

IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

Ind. Tri. No. 9/2004

BETWEEN:

CHARMAINE BERTHA SOUSSI

Complainant

-and-

SIR WILLIAM JACKSON GROVE
(MANAGEMENT) LIMITED

Respondents

J U D G M E N T

The 19th day of January 2005

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Mr Gilbert Licudi for the Complainant

Mr Charles Gomez for the Respondents

BRIEF FACTS

The Complainant had been working for the Respondents as a clerk since June 1997 on a full time basis. On her return from maternity leave in February 2000, at her request, she worked only in the afternoons between 1.00 and 5.00. These hours of work still prevailed at the time of the events leading up to her dismissal by the Respondents from her employment on 22nd April 2004. A new management Council was elected towards the end of 2003 which introduced some changes, some of which were described by the Complainant in her evidence as "drastic".

At a staff meeting held on 17th March 2004, the Council informed the staff, which consisted of Mr Chichon, Mr Joseph Macedo, Mr Michael Lavagna, Mrs Debono and the Complainant that job descriptions were to be introduced for all members of staff setting out their hours of work, their duties and other terms of employment.

A job description document was prepared for the Complainant and given to her to sign on 5th April 2005. Her hours of work shown on this document were 9.00 to 13.00 hours Mondays to Fridays with an extra two hours on the Friday afternoon between 18.00 and 20.00 hours. Such hours did not accurately reflect the working hours the Complainant had had since February 2000.

The Complainant realised the difference in her working hours shown in the job description document but came to the conclusion that such change had been deliberately made by the Council as part of the many changes which it had introduced since coming into office in 2003. She signed the document signifying her agreement to the new hours.

Mr Chichon, Mr Macedo and Mr Lavagna explained to the Complainant after the document had been signed by her that the different working hours shown in the document were a result of a typographical error and that she should continue working in the afternoons as she had been doing since her return from maternity leave in February 2000.

However, the Complainant insisted in coming in to work during the morning hours as shown in the job description document despite what has been said by witnesses for the Respondents were continuous attempts by them to persuade the Complainant about the genuineness of their error and their efforts to convince her to continue working in the afternoons as hitherto. The Complainant denies any such attempts were made.

As a direct result, the Respondents's solicitors wrote to the Complainant on 19th April 2004 repeating the inadvertent error in the working hours shown in her job description document and informing her that "*...you are to continue to report for work in the afternoons and any failure on your part to do so will be a serious disciplinary offence entitling our client to dismiss you.*" This was followed on 22nd April by

a letter to the Complainant from the Respondents headed "Final written Notice" where she was informed, *inter alia*, that "...unless you report for duty tomorrow afternoon we shall have no option but to dismiss you."

Later that same day the Respondents sent a second letter to the Complainant as follows, "With reference to our letter dated 22nd April and still wanting to take advantage of the typographical error in the job description, you leave us no choice but to dismiss you on this ground."

Whilst the Respondents accepts that the Complainant was dismissed, it is maintained on its behalf that such dismissal was, in the circumstances, fair as the different hours shown in the job description document was the result of an error and that the Complainant was seeking to take advantage of such error. The manner in which she was dismissed was also fair and reasonable in that she was given many opportunities both verbally and in writing to comply with the reasonable requests of the Respondents.

For the Complainant it is argued that the working hours set out in the job description document accurately reflected the Respondents's intentions and that, even if it were a typographical error, the Complainant was entitled in law to work in accordance with the hours set out therein and that her dismissal for insisting on this was thus unfair and that, in any event, the procedure followed by the Respondents leading up to the dismissal was in itself manifestly unfair.

ACKNOWLEDGMENT

Mr Gomez opened for the Respondents acknowledging the Complainant had been dismissed and that the onus lay upon the Respondents to show that the dismissal was fair.

THE EVIDENCE

FOR THE RESPONDENTS

The first witness to be called on behalf of the Respondents was Mr Paul Chichon. His witness statement, the content of which he confirmed as true on 14th November of this year, was produced to him and he verified this as his evidence in this matter. At paragraph 1 of the statement he describes himself as director of the Respondents

In cross-examination by Mr Licudi, he explained that the job description document given to the Complainant wrongly recorded her hours of work. There was a typographical error in that the hours shown during which the Complainant had to work were 9.00 to 13.00 Mondays to Fridays and also 18.00 to 20.00 hours on Fridays. This should have been 13.00 to 17.00 hours Mondays to Fridays. The Complainant raised no objection when she was given the document.

He realised the error when she came to work in the morning. He said that he and other members of the Council were unpaid voluntary workers and that Mr Lavagna, who is the full time estate manager, pointed out the error to him. The Respondents was informed of this error.

