

**IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR**

Ind. Tri. No.8/2010

**BETWEEN :**

**SALVADOR ROCCA**

*Complainant*

and

**OESCO LIMITED**

*Respondents*

Tuesday 5<sup>th</sup> & Wednesday 6<sup>th</sup> April 2011

Before Eric C Ellul Esq MBE, Chairman

Andrew Cardona Esq & Andrew Almeida Esq for the Complainant

Charles Simpson Esq & Daniel D'Amato Esq for the Respondents

**RULING**

**THE BRIEF HISTORY**

1. The Complainant had been employed by the Respondents since 10<sup>th</sup> December 1997, some 13 years, as a driver/welder.
2. On 10<sup>th</sup> December 2009 the Complainant cooked himself some sausages in the mess room oven at work. This left a deposit of fat and grease in the oven. He heard one of his workmates, Mr Dominguez, comment that the oven had been left in a dirty state. According to the statement signed by Mr Bolaños, Assistant Manager, Mr Dominguez had reported this to him. The Complainant thus returned to the mess room where he saw another workmate, Mr Portela, cleaning the microwave oven with a cleaning product by the name of Flash. The Complainant then proceeded to clean the oven with the same product. As he was doing so, Mr Dominguez came up to the mess room window.
3. There is some dispute as to who said what at that moment, but it is clear that the Complainant made some derogatory remarks to Mr Dominguez such as *"You should sand your tongue down, you whistle blower"*. According to the written statement of Mr Dominguez, he replied that the Complainant should clean the oven as everyone had to use it and he himself wanted to cook a pizza. The Complainant then proceeded to reply that he was a whistle blower and said, according to Mr Dominguez, *"You go and fuck yourself"*. The Complainant denies he used such words although he admits to using other insulting words. He then proceeded to empty a large quantity of Flash into the oven saying at the same time that he (Mr Dominguez) would not now be able to cook anything there. Mr Dominguez then informed the Complainant that if the oven had been left by him stinking of Flash, he would report the matter to Mr Young, the Station Manager. According to the statement prepared by Mr Bolaños, he told the Complainant not to use Flash. The Complainant denies that this was said or, if it was said, that he did not hear it.
5. The Complainant was then summoned by Mr Bolaños to Mr Young's office. What transpired there must be taken from the evidence of the Complainant at the

hearing and the statement of Mr Bolaños, who was present, as Mr Young has not made a statement himself. There was an argument in the office between the Complainant and Mr Young during which, according to the statement of Mr Bolaños, Mr Young told the Complainant that he had deliberately used Flash in the oven so that Mr Dominguez could not later use it. The Complainant started shouting at Mr Young. The Complainant denied this and said in his evidence that Mr Young just kept on saying "No, no, no..." and told him to go home.

6. On his way out of the office, according to Mr Dominguez's statement, the Complainant went up to him and used insulting and threatening words such as "*Son of a bitch, I am going to get you outside in the street*".

7. On 7<sup>th</sup> January 2010, there was a disciplinary hearing at the Respondents' premises presided over by Mr Victor Bensadon, the General Manager of the Respondents when evidence was taken from the Complainant. Mr Michael Tampin, a senior union official was also present supporting the Complainant. The written statements of a number of workers were read and taken into account by Mr Bensadon. Notes of the meeting were taken by a member of the Respondent's solicitors. There is a full attendance note of such hearing. A petition signed by a number of workers asking for the Complainant not to be dismissed was presented at the hearing.

8. On 13<sup>th</sup> January 2010 Mr Bensadon wrote to the Complainant informing him that he was being dismissed forthwith for acts of gross misconduct by him and advised him of his right to appeal to the Respondents Managing Director, Mr James Ramagge.

#### **THE EVIDENCE AT THE HEARING**

Mr Bensadon gave evidence for the Respondents.

1. He explained that he is the General Manager with the Respondents and has been employed with them since September 1990. The Respondents employ about 28/29 workers.

