

INDUSTRIAL TRIBUNAL

Ind. Case 2 of 2009

Eric Hammond

Complainant

-and-

Gibraltar Taxi Association

Respondent

Mr. Kenneth Navas for the Complainant
Mr. Christopher Allan for the Respondent.

JUDGMENT

BACKGROUND

According to the originating application filed on the 6th day of January 2009 by the Complainant he was dismissed "*as office Clerk performing as Office Manager and recognised as such*" on the 20th October 2008 for "*numerous allegations of gross misconduct made which despite not having been proved resulted in*" his dismissal.

By Notice of Appearance dated the 29th day of January 2009 the Respondent confirmed that the Complainant had been dismissed for "*serious acts of misconduct*" on dates "*to be confirmed*" and (1) denied that the Complainants' dismissal was unfair and (2) required the Complainant to provide further and better particulars of the grounds on which the Complaint was filed.

The Complainant was originally represented by Mr. Nicholas Caetano but sometime in 2010 Mr. Kenneth Navas took over the conduct of the case. The Respondent whilst represented throughout by the same firm nevertheless had different counsel with the conduct of the case; i.e. from Ms Gillian Guzman QC to Mr. Christopher Allan.

Some time in 2009/2010 Mr. Stephen Bossino was appointed as the Chairman of the Tribunal to hear this case; and indeed on the 6th day of December 2010 he made various practice direction orders with regard to it. Unfortunately, for one reason or another, Mr. Bossino stepped down as Chairman of this case prior to the hearing commencing on the 4th day of July 2011 and, even more unfortunately, no Chairman was formerly appointed in substitution until the 2nd day of May 2013 when I was appointed. The considerable and inordinate delay that has therefore occurred between the date of dismissal on the 20th day of October 2008

and the hearing of the Complaint commencing on the 17th day of March 2014 has been unsatisfactory to say the least and resulted in greater allowances than normal having to be made for witnesses recollections of events, chronology and dates thereby making it more difficult for this tribunal to conclude where the truth lies with reference the various aspects of this case testified to by any particular witness.

In any event the practice directions of the 6th day of December 2010 did result in Mr. Navas on behalf of the Complainant filing a thirty-one page Further and Better Particulars of Claim. The filing of this document did not elicit from the Respondent the filing of an amended Notice of Appearance or other supplementary document and that is how matters stayed until the 10th day of July 2013.

On the 10th day of July 2013, I held a practice direction hearing with regard to this case. On that occasion Mr. Ian Winch, on behalf of the Respondent, applied to have the Complaint filed dismissed on the grounds that the Complainant following from the inspection of documents disclosed had failed to provide the Respondent with photocopies of some documents which it had requested in two e-mails and a letter. I did not accede to Mr. Winch's application and thereafter made various practice direction orders which eventually lead us to start the hearing of this case on the 17th day of March 2014. Unfortunately, for one reason or another, ranging from availability of one particular witness and counsel and/or premises, the hearing of this case was not heard on consecutive days.

I point out at this stage that I have read the documents contained in the various bundles before me as well as all the witness statements and the exhibits attached to those and have heard the tape recording presented. I have also taken into account the oral evidence given before me spanning over many many days and have read the skeleton arguments presented and all the authorities drawn to my attention by both counsel. I thank Counsel for both parties for all the assistance they have given me throughout the proceedings.

In this judgement I may quote from the verbal evidence given before me as set out in my notes but this does not signify that I have not taken the contents of the witness statements tendered into account when deciding as to the facts of the case. Having said this, I point out that in the case of some witness statements tendered by the Respondent I have treated their contents with some caution since in the course of the hearing it became clear to me that certain witnesses had signed statements prepared by Counsel which provided for factual content which was not in their personal knowledge and/or which did not conform to their recollection of events as at the time they gave evidence. In saying this I emphasize that I do not mean to imply or suggest any wrong doing on the part of counsel.

A number of the Respondents' witnesses referred in their witness statements to wording which in effect or practice was similar to the following:-

I have read the Witness Statement of Ronald Ignacio, and in order to avoid repetition, rely on the statements made therein regarding the Complainants behaviour at work.

The problem with this, and Mr. Zammitt to his credit admitted to it, is that the witnesses either did not read any or all of Mr. Ignacio's witness statement before signing their own and/or could not actually recall the events, either in whole or in part, referred to by Mr. Ignacio in his witness statement. This being the case when particular witnesses have not made specific mention either in their statements or when giving evidence to particular events etc then I have taken it that they have given none or little evidence of weight on the issue.

In considering the evidence of a good number, but not all, witnesses that came before the Tribunal, I have also taken account of the fact that on numerous occasions a slant was given to the evidence tendered or side comments and/or statements made by the witnesses concerned which appeared to have been drawn from thin air or which sought to portray individuals or events in the worst or the best possible light depending on perceived advantages that could be gained, and, further that there appeared to be a habit amongst witnesses of talking in absolutes about events/conversations which they had no personal knowledge of and in respect of which they could not recollect how it came to their knowledge or how it did so. There is no doubt in my mind that even after all these years there is great antagonism between the Complainant and virtually all of the persons who gave evidence on behalf of the Respondent and consequently each persons evidence has to be treated with caution even after making allowances for the time that has elapsed since events occurred. Having said all of that, I emphasise that I am quite aware and have taken into account the unfortunate delay that has occurred in the hearing of this case and therefore that it is only natural that witnesses should at times be mistaken or confused about the sequence of events, or, the contents of conversations etc, or, simply not recollect details put to them, or, be inconsistent with regard to them; this is only natural.

THE CASE FOR EACH PARTY

It is the Respondent's case that as a result of an incident that took place in December 2007 between the Complainant's wife and an employee of the Respondent, the Complainant for purely personal reasons tried to persuade the Committee of the Respondent to dismiss the employee in question for no good reason. When the Respondent refused to do so, the Complainant feeling aggrieved that he had not been supported in the matter after working for the Respondent for so many years, began a campaign of

obstructiveness against the Committee who were trying to introduce new policies and practices in the running of the business, whilst at the same time making life difficult for the employee in question. Following a second incident in February 2008 between the Complainants wife and the same employee the Complainants behaviour worsened in both aforementioned respects. The matter escalated still further when the Respondent granted that same employee retrospective overtime pay whilst refusing the Complainants own long standing pay claim. This led to the Complainant encouraging the Respondent's employees to air their grievances to the Respondent and to appoint him as shop steward, to involve the Union in support of his appointment as shop steward against the wishes of the Respondent, to become more obstructive, insubordinate and disrespectful to the Committee. This, in turn led to the Complainant being given a warning and then, within a very short time afterwards, a final warning but matters did not improve. Matters then came to an explosive head when information on a computer and on back up pen drives suddenly went missing as a consequence of which the Complainant was suspended pending an investigation. Once the investigation was concluded the Complainant was summoned to a disciplinary hearing before the Committee of the Respondent which he attended with his union representative but the Complainant failed to reply substantively or at all to the various allegations put to him. Following the hearing the Complainant was dismissed for:-

- (a) refusal to work with and victimisation of Miss Ocaña;
- (b) failure to attend to his duties as a result of the victimisation including refusal to work overtime;
- (c) failure to keep important documentation relating to fuel safe, bank cheques and chase up arrears amounting to £50,000;
- (d) failure to ensure that the SAGE software was kept safe;
- (e) unacceptable attitude and behaviour towards the Executive Committee including abuse;
- (f) failure to implement policies and decisions made by the Executive Committee.

The Complainant, as was his right under the Constitution of the Respondent, appealed against the decision of the Committee of the Respondent to the membership but that membership refused the appeal by endorsing in a vote the decision of the Committee to dismiss the Complainant. In consequence of all of this, the Respondent avers that the Complainants' conduct amounted to conduct which gave the Respondent sufficient and a fair reason at the very least to dismiss him and that in all the circumstances of the case the Respondent acted reasonably in so dismissing him and followed a procedure which overall was fair to the Complainant. The Respondent repeatedly emphasised that (a) the Complainant was at all times aware of the allegations made against him through formal and informal discussions with members of the Committee (b) the Complainant was given ample time in which to mend his ways (c)

the Complainant was given plenty of opportunity to put forward his side of the story including the opportunity of attending before two adjudicating bodies and (d) at all times the Committee were prepared to work with the Complainant and find a resolution to the problems but that the Complainant refused all attempts to resolve matters and was simply interested in imposing his wishes on the Respondent.

On the other hand, it is the Complainants' case that prior to July 2008 there was nothing about his conduct and/or performance that the then Committee of the Respondent, or indeed any previous Committee, had any reason to complain about and, in point of fact, had ever complained about and this was the reason why there was no mention in minutes of complaints against him, or, the issue of warning letters against him, or, any other documentation to show that there had ever been any complaint by or reason for the then or any other Committee to complain about him. The Complainant states that problems first arose when the Committee in July 2008 decided to retrospectively consider and grant a pay claim to Miss Ocaña whilst at the same time failing to consider or indeed grant the Complainants own pay claim which had been simmering on the back burner for some thirteen years. As a result of this decision, the Complainant in support of his pay claim, and in furtherance of the rights of his co-workers and self with regard to various employment grievances held, took a series of steps to which the Respondent reacted by singling him out and issuing him with the two warning letters in a two fold attempt to dissuade him from pursuing his pay claim and in an attempt of making an example of him so as to ensure that the other staff members dropped their grievances against the Respondent and got in line. The Complainant avers that the allegations contained in the warning letters were untrue and unfounded and simply served to justify the steps that the Committee was taking against him; proof of that being that as soon as the Complainant was dismissed the staff withdrew from the Union and dropped their claims/grievances. It is the Complainants contention that when the dispute between the Union, on behalf of the staff of the Respondent, and the Respondent began to be aired in the local media this bad publicity was the last straw for the Respondent and was what really caused the Respondent to suspend and then dismiss the Complainant on what can colloquially be said to be trumped up charges. The Complainant avers that the above-mentioned reasons given by the Respondent for the dismissal were fabricated, embellished and/or unfairly relied on in an attempt to justify the dismissal on reasonable grounds and that in point of fact the real reasons for his dismissal were (a) that there was a personal malaise between Messrs Ignacio, Zammit and himself (b) that he had become a representative of the other staff members of the Respondent and helped them put their grievances before the Committee (c) that he had involved the Union in the staff's grievances and (d) that as a consequence thereof the Union had threatened industrial action. Moreover, it is the Respondents contention that the procedure followed by the Complainant in suspending and then dismissing him, inclusive of the appeal, was flawed,

unfair, contrary to the provisions of the Constitution of the Respondent and unjustified/unreasonable / in breach of natural justice.

That then, very briefly put is the case for each of the parties as I have understood it.

THE HEARING

I am not sure if this is the longest running industrial tribunal case ever in Gibraltar but it must surely rank amongst the top. The hearing commenced on the 17th March 2014 and continued on the 18th to 28th March, 4 and 7 to 9th April 12th and 13th May, 11th June and 13th October 2014. In the course of all those days the following persons gave evidence, some of them for very lengthy periods of time; Eric Hammond, Ralph Capurro, David Chrone, Charles Sisarello, Ronald Ignacio, John Gonzalez, Paul Balban, Clive Zammit, Hazel Macedo, Peter Desoiza, Ronnie Alecio, Michelle Vinet, Jasmine Bacarisa and Claudette Ocaña. The hearings at times produced heated retorts from witnesses and counsel but in the whole matters proceeded satisfactorily notwithstanding the length of the sittings. There was a very noticeable undercurrent of antagonism between people who had previously worked together amicably (apparently) and this resulted in some witnesses making adverse comments of one kind or another whenever the opportunity offered itself. Embellishment, generalisation, exaggeration, failure to answer questions have been a recurrent theme on which counsel for both sides have addressed me and quite rightly to.

The Complainant sought, no doubt in an attempt to embarrass the Respondent, to raise issues which had little to do with the claim before this Tribunal but had everything to do with malpractices and, especially these days, socially unacceptable fiscal behaviour. There is little doubt that the Complainant felt very aggrieved and angry at the Respondent and still does. On the other hand, the Respondent, whilst accepting that certain long established practices had to change, sought to minimise the issue of past practices and portray the Complainant as being the cause either for the ills of the association or the person preventing change. There is no love lost between the parties even after so many years have elapsed and this made the task of determining the case even harder.

CHRONOLOGY OF EVENTS

It is encumbrant on me to establish to such an extent as is reasonably possible in the light of the evidence before me the chronology of events in this case and the following are my findings on this issue based on the evidence heard and taking into account the various witness statements and exhibits etc. To establish the chronology has been far from easy in the light of the fact that witnesses were, apart from everything else, rarely able to pinpoint dates; much of what was alleged to have occurred was not

documented at the time and peoples recollections of when things occurred and the sequence of occurrence were sometimes wayward.

The Respondent is a registered trade union since 1957 whose objects are to organise the taxi owners in the taxi trade, to further the interests of said taxi owners, to regulate relations between taxi owners and taxi drivers etc. The Respondent is governed by a Constitution which sets out its objects and the rules governing membership, the calling of meetings, the powers and duties of the Executive Committee etc. As at the time of the events relevant to this case the Constitution under which the Respondent operated was that passed in 1985. I pause here to point out that under Rule 9 of the Constitution:-

- (i) the President shall *“in conjunction with the General Secretary and treasurer he shall superintend the general administration of the affairs of the Association”*;
- (ii) the General Secretary shall *“conduct the business of the Association and shall carry out the instructions of the Executive Committee”*; and
- (iii) the Treasurer shall *“be responsible for the financial books on all money the Association”* (bad printing has resulted in bad English).

In his closing submissions Mr. Allan has submitted, on the basis of a statement made by Mr. Gonzalez when giving live evidence, that the Constitution disclosed to me had been amended by a vote at one or other unknown Annual General Meeting of the Respondent though it had never been put in writing. There is no evidence whatsoever other than Mr. Gonzalez’s one statement very late in the day to show that this was indeed the case. Moreover, this begs the question whether there are supposedly other amendments that have not been put in writing and, if so, whether one should put any relevance whatsoever on the Constitutional document put before the tribunal by consent. The provisions of section 11(1) of the Trade Unions and Dispute Act are relevant in this context and I will refer to it later on. Suffice to say at this point that I do not accept Mr. Gonzalez’s evidence that the Constitution presented to me had at any time been amended.

The Complainant employed the Respondent in September 1995 and the ETB Notice of Terms of Engagement form filed states he was employed as an *“office clerk”* working a 35 hour week. The Complainant has sought to make much of the fact that his official job description during the entire period of his employment with the Respondent remained as *“office clerk”*. It is undoubtedly true that as far as the official ETB records are concerned that is the case since the Respondent never filed a Notice of Variation of Terms of Employment. However, the Complainant himself, and indeed

every other person who worked for the Respondent, regarded him as being the office manager. This being the case, and in the absence of the production of any document showing his duties or responsibilities or providing instructions as to particular tasks, I have determined that he would have such duties and responsibilities as such a post would normally carry in the business such as that of the Respondent (bearing in mind the nature and practices of the Respondent) and obviously under the direction and instructions of the Executive Committee of the Respondent.

In July 2007, the Respondent employed two persons as telephone operators; namely Claudette Ocaña and Jacqueline Barea. At the time Miss Ocaña and Miss Barea were employed the Committee decided (for reasons that are not relevant to this case but which settled a dispute between them) to engage Mr. Mario Diani as a telephonist. This decision in effect meant that one of either of the recently engaged Miss Ocaña or Miss Barea was surplus to requirements. The Respondent instead of dismissing one of them resolved the situation by having each of the women spending an alternate week as a telephonist and the following week in the office as a messenger. I pause here to comment that Ms Ocaña was only a messenger with the duties and responsibilities that such a role normally carries. Ms Barea has not given evidence in this case notwithstanding that she would have been in the office as often as Miss Ocaña was and that her evidence may have been interesting on some issues.

It is common ground between the parties that shortly after Miss Ocaña commenced work in the office and until December 2007 inclusive, the Complainant and Miss Ocaña regularly did overtime in the office together. There are differences of opinion as to why it was Ms Ocaña and not other members of staff that did the overtime during this time but suffice to say that whatever the reason the Complainant and Ms Ocaña spent long periods of time in the office without a hint of a problem.

It is not clear as to why the overtime was required in the first place. According to Ms Ocaña during the overtime done the Complainant would dictate letters to her or they would sort out documentation related to the 50th Anniversary of the Association. According to the Complainant there was extra work at around this time since he was trying to obtain more work for the Association from Inter Cruises. Whichever way one looks at it, the essence is that until the xmas party in December 2007, according to all the witnesses who have given evidence on the matter with the exception of Ms Bacarisa (who, mistakenly in my view, referred to the atmosphere being tight due to Mrs Hammonds visits to the office), the atmosphere within the office and the comradeship between the Complainant and staff was generally good.

It is also common ground that after December 2007, the Complainant and Ms Ocaña no longer did any overtime together; as distinct from either one

of them doing overtime individually. Here again there is a difference of opinion as to why this was. According to the Complainant, it was because Ms Bacarisa decided to start doing overtime again as she was feeling the pinch and she had seniority over Ms. Ocaña. According to Ms Ocaña, it was as a result of the December incident between Paulette Hammond and herself. According to Ms Bacarisa she does not remember doing any overtime after December 2007 although she cannot be sure. I have come to the conclusion that no overtime was done after December 2007 by the Complainant jointly with either Ms Ocaña or Ms Bacarisa. This is not to say that any of them did not do overtime individually during January to August 2008.