On the day the Complainant came in to work in the morning he informed her of the error, although he does not remember the exact day, and that the committee wanted her to stay. He thought this might have been on the Monday. Mr Macedo was there at the time. He asked the Complainant to resume work in the afternoons

He said he spoke to her several times about coming in to work in the afternoons. In view of her insistence in coming in to work in the mornings, he said the Respondents' lawyers were informed who wrote to the Complainant on 19th April requiring her to work in the

afternoons, failure of which would constitute a serious disciplinary offence entitling the Respondents to dismiss her. On 22nd April Mr Chichon wrote a letter to the Complainant headed "Final Notice" informing her, *inter alia*, that unless she reported for work the following day in the afternoon, the Council would have no option but to dismiss her. A second letter was sent to the Complainant that same day by Mr Chichon dismissing her. At the time Mr Chichon was under the impression that the lawyers had previously written to the Complainant.

Mr Chichon said that the Respondents had no money. The Council wanted to make things better and that there was no discrimination against the Complainant. He said the Complainant was insisting in taking advantage of the error in the job description document and that she was told this. He said that, if she had been his personal employee, he would have given her proper notice and sent her letters. They were not permanent employers. He said the Council did not want her to leave and that she should continue working afternoons as she had been doing for the last five years.

He explained that the office opened only in the mornings and that they could not afford to employ anyone else. The office currently opens between 1.00 and 3.00. The Manager works until 5.00 and they would prefer for the office to be open until then and for the Complainant to work from 1.00 to 5.00. He acknowledged that the Complainant was a very good worker.

In re-examination by Mr Gomez Mr Chichon confirmed that over many years Mrs Debono worked mornings and the Complainant worked afternoons. It was the intention of the Council that the same pattern should continue. The Council was unhappy about control of expenditure. The job description document was prepared by Mrs Macedo.

Mr Chichon explained that he had told the Complainant on more than one occasion about the error in the job description document before and after the letters were sent to her by the Council and their lawyers.

They did not want her to go. The Complainant told them she would take the job description document to the letter and would carry on working mornings. He ended his re-examination by saying that, if the Complainant wanted to, she could come back to work in the evenings.

The second witness to be called on behalf of the Respondents was Mr Joseph Macedo. His witness statement, the content of which he confirmed as true on 14th November of this year, was produced to him and he verified it as his evidence in this matter. At paragraph 1 of the statement he describes himself as director of the Respondents.

In cross-examination by Mr Licudi, he explained that he had prepared the job description document. He prepared the draft with his wife, Mrs Debono, who worked from 9.00 to 1.00 and the Complainant from 1.00 to 5.00. He did not notice the mistake. Mr Letto printed the final document.

He said he had told the Complainant they had made a mistake about the working hours. She was taking advantage of this. On 22nd April she was given written notice of dismissal. He said they spoke to her several times and asked her to stay. They asked her to reconsider and to stay. He emphasised that he spoke to her trying to convince her to stay and carry on working. Once she had signed the job description document they realised their typing error. When they told her they wanted her to stay she had replied, "If you say so, I want to discuss this with my husband."

He said she told them she had taken legal advice and to stick to her job description. They had asked her to stay many times. The same document which was prepared for Ms Debono was used by mistake for the Complainant.

The third and final witness to be called on behalf of the Respondents was Mr Michael Lavagna. His witness statement, the content of which he verified as true on 14th November of this year, was produced to him and he verified it as his evidence in this matter. At paragraph 1 of the

statement he describes himself as estate manager of the Respondents.

He explained that the Council had decided to get employees to sign a document containing their job descriptions. Management did not have these and they wanted them. He did not know whether the Complainant had consulted the union. He believed that Mr Chichon signed all the job description documents at the meeting of 17th March. He said he had told the Complainant of this meeting and gave her her job description document and asked her to sign otherwise she would be dismissed. He said that prior to this the new management had introduced some changes. He informed her the weekly £10 bonus to employees for handling cash was to be removed. This had been given some years ago and it was now to be removed without consultation.

Mr Lavagna said he did not discuss with the Complainant a change in staff working hours. He said the current working hours had been in operation for several years and the Council had no intention to change. He said that when he gave the Complainant her job description document she took it away. She later raised the matter of the working hours and this was between them unofficially. Mr Lavagna explained that he then informed Mr Letto of this before the Complainant signed the document. She then signed this knowing what the working hours were. Mr Lavagna then filed all the job description documents.

