

IN THE INDUSTRIAL TRIBUNAL

Case No. 22/2007

MOHAMMED BAKKALI

Complainant

- v -

WELLINGTON COURT
MANAGEMENT LIMITED

Respondent

DECISION

1. General

- 1.1. The Complainant was employed on the 18th September 2000 by the Respondent as a caretaker/cleaner with respect to the building known as North View Terrace, Devil's Tower Road, Gibraltar, of which the Respondent was the managing company for.
- 1.2. The Complainant claims that he was dismissed on the 4th May 2007 by the Respondent summarily without cause and/or dismissed by notice without cause and was at the time of the dismissal earning £6,300 per annum, £88.00 net per week. Notwithstanding the number of different allegations in the Originating Application, the evidence put forward by the Complainant related to the unfairness of his dismissal, and that is the only claim that has been pursued by the Complainant.
- 1.3. The Respondent contended in its Notice of Appearance that the reason for dismissal was that the Complainant was incapable and incompetent, had failed to heed/obey the employer and/or some other substantial reason connected to the management of the estate and that having issued the first written warning on the 6th April 2005, a second written warning on the 6th July 2006, a third written warning on the 13th February 2007 and ultimately dismissing the Complainant on the 27th April 2007 that it acted fairly for a small private estate of residents where the Respondent believed and had grounds to come to the conclusion it did, albeit that it applied the wrong notice period for termination which was subsequently corrected.

2. The Evidence

- 2.1. The Respondent called one witness, Mr. Colin Francis, an employee of BFA Management Limited (“BFA”), agents acting on behalf of the Respondent. The Respondent is a management company, controlled by the flat owners of the estate, and which is run by a committee of which the membership has fluctuated between two to four members, although at the time of the decision to dismiss there were three members. BFA manage the common areas of the building, ensure that cleaning services are provided together with general maintenance on behalf of the Respondent, and manage any employees engaged to carry out these works. They are in contact with the committee on a daily basis depending on the issues that are raised by residents/the committee.
- 2.2. The Complainant was originally employed to carry out caretaking/cleaning duties but following problems with his eyesight, the Respondent decided to use his services for cleaning the common areas only, and engaged sub-contractors to carry out other duties, albeit that the Complainant’s pay was not reduced, notwithstanding the reduction in duties, and that his working hours remained the same, namely 9 a.m. to 1 p.m. Mondays to Fridays. There was no time restriction placed on how and when he should clean the main entrance, staircase, door mirrors, staircases and notice boards. The building had several actual or potential storage areas, including a salt water tank room on each side of the building and the electricity room.
- 2.3. When the Government refuse collectors refused to return bin stores from the public highway to the estate, the Complainant was engaged to do so on Saturdays and paid the equivalent of two hours pay for carrying out that duty. When the refuse collectors began to return the bin stores to the estate, there was no longer a requirement for the Complainant to carry out that duty or to work on a Saturday, but he nevertheless retained the additional pay as part of his pay packet.
- 2.4. On the 6th April 2005 Mr. Francis addressed a first written warning arising as a consequence of several complaints from residents within Wellington Court who had complained that the Complainant was not cleaning the common areas properly and was using dirty fresh water for cleaning the flooring within the common areas, matters that Mr. Francis had already raised with the Complainant in the past. The Complainant was warned that unless he improved his cleaning standards, the management council would have no option but to take further action and that he was to use clean fresh water when cleaning the common areas. Prior to writing that letter, Mr. Francis checked whether the common areas were being cleaned properly. He found that dirty water was being used. When Mr. Francis handed the Complainant the letter, he explained its contents and the reasons for it in Spanish and was satisfied the Complainant had understood it. Mr. Francis explained to the Complainant that fresh clean water was available on the ground floor, and that in carrying out the cleaning duties, it needed to be replaced when cleaning each floor otherwise it would become dirty. The complaints were of a stale smell following

cleaning and which he was satisfied was due to dirty water being used to clean the floors. The Complainant did not accept that he was using dirty water.

