

IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

No. 1 of 2005

BETWEEN :

SANDRA THORN

Complainant

-and-

GROUP V

Respondents

JUDGMENT

The 13th day of February 2006

INDUSTRIAL TRIBUNAL
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Complainant

- and -

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JUDGMENT

Mr Joe Bossano for the Complainant

Mr Hector Payas for the Respondents

BRIEF FACTS

The Respondents are a security company. Mr Hector Payas is the managing director. The Complainant worked for the Respondents as security guard between 27th January 2000 and 14th March 2002 when she voluntarily left the employment of the Respondents. She rejoined the Respondents and started work for them on 23rd September 2003 until 29th December 2005 when she was dismissed.

The Respondents have acknowledged that during the first period of employment between 27th January 2000 and 14th March 2002 the Complainant committed only some minor infringements and that there was no really unsatisfactory conduct; nothing serious occurred. This

is supported and confirmed by the fact that some 6 months after the Complainant voluntarily left the employment of the Respondents on 14th March 2002, she was taken back.

The Tribunal will thus disregard anything that might be adduced in evidence or said, deliberately or inadvertently, relating to the first period of employment as in any way justifying or supporting the dismissal. The fact of re-engaging the Complainant on 23rd September 2002 is deemed to amount to an admission that there was no conduct on the part of the Complainant during this period justifying dismissal or, if there was such conduct, the re-engagement will be deemed to amount to condonation by the Respondents of such conduct. All references to follow will thus be exclusively to the Complainant's second period of employment beginning with the 23rd September 2002 and ending on 29th December 2005.

Evidence was called in behalf of the Respondents to show that the Complainant had been late very frequently to relieve the guard who had completed his or her tour of duty before hers began. This has not been seriously contested by the Complainant.

According to the Complainant, some 4 or 5 weeks before Christmas 2005, she asked Mr Tony Ramos, the Operations Manager and Rostering Officer of the Respondents, not to be rostered for duty on 25th December as she wanted to spend the day with her daughter and also because she had worked on Christmas Day in previous years. She said she was told by him that "...it should not be a problem." She thus made no further mention or enquiries about the matter and heard nothing further from him. She therefore assumed everything was in order.

Mr Ramos in his evidence said that he did not recall having been asked by the Complainant at any time before Christmas that she wanted to be free on 25th December. He explained that whenever an employee asked for a day off, he would request a note from the employee and ask to be reminded one week before.

On 24th December the Complainant said she went to collect her wages. She was told that she was on duty the following day. She was very upset. According to Mr Ramos, when she was told this she was very annoyed and said "...I am not going to work on Christmas Day. I want to spend it with my daughter." With that she stormed out of the office.

Twenty minutes later, the Complainant said she received a telephone call from Mr Ramos telling her not to worry as he and Carl Duarte would cover for her on 25th December. Mr Ramos explained the telephone conversation somewhat differently in that he said that what he explained to the Complainant was that, if she did not come in to work the following day, he and Carl "...would have to cover for her." This was denied by the Complainant.

Following this, the Complainant did not go in to work on 25th December. She went in to work on 26th and 27th December. She did not work on 28th December as she was ill.

Mr Payas said in his evidence that he first learnt on 29th December, when he came back from his Christmas holidays, of the Complainant not having turned up for her duty on 25th December. That same day he wrote to the Complainant effectively dismissing her from her employment. The way Mr Payas put it in his letter was as follows, "...This blatant disregard to authority and abandonment of duty is not acceptable and therefore you terminated your services on 24th December with our company yourself by acting as above described." The letter ended by inviting the Complainant to call upon Mr Payas to further discuss the matter so that he could reconsider his decision.

On 30th December, the Complainant went to collect her wages and she saw Mr Payas. She explained to Mr Payas that she had asked Mr Ramos some 4 or 5 weeks before 25th December that she did not want to work on that day. Mr Ramos was called into the office by Mr Payas. The Complainant said that the explanation given by Mr

Ramos was that he did not "...want to discuss/dispute this." She explained further in reply to my question that she did not have a chance to further press Mr Ramos on this as Mr Payas' telephone rang and Mr Ramos left the office. Mr Ramos' version is different in that he said in his evidence that what he said at the time was that he did not recall the conversation the Complainant said she had had with him 4 or 5 weeks before 25th December.

