IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

I/T No. 7 of 2008

BETWEEN:

LIRIAN TIRADO RAMBLAS

Claimant

and

AML CATERERS LIMITED

Respondent

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**DECISION**

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**Introduction**

1. The claimant is a twenty-three year old Spanish national from La Linea. The respondent company runs a Canteen/Cafeteria at St. Bernard's Hospital. She was employed as a waitress to serve in the bar area. It is apparent from their respective Originating Application and Notice of Appearance[1] that her uninterrupted period of employment begun on 9th October 2006 and ended on 30th November 2007.

2. The ETB forms[2], not disputed by either side, independently show that the claimant was:

   (1) Initially employed on a 14.5 hours per week contract earning £285.75 per month from 9th October 2006 to 21st October 2006;

   (2) Her contract was then formally extended until 6th July 2007 and her working hours increased to 39 hours per week and her pay to £760.50 per month;

   (3) This contract was then extended to an indefinite period on the same terms in July 2007.

3. The claimant's unchallenged evidence[3] was that she worked Mondays to Fridays 8.00 a.m. to 4.00 p.m. and alternate Saturdays 8.00 a.m. to 8.00 p.m. (40 hours a week and 52 hours a week on alternate weeks).

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[1] Dated 27th February 2008 (paragraphs 8 and 9) and 28th March 2008 (paragraph 2 (c))
[2] Notice of Terms of Engagement dated 4th October 2006 and two Notices of Variation dated 2nd January 2007 and 6th July 2007 respectively – exhibits AM (1) to (3)
[3] Paragraph 2 of her witness statement dated 1st December 2008

**The Dispute**

4. This employment dispute arises from the often sour working relationship between the claimant and Javier Morales, the claimant's bar area manager and work colleague. He is also the brother of Adrian Morales, the director and owner of the respondent. Both are Spanish nationals and experienced in the catering business whereas the claimant required some guidance and supervision, at least initially.

5. They have all given witness statements[4] and live evidence[5].

6. In essence, the claimant described herself as a good worker who, in addition to her duties, voluntarily helped out in the kitchen washing dishes. Adrian Morales was in agreement with that[6] and Javier Morales agreed that she worked reasonably well. It is common ground that the claimant and Adrian Morales enjoyed a good relationship throughout.

7. The disputed origin of the friction between the claimant and her manager stemmed, according to her, from being constantly spoken down to and belittled by him, often in the presence of customers at the Canteen. According to Javier Morales he reprimanded her for not speaking well to customers but says he did so privately and in the kitchen of the premises. He had no other reason to take exception with her work performance.

8. Adrian Morales claimed that the claimant did not like being reprimanded by her manager and would often complain to him about it adding threats to resign. Both Adrian and Javier Morales claimed that her work performance was deteriorating towards the last two months of her employment. Adrian Morales further claimed that he had to draw her attention to his concerns over her choice of clothing and hair dress as inappropriate for work. Nothing more turns on her work conduct and performance.

**Incident(s)**

9. This apparent and intermittent ongoing-tension between the claimant and Javier Morales peaked twice according to her and only once according to Adrian Morales.

10. I shall deal with them in reverse chronological order for evidential ease and exposition.

*The Doctor's Appointment*

11. Sometime in November 2007 the claimant had a doctor's appointment in Spain. It is common ground between her and Javier Morales that they agreed

[4] Adrian Morales' is dated 12th December 2008 and Javier Morales' is dated 6th January 2007
[5] The claimant on 19th and 21st January 2009 and Adrian and Javier Morales on 21st January 2009
[6] He reluctantly accepted she would help in the kitchen, if required

beforehand that she could absent herself from work and attend[7]. However, she did not. She blamed Javier Morales for turning up late for work knowing her appointment was in the early morning. He blamed her instead for having forgotten to go but accepted he had also forgotten denying her account.

12. The end result was some kind of serious flare-up between both at their place of work with counter-allegations levelled at each other.

13. The claimant called her father, who picked her up and, she says, never returned to work whereas Adrian Morales claimed she did the following day. This episode is likely to have occurred on Thursday 29th November 2007[8].