- 2.5. Prior to issuing a second written warning on the 6th July 2006, Mr. Francis had had occasion to speak to the Complainant about his storing personal property in the common areas of the building and had requested him to remove those items. The Complainant had informed him that he would remove the items when a van arrived. Mr. Francis considered these items to constitute a fire hazard. Notwithstanding his verbal request, the Complainant continued to store personal property in various storage areas within the building. As a consequence of the Complainant not complying with this verbal instruction, Mr. Francis issued a second written warning letter on the 6th July 2006 concerning the Complainant's failure to abide with the request to remove his personal property from the common areas and also raised the issue of punctuality following complaints that the Complainant was attending work late at 9.30 a.m. and leaving at approximately 12 noon on a daily basis which was not acceptable to the Respondent. He was warned that unless he removed his personal items from the common areas and improved his punctuality/working hours, further action would be taken. Mr. Francis further explained in his evidence that the Complainant had been storing items of property in the salt water tank rooms on the seventh floor of the building which including TV sets, Hi-fi's, washing machines and a mattress. The mattress was used for resting during the afternoons when the Complainant was not working. The Complainant's reaction on being handed the second written warning by Mr. Francis was to raise his voice and to get very upset on being told that he could not store personal property within the common areas. He did not want to remove these items and turned his back on Mr. Francis. As far as Mr. Francis was concerned, the Complainant had fully understood what Mr. Francis had asked him to do/not to do and took the letter with him. He maintained that he had been punctual and Mr. Francis' evidence was that not only had a committee member seen him at 9.30 a.m. at Buenavista at the bus stop, but that he himself had seen the Complainant on a number of occasions at about 12 noon away from the building, and that the Complainant was generally hard to find in the building after 12 noon.
- 2.6. Following the second written warning, Mr. Francis was going down to the building approximately two to three times a week to do spot checks and to see if the cleaning was being carried out properly in the common areas. He had had a number of further complaints from residents. He found that the Complainant continued to store personal unwanted items within the Wellington Court storerooms including old household appliances within the rear bin store walkway, and that he continued to use dirty water to clean the communal main entrances and landings. Nor had his punctuality improved. As a consequence, and because the Complainant had not reacted to the prior warnings and the instruction not to store personal items on the property, he was given a final written warning on the 13th February 2007 that unless his services/standards improved within 21 days, he would be immediately dismissed. Mr. Francis monitored the situation for those 21 days and found no improvement, and that the Complainant continued to store

personal unwanted items within the common areas. Mr. Francis did not know where he was collecting them from. The final written warning was explained verbally to the Complainant by Mr. Francis in Spanish and Mr. Francis believed that the Complainant understood the nature of the warning. His impression was that the Complainant was not interested in what Mr. Francis had to say generally and with respect to the manner of discharging his cleaning duties. There was no reaction from the Complainant. He had continued using dirty water and complaints from residents about this continued unabated. He had contested that he was using dirty water by putting his hand in the bucket. As far as punctuality was concerned, he had been seen by other residents, and the committee member, and Mr. Francis himself on numerous occasions. He gave no explanation for storing those items in the ground floor electricity room, which Mr. Francis considered a fire hazard, nor in the salt water room but did accept that they were his goods.

- 2.7. On the 27th April 2007 Mr. Francis handed the Complainant a letter of dismissal with effect from the 4th May 2007 on the grounds that he had continued, notwithstanding the Respondent's instructions and requests, to use dirty water for mopping the internal common areas, collected large unwanted items and stored these within the rear refuse area, collected other items such as second hand clothes and television sets and stored them within the electricity department utility rooms constituting a fire hazard and for arriving late to work. Mr. Francis handed the letter to the Complainant when he came to collect his wages and he got very upset. Whilst there had been no improvement within the 21 days stipulated in the final written warning, the reason for the delay in dismissal was that the Respondent had a significant decision to make concerning the dismissal and took its time to arrive at that decision.
- 2.8. Following the Complainant's dismissal, AB Cleaning Services were engaged to carry out the cleaning duties during the same hours, but at less cost to the management company as there was no requirement to pay social insurance contributions for the persons engaged to carry out cleaning duties, and there had been no complaints from residents who were very happy with the new arrangements for the cleaning of the estate.
- 2.9. On realising that the Complainant had been given inadequate notice of termination following a meeting Mr. Francis had with employees of the Employment Service, the Complainant was offered a further two weeks notice but to date has not collected those wages, although he has been informed of his right to do so and that it will not prejudice his claim for unfair dismissal if he does collect those wages.
- 2.10. On cross-examination, Mr. Francis acknowledged that in 2001 the Respondent had asked for a pay increase but had no recollection of ever informing the Complainant that he could have one after four years in employment. Questions were raised concerning how the Complainant procured cleaning materials for carrying out his cleaning duties, and Mr. Francis explained that he could purchase those materials from a shop used in Devil's Tower Road with which there was an account, but as