It is common ground that an incident occurred on or about the 22nd December 2007 (there is a dispute as to the exact date) involving various members of the Respondent's staff and Mrs Hammond which was unfortunate if nothing else. There is a dispute between the parties as to who was present during the incident in question, what was said and how the incident actually occurred. It is unfortunate that Mrs Hammond never gave evidence since after all she was the main player (as it were) in this and the February incident referred to below. The mechanics of the incident are irrelevant since it is the consequences that flowed from this incident that are of some importance to this case.

It is the Complainants' case as stated by him to the Tribunal that:

"my work performance was not affected by the incident in December. I carried out my work irrespective of the situation that had arisen";

"I was a bit uncomfortable with Ocaña as a result of this incident";

"after the December incident Ocaña hardly did any more overtime with me";

"I did not state to Ignacio shortly after this and tell him that I had personal problems with Ocaña and that he had to dismiss her..... I did not state it to Mr Zammit either".

"I did not seek to have Ocaña dismissed".

"I do not accept that I began to ignore Ocaña. I do not accept that for days on end I would not give her work."

"This incident was discussed by me with my wife and she was upset but it did not cause difficulties between my wife and self. At no time did she ask me whether I was having an affair with Ocaña."

“Nothing changed after the December incident. It was just a bit uncomfortable.”

“After December 2007 the issue of my working with Ocaña was not a serious problem in the relationship between my wife and self. The incident in December we talked about it and that was the end of the questioning.”

“Between December and July Ocaña was not a subject of conversation between my wife and self in our personal life.”

On the other side the version is somewhat different. Thus, by way of sample, the following statements were made by the Respondents witnesses in the course of the oral evidence:-

Ms Vinet:-

“After this incident he stopped giving her overtime, hardly spoke to her and started saying he did not want her in the office, did not give her work.”

“After the incident with Ocaña the relationship between Eric Hammond and staff the atmosphere was not good, we were a bit cold.”

“After the incident Eric Hammond did not give her any work or anything to do.”

“In the first instance Eric Hammond gave her less and less work, it all changed after the first incident.”

“After the incident Eric Hammond would speak to me only about work and nothing else, no conversation whatsoever.”

Ms Bacarisa:-

“After this the atmosphere was cold everyone was uncomfortable. I felt bad about this. It did not affect my work. It was uncomfortable being in the office with Eric Hammond after this. My relationship with Eric Hammond was more distant.”

“The atmosphere was very cold when he was there.”

Ms Ocaña:-

“I worked in the office one week and one week I worked out of the office. I can tell you the atmosphere was uncomfortable

during the five days I worked in the office because I worked one week in the office and one week in the telephones.”

“I can’t recall how long it went on for me not to have work, I suppose it went on until everything came to a head.”

“Eric Hammond never spoke to me again after that. He would ignore me. We never spoke on that or any other subject after this. After the first incident the atmosphere was horrible.”

“In the office I felt very uncomfortable. I ended up just counting calls as I had no work, the overtime stopped, everything stopped it was as if I was not there, he would give the work to Jasmine or Michelle and would leave the office. I was asked to log calls, Eric Hammond told Jasmine to tell me to log calls. I used to count the calls and then give him the paper with the total number.”

“Everything was cold, it was not the same after this. I can’t say what happened the week I was not in the office.”

Mr. Ignacio:-

“Sometimes she would be in the office and sometimes she would be in the telephonist. It depended on her roster She was also sometimes in the office helping to pick up the calls for crew members.”

‘Ocaña conveyed to me that Eric Hammond would avoid her and this was distressing to her. She could not have a normal conversation with him. When you went into the office you could feel that there was not a nice environment.’

Having heard all the evidence, and seen the witnesses, I have concluded that whilst the Complainant sought to minimise the extent of the ill feeling between persons in the office, and the staff of the office have exaggerated the extent of that ill feeling, there is no doubt in my mind that things were not as they had been prior to December 2007. There was undoubtedly a problem.

What is more it seems to me that three events occurred between December to March 2008 to further aggravate the situation:- namely:-

- (i) the Complainant requesting the Committee to dismiss Ms Ocaña (see below for my analysis of this issue);

- (ii) Mrs Hammond deciding to frequent the office of the Respondent during lunch times. In oral evidence Ms Vinet stated:-

“The incident from that day onwards, it became very uncomfortable in the office as she came to the office for lunch. Every day she came to the office and waited for Eric Hammond and they would come down for lunch and she would speak to Ocaña which was a bit awkward when she came in. The atmosphere in the office was not the same at all since the incident.”

I accept this evidence, which was not challenged by the Complainant.

“The incident from that day onwards, it became very uncomfortable in the office as she came to the office for lunch. Every day she came to the office and waited for Eric Hammond and they would come down for lunch and she would speak to Ocaña which was a bit awkward when she came in. The atmosphere in the office was not the same at all since the incident.”

I accept this evidence, which was not challenged by the Complainant.

- (iii) there was an exchange of words between Mrs Paulette Hammond and Ms Ocaña in the office of the Respondent which resulted in Committee members having a conversation with the Complainant and his wife which for all intents and purposes ended up with no one leaving the meeting satisfied. As Mrs Hammond has not given evidence, and as the Complainant says he knew nothing about this incident when it happened, I have to accept the version of events given by Messrs Bacarisa, Vinet and Ocaña with regard to what occurred. Insofar as to what transpired at the meeting between the Committee members and Mr. and Mrs. Hammond, I have concluded that Mr. Ignacio’s version of events is probably closest to what actually happened.

What is the relevance of all of this? As in the previous case the mechanics of the incident are irrelevant since it is the consequences that flowed which are important. It all goes towards showing that there was rising antagonism between the Complainant and the Committee members on the one hand and, on the other hand, the Complainant and members of staff, especially Ms Ocaña. The Complainant has more or less acknowledged that there were differences but has sort to portray these as being non-consequential. On the other hand, the witnesses for the Respondent have, in my view, exaggerated matters.

In my view between April to June 2008 there was a worsening of relations between the Complainant and staff, including Ms Ocaña, and the Complainant and various Committee members but nothing which was irreparable. The events of early July 2008, changed the situation completely since this was when the trust that had co-existed between the Complainant and the Committee members began to be lost so that from here on each side viewed the motives of the other side with respect to each detail of the events that transpired with growing suspicion and ill intent believing that the other side was, insofar as the Complainant was concerned, being victimised, and insofar as the Committee were concerned, part of the growing plan of the Complainant to destroy the association and/or remove the Committee. The inevitability of the end game was on the cards and both sides doggedly set their course towards it.

It is accepted by both sides that at some point in the course of June 2008 Ms Ocaña covered the post of Ms Bacarisa whilst she was away on special leave and that initially she was not paid at the rate of Ms Bacarisa's salary rate for the period in question. The end result of this was that Ms Ocaña complained to the Committee on the grounds that she had previously been paid at the higher rate when covering for posts.

On the 2nd July 2008 the Committee met and amongst the topics discussed was the question of Ms Ocaña's claim. According to the minutes of the meeting the Committee decided that "*office workers which cover must be paid the equivalent for when she covers*". This straight forward/enough principle caused a problem since in the Complainants own words:-

"The next day Ocaña was paid. It annoyed me because she had lied to me and to the President."

"The decision made on the 2nd July by the Committee was directed at Ocaña only. The policy was designed for Ocaña only. I was told by Gonzalez to pay Ocaña only."

"The next day Gonzalez came up to me and said that I had to pay an employee retrospectively from the date they made the claim. I then said I would like to meet with the Committee and hence my meeting of the 9th July."

"Clearly the committee was acting in favour of Ocaña. I did not argue with Gonzalez I just asked for a meeting with reference my claim."

The Complainant had a historic claim for an increase in pay dating back over ten years and this incident over Ms Ocaña's claim, and the decisions taken by the Committee in consequence thereof, caused or gave the Complainant the opportunity to revive his claim. I have little doubt that the Complainant was annoyed with Ms Ocaña for having won her

argument and resentful with a Committee who he perceived was favourising Ms Ocaña and not accepting his view that she was not entitled to be paid the extra amount.

At the meeting of the 9th July both parties went into it with totally different perceptions as to what was going to be discussed. According to the Complainant:-

“I took into the meeting of the 9th July a copy of my employment contract, the list of signatures and I think that is it. At this meeting I presented my claim for retrospection. I asked Gonzalez to repeat to me what he had told me. I asked him to confirm what he had said once he said it.”

“There was a pretty heated exchange at the 9th July meeting. At that meeting I did not deal with any ones claims for retrospection.”

The Complainants’ view of the meeting was that they were going to discuss his historic claim for higher wages. The Committee went into the meeting with other objectives in mind. In his evidence Mr. Ignacio stated:-

“The meeting of the 9th July started discussing Eric Hammond’s issues but as the meeting progressed different issues arose/discussed. Before the meeting Eric Hammond was not informed of the various issues that were going to be discussed by the committee with him.”

“On the 9th July it got to the stage that there were too many verbal warnings and therefore it was decided by the Committee to put things in writing.”

In his oral. evidence Mr. Gonzalez stated:-

“I don’t remember if we gave Eric Hammond notice or not of the meeting we were going to have with him on the 9th July regarding our issues.”

This meeting, which appears to me to have been badly handled by the Committee who virtually ambushed the Complainant with their issues, merely served to entrench both sides in their respective views of the motives of the other side. The minutes of the meeting of the 9th July 2008, which in my view were prepared with self serving motives in mind, state as follows:-

“Meeting with Office Manager reference his claim for arrears in wages and his duties.

Discussion with Committee reference his role as manager. The Committee informed Mr. E Hammond that we were not content with his refusal to do extra time if and when needed as has been the norm in the past and that the situation which had been developing over the past six months in which due to a personal situation between himself and an employee of the GTA his ability in which he was conducting his role as manager was been compromised, further more the Committee could not tolerate the manner in which he was been obstructive and not complying with instructions given to him by the Committee on matters relating to the running of the GTA. His reply was that he would do what he thought he had to do and that it was for the Committee to do what it thought it had to do."

At the end of this meeting the Committee decided to issue the Complainant with a written warning. Much has been made of the time it took to issue this letter, (i.e. the 8th August) who prepared it etc., but in my view nothing turns on any of this.

On the 11th July whilst Ms Ocaña was acting as a telephonist an incident occurred whereby taxi drivers refused to attend at Catalan Bay Village for the purpose of picking up a fare which had been pre-booked by a Mrs Parody. This resulted in the Complainant receiving a verbal complaint against the Respondent. In consequence of this, the Complainant on the 16th July 2008 wrote to the Committee complaining of how Ms Ocaña had handled the situation and on the 18th July 2008 a formal written complaint from Mrs Parody was received by the Respondent. It is common ground that no action was taken against Ms Ocaña and/or the taxi drivers involved. Interestingly enough it seems clear from the evidence given that in the Complainants mind this was favouritism by the Committee of Ms Ocaña whilst in the Committee's mind this was further proof of the Complainants' victimisation of Mrs Ocaña. An incident which speaks volumes of each sides perceptions of matters.

On the 1st August 2008 an incident occurred between Ms Ocaña, who was on duty as the telephonist in the evening, and Mr. Luis Debono, a taxi driver, as a consequence of which Mr. Debono made a written complaint against Ms Ocaña. Here again nothing seems to have been done by the Respondent with regard to the complaint.

At some point between the 30th July and the 4th August 2008 the Complainant and staff of the Respondent, excluding Ms Ocaña and possibly one other, met in order to draft up what has been termed a letter of grievances which the various persons had against the Respondent. According to the Complainant the production of the letter came about in the following manner:-

“I dictated the letter to Jasmine with other staff members around. I spoke to the employees about their grievances, and notes taken. I then dictated to Jasmine.”

Whilst Ms Bacarisa had this to say:-

“I don’t know how this letter came about. All I know is that I was in the UK. When I came back this letter was already prepared and Eric Hammond showed it to me as I was the only one who had not signed as I had been out..... I did not draft this letter on Eric Hammond’s instructions. I did not draft this letter in the presence of colleagues.”

and Ms Vinet stated the following:-

“I signed it. Eric Hammond drafted it. We had a meeting one day in the Water Gardens. He called all of us except Ocaña. He started to tell us that he was going to make a letter with all the grievances were of different points of different members and he asked us to sign it and hand it to the Committee.”

There are some discrepancies but the essence of all of this is that the Complainant was the instigator of the letter and that the staff members were all happy enough to sign it and follow the Complainant’s lead. It has been suggested that the staff signed out of fear of the Complainant but in my view this was not the case. In this, as in subsequent events, the staff were quite happy in my view to let the Complainant lead the battle against the Respondent, (hence why at the end of the letter there is a reference to the Respondent contacting the Complainant for any clarification it may require) and to disown the Complainant’s actions when they perceived it was in their interest to do otherwise.

That the Respondent perceived that the Complainant was the instigator of the grievance letter seems clear from their reaction to the letter on receiving it on the 5th August 2008. On the one hand, they decided to question / interview the staff members individually about their grievances but not allow the Complainant to be present, and, on the other hand, to interview the Complainant in order, in Mr Ignacio’s words, *“to resolve the Complainant’s discontent and sub-due his wayward behaviour.”*

In the course of the 6th and 7th August the meetings with all staff members were held. The Complainant accepts that he overstepped his mark by insisting that he be present at meetings between individual staff and the Committee. The meeting between the Complainant and the Committee, which appears to have taken place on the 7th August, was a heated affair; neither party accepting the other side’s version of what transpired. According to the Complainant:-

“I was called in last to discuss my grievances with the Committee. When they asked me about my grievances it is not true that I said my only grievance was Ocaña. I said that my only grievance was retrospective pay because they would not allow me to speak about other staff’s grievances. They did not talk about my attitude or poor work performance. I was not obstructive, they were.”

Whilst according to Mr. Ignacio:-

“Eric Hammond went in to discuss grievances but we then took the opportunity to discuss our issues with him. We did not really notify Eric Hammond before hand that we were going to discuss our issues with him, at first he wanted to discuss other grievances, I told him no just your grievances and then the meeting went on about things and it just ended. The allegations put to Eric at this meeting are contained in the 11th August letter.”

According to Mr. Gonzalez:-

We called him in for a meeting but not about his grievances We had more urgent things to discuss with Eric Hammond than the grievances.”

In my view Mr. Ignacio’s version of what issues were discussed at the meeting is probably more accurate than that of the Complainants. In any event, three events occurred on the 8th August 2008, which only served to worsen the relationship between the parties; in which order they occurred cannot be pinpointed. Firstly, the Complainant was handed a letter dated the 7th August 2008 in which the Committee highlighted concerns they had about the Complainants behaviour with regard to certain matters and in which the Complainant was given a first written warning. According to Mr. Ignacio’s evidence :-

“This letter was the one relating to the 9th July meeting. This letter was handed to the Complainant after the meeting held with him on the 7th August. No it was handed to him on the 8th August. The letter included the issues discussed with Eric Hammond on the 9th July and the 7th August that is why it referred to meetings in this paragraph.”

“The reason for the Committee to decide to issue the letter of the 7th August was as a result of the Committee feelings on a number of points. One of the points was that we were not happy with Eric Hammonds participation in the grievance letter.”

Whilst according to Mr. Gonzalez:-

I do not agree with Ignacio that the letter of the 7th August took account of the events of the 7th August."

The discrepancies within these statement's are obvious but it does not detract from the fact that the letter in question was handed to the Complainant on the 8th August.

Secondly, the Complainant and the staff got together and signed a letter dated the 8th August informing the Committee that they wished the Complainant to represent them in negotiations relating to their employment; this letter being handed to the Committee that same day.

Thirdly, Ms Barea, a staff member joined the union, a move which was subsequently followed by other staff members and the Complainant.

By letter dated the 11th August 2008 the Respondent after referring to the incidents of the 7th and 8th August and to the attitude displayed by the Complainant when staff were informed of the intention to have individual meetings with them without the Complainant being present, informed the Complainant that he was being given a final warning. According to Mr. Ignacio the reason for the issuing of this letter was as follows:-

"The reason for issuing the 11th August letter was not a reaction to them handing in this letter applying Eric Hammond as a staff representative I reckon that the third warning given on the 11th August was mostly due to his abusive language on the 7th August."

If it is correct that the letter of the 11th August was issued as a consequence of what transpired in the course of the 6/7 August, and if it is correct that the letter of the 7th August included the events of the meeting with the Complainant on the 7th August, then there is a clear overlapping of issues in both letters and one has to wonder why the final warning letter was issued. It seems to me that the letter of the 11th August was not issued as a reaction to the letter of the 8th August 2008 informing the Committee that the staff had appointed the Complainant as their representative in negotiations concerning their employment. In my view Mr. Ignacio was clearly mistaken when giving evidence on this issue. In my view the contents of the letter of the 7th August are perfectly clear in only referring to the meeting of the 9th July 2008; just as the contents of the letter of the 11th August only refer to the events of the 6th / 7th August.

By letter dated the 19th August 2008 Isolas wrote to the Respondent on behalf of the Complainant with respect to the letters dated 7th and 11th August 2008. In said letter Isolas denied the various allegations made

against the Complainant, asked for further particulars to said allegations, informed the Respondent that the Complaint was appealing the written warning of the 7th August, that the Complainant was not accepting the final warning of the 11th August since no disciplinary hearing had been convened and that the Complainant was prepared to attend any disciplinary hearing heard. No reply to this letter was ever received by the Complainant and/or Isolaz. When this failure to reply was put to Mr. Ignacio he stated as follows:-

“The request by Eric Hammond asking for an appeal I don’t know why it was not answered. To tell you the truth I don’t even recall the letter.”

Such a statement, echoed by others on the committee, is very indicative of the Respondents attitude with respect to disciplinary procedure and how it disregarded the same. Such failures have in the end been conclusive in my determination of this case.

