006**

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Mr C Salter for the Respondent

# COMPENSATION

1. The parties have been unable to agree on the final amount of compensation payable. This is to be much regretted but I have received written representations from both sides and shall decide the issue finally by reference to my Decision of 31st March 2006 and I am not minded either to entertain any further submissions or receive any new evidence.

2. I award the Applicant the minimum statutory amount of **£2844.60**. I have advised the Secretary to bring this increase to the attention of my fellow Chairmen.

**Earnings**

3. Taking the Respondent's detailed report for the Applicant's gross earnings and deductions for the period 29.6.03 to 9.11.03, I find as follows:

(1) Applicant's basic gross weekly wage was £284.70 (39 hours @ £7.30)

(2) His tax Code, I am advised, was 39.

(3) Applicant's basic net weekly wage was £243.10 – see page 132 of the PAYE TAX DEDUCTION TABLES July 2003 ("the TABLES").

(4) Overtime was not a contractual entitlement. However, it is envisaged in Clause 5 of CATA and it is noteworthy that the Applicant worked overtime on 15 out of a total of 19 weeks (from 29.6.03 to 2.11.03). His average gross income from overtime was £75.00 per week. Added to subparagraph (1) above, his net average weekly wage would be **£292.87** – see page 140 of the TABLES. I have been advised that Fred Pascual was not paid any overtime but not been so advised in respect of Charles Halliday and it is a reasonable expectation which can be claimed by the Applicant.

(5) In a period of 8 weeks, see paragraph 4 of my Decision, the Applicant received his bonus twice (26.10.03 and 2.11.03). Therefore, his average gross loss was £13.13 per week. This is the minimum expectation the Applicant could reasonably claim and have. Added to subparagraph (1) above, his net average weekly wage would be **£252.33** – see page 136 of the TABLES.

(6) The Applicant's maximum average net weekly wage, adding subparagraphs (1), (4) and (5) above, would be **£301.27** – see page 140 of the TABLES.

(7) The Applicant's social security contributions would have been £18.87 per week.

**Payments received by Applicant**

(8) He received a redundancy payment of £1749.61; unemployment benefits of £1033.50; rent relief of £121.80; and, social assistance payments of £6677.00. Total monies received amounted to £8878.19 over a period of 70 weeks of unemployment. Therefore, his net weekly income from these sources was **£126.83** per week.

4. I award the Applicant the following losses:

(1) £252.33 per week less (a) £126.83 and (b) £18.87 amounts to £106.63 x 28 weeks = **£2985.64**.

(2) £301.27 per week less (a) £126.83 and (b) £18.87 amounts to £155.57 x 42 @ 30% only = **£1960.18**

(3) Totalling **£4945.82**.

5. The final amount payable to the Applicant is **£7790.42**.

**Stephen Bossino**
**Chairman**

**25th April 2006**