the Complainant said he did not like using the materials sold there, he purchased his own and was reimbursed the costs of purchasing those cleaning materials. When the Complainant was absent from work to attend in the United Kingdom for eye treatment, there were no deductions from pay. The Complainant suggested that the reason there were no complaints from the Respondent up until 2004, is that he had not asked for an increase in wages until that time. Mr. Francis' explanation for the complaints was that by that time, the Complainant had lost interest in carrying out his duties. The Complainant sought to explain that the reason he was out of the building earlier than the allocated hours was because he needed to use toilet facilities in the hostel as there were none within the building and Mr. Francis replied that that did not explain why he was at the Sundial Roundabout during working hours. Mr. Francis explained that the Complainant's wages were increased in line with the RPI each year. The Complainant mentioned that a committee member of the Respondent had used insulting language against him. Mr. Francis stated that he had never heard of these complaints. The Complainant confirmed that he had not said anything at the time as the person who had used that abusive language against him was a friend of his and was a committee member.

- 2.11. In his evidence, the Complainant explained that he had used one of the rooms to change in and had his chairs in that room for that purpose, namely the electricity room. He confirmed that he remembered receiving the warning letters from Mr. Francis. He alleged that each time he requested a pay increase, he would get a warning letter delivered to him by Mr. Francis. He kept these letters at home. He would challenge Mr. Francis about the contents of the letter and whether he was using clean water. He would always arrive at work early. He would store things within the common areas that he was given by residents but if he was told to remove them, he would do so. As and when he was given things, he would store them. He could not remove them during working hours and he had to wait until he had finished. The Complainant insisted that Mr. Francis was trying to make life difficult for him with a view to getting rid of him. He stated unequivocally in evidence that he had not found employment since he was dismissed and had not worked since he was dismissed. It was agreed that his salary prior to dismissal was £6,300 per annum. He did not believe that the reason he was dismissed was because of his Moroccan nationality.
- 2.12. On cross-examination, the Complainant admitted that he had recently done work for two weeks and earned £260. He could not confirm the approximate date on which he had been doing that work. He stated that since his dismissal and when he stopped receiving unemployment benefit of £110 to £120 per fortnight for 13 weeks, he survived on charitable donations from friends of his and the Moroccan Community Association. The Complainant insisted that he had done no other work other than that to which he admitted to on cross-examination. A number of other matters were raised on cross-examination:-
 - (a) As to why it had been alleged in numbered paragraph 8 of the Originating Application lodged by the Complainant ("the Grounds") that the first he

knew of the reason for summary dismissal was in the Notice of Termination form filed with the Employment Service when in fact he acknowledged receiving the dismissal letter from Mr. Francis. The Complainant maintained that the lawyer from the Citizens Advice Bureau must have misunderstood him or he had not explained matters properly to her.