As was mentioned previously the staff of the Respondent excluding Ms Ocaña joined the TGWU and by the 21st August 2008 the Complainant had been elected shop steward, as confirmed by a letter sent by the TGWU to the Respondent dated the 21st August 2008. The receipt of this news was undoubtedly unwelcomed by the Respondent who expressed their dissatisfaction by letter dated the 5th September 2008 to the TGWU. It is somewhat ironical that the Respondent, a registered trade union, was complaining against the appointment of the Complainant as a shop steward on the grounds that:-

“we find Mr. Hammond’s request to be the Union’s representative to be contradictory to the efficient running of the GTA and it is clearly evident that there is a massive conflict of interest.”

and in consequence thereof decided that:-

“unfortunately we cannot accept that Mr. Hammond physically represents any member of staff or taxi driver in front of the Committee, against the Committee, as a union representative although his presence is very much welcomed. We are totally against him representing staff members as he is considered part of the Directive”.

The TGWU not unsurprisingly, that same day replied to the Respondents letter pointing out that:-

“we do not consider that Mr. Eric Hammond’s role as shop steward and manager creates a conflict of interest. The members have shown that they trust Mr. Hammond as their

representative. This does not mean that Mr. Hammond will not fulfil his responsibilities as manager.”

By letter of reply dated the 12th September 2008 the Respondent insisted that:-

“Clearly as manager Mr. Hammond cannot also seek to act as union representative .”

“There is an obvious conflict of interest in Mr. Hammond being appointed union representative while he is the manager of the GTA”.

By letter dated the 23rd September 2008 the TGWU confirmed their position that :-

“We see no conflict of interest of Bro Hammond performing his role as Manager and Shop Steward; he will undertake a liaison role, which we consider to be beneficial to the GTA.”

but offered the compromise that:-

“Bro Hammond be recognised for a period of 6 months, after which time, the GTA will be able to assess whether his position as a Shop Steward carries any conflict of interest.”

As there appears never to have been a reply to this letter it is not known whether the compromise suggested by the TGWU was ever considered and/or rejected. Suffice to say that whatever the case the TGWU by letter dated the 2nd October 2008 informed the Respondent that its failure to accept the Complainant as a Shop Steward had left:-

“The TGWU/ACTS has no other alternative but to implement as from Tuesday 7th October, selective industrial action in pursuance of our objective.”

There has been controversy as to when this letter was received by the Respondent. According to Mr. Sisarello the letter of the 2nd October:-

“We sent it by fax and Chrome delivered it by hand.”

“The letter of the 2nd October was sent on the day by fax and delivered by hand so they were aware of it.”

According to Mr Chrome:-

“The letter of the 2nd October was delivered on the day. I know it was. A fax was sent on the 2nd October and I

delivered myself the original of the letter the same day. I made sure that the Committee was in so I went where they were and put my head and said there is a letter here for you. Mr. Ignacio was there with other committee members. The Committee knew who I was. I then left the letter with Jasmine. It was between 4 to 4.20 pm.”

And according to the Complainant:-

“The letter of the 2nd October came in by fax and I was unable to hand it in that day as they did not want me to disturb them. Next morning I handed the letter to Harry Parody. I don’t know at what time Parody handed the letter to the Committee.”

This version of events is disputed by the Respondent. In oral evidence Mr. Ignacio stated:-

“As far as I am concerned on the 2nd October I was not aware of the letter as we were discussing whether to suspend Eric Hammond or not. As far as I know the Committee members were not aware of the letter on the 2nd October. I became aware of the letter on the morning of the 3rd October. I don’t recall exactly but when I went in the morning Balban/Gonzalez were there preparing a letter to be sent to Eric Hammond and then they talked about the letter. They had the letter by the time I arrived.”

whilst in oral evidence Mr. Gonzalez stated:-

“On the 2nd October I recall having a GTA meeting in the Board room I do recall the preparation of a suspension letter. I cannot specifically recall the time that I was preparing the letter of the 3rd October. I think that the preparation of this letter was jointly with the rest of the Committee, I recall that when Ronnie came in on the 3rd October and we were preparing the letter that I then showed him the letter of the 2nd October from Unite.”

and Mr. Zammit said:-

“I don’t recall seeing this letter. I have heard about this letter. I don’t think I have seen this letter..... The Chairman brought the letter to our attention and saying that the TGWU was going to take industrial action next week. This surprise me a lot The Committee on receiving this letter were not very happy.”

So why is it important as to when the letter came to the knowledge of the Respondent. Simply because it is the Complainant's contention that the decision to suspend him was made in consequence of the Respondent receiving the letter of the 2nd October rather than any of the matters referred to by the Respondent in the so called suspension letter of the 3rd October 2008. The Respondent denies fully such an allegation stating that the decision to suspend was made on the 2nd October 2008 before the contents of the union's letter was known to it and in any event that the reasons were as set out in said suspension letter.

I accept Mr Chrones evidence that the union letter was delivered by fax and by hand to the Respondent on the 2nd October. Such an acceptance does not mean that knowledge of the contents of the letter were in the committee members domain prior to their deciding to suspend the Complainant. Indeed I doubt that they were but similarly I am confident that the contents of the letter were known to the Committee when they met with the Complainant on the 3rd October and that said letter merely confirmed their perceived view that the Complainant was intent on bringing the Association down.

So what transpired on the 3rd October. According to the Complainant:-

"I was called to the meeting and Gonzalez, Ignacio, Zammit and I cannot remember who the rest were at the meeting When the letter was handed to me I said I would get my glasses from my office. I went to my office, got the glasses and then returned to the room. I read the letter and then said ok and walked out. I did not say anything."

The Respondent does not accept that nothing was said by the Complainant but nothing turns on this issue. An examination of the letter of the 3rd October shows that the allegation(s) made against the Complainant, and the reason for the suspension, were that:-

"you appear to have failed to meet your duty to keep the systems safe."

when

"following a system crash and loss of all data, it was found that neither of the pen drives held any information."

so that

"we are led to believe that the information has been deleted deliberately as both pen drives have been affected."

The letter also refers, vaguely, to:-

“This latest incident is to be considered in the context of previous breaches of duty, and our letter to you of 7th August 2008.”

I have little doubt that this letter was prepared by the Respondents lawyers, and that therefore they must have been consulted at some point during the latter half of the 2nd October and the early afternoon of the 3rd October. This being the case, it supports the conclusion referred to above that the Respondent made its decisions without being aware of the contents of the union’s letter of the 2nd October 2008.

The suspension letter is referring to the loss of the SAGE information. There is no clear evidence as to when exactly this information was lost, or, indeed, when the loss was detected. Thus, for example, in evidence given, Mr. Ignacio stated:-

“SAGE was lost around September 2008. I don’t know why nothing was done about the loss of SAGE until October”.

The fact that SAGE may have been lost sometime prior to the 2nd October begs the question of why it took until the 3rd October 2008 to issue the Complainant with the letter and/or why he was suspended in the first place. Turning to the evidence given, the witnesses for the Respondent stated as follows:-

Mr. Ignacio stated:-

“We had to suspend him as we were not getting anything from him and just getting one problem after another with him. We did not need him to be out of the office. We would not tolerate any more abusive language, back talk and other things and we decided to suspend whilst we tried to get to the nitty gritty of things.”

Mr. Gonzalez stated:-

“I was a party to the decision to suspend Eric Hammond. I understand the nature of the suspension. It was necessary to suspend because we gave him a warning letter then a second warning letter and things did not improve so we gave him a suspension. That is basically it.”

Mr Zammit stated:-

“Eric Hammond was suspended at one point in order to carry out an investigation. He was suspended probably because we did not like the way he was acting and it was better that he go

home. I do not recall what he was doing but he must have been doing something when we suspended him."

This evidence is all very indicative that the Complainant was suspended because the Committee Members were fed up with him rather than because they were going to carry out the "further investigation" referred to in the suspension letter. Indeed at that stage there was no evidence to suggest let alone show that the Complainant had deliberately tampered with the Respondents equipment. As to the investigation that was conducted, more on this later on in this judgement.

On the 3rd October 2008 Mr Chrome met with the staff of the Respondent at a bar in the Watergardens and they confirmed their continued support for the Complainant as a shop steward. Later that day Mr. Chrome also met with members of the Committee of the Respondent who apparently, according to Mr. Chrome, were using the problems between Ms Ocaña and the Complainant as the reason for the Complainants suspension.

On the 7th 9th, 10th and 15th October various articles appearing in the local media referring to the dispute between the Respondent and the TGWU over the appointment of the Complainant as a Shop Steward. The Respondents' witnesses have sought to downplay/minimise the importance of the adverse publicity but in my view these served to harden its stance against the Complainant although not to the extent that the Complainant wishes us to determine. Mr. Balban in particular seems to have disliked the unwarranted attention.

By the letter dated the 8th October 2008 Isolas, on behalf of the Complainant, replied to the contents of the Respondents letter of the 3rd October 2008 denying completely the allegation levelled against the Complainant, confirming that the Complainant was prepared to assist in the investigation being conducted and pointing out the failure of any reply to their previous letter. No reply to this letter was ever received.

On the 8th October 2008 the staff of the Respondent informed Mr. Sisarello that they were under pressure from the Respondent as a result of recent events. Later on that same day Mr. Sisarello gave an interview to the Vox which appeared two days later.

By letter dated the 9th October 2008 the TGWU informed the Respondent that it would suspend industrial action if the Respondent gave a commitment:-

"that the GTA fully recognises Bro Eric Hammond as the elected Shop Steward of our members employed by the Association and that once the suspension is lifted he would be allowed to perform his duties as such."

It is interesting to note that this proposal of the union was taken after a meeting of the staff of the Respondent held on the 8th October; in other words the staff were backing the Complainant. Similarly it is interesting to note that just two days later that same staff complained to the District Officer of the Union about an article that had appeared in the Vox newspaper that same day concerning the dispute (where the name of Mr. Balban and his connection with a political party, the opposition at that time, were mentioned), that they were under pressure from the Respondent and that they wished to leave the union, and in consequence thereof, the union had to issue a retraction/rectification to the article in the Vox and in the Chronicle on the 11th October. This, however, appears not have satisfied some members of staff since on the 13th October the District Officer had to write to all members of staff asking them in effect to *"reconsider your on the spur of the moment position"* and to continue *"supporting your Shop Steward"*. One can but wonder why the staff would have reacted in the manner that they did to the Vox article and who pushed those buttons. It can only have been pressure placed on staff by the Respondent. Suffice to say that it made the staff members waiver in their former support of the Complainant as a shop steward to the extent of wishing to leave the Union. If there was such pressure on staff with reference the Vox article, it must also be indicative that the Respondent would have had very much in mind the adverse publicity in the media when considering the steps taken against the Complainant. This is denied by the Respondent, and thus Mr. Ignacio stated in evidence :-

"It is not the case that the disciplinary letter was issued only because of all the reports in the newspaper and GBC."

"The rationale for giving the 14th October letter was not that the Union dispute was in the news."

I beg to differ with Mr. Ignacio. It seems to me that the adverse publicity was the catalyst that pushed the Respondent to conclude that there was no other alternative but to confront the Complainant head on. In saying this I do not seek to imply that the adverse publicity was the real reason for the dismissal. It was not.

On the 14th October 2008 the Respondent wrote to the Complainant stating that their investigations had now been completed and that they proposed to hold a *"meeting to discuss various issues relating to your general work performance and attitude and in particular"* thirteen specified issues set out in the letter. The letter further went onto say that the Complainant would in due course be informed of the date, time and venue of the proposed meeting and that at the meeting he could be accompanied by a trade union representative or colleague of his choice. As I deal with the issue of what kind of investigation was conducted and as to the individual allegations against the Complainant further along in this judgment I am not

going to go into this letter at this point save to say that from here on things move quickly.

By letter dated the 15th October 2008, Caetano & Co, on behalf of the Complainant, informed the Respondent that their client is declining the offer to meet and is instead appealing his suspension to a general meeting as provided in the constitution of the Respondent.

By letter dated the 8th October 2008, which date is plainly wrong, addressed to Caetano & Co, Hassans on behalf of the Respondent disregards completely the issue of the Complainant's appeal and simply urges that the Complainant reconsider his decision not to attend the disciplinary meeting which has been set for the 17th October. This letter must have been sent by Hassans on the 16th October 2008, and indeed it served to persuade the Complainant to appear at the disciplinary hearing with Mr. Capurro. As to what happened at this meeting I comment amply further on so I make no further mention at this point save to say that it took place on a Friday. Once the Complainant and Mr. Capurro left the meeting what occurred was as follows according to the Respondents witnesses:-

Mr. Ignacio stated:-

"We first talked between ourselves. I don't recall if we considered recalling Eric Hammond or reconvening the meeting. In view of all the chances we had given Eric Hammond to do what the Committee wanted him to do I think that we had given him a lot of chances."

"I don't think we decided to dismiss on the day. The decision was taken on the meeting I am sure, I am blank."

"The decision to dismiss was not taken easily taking into account Eric Hammond working for the GTA for so long it was a big decision to take but as it got to the stage that after so many things that had happened we had to decide to dismiss."

Mr. Gonzalez stated:-

"The decision to dismiss Eric Hammond we had a meeting to discuss the hearing and decided at the meeting. The meeting I can't remember when it was held. I don't think it was on the same day but I could be wrong. There were two meetings."

"It could be that the voting took place on the same day. We could have adjourned and come back and carried on writing on the same paper."

Mr. Balban stated:-

"I don't know when the decision to dismiss Eric Hammond was taken."

I have very little doubt that the decision to dismiss the Complainant was taken that same 17th October 2008, and that the Respondents lawyers were then immediately instructed to prepare the letter of the 20th October 2008, pursuant to which the Respondent advised the Complainant that the allegations against him had been found to be proved and that due to the seriousness of the misconduct involved he was being dismissed with a three months notice which he was not required to work. One wonders why he was given three months notice if the misconduct found was so serious!! The letter of the 20th October 2008 was issued but as the Complainant had gone away on a two week holiday after the disciplinary hearing of the 17th October it is not known to whom said letter was handed to; the Complainant alludes to the letter being handed to his solicitors.

Following this dismissal, an appeal hearing was held on the 5th December 2008. How this appeal came to be is somewhat of a mystery to me since neither the Complainant, or, his solicitors appear to have written to the Respondent requesting an appeal against the dismissal. The Complainant had written in asking to appeal the written warning and his suspension but both these requests were ignored and yet we end up with an appeal against the Complainants dismissal which the Complainant never seems to have formerly requested. Be that as it may, the appeal before the membership of the Respondent took place on the 5th December 2008. As I deal with the issue of the appeal hearing later on in this judgement I make no further comment at this point save to say that the membership by a vote of 35 to 16 endorsed the decision to dismiss the Complainant.

By letter dated the 10th December 2008 addressed to Caetano & Co the Respondent informed the Complainant that his appeal against dismissal had been dismissed by the membership.

That then is the chronology of events as far as I have been able to determine them to be. However, before going on it seems to me pertinent to raise one particular issue.

I have throughout been struck by the curious contradiction in the evidence of those members of staff who gave evidence for the Respondent. They all emphasise how after the first incident, in December, and most especially after the second incident in February, the atmosphere in the office degenerated from being good to icy to terrible. At the same time they also stress how the Complainant after the first incident, but particularly after the second incident, spent less and less time in the office. This being the case, if the Complainant was not spending time in the office why was the atmosphere so bad? It begs the question as to whether the Complainant

was the person responsible for the deterioration in the office atmosphere. This is more so, if we bear in mind that according to the same witnesses it appeared that the Complainant did not want to be in the office at the same time as Ocaña and yet Ocaña was only in the office one week out of two. This begs the question as to why the Complainant would want to be out of the office all the time in that week during which Ocaña was not in the office. Moreover, the questions grow after the 4th August since those same staff members are happy enough to back the Complainant in his attempts, not only to represent them as their shop steward, but also to get the Respondent to deal with their grievances which they are happy enough to put their names to. Indeed they are even happy enough to appoint him as their Shop Steward after all join the TGWU with him. This begs the question as to whether, as has been suggested, the staff were indeed brow beaten into following the Complainant's lead since they were scared of him. Indeed their sudden decision to leave the Union suggests that they were more concerned about the Respondent than the Complainant. This is even more so bearing in mind some of the descriptions of character of the staff given by committee members. I am afraid that I do not believe the simplistic pictures some of the witnesses for the Respondent have sought to draw with regard to the state of their inter action with the Complainant over relevant periods and/or the reasons for and extent of their working relationships. This all leads one to question the motives for the over egging of the evidential pudding that has taken place.

The Law

The Complainant has brought his action for unfair dismissal under section 59 of the Employment Act and therefore this tribunal has to determine the following issues:-

- (a) what the principal reason or reasons for the dismissal were and thereafter whether that/those reason(s) are permitted reasons for the purposes of the Act, and, if so, whether in the circumstances of the case the Respondent acted reasonably in treating it/them as sufficient reasons to dismiss the Complainant; and
- (b) whether the procedure used for the dismissal was fair and reasonable.

The burden of establishing the principal reason(s) for the dismissal falls squarely on the Respondent. Similarly, if there is a dispute as to the real reason for the dismissal the burden of proving which one of the competing reasons is the principal reason remains on the Respondent.

We turn therefore to what are said to be the principal reason(s) for the dismissal in this case.

The Principal Reasons (s) For The Dismissal

The Complainant was notified of his dismissal by letter dated the 20th October 2008 and in said letter the reasons given for the dismissal were:-

1. Your refusal to work with and your victimisation of Miss Ocaña;
2. Your failure to attend to your duties as a result of the above, including your refusal to work overtime in spite of a need for you to do so in order to fulfil your responsibilities;
3. Your failure to keep important documentation relating to fuel safe, to bank cheques and to chase up arrears which amounts to £50,000;
4. Your failure to ensure that the SAGE software was kept safe;
5. Your unacceptable attitude towards the Executive Committee and your behaviour towards them which has included verbal abuse;
6. Your failure to implement policies and decisions made by the Executive Committee.

