

**INDUSTRIAL TRIBUNAL**

**23 NOV 2011**

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**IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR**

**IND TRI 15 of 2009**

**BETWEEN**

**GRAHAM NEETENCOOK**

**Complainant**

**-and-**

**GOVERNMENT OF GIBRALTAR**

**Respondent**

Mr Christian Rocca for the Complainant

Mr Johan Hernandez for the Respondent

**1. FACTUAL BACKGROUND**

- 1.1 The Complainant was made an offer of appointment as Police Constable with the Royal Gibraltar Police ("RGP") effective as from 1<sup>st</sup> March 2007 by virtue of a letter dated 28<sup>th</sup> February 2007 from the Human Resources Department of the Government of Gibraltar. The appointment was set to be permanent and pensionable but subject to a probationary period of 2 years. On the 2<sup>nd</sup> March 2007 the Complainant accepted the offer and his appointment as Police Constable was confirmed in writing by letter dated 15<sup>th</sup> May 2007.
- 1.2 It is to be noted that although the 2 year probationary period with the RGP ended on the 28<sup>th</sup> February 2009 the Complainant was not confirmed in his post. The only communication received thereafter was a letter dated 22<sup>nd</sup> June 2009 from the Commissioner of Police to the Complainant where reference is made to Section 5 of the Police Regulations regarding probationers and in which the Commissioner states:

*"Not having yet been confirmed in your appointment you are still serving as a Probationary Constable. It is, based on the evidence presented to me, my considered opinion that you are not likely to become an efficient and well-conducted constable of the Royal Gibraltar Police. As such and Pursuant to Section 5 of the Police Regulations, you are officially notified that your services as a Police Officer will be dispensed with. You are hereby given one month's notice of your termination of service as from the date of this letter".*

- 1.3 The Complainant avers that prior to then the Respondent did not inform him that his probation had been extended or that he was at risk of dismissal. He was informed by letter without a hearing or explanation provided and was thus aggrieved by not only the decision but the procedure adopted.

## 2. **THE CLAIM**

- 2.1 The Complainant brings a Claim for unfair dismissal against the Respondent pursuant to Section 59 (1) of the Employment Act ("the Act").
- 2.2 In the Originating Application lodged the grounds for dismissal are as follows:
- (1) That the procedure applied was not fair;
  - (2) That there were no grounds to dismiss; and
  - (3) That the dismissal was unfair on both procedural and substantive grounds.
- 2.3 Furthermore, in the grounds of complaint annexed to the Originating Application the Complainant pleads that contrary to that stated in the Commissioner's letter of the 22<sup>nd</sup> June 2009 he had successfully completed

his two year probation period which concluded on the 1<sup>st</sup> March 2009 i.e. 2 years after his appointment commenced.

2.4 In response the Respondent in his notice of appearance states that the Complainant was dismissed as he had *"failed to pass his probationary period"*.

2.5 The matter was set down for a substantive hearing but shortly before the Respondent raised a challenge to the jurisdiction of this Tribunal on the basis that they claimed that the Complainant was not an *"employee"* and as such he did not have the right to sue for unfair dismissal before the Tribunal.

2.6 The issue raised, although late in the day, was so fundamental to the Tribunal's powers that I adjourned the matter to a hearing on a preliminary point.

### 3. THE PRELIMINARY ISSUE

3.1 The right not to be unfairly dismissed is contained in Section 59(1) of the Act which reads *"In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer"*. Subsection 2 further states that this section *"applies to every employment except in so far as its application is excluded by or under any of sections 60 to 63"*.

3.2 Again Section 70 of the Act refers to the Industrial Tribunals jurisdiction to hear complaints for unfair dismissal by employees as it provides that *"a complaint may be presented to the Industrial Tribunal by an employee against an employer..."*.

3.3 It follows from the above that in order for the right to be operative and for this Tribunal to have jurisdiction to hear the claim the person must be an employee and the question that follows is *"Is the Complainant an employee for the purposes of Section 52(1)?"* If he is, then he is entitled to have his claim for

unfair dismissal determined. If he is not, his claim fails at the first obstacle and that is the end of the matter.

#### 4. THE SUBMISSIONS

4.1 Counsel for the Respondent succinctly sets out the Respondent's position at paragraph 10 of his Skeleton submission (page 3) as follows:-

- i) Police Officers of the Royal Gibraltar Police do not fall within the definition of employee set out in the Employment Act;
- ii) Neither the Government of Gibraltar nor the Commissioner of Police is their employer;
- iii) Given that the relationship of employer/employee cannot be established there is no corresponding right to sue for unfair dismissal as Section 52 (1) only applies to employees;
- iv) The Industrial Tribunal is a creature of statute and as such only has the jurisdiction to hear complaints for unfair dismissal under the Act.
- v) The Complainant is not an employee but an office holder and that as such no right arises.