- (b) As to why it was alleged in numbered paragraph 4 of the Grounds that the Complainant had a perfect disciplinary record and at no time during his employment had he received a disciplinary warning or sanction for capability or performance matters. The Complainant stated that he had told the lawyer from the Citizens' Advice Bureau that he had received some warning letters, but that he did not know where they were.
- (c) As to why in numbered paragraph 3 of the Grounds it was contended that the Complainant had a perfect attendance record. The Complainant acknowledged that that was incorrect.
- (d) With respect to paragraph 6 of the Grounds as to why he had alleged that he was not informed in advance of the alleged misconduct which resulted in his summary dismissal. He stated that although letters were written to him, he did not understand their content.
- (e) As to why he alleged that he was dismissed because of his Moroccan nationality. The Complainant said that he had never alleged this. He accepted there was no connection between his dismissal and him being a Moroccan national.
- (f) The Complainant acknowledged and accepted that all letters written by Mr. Francis had been received and he had kept them at home in his jacket. He had not shown these letters to the lawyer at the Citizens' Advice Bureau as he had left them in his jacket at home.
- (g) It was put to the Complainant that having not been paid more money for doing less, he began to carry out his duties badly notwithstanding that he was being paid 2 hours for carrying out duties on a Saturday which he was not required to do and became truculent choosing to ignore Mr. Francis and the warnings he issued. When asked whether he had the warning letters translated, and replying that he had not, he was then asked whether he had then chosen to ignore them. The Complainant said he had shown them to some people who explained their contents. He was asked why then did he continue to store items in the common areas. The Complainant replied that if he was given things on a daily basis, and had nowhere to put them, that is where he would store them. The Complainant denied keeping those goods for sale and to make money. The Complainant denied that that was his motive for continuing to ignore Mr. Francis' instructions not to store such

items on the property. The Complainant maintained that he was confused when he received these letters.

2. **Reason for Dismissal**

- 2.1. By virtue of Section 65 (1) of the Employment Act, the onus is on the employer to show that the reason for dismissal is a potentially fair reason and falls within one of the categories mentioned in that section. If the employer is unable to discharge that burden, then the dismissal is automatically unfair, without the tribunal needing to consider the fairness or otherwise of the reason for dismissal.
- 2.2. I find that the Respondent has discharged this onus, and that the reason falls within Section 65 (1) (b) in that it relates a dismissal relating to the conduct of the employee in refusing to comply with lawful and reasonable instructions.

3. **Was the dismissal fair or unfair**

- 3.1. The Respondent, having discharged the burden imposed upon it to show that the reason for dismissal was a potentially fair reason for dismissal, has no burden upon it with respect to showing whether it was fair or unfair for it to have dismissed for that reason, which is a matter for me to determine on the evidence before me and base on the criteria set out in Section 65 (6) of the Employment Act, namely:-

“Subject to sub-sections (4) and (5) the determination of the question of whether the dismissal was fair or unfair having regard to the reasons shown by the employer shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case”.

- 3.2. In applying Section 65 (6) of the Employment Act to the facts, it is not for the tribunal simply to substitute its own opinion for that of an employer as to whether certain conduct is reasonable or not but to determine whether the employer has acted in a manner which a reasonable employer might have acted, even though the tribunal, left to itself, would have acted differently.
- 3.3. Before dealing with my determination on the issue of fairness, I would refer to the following extract from the Judgment of Browne-Wilkinson J in the case of **Sillifant v. Powell Duffryn Timber Limited (1983) IRLR 91** which was cited with approval in the judgment of Lord Mackay in the leading case of **Polkey v. AE Dayton Services Limited (1987) 3 All ER 974**:-

“Apart therefore from recent Court of Appeal authority and the Lowndes case, the British Labour Pump principle appears to have become established in practice without it being appreciated that it represented a fundamental departure from both basic principle and the earlier decisions.

