IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

IND.TRI
No.9/2005

BETWEEN

PETER SARDENA

COMPLAINANT

-and-

GIBRALTAR BUS COMPANY LIMITED

RESPONDENT

JUDGMENT

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1. GENERAL

1.1 On 22nd January 2013 the Respondent confirmed its decision not to defend the Complainant's claim that he had been unfairly dismissed. This was after a long, heated and incident laden series of hearings.

1.2 Each party has a right to decide how to pursue its case. However, the Respondent's decision not to defend the claim took everyone by surprise, not least this Tribunal.

1.3 The effect was that the Respondent, as the employer, failed to satisfy let alone even address the burden of proof pursuant to Section 65 of the Employment Act ("the Act") which states as follows:

> "(i) In determining for the purposes of Sections 59 and 70 whether the dismissal of an employee was fair or unfair, it shall be for the employer to show –
>
> (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal and
>
> (b) that it was a reason following within the next following sub-section or some other substantial reason of a kind such as to justify the dismissal, of an employee holding the position which that employee held."

1.4 Therefore, the Respondent (as employer) having not provided any evidence has failed to satisfy the Tribunal that the dismissal was fair or justified.

1.5 Pursuant to Section 59(1) of the Act:-

> "In every employment to which this section applies every employee shall have the right not to be unfairly dismissed."

1.6 In the circumstances of the Respondent's failure to satisfy. or even address Section 65 the Tribunal has no choice but to find that the Complainant's right not be unfairly dismissed has been breached.

1.7 The Tribunal's only role. therefore, is to decide upon the remedies sought by the Complainant and to consider applications made.

1.8 A recital of the facts that led to the dismissal is unnecessary as these are not relevant to compensation. In any event, the facts have not been agreed, let alone tested before this Tribunal.

2. COMPENSATION - GENERAL

2.1 At a hearing before this Tribunal on 22nd January 2013 I was addressed by Stephen Bossino Esq., acting for the Complainant and by Mark Isola Esq, acting for the Respondent.

2.2 Mr Bossino made submissions that his client was seeking:-

(i) re-engagement;
(ii) the statutory award (to be increased in line with inflation); and
(iii) full monetary compensation over a two year period.

2.3 Mr Isola submitted that it was for the Complainant to not only prove his loss but to show how he had mitigated it.

2.4.1 Mr Bossino countered that his client had applied for over 27 jobs over 2005 and 2006. He conceded that his client had been convicted in the Supreme Court for, what he described as. the "infamous Duflon episode". This involved the creation by the Complainant of a fictitious job offer.

2.4.2 Mr Bossino also submitted that the employer (the Respondent) had provided negative references to any prospective employer. He argued that the purpose of the Duflon letter had been to flush out a negative reference from the Respondent, which mistake he paid for on conviction.

2.4.3 Mr Bossino asked the Tribunal to place the effect of the conviction and the existence of the Duflon affair within its proper ambit (ie the flushing out of negative references).

2.4.4 Mr Bossino also asked the Tribunal to bear in mind that his client had not been legally represented at the time of the Duflon affair, otherwise Mr Sardena would have been properly advised to obtain copies of the references legally, via an appropriate mechanism, namely an Order or the Data Protection Act.

2.4.5 Section 71(2) of the Act makes it clear that the Compensatory Award has to be made subject to the Complainant satisfying the Tribunal that he has fulfilled his "duty ..... to mitigate his loss".

2.4.6 Mr Isola argued that the Complainant was not qualified for many of the jobs applied for by the Complainant. This was accepted by Mr Sardena on cross-examination. Mr Sardena however commented that he was open to work anywhere, try anything, even be re-trained in an attempt to restore his life.

2.4.7 It is the Tribunal's view that, had Mr Sardena's argument that the Duflon letter was to flush out the Respondent's alleged underhand behaviour been true, he would not have used it as part of this case. The Duflon letter formed part of evidence submitted to this Tribunal. Had it not been "challenged" there is some doubt that Mr Sardena would have told the Tribunal that it was not valid. It is unfortunate, if what Mr Sardena alleged re the negative references being issued, actually was true.

2.4.8 Duflon when placed next to the other job applications made tends to lead to the conclusion that the Duflon letter was added to bolster his compensatory claim. However, one also has to take into consideration the political climate existing at the time and the Complainant's "notoriety" as a consequence of the case, which made it virtually impossible in any event or at least very difficult indeed, for Mr Sardena to seek any employment. At least Mr Sardena tried to obtain employment.