*The Resignation Letter*

14. At some stage, the claimant prepared a letter of resignation and was ready to leave her employment. An alleged copy of this letter was produced, for the first time, in the bundle of documents filed by the respondent's solicitors. It was unsigned and undated[9]. It was not disclosed to the claimant's solicitors as part of the standard disclosure order made by this Tribunal and it ought to have been for obvious reasons.

15. The dispute revolved on when this letter was handed by the claimant to Adrian Morales. She claimed it was sometime during July or August 2007 with the respondent claiming it was sometime towards the end of November 2007.

16. During her evidence, the claimant claimed she had kept a copy of her letter at home. I made an order that she should produce it. Albeit an alleged copy, it refers to the month of August 2007 and is also unsigned. Mr Caetano did not produce it before – he was unaware of its existence and the claimant, I accept, had forgotten about it and her memory triggered whilst giving evidence.

17. Significantly, the texts of both letters is identical and a contemporaneous record of events irrespective of its disputed timing.

18. It is common ground that Adrian Morales tore up a letter of resignation when handed to him by the claimant personally; that he wanted her to continue at her place of work; and, that he offered her a job in the kitchen washing the dishes where she would not be under his brother's supervision with less hours of work but at the same hourly rate. He says she accepted this and came to work the following day, which the claimant refuted, claiming he did not want to see her out of a job.

19. The evidence on timing is starkly contradictory and recollections are either badly wrong or self-serving on one of the sides to this dispute complicated by the fact that precise memory of events can also fade over time.

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[7] She claimed it was a week before and he claimed it was only a couple of days before, which is, really, irrelevant

[8] It is the date when Adrian Morales signed her Termination Notice – exhibit AM (4)

[9] Exhibit AM1

**Findings of Fact**

20. I am satisfied, on a balance of probabilities on the evidence before me, that the claimant prepared her letter of resignation sometime in the late part of July or early August 2007 and did hand it personally to Adrian Morales in early August 2007. I reject the latter's evidence as unreliable and equivocal in respect of this matter. I was not impressed by it[10].

21. I am likewise satisfied that the claimant took holiday leave sometime in July 2007 and that Javier Morales had taken leave previously sometime in June 2007. Her leave, I accept, coincided with the annual fair of La Linea which starts every year on 14th July – a fact which is well-known in Gibraltar and confirmed by the claimant in evidence. Despite this Tribunal requesting documentary evidence from the respondent to independently verify these dates beyond any doubt, counsel for the respondent advised that his client had instructed him that he did not keep any records of this – not only is this assertion by the respondent utterly surprising but a bad industrial practice and possibly in breach of the law, if it is true.

22. With reasonable certainty, this Tribunal is satisfied that there was a two-months cooling off period, or thereabouts, mutually agreed or assented to (expressly or tacitly) between all three protagonists due to the intermittent bad atmosphere between the claimant and Javier Morales at work. Furthermore, the claimant was not challenged that Adrian Morales had given her and his brother an extra 15 days of leave each for having worked on their own, with some assistance from Adrian Morales, whilst the other was away from work.

23. I am also satisfied that the claimant must have handed in her letter of resignation sometime during the first fifteen days of August 2007 before Javier Morales was due to return to work from his own leave – it stands to reason that after her vacation in July 2007 she returned to work as opposed to having almost five consecutive weeks of leave, which would be most unusual and extremely peculiar for a small business. Adrian Morales' solution was offering her a different job description on less favourable terms[11] to alleviate the situation which she did not accept. In any event, she did carry on her duties as a waitress without any changes being made.

24. I am likewise satisfied that Javier Morales did upset the claimant to such an extent that she left work never to return. I reject his evidence that she had forgotten her doctor's appointment. It is very likely that the situation was as the claimant said it unfolded. The Tribunal formed the impression that Javier Morales was not a person of many words but could potentially be very short with them. The text of the resignation letter is consistent with her account – she considered Javier Morales's conduct towards her unacceptable without justified motives. I am satisfied her letter is not unworthily tendentious.