2. Some time after the incident on 10<sup>th</sup> December 2009 but before the disciplinary hearing on 7<sup>th</sup> January 2010, the Complainant went to see him to say that he did not want to go through a disciplinary hearing and that he was leaving his employment with the Respondents. Some ten minutes after he left, the Complainant telephoned him and asked him to forget everything he had said. He explained that he had just met the Respondents' Managing Director, Mr James Ramagge, who had informed him that no decision had been taken to dismiss him and that he would try and help him. This gave the Complainant some hope that he would not be dismissed.

3. Mr Bensadon explained that the Complainant had always been treated well and that he had never made any complaints against Mr Young. The statements of Mr Dominguez, Mr Portela Beltran, Mr Britto, Mr Bolaños, Mr Serra, Mrs Rocca and that of the Complainant himself were produced and also a copy of the Attendance Note taken at the disciplinary hearing on 7<sup>th</sup> January 2010 and Mr Bensadon's letter of 13 January to the Complainant. Mr Bensadon's own statement of 28<sup>th</sup> February 2011 was also produced. The Employees' Handbook, which was introduced to workers in November 2009, was also produced.

4. In cross examination Mr Bensadon acknowledged that his meeting with the Complainant had not been mentioned in his statement. He said he had not discussed with Mr Ramagge the conversation the Complainant alleged he had had with him. He said he had considered the statements of all the employees who had made one and had absorbed the gist of all of them. He said that in considering the outcome of the disciplinary hearing, he had not taken into account the Complainant's previous conduct.

5. The disciplinary hearing he had presided over on 7<sup>th</sup> January was the first such hearing he had been involved in. There was no standing order not to use Flash as a cleaning agent. Only on this occasion had the Complainant been told not to use it. He explained that he did not consider it to be a safety health hazard. The Complainant had admitted his misconduct in Mr Young's office. Mr Young had not made a statement. One of the reasons for this was that at the relevant time, Mr Young was away from Gibraltar on holiday. There was a statement from Mr Bolaños so one from Mr Young was not necessary. The Complainant had not insulted Mr Young in his office. From the statements he saw that the Complainant had threatened Mr Dominguez after he had left Mr Young's office.

6. Mr Bensadon went on to say that Mr Bolaños did not threaten employees and acknowledged that amongst employees there was often an exchange of bantering insults. Some employees were saying that they had been tricked into giving written statements. Mr Bensadon insisted that he had carried out a reasonable investigation. He had taken account of the letter of apology written by the Complainant to Mr Ramagge on 14<sup>th</sup> December 2009. He had accepted as truthful the statement of Mr Dominguez.

7. Mr Bensadon explained that the Complainant had called Mr Dominguez twice to retract his statement. Mr Dominguez had not signed the petition in his favour. Looking at the Employees' Handbook, Mr Bensadon said he considered the Complainant's conduct to have amounted to gross misconduct.

The Complainant then gave evidence.

8. He started by saying that he had met with Mr Bensadon. He recognised that he had been wrong. He had found another job but wanted him to help him. He later met Mr Ramagge and told him that he was not well. He felt he was out in the street. He asked him for his help. He told Mr Ramagge of his problems with Mr Young and Mr Ramagge asked him why he had not told him of this before. He says Mr Ramagge replied, "*Leave it with me, I'll see what I can do*". He went on to explain that he suffers from anxiety. He explained that he had been bullied; that he had been ignored. Mr Young made him go into his office. People did not know him as he did. The Complainant was scared to report him as he feared matters could get worse. The Complainant went on to say that he was not right, he was bad and having a bad time.

The Complainant was then cross-examined.

9. He said he had been employed with the Respondents since 10<sup>th</sup> December 1997. He got on well with Mr Ramagge. Mr Bensadon looks after the company. Mr Bolaños was not there. Mr Bensadon was fair minded. The employees were all friends of his. Mr Dominguez is a good friend of his. He and Mr Bolaños are very close. He is not a member of the union. He had been informed by Mr Tampin that he would lose his job for gross misconduct. The employees were betting on whether he would lose his job. Mr Ramagge explained to him that he had put him in a tight corner and that Mr Young did not want him at work. He had been pushed out of the office by Mr Young and not by Mr Bolaños.