4.2 Counsel for the Complainant argues that Police Officers are employees and have the right to sue for unfair dismissal and in his skeleton analyses in depth the position both under common law and statute.

#### 5. THE COMMON LAW

5.1 The Respondent has addressed the Tribunal on the common law position and has referred me to various authorities including but not limited to the case of *Attorney General for New South Wales and Perpetual Trustees Co Ltd and Ors (1955) AC 457* all of which I have considered. The relevant statement which encapsulates the common law may be found at page 459

*"Their Lordships can now express their final opinion upon the case. They repeat that in their view there is a fundamental difference between the domestic relations of a servant and master and that of the holder of a public office and the state which he is said to serve. The constable falls within the latter category. His authority is original not delegated and is exercised at his own discretion by virtue of his office. He is a ministerial officer exercising statutory rights independent of contract. The essential difference is recognised in the fact that his relationship to the Government is not the ordinary parlance described as a servant and master".*

5.2 Counsel for the Complainant accepts that the above reflects the position of the English common law which is applicable to Gibraltar but proceeds to submit that:-

5.2.1 the fact that Police Officers are not regarded as employees under English (Gibraltar) Common Law does not mean that they are not deemed to be Employees in Gibraltar under the Act;

5.2.2 the definition of "employee" in Section 2 of the Act does not intend to enshrine the Common law; and

5.2.3 that the definition of Employee in the Act is a "*new statutory definition and must be approached as such*".

5.3 I accept the Complainant's submission to the extent that I consider that the common law position does not advance the Respondent's case but that is not to say that the common law position has been abrogated by statute or that the Act provides a "*new statutory definition*". In order to reach such a conclusion I have to assess whether the statutory right given to employees to sue for unfair dismissal includes Police Officers. In other words, did Parliament intended for Police Officers to fall under the definition of

"employee" under the Act. I therefore now turn to address the relevant provisions.

## 6. LEGAL PROVISIONS

- 6.1 The Respondent states that "*by Section 89(3) of the Act the rights and obligations in respect of unfair dismissal are expressly stated to be "binding on the Crown, whether in right of the Government of Gibraltar or otherwise, except as regards members of the naval, military or air forces of the Crown or of any women's service administered by the Defence Council". They contend that because members of the Police Force are not excluded they are entitled to the unfair dismissal protections afforded by the Act.*
- 6.2 The section clearly denotes that an individual employed by the Crown who is unfairly dismissed can sue for unfair dismissal but it does not advance their position in that it still needs to be established whether a Police Officer is an employee under the Act so as to trigger off the right.
- 6.3 The definition of "*employee*" under the Act is set out in section 2:  
*An employee "means any person who has entered into or works under a contract with an employer, whether the contract be for manual, clerical work or otherwise, be express or implied, oral or in writing and whether it be a contract of service or a contract personally to execute any work or labour, and includes an outworker but does not include...."* and then lists various exceptions none of which apply in this instance.
- 6.4 This is an important definition as it is only "*employees*" as defined who enjoy the full benefit of the rights provided under the Act, notably the right under S59(1).
- 6.5 So what criteria must be satisfied for an individual to fall under the category of employee as defined in the Act? An employee is a person employed under a contract with an employer. A contract of employment requires the presence of two principal elements namely, mutuality of

obligation and control. Mutuality of obligation exists when an employer undertakes to provide a person with work and that person agrees to do that work in return for an agreed salary or wage, and on terms and conditions laid down by the employer. Control exists if the employer determines when, where and how the work is to be done or the manner in which it is to be done. (See *Montgomery v Johnson Underwood Ltd* (2001) EWCA Civ 318 and other cases that follow).