After 5th April the Complainant asked for a copy of the document. The matter was again discussed and she told Mr Lavagna that she would come to work in the mornings despite his informing her that the change in the working hours was the result of a typographical error. The Complainant was aware of the error but informed Mr Lavagna that she would sign despite the error. He said that the document had probably not been signed by Mr Chichon on 17th March and that it had been given to him by the Complainant already signed on 5th April and that she had pointed out to him the typing error regarding the working

hours and that these were the same as those of Mrs Debono. Mr Lavagna informed Mr Letto of this and he said that this was a mistake. This must have transpired after the Complainant had signed.

On 7th April Mr Lavagna gave the Complainant a copy of the document at her request. Around that date she highlighted the change in the working hours. He explained that this must have occurred after signature. It must have been two or three days after the Complainant returned the signed document to Mr Lavagna that she asked for a copy on 7th April. It was around that date that the typing error was brought to light. He said that the Complainant came back and started working in the mornings as from 8th April. Mr Lavagna said he told her that she should come to work in the afternoons and he called Mr Chichon about this who told him to await instructions.

He said that on 19th April he gave the Complainant the letter from the lawyers in a sealed envelope. He took no decision. Mr Chichon asked him to get the Complainant to come in the afternoons. He said that the Complainant had told him after receiving the lawyer's letter that she would seek legal advice. The following morning he told the Complainant that she should not be there and she replied that she wanted this in writing.

He explained that Mr Chichon had told the Complainant that this was an error and that he wanted her to stay. However, she insisted that she would stick to the hours stated in the document. Mr Macedo became involved in the conversation and tried to persuade the Complainant. He explained that between 8th and 19th April he had raised the matter of the working hours on several occasions although, as far as he knew, this had not been raised officially by the Respondents.

In re-examination Mr Lavagna explained that he had started work for the Respondents in December 2000. At the time the Complainant

was already working there from 1.00 to 5.00. Mrs Debono and the Complainant did similar work. The Complainant was more skilful than Mrs Debono. The Respondents had been in a precarious financial position and could not afford to accommodate the Complainant. She had returned to work on 5th April from holiday or sick leave or annual leave.

Mr Lavagna went on to explain that he had given the Complainant a job description document which she had taken away to her desk. He said that he had possibly had a conversation with her about the document but that the Complainant had not pointed out to him at the time there was an error in the working hours. On 17th March job description documents were handed out to employees but not the Complainant as she was not there. This was done on 5th April. He said he believed she came to work in the afternoon on 6th April but could not recall and on 7th April he gave her a copy of the document. Two or three days later she started coming in in the mornings. This will have been after 5th April.

Mr Chichon signed the document before the Complainant did. He said that he had not had a conversation with the Complainant about the document between 5th and 7th April but that she had highlighted the error when she signed. She said she would be coming in to work in the mornings but, although he had told her not to, she had insisted.

In further re-examination by Mr Gilbert, Mr Lavagna said that the Complainant had told him there was an error in the job description document. This was on 5th April. He informed Mr Letto of what the Complainant had said about the error. He had given the Complainant a copy of the document on 7th April knowing it was wrong. He said the Committee had no intention to change the working hours of the Complainant. He said the Complainant would say that she had heard her working hours were to be changed from afternoons to mornings and confirmed that the Complainant used to work on Friday mornings due to an overload of work.

FOR THE COMPLAINANT

The Complainant, Mrs Charmaine Bertha Soussi, was called to give evidence. Her witness statement, the contents of which she confirmed as true on 14th November 2005, was produced to her and she verified this as her evidence in this matter. The Complainant was examined in chief by Mr Gilbert.

The Complainant confirmed she had signed a job description document on 5th April. At the time it had not been signed by Mr Chichon. She had not kept a copy as she had handed this to her lawyer. She noticed there was a change of working hours but felt that, since the Council was making such drastic changes, she was not surprised that they should change her working hours. She believed this was a genuine change of hours and not an error. Mr Lavagna had told her the Committee was going to issue a job description document and that if it were not signed they would be dismissed. She felt that she would be dismissed if she did not sign and that she did not want this. She had considered the change in hours and because of the dismissal threat she signed.

On 7th April she had asked Mr Lavagna for a copy. That same day she told him she would come to work in the mornings. He then told her he was awaiting instructions on the matter of the change of working hours. No one had told her she had to come in the afternoons. She said she was never told the document had an error. On 8th April Mr Lavagna told her he had spoken with Mr Letto. He had told her there was an error and that she had to work afternoons. The lawyer's letter of 19th April was the first communication. Before 19th April no one had told her she would receive disciplinary action if she worked mornings. She had had no warnings. No one had discussed alternative hours with her.