ACKNOWLEDGMENT

Mr Payas acknowledged on behalf of the Respondents that the Complainant had been dismissed. The position in law by virtue of Section 65 of the Employment Ordinance is thus that the burden of proof falls upon the Respondents to show that such dismissal was fair. The procedural effect of this is that the Respondents are entitled to present their evidence to the Tribunal first.

THE EVIDENCE

FOR THE RESPONDENTS

Mr Payas gave evidence as the first witness for the Respondents. He said he and other colleagues had spoken to the Complainant on two occasions about her turning up late for her duties. A letter had been written by the Respondents to the Complainant complaining about this on 18th February 2004.

When the Complainant returned to work on 23rd September 2002, she carried out a series of postings at various posts for a short period of time and was then posted to the KGV hospital as security guard. The Complainant was failing to report on and off duty and was failing to collect or, at times, return the Occurrence Book from the Control Room before and after completing her tour of duty respectively. There were also some complaints from staff at the hospital about the

Complainant turning up late for her duties. This required the Controller to have to telephone her when she would explain that she had overslept. As a direct result of this, Mr Payas wrote to the Complainant on 18th February 2004. Notwithstanding, hospital staff spoke well of the Complainant and wanted her to stay.

Despite the letter of 18th February, the Complainant continued to arrive late for work and, as a result, was sent to work two day shifts at the Jewish Home and the Control Room. Part of her duties at the Control Room was to prepare wages for staff. However, the Complainant was not happy doing this type of work and her days on duty at the Control Room were changed so that she did not have to deal with this. Her record of arriving late continued at the Jewish Home.

He explained that he first heard of the Complainant not turning up for her duties on 25th December when he returned to work on 29th December. He was informed of this at a meeting with Mr Ramos and Mr Duarte who explained to him that when, on 24th December she was told she had to work on 25th December, she had blatantly refused to do so and had stormed out of the office. As a direct result of this, Mr Ramos and Mr Duarte had to cover for her. He then wrote to the Complainant that same day dismissing her for her "...blatant disregard to authority and abandonment of duty..." and terminating her services as from 24th December. The letter ended by inviting her to call on him in order to discuss the matter further if she wished him to reconsider his decision.

Mr Payas explained that the Complainant duly met with him on 30th December when she explained to him that she had asked Mr Ramos some 4 or 5 weeks before 25th December that she wanted to be free on that day and that he had told her there should be no problem. Mr Ramos was then called into his office. He explained that Mr Ramos seemed surprised at the Complainant's allegation and said that he did not recall the conversation. Mr Payas ended his evidence in chief by

saying that he found no reason to reverse his decision to dismiss the Complainant.

In cross examination by Mr Bossano, Mr Payas explained that on 24th December the Complainant had said she would not work on 25th December. Mr Payas explained this as "abandonment of duty". He explained the principal reasons for dismissal were the Complainant's history of lateness and also her blatant disregard of her duties in saying she would not work on 25th December. Mr Payas said he considered the Complainant to have terminated her employment herself on 25th December. Since she worked two extra days, that is, on 26th and 27th December, she would be paid for those two days.

Mr Bossano put to Mr Payas the Complainant's case which is that she saw from the roster of work that she was down for duty on 25th December some 4 or 5 weeks earlier and that she had then made a request to Mr Ramos that she did not want to work on that day. The Complainant was not asking for annual leave or for a private arrangement with another employee. She was simply asking not to be rostered for duty on 25th December.

Mr Bossano put to Mr Payas the fact that the managers did not assume the Complainant had abandoned her work but simply that she would not go to work on 25th December, otherwise they would have made arrangements to cover her post on 26th and 27th December.

Mr Payas explained in answer to a question by Mr Bossano that the Respondents consider the Complainant's employment to have been terminated by her on 25th December. However, since she had worked on 26th and 27th December, he said she should be paid for those two days.

Mr Carl Duarte was then called as a witness for the Respondents. He explained he was the Administrative and Personnel Manager for the Respondents. He went on to explain the procedure followed by

employees in order to exchange duties between themselves whenever a day off was required. The system is known as the private arrangement system. No annual leave is granted after 15th December.