10. Mr Tampin is a union representative. They discussed the several statements. He said he had telephoned Mr Dominguez but not to threaten him. He told him he needed help and that he had a family to look after. Mr Dominguez said he would try to talk to Mr Young. Mr Bolaños was not in the kitchen, Mr Dominguez was a good friend. He gave a statement and stood by it. He was told he would be returning to work on Monday. Mr Young did not let him talk. He had seen only one statement from Mr Dominguez.

11. The Complainant said that he assumed he had received the several statements with Mr Bensadon's letter of 16<sup>th</sup> December. Mr Tampin had read them

and had told him about them. He himself had not read them. He is not a great reader. He knows what Mr Dominguez had said and said that Mr Dominguez and Mr Young had something together. He had resigned as shop steward on 5<sup>th</sup> June 2009. He said he knows Mr Young. He is difficult and the Complainant said he was scared of him.

12. The Complainant then referred to the incident of 10<sup>th</sup> December 2009. He said it started as a joke. He was laughing as he was cleaning the oven. He was joking around. Everyone was always joking calling each other names. He was referred to Mr Dominguez's statement and said that Mr Dominguez had gone with Mr Bolaños to complain to Mr Young. Mr Dominguez had said that the Complainant had said "...go and fuck yourself". The Complainant denied he had done so but admitted having said something about "chuparla" (suck it). When he went into Mr Young's office he kept on saying "no, no, no...". He asked Mr Young to tell him what he had done to deserve this. He explained that he had told Mr Dominguez that he was going to eat sausages with Flash merely as a joke. He was going to have his pizza at 3.00. If Mr Bolaños had said anything to him he had not heard it. He had not mentioned anything to Mr Tampin about his hearing. He had not fallen out with him. The union had not wanted to take the matter forward.

13. Mr Bolaños had told Mr Serra that if he helped the Complainant he would be the next one out of a job. He said that Mr Bolaños was not the same; he had changed a lot. He had never told him not to use Flash and if he did, he had not heard him. The Complainant explained that he was happy with his job. The problem was with Mr Young. He was explaining what he could remember. He said he had met Mr Dominguez at the station and said to him "you are a bastard. I'll get you outside". Mr Bolaños had asked Mr Young to retract what he had decided against the Complainant but he had said no. The Complainant had told Mr Dominguez that he knew he was going to be dismissed and had asked him to help him. He replied by asking him to leave him alone. He was concerned that he could get into trouble himself. The Complainant said he had a problem with Mr Young but with no one else.

14. The Complainant insisted that the whole incident was a joke. It was put to him that he did not want to clean the oven and that he had put in too much Flash in order to put the oven out of action. He denied this. Mr Young was waiting for him. He said "go home" and pushed him out of the office. The Complainant admitted that he had shouted but said that Mr Bolaños would say nothing against Mr Young. Mr Young had pushed him out of the office many times. He did threaten Mr Dominguez. At that moment it was the right thing to do. After having been thrown out the Complainant went to see the doctor. Mr Young wanted to get rid of him. Mr Ramagge told him Mr Young did not want him. The Complainant then went to Mr Ramagge's house. There was no one there.

15. Mr Young told the union that the Complainant had been dismissed. The Complainant did not remember whether he had been told he could appeal. Mr Tamplin had told the Complainant that he would be dismissed. He did nothing. Mr Tamplin had not told him off but told him not to worry. The union had not wanted to help him. Mr Young had bullied many employees. Mr Dominguez had to stay on the right side of Mr Young and Mr Bolaños.

16. The Complainant was referred to the letter he wrote to Mr Ramagge on 14<sup>th</sup> December apologising for his conduct on 10<sup>th</sup> December. He described the letter as "a crying letter" to see whether Mr Young would take him back. The Complainant explained that it had all been a joke; a moment of anger. Dr Beguellin had seen that he was not well. He said he respected his superiors but Mr Young did not treat people well.

17. In re-examination the Complainant said that there was no point in appealing; he was out. Mr Tampin had been advised by the union lawyer.