As I have understood the Respondents' case it is saying that the Complainant was dismissed for the above six grounds, each of which justified the dismissal independently of the other and it is on this basis that I have considered the case.

I will now turn to deal with each of these issues but before doing so it seems to me worthy of setting out what the members of the Committee said in evidence when they were asked what the reason(s) for the suspension/dismissal were:-

(a) **John Gonzalez:-**

"The main allegations most damning for everyone was trying to force out an employee for no grounds at all except personal ones. The misconduct and abuse of the Committee occurred as a result of us refusing to dismiss Ocaña and his threats to close down our offices came from the Ocaña issue to."

"The reasons for the dismissal were (1) Ms Ocaña and his refusal to drop his campaign of kicking her out (2) accountancy was another big issue, not following Sage for the loss of data and more importantly for us to be able to change the structure in the office to be able to account for monies much better and we had a lot of resistance to this like the cashing of cheques which Eric Hammond kept leaving the cheques and banking a week or month later we tried to change that and we met a lot of resistance to that (3) his

conduct towards the Committee when we confronted him with those various issues was very rude and forceful against us, you don't say that to an employer. There was no other serious issue."

(b) Paul Balban:-

"The G'A suspended Eric Hammond because the GTA felt that Eric Hammond's behaviour at work was not acceptable. His attitude towards the ladies of the staff, wanting to have Ocaña dismissed for his own personal reasons, creating attitude amongst staff not conducive to work, his poor administration/management of the office generally, his clear attitude towards the Committee, not wanting to work in union with the Committee".

"The issue was either the issue with Ocaña that brought it all to a head or a number of issues prior to that as the shop was being put in order but the most notable issue was the direct conflict between Ocaña and Eric Hammond".

(c) Clive Zammitt:-

"Eric Hammond was suspended at one point in order to carry out an investigation. He was suspended probably because we did not like the way he was acting and it was better that he go home. I do not recall what he was doing but he must have been doing something when we suspended him".

"As far as I was concerned it was a war with Eric Hammond".

(d) Ronald Ignacio:-

"The Ocaña issue was a big issue because Eric Hammond wanted us to throw her out. What was the problem. It was not a work related issue. It was an issue between Eric Hammond and his wife. It did affect a lot Eric Hammond's attitude towards the Committee because he felt we did not back him up and that is why he became abusive and disrespectful I mean. He first became abusive when we started issuing him with warning letters".

"Gonzalez statement that the suspension was due to Eric Hammond getting the employees together being a shop steward. This was said as were going along. This was one of the issues raised. It was not part of the reason. It was one of the issues that we had to tackle. His getting the employees together was one of the obstructive issues that the Committee had with Eric Hammond."

“We had to suspend him as were not getting anything from him and just getting one problem after another with him”.

“We would not tolerate any more abusive language back talk and other things and we decided to suspend him whilst we tried to get to the nitty gritty of things”.

It is pertinent to also point out at this stage that even though the Respondent held regular Committee meetings between January to October 2008 and kept minutes of the meetings held there is virtually no, not to say any, references made therein, let alone substantive ones, either to the difficulties, clashes/problems allegedly occurring between the Complainant and the Committee, or, between the Complainant and Miss Ocaña, or, to the other matters referred to in the letter of the 20th October. This curious lack of documentary support for the evidence given by Committee members has been explained away on the basis that this was the way the Association did things historically; a rather lame explanation in my view.

Having said this, it is clear from the above-mentioned evidence that the big issue with the committee was the Ocaña issue.

I turn now to consider individually each of the grounds of dismissal contained in the letter of the 20th October 2008 in order to ascertain whether all or any of these grounds were the principal reason or reasons for the dismissal.

Failure to work with and victimisation of Miss Ocaña

In its letter of the 20th October 2008 the Respondent stated that the Complainant was being dismissed as a result of his *“refusal to work with and your victimisation of Miss Ocaña.”* What exactly lay behind such an allegation was set out in the Respondent’s letter of the 14th October 2008 which I set out below in full; namely:-

“1. Miss Claudette Ocaña commenced work on 16th July, 2007. You hired her after a successful interview. However, following her appointment, Miss Ocaña contends that your wife, a taxi diver, began harassing her. Your response was to state that you could not be in the same office as Miss Ocaña, and to accuse her of wearing provocative and inappropriate clothing. You have since refused to be in the office with her on your own, and have left the office various times in order to avoid being alone with Miss Ocaña. Ms Jackie Barea had to be transferred to assist in the main office. As a result, another radio operator had to be paid overtime to cover Ms Jackie Barea at the radio base. Further, you informed Mr. Ronald Ignacio, Mr. Jonny Gonzalez and Mr. Paul Balban that you

did not want Miss Ocaña as an employee and that you would make life as difficult as possible for her so that she would decide to resign. This treatment of an employee under your management is wholly unacceptable.

2. *We have attempted to resolve the situation by suggesting that Miss Ocaña be transferred to the GTA's Frontier Office. You would not accept this and stated categorically that you would not receive the takings of sales from Miss Ocaña at the Frontier Office and that she would need to pass the money on to another member of staff to then pass on to you.*
3. *On the 4th August we received a letter from you setting out details of interviews you chose to hold with each member of staff to obtain their grievances. You excluded Miss Ocaña from this exercise. This is creating tension in the office and affecting all members of staff.*
4. *You have made a written complaint about Miss Ocaña, despite the fact that any other complaints made about operators are referred to the Executive Committee verbally.*
5. *These issues have been raised with you previously but you have failed to desist in your conduct towards this employee and continue to alienate and victimise her."*

There are a whole series of allegations against the Complainant contained in the above-mentioned passage. For the reasons set out below I completely disregard the following allegations since they could not have been a justified and/or reasonable and/or real reason for the dismissal of the Complainant; namely:-

- (i) that Mrs Hammond began to harass Ms Ocaña - what may or may not have transpired between these two persons cannot possibly be the fault of the Complainant, especially as the Respondent failed to itself take any action against Mrs Hammond, a member of the Association, and/or be a reason for disciplining the Complainant. In any event, even Ms Ocaña did not contend before the tribunal that she was being harassed by Mrs Hammond although, according to Mr. Ignacio's oral evidence, there was a complaint to that effect made to him by the girls in the office;
- (ii) that Jackie Barea had to be transferred to assist in the main office as the Complainant refused to be in the main office alone with Ms Ocaña - there is absolutely no evidence with regard to such a transfer and interestingly enough Ms Barea never gave evidence;

(iii) that another operator had to be paid overtime to cover Ms Barea when she was transferred to the main office - as above there is no evidence at all with reference this allegation.

That therefore leaves the following allegations:-

- (i) that the Complainant could not be in the same office as Ms Ocaña and that he had left the office "*various times*" in order to avoid being alone with Miss Ocaña;
- (ii) that the Complainant accused Ms Ocaña of wearing provocative and inappropriate clothing;
- (iii) that the Complainant informed Messrs Igacio, Gonzalez and Balban that he did not want Ms Ocaña to continue working there and would make life difficult for her until she resigned;
- (iv) that the Complainant refused to accept having Ms Ocaña transferred to the frontier office and that he would not take the takings from her if this occurred;
- (v) that the Complainant had excluded Ms Ocaña from the interviews he had had with other members of staff in August 2008 to obtain their grievances against the Respondent;
- (vi) that the Complainant had written a complaint against Ms Ocaña when usually the complaints were made verbally; and
- (vii) that the above issues had been raised previously with the Complainant and he had still continued "*to alienate and victimise her.*"

I now therefore turn to consider each of these allegations separately.

- (a) That the Complainant could not be in the same office as Ms Ocaña and had left it at various times in order not to be alone with Ms Ocaña:- Bearing in mind the number of persons who were in the office working throughout the day, and bearing in mind that Ms Ocaña only worked in the office every other week, and bearing in mind that it is alleged that the Complainant stopped giving Ms Ocaña overtime after December 2007, it is difficult to imagine what opportunity there could be for Ms Ocaña and the Complainant to be "*alone*" in the office simultaneously. Moreover, no example of "*at various times*" was ever provided and the allegation of the staff in the office was that the Complainant would not be in the office at the same time as Ms Ocaña rather than that he would not remain "*alone*" in the office with Ms Ocaña.

The assumptions and generalisations which make up the Respondents' case on this allegation can, by way of example, be gleaned from the following portion of Mr. Zammit's witness statement:-

"I also recall an occasion which occurred sometime in August 2008. Ronald Ignacio, Ronald Alecio and I, as committee members, held an informal meeting in the boardroom. During this meeting Mr. Hammond entered in order to ask a question. We informed him that he should not leave the office as it was unprofessional to leave it unsupervised. I was aware that he had let the office in order to avoid being alone with Ms Ocaña."

The contradictions within this statement are obvious. As is mentioned more than once in this judgment the committee members, as active taxi drivers, were rarely in the office, or, in the office for any length of time and therefore they would have relied on what members of staff, including Ms Ocaña, would have told them with reference to this issue. Such information as may have been given by staff members cannot in my view be relied on for the reasons explained further down in this judgment, even if they could possibly say what was in the mind of the Complainant each time he left the office. The assumptions that staff members may have made are not facts on which the Respondent could reasonably rely on.

- (b) That the Complainant accused Ms Ocaña of wearing provocative and inappropriate clothing:- As with other issues this matter was quite literally blown out of all proportion(s) to the not unnatural discomfort, and indeed annoyance, of Ms Ocaña. So what is the actual evidence on the matter. In her oral evidence Ms Ocaña stated as follows:-

"The day after the incident I was called in by Mr. Zammit and Eric Hammond and he told me that I had to cover up as it was causing problems between Paulette and Eric Hammond."

Whilst Mr. Zammit stated:-

"I remember a meeting between Ocaña, Eric Hammond and myself after an incident with Ronco about the way she dressed. The only thing I told Ocaña that she could carry on coming dressed the way she was dressing but I advised her to put a scarf around her neck. She was not showing anything. She said do you want me to dress like a nun. I said it would be better if she wore a scarf. The issue came up after the Ronco incident. She was only wearing a V-neck."

The important difference to note about these two accounts is that Ms Ocaña refers to Mr and/or Mrs Hammond making the complaint of inappropriate clothing whilst Mr. Zammit refers to the complaint being made by Mr. Ronco. The waters are muddied further by the evidence of Mr. Ignacio.

In his witness statement Mr. Ignacio refers to the Complainant complaining to Mr. Zammit about Ms Ocaña showing too much cleavage thereby upsetting Mrs. Hammond and as a result Mr. Zammit had spoken to Ms Ocaña asking that she change her attire. In his oral evidence Mr. Ignacio had this to say:-

“Clive probably talked to Ocaña. I remember speaking outside the lobby to Zammit/Ocaña. Zammit was explaining to her about this issue. When Clive addressed Ocaña outside the lobby I was there yes, I was there. He was explaining to her. This conversation had something to do apparently with trying to put the fire out. Clive spoke to Ocaña and she was not happy with it. We said look whether or not you are happy with it lets try and calm things down. It was not unfair to Ocaña because we were trying to avoid escalation and even though we knew she was dressing properly we also know Eric Hammond was having a lot of problems with his wife so we were trying to ease on his behalf so that he did not get so much stick from his wife.”

“When Zammit was talking to Ocaña, Eric Hammond was not there, I was there.”

“I recall that I was present when Zammit spoke to Ocaña. Maybe there was another occasion when Eric Hammond was present when Zammit spoke to Ocaña.”

In my view Mr. Ignacio’s evidence on this issue can be discarded since I am not persuaded that he was present at any conversation held with Mr. Ocaña about her attire.

In his oral evidence the Complainant had the following to say with respect to the issue of Ms Ocaña’s attire:-

“Before Xmas there were comments but no complaints about Ocaña’s attire. The incident with Carlos Ronco, Ocaña was sitting at Jasmine’s desk. He walked in to get paid. He said mira que vista tan bonita tan temprano por la mañana Ocaña said to me I have had this incident. I said to her what do you expect if you come dressed like that. I then referred the matter to the Committee. She was giving a complaint. She was saying like I cannot have this. That is why I referred the matter to the Committee.”

"I was not the only person who had an issue with her attire it was the comments going round taxi ranks, members etc and the complaints of Mr. Ronco which made me bring the matter to the attention of the Committee."

"It did personally make me uncomfortable to have people making comments all the time about Ocaña's attire."

"My wife was slightly concerned about Ocaña's dress sense but nothing major."

It is interesting to note that according to the Complainant he reported the Ronco incident because it was Ms Ocaña who was upset at Mr. Ronco's remark rather than because Mr. Ronco was complaining about Ms Ocaña's attire. On the other hand, Ms Ocaña believed that the complaint emanated from Mr. and Mrs. Hammond (as Mrs Hammond was unhappy with her attire) since she had not complained about Mr. Ronco and Mr. Zammit believed that it was Ronco who had complained. Look at it as one may all that is clear from the evidence is that there was one incident, that this incident occurred a long long time before the 14th October letter, that there were comments about Ms Ocaña's attire and that it is unclear whether the person complaining about Ms Ocaña's attire was the Complainant. Moreover, even if the Complainant himself was the one complaining, as the manager of the office, it was his duty to deal with a case of inappropriate attire at the office; and this presumably was the case since otherwise Mr. Zammit would not have spoken to Ms Ocaña - I do not accept that Mr. Zammit only did so to keep the Complainant and/or his wife happy.

- (c) That the Complainant informed Messrs Ignacio, Gonzalez and Balban that he did not want Ms Ocaña to continue working there and would make life difficult for her until she resigned:- This is by far the most serious allegation made by the Respondent against the Complainant and therefore there is a need to set out below some, not all, of the oral evidence given by the witnesses of the Respondent on this issue.

In his oral evidence Mr. Ignacio stated:-

"Around December 2007 Eric Hammond tried to get Ocaña dismissed shortly after an incident occurred at a party at the GTA. The first attempt he called me over at the coach park and said Ronald I have a personal problem and I would like you to solve it for me. I asked him what problem he had and he told me that he had problems with his wife reference Ocaña and told me that for personal reasons he did not want Ocaña employed by the GTA. I said to him what is the reason for

throwing her out. He insisted that he had problems with his wife..... He asked me you have to dismiss her and I said we cannot unless we have grounds. Then he stated that if I didn't comply with his demands he would make things very difficult for her and the GTA."

"When we had the conversation at the coach park he said throw her out/dismiss her. When I said no he then said Aburrala hasta que la hechara."

"This conversation occurred at the Coach Park Eric Hammond called me. He called me. It occurred in my car in the coach park. Eric Hammond threatened but not to that effect, he said I was not respecting his loyalty to the GTA and that if we did not throw Ocaña out he would make it difficult for her and for me and for the Association."

In oral evidence Mr. Gonzalez stated:-

"This was an on going issue which we over a period of time tried to diffuse the situation on numerous occasions. Eric Hammond had asked us to dismiss her stating that this was due to his personal problems that he could not be with her or be with her on his own. The issue came more to a head when we agreed to give Ocaña an acting allowance to which Eric Hammond stated that if his wishes had been to dismiss her but on top of that not done that but had given her acting allowance and that it looked that we were not going to dismiss her and that therefore he was going to make it as difficult as possible for us. That is when the issue was brought to a head. Eric Hammond asked for Ocaña to be dismissed on numerous occasions. I have mentioned one occasion in my statement but what I am saying is that there were numerous occasions. I was alone sometimes with Eric Hammond when those requests were made."

"He said that on numerous occasions he said "Que la heche". I spoke to Eric Hammond on a few occasions even privately to find a solution. I told him there was no valid reason to dismiss her as she was doing her job properly and if we followed his instructions she would sue for unfair dismissal. His reply was "aburirla entonces" that is what I mean in my transcript."

"On more than one occasion he said to dismiss her."

"Eric Hammond asked for Ocaña to be dismissed and we did not agree. Eric Hammond essentially said that he would close

GTA down if Ocaña was not dismissed. On a scale from 1-10 the seriousness of the threat was 100% to the Committee.”

In the course of his oral evidence Mr. Balban stated:-

“I definitely recall that I was at a meeting when Eric Hammond asked the Committee to terminate the employment or else. Eric Hammond was very clear either the Committee backed him up and dismissed Ocaña or he would cause as much as I will do what I have to do to ensure the GTA falls. What Eric Hammond was saying was that Ocaña was a good worker doing well doing what she was told but Ocaña was causing too much trouble for him at home so he wanted the Committee to dismiss her.”

“I agree that Eric Hammond said “que la echen” y no “que la aburran”.

In the course of his oral evidence Mr. Desoiza stated:-

“I was approached on several occasions by Eric Hammond and asked that Ocaña had to be dismissed of her duties, sacked basically. Eric Hammond approached me at the office and in the meeting room. It was more than one occasion. On these occasions there was one occasion that it was at a Committee meeting and in the other couple of times it was personal him and me.”

“What I recall what I said is that Eric Hammond told me that Ocaña had to be dismissed that she did not fit in that she was not dressed appropriately for the job..... I don't know why Eric Hammond asked her to be dismissed but I assume it was because he was in the middle of a bad situation with his wife.”

In the course of his oral evidence Mr. Zammit stated:-

“What he wanted was us to throw Ocaña out of the building completely. I did not state that in my statement but I have said it now. He did not say that, it was my point of view by the way he acts. He did not say it there on that occasion.”