He explained that after the Complainant returned to work for the Respondents in September 2002 she was sent as security guard to the KGV hospital. There were some complaints about her turning up for her duties late. She was required to come into the Control Room to report on and off duty and collect and return the OB Book and keys. Sometimes she would not return these.

He recalled that on 24th December the Complainant arrived at the office and then left. Mr Ramos told him that she was not prepared to work the following day. He came in the following day to cover for her. He did half a day and Tony did the other half. He paid the Complainant for every day she worked.

In reply to a question put by me, Mr Duarte replied that they did not accept the Complainant's refusal to work placidly; it was a matter of having no choice; they had to cover.

In cross examination by Mr Bossano Mr Duarte explained that in the Termination of Employment Form the Respondents had said that the Complainant had abandoned her work on 25th December and had dismissed herself. They have many employees coming and going and many leave without giving notice and they often dismiss them without giving notice either.

Double time is paid if employees work on bank holidays. The Complainant was not asking for annual leave but to be off work on 25th December. He said that he knew of the Complainant's record of lateness through his personal knowledge. Staff at the KGV hospital were happy with the Complainant and no complaints were received. Some people covered up for her. Employees are required to come to

the Control Room to ensure they have gone on site. There is no system of disciplining procedure in the office.

He explained there is a high turnover of employees. Over the year since the Complainant had left 120 people had been employed and had left. The question of lateness is important for the Respondents. In the last few months the Respondents have dismissed quite a number of people. He said that Mr Payas is more flexible than he is and that he gives employees lots of chances and gives them many verbal warnings.

Mr Tony Ramos was then called as a witness. The Complainant started with the Respondents early in 2000 and was posted at the City Hall. She left in March 2002 and returned on 23rd September 2002. She was sent to the KGV hospital as a security guard. She was frequently late. On a few occasions he had to call her at home as she was late for work. It has sometimes been necessary to send a car to her home to collect her and to send people up to KGV to cover her duties. He had spoken with the Complainant many times about her lateness and the KGV had on occasions complained to the Respondents that the Complainant was not there.

Because of this the Respondents had introduced a system whereby guards had to collect and bring OB Books to the Control Room so as to maintain some control. The Complainant was then sent to the Jewish Home and also worked in the Control Room. She made mistakes in preparing wages. Colleagues were complaining because the Complainant was turning up late for work so they had to overstay their presence at work.

On 24th December the Complainant came in to collect her wages. The office Christmas party was taking place. The Complainant was very upset. She had her daughter with her. She went to see him about her duties and said "I am not working on the 25th" and stormed out. He said he discussed the matter with Mr Carl Duarte and that he

later rang the Complainant and told her that Carl and he would have to cover her. They did cover her.

He explained that if someone wants a day off he asks for a note to be left with him and to be reminded one week before. If leave is not possible the employee can make a private arrangement with another employee. Annual leave is also possible.

On 29th December the matter was discussed at a meeting and a letter was sent to the Complainant saying she had abandoned her duty. He was called into Mr Payas' office where the Complainant said she had asked him some 5 weeks earlier for the day off and he replied that he did not recall this conversation. The Complainant had never mentioned anything further in the future. He explained that when he telephoned the Complainant he had not said "Don't worry."

To a question put to Mr Ramos by myself he said that when he rang the Complainant he had said "If you do not come in tomorrow, Carl and I will have to cover you."

In cross examination by Mr Bossano Mr Ramos said that the Complainant had said "Yo no voy a ser la cabrona de la compañía." He said that if he had been told 5 weeks earlier and had not been reminded he would have forgotten. He said he had made his statement in July of last year. He had not told the Complainant her job was at risk if she did not go to work on the 25th.

The practice of having employees report to the Control Room before and after duty was introduced to keep control over the guards. The record kept by the Respondents of the wages paid to the Complainant does not reflect accurately the hours worked each week nor the wages paid. The record shows a 40 hour week paid at £184 per week. The reality is that she used to work 45 hours one week and 60 hours the following week. The wages for this would be more than £184 per week.

He said he had not interpreted the Complainant's decision not to work on 25th December as her discharging herself. Following her decision not to come in to work on 25th December his job was to ensure that the post would be covered. He had spoken with Carl but not with Mr Payas.

In re-examination by Mr Payas Mr Ramos said that he did not recall the Complainant requesting 4 or 5 weeks earlier not to be included for duty on 25th December.