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[10] He accepted he was prepared to include a false reason for her termination so that she could claim unemployment benefit

[11] 3 hours less of work, at the same hourly rate, and washing the dishes instead

25. The conflicting recollection over the words used, in this case, is not of major significance because the essence of what was said is the same: Javier Morales had had enough of the claimant and he made it clear she was not welcomed there anymore and she understood it exactly. I accept, however, that Javier Morales vented his anger or frustration at the claimant but would not have taken it upon himself to have dismissed her there and then without his brother's knowledge and approval. What he said, I hold, was conditionally toned and an implied threat that dismissal was on its way and inevitable. Adrian Morales, by offering her less favourable terms[12] thereafter, was condoning his brother's stance and attempting to bring their employment relationship to an end.

26. I am satisfied that the claimant was not entirely measured in her response to having missed such an important appointment and that the flare-up concluded as a joint remonstration of animosity or tension. The claimant came across as a strong character, quick and ready to challenge even if it was based on a misunderstanding on her part as evidenced by her reaction to one of counsel's questions during cross-examination. I hold the view that post August 2007 she was less willing or able to avoid moments of pique with Javier Morales – she had wanted to leave and was probably nearing or at the end of her tether despite having been convinced to stay on by Adrian Morales. She needed the job and stuck it through until it reached the final showdown at the end of November 2007.

27. The text of the resignation letter, for a second time, contradicts the evidence of Adrian and Javier Morales. It is inconceivable that the claimant would have stayed on after this incident for as long as was necessary, over and above the contractual period of notice, so that the respondent could find and train a substitute waitress, as the text itself sets out.

28. Finally, I am also satisfied that Adrian Morales failed to handle the tensions between his brother, as an employee of his company, and the claimant in a reasonable fashion or at all. He vacillated and prevaricated in this regard and was largely permissive of such tensions and its escalation. Such responses as came from him do not, in my view, fall within the band of reasonable responses to be expected of a reasonable employer. He could have given the appropriate notice of termination to the claimant at any time before the anniversary of her contract and he chose not to – that, in itself, undermines his brother's conduct and the respondent's evidence. The only reasonable conclusion that can be drawn from this is that the claimant was not deemed by him, as her employer, to be entirely or substantially to blame for the tensions at work and that Javier Morales was not an easy manager to work with – for whatever reason. Towards the end she may have become somewhat less tolerant and challenging but no more. The tearing up of such an important document, in the manner he did, is also indicative of significant lack of judgment and objectivity in dealing with this situation.

[12] See paragraph 3 of her witness statement dated 1st December 2008, which was not challenged

**The Law**

29. Firstly, this Tribunal must be satisfied of two requirements. The claim was presented within three months before the effective date of termination[13] – section 70 (4) of the Employment Act ("EA") – and that she worked for not less than 52 weeks ending with that same date – section 60 (1) (a) EA. The respondent has not taken issue with either.

30. Secondly, the onus is on the claimant to show she was dismissed – sections 64 (1) and (2) (a) or (b) EA.

31. Counsel for the claimant had some difficulty, in drafting terms, when classifying the respondent's conduct. This is not entirely surprising having heard the evidence because overlaps often do exist between cases of constructive dismissals and outright/unilateral withdrawal of terms coupled with offering less favourable ones (sometimes wrongly referred to as 'summary dismissal'). Mr Caetano relied upon a decision of this Tribunal in **Manuel Perez Garcia v A & M Scaffolding & Cradles Limited I/T No. 6 of 2003** ("**A & M Scaffolding**"), and, in particular, paragraph 123 in his support of his contention that this was an outright dismissal by Javier Morales further relying upon the principle established in **Hilton International Hotels (UK) Ltd v Protopapa [1990] IRLR 316** ("**Hilton**") set out at paragraph 409 in Harvey on Industrial Relations & Employment Law – Volume 1 ("**Harvey**") – that the "termination" need not come directly from the employer but may do so from a supervisory employee (the "first principle").