18. I asked the Complainant whether the oven had been permanently damaged by his having sprayed too much Flash into it. He replied it had not.

Mrs Carol Rocca

19. Her statement dated 7<sup>th</sup> March 2011 was produced to her. She was then cross-examined. She said she was surprised to see Mr Dominguez come to her house on 11<sup>th</sup> December 2009. She was in the kitchen. Mr Dominguez and the Complainant were in the living room. There is no door between the two rooms. Mr Dominguez was very upset. He thought it was all a joke and thought her husband (the Complainant) would be going back to work on Monday. He said he did not want to be a part of the sacking of a fellow employee.

Mr Richard Serra

20. He explained he had been the head mechanic for 7/8 years with the Respondents. He later got another job with Government at the Power Station.

21. On 10<sup>th</sup> December 2009 he had not been present when the incident occurred. He was at the stores. He said he had asked Mr Bolaños whether there was anything they could do to help the Complainant and he had replied "*Be careful. If you do you might be the next one out of work*".

22. In cross examination Mr Serra said that he had signed the petition to help the Complainant. He had not lost his job. Mr Bolaños should not have said that to him. When he went to see Mr Young, he started shouting at him and he left. Employees who signed the petition had not been sacked except George Surrey. He had gone to see Mr Bolaños on 14<sup>th</sup> January.

**SUBMISSIONS OF COUNSEL**

1. Mr Cardona addressed the Tribunal with his final submissions on behalf of the Complainant.

2. The Respondents must prove (i) the reasons for the dismissal and (ii) that the dismissal was fair.

There are five points to deal with

1. The Burchell test
2. Have the Respondents proved gross misconduct?
3. If the answer to 1 and 2 above are yes, was summary dismissal reasonable?
4. Was the procedure fair?
5. If the answers to points 1 to 4 are no, what is the appropriate compensation?

3. Mr Cardona then dealt with the reasons for the dismissal. Flash cannot damage property. It created no health risk. It was a silly conclusion. The amount alleged which was used was excessive. Mr Bolaños said he gave orders not to use Flash. The oven was not damaged.

4. Mr Bensadon relied on the statement of Mr Bolaños. He never gave evidence as to the amount of fat or grease in the oven. Mr Bensadon assumed Mr Bolaños had seen the fat and grease. Mr Bensadon is guessing things. Using excessive Flash does not amount to misconduct. Mr Bolaños told the Complainant not to carry on using Flash. As to the Complainant's conduct in Mr Young's office, Mr Bolaños has not said that he had threatened Mr Young or insulted him.

The Burchell test.

- A. The employer must have believed in the guilt of the employee.
- B. The grounds of such belief must be reasonable.
- C. There must be reasonable investigation.

5. The investigation carried out does not satisfy the Burchell test. It was not thorough or genuine. When the statement was being made by Mr Dominguez he was told it was "for the record". The Complainant said he would be returning to work on Monday. Mr Serra told him that if he helped him he could lose his job. The Respondents failed to investigate matters further. Conflicts were not investigated. Mr Portela was not asked what was being used to clean the oven. An investigation must be objective. There was no conclusive evidence that Mr Bolaños told the Complainant not to use Flash. Only Mr Bolaños said he had told the Complainant not to use Flash. Mr Bensadon did not consult other employees on the statements they had made. He had seen the statements the employees made to Mr Young only later.

6. On gross misconduct Mr Cardona said as follows. Mr Bensadon did not take into account any previous incidents involving the Complainant. The present incident does not amount to gross misconduct. The misconduct was the Complainant's threat to Mr Dominguez upon his leaving the office "*I'll see you outside, son of a bitch*". This does not amount to a repudiatory breach of contract. Mr Dominguez went to see the Complainant at his home. It was only later that he telephoned for them to meet.

7. The Handbook was explicit. The offence of the Complainant was under section 3 for which the sanction is a final warning and not section 4 for which the sanction is summary dismissal. Mr Cardona then referred the Tribunal to the case of *Taylor v Parsons Peebles Ltd. (1981) IRLR 119*.