Mrs Marilyn Macedo was then called as a witness for the Respondents. She said she had worked with the Respondents over three separate periods. During late 2004 she had been on duty at the Jewish Home. The Complainant used to come in late a few times to relieve her. At first she used to call her. This happened so often that she decided to speak with Mr Payas. Other people were also complaining. She also rang the Controller on a couple of occasions. She did not want to get the Complainant into trouble nor did she want to get involved.

In cross examination by Mr Bossano she said that she could say more. She had decided to do this through the Controller and not direct. The Complainant was with her at the KGV hospital for about 5 weeks. She was then at the Jewish Home about the end of October or early November and the Complainant was constantly late for her. She then found out she was also late for others. She used to relieve her on Monday and Tuesday mornings. She used to relieve her late, about 10.15 or 20 minutes late. There used to be a recurring joke about the Complainant always arriving late. Other employees had also mentioned that she used to arrive late to relieve them in the past.

It could be that she worked at the Jewish Home for 20 weeks. She complained to Mr Payas as she was tired of having to wait to be relieved. The Complainant had to relieve her at 8.00 am.

In answer to a question from me the witness explained that from the last week in October to 25th December 2004 the Complainant had worked at the Jewish Home for about 6 weeks at 2 days a week, that is, a total of 12 days.

Mr Frank Mcmenaraim was then called as a witness for the Respondents. He said that on one occasion he relieved Marilyn at the Jewish Home so that she could go to an appointment. On two occasions he had to telephone her because she was late for work. On one occasion she answered the telephone; on another, there was no answer.

In cross examination by Mr Bossano he said that he gets 40 hours' wages. If he does any work over 40 hours a week, he gets those extra hours paid separately. He produces pay packets for the Respondents' employees and prepares these only for 40 hours

In reply to my question the witness explained that in his case he gets paid for 40 hours as week as all other employees do. If he works for over 40 hours in any week he receives payment for the extra hours from Carl separately.

Mr Eric Amor was then called as a witness for the Respondents. He said the Complainant used to be late for work. He had had to call her several times, between 6 and 10 times. On occasions he discovered that the OB Book had not been returned by the Complainant. When he asked her about this she would say she had forgotten. He had also received complaints from the KGV staff. He had also received a call from the Jewish Home to say that the Complainant had not arrived. The OG had had to go there to relieve the night guard.

In cross examination by Mr Bossano he said that he had written his witness statement himself. He gets a wage packet for 40 hours. Anything over 40 hours is paid in a separate packet. He said he had been working for the Respondents when the Complainant was posted at KGV hospital and the Jewish Home. She was at KGV hospital

between 24th April 2004 and 28th September 2004. In November 2004 she was at the Jewish Home and the Control Room. The Complainant was away on holiday during October.

Mr Gary Seymour was then called as a witness for the Respondents. He said that the Complainant was some days on duty at the Jewish Home. He had once gone to her flat and knocked on her door because she was late for work. There had been no answer. The Complainant had to be called often. On another occasion he had relieved Marilyn Macedo. The Complainant was between 40 minutes and 1 hour late.

In cross examination by Mr Bossano the witness explained that these incidents took place on Mondays and Tuesdays. The conversations took place before 8.00 am. He did not go to KGV hospital to relieve the Complainant. He has also had to chase other guards. That would have been after August 2004 when he started work.

In reply to a question out by myself the witness replied that he had gone only once to the Complainant's flat, which was when she had not opened the door. He also said that payment in lieu was nett.

FOR THE COMPLAINANT

The Complainant was called to give evidence. She said she had worked previously on Christmas Day. She had asked Mr Ramos not to be rostered for Christmas Day 2004. This was about 5 or 6 weeks before. She said he had said he did not remember. She explained that he had told her it should not be a problem. She was working in the Control Room. Towards the end of November she was 2 days, that is, Mondays and Tuesdays at the Jewish Home. On Saturdays and Sundays she was in the Control Room. She thus knew she would be on duty on 25th December which was a Saturday. She thus asked Mr Ramos not to roster her for duty on Saturday 25th December.