32. Alternatively, he submitted the four conditions to establish constructive dismissal set out in paragraph 403 of **Harvey** were satisfied in this case drawing attention again to the **Hilton** case at paragraph 447 of **Harvey** that reprimanding in a degrading, intimidating or humiliating manner is sufficient conduct for this purpose (the "second principle").

33. I was not addressed on the law by counsel for the respondent.

33. This Tribunal has considered the full report in the **Hilton** case after reserving judgment. I consider, as a matter of law, that it is good authority and to be followed in Gibraltar in these two matters of principle. However, since I have not had the benefit of full and considered arguments from counsel on the first point of principle, I resist in this case any temptation to rule in its favour and distinguish the **A & M Scaffolding** case because the termination in that case (demotion on clearly less favourable terms as opposed to an outright summary dismissal) emanated immediately and directly from the employer and not any other employee having the employer's actual or ostensible authority to do so.

34. "Employer" is not a defined term in section 2 EA and section 70 (1) EA refers, in (a) "*to action ...taken by the employer or by a person acting on the employer's behalf* and in (b) "*such action constituted a breach...on the part of the employer...or of the person acting on the employer's behalf*". The

[13] See section 64 (5) (b) EA

language is apt to go beyond English statutory law, as it then was at the time of the **Hilton** case, but the matter will have to be decided in the future, if it arises.

35. Also, in view of my findings of fact at paragraph 25 above, I am satisfied that I should not rule in the claimant's favour and dismiss her first ground.

36. I am, however, satisfied that this claimant was constructively dismissed – see section 64 (1) and (2) (c) EA by reason of Javier's Morales conduct as found proved which, in accordance with section 70 (1) EA and/or the second principle established in the **Hilton case**, is to be regarded as the respondent's conduct - subsequently affirmed (and this is clearly not a necessary requisite for these purposes as a matter of law) by Adrian Morales in offering the claimant less favourable terms of work. All four conditions are satisfied and I am, therefore, satisfied that there was a breach of trust and confidence that went to the root of the contract that had surfaced in a major way in August 2007, which intermittently continued until it surfaced again in a major way and for the final time in November 2007 with the claimant bringing it to an end as she was entitled to do.

37. In reaching this conclusion, this Tribunal has reminded itself of two important matters restated in the **Hilton** case by Mr Justice Knox at paragraphs 19 and 9. Firstly, it is not always "*useful to compare one case with another because each case depends on its own circumstances*". Secondly, each case depends, as a matter of logic, "*not upon the number of grounds for claiming that there has been a constructive dismissal but upon the validity of any ground which, at the end of the day, survives for consideration by the Tribunal. Analogies were drawn in argument about straws on camels' back but we feel that where there is only one significant breach it must, in logic, depend entirely on the weight of that breach which eventually breaks the camel's back whether or not there has been the sort of repudiatory breach of conduct on the employer's part that justifies a finding of constructive dismissal*" [my underlining].

38. I am satisfied that her working conditions had become intolerable by the summer of 2007 and November 2007 and that Javier Morales was substantially responsible for that. Likewise, the respondent failed to address adequately or at all this prevailing situation within his business and despite offering some kind of temporary but ineffective relief was at fault for her finally leaving in November 2007.

39. Thirdly, I must consider the provisions of section 65 (1) (a) and (b) together with sub-section (2) and hold that the respondent has not advanced any evidence to substantiate any real reason for dismissal or one that falls under those statutorily provided. In accordance with what this Tribunal said in the **A & M Scaffolding** case, at paragraphs 129 and 130, failing to discharge this onus makes the dismissal automatically unfair.

40. I shall, however, consider whether or not the dismissal was fair for the sake of completeness. The burden of proof is neutral on this issue. I agree with and

adopt the approach of Mr Justice Knox in the **Hilton** case, found at paragraphs 22 and 23, in relation to this same matter:

"*Cases of constructive dismissal vary very widely and there can be cases where such a question demands separate and detailed consideration...But at the other end of the scale it is equally clear that on the facts it is sometimes perfectly clear that if the employer is guilty of constructive dismissal it is hopelessly unarguable to suggest that the dismissal was in the circumstances fair. Circumstances alter cases and one finds both categories in practice*".

