

INDUSTIAL TRIBUNAL OF GIBRALTAR

Case No. 1/2006

BETWEEN

JOANNA HERNANDEZ

Complainant

and

SOCIAL SERVICES AGENCY

Respondent

Mr J Bossano – For the Complainant
Mr M Isola – For the Respondent

JUDGEMENT

1. Pursuant to *Section 59 (1) of the Employment Act* (“the Act”):-

“In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by an employer”.
2. *Section 65* of the Act places the burden of showing that the reason for the dismissal falls within certain parameters on the employer:-
 - (1) “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 falling 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.”

3. As seen from Section 65 it is for the Respondent to satisfy the Tribunal that the reason for the dismissal falls within one of those set out in Section 65. Counsel for the Respondent advised the Tribunal in opening that, because the person who took the decision to dismiss could not be contacted and brought before the Tribunal, no evidence would be brought by the Respondent to satisfy this test and the Tribunal would have to find the dismissal as unfair. This admission leaves the Tribunal with no option but to hold that the employer has failed to satisfy the reasonable dismissal test and therefore, as a consequence of the Respondent's failure, the Tribunal hereby finds the dismissal of Ms Hernandez unfair.
4. This case has over the last two years been actively pursued and defended; It has also involved an appeal by the Respondent from a decision made by this Tribunal to the Supreme Court and Court of Appeal, so much so that the Respondent's unexpected decision not to adduce evidence as to the fairness of the dismissal, whether by unwillingness or inability, has come as a surprise. However, it is each party's right and prerogative to decide how, when and if to defend its case. It is not for this Tribunal to make any further comment on the Respondent's decision, or motive.
5. On the foregoing basis, the Tribunal's only role is to calculate the compensation due to the Complainant and consider other applications made by the Complainant's Representative. A recital of the facts is unnecessary in the circumstances, as these have neither been agreed nor tested before this Tribunal.

6. **BASIC AWARD**

- 6.1 Pursuant to *Rule 2 of the Industrial Tribunal (Calculation of Compensation) Regulations* ("the Regulations") the amount of the Basic Award is set as being "not less than £2,200.00".

The Tribunal, therefore, awards Ms Hernandez a Basic Award of £2,200.00.

7. **COMPENSATORY AWARD**

- 7.1 This element relates to the financial loss suffered by an employee as a consequence of an employer's dismissal, usually loss of income.
- 7.2 The prescribed amount of Compensatory Award, for the purposes of Section 72 of the Act, is set by *Rule 3 of the Regulations*, as being:-
 - “(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 which is 104 times twice the amount specified as weekly remuneration in the Schedule to the Conditions of Employment (Standard Minimum Wage) Order

whichever is the less”.

- 7.3 Ms Hernandez received an average salary of £1800.00 per month which equates to £450 per week.

$(450 \times 104 = £46,800.00)$

Therefore, under sub-rule (a) the sum to be used in the formula would be £46,800.00.

- 7.4 Under the Conditions of Employment (Standard Minimum Wage) Order the weekly remuneration set is £175.50 (LN136/05)

$(104 \times 175.50 \times 2 = £36,504.00)$

Therefore, under sub-rule (b) the sum to be used in the formula would be £36,504.00

Consequently the lesser sum to be considered under the Compensatory heading is £36,504.00.

- 7.5 However, the Compensatory Award has to be made subject to the Complainant satisfying the Tribunal that she has fulfilled her “duty... to mitigate her loss”. (*Section 71 (2) of the Act*).

- 7.6 An Industrial Tribunal is obliged to consider the question of mitigation, whether or not it is raised or challenged, because statute requires it.

- 7.7 The reasons given by the Complainant, or implied thereby, for not applying for other employment, which would have mitigated her loss, are as follows:-

(i) that as a result of her dismissal by the Respondent she was medically or psychologically so affected as to be unable to work or even seek alternative employment. A large sheaf of Medical Certificates was produced by way of explanation. The Certificates referred to “work induced anxiety” and “stress/depression work induced” as being the reasons given by the Doctors the Respondent attended, as to why the Respondent was unable to work;

(ii) the field of her work was specialised and, therefore, there was nowhere else for her to apply to for a similar job;

(iii) the publicity that the case had attracted effectively rendered her unemployable;

(iv) that preparation of a case of this complexity required her to concentrate on the same.

- 7.8 After careful consideration, whilst accepting that mental or psychological issues are important and can prevent an employee from working, it is unreasonable to accept that this state of mind prevented her absolutely, not only from working for over two years, but also rendered her unable even try to seek an alternative source of income. Her conduct in this regard cannot be seen as reasonable, in that she deliberately made herself unavailable for alternative employment. Such a state of mind should not have prevented her from at least seeking some form of alternative employment, even if unsuccessful. This does not mean that she had to be offered a job, but at least be seen to have reasonably tried to find employment and if offered reasonable employment to have accepted it.
- 7.9 That Ms Hernandez was trained in one particular form of speciality, does not abrogate her statutory duty to mitigate her loss. After a reasonable period of time, allowing a recovery period from anxiety and depression suffered and so that she could recognise the reality of her situation, she could and should have sought alternative employment.
- 7.10 Ms Hernandez could also have retrained as she had done in the past. As her Representative, Mr Bossano stated during the hearing, Ms Hernandez began as a 'classroom aid', a position far removed from the job she found herself in at the Social Services Agency. There can be no doubt, therefore, that someone of the Complainant's intelligence and ability could have transferred, upgraded or changed her skills accordingly.
- 7.11 As for the possibility that all her time was taken up in preparing for this case, this is also not seen as reasonable. In the ideal world it would be a nice thought, but in reality every dismissed employee has the duty to mitigate the loss of income suffered, by at the very least positively trying to obtain alternative employment.
- 7.12 The publicity created by this case would not have affected all employers in Gibraltar. To use publicity as an excuse for not even attempting to seek alternative employment is also not accepted as being reasonable.
- 7.13 The Tribunal is therefore of the view that, had the Applicant sought employment within a reasonable time following her dismissal, as she should have done, and being mindful of Ms Hernandez' particular circumstances, allowing her a reasonable time to recover from a mental health perspective and retrain if necessary, it is likely that she would have found other comparable employment by at least the end of January 2007. There can be no excuse for her not having at least attempted to find employment from February 2007 onwards. This (suggested time period) is extremely generous in the circumstances and it may be that other Tribunals may have allowed less time. However, I feel this to be fair, given the circumstances of her dismissal and her mental state at the time.