If we felt able to do so we would hold that it is wrong in principle and undesirable in its practical effect. It introduces just that confusion which Devis v. Atkins was concerned to avoid between the fairness of the dismissal (which depends solely upon the reasonableness of the employer's conduct) and the compensation payable to the employee (which takes into account the conduct of the employee whether known to the employer or not). In our judgment, apart from the authority to which we are about to refer, the correct approach to such a case would be as follows. The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An industrial tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the industrial tribunal in deciding whether or not the dismissal was reasonable within [s 98 (4)]. The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal, not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an industrial tribunal would be likely to hold that the lack of "equity" inherent in the failure would render the dismissal unfair. But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advances it would make no difference: see the example referred to by Lawton LJ in Bailey v. BP Oil (Kent Refinery) Ltd [1980] ICR 642. Where, in the circumstances known at the time of dismissal, it was not reasonable for the employer to dismiss without giving an opportunity to explain but facts subsequently discovered or proved before the industrial tribunal show that the dismissal was in fact merited, compensation would be reduced to nil. Such an approach ensures that an employee who could have been fairly dismissed does not get compensation but would prevent the suggestion of "double standards" inherent in the British Labour Pump principle. An employee dismissed for suspected dishonesty who is in fact innocent has no redress: if the employer acted fairly in dismissing him on the facts and in the circumstances known to him at the time of dismissal the employee's innocence is irrelevant. Why should an employer be entitled to a finding that he acted fairly when, on the facts known and in the circumstances existing at the time of dismissal, his actions were unfair but which facts subsequently coming to light show did not cause any injustice? The choice in dealing with [s 98 (4)] is between looking at the reasonableness of the employer or justice to the employee. Devis v Atkins shows that the correct test is the reasonableness of the employer; the British Labour Pump principle confuses the two approaches".

3.4. This was not a case where an employer could reasonably conclude on the facts known to it at the time of dismissal that no explanation or mitigation could alter its decision to dismiss. The Complainant could at the stage of a final written warning have been notified of the Respondent's intentions to dismiss him and afforded an opportunity to state his case. That opportunity was not afforded to him. Nor was he afforded a right of appeal, which is an important one even if there was no disciplinary procedure in place giving the nature and composition of the Respondent. Whether affording the Complainant that opportunity would have made any difference to the outcome, is a matter I will address below.

3.5. I therefore find the dismissal unfair due to that procedural omission.

4. **Remedies**

4.1. **Re-Engagement:** I have considered whether it would be practicable and in accordance with equity for the Complainant to be re-engaged by the Respondent and do not consider that it would be reasonable for the Complainant to do so. The relationship of trust and confidence between the Complainant and the Respondent had broken down, and in any event, a company now carries out the cleaning services.

4.2. **Basic award:** £2,200. This is a fixed award and in respect of which I am not empowered to make any deductions.

4.3. **Compensatory award:**

4.3.1. Compensation payable under this head must be "just and equitable" in accordance with Section 71 (1) of the Employment Act. I find that the award should be reduced to nil to take into account the fact that the prospects of the Complainant keeping his job were negligible even if he had been afforded the opportunity of a hearing. In reaching this decision, I emphasise what Lord Bridge said in the case of Polkey (supra):-

"There is no need for an "all or nothing" decision. If the Industrial Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment".

4.3.2. I am of the view that the likelihood that the employee would have been dismissed even if a fair procedure would have been complied with would have been 100% and I therefore reduce the award accordingly on the grounds that this would be just and equitable. In determining what is just and equitable, I have taken into account:-

- (a) Mr. Francis' explanation that he explained each warning to the Complainant and that he was satisfied the Complainant had understood them was not

challenged by the Complainant at the hearing. The Complainant admitted that when he received these warnings, others were also asked to explain them to him. He was therefore fully aware of their contents and chose to ignore them.

- (b) The Complainant's explanation in his Originating Application that he had a clear disciplinary record, notwithstanding that he acknowledged receiving these warning letters, was untrue and is not satisfactorily explained by stating that the person who assisted him in completing the Originating Application had been told that he had received them but did not know where they were.
- (c) The Complainant had received explicit instructions not to store personal property in various storage areas within the building on the 6th July 2006 and which had been preceded by a number of discussions Mr. Francis had had with him instructing him not to do so. The Complainant's response to the second written warning when speaking to Mr. Francis was that he did not wish to remove these items, raised his voice, was visibly upset and turned his back on Mr. Francis. When the final written warning was given, there was no reaction from the Complainant to it. His explanation at the hearing that he would store goods within common areas he was given by residents but would remove them if he was asked to do so was altogether unconvincing in light of the nature of the specific instructions and warnings that had been given to him. The Complainant had deliberately refused to comply with lawful instructions and there was no justification for him doing so.
- (d) Whilst the Complainant may have linked these warnings to his request for a pay increase, the fact is that the evidence as to the manner in which the Respondent treated him with respect to wages is that it acted fairly. Nor was any such allegation suggested in the very detailed Originating Application.
- (e) The Respondent would have taken a serious view of the Complainant's failure to adhere to the warnings even if he felt he was being unjustly treated insofar as his request for a wage increase was concerned. That would not have justified his continuing refusal to comply with the lawful and reasonable instructions of the Respondent with respect to the storage of goods.
- (f) There were far too many inconsistencies in the Complainant's account. With specific reference to the matters referred to in 2.12 above, Mr. Francis had explained to the Complainant the contents of each letter addressed to him and he had on his own admission the assistance of others to explain them to him. Having been so informed of their content, he knew of the nature of the warnings. Whoever advised him in the Citizens' Advice