On 24th December she went to the office with her daughter. The office Christmas party was taking place. She received her wages from Julie. Mr Ramos told her she was on duty the following day. She explained that she expected to work from 26th to 29th December and that she had approached Mr Ramos to find out about her duties. She said she was upset when told she had to work the next day. There was no need for her to remind Mr Ramos. She used to work every Saturday and Sunday in the Control Room and she thus wanted to have 25th December off. Mr Ramos had clearly forgotten.

In cross examination by Mr Payas she said that Mr Ramos had said "It should not be a problem." He was sure it would be alright. She had dedicated Christmas to the company for 4 or 5 years and her daughter has opened her presents alone. The conversation was very clear to her. Mr Ramos had to tell her what other day she had to work in lieu of 25th December. She acknowledged she had not mentioned her request to Mr Ramos again. She said she felt she did not have to.

When she was sent to work at the Jewish Home and at the Control Room, she did not enjoy working in the Control Room. Working at the Jewish Home was boring but she said she had to do it as it was her job. She accepted she had been late "a couple of times". This was in November. However, she did not accept the evidence as to her lateness.

The Complainant said that on 24th December she had told Mr Ramos that she was not coming in to work the following day. When he telephoned her he had said "Don't worry, Carl and I will cover you". He had not given her any suggestion that she would be dismissed if she did not turn up for work on 25th December. Otherwise, she said, she would have gone to work. She stressed that Mr Ramos had not told her that he would have to cover her duty if she did not turn up for work on 25th December. He had only reassured her.

The Complainant went on to say in reply to questions put to her that she had been sent a letter by Mr Payas on 29th December. She saw

him the following day. She said that she told him at the meeting that she had asked Mr Ramos 4 or 5 weeks earlier that she wanted Christmas day off. When Mr Ramos was called into the office he said "I do not want to discuss/dispute this." She said he had not seemed surprised. The Complainant said that he might have said that he did not want to dispute this. She could not recall. After Mr Ramos had left, Mr Payas had told her he would consider the matter. She went on to say that Mr Payas had not said that he had heard nothing which would make him change his mind. She repeated that she had asked to be free from duty 4 or 5 weeks earlier. She had not reminded Mr Ramos after she had initially asked him.

To a question put to the Complainant by myself she replied that she had not had a chance to press Mr Ramos at the meeting. Mr Payas' telephone had rang and Mr Ramos left the room.

CLOSING STATEMENTS

Mr Payas, on behalf of the Respondents, made his closing statement.

The first period of employment is not relevant. The Complainant said she had asked for leave, Mr Ramos did not remember this. She had had an opportunity to remind him of this. When she had gone to see him she had not pressed Mr Ramos. The Complainant had worked on 26th and 27th December. On 28th December she was ill. On 29th December the office opened and he had thus had no opportunity to tell her she was dismissed. He had first heard of the incident on 29th December. He had then told her she had abandoned her duty on the 25th. He had instructed Mr Duarte to pay her for those two days.

As to the Complainant's record of lateness, he referred to the witnesses' statements. He had told the Complainant that he had heard nothing from her that would change his mind and that he would inform her of any change in his decision. She had been fully paid for her leave. He said that he considered the Complainant's failure to

turn up for work on 25th December as a blatant disregard of her duty. He said he equated "blatant disregard" with "gross misconduct".

Mr Payas went on to say that he did not rely on the Complainant's lateness as constituting a reason for dismissal. He said he relied on it to show his tolerance but not as a contributing reason for dismissal. Had it not been for the incident of 25th December she would have still been with the company.

Mr Bossano, on behalf of the Complainant, then made his closing statement.

The Complainant said on 24th December she would not work on 25th December. She had an expectation she would be off on the 25th. The Complainant has said on oath she did ask Mr Ramos for leave. He said he did not remember. Mr Ramos and Mr Duarte did not see her conduct as gross misconduct. They discussed matters between themselves. The Complainant was convinced she had had a favourable reply from Mr Ramos.

For the two previous years, 2003 and 2004, the Complainant had not taken annual leave. During 2004 she had taken leave for 7 days. He went on to say that Mr Payas was not saying that her lateness was a reason for her dismissal. The Complainant had assumed her request had been approved because she had had no reply. Perhaps she should not have assumed this. But that is no reason to dismiss her. She felt aggrieved because Mr Ramos had said no to her request at the last moment. Mr Bossano went on to deal with the turnover of employees with the Respondents. They had taken on 117 and had lost 110 over two years, 2003 and 2004.