8. On the procedure followed by Mr Bensadon he commented that Mr Bensadon had said that he had spoken with Mr Young and relied on what he had said but had not taken a statement from him. Such statement should have been taken and given to the Complainant. The defect in the procedure would have made no difference to the outcome of the case.

9. On the matter of the sanction imposed Cardona posed the question as to whether the sanction of summary dismissal was fair. He argued that such sanction was not reasonable having regard to the 13 years' employment of the Complainant with the Respondents and the fact that this had been an isolated incident. No final warning had been given. It had not been shown that the Complainant had any propensity for such behaviour. The Complainant had not threatened Mr Dominguez in the presence of others.

10. Mr Simpson then addressed the Tribunal with his final submission on behalf of the Respondents. He very usefully provided the Tribunal and Mr Cardona with a full summary of his submissions. Mr Cardona took exception to this on the ground that Mr Simpson had taken advantage of the evidence which had been given in preparing his submissions in writing. Mr Simpson replied that it was the normal and inevitable procedure to rely on the evidence given and arguments expounded during the course of the hearing and that setting his submissions in writing could not be objectionable.

11. I agreed with Mr Simpson and he thus handed his written submissions to the Tribunal and to Mr Cardona.

12. Mr Simpson highlighted some aspects of his submissions. He said that what was in dispute was whether the dismissal was fair or unfair. The employer (Respondent) had to show that the dismissal was potentially fair. The Tribunal had to

decide whether it was reasonable. He then referred the Tribunal to Mr Bensadon's letter of dismissal to the Complainant of 13<sup>th</sup> January 2010 and referred briefly to several parts of it. He invited the Tribunal to consider what material Mr Bensadon had before him in arriving at a decision at the disciplinary hearing and posed the question whether he had acted reasonably. He mentioned that the Complainant had initially denied having threatened Mr Dominguez and that Mr Dominguez had stuck to his statement despite requests by the Complainant not to. Mr Bensadon had been criticised for not obtaining a statement from Mr Young or Mr Ramagge. The Complainant had assumed that he would be dismissed. There had never been any bad faith on the part of Mr Bensadon.

13. The Respondent had had a firm belief in the misconduct of the Complainant.

14. On the investigation which had been carried out by Mr Bensadon, Mr Simpson said that the Tribunal must be satisfied that a reasonable investigation had been carried out. He posed the question as to whether, based on the evidence, Mr Bensadon had come to the right decision. The procedure followed had been agreed with the union. There had been no unfairness in the procedure. The Complainant had been accompanied at the hearing by Mr Tampin.

15. The written submissions handed by Mr Simpson to the Tribunal have been read and fully considered by me.

### THE LAW ON GROSS MISCONDUCT

1. Section 59(1) of our Employment Act ("the Act") provides protection for employees against being unfairly dismissed by their employers. Naturally, an employer has a right to dismiss an employee in certain cases although Section 65(1) of the Act imposes a burden on him to show the reason for this and that such reason related to :

- (a) the capability of the employee to carry out the work for which he was employed
- (b) the conduct of the employee or
- (c) the impossibility of the employee continuing to work in his position without the contravention of some enactment.

2. In determining whether a dismissal was fair, the employer must show that he acted reasonably and in accordance with equity and the substantial merits of the case. This is encapsulated in Section 65(6) of the Act.

3. The case of *British Home Stores Ltd v Burchell (1978) IRLR 379* established useful guidelines, although not rigid rules, (popularly known as the Burchell test) in determining whether dismissal for misconduct is fair:

- (a) the employer must establish belief in the fact of the misconduct
- (b) the employer must show that he had reasonable grounds for such belief and
- (c) the employer must have carried out at the time of forming such belief such investigation into the matter as was reasonable

4. One of the reasons for which an employee can be dismissed, as can be seen from Section 65(1) above, is misconduct. Gross misconduct is a term of art rather than a legal term and, although Tolley in Volume 1 at Paragraph C7030 and Harvey in Volume 1 at Paragraphs 1405-1414 list a number of acts of misconduct which might amount to gross misconduct, both works emphasize that the lists are not exhaustive. Included in the lists are acts of physical violence or bullying; dishonesty; deliberate and serious damage to company property and serious insubordination.