The Complainant was then cross examined by Mr Gomez for the Respondents. She explained that 3 people worked in her office since 1997. They discussed matters of work. There were no problems. The relationship was very good. Prior to the holidays she knew the job description document was being prepared. Her document would deal with normal administration matters. Her normal hours were in the afternoons. She used to work full time but after maternity leave she started working afternoons only.

She went on to say that Mr Lavagna had told her there would be a change of hours for the administrative staff but that she has made no comment as it was an unofficial comment. She was told of the meeting of 17th March by colleagues and that Mr Chichon had said that anyone not signing the job description document would be dismissed. Before the meeting there were rumours of changes in the working hours. Between 17th March and 5th April no one mentioned changes in the working hours.

Normally, two people were not needed in the office. She saw Mrs Debono's job description document was the same as hers and agreed that the office did not need 2 people at the same time. She went on to say that on 5th April she read the job description document. What Mr Lavagna said about her having realised the error is not true.

She explained that the Committee had made drastic changes. As an example she explained that the £10 bonus payable to employees for handling cash had been withdrawn and that it therefore did not come as a surprise that changes had been made in the working hours without consultation. On 7th April she had told Mr Lavagna that her working hours had been changed. When she signed the document on 5th April she thought that was not the final thing and that it still had to go before the committee for approval and that she did not consider it to be binding until it had been countersigned by the Council. She had not sought legal advice before 7th April.

She said that on 8th April she was told of the mistake in the document after Mr Lavagna had had a word with Mr Letto. She went to work in the afternoon on 6th and 7th April. On 8th April she went to work in the morning. The Complainant went on to say that she wanted to stick to the new hours because she had heard there was an intention on the part of the Council to change the working hours. The reason for the change of hours was in order to have her dismissed so as to cut down on wages. The employers never sat down to talk to her. Mr Chichon never asked her to stay and he only asked her to return after she had been dismissed. Neither Mr Macedo nor Mr Letto had asked her to stay. They never bothered.

The Complainant believed the change was not a mistake but that it actually reflected the intentions of the Council. Mr Chichon had asked her to go home and return in the afternoon and the Complainant had asked him to put this in writing. She then went on to say that if her request to have this put down in writing had been accepted, she might have agreed.

She was then re-examined when she explained that her husband was self employed and that she was running the business although it had never been her intention to leave the Respondents to join him. When she signed the job description document she said she thought the Respondents were offering her a change of hours. She used to work full time for 3 or 4 years so that it came as no surprise to her when she was once again asked to work mornings. The change in hours would benefit the Respondents as well.

She considered the new committee to be heavy handed in the manner it dealt with such matters as security arrangements when they changed contractors three or four times, the cleaning contractors, who were dismissed and their duties taken over by in-house cleaners and later given once again to sub-contractors, the termination of overtime for office employees and the opening hours limited to 9.00 to 1.00 and the dismissal of the maintenance barrier man and the issue of the job description document. They also withdrew the bonus.

FINAL SUBMISSIONS

Mr Licudi made his final submissions on behalf of the Complainant.

He argued that the hours appearing in the Complainant's job description were not as a result of a "typographical error" but accurately reflected the intention of the Respondents. The Respondents said they mistakenly wrote 9.00 to 1.00 instead of 2.00 to 5.00.

Although the Respondents had said there had been several consultations with the Complainant and that she had been continually reminded she had to come in the afternoons, she had denied this. Mr Lavagna had referred this to Mr Letto and he was told to await instructions. Days went by without any come back. The Complainant then received a lawyer's letter on 19th April. Mr Lavagna had said that Mr Chichon had signed on 5th April before it was signed by the Complainant. When it was handed to her she signed that same day. Two days later she asked Mt Lavagna for a copy.

He said the Complainant had said the job description document had not been signed by Mr Chichon when given to her for signature. The document was given to the Complainant not as an invitation to treat but under threat of dismissal if she did not accept. This was a firm offer. An employment contract or change of terms of employment is not required to be signed if the offer is clear.

The new Council came in with new things and changes which had to be made. They made heavy handed changes following an agenda of change regardless of the views of staff. The Complainant had heard rumours of change of hours and the removal of the £10 bonus. This bonus had become a legally binding obligation and yet the new

committee had decided to withdraw this. The removal of the bonus and the change in the working hours thus came as no surprise to the Complainant. The Complainant believed the Respondents wanted a change in the working hours. This belief was not unreasonable having regard to the heavy handed attitude of the Respondents. Before the Complainant went on maternity leave the Complainant and Mrs Debono were working mornings. The Complainant worked a full day and Mrs Debono worked mornings only. The Complainant returned to work in February or March 2000, after which she worked afternoons only. The office is now open from 9.00 to 3.00 from 22nd April.