Mr Bossano then referred to Section 65(i)(b) & (2) of the Employment Ordinance and said that this section contemplated four reasons for dismissal, that is, the capability of the employee to do the work he had been employed to do; the conduct of the employee; redundancy of

the employee and the employee being unable to continue working without contravening a duty or restriction imposed by any enactment.

The principal reason for dismissal was the Complainant's refusal to come in to work on 25th December. This was not a case of constructive dismissal. There had been procedural defects. The procedure had not been followed by the Respondents. The Complainant did not raise matter or press Mr Ramos at the meeting in case she could salvage her job and work under him in the future. The Complainant had said that if she had been told that she would lose her job if she did not turn up for work on 25th December, she would have worked on the day.

There were no grounds for dismissal and, if there were, they were not reasonable. This was a clear case of unfair dismissal.

Mr Bossano then dealt with the matter of compensation. Since January the Complainant had been receiving unemployment benefit at the rate of £88 per week. These included supplementary benefits. She had done part time work as a barmaid. Her last earnings with the Respondents were £184 for a 40 hour week. But in addition she was receiving an extra amount for the extra hours. She worked alternate 45 and 60 hour weeks.

Mr Bossano and Mr Payas then agreed to supply the Tribunal with agreed figures as to the Complainant's wages.

On 16th January 2006 a letter was written by Mr Bossano on behalf of the Complainant and addressed to the Tribunal wherein he set out his arguments on what the compensation to be awarded to the Respondent should be.

On 20th January 2006 a latter was written by Mr Payas on behalf of the Respondents and addressed to the Tribunal in reply to Mr Bossano's said letter.

DECISION

There are three important and significant matters which demarcate the scope of the conclusions and decision which this Tribunal can arrive at. The first is the acknowledgment by Mr Payas on behalf of the Respondents that the Complainant was dismissed. The second is the acknowledgment on behalf of the Respondents that during the first period of employment of the Complainant between 27th January 2000 and 14th March 2002 she committed only some minor infringements and that there was really no unsatisfactory conduct; nothing serious occurred. This is supported and confirmed by the fact that some 6 months later after the Complainant voluntarily left the employment of the Respondents on 14th March 2002, she was taken back.

The Tribunal has thus disregarded anything that might have been adduced in evidence or said, deliberately or inadvertently, relating to this period and particularly as it might tend to support an argument in favour of or justification for the dismissal of the Complainant. The fact of re-engaging the Complainant on 23rd September 2002 is deemed to amount to an admission that there was no such conduct on the part of the Complainant during this period justifying dismissal or, if there was such conduct, her re-engagement is deemed to amount to condonation by the Respondents of such conduct.

The third important and significant matter is that Mr Payas, on behalf of the Respondents, has said in his closing statement that he did not rely on the Complainant's record of lateness as being a contributory reason for her dismissal and that this was relied upon only "...to show his tolerance. It was not a contributory reason for dismissal. Had it not been for the incident of 25th December, she (the Complainant) would have still been with the company."

For the Complainant, it is argued that the Complainant had, some 4 or 5 weeks earlier, asked Mr Ramos not to roster her for duty on 25th December as she wanted to spend the day with her daughter. She explained in her evidence that she had dedicated Christmas day to the company for the last 4 or 5 years and that on previous Christmas days her daughter had opened her presents on her own. This year, she wanted to be with her daughter on Christmas day. She acknowledged that she had not subsequently reminded Mr Ramos of her request or mentioned it to him. Having heard nothing from Mr Ramos, she assumed her request had been approved. Mr Bossano suggested in his closing statement that "...perhaps she should not have assumed this, but this is no reason for dismissal."

The Complainant's case is as succinct and simple as that. The question therefore is firstly, was the Complainant telling the truth about having made such a request to Mr Ramos 4 or 5 weeks before Christmas day and secondly, if she did make such a request, having had no reply approving such request, was it reasonable and justifiable for her not to turn up for work on 25th December, in particular since she had been positively informed on the previous day that she was on duty on Christmas day.