2.4.9 The Complainant did start a small business in 2008 (ie. mobility services repairs) which enabled him, in his words "to keep up with payments". He said in evidence: "I can't get a job so I did this".

3. BASIC AWARD

3.1 Pursuant to Regulation 2 of the Industrial Tribunal (Calculation of Compensation) Regulations ("the Regulations") as amended by Legal Notice No 3 of 2012:

"The amount of the Basic Award provided in Section 72(1) of the Act, shall be £2,200, or such higher amount as the Tribunal, at its discretion, shall determine".

3.2 The key words are "shall be £2,200 or such higher amount as the Tribunal, at its discretion, shall determine".

3.3 The Explanatory Memorandum which helpfully forms part of Legal Notice No 3 of 2012 says as follows:

"These Regulations amend the Industrial Tribunal (Calculation of Compensation) Regulations 1992 by allowing the Tribunal to increase the basic award which is currently a flat sum. As a consequence of this amendment there will be no upper limit as to the amount that may be awarded as the basic award". (Underlining is mine).

3.4 Clearly, it is a matter for the discretion of this Tribunal as to what sum can or should be awarded. How the Tribunal comes to such a figure is up to the Tribunal, in its discretion, to decide in the light of the facts of the case before it.

3.5 The Tribunal is troubled by the number of cases defended by employers (being a Government run or controlled entity) which have not then been defended by such Respondent employer. This is unfair on the employee who, at this level of justice, represents an inequality of arms and leaves an employee open to the tactical bullying of an employer. An employee of such an entity also cannot always rely on a change of political party control for a just outcome. A level playing field needs to be achieved and accepted by both parties.

3.6 The Tribunal declines to increase the Basic Award by reference to the inflation or price index, however, awards the Complainant more than the minimum sum, in this case the sum of £5,000 Basic Award by exercising its discretion to do so. The Tribunal comments that it hopes that other Chairmen will follow the lead given in this case to exercise its discretion positively where (and only where) the case merits it.

3.6.1 In doing this the Tribunal comments that the Duflon affair has left a very poor view of Mr Sardena, but he has been convicted by the Supreme Court for this offence and it would be wrong of this Tribunal to punish Mr Sardena a second time. It should be enough to say that he has suffered by being unfairly dismissed and by having to fight this case against an aggressive employer, only for the employer to decide not to defend the case. An employer ultimately funded by the tax payer and with virtually unlimited financial resources who then decided to throw in the towel. It is for these reasons alone that the Tribunal exercises its discretion to increase the Basic Award.

4. COMPENSATORY AWARD

4.1 This element is to deal with the financial loss suffered by an employee as a consequence of an employer's dismissal, ie loss of income.

4.2 The prescribed amount that can be awarded under Regulation 3 of the Regulations is the lesser of:

"(a) the amount which, in the case of the person who has presented a complaint under Section 72 of the Act, represents 104 weeks' pay; or

(b) the amount calculated as follows:

104 x (2 x the weekly minimum wage) whichever is the less".

ie 104 x 2 x £222.30 = £46,238.40

4.3 The Complainant was earning £23,203.20 per annum (para. 6.2 of Mr Isola's Skeleton). Therefore, 2 x £23,203.20 = £46,406.40

4.4 The lesser sum that can be awarded per Regulation 3 therefore, is £46,238.40.

4.5 The Tribunal then must return to the issue as to whether the Complainant mitigated his loss or not. It is for a dismissed employee to take reasonable steps to minimise his loss by looking for another job. If he fails to take any reasonable steps, an appropriate amount representing what he could have earned should be deducted from the award of compensation.

4.5.1 Mr Bossino argued that the Duflon letter should be isolated, as its purpose was to prove that negative references were being issued by the Respondent. Mr Sardena on cross-examination conceded that this had been an error of judgment which he had been punished for by the Courts.

4.5.2 Mr Isola argued that the Duflon letter was adduced as evidence that the Complainant had been unable to find work, evidence which proved to be false. He argued that if this one piece of evidence was false, this put into question the genuineness of any evidence that the Complainant was attempting to mitigate his loss.

4.5.3 Mr Isola also argued that the Complainant had remained unemployed since 2005. He had latterly engaged himself in a business that did not seem to be generating any real income, which he said showed that no real, serious attempt to mitigate his loss had been shown.