THE LAW

Mr Licudi referred to S.65 of the Employment Ordinance and to paragraph 1 (a) requiring the Employer to show the reason for the dismissal and to sub-paragraph (b) requiring the Employer to show that, by not agreeing to work afternoons, the Complainant was in breach of conduct.

If the Employer fails to satisfy the Tribunal on conduct he fails to discharge his duty and the dismissal is then unfair automatically.

He referred to paragraph 6 and as to whether the Respondents had acted reasonably in the circumstances. For the Employer to believe there has been misconduct is not enough to discharge burden. There must be facts for belief to be substantiated. In support of this he referred the Tribunal to a passage in Sweet & Maxwell's Encyclopedia of Employment Law at Page 408 5B-4-16 which deals with the need for an honest belief based upon reasonable grounds on the part of the employer in support of his views of any unsatisfactory work by the employee.

By 19th April the decision had been taken by the Respondents to dismiss with the lawyer's letter. Then there was the letter from the Employers of 22nd April. He argued that the Respondents' case was

that, since the Respondents refused to accept the change in the hours, the Complainant's insistence on this amounted to misconduct justifying dismissal.

Mr Licudi then referred the Tribunal to Chitty on Contract Volume 1 at Page 122 to the chapter on "The Offer" to show that a mistake by an offeror was irrelevant and that if the offeree accepts an offer mistakenly made by the offeror, the offeror could not escape liability relying on his mistake.

He referred to the judgment of Nicholls, LJ in the case of *Food Corporation of India v Antclizo Shipping Corporation* reported in Lloyds Law Reports 1987 Volume 2 at page 130.

The job description document required the Complainant to sign and return the document. This is what she did. If she believed the offer was genuine by virtue of the surrounding circumstances, this was enough, even if in the mind of the offeror they had not intended this.

Mr Licudi referred to Chitty on Contract again at paragraph 2-003 dealing with the requisite state of mind of the offeree. He then referred to a sort note in the case of *Cebtrovincial Estates v Merchant Investors Assurance Co.* (1983) Com LR 158. This states that "*Where an offeror makes an unambiguous offer to a third party under a mistake of which the latter is unaware, he is bound by acceptance of that offer so long as good consideration is offered.*"

He then referred to the judgment of Lord Diplock (915-916) in the case of *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* (1983) QBD 854 dealing with the acceptance of an offer made in error.

He then referred the Tribunal to the case of *OT Africa Line Limited v Vickers PLC* (1996) QBD Volume 1 700 again dealing with the point that the acceptance of an offer made by mistake by the offeror was capable of acceptance and creating a contractual obligation on the

part of the offeror provided that the offeree neither knew or ought reasonably to have known about the mistake.

Mr Licudi went on to argue that the unilateral mistake by the Respondents did not vitiate the binding agreement. If the Complainant had known at the time of signing that there was a mistake in the hours set out in the job description document, the offer or contract would not be binding. If the Complainant knew before she signed that there was a mistake, the contract would not be binding. The crucial point was "belief" by the Complainant as to what the Respondents had meant, that is, whether the job description document accurately reflected what the Respondents meant to offer. If the belief by the Complainant was not reasonable, even if it was genuine, there was no contract.

Under the test provided by S. 65 of the Employment Ordinance, the dismissal would have been unfair even if the Complainant ought to have realised the mistake. It would not have been reasonable for the Respondents to dismiss the Complainant. She was given no oral warning. Between 8th and 19th April the Complainant had exercised her right as she believed this to be. If there was no process of warning, then the dismissal was unfair. She was never given the opportunity to work during different hours.

LOSSES INCURRED BY THE COMPLAINANT

Up to date of termination of employment on 22nd April 2004 the Complainant was earning £120.52 a week plus £10 a week bonus.

On termination of employment the Complainant received £107.16 by 4 plus 4 days' annual leave of £83.84, totalling £512.48.

After termination the Complainant started work on 31st January 2005 earning £192.50 a week.

Mr Gomez then made his final submissions on behalf of the Respondents.

He started by saying that there was a general consensus on the law between himself and Mr Licudi.

The Complainant had been fairly dismissed. There was a distinction to be drawn between substantive and procedural fairness. There must be a good reason for dismissal and the manner in which this is carried out must be fair on the employee. Investigation is important where issue needs investigating. The matter was a simple one and there was nothing to investigate. The Employer has a duty to investigate, but in this case there was nothing to investigate.