The evidence for the Respondents has been that Mr Ramos, at the meeting with the Complainant and Mr Payas on 30th December, said, according to his evidence and that of Mr Payas, that he did not recall the Complainant having made such a request or, according to the evidence of the Complainant, that he did not want to discuss or dispute this.

What occurred on 24th December is also helpful in assisting the Tribunal in arriving at a conclusion. After the Complainant was informed by Mr Ramos that day that she was on duty the following day, the Complainant said she would not be turning up for work and, according to the evidence for the Respondents "...stormed out of the office."

Moments later, Mr Ramos telephoned the Complainant. According to the Complainant he said "...Don't worry. It shouldn't be a problem, Carl and I will cover for you." This version is disputed by Mr Ramos who said in his evidence in reply to a question from me that what he said to the Complainant on the telephone was "...If you do not come in tomorrow, Carl and I will have to cover you." This version was not accepted by the Complainant as the truth of what was said.

Mr Duarte in his evidence explained the events of that day as follows. "Ramos told me she (the Complainant) was not prepared to work the following day. I came in the following day to cover for her. I did half a day and Tony (Ramos) did the other half." In reply to a question from me he said "We did not accept the Complainant's refusal to work placidly. It was a matter of having no choice. We had to cover."

I prefer the evidence of the Complainant on this matter. This is not to suggest that either Mr Ramos or Mr Duarte were lying or seeking to mislead the Tribunal. The truth would seem to be that Mr Ramos, as he put it himself, did not honestly recall the request which I accept and hold the Complainant did make to him some 4 or 5 weeks earlier to have Christmas day off. This is not surprising. Mr Ramos has many and varied duties with a large number of employees to attend to. He explained that the usual procedure for someone seeking a day off was to put such request in writing so that he would not forget about it. This, unfortunately, was not done by the Complainant, nor did she remind him verbally closer to the date. And, notwithstanding, she assumed from Mr Ramos' silence, that he had acceded to her request.

Having decided that the Complainant did make such a request for leave to Mr Ramos and that he had forgotten about it, it would seem that, having been reminded of this by the Complainant on 24th December, Mr Ramos either then recalled the request or felt guilty that such request might have indeed been made and that he could not recall it even then. Had it not been so, it remains a matter for speculation as to whether he and Mr Duarte would have so readily,

albeit reluctantly, agreed to give up their Christmas day and be away from their families in order to accommodate the Complainant.

The question now to consider is whether in the above circumstances it was reasonable and justifiable for the Complainant not to turn up for her duty on Christmas day and, as a direct result, whether it was justifiable and fair for the Respondents to dismiss her because of it.

The Complainant made a request for leave on 25th December some 4 or 5 weeks earlier. At the time of the request she knew she would be on duty on that day as she worked on Sundays and Christmas day fell on a Sunday. She did not follow this up with a request in writing as she should have, nor did she remind or mention this again to Mr Ramos at a later date. Having had no reply from Mr Ramos, she assumed her request had been accepted.

Although it is possible to be critical of the Complainant for her failure to make the request in writing or to remind Mr Ramos verbally of this and then to assume from his silence that her request had been acceded to, this has to be seen against the background of her place of work and the special circumstances there. From the evidence it would seem that the general atmosphere at work, and in particular in the Control Room where the Complainant was working part of the time at the relevant time, was casual and friendly and bereft of the formality and strictures which exist in other workplaces.

It is thus not unreasonable for the Complainant to have come to the conclusion, despite her shortcomings as stated above, that silence from Mr Ramos meant that he had no objection to her request. The period leading up from the date of her request to 24th December ensued for the Complainant in full expectation of having Christmas day off with her daughter. The news on 24th December that she would have to work on Christmas day after all will have thus come to her as a great and unexpected disappointed and shock and will explain her reaction and her voicing her refusal to work on that day and her storming out of the office.

What is important and must be borne in mind is that the Complainant was informed by Mr Ramos on 24th December after she informed him that she would not be turning up for work on the following day that she would be covered by him and Mr Duarte. For the present purpose, whether he said that he and Mr Duarte would cover her or that they would *have* to cover her is not of fundamental importance. What is important is that the Complainant knew that she would be covered. She was given no reason at the time to believe that, if she failed to turn up, she would be dismissed.

In all of the circumstances, therefore, the conduct of the Complainant on 25th December in not turning up for her duty is not unreasonable and not such as to justify her dismissal which I hold was thus unfair.