Bureau was wrongly informed by the Complainant that he did not know of the reason for his dismissal until receiving the Employment Service Notice of Termination form, that he had a perfect disciplinary record and had received no disciplinary warnings or sanctions. He simply omitted to show that person the warning letters, the importance of which must have been obvious to him.

- (h) I do not accept the suggestion on the part of the Complainant that Mr. Francis was seeking to make life more difficult for him so that he could be got rid of. I am sure Mr. Francis could have been far more efficient in doing so earlier if that had been his intention rather than wait from a period prior to the 6th April 2005 to the 27th April 2007 within which to do so. That period spanned over two years and if anything indicated a wish on the part of Mr. Francis to act fairly and to give the Complainant every opportunity to do what was required of him in performing his duties. His failure to comply with a specific instruction not to store personal belongings in the building could have resulted in an even earlier dismissal.

4.3.3. Nor do I accept the Complainant's evidence that he suffered loss. The Complainant stated without qualification in his evidence-in-chief that he had not found employment since his dismissal. On cross-examination, he admitted to having done work recently when the Respondent's Counsel put that question more specifically to him. Whilst the Complainant then maintained that he had done no other work other than that to which he admitted, I am not satisfied of that. The credibility of the Complainant is very much at issue. Having failed to disclose income received from a recent job until it was specifically put to him on cross-examination, and when he should easily have recalled that given that it was a recent job, I do not accept his evidence as to loss, given that and the other serious inconsistencies in his evidence.

4.3.4. Section 71 (3) of the Employment Act further provides as follows:-

“Where the tribunal finds that the matters to which the complaint relates were to any extent caused or contributed to by any action of the aggrieved party in connection with those matters the tribunal shall reduce its assessment of his loss to such extent as, having regard to that finding, the tribunal considers just and equitable”.

4.3.5. Had I needed to consider making any deduction from the compensatory award for contributory negligence, I would have done so. The behaviour, action or conduct of the Complainant which would have given me cause to consider a reduction pursuant to Section 71 (3) of the Act, was the following:-

4.3.5.1. The Complainant had the warnings explained to him by Mr. Francis, who I found frank and candid in his evidence. Mr. Francis' evidence was consistent as was his explanation that having explained these warnings to the Complainant in Spanish, he was satisfied the Complainant had understood them. The Complainant also acknowledged in evidence that others had explained those warnings to him, and yet he chose to ignore them and in particular with respect to storing goods in the building.

4.3.5.2. Notwithstanding verbal requests for the Complainant not to store personal property in the building prior to the second written warning of the 6th July 2006, the Complainant chose to ignore Mr. Francis, culminating in the second written warning. The Complainant's reaction to that second written warning was not to question its veracity with respect to the storage of personal items of property in the building, but manifest of his intention to disobey that instruction without any explanation or justification. The subsequent evidence was that the Complainant had ignored those instructions. The fact that the Complainant in his own mind linked these warnings, if he believed this to be the case, to a refusal to increase his wages, merely evidences that he was not of a mind to comply with warnings being given to him about his conduct and performance.

4.4. Accordingly, the total amount to be paid by the Respondent to the Complainant by way of the basic award is £2,200.00.

Dated this 8th day of August 2008



**Mark Isola
Chairman**