- 6.6 If I analyse the constituent elements in reverse by analysing the requirement of "control" first can it be said that the Government of Gibraltar or the Commissioner of Police depending on whom it is determined a Police Officer is answerable to exercises such control over a Police Constable so as to determine when, where and how the work is to be done or the manner in which it is to be done? To rule in the affirmative would be to remove from Police Officers the right to exercise independent judgment and to apply the necessary discretion in the performance of the duties they have sworn to perform.
- 6.7 I do not consider that the statutory provisions either abrogate the common law position or create a new status for Police Officers as employees. In this regard I consider that the applicable law is succinctly stated in Harvey on Industrial Relations (para 177, A-41) in the following statement:-

*"Despite the greater size and more regimented organisation of the modern police forces, it remains true that the police officer is an office holder and not an employee. There is a deal of discretion inherent in his office and he is not obliged to carry out the orders of the Police authority. He must exercise his independent judgment and do his duty as he sees fit (Fisher -v- Oldham Corpn (1930) 2 KB 364, McCardie J; A-G for New South Wales v Perpetual Trustee Co Ltd (1955) AC 457, (1955) 1 ALL ER 846, PC; Yates v Lancashire County Council (1975) 10 ITR 20, NIRC)".*

6.8 I derive further support from the following provisions in the Act and in the Equal Opportunities Act 2006 (EQA) as follows:

6.8.1 Police Officers are expressly excluded from the definition of “worker” in Section 18 (1) of the Act which states that a worker is *“any person to whom this Act applies employed whether by the Crown or any other person, as a servant or apprentice by way of manual labour, clerical work or otherwise and whether or not in receipt of any salary, wages or remuneration in respect of such employment ~~except~~ any person employed—*

*(b) as a member of the Gibraltar Police Force;*

6.8.2 The concept of “worker” is far wider than that of employee as the element of control is absent. It seems that were it not for the express exclusion then a Police Officer could fall under the umbrella term of worker but not under the sub category of “employee” but more specifically under the title of “office holder”. *“Another category of worker known to the law is the officeholder. He is not as such an employee. His rights and duties are defined by the office he holds, and not by any contract. The best example is that of the policeman, who holds the office of constable”* per Harvey at para 168, A-40 )

6.8 Although the parties have not addressed me on the position vis a vis the provisions in the EQA an analysis of the relevant provisions supports the Respondent’s contention that Police Officers cannot avail themselves from the rights and protections encompassed in the Act in that they are neither employees nor can they be so ranked as “Workers”.

6.8.1 In the EQA a “worker” in relation to sections 27(8), 59, 60 and Schedule 2 (occupational pensions – age) means, as the case may be,

(d) a person to whom Section 21 (police) applies;”



6.8.2 Section 21 specifically refers to the Police and reads

(1) For the purposes of this Part, the holding of the office of a police officer shall be treated as employment by -

- (a) the Commissioner of Police as respects any act done by him in relation to a police officer or that office;
- (b) the police authority as respects any act done by it in relation to a police officer or that office.

(2) For the purposes of Section 47 (liability of employers and principals) -

- (a) the holding of the office of police officer shall be treated as employment by the Commissioner of Police; and
- (b) anything done by a person holding such an office in the performance, or purported performance, of his functions shall be treated as done in the course of that employment.

(3) Any proceedings under this Act which, by virtue of subsection (1), would lie against the Commissioner of Police shall be brought against the Commissioner of Police for the time being or, in the case of vacancy in his office, against the person for the time being performing the functions of the Commissioner of Police.

(5) The Police Act, any regulations made under it or legislation governing the police shall not treat men and women differently.....”  
and then go onto list the exceptions.

- 6.9 In the EQA a Police Officer is referred to as an office holder and it is clearly stated that "*the holding of the office of police officer shall be treated as employment by the Commissioner of Police*" only for that purpose which connotes that they are not "*employees*" in the general sense. To deem otherwise would beg the question why has it been necessary to carve out a specific inclusion of police officers in the EQA and to specifically states that that the relationship between the police officer and the Commissioner of Police is deemed to be employment for that sole purpose if they were already deemed employees under the Act. If that was the case this section would effectively become redundant.
- 6.10 The Provisions in the Police Act also lend support to the contention that Police Officers are not employees. To name but one example if the Act applied to Police Officers then there would be a clear tension between the length of the probationary period for employees under Section 53 of the Act which is one week and the two years stipulated by Section 5 of the Police Regulations. Furthermore, the Police Act makes a clear distinction between the employment of Civilians under S74(1) of the Police Act and the appointment of Police Officers, the former being employed in contrast to the latter. S74(1) reads:

*"The Commissioner may, with the approval of the Government, employ, or enter into contracts for the employment of, civilians to exercise such functions and duties as are conferred or imposed upon police officers by any law and are specified in terms of employment"*.

## **7 CONCLUSION**

- 7.4 I hold that Police Officers are "office holders" and not "employees" within the meaning of the Act and therefore do not enjoy the benefit of the right granted to employees under S59(1) of the Act.

7.2 For the reasons outlined above the Complainant's case fails and the Originating Application filed herein is hereby dismissed for want of jurisdiction.



Gillian M Guzman  
Chairperson  
23<sup>rd</sup> November 2011