- 7.14 I therefore reduce the sum of Compensatory Award by 8 months salary (32 weeks x 2 per sub-rule (b)) – (£5616 x 2 - £36,504.00 = £25,272.00)

The sum awarded by way of Compensatory Award, therefore, being a total of £25,272.00.

8. REINSTATEMENT/RE-ENGAGEMENT

- 8.1 The Complainant's Representative also sought an Order that the Complainant be re-engaged by the Respondent.

Section 70 (2) of the Act states :-

“Where on a complaint relating to dismissal the Tribunal-

- (a) finds that the grounds of the complaint (as specified in Sub-Section (1) (a) to (c) are well founded; and
- (b) considers that it would be practicable, and in accordance with equity, for the Complainant to be re-engaged by the employer or to be engaged by a successor of the employer or by an associated employer

the Tribunal shall make a recommendation to that effect, stating the terms of which it considers that it would be reasonable for the complainant to be so re-engaged or engaged”.

- 8.2 Counsel for the Respondent argued that it would be inappropriate for the Complainant to be re-engaged. His argument was that the Complainant had not changed her attitude and continued to make the same accusations against the Respondent. Further, that if re-engaged there would be a great deal of (cross) animosity. It was also argued and pointed out, that Ms Hernandez's Witness Statement showed the strength of her feeling of animosity towards her employer and even her opinion that she would not ever contemplate returning to work for the Agency/the Home. Ms Hernandez and her Representative countered this by arguing that those persons previously involved at the Home, who had directly or indirectly brought about her dismissal and the state of affairs Ms Hernandez alleged had existed at the Home, had since left. Ms Hernandez argued that based on statements made on behalf of the Agency since her dismissal, the Home and its working practices had changed for the better and she would have no difficulty working within the Agency once again.
- 8.3 Throughout the case political undercurrents, far transcending a dismissal case have been noted. Indeed, many Press Statements have been made making accusations of issues to be raised in this case. Whilst there is nothing inherently wrong in using the Press to debate issues of importance, the manner in which this case has been publicised, before even bringing evidence before

this Tribunal, cannot but have had the effect of creating animosity between Ms Hernandez and her former fellow workers and more senior staff.

- 8.4 Counsel for the Respondent also argued that Ms Hernandez's long term mental health should also be an important factor when considering the possibility of re-engagement. Ms Hernandez has been unable to work for over 2 years because of inter alia depression and anxiety problems. Counsel for the Respondent posed the question as to what would be the prospect of Ms Hernandez being fit and healthy to take up alternative employment if re-engaged? Ms Hernandez on the other hand countered that once this case was over, her life would return to normal and her mental anxiety and depression would dissipate. The Tribunal accepts Ms Hernandez's explanations and assertions. It would be inequitable for this Tribunal, when considering the possibility of re-engagement, to punish Ms Hernandez for ill health attributed to her present predicament. Whilst acknowledging all of the arguments advanced by Mr Isola, in his capacity as Counsel for the Respondent, his client's decision to withdraw its defence of this case, whatever its reasons may have been, means that I have had no choice but to hold Ms Hernandez to have been unfairly dismissed - with all the consequences that such a finding brings, including serious consideration being given to re-engagement.
- 8.5 It also has to be accepted that from a common sense point of view, all trust and confidence between the Agency and Ms Hernandez must have broken down, notwithstanding Ms Hernandez's statement to the contrary and re-engagement in her previous position may not be practicable or advisable. Mr Isola's firm submissions that the Respondent would strongly object to an order of re-engagement tends to reinforce this view.
- 8.6 Just because the employer decides not to defend a case does not mean that an employee has an automatic right to be re-engaged. A Tribunal also has to decide whether it is practicable for re-engagement to be recommended and in doing this the Tribunal must take a broad common sense objective point of view. As it was put in *Coleman v Magnet Joinery Ltd* [1975] ICR 46 "practicable" is not to be equated with "possible".
- 8.7 It is clear that direct re-engagement (in the sense of returning Ms Hernandez to her previous position of employment) is not in my view possible, the Tribunal must therefore consider what, if any, alternatives may be available.
- 8.8 Given the size and scale of the Government of Gibraltar and the fact that it is the principal and largest employer in Gibraltar, it should be possible for the Government of Gibraltar to find a suitable alternative position for Ms Hernandez without much difficulty, thus avoiding the problems that would arise if she returned to her previous post. By Ms Hernandez's own admission, she started as a classroom aid in the Education Department and she undoubtedly has the capacity to retrain as she has done in the past and as many Civil Servants have successfully done and continue to do. The Tribunal, therefore, recommends that Ms Hernandez be found an alternative position in

another Government Department, at the same scale, conditions, rights and level of responsibility as she had when employed by the Government of Gibraltar's Social Services Agency. The Tribunal is sure that the Respondent will do what is right and just, in accordance with the high standards and behaviour that all citizens of Gibraltar expect from its Government.



ISAAC C MASSIAS
CHAIRMAN

15th April 2008