5. The essence of an act of gross misconduct by an employee is the particular remedy of summary dismissal it affords the employer. Traditionally, a right of dismissal was regarded as incidental to the relationship of master and servant. With the evolution of workers' rights and human rights such right of dismissal must be justifiable today in contractual terms in that the employee must have committed a repudiatory breach of the contract of employment. Such severe sanction as summary dismissal, which can entail the employee in loss of accumulated gratuity and pension rights, must be reserved for acts of gross misconduct either of a very serious nature or in serious breach of a specific rule established by the employer.

6. It is necessary to consider what the law has to say about this last act of misconduct in committing a breach of specific rules since, in this particular case, there is what is known as an Employees' Handbook setting out a non-exhaustive list of acts defined therein as acts of gross misconduct and also a table showing the possible sanctions applicable for different offences. The Complainant is alleged to have been in breach of one or more of the said company rules.

7. In normal circumstances, a Tribunal should uphold a dismissal carried out for a breach of a specific company rule even though the conduct in question would not otherwise be considered sufficiently gross to warrant summary dismissal. A simple example of this would be where there is a particular company rule that smoking is not allowed within the company premises with a warning that any employee acting in breach of such rule will be instantly dismissed. Certainly, a tribunal would not be entitled to look into the right of the company to have such a rule which is set out in clear and unambiguous terms. Of course, if, on the other hand the rule were to be set in very general and vague terms stating, for example, as in the case of *Singh v London Country Bus Service Ltd (1976) IRLR 176* that "the company reserves the right to dismiss summarily without notice any employee guilty of serious misconduct or misbehaviour", a tribunal would be entitled to look into and consider and adjudicate upon what constitutes "serious misconduct or misbehaviour".

8. However, even in a case where there exists a specific rule couched in clear and unambiguous language, a tribunal, whilst not entitled to question the right of the company to have such rule, can consider whether it should be strictly implemented against an employee having regard to certain subjective circumstances concerned with the employee. Such was the case in *Taylor v Parsons Peebles NEI Bruce Peebles Ltd (1981) IRLR 119* where company policy was to dismiss an employee who struck another. The Tribunal upheld the dismissal of the employee for fighting with another employee but that decision was reversed on appeal. Lord McDonald, after stating that the tribunal had considered dismissal as the only possible penalty continued,

*"So expressed, this does not in our view state the proper test. The proper test is not what the policy of the respondents as employers was but what the reaction of a reasonable employer would have been in the circumstances. The reaction would have taken into account the long period of service and good conduct which the appellant was in a position to claim. It is not to the point that the employer's code of disciplinary conduct may or may not contain a provision to the effect that anyone striking a blow would be instantly dismissed. Such a provision, no matter how positively expressed, must always be considered in the light of how it would be applied by a reasonable employer having regard to the circumstances of equity and the substantial merits of the case".*

9. Tolley, in Volume 1 at Paragraph 6027, considers from a different perspective the appropriateness of the sanction of dismissal and, relying to some extent on the case of *Trust House Forte (Catering) v Adonis (1984) IRLR 382*, sets out the following matters which an employer should expressly take into account when considering what the appropriate sanction is :

- (a) the extent and significance of the misconduct itself
- (b) the worker's previous record
- (c) the worker's length of service



- (d) matters raised in mitigation by the worker
- (e) the worker's ranking in the company
- (f) previous sanctions imposed on other workers for similar offences

10. It is thus against the background of the law that the acts of the Complainant alleged by the Respondents must be considered and also the categorisation by the Respondents of such acts as gross misconduct and the imposition of the sanction of summary dismissal.