Both Mr Chichon and Mr Macedo had spoken with the Complainant before seeking advice. Everything had been said. The Complainant had been asked to work afternoons before the lawyer's letter had been sent. They have both sworn to this. They are both voluntary and unpaid workers. Why should they lie about this? She says she was never told.

The Complainant received the lawyer's letter on 19th April asking her to return to work. This was the first opportunity she was given. She then received a letter from the Respondents on 22nd April. This was a second opportunity given to her. Between the said two letters the Complainant discussed the matter with Mr Chichon. In the Complainant's own statement, at paragraph 25, she admits that, even after the second letter of 22nd April dismissing her, Mr Chichon spoke with her and asked her to forget such letter and to return to work in the afternoons. This was a third direct opportunity given to the Complainant. In the Notice of Appearance filed by solicitors on behalf of the Respondents, it was stated that they were prepared to allow the Complainant to return to work in the afternoons. This was the fourth opportunity directly given to the Complainant.

The Respondents had bent backward to accommodate the Complainant. Many chances were given to her to return to work.

On the matter of an offer containing a mistake, in order to rely on such mistake, it is necessary not only to consider what was in the mind of the offeree, but also what the offeree did and whether a reasonable person would have come to the same conclusion. The test is objective. It is not what the Complainant said she thought it was but whether a reasonable person would have thought that. The Complainant had read the job description document. She knew the Respondents had no such intention. A reasonable person would have known. If the Respondents succeeded on either argument, the Complainant would lose.

The Respondents knew there was an error. It could not have been any other way. The Complainant was aware of the error before she signed. She had noticed the error. The Complainant knew this was not the intention of the Respondents. The job description document does not contain a new offer but simply sets down in writing the existing duties. One needs to apply an objective test. The Complainant was already working afternoons. Mrs Debono was working mornings. Mr Lavagna said there had never been any talk of changing hours.

Four years before, on her return from maternity leave, the Complainant worked afternoons out of choice. She never questioned the change of hours. The job description document is not an offer. It is not a contract. It merely sets down existing duties. It is not a contract. It is not an offer of change. The Complainant knew Mrs Debono worked mornings. They both did the same work. There would thus be no cover in the afternoon. When she was asked by him in cross examination whether she knew she was not required to work mornings she replied "I guess so".

Any reasonable person would have realised this was an error. The explanation given by the Complainant for the change in the working

hours was that there was an intention to save on overtime. There were no savings to be made. There clearly was no point in both Mrs Debono and the Complainant working the same hours. This shows there was an error. The Complainant had admitted that, after 5th April, after she signed the job description document, she worked afternoons on 6th and 7th April.

It was reasonable for the Respondents to dismiss the Complainant. The Complainant left no option but to be dismissed. Mr Chichon was given no option. He owed a duty of care to the families in the estate.

MITIGATION OF DAMAGES

Referring to paragraph 25 of the Complainant's statement, Mr Gomez emphasized that the Complainant was offered re-employment. Had she accepted this she would have suffered no loss. Two months later she was offered re-employment contained in the Respondents's Notice of Appearance dated 23rd June 2004. She need not have been unemployed. When she later worked for her husband at the Orthopaedic Centre, although she received no wages, there was a saving of wages which would otherwise have had to be paid to a third party. This was a gain. As a result of the error, the Complainant lost nothing.

Mr Licudi replied by saying that the only test of fairness is to be judged at the time of dismissal. Anything done or said by the Employer after the date of dismissal cannot be part of the procedure leading up to a dismissal.. A fair process must have been carried out. Procedural fairness is essential. Conversations between Mr Chichon and Mr Macedo with the Complainant were procedurally fair.

As to mitigation by the Complainant, when she was asked to return to work, she refused because she did not want to work afternoons. There had been no evidence to show the Complainant had been

asked to work mornings. The Respondents had no reason to offer this to her.

DECISION

It has been agreed between Counsel for the parties that the Respondents admit the fact of dismissal of the Complainant by the Respondents. The onus therefore shifts onto the Respondent under Section 65 of the Employment Ordinance to show what the reason was for such dismissal and that such dismissal was fair.

The Respondents are a limited liability company looking after the management and administration of the housing estate known as Sir William Jackson Grove. The Respondents employ permanent paid staff although the directors and committee members are residents of the estate and carry out their duties on a voluntary and unpaid basis.

The Complainant had been working for the Respondents since 1997 as a salaried clerk on a full time basis. On her return from maternity leave in February 2000 she worked at her own request only in the afternoons from 1.00 to 5.00. These hours of work still prevailed at the time of the events leading up to her dismissal by the Respondents from her employment on 22nd April 2005.