These are very serious allegations to make and if they were the principal reason or one of the principal reasons for dismissing the Complainant it most certainly justified the Respondent's actions in not only taking disciplinary proceedings against the Complainant but also in dismissing him. The Complainants' reply to these allegations is that these

conversations never occurred and that he never asked for the Respondent to dismiss Ms Ocaña. Thus, in oral evidence he stated the following:-

“A conversation did take place with Ignacio but I did not ask for Ocaña’s employment to be terminated. He asked me if I was happy with Ocaña’s performance and I said yes except for a couple of issues. Mr. Ignacio started the conversation. I suppose because she probably complained to Mr. Ignacio. I am not sure why he raised the issue.”

“It is not correct that I at any time asked Ignacio to dismiss Ocaña”.

“I did not seek to have Ocaña dismissed.”

“I did not state to Ignacio shortly after this and tell him that I had personal problems with Ocaña and that he had to dismiss her..... I did not state it to Zammit either.

“It is not correct that I at any time asked Ignacio to dismiss Ocaña. He asked me if she was a good worker in the office and I said yes. I did not ask him to dismiss her.”

I do not accept the Complainants’ blanket denials on this issue and I am satisfied with the evidence given on this point by the Respondents witnesses that he did ask the Respondent to dismiss Ms Ocaña outright, and on more than one occasion, and that when such a request was rightly turned down, the Complainant then requested that the Respondent bore her into resigning.

- (d) That the Complainant refused to accept having Ms Ocaña transferred to the frontier office and would not take the takings from her if this occurred:- The Complainant does not deny that at some stage the Respondent did discuss the issue of moving Ms Ocaña to the frontier office. Thus, in oral evidence the Complainant stated:-

“At one time Alecio talked about moving Ocaña to the frontier office. I told them what is the point of moving her. Things would sort themselves out.”

“My recollection is that at that meeting Ignacio did not offer to move Ocaña to another office but at some point this offer was made. The comment was made but I don’t recollect if it was made at this meeting but it was made by Mr. Alecio.”

“I never refused to take takings from Ocaña.”

So we start from the agreed basis that an offer to move Ms Ocaña to the frontier office was made. That such an offer was made, and acknowledged to have been made, gives implied support to the contention that there was a problem with Ms Ocaña being in the office in the first place. The Respondent's evidence on this point commences with that of Mr. Alecio who in oral evidence stated that:-

“Eric Hammond never wants to stay in the office with Ocaña. To avoid this I suggested, that we could send Ocaña to the frontier office. Eric Hammond replied that he would not take the takings. Anyway there was the late Paul Cavilla who would have been the one bringing the takings to the office so anyway Eric Hammond would not had any contact with her anyway. The Committee and all the members were trying to resolve the situation. I first told Eric Hammond this was an option but it was not upto me to decide whether we were going to move Ocaña down to the frontier office. That was a suggestion. It was not for me to decide. It was for the whole Committee to decide whether to move her to the frontier office or not. I said this to Eric Hammond in the corridor outside the office. I was by myself with Eric Hammond when I said this. Because of the response I got from Eric Hammond about the refusal to take the takings and things and that is why I did not suggest it to the Committee. I think Zammit also suggested that to Eric Hammond but I don't remember about this.”

It would appear from this evidence, which I accept, that Mr. Alecio was acting in a personal capacity rather than on behalf of the Committee, that the Committee never formally put such a proposal to the Complainant and that had the Complainant enforced such a transfer it would have resolved matters since there was another person who could have taken the takings to the Complainant thereby ensuring that the Complainant and Ms Ocaña did not have to meet.

In his witness statement Mr. Zammit states that:-

“We suggested we relocate Ms Ocaña to the frontier office in order to avoid further problems and reduce the hostility between them. Mr Hammond was not happy with the suggested arrangement as he took the view that we were favouring Ms Ocaña. He said that if we proceeded with this arrangement he would refuse to collect any takings from her and that the alternative arrangements would have to be made for another person in the office to collect the takings from her.”

The wording of this paragraph is virtually the same as in the witness statement of Mr Alecio and yet we know from Mr. Alecio's oral evidence

that what actually occurred was different to what is in the witness statements. Mr. Ignacio in his first witness statement also refers to Ronald Alecio suggesting that *“we relocate Ms Ocaña”* to the frontier office *“and that the Complainant was not happy with the suggested arrangement as he took the view that we were supporting her and not him.”*

In oral evidence Mr. Zammit stated:-

“In August 2008 we were trying very hard to solve the problem with Eric Hammond. We were asking him whether the arrangement with Ocaña he was in agreement with. We were asking him to decide whether Ocaña should be moved or stayed, we were giving him the choice.”

“We did not just decide to do it because Eric Hammond was obstructing because he said he would not take the takings and I was not going to be there to take the takings, he was the manager.”

In his oral evidence Mr. Balban stated :-

“The Committee tried to mitigate tried to help tried to find a solution with the intention to make things work. We would ask her to work at the frontier office far away where Eric Hammond worked in that way it was felt that we could find a way forward but unfortunately this was not enough We didn't get to that. The Response was a no. You do as you want but I will not be here when she delivers the takings daily.”

Insofar as this issue is concerned, the person whose oral evidence I accept is that of Mr. Alecio. It does not seem to me that the idea of moving Ms Ocaña to the frontier office ever got any further than being a suggestion put by Mr Alecio in his personal capacity to the Complainant which on being rejected by the Complainant was discarded. Undoubtedly Mr. Alecio reported this conversation to his fellow committee members after the event and that is possibly why the recollection all these many years later is that the Committee, rather than Mr Alecio, put the matter to the Complainant. Having decided that I accept Mr. Alecio's version of events on this issue, it then follows that the Complainant was never officially asked, and even less instructed, about Ms Ocaña moving to the frontier office. This being the case I cannot see how the Respondent could have seen this as being an actual or potential breach by the Complainant of his obligations to the Respondent since he was never instructed either to move Ms Ocaña to the frontier office and/or to take the takings from her and/or any *“refusal by the Complainant to have Ms Ocaña moved to the frontier office”*.

- (e) That the Complainant had excluded Ms Ocaña from the interviews he had had with other members of staff in August 2008 to obtain their grievances against the Respondent:- In her witness statement Ms Ocaña stated as follows:-

In July 2008 the Complainant encouraged the staff members to submit grievances by way of written document and also encouraged all the members of staff to join the TGWU. I was not told about this, nor was I given the opportunity to air my own grievances by the Complainant."

What I find interesting about this paragraph, as indeed generally with respect to this allegation by the Respondent, is that all the other staff members also failed to either include Ms Ocaña in their discussions and/or failed to agitate that she be so included and yet it is the Complainant who is alleged to have victimised Ms Ocaña on this issue. Can it not also be said that other staff members similarly victimised Ms Ocaña and yet no such allegation is made against them. And in any event, can the Respondent itself complain with respect to a matter which was not part and parcel of a persons employment or obligation to it. Surely it was upto the persons concerned as to who was to be included in deliberations concerning grievances against their employer; albeit that an employer may be concerned about the environment in the office. It is not for the employer to say who should or should not be included in such deliberations and/or use such matters in disciplining an employee.

When this allegation of not including Ms Ocaña was put to the Complainant he stated:-

"I dictated the letter to Jasmine with other staff members around. I spoke to the employees about their grievances and notes taken. I then dictated it to Jasmine. The printed document was left on Jasmine's desk and as each person came in they signed it. I actually asked each staff member if they had a grievance."

"Ocaña was one of the problems so she was not told about joining the union."

The Complainant therefore freely admitted that a decision was made to exclude Ms Ocaña from the discussions relating to and including the letter of the 4th August 2008. This being the case, can it be said that this is proof of the Complainant victimising the Complainant in her work place and/or should the Respondent have taken account of such matters for the purposes of disciplining and/or dismissing the Complainant. I think not. Whilst it supports the point previously made that the Complainant had an issue with Ms Ocaña I cannot see

how this could have been a real and/or principal reason for the dismissal.

- (f) That the Complainant had written a complaint against Ms Ocaña when usually complaints were made verbally:- I must admit that I am somewhat at a loss as to how this can be a justified allegation against the Complainant. It is the responsibility of an office manager to make complaints against staff members who have acted inappropriately or against standard policy and/or office practices. Why does it matter if such a complaint is made verbally, or, in writing, or, indeed whether in the past it has always been made verbally? Surely what is important is whether the complaint was justified or not, and in so far as this aspect is concerned the Respondent did not produce any evidence to show that it was not. The Complainant fully accepted when giving evidence that he had made the complaint against Ms Ocaña:-

“I wrote this letter of complaint to the CommitteeThe only reason why it was put in writing was because other committee members were complaining about Ocaña and because a few days earlier I had received from the Committee a written complaint so I put things in writing in order to see if the Committee were victimising me.”

“I wrote a letter because it was not the policy of the GTA giving a written complaint and I had on the 9th July been given a written complaint, so I wanted to put down on writing that I had a written letter against me and I wanted to see if it was victimisation against me or not.”

“The only complaint letter written by me was that of the 16th July and Ocaña did not receive a warning or other letter from the Committee so it proved my belief.”

“It was the first case after my complaint involving any member of staff and it was a coincidence that it involved Ocaña. It could have been any other staff member as I just wanted to see if I was being victimised by Committee.”

There was no evidence on this issue contained in the witness statements of any of the persons appearing on behalf of the Respondent and neither was the issue really touched upon by the witnesses when giving oral evidence both of which facts suggest that this could not have been a reason and/or the principal reason for the dismissal.

I accept that the Complainant wrote the complaint in question, which had a reasonable foundation to it, in order to test out his theory that the

Respondent was victimising him and that he would have written the said complaint even if it had been another member of staff. Let us not forget that at this time the Complainant was annoyed at having been reprimanded by the Respondent and, according to other staff members, the atmosphere and interaction in the office was bad; the fact that the person who he was complaining about was Ms Ocaña would only have hastened his desire to write the complaint. All in all I am of the opinion that this event does not of itself show victimisation of Ms Ocaña on the part of the Complainant and/or that the Respondent was justified in believing it to be so or did believe it to be so.

- (g) That the above issues had been raised previously with the Complainant and he had still continued to alienate and victimise Ocaña - in the case of some but not all the issues this is mostly certainly the case but such an allegation adds nothing of substance to the situation as already existed as at that time.

Bearing in mind all of the above, and with reference the allegations made at point 1 of the letter of the 20th October 2008, I find that a principal reason for the dismissal was the Complainant's victimisation of Ms Ocaña in that the Complainant informed Messrs Ignacio, Gonzalez and Balban on more than one occasion that he did not want Ms Ocaña to continue working there and, that the Respondent should bore her into resigning.

Failure to keep Fuel Records safe, to bank cheques and chase up arrears amounting to £50,000.

The issue of the banking of cheques and of the failing to chase up arrears is dealt with further below so here I will only deal here with the remaining issue; i.e. the fuel records allegation.

In the Respondents' letter of the 14th October 2008 the allegation made against the Complainant with respect to the issue of the fuel records is as follows:-

“a document containing essential information relating to fuel has also disappeared. You failed to inform the Executive Committee, who found out through staff members. This will also cause financial loss to the GTA.”

The reference to financial loss in that paragraph is somewhat strange since the Respondent has at no time pointed the finger at the Complainant or anyone else as the cause for the disappearance of the information. The allegation of the Respondent is solely that the Complainant failed to inform the committee as to what had occurred.

The person responsible for inputting the fuel records information was Michelle Vinet who in her witness statement said as follows:-

I did input this data using Excel, and have been doing this work for many years. After each session, I would save the information. However, the data all disappeared from the computer and when the hard drive was inspected, it was clear that no data at all was left on it. It seems clear to me that the data was removed deliberately; even if I had made an error on one day, the data for previous weeks and months would obviously still have been on the computer."

Ms. Vinet clearly makes no mention as to who she reported the disappearance to, or, when but it is interesting that she confirms that the information was not backed up at all and was simply on the computers hard drive. In his evidence Mr. Gonzalez made no reference as to who had informed him about the loss of the fuel records data but it is suggested by his evidence that he ascertained this from Ms Vinet at the time that she informed him of the loss of the SAGE data.

In his oral evidence Mr. Ignacio stated:-

"When one of the staff told me that SAGE had been lost (Michelle or Jasmine) and had problems with the fuel. They said that the fuel data has been lost for some time. I asked Eric Hammond if he knew about the fuel and he said that he did but not to worry as the data could be backed up from the vouchers. I presume that if he knew about the fuel data loss he would also know about SAGE being lost."

"My recollection is that when I found out about the fuel records some weeks later. When I was at the office it was one of the staff who told me that the fuel records had been lost previously a few weeks before."

With regard to the fuel records it is the Complainants position that it was not his responsibility to input into the system the fuel records data, that being the job of Michelle Vinet, and that whilst he accepted that data was lost he knew nothing about how, or, when, or, why the information in the system was lost. In his evidence the Complainant stated:-

With relation to the fuel it was Michelle who was responsible for inputting the data. I was told by Michelle that it had gone missing. It happened last night she said..... I told the President that same day. It was only one days information that was not on the system."

I do not believe this evidence from the Complainant since to me it is far fetched to think either that the Complainant would in the climate that existed at the time volunteer that information to any member of the Committee "that same day," or, that the President or any other committee member would pose the question to the Complainant on the same day as the disappearance was detected.

In the letter of the 20th October 2008, the allegation against the Complainant materially changes since now the allegation is not that he failed to inform the committee of the loss but that he failed "to keep important documentation relating to fuel safe." In what manner and to what extent the Complainant had failed to keep the fuel records safe was not stated and/or specifically alleged in the course of the evidence given. One has the feeling that this was an allegation simply thrown to make up the numbers. In any event and for basically the same reasons as are stated below with regard to the allegation to keep SAGE safe, I am not persuaded that the Respondent acted reasonably in treating this as a sufficient reason to dismiss even if it was a reason to dismiss in the first place.

Failure to attend to his duties including refusal to work overtime.

It is the Complaints case that at the heated meeting of the 9th July 2008 between members of the Committee and himself he did state the following:-

"I refused to do overtime unless I was legally required to do because of the reaction of the Committee".

"The Committee asked me whether I would do overtime and that is when I said what I said. Prior to this meeting I had never refused to do overtime".

The Complainant further contends at paragraph 146 of his witness statement that after this meeting :-

"I confirm that overtime was conducted on many occasions as described above both with and without Ms Ocaña"

and at paragraphs 74 and 75 of his second witness statement that

"However I continued to do it as someone suggested to me that if I had been doing it for many years, it could be considered a term of the contract In any case, I administered my own overtime. The Committee was rarely aware of whether I was doing overtime or not."

It is to be noted that in Isola's letter of the 19th August 2008 to the Respondent it is stated that:-

“Our client has not refused to work extra hours and, as always, is more than happy to work reasonable overtime as required by the job.”

So what does the Respondent say about this.

In the course of his evidence Mr. Ignacio stated the following :-

“The issue of overtime was not a serious issue for me but we were not very happy about it but at the end of the day you cannot force someone to do overtime.”

“During 11th August to 3rd October I don’t recall if Eric Hammond did or did not do overtime and I was not in the office all the time anyway”.

“It is my evidence that Eric Hammond did not do overtime. It was not really a problem. I suspect he was doing the work during the day in order not to do overtime. We were not very consistent with looking at his hours of work etc”.

“He may have done overtime”.

“Overtime issue was not a serious issue in my opinion. The situation with Ocaña I do find that quite serious”.

“The issue of overtime was not a big issue for me but it was a big issue for the Committee”.

“As far as I recall he said at the meeting he would not work overtime. I suppose that after the 9th July he did carry out doing overtime, but I don’t know”.

In the course of his evidence Mr. Gonzalez stated the following:-

“After the 9th July I do not know if he continued to do overtime. He said he wouldn’t”.

That then is the evidence around which we have to consider :-

- (a) the statement made by the Respondent in the letter of the 20th October 2008 that one of the reasons for the Complainants’ dismissal was:-

“your failure to attend to your duties as a result of the above (the Ocaña issue) including your refusal to work overtime in

spite of a need for you to do so in order to fulfil your responsibilities”.

- (b) the statement made by the Respondent in the letter of the 14th October 2008 that after due investigation they had found that:-

“For some time you refused to do overtime and have threatened to leave at 4pm regardless of any work pending on more than one occasion”.

- (c) the statement made by the Respondent in the letter of the 7th August in which it was stated that:-

“as part of your employment you have always worked extra hours as and when necessary given that your role as manager has required this. You have now out- rightly refused to work extra hours.....”

Whilst there is no doubt that the Complainant did at the meeting of the 9th July 2008 state that he was not going to do any overtime, there is no evidence whatsoever to show that during the period 10th July 2008 to the 20th October 2008 there was a need for the Complainant to do overtime, or, that he in fact was asked to do overtime and refused, or, that he did not do overtime let alone that his contract of employment required him to do overtime. The issue of the overtime could not possibly have been a real reason for the Complainant’s dismissal and was most certainly not considered by Mr. Ignacio as being a principal reason for the dismissal.

Turning then to the second limb of this particular allegation; i.e that the Complainant failed to attend to his duties. The basis of this allegation would appear to be that the Complainant on more than one occasion left the offices unattended and/or left the offices in order not to be alone with Miss Ocaña.

Thus, in evidence Mr. Ignacio stated:-

“Eric Hammond mentioned to me and the Committee that he would leave the office if he was going to be alone with Ocaña and he was told he could leave the office to do his work but not leave the office unsupervised for that reason.”

All members of the Committee who gave evidence on this particular point repeated the allegation on more than one occasion that the Complainant would leave the office unattended and/or in order not to be “alone” with Ms Ocaña, but none of them were able to give a single instance when they personally witnessed this. Indeed one would be right to assume that they could not since as

working taxi drivers, as they all accepted, they were rarely in the office for any length of time during the day. They must have in my view arrived at this conclusion from what members of staff may have individually or collectively said to them rather than from anything witnessed by them. So what was the evidence of members of staff on this point. The only members of staff who gave evidence on this issue were Ms Bacarisa who in the course of her evidence stated:-

“Eric Hammond was pretty much away from the office when she was there. This started with the first instance and got worse with the second incident when he was never there. I remember he was always out of the office as Claudette was in the office since if I needed him I could not”.