41. In this case, the respondent did not plead fair dismissal as an alternative, no evidence was tendered to that effect and counsel was clearly not briefed to argue it before me. I find, on either basis, that the dismissal of the claimant was unfair and in breach of her right not to be unfairly dismissed under section 59 (1) EA and that her claim is well-founded under section 70 (1) EA.

**Compensation**

42. Under section 70 (3) EA the Tribunal is obliged by law to make an award of compensation payable by the respondent to the claimant in respect of her dismissal.

43. Under sections 71 (1) and 72 (1) EA and under paragraph 2 of the ***Industrial Tribunal (Calculation of Compensation) Regulations 1992*** the Tribunal is obliged to make a basic award of **£2200.00** in the claimant's favour, which is to be disregarded under what follows.

44. Under sections 71 (1) and 72 (2) EA this Tribunal is obliged to compensate the claimant for the losses she has sustained as a result of the dismissal and, such losses are attributable to the respondent. Bearing in mind the following:

(1) It shall be such amount as this Tribunal considers just and equitable in all the circumstances of this case;

(2) A claimant is under a duty to mitigate her losses;

(3) Where a claimant caused or contributed, to any extent, to her dismissal the Tribunal is obliged to reduce that loss as it considers just and equitable.

(4) The maximum amount cannot exceed the amounts provided in paragraph 3 (a) or (b) of the ***Industrial Tribunal (Calculation of Compensation) Regulations 1992***[14] as read in conjunction with the ***Conditions of Employment (Standard Minimum Wage) Order 2001***[15] and must be the lesser of the two.

45. The claimant claims the total sum of £9652.75 - 55 weeks at £175.50 from her dismissal to 19 December 2008[16]. The respondent's counsel did not challenge

[14] As amended by Legal Notice 93 of 2008 dated 4th December 2008
[15] As amended by Legal Notice 107 of 2008 dated 18th December 2008
[16] Claimant's additional witness statement dated 19th December 2008

this evidence in cross-examination but the Tribunal invited him to do so. The claimant's counsel, very fairly, did not object despite it being after he had re-examined his witness. I am satisfied, despite counsel's valiant attempt to do so without very much to go on, that the claimant tried to mitigate her losses unsuccessfully.

46. This Tribunal, in accordance with its duty, independently considers that the claimant contributed to Javier Morales' open outburst in November 2007 even if marginally; she was inexperienced in the catering business and, at least initially, required some supervision and some of the reprimands were possibly also called for and possibly not all of them were entirely unmerited or all in the presence of customers; in her letter of resignation she also points out to a lack of understanding with Javier Morales; she only worked for the respondent for a year and had her resignation been accepted in August 2007 she would, as a possibility, have still been unemployed today but with no legal redress against the respondent for unfair dismissal; she was treated to an 15 extra days of leave in August 2007 despite not being entitled to them under her contract of employment or legally; the respondent was not wholly insensitive to the claimant; her young age should enable her to have better prospects in the employment market, difficult as it may currently seem, particularly because it has been clearly established in this case that she is a good worker; and, she may also be entitled to some form of unemployment benefit, either here or in Spain, once her termination papers are put in order after this ruling.

47. The claim for loss of income must be payable net of tax liability – neither counsel alluded to this in their final addresses.

48. The Tribunal has, within the limits provided by Parliament, discretion to determine the amount of compensation. In fairness to both sides and taking all the circumstances of this particular case into account, it is of the view that it is just and equitable that the claimant should be paid the sum of **£4800.00** by way of compensatory award.

49. Thus, the total amount of compensation awarded and ordered is **£7000.00**

Dated this 28th day of January 2009

**Stephen Bossino**
**Chairman**

Counsel
Mr Nicholas Caetano for the claimant
Mr Kerrin Drago for the respondent

Solicitors
Messrs Caetano & Co for the claimant
Messrs Isolas for the respondent

Hearing dates: 19th and 21st January 2009