A new management committee was elected towards the end of 2003 which introduced some changes, some of which were described by the Complainant in her evidence as "drastic" and which were carried out "...in a heavy handed manner". She explained this by saying that the new committee had withdrawn without consultation a bonus of £10 a week hitherto allowed to employees for handling cash, that the Respondents had changed security contractors three or four times, that the cleaning contractors had been dismissed and their duties transferred to in-house cleaners only to be later dismissed and their duties once again transferred to sub-contractors, that overtime for

document contained an error in the description of the working hours and that she should come to work in the afternoons and not in the mornings. He went on to say that he spoke to the Complainant several times thereafter about this and that he had accused her of taking advantage of the error. He explained that the Complainant had said to him that she would take the job description document to the letter and would carry on coming in to work in the mornings,

Mr Lavagna for his part said that the current working hours had been in operation for several years and that the committee had had no intention of changing these. He said that he too had explained to the Complainant that the change in the working hours was as a result of a typographical error and that she should come to work in the afternoons as hitherto. He went on to say that, when the document was given to the Complainant on 5th April, she had actually pointed out to him the difference regarding the working hours. This was denied by the Complainant in her evidence. He said that on 7th April, when he gave the Complainant a copy of the job description document, he explained to her that the difference in her working hours was a typographical error.

Mr Macedo for the Respondents gives a similar explanation. He said he had prepared the document with his wife. She used to work in the mornings and the same document she had prepared for herself was given in error to the Complainant. He said that he too had explained this to the Complainant and that he had tried to convince her to continue working in the afternoons. Only after she had signed the document was the error noticed. He had told her the committee wanted her to stay, to which she had replied that she would discuss the matter with her husband. She had told him that she had taken legal advice and that this was that she should stick to her job description document.

As a direct result of this, a letter was written to the Complainant by the Respondents' lawyers on 19th April explaining the error in her working hours contained in the job description document and requiring her to

work in the afternoons as hitherto and that if she did not she would be committing a serious disciplinary offence which would entitle the Respondents to dismiss her. This letter was followed on 22nd April by a letter sent to the Complainant by the Respondents and signed by Mr Chichon pointing out the regret of the committee that, despite the lawyer's letter, she insisted in coming to work in the mornings and that this was seen as her taking unfair advantage of what was a typographical error in her job description document. The letter required her to turn up for work on the following day in the afternoon, otherwise the Respondents would have no alternative but to dismiss her.

This letter was followed by another letter that same day, also signed by Mr Chichon, dismissing the Complainant on the grounds that she was trying to take advantage of the typographical error in the document.

The evidence in this case demonstrates what I hold was clearly a genuine error on the part of the Respondents in giving the Complainant a document which contained a mistake in her working hours. The explanation given by the Complainant is equally credible and that is that she genuinely thought that, in keeping with a number of changes the new committee had recently introduced which she considered to be drastic and which had been implemented in a heavy handed manner, her hours of work had been changed in similar heavy handed manner and without consultation.

It is necessary to consider the job description document itself. This document, standing on its own, is not a contract and the signing of it by the parties would not create legally binding obligations or a contractual relationship. The document is what it purports to be by virtue of its own limiting heading which describes it simply as a "Job Description/Terms of Reference - Office Clerk". There is no offer or acceptance or consideration. The document merely purports to confirm for the record an existing set of circumstances including the

working hours of the Complainant, her annual leave and her range of duties.

However, the fact that there already existed a contractual relationship between the parties by virtue of the ETB contract of employment signed by the parties on 10th June 1997 and the on going contractual relationship since then, the job description document, in introducing, albeit mistakenly, a new fundamental change in the terms of employment, that is, new hours of work and not merely reciting a repetition of the original terms and conditions, will have had the effect of amending the original contract of employment and thereby becoming an integral part of it.

In that limited respect, therefore, the job description document will have become a legally binding document as between the parties upon signature and acceptance of the new terms introduced therein.

I cannot but agree with the well established legal argument propounded by Mr Licudi on behalf of the Complainant that the fact of the mistake in the document, being in the form of an offer of new terms of employment by the Respondents, is capable of being accepted by the Complainant and thereby creating a contractual obligation on the part of the Respondents. The usual caveat about requiring that the offeree, the Complainant in this case, should not have known or reasonably known of the mistake, has been satisfied in my judgment in that no evidence has been produced by the Respondents to show that this was the case.

In such circumstances as above, the Respondents acted unfairly in dismissing the Complainant from her employment since an offer, albeit mistakenly, made by the Respondents to her had been accepted. It was directly because of her insistence in performing her duties during the new hours which had been offered to her that she was dismissed.