4.5.4 Mr Isola also argued that very few of the job applications made by the Complainant were realistic ones. Mr Sardena partly accepted this, but argued (as

mentioned earlier) that he would have applied for a job as a street sweeper if available.

4.5.5 Mr Bossino argued that no evidence was adduced that the applications were not genuine. Further, it would be wrong to just rely on the Duflon conviction to destroy all other applications made. He submitted that a broad brush approach was required. He also argued that there was no hard and fast rule as to how he should mitigate his loss.

4.5.6 The Tribunal accepts the Complainant's assertion that the Complainant's use of the Duflon Letter was an error. What it cannot ignore, however, is that it was an attempt by the Complainant to "garnish" his claim. It was false. It was unlawful. It was an attempt to pervert the course of the Tribunal system and justice. However, as stated earlier, Mr Sardena has already received his punishment for this act and on its own the Duflon affair adds little.

4.5.7 On the evidence before the Tribunal the Complainant made attempts to find alternative employment at every possible level. Given the atmosphere that existed at the time the Complainant was dismissed, with all the political and other undercurrent that also existed, the Tribunal can but conclude on a common sense basis, that it would have been unlikely that Mr Sardena would have been offered a job at that time. He was being "black balled". Therefore, his attempts to re-invent himself via varied applications, coupled with the modest business he latterly set up can be seen as reasonable in these peculiar and particular circumstances. Mr Sardena did try to obtain employment. Some at a realistic level (even if requiring training) others perhaps not so. However, Mr Sardena actively tried.

4.5.8 Following the principles set out in Gardiner Hill v Roland Berger Technics (1982) I.R.L.R. 498, which were not referred to the Tribunal by the parties, a percentage deduction for the Duflon episode would be inappropriate in any event. Compensation should be reduced only by the amount by which the loss would probably have been reduced if there had been no failure to mitigate. The Tribunal finds that no such failure existed and a deduction would be inappropriate because the sheer number of other job applications made are sufficient, in the very peculiar circumstances of this case.

4.5.9 Further in Hibiscus Housing Association Ltd v McIntosh (2009) (also not referred to by the parties) it was held:

"The Tribunal had found that .... M had made a significant job search to an extent that met her continuing obligation to mitigate her loss. The Tribunal was not obliged to spell out to any greater extent than it did that M could not have expected to immediately obtain work. Firstly, she had been unfairly dismissed on the grounds of misconduct; secondly she had received the recruitment agency's advice about her employment prospects in the absence of a favourable reference; thirdly, it was not reasonable to expect a dismissed employee to lower their sights

immediately as regards the kind of job for which they applied. It might become reasonable to expect a lesser paid job with lesser status after a period time, but this was a matter of fact and degree for the Tribunal".

4.5.10 Likewise in this case firstly, Mr Sardena was unfairly dismissed on the grounds of misconduct; secondly, in the political climate that existed at the time (and given the associated relationship that existed between the Respondent and the Government of the day) it was unlikely that any job application would have been positively assessed; thirdly, the Complainant applied for jobs of every conceivable level for which he should not be punished; fourthly, the Duflon Letter (unacceptable though it was in isolation) cannot in the above context, lend much to the argument. If the Duflon job existed he did not get it then or later. Duflon can be ignored in its entirety, which is the just and reasonable thing to do given the circumstances. Finally, it was not reasonable to expect Mr Sardena to lower his sights immediately as regards the kind of job for which he applied. His applications was generally very varied indeed.

4.5.11 The Tribunal also notes the Respondent's submission that having been dismissed in 2005, the Complainant remained unemployed for over 8 years and that this showed a manifest failure to mitigate his loss. However, the Tribunal is only interested in a two year period from dismissal and the Complainant's attempts over that period. The Tribunal is satisfied with the Complainant's explanations and the efforts made by him to obtain employment.

4.5.12 The Tribunal comments that the allegation that the Respondent may have been issuing negative references to prospective employers whilst troubling, lacks evidential basis – neither being proved nor disproved to the correct standard. This suggestion is also discounted.

4.5.13 The Complainant only began his mobility services business in 2008 so I do not intend making any reduction from the Compensatory Award for any income earned from 2008.

4.5.14 No further awards are considered as being reasonable for consideration.

5. RE-ENGAGEMENT

5.1 For the sake of completeness the Tribunal notes that this application element was dropped by Mr Sardena when he represented himself at the last hearing and no further consideration is necessary.

ISAAC C MASSIAS
CHAIRMAN
25 JUNE 2014