“Sometimes Ocaña went down to the radio base as she realised also what he was doing so sometimes she would go and help in the base. Eric Hammond was not out of the office all the time.”

“I don’t think I am exaggerating the time Eric Hammond spent out of the office. He would get up and leave and not say where he was going. Eric Hammond could have had things to do outside of the office. Sometimes he did go to the meetings to go to the liners. This was the case before and after Claudette”.

“If an issue arose in the office and he was not there I would call him and if I couldn’t get hold of him I would call one of the delegates. I mean the Committee I would say that he was out of the office and they could call me later.”

“Prior to December 2007 he left the office when he had to leave the office and not all the time when he was called. After December 2007 he would leave the office more than normal and after February he was always away. When away I have no idea what he was doing.”

and Mrs Vinet who stated in the course of her evidence:-

“after this second incident the atmosphere in the office was really really bad we were dreading going to the office. Eric Hammond would go out of the office even more and I remember him saying that he would not stay in the office if Ocaña was there. He would go out of the office even more.”

I do not accept Ms Vinet’s statement that the Complainant, who it must be recalled was, according to her, allegedly making the atmosphere in the

office really really bad, would have volunteered the tit bit of information that he would leave the office if Ocaña was there.

The problem I have with Ms Bacarisa's evidence on this point is that it seems to me that she has exaggerated matters. Between December 2007 and October 2008 Ms Bacarisa spent a lot of time out of the office, and indeed Gibraltar, since she was supporting her sister in a hospital in the UK and therefore could only give evidence on the short periods she herself was in the office. Moreover, she speaks of the Complainant leaving the office whenever Ms Ocaña was present (which on the evidence we know Ms Ocaña was only in the office one week out of two) whilst the Committee refers to his leaving the office unattended in order not to be alone with Ms Ocaña, an allegation which not even Ms Ocaña herself made at any time. Furthermore, Ms Bacarisa herself admits that she did not know whether when the Complainant was out of the office he was attending to the Respondents business or not, whilst Mr. Ignacio complained that the Complainant spent too much time attending to taxi drivers problems (a strange comment bearing in mind the Respondent is a trade union!) when he should be in the office. And at the end of all of this not a single example was given in evidence by anyone (See above with regard to my comment on Mr. Zammit's evidence) of the office being left unattended on any day for any length of time. The issue of failure to attend to his duties and/or leaving the office unattended could not in my view have been a real reason for the dismissal.

Failure to ensure that the SAGE software was kept safe

With regard to this allegation it is the Complainants position that it was not his responsibility to back up the pen drives and/or that he was never trained as to how to do the back ups or to utilize the system.

Thus, in evidence he stated, amongst other things, that:-

“Sometime in September Sage goes missing I do not recollect when. In relation to Sage I had no role. No instructions were given to me about Sage.”

“I was not responsible for the imputing of the Sage information. It was not my responsibility to input information into the system. I was told by Michelle that it had gone missing. It happened last night she said. It was early morning when she told me. I told the president.

“As far as I am aware the pen drives have only to do with the fuel records. I know nothing about the pen drives.”

“SAGE software. Jasmine mentioned to me that it got lost. This happened 4/5/6 weeks prior to the pen drives problem. I do not

know if between these 4/5/6 week period the SAGE software was re-instated into the computer. The SAGE was looked after by Jasmine, Michelle and accountant.”

So what then is the evidence of the Respondent on this issue.

In evidence John Gonzalez stated the following:-

“The SAGE software I would have to look at the document to say when things disappeared. The program I can’t recall a definite date on that. It came to my attention sometime in May/June 2008. No where definite. Time has passed on. A member of the staff when I asked for some figures told me that SAGE had disappeared. I believe it was Michelle who told me.”

“ Michelle came in the morning and there was no data there on the computer. I asked her to go get the pen drives to get the back ups. We had two pen drives. The pen drives were completely deleted.”

“The back ups were also empty. I asked Eric Hammond where the pen drives were kept to see if they were kept securely. Eric Hammond did not know where they were kept”.

“Once we concluded that the data was deleted our main theory was that it was done purposely since it was unlikely that both had been done by error at the same time although it could not be ruled out”.

“The Committee decided not to take any steps at that stage since we could not identify who or how it was done”.

“Eric Hammond was responsible to make sure the girls in the office were doing their back ups. To check the back ups were being done. Eric Hammond had to ensure that the girls did it and then put it on the pen drives. As to how he checked the girls did it was upto him”.

“Hammond was responsible for ensuring records were kept.”

“Eric Hammond was aware that he was responsible for and responsible to oversee the backup of the data as a result of the instruction of the Committee and of Hazel.”

“I recall that I did set up a protocol for the keeping of the pen drives but I cannot recall what it was. I believe I said it was to be kept in the safe.”

“I don’t know of the protocol was put in writing or not. I did not put it in writing. I discussed the protocol with Eric Hammond and

it was upto Eric Hammond to put it in writing and ensure the staff adhered to it.”

“Before the protocol the system to be followed for ensuring the data was safe was to back up the computer on the pen drives and then to put the pen drives in a safe place in the office not necessarily locked up.”

In evidence Ronald Ignacio stated the following:-

“I am saying that with regard to the pen drives I could not point the finger to anyone let alone to Eric Hammond but he was responsible and he should have told the Committee what had happened”.

“There is no written record of Eric Hammond being informed that he was responsible for managing the inputting of information. He was told he was responsible. He has to be responsible for every that happens in the office. In 11 years he would have been told what has to be done and when and therefore he does not need to be told this has to be done or not done every time.”

“As far as I was aware all the staff knew that they had to back up all the stuff on the computers with pen drives.”

“No minutes or written instructions as to Eric Hammond being told he was responsible for ensuring pen drives. I suppose that he was told he was responsible for backing up the pen drives. I know he was told but I cannot recall who.”

“As far as I know every person who worked with computers had to back up and it was for the manager to be responsible to ensure this was done.”

“We were not pointing the finger at him with regard to the tampering.”

In evidence Hazel Macedo stated:-

“I became aware that SAGE had disappeared when I was told about it. I went to the office, hit the icon button and nothing came up. I stuck in the pen drive and no data came up and I know that there was a back up because I did the first one myself and I showed the girls how to do it.”

In evidence Ms Bacarisa stated that:-

"I remember saying that I did not understand why he was suspended with regard to the pen drives because it was my responsibility. I can't recall Gonzalez saying they need to start from the top."

That being the gist of the evidence given, I turn to what the allegations made by the Respondent against the Complainant were.

In its letter of the 20th October 2008, pursuant to which the Complainant was notified of his suspension, the Respondent stated:-

"Our technicians have advised that the information on the pen drives has been deleted. There is no evidence of viruses having affected the information, so that we are led to believe that the information has been deleted deliberately, as both pen drives have been affected.

As office manager, it is your responsibility to ensure that the GTA office runs smoothly.

This includes managing staff and equipment."

In its letter of the 14th October 2008, pursuant to which the Complainant was notified that he was going to be disciplined, the Respondent stated:-

"Following the implementation of a new accounting database (SAGE) you were informed that you, as manager, were responsible for managing the on going inputting of information. You failed to keep tabs on this and informed us that you did not know how the data inputting was progressing.

You were instructed that all information was to be backed up on external pen drives and the staff were shown how to do this.

The SAGE software suddenly disappeared from the computer system. The GTA found out about this from members of staff, as you failed to inform us. We are advised by the SAGE software technician that the loss was due to the reformatting of the hard disk drive following a virus attack. However, it was found that the pen drives did not contain the backed up information. Our investigations have shown that this was deleted We have found out that the pen drives were kept in a desk drawer, thus failing to ensure that they were kept safe."

In its letter of dismissal of the 20th October 2008 the Respondent states that:-

"Your failure to ensure that SAGE software was kept safe."

There is no doubt in my mind that the Respondent, whilst accepting that they could not prove who had deliberately deleted the information on the pen drives, nevertheless feared that somehow the Complainant was responsible for what had occurred and was carrying out his alleged threat of closing down the Association. This may well have dictated their decision to hold the Complainant (but none of the staff who were actually inputting the information and responsible for doing the back ups and putting them away) responsible for ensuring that the pen drives were safe. As manager of the office the Complainant certainly had a general responsibility for ensuring that documentation in the office was kept safe but could the Complainant be reasonably held responsible or accountable for the deliberate deletion of the pen drives by an unknown person when:-

- There is grave doubt certainly in my mind as to whether anyone in fact actually (as distinct from presumably as the Respondents witnesses state) told him that he had to supervise the back ups and/or ensure their safe custody;
- The supervisor of the SAGE programme and its maintenance was Mrs Macedo and she made no reference to having given the Complainant instructions as to the safe guarding of the pen drives;
- There had been no reason to believe that the pen drives would be tampered with prior to the incident occurring;
- As I do not accept Mr. Gonzalez's evidence on the point, the Respondents had not introduced written procedures for the storage and handling of the computer data; and
- There was no security protocols installed in any of the computers in the office.

In my view, the Respondent unable to find who or what had caused the deletion of the back-ups reacted to their worst fears and decided blindly or otherwise, to make the Complainant accountable for the disappearance of the data. Mr Allan has submitted that this was the literal straw that broke the camel's back. In the minds of the Committee it may well have been but it was not a justified and/or reasonable stance to take in all the circumstances of the case.

As an aside I find it noteworthy that in the letter of the 14th October 2008 the Respondent makes great reference to the cost of the Association of losing the information in question etc and yet in evidence it transpired firstly, that the Respondent had decided that SAGE was not suitable for their needs and was to be replaced with another programme, and secondly, that the information lost was still being manually archived, both of which points should in any event have dictated the view taken on any disciplinary action to be taken in the event of the breach of duty being found.

Unacceptable attitude and behaviour towards the Executive Committee including abuse.

In its letter of the 11th August 2008 to the Complainant the Respondent states:-

“Thereafter when we met with you in order to ascertain and discuss your own grievances you were abusive and insulting towards the Committee members and you stated in very derogatory terms that you would not heed our instructions.”

By letter dated the 19th August 2008 Isolas’ informed the Respondent that the Complainant “categorically denies that he was abusive and insulting towards the Committee members” and requested specific information as to “who was purportedly abused or insulted or indeed what words were used by” the Complainant. This letter was never replied to.

In its letter of the 14th October 2008 to the Complainant the Respondent stated with respect to this issue that:-

“At a meeting with you in relation to your wish to attend meetings held with staff so that they could air their grievances, you were verbally abusive and threatened Mr. Ignacio, Mr. Gonzalez and Mr. Balban saying that if you were not allowed to represent staff members you would do whatever it took to close the place down.”

I pause here to note the obvious differences between both letters. There is no mention of threats in the letter of the 11th August but in that of the 14th October it is alleged the Complainant threatened to close the Association down. In the letter of the 11th August it is alleged the Complainant would not heed the Committees instructions but such an allegation is not contained in the letter of the 14th October. In the letter of the 11th August it is said that the Complainant was abusive to Committee members but in the letter of the 14th October it is only alleged he was abusive to some Committee Members; Mr. Ignacio, Mr. Gonzalez and Mr. Balban. Be that as it may the Respondents allegation against the Complainant is directed solely to what transpired at the meeting with him on the 7/8th August 2008.

Turning then, to the oral evidence given by the Committee members on this issue.

In his witness statement Mr. Balban does not refer to what transpired in the meeting of the 8th August and in oral evidence the only thing of relevance he stated was that:-

“As to attitude to work and verbal abuse that was never ended as such and continued throughout.”

But this was said generally and not in relation to the meeting of 8th August 2008.

In oral evidence Mr. Clive Zammit stated:-

“I tried to do the best I could for Eric Hammond before Ignacio came in but I could not cope with Eric Hammond so it was a war on a daily basis in all aspects.”

“The war started from the day he started. From those days he started doing things bit by bit today one thing tomorrow another one.”

In his first witness statement Mr. Ignacio states:-

“A further incident occurred on 8th August 2008. He was clearly very bothered by this and told Mr. Gonzalez “yo me paso a ti y al comite por los cojones.” If you don’t allow me to sit with the staff I will do whatever I have to close this place down.”

In oral evidence Mr. Ronald Ignacio stated:-

“The letter of the 11th August was written in relation to the grievance letter and because Eric Hammond was a bit abusive with Gonzalez. It was mostly because he was very abusive with Gonzalez. It was mostly because he was very abusive with Gonzalez - Esta carta me lo paso yo por los cojones.”

“The instructions which Eric Hammond was not following were the Committee’s instructions and he was being abusive to certain Committee members.”

“Eric Hammond was being abusive to me and Gonzalez.”

“The threats of Eric Hammond and the disrespect to the Committee are not mentioned in the 7th August letter but they did happen but we were not going into details of what was said or not said. In the letter of the 11th August there is no mention of Eric Hammonds threat to close the GTA because we would not put down the details but there was a lot of abusive language and things said.”

“He first became abusive when we started issuing him with warning letters.”

“The tone of Eric Hammond was arrogant, he was annoyed, looked irritated when he said to us esto me lo paso.....”

In his witness statement Mr. Gonzalez does not specifically refer to what occurred in the meeting of the 8th August and in evidence Mr. Gonzalez does not appear to have been asked questions on this matter since I could find nothing in my notes referring to this point.

As I understand the evidence given by members of the Respondent on this point it is clear to me that:-

- (i) Mr. Balban has no or little recollection of the meeting in August with the Complainant and certainly made no mention of being insulted or threatened at the meeting;
- (ii) Mr. Ignacio is very clear that the Complainant was only abusive to Mr. Gonzalez and himself and not to other Committee members;
- (iii) the only example given of the abuse which allegedly was suffered by Mr. Ignacio and Mr. Gonzalez was “*Esta carta me lo paso yo por los cojones*” which is hardly going to make seasoned taxi drivers even blush however disrespectful some of us may think such a comment is;
- (iv) Mr. Zammit feels so strongly against the Complainant that his evidence with regard to any matter concerning the Complainants attitude to the Committee lacks total impartiality.

I therefore now turn to the evidence of the Complainant on this point.

In his witness statement the Complainant states:-

“I was called in last on 7th August 2008 and a very heated meeting ensued.”

In oral evidence the Complainant stated:-

“On the 7th August I walked in the office and Gonzalez started asking me if I was office Clerk or Office Manager. Certain points were briefly made about my attitude and then I walked out. It was very heated and I just walked out.”

“I was called to the meeting and Gonzalez, Ignacio, Zammitt and I cannot remember who the rest were at the meeting. I don’t have a personal issue with Gonzalez. When Ignacio handed me the letter I never said “Esto me lo paso por los cojones.” When the letter was handed to me I said I would get my glasses from my office. I went to my office got the glasses

and returned to the room. I read the letter and then said ok and walked out. I did not say anything."

"I was not obstructive at the meeting, they were. I did not make any derogatory remarks at the meeting or say that I would not heed the instructions of the Committee."

Interesting enough (could he have confused the events) in his witness statement the Complainant states the following when referring to the events of an earlier meeting that of the 9th July 2008;

"In frustration, I cut Mr. Gonzalez off by saying that I was whatever I wanted to be (yo soy lo que me salga de los cojones)."

And in oral evidence when generally referring to his inter action with Committee members the Complainant stated:-

"The position with Gonzalez was the attitude he had towards me with reference Zammit and Ignacio there had been growing tension for some time reference certain issues related to members with my wife - one was she was victimised with regard to the guide pass with other female drivers when the constitution stated they had to defend all members and the workings of the temporary drivers issue".

Having considered all the evidence, and bearing in mind the chronology of events from the 4th to 8th August, I have little doubt that the meeting of the 8th August was a short heated affair in the course of which the Complainant was certainly disrespectful to Mr. Gonzalez and probably threatening with regard to his future actions.

Failure to implement policies and decisions made by the Executive Committee

In its letter of the 7th August 2008 the Respondent states that:

"You have become obstructive in your attitude by not complying with instructions issued to you by the Committee, for instance, in matters to the running administrative tasks of the GTA. As you are aware your role as manager is to implement the decisions taken by the Committee so as to ensure the smooth running of the Association."

It is to be noted that no specific examples are given in this statement with regard as to what and/or when the Complainant failed to implement policies and/or decisions. This point was indeed made to the Respondent in Isolas letter of the 19th August 2008 before going on to ask the Respondent to

“specify when and how our client has been obstructive and not complied with instructions issued by the committee”. It is worthy of note that neither the Respondent or its solicitors ever replied to this letter of the 19th August 2008 and/or provided the information sought. Having said this, in the minutes of the Committee meeting of the 9th July 2008 there is a reference to the Committee not being able to *“tolerate the manner in which he has been obstructive and not complying with instructions given to him by the Committee on matters relating to the running of the GTA.”*

In its letter of the 14th October 2008 the Respondent informed the Complainant with respect to this issue that:-

“You are failing to implement policies and decisions made by the Executive Committee. For example, cheques supposed to be banked have remained lying around the office without being banked for exceptionally long periods of time and arrears are not being chased up amounting to over £50,000.”

So the two specific complaints are failing to bank cheques and failing to chase arrears. In my view the Respondents failure at the time of the issue of the 14th October 2008 to particularise all the examples of the Complainants failure to implement policies and decisions means that it is restricted to relying now only on the two specific examples given. Turning then to the evidence given on behalf of the Respondent with respect to this matter:-

In evidence Ronnie Alecio stated that:-

“Eric Hammond never obeyed the Committee. The Committee was annoyed every time we asked anything Eric Hammond would not answer.