There can be no doubt that the Respondents have acted under an honest but mistaken belief and have been caught by what can only be described as a technicality of the law. The Complainant was able to and did take advantage of such technicality.

What in my judgment is important in this case is the conduct of the parties after the job description document was signed and the error was discovered and pointed out to the Complainant by the Respondents and her reaction to that. As I have said above, the offer of new hours of work was a genuine mistake on the part of the Respondents. The Complainant was entitled to and did take advantage of this.

We know from the evidence of Mr Lavagna that the Complainant was told at least as early as 7th April that the new working hours were the result of a typographical error after she had signed this document two days earlier on 5th April.

The evidence of the several witnesses for the Respondent has been that they spoke with the Complainant on a number of occasions explaining that the new working hours appearing in the job description document were the result of a typographical error and asked her to continue working in the mornings. The Complainant denied this saying that no one discussed altering hours of work with her. Mr Chichon had never asked her to stay and had only asked her to return after she had been dismissed. Neither Mr Macedo, Mr Letto nor Mr Lavagna had asked her to return. After she had been dismissed, "...they never bothered".

The lawyer's letter of 19th April gave the Complainant an opportunity to relent and continue working in the afternoons as hitherto. The letter from the Respondents of 22nd April gave the Complainant another opportunity to continue working during the afternoons. Indeed, as late as 23rd June 2004, the Respondents, in their Notice of Appearance filed following the Complainant's Originating Application to this Tribunal, stated they were prepared "...to allow the

Complainant to return to work on the same terms as has always applied to her, that is, afternoons only, on condition that she returns to work within the next ten days".

AWARD

THE LAW

Where the Tribunal has determined that an employee has been unfairly dismissed, compensation shall be awarded under Section 72(1) of the Employment Ordinance which provides for a basic payment of what is termed "the prescribed amount" which is set by Regulation 2 of the Industrial Tribunal (Calculation of Compensation) Regulations 1992 at not less than £2,200.

Section 72(2) of the Ordinance additionally provides that the Tribunal may award an amount in compensation for any loss suffered by the person unfairly dismissed and, in determining such amount, no account is to be taken by the Tribunal of any payment made by virtue of Section 72(1).

Section 72(3) of the Ordinance provides that the maximum amount of compensation that may be awarded under sub-section (2) shall not exceed what is termed "the prescribed amount". This is set by Regulation 3 of the Industrial Tribunal (Calculation of Compensation) Regulations 1992 at (a) an amount representing 104 weeks' pay or (b) the amount which is 104 times twice the minimum weekly remuneration allowed by law, whichever is the lesser amount. Since 1st July 2005, the minimum hourly rate is set at £4.50. Over a normal 39 hour week, the minimum remuneration allowed for a week's work is thus set by law at £175.50.

COMPENSATION FOR UNFAIR DISMISSAL

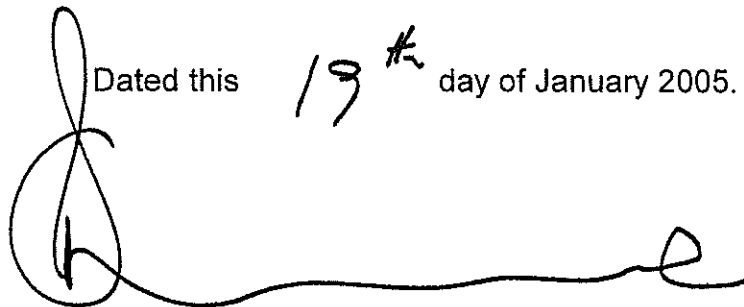
The Respondents in this case must therefore pay by way of a basic compensation to the Complainant the sum of £2,200 for having unfairly dismissed her.

I do not consider it proper or fair that the Complainant should be further compensated by the Respondents. Her losses through being out of work have been brought upon herself by what I consider to be the Complainant's own unreasonable and inflexible attitude in insisting to hold the Respondents to what she knew from a very early stage to have been a genuine and honest error on their part in setting down in the job description document the wrong hours. The Complainant knew there was already another employee covering the mornings and that there was no need to cover the afternoons; nor could the Respondents afford to employ another person to do so. Also, they had no need for two employees during the morning.

The Complainant was given every opportunity to continue her employment during the afternoon hours as she had been working since February 2000 and there has been no evidence produced to show that to have continued with such hours would have incurred the Complainant in any particular personal difficulty.

I wish to thank Mr Licudi and Mr Gomez for the very useful and courteous assistance they have given to the Tribunal.

Dated this 19th day of January 2005.

A handwritten signature in black ink, consisting of a large loop on the left and a long, wavy line extending to the right.

Eric C Ellul
Chairman