AWARD

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" and 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.

COMPENSATION FOR UNFAIR DISMISSAL

Mr Bossano has urged the Tribunal in his letter of 16th January to follow the basic award made by the Tribunal last year in the Calypso case. This award broke with the long standing traditional minimum award of £2,200 and increased it to £3,500. The minimum basic award of £2,200 has been followed and implemented since its inception in the 1992 Regulations mentioned above.

Mr Payas, in his written reply of 20th January to Mr Bossano's said letter merely comments on such proposal that this is "...a matter for the discretion of the Chairman."

I hold that such strict allegiance to the basic minimum award in being since 1992 can no longer be justified 14 years later and I thus award the Complainant a basic award of £3,500.

As regards an award under Section 72(2) of the Ordinance for loss suffered by the Complainant directly flowing from her unfair dismissal, the position is that it is 59 weeks since the Complainant was dismissed, that is, from 29th December 2004 until today's date, 13th February 2006. Had the Complainant not been dismissed, she would have earned during this period from her employment with the Respondents, based on Mr Bossano's own figures, an after tax amount of £11,811. This is calculated on the basis, according to Mr Bossano, of the Complainant having earned an after tax amount between 1st July 2004 and the end of December of that year, that is, 26 weeks, of £5205.

However, unlike the award available under Section 72(1) where a minimum basic award *shall* be made by the Tribunal, an award under Section 72(2) for loss suffered as a result of the unfair dismissal *may* be made by the Tribunal. This discretion given to the Tribunal is right and proper since it enables the Tribunal to take into account a number of matters, not least of which is the conduct of the dismissed employee.

Although I have disregarded entirely the evidence given during the hearing regarding the record of lateness of the Complainant as it might have in any way influenced or justified the decision by the Respondents to dismiss her, it is nevertheless conduct which this Tribunal must have in regard when awarding compensation of a discretionary character such as under Section 72(2).

The Complainant has not strenuously disputed her record of frequently turning up late for work. This has been not so much contrary to the terms of her employment but, importantly, unfair on her own colleagues who, as we heard in evidence, have on numerous occasions been kept waiting to be relieved after a whole night's stint on duty. I was particularly impressed in regard to this matter with the evidence of Ms Marilyn Macedo who came to the Tribunal only reluctantly to give evidence of the times she had been kept waiting to be relieved by the Complainant at the Jewish Home after she had completed her night duty. She also said in her evidence that other colleagues had been treated by the Complainant in this fashion.

In such circumstances, one is left with the inevitable question; but for her record of lateness, would the Respondents have dismissed the Complainant for her conduct on 25th December? Or is this a case, such as was mentioned by Mr Payas, of "the last straw"?

According to Mr Bossano's said letter to the Tribunal of 16th January of this year setting out his arguments on compensation, the Complainant has earned during the whole of last year an amount of

£4,485 from unemployment benefit and from her work between 7th November and the end of last year as a barmaid.

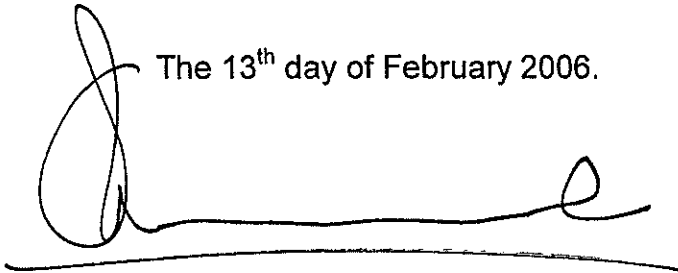
In all of the circumstances, in my judgment a fair compensation under Section 72(2) is £7,000. From this sum must be deducted her earnings, which I am limiting to the end of last year and I am not taking into account what she might have earned during the current year. This amount is £4,465. When taken from the award of £7,000, this leaves an amount of £2,535.

The total amount of the award thus made by this Tribunal is :

Basic Award under Section 72(1)	£3,500
Discretionary Award under Section 72(2)	<u>£2,535</u>
Total Award	£6,035

I wish to thank Mr Bossano and Mr Payas for their courtesy to the Tribunal and for their invaluable and well presented arguments.

The 13th day of February 2006.



Eric C Ellul
Chairman