“Eric Hammond was never doing what he was supposed to be doing. Eric Hammond wanted a new Committee and he was encouraging the members to change the Committee really.”

In evidence Ronald Ignacio stated that:-

“I have no idea why there is no mention in the minutes prior to the 9th July as to Eric Hammond being obstructive. Not really should have been in the minutes because we got together we discussed other matters and with regard to Eric Hammond being obstructive we would deal with him directly and that is why it is not in the minutes. I do not agree with you that the issue of Eric Hammond being obstructive was not an issue at all.”

“There is not a single mention in the minutes about Eric Hammond and any of the problems with him in any respect

with him due to the fact that unfortunately with Eric Hammond a lot of things were done with him on a one to one basis verbally.”

“Eric Hammond was also seriously insubordinate and there is nothing there prior to the 9th July but if I recall it, we were having problems with Eric Hammond we were talking to him verbally and explaining to him how we wanted to do things.....”

Taking into account all of the above, and putting aside the sweeping generalisations made by witnesses on behalf of the Respondent, as referred to above what we are left with are two specific allegations against the Complainant insofar as this head of complaint is concerned; namely that he failed to bank cheques and that he failed to chase arrears. So I turn to consider each of those allegations.

- (i) Failing to bank cheques:- It is accepted by both sides that for as long as anyone could remember there was a peculiar system in the office with regard to payments received; be this cash or cheques. This system had been known to, and obviously approved by, previous committees, treasurers etc of the Association over many years and was an institutionalised manner of dealing with payments received by the Association. As in other areas it was simply the way the Association dealt with its affairs. So what happened to change this. According to Mr. Desoiza, who at the time was the Treasurer of the Respondent, and Mr. Zammit who at the time in question was the President of the Respondent, around January 2008, it was decided to introduce the SAGE software programme into the office and to chase up arrears outstanding to the Respondent. I stop to point out that in my opinion the evidence clearly shows that historically the Respondent always appears to have had large amounts of monies outstanding so that one can say with confidence that it was nothing new for the Respondent to have large sums of monies owed to it at the beginning or during the course of 2008. Such a state of affairs appears to have been accepted as much by the membership as by previous treasurers as by previous committees. Mr. Zammit in oral evidence stated that *“the GTA prior to 2008 was the way it had always been working since time immemorial. Before me it was even worse.”* As a consequence of arrears being chased up and payments being received, it is alleged that the Complainant was instructed to bank cheques and that he failed to do so. The evidence on this point is the following.

In the witness statement of Peter Desoiza it is stated that:-

“Both Clive Zammit and I then told the Complainant that cheques must be banked within the same week of having

received them. He said he could not do this as it would interfere with his accounting methods.

As he refused to follow my instructions as Treasurer I had to ask Clive Zammit, who was President at the time, to intervene. I also asked Hazel Macedo to ensure these cheques were banked by the staff as a matter of importance, but the Complainant still refused to do so. Eventually he told us that the Committee would be responsible for any problems that arose as a result of this request.”

In oral evidence Mr. Desoiza stated that:-

“I have no idea what the accounting methods of Eric Hammond were. When I handed in the cheques I asked him that they needed to be banked and this is when Eric Hammond said that he couldn’t bank them and that it would interfere with his accounting method or system. I replied said cheques were information and money so photocopy the cheques, do with them what you had to do and bank them. Eric Hammond said no to this as the cheques had to go through a procedure. That is why I asked Zammit and later Macedo to say that they need to be banked.”

“I don’t know if after this cheques were banked. Macedo did mention that cheques had to be banked. Zammit also said this to Eric Hammond. This was at my insistence/ request.”

In his witness statement Mr. Zammit stated as follows:-

“Both Mr. Desoiza and I told Mr. Hammond that this was unprofessional behaviour and that in future cheques needed to be paid into the bank within the same working week.

..... The Complainant said that banking cheques immediately would interfere with his method of accounting. After much insistence he agreed but tried to force Peter Desoiza and I to sign a document excluding him from any liability if something went wrong.

The Complainant started banking cheques in accordance with my instructions. However he would bank the cheques and not take note of the cheques details such as the cheque number and the person/company who had issued the cheque. This led to further problems. The Complainants reply to this was “I told you so”. After this incident I insisted he make photocopies of every cheque and take note of the relevant details.”

In oral evidence Mr. Zammit stated:-

“This was a written letter presented by Eric Hammond saying that if we wanted him to do that work we wanted, we then had the responsibility of the accounts and I asked him why. He said because this is not the way the accounts system works. What we were presenting him was very simple. Do a photocopy of the cheque and deal with the photocopy whenever he wishes to give the cheque to Jasmine whenever he wants and do the accounts whenever he wants, but the cheque has to be banked.

..... I think Eric Hammond refused to adopt the system. He probably refused because it was not the way he wanted it but he refused. He eventually accepted it.”

In her witness statement Mrs Macedo makes no reference at all to the issue of the banking of cheques whilst in oral evidence she stated:-

“I don’t recall implementing any change with regard to the photocopy of cheques but I was aware of it and I had no involvement in implementing it.”

In oral evidence Mr. Ignacio stated the following with regard to this issue:-

“I remember that De Soiza wanted to change some things with cheques which were flying around and De Soiza wanted them banked. This issue had not been resolved when I became president as Eric Hammond was totally against it.”

“Maybe there isn’t a mention of arrears in the minutes but I can assure you that Desoiza commented to me and Clive that he was having difficulties with Eric Hammond reference cheques with arrears and Eric Hammond specifically told by De Soiza and Zammit that all cheques had to be banked and Eric Hammound said No and if you want them banked then someone needs to sign for the banking of the cheques.”

On the basis of the above it is clear to me that:-

1. The issue of the banking of cheques arose between January to April 2008.
2. The Complainant was not in favour of the system proposed and rebelled against it;
3. The two committee members involved in the matter were Desoiza and Zammit.

4. Zammit confirmed that reluctantly the Complainant “eventually accepted” the system whilst De Soiza, strangely enough as he was treasurer, was unable to say whether the cheques were banked.
5. This matter was a dead issue by the time the letter of the 14th October 2008 was written.

It may well be that the Respondent was initially irritated by the Complainants’ refusal to immediately act on their instructions and/or to require that a member of the Committee sign for the banking of cheques but even if that was the case that is not the same thing as saying that he was not banking cheques and/or that cheques were left lying around the office for a long time. The evidence given with regard to old cheques found lying around the office dating back some years/months does not go anywhere close towards proving the Respondents’ allegation on this issue. I am not persuaded that this was a reason for the dismissal and, even if it was, the Respondent would not have acted reasonably in relying on it for the purposes of dismissal.

- (ii) Failing to chase up arrears over £50,000:- As referred to above the evidence is that in, or, sometime after January 2008 Mr. Zammit and Mr De Soiza decided to chase up arrears.

In his witness statement Mr. Desoiza stated:-

“I confirm that it was me who investigated whether invoices remained unpaid, and who established that there were invoices totally approximately £36,000 still outstanding. There was also rental arrears of approximately £15,000 in relation to Private Hire vehicle rentals.”

“Both Clive Zammit and I attempted to recover some of the arrears, such as those in relation to a local shipping agent Smith Imossi. In one particular week I managed to collect a total of £33,000. It was the responsibility of the Complainant as office manager to manage the accounts and check that the arrears are chased and settled.”

In oral evidence Mr De Soiza stated:-

“It was the responsibility of Eric Hammond to manage the accounts and check that arrears are chased and settled.”

“I was responsible as treasurer for all of the monies of the GTA under the constitution. There were books in the GTA. Personally I did not see any of those books.”

In his witness statement Mr. Zammit stated that:-

“It was brought to my attention before the end of 2008 in a meeting with Peter Desoiza the Treasurer of the GTA, that there were outstanding amounts owed to us by various clients. I confronted the Complainant with regard to this issue and he said “I go or send staff to collect dues, sometimes they pay us and sometimes they don’t.” I told the Complainant that he must be more assertive and ensure that the cheques were collected.”

In oral evidence Mr. Zammit stated:-

“Before Desoiza told me I was aware of the debts. I was aware of the debts as I was in the Committee for years. Sometimes I had gone with Eric Hammond to resolve the debts. Sometimes I went with Michelle and sometimes I went alone.”

“The arrears of £50,000 could be in relation to the cheques found in Eric Hammonds cupboard or it could be as well bills outstanding that were outstanding and not collected for a long time. I don’t know the details of what arrears were in respect of. They were for bills. I cannot say in respect of what.”

In oral evidence Michelle Vinet stated that:-

“The GTA had historic debts with shipping agents. I was aware of the monthly records and I used to tell my manager. I was aware that there were debts. Maybe they paid me one month and they owed me two and so on that is what I was aware of.”

“I think that some ship agents owed more than one or two months invoice and some could have owed many thousands of pounds.”

“I used to deliver the invoices and collect payment by hand I had always done this, this way. Some cheques were sent by post but this was rare. Payments were not always waiting for me when I went to collect.”

“Eric Hammond was responsible for negotiating and dealing with disputed invoices. Eric Hammond used to speak to the agents.”

“When an invoice was disputed I used to highlight it in the book, take a photocopy of the invoice and wait to see what my manager came up with after. I would tell my manager about the disputed invoice and he would deal with it.”

Mr. Gonzalez stated the following when asked about this particular issue:-

“In the dismissal letter reference is made to over £50,000 in arrears, in the AGM of April 2008 it was £120,000 and in Ignacio’s statement it is different figures. I would want to look at the accounts to see if I can find out what the £50,000 referred to in the dismissal is about. The over £50,000 would be a collection of all the amounts referred to in the accounts of 2008. Between the AGM and the dismissal the Committee was very active in pursuing those arrears.”

“I cannot say what exactly £50,000 referred to”.

In the course of his oral evidence Mr. Ignacio stated the following:-

“The Shipping debt had been in existence always since we gave them credit but it was always the responsibility of the manager to keep the debts as low as possible. Michele/Yolanda used to go out and collect those arrears. It was always the responsibility of the manager. He had to make sure that the arrears kept upto date.”

“... one day I was in the office it was brought to my attention that there were Companies owing a lot of money and I mentioned this to the manager and he said Michelle goes every month and they don’t pay her so I told Eric Hammond you have to chase those arrears. Eric Hammond said it was for Michelle to chase up and she mentioned it to the companies but they did not pay attention to her. I said that Eric Hammond had to ensure that he chased up.”

“I did not know that we had a lot of arrears and we thought we were chasing them up properly but we were not doing so, so I felt that those aspects had to change.”

“I knew that certain things were not being done properly and patched up. It had got to be a habit with regard to arrears. They were not being chased up.”

On the basis of all of the evidence including the above it is clear to me that:-

- (i) the Respondent had always had historical debts with its clients;
- (ii) that in April 2008 the debts stood at some £120,000;
- (iii) that both Mr. Zammit and Mr. Desoiza tasked and reduced the arrears;
- (iv) that Ms Vinet was charged with delivering the invoices and collecting payment;
- (v) that when Ms Vinet was confronted with a disputed invoice and/or with a recalcitrant debtor she would inform the Complainant;
- (vi) that between April and the date of the dismissal letter the arrears must have gone down from £120,000 to “*over £50,000*”;
- (vii) that according to both Mr. Zammit and Ms Vinet the Complainant did take (some) part/action to deal with the collection of outstanding payments;
- (viii) there is absolutely no evidence whatsoever to show how the “*over £50,000*” sum referred to in the disciplinary letter was made up, or, what period exactly the arrears covered, or, what those arrears referred to, or indeed if in fact said sum was owed.

It may well be that the Respondent thought that the Complainant was not being pro-active or stern enough in getting debtors to pay their arrears but even if that was the case, this is not the same thing as saying that he was not chasing up arrears which is the allegation made against him. I am not at all persuaded that this was a reason for the dismissal, or, even if it was, that the Respondent would have acted reasonably in relying on it for the purposes of dismissal.

Bearing all of the above in mind, I have come to the conclusion that with regard to the two specific issues raised by this head of complaint, failure to implement policies and decisions made by the Executive Committee, neither issue could have been a real reason for the dismissal.

The summary of all of the above is that I have determined that the principal reason for the dismissal is that the Complainant on more than one occasion asked Messrs Gonzalez, Ignacio and Balban to dismiss Ms Ocaña and that, on their refusing to do so, he asked them to bore her into resigning. I have also determined that a lesser reason was the Complainants abuse of Mr Gonzalez. With reference the principal reason there can be no doubt

whatsoever that the Respondent acted reasonably in treating that reason as a sufficient reason to dismiss. With regard to the issue of abuse it does not seem to me that in the circumstances of the case dismissal was a reasonable response and/or within the band of reasonable responses of an employer.

It is the Complainants' contention that the real and only reason for his dismissal was that he had managed to unite the staff, firstly and informally, and then through the Union, so that their grievances were put forward with the result that a state of industrial action between the union and the Respondent arose which was given publicity through the media to the embarrassment and annoyance of the Committee members. The Respondent, obviously, denies this. I have taken careful stock of Mr. Navas's forceful submissions with respect to this contention and whilst there is some merit in it I have in the end not been persuaded that one can say that the real reason for the dismissal was the airing of staff grievances and/or the involvement of the union and/or the publicity given to the dispute. That all or any one of these did to some extent influence the decision of the Respondent to finally confront the Complainant head on I have no doubt but this does not detract from my determination that the principal reason for the dismissal was the Complainant's demands to the Committee concerning Ms Ocaña.

Having determined what the principal reason for the dismissal was/were, and having found that said reason was a permitted reason for the purposes of the Act thereby enabling the Respondent to act reasonably in dismissing the Complainant, insofar as that particular ground is concerned, I now turn to the issue of whether the procedure used for the dismissal was fair and reasonable.

Mr. Allan has vigorously submitted that the Respondent followed a fair procedure in dealing with the Complainant since (a) the Complainant was at all times aware of the various issues which were of concern to the Respondent through both informal and formal discussions with the Respondent (b) the Complainant was given ample time in which to improve his conduct and (c) the Complainant was given plenty of opportunities in which to state his case and deal with those issues of conduct including the attending of two hearings before adjudicating bodies who both found that dismissal was appropriate in the circumstances.

In dealing with this submission I will restrict myself solely with examining what occurred before the two adjudicating bodies Mr Allan has referred to.

The Disciplinary Hearing

By letter dated the 3rd October 2008, the Respondent informed the Complainant that an investigation was being conducted for the purposes of ascertaining how accounting information on two pen drives had come to be deleted and that as it was the Complainant's duty "*to keep the systems safe*"

he was being suspended on full pay pending the outcome of the further investigation; which could result in a disciplinary hearing. In said letter it is also stated that *“this latest incident is to be considered in the context of previous breaches of duty, and our letter to you of the 7th August 2008.”*

So what then was the investigation conducted. Accordingly to the evidence given by the Respondent witnesses it was as follows:-

(a) John Gonzalez:-

“The Committee decided to try and find out if Eric Hammond or the staff knew anything about the disappearance. We were going to investigate. The investigation we asked the individual members Jasmine, Claudette, Yolanda, Eric Hammond and Michelle. It was me / Ignacio, Balban and a couple of other committee members asked. I cannot remember how long this took. It was a day or two in which it was done. It took a couple of days to get everyone to answer.”

(b) Ronald Ignacio:-

“The investigations after 3rd October were done by the Committee. I did not investigate anything as I knew what had happened to me. All the members were investigating different things and checking things out and asking staff. Everybody did a little bit of everything trying to close down all the issues since day one.”

“After the 3rd October we held an investigation into the loss of data. I am afraid I cannot tell you how it was done as I was not involved in it. It was either Gonzalez or Balban who were involved in the investigation.”

(c) Clive Zammit

“I think I did take part in the investigation. I checked all his old cheques left behind and cleared the desk which I used to do every time I went to see him. I checked the vouchers of the quarter of the harbour collect cheques from the funeral. Some investigation was done by Gonzalez by Ignacio.”

With all due respect to those concerned it appears to me that whatever investigation was conducted it was uncoordinated, superficial and haphazard.

By letter dated the 14th October 2008 the Respondent informed the Complainant that:-

- *“our investigations have now been completed and we propose to hold a meeting to discuss various issues with you relating to your general work performance and attitude and in particular Refusal to work with Miss Claudette Ocaña..... Attitude to work and verbal abuse Loss of Accounting Data”*
- *“Further details will be given at the proposed disciplinary meeting and you will have a chance to explain your actions”.*
- *“It is important that you attend the meeting at which you may be accompanied by a trade union representative or colleague of your choice We would be grateful if you would let us know if you wish to be accompanied.”*

By letter dated the 15th October 2008, Caetano & Co, ostensibly acting for the Complainant, or, the trade union, or, both since it does not state, (but in his first witness statement the Complainant does state that Caetano & Co were his solicitors) informed Hassans, the Respondent’s solicitors that the Complainant declined the meeting offered and instead exercised his right to appeal against the suspension imposed on the 3rd October 2008.

At this stage the Complainant had therefore informed the Respondent that he was appealing the decisions to issue him with a written warning on the 7th August 2008 and to suspend him from work on the 3rd October 2008. It is pertinent to note that the Respondent never processed either of these appeals thereby denying the Complainant a right to which he was entitled. By a letter, which I have deduced should have been dated 16th October 2008 (but was actually dated 8th October 2008), Hassans requested Caetano & Co to ask the Complainant to reconsider his decision not to attend the disciplinary meeting since the meeting would continue in the Complainants absence.

It would appear that for one reason or another the Complainant changed his mind and did attend the disciplinary hearing on the 17th October 2008 accompanied by a trade union representative, Mr. Ralph Capurro.

I pause here in the narration of events to make the following observation. In my view the disciplinary hearing should not have taken place until such time as either or both of the appeals requested by the Complainant had been heard or the Complainant had withdrawn his requests. This is especially so with regard to the appeal against suspension which is a right specifically provided for in Rule 8 (e) of the Respondents Constitution :-

“Any person suspended or dismissed under this rule will have the right to appeal to a General Meeting.”

Thus, at the point that the Complainant appealed against the decision to suspend, the Respondent was obliged to process that appeal by its own Constitution and the failure to do so cannot simply be brushed aside. Mr. Ignacio, in cross-examination stated:-

“Eric Hammond said he wished to appeal his suspension for us there was no need to hold an appeal as we were going through a process.”

“He has a right to appeal to the members but the Committee was dealing with all of this. We were going to have an EGM with the members and Eric Hammond. The feedback was from the members and they said we had to decide the issue first as the Committee with the responsibilities and then we could go on to the EGM. That is why we did not have an EGM with regard to appeal of the suspension.”

Mr Ignacio’s evidence on this issue is telling at various levels but at the end of it all it comes down to the Committee refusing to grant the Complainant his right to an appeal and this cannot be right or justifiable. Mr. Allan has contended that eventually the Complainant did exercise his right to appeal since an appeal was heard on the 5th December 2008. That may be so but with respect he misses the point. The appeal heard was against the Committee’s dismissal of the Complainant and not of the Committee’s decision to suspend the Complainant, a material difference. Different issues and considerations were put to members on the 5th December 2008 than would have been the case if the appeal against suspension had been put before members.

Turning then to the hearing itself. Mr. Allan has reminded me that the basic underlying principle in relation to a disciplinary hearing is that the employee should know the nature of the accusations made against him and be given an opportunity to state his case. I agree entirely. Both Mr. Navas and Mr. Allan have gone to great lengths to justify and explain away their own clients actions whilst at the same time attacking the other sides stance but the fact of the matter is that when all is said and done this was a shambolic event with both sides lacking good faith and each trying to obtain tactical advantages to the prejudice of the other.

Mr. Navas has complained of:-

- the Committee’s behaviour towards Mr. Capurro;
- the composition of the disciplinary panel;
- the procedure followed at the hearing;
- the Complainant’s lack of opportunity to question witnesses;
- the lack of information given to the Complainant with regard to the allegations made against him;
- the panel’s refusal to permit Mr. Capurro to speak;
- the failure to permit the Complainant to make representations.

Mr. Allan has contended that:-

- the Complainant was provided clearly and unambiguously with the various issues/allegations which were going to be dealt with at the disciplinary hearing;
- the Complainant was given the opportunity to state his case and he chose not to do so;
- the Complainant acted as if he was not interested in or concerned about the proceedings at the hearing;
- there was nothing wrong in the disciplinary panel being made up entirely of members of the Committee;
- in the end Mr. Capurro was permitted to accompany the Complainant during the hearing and was given the opportunity to speak.

Was the disciplinary hearing a fair process? After having carefully considered the evidence of all concerned and the manner in which they gave it, in my view it was not, and a good portion of blame for this must fall on the Complainant and his advisers for the approach which they adopted at the hearing which simply served to aggravate matters, intentionally or otherwise, by at the very least giving the panel members reason to believe that he was being obstructive and would not co-operate with the whole process thereby bringing events to a sudden close and dictating how the panel re-acted. After carefully considering the evidence of both the Complainant and Mr. Capurro and having heard them give it that is my firm impression. However, such an impression does not let the Respondent off the proverbial hook.

I accept that in some cases it is not legally unfair for the same individuals to carry out the investigation and conduct the disciplinary hearing. I also accept that there is no legal requirement to allow for cross-examination during a disciplinary hearing. I also accept the proposition that if an employee is given the opportunity to deny the allegations but does not do so this would reinforce the employers case. But, with all due respect, none of that applies to this case. There was an obvious and growing antagonism between the Complainant and the members of the Committee acknowledged by all, and therefore in such circumstances this was the factor that should have dictated the establishment of an independent panel to hear the disciplinary since it was much more than a question of the same persons being the investigator and conductors of the hearing; indeed that antagonism on both sides is in my view what dictated how the proceedings run and ended. Moreover, it is clear that there was never any intention on the part of the panel to permit any cross-examination by the Complainant of any person making any of the allegations against the Complainant since no one other than the panel members was present at the hearing. Furthermore, the Complainant, albeit in my view ill advisedly, never got to the stage of actually refusing to deny even those few allegations put to him prior to the meeting breaking up since reserving one's right to reply is not the same thing as not denying the allegations.

It was the responsibility of the disciplinary panel to ensure that the meeting was properly and fairly run. The panel should at the very beginning clearly and precisely explained to the Complainant and Mr. Capurro how they were going to conduct the meeting, they should have done more than simply put a number of questions to the Complainant (whether this be 3 or 5/7 as each side alleges) which were read out from the letter of the 14th October 2008, they should have asked the Complainant what he meant by “*reserving his right to reply*” and what his intentions with respect to the conduct of the hearing were and they should have continued with the hearing even if they thought that the Complainant was going to continue replying in the same manner. In my view the Respondent fell far short of their obligations to ensure that the disciplinary hearing was inherently fair. I have considered the references in Harvey and the cases referred to me by Mr. Allen but at the end of the day it seems to me that fairness and/or justice was not done.

The Appeal Hearing

The Complainant has submitted that the many procedural irregularities which he has drawn the Tribunal’s attention to, make the decision arrived at by the members at the appeal hearing to endorse the dismissal of the Complainant unfair. The Complainant has drawn to the Tribunal’s attention the following perceived irregularities:-

- (1) No or no sufficient or genuine notice was provided to the membership about the EGM;
- (2) No or no impartial and/or sufficient information regarding the appeal was provided to the membership about the EGM;
- (3) Incorrect and/or biased information regarding the appeal was provided to the membership;
- (4) The order of the presentations in the course of the EGM was incorrect and/or unfair and/or prejudicial to the Complainant;
- (5) No or no adequate system was employed for the taking of the postal votes and the postal votes should not have been admitted;
- (6) Only votes cast by members who had been present throughout the appeal should have been counted;
- (7) Voting in advance of the conclusion of the hearing should not have been permitted;
- (8) Committee members should not have voted;
- (9) The EGM should have been chaired by an independent third party;

- (10) Questions to the Complainant as to whether he was prepared to return to his employment should not have been permitted;
- (11) There was no quorum for the meeting at the beginning or end of the EGM.

The Respondent counters by pointing out that at the EGM the Complainant was allowed to address those present at great length and in significant detail about each of the allegations against him, that there is nothing intrinsically wrong in a member of the Committee having chaired the EGM and/or been the first to present the Committee's view of the issues and the reason why they took the decision to dismiss, that at no time did the Committee attempt to persuade those present that they should vote in any particular manner, that the Complainant was allowed to freely answer the questions of persons present at the EGM, that the issue of votes cast by persons not entitled to be members under the Constitution was a technical issue and the Complainant's contentions on the subject were flawed, that in any event a breach of the constitution did not make the dismissal automatically unfair, that Committee members were perfectly entitled to vote under the Constitution and that any procedural fault was cured by the overall general fairness which the Respondent followed in dealing with the Complainant. Mr. Allan referred me to the cases of *Rowe v Radio Rentals Limited* and *Taylor v OCS Group Limited*, both of which I have read.

I have carefully considered Mr. Navas submissions on the following points but have come to the conclusion that I have to disregard them:-

1. the "covert" tape recording – the Complainant cannot complain about the unfairness of its production when he has sought to rely so heavily on the contents of the transcript produced from it in order to discredit witnesses and/or in support of his contentions. Indeed the fact that the Complainant has used the recording to attack the credibility of the Respondent's witnesses etc demonstrates that there was nothing unfair in keeping the fact from him unless he is saying that he would not have said some of the things he had said if he had known he was being taped;
2. Mr. Ignacio addressing the EGM first and/or Mr. Gonzalez chairing the meeting - had there not been a tape recording I may have given greater consideration to the force of Mr. Navas's arguments on these two matters but after having heard the tape recording and reading the transcript it seems to me that considering matters overall no unfairness whatsoever was suffered by the Complainant since he was given the opportunity to deal with the case against him and be heard;
3. misleading and/or biased and/or incorrect information given to the persons present at the EGM by Messrs Ignacio/Gonzalez - bearing in

mind that we are talking about taxi drivers who had been at logger heads for many months during which a fair number of events had occurred and a good number of things said, and who were not speaking from notes or a transcript it is unsurprising to say the least if, with hindsight and in the cold light of the day, one goes through the transcript and cannot find holes with which to pick on. To somehow try and fit the proceedings at an EGM of taxi drivers into some sort of legal straight jacket adopting semi-quasi legal procedures is one which a tribunal should steer well away from trying to impose and I see no reason to do so. Moreover, the Complainant had a full opportunity to address the EGM and correct such misleading/incorrect/biased statements as were made; which to such an extent as were made do not appear to me to have been that significant and/or material in the overall context of the case;

4. undue pressure on the persons at the AGM - this allegation is based on two short comments contained in the transcript to the effect of "*if you support him or you support us*" and the comments made at one stage from the floor by a member to a similar effect. I am quite sure that every person who attended that meeting was well aware, even before the meeting had commenced, that any decision they made that night would in practical terms be seen as a vote of support for one side or another and the comments made by Mr. Ignacio and Mr. Rodriguez (not a Committee member) were simply re-iterating the obvious. In my opinion there was no undue pressure placed on the membership to vote in favour of the committee, taking the meeting and its length in overall context; indeed I would venture to suggest that the Complainants' repeated refusal to confirm that he would let bygones be bygones if he was re-instated in his job caused his cause more damage in the eyes of those who voted than either of the aforementioned two comments made by Mrs Ignacio and Rodriguez; and
5. questions relating as to whether the Complainant was prepared to return to his employment should not have been permitted - I am somewhat at a loss to understand how the committee could be expected to prevent any one of the 43 taxi drivers present on the floor from asking the Complainant this question or indeed why members should be prevented from asking this question. Perhaps the Complainant, with hindsight, regrets the manner he answered the questions sensing that it may not have done his cause any good whatsoever in the eyes of those present but what is relevant is that the Complainant chose to answer the questions and that he answered the questions freely and to the extent that he wished to do so without any impediments from the committee. I also bear in mind the fact that Mr. Ignacio informed the membership that the committee would not resign if the vote went against it.

Having dismissed Mr Navas's submissions with reference the above, I turn then to what in my mind are the substantive points raised by Mr. Navas with regard to the appeal hearing since they are issues which concern me greatly since they go to the essential question of the fairness of the appeal. The points in question are as follows:-

- (a) the membership of the Association was informed of the EGM not by individual letters sent to each member informing them of the date, time and reason for the EGM but simply by a notice placed in public taxi stands (and we don't know which ones) informing members that an EGM was being held on a certain time and date. There is therefore no way of knowing whether all members of the Association, especially those who were entitled to vote under the constitution but who did not work the Taxis, knew about the EGM, or, the reason for the EGM, or, what any particular member was told via the taxi grape vine as being the reason for the EGM, or, what committee members told inquisitive members before the EGM commenced of what the Complainant had or had not done;
- (b) there were a number of persons who voted by post prior to the EGM (i.e. 11) even though they had not heard the arguments for and against dismissal, and even though the Constitution of the Association does not refer to postal votes being permissible, and even though the EGM notice did not refer to postal votes being acceptable;
- (c) there was another number of persons (upto 18 according to Mr. Ignacio's evidence but 19 according to my reading plus three postal voters) who voted either by post or at the EGM who under the Constitution of the Association had no right to be members of the Association since they were not the owners of the taxi and therefore were not entitled under the Constitution of the Respondent to be either present and/or vote at the EGM;
- (d) all members of the committee of the Association voted at the EGM even though they had been the persons who felt aggrieved by the Complainants actions/course of conduct/behaviour and who had investigated and then dismissed the Complainant;
- (e) members came and went from the room during the course of the EGM voting at such time as each particular member wished even before the Complainant had finished addressing the floor so that some votes may have been cast without the voter being fully or at all aware of what the Complainants' reply to the allegations were; and
- (f) the issue of the majority of votes required under the constitution to approve the decision of the dismissal - it is unclear whether under the constitution a two thirds or a simple majority is required and in

the case of the latter whether there were sufficient members entitled to vote to have that simple majority.

As I understand it, Mr. Allan has adopted a two fold approach with reference the Complainants submissions with regard to these issues; namely:-

- (i) the Constitution had been amended years before at an AGM in order to permit persons working the taxi who were not owners of the Taxi to become members of the Association even though the owners of their taxi were not themselves members of the Association and therefore entitled to vote at AGM/EGM's. Consequently the persons at the EGM who were members but not owners of taxi's were entitled to vote; and
- (ii) even if there was a breach of the Constitution and persons voted who were not entitled to vote, the law still did not make the dismissal automatically unfair since ultimately the Tribunal had to look at the overall fairness of the procedure.

On such basis, and bearing in mind that 43 independent persons who were not involved in the preliminary investigations voted, it is submitted that the overall procedure adopted ensured that the Complainant received a fair appeal hearing.

Mr. Navas for the Complainant counters this by, amongst other things, drawing my attention to the provisions of section 11(1) of the Trade Unions and Dispute Act which provides:-

“Every alteration of the rules of a registered trade union shall be registered with the Registrar and shall take effect from the date of registration unless some later date is specified in the Rules.”

As on the evidence of Mr. Gonzalez the Respondent never put the alleged amendment into print, it follows that the amendments, even if one believes the evidence given, and as I have previously said I do not accept it, had not been registered with the Registrar as required by the stated provision and consequently had not taken effect. I accept Mr. Navas's submissions on this point and agree that pursuant to the provisions of the stated Act any amendment there might have been, assuming the validity of Mr. Gonzalez's evidence with regard to the question of non owner taxi drivers being entitled to become members of the Respondent, has even to this date not become effective.

Indeed I would go further. On the basis of Mr. Gonzalez's evidence, and indeed that of Mr. Ignacio with regard to the point, we do not know whether Rule 16 of the Constitution was properly followed (and therefore validly passed) at the time of the alleged amendment being approved, or,

indeed what exactly the wording of the amendment was. The end result of all of this is that I do not accept that persons who are not owners of taxis are entitled to become members of the Respondent and therefore, by logical extension, be entitled to vote. This in effect means that 18 (or on my count 19) persons who voted at the appeal hearing were not entitled to vote; as to how they may have voted is a question of conjecture and totally irrelevant. I now turn to the issue of the postal votes.

There were eleven postal votes cast; ten votes in favour of the Committee with one abstention. The constitution is completely silent on whether postal votes are permissible for the purposes of voting at an EGM/AGM. In the light of such silence I am of the opinion that the constitution has to be interpreted as not permitting postal voting. This is even more so where the vote at stake is the employment future of an individual and the EGM has been called in order to permit such individual to explain to the membership why they should not endorse the disciplinary action taken against him. It is yet even more so when it is not known whether the person submitting the postal vote is even aware of the real reasons for the dismissal and/or the defence to the allegations being made against the individual in question. What is more is that three of those postal voters may not have been entitled to vote in any event for the reason canvassed in the previous paragraphs. To permit the postal voting in such circumstances is in my opinion a complete denegation of natural justice.

This leads me onto another point. Pursuant to Rule 6 of the Constitution it is in my opinion a requirement imposed on the secretary to the Association to have forwarded an agenda of the EGM to all members. This was not done and therefore a further breach of the constitution took place. What is worse is that the notice of the EGM given can be said to have been given to only a select few of the members of the Respondent; i.e. those that work the taxis on a regular basis. I say this because the notice was placed on the taxi stands and therefore it is questionable whether all members were aware of the EGM and, if so, its purpose. Indeed it would appear that 39 members did not bother to attend the EGM and/or postal vote and consequently one is entitled to wonder whether all or any part of these persons knew about the EGM and, if they had known, whether they would have voted in favour of the Complainant.

The issue of numbers seems to be important in the following sense. If one removes the postal voting from the equation this means that the voting was:-

Votes for Dismissal - 25 including the five votes of the committee

Votes for Re-instatement:- 16

The vote was therefore won by nine votes at most (assuming one accepts that it was fair and reasonable for the committee members to vote). Now within these figures we have 18, and possibly 19, votes belonging to

persons who were not entitled to be members under the constitution who voted. It is true that we do not know how they voted but it is a perfectly valid assumption that at least a good proportion if not all those votes went to the committee. How safe can one thereof be in stating that the committee did win the vote even by a bare majority if one simply counts the votes of persons who were entitled to vote and we do not take into account whether a two third majority was required.

Mr. Allan has urged me to put aside these technical breaches of the Constitution and to look at the bigger picture as to whether the Complainant was fairly and reasonably dealt with. With all due respect to the Respondent these are not mere technical breaches that can be swept aside; they are fundamental issues which go to the very heart of the question of fairness and natural justice. I have therefore concluded with some reluctance that the many material procedural defects that occurred in the course of the Appeal Hearing make that appeal flawed and unfair to the extent that it must be considered a nullity. I further conclude that bearing in mind the other procedural defects alluded to in the course of this judgment that occurred prior to the appeal hearing (i.e. failure to deal with appeals made by the Complainant, an inherently unfair disciplining hearing), it must be my view that the Respondent did not follow a dismissal procedure against the Complainant which was fair and reasonable as is required by section 59 of the Employment Act. On this basis I have concluded that the Complainant was unfairly dismissed.

The above being the case we will now proceed to hear the parties on the question of compensation.

Dated this 10th day of July 2015



J. Nuñez
Chairman