## DECISION

### Review of the Evidence

1. These proceedings were initiated by the Complainant when he issued an Originating Application under Section 70 of the Employment Act ("the Act") on 10<sup>th</sup> March 2010 in breach of his right under Section 59 of the Act not to be unfairly dismissed. Under Paragraph 14 of the Originating Application where the complainant is invited to state what, in his opinion, was the principal reason for dismissal the Complainant states

*"The Employer no longer wished to (be) bound by its obligation under the contract of employment and simply wanted to get rid of the Complainant."*

In its Notice of Appearance the Respondents, through Mr James Ramagge, its Managing Director, states as the grounds on which the Complainant's claim is to be resisted as follows :

*"The disciplinary action taken arose after an incident in which the Applicant deliberately sprayed an unnecessarily excessive amount of an unsuitable cleaning product into the mess room oven with the stated intention of putting the oven out of service. Moreover, the action arose after being specifically instructed by his superior not to use the said product. In complete disregard of those instructions, the risk to his colleagues' health and safety and the damage that could have been occasioned to company property, the Applicant proceeded as stated above. Following the incident, when summoned to the Stations Manager's office for an explanation, the Applicant was verbally abusive towards management staff and was therefore asked to go home and "cool off". The Applicant again failed to proceed as instructed and instead confronted a colleague with insults and threatening behaviour."*

2. Mr Bensadon, the Respondent's General Manager, carried out an investigation into this matter and on 7<sup>th</sup> January 2010 held a disciplinary hearing where he sat as Chairman of the meeting. Present at the meeting were the Complainant and Mr Michael Tampin, the National Secretary of the Union Unite, representing the Complainant. Notes of the meeting were taken by Mr Daniel D'Amato, a member of the firm of solicitors representing the Respondents. The notes were produced at the hearing under the heading "Attendance Notes" and the following are extracts of the more relevant parts thereof.

3. The Complainant was invited to present his defence. He explained that he had been employed by the Respondents for the last 11 years. He recognised that he can become very anxious and blustery when he loses his temper but that that was simply his nature.

4. He explained that on 10<sup>th</sup> December 2009 he put some sausages to cook in the mess room oven. Fat dripped onto the base of the oven. After eating he left the mess room but, having heard comments from work mates that the oven had been left dirty, he went back where he saw a colleague, Mr Portela, cleaning the microwave

with Flash, which he explained was what was usually used to clean the oven and cooking utensils. He then proceeded to use Flash to clean the oven.

5. During the course of this, Mr Dominguez, another employee, came up to the mess room window. Mr Bolaños, the assistant station manager, was behind him. The Complainant carried on to say that Mr Bolaños then said *"not to do that"*, that is, not to use Flash to clean the oven. He then qualified this by saying that *"maybe he said that, maybe he didn't....I don't know...I'm like this, I can't help it, it's my voice."*

6. The Complainant then carried on by saying that, "as a joke", he sprayed the oven with Flash and told Mr Dominguez that he would not now be able to cook his pizza. After this he admits having used insulting words against Mr Dominguez but meaning to cause no offence. Later on, he was informed by Mr Dominguez that Mr Young, the station manager, wanted to see him. The Complainant explained that he knew this was bad news for him. When he arrived at Mr Young's office, the Complainant states that he realised this had nothing to do with the incident involving Flash, but was something personal, *"a vendetta of some sort."* Mr Young then sent the Complainant home until Monday, a decision which the Complainant considered unfair since they *"had not even finished their conversation."* He admitted having raised his voice at the meeting although he maintained that he never insulted anyone. He went on to say that he realised that the decision to sack him had already been made. As he left the office he was cursing at himself and not at Mr Dominguez.

7. After this, he said he went to see Dr Beguellin because of his anxiety. The Complainant described his relationship with Mr Young as good but that, since the arrival of the Employees' Handbook, attitudes around the station had changed. Even Mr Bolaños had warned employees that *"whoever doesn't like it will be shown the door."* Mr Tampin intervened at this juncture to say that such attitude is reproachable. The Complainant explained that he had been affected in his health because of the incident and that he had had to have his stress medication because of it and had been anxious all through the Christmas period.

8. That night, Mr Dominguez went to see him at his home and reassured him that he would not be dismissed and that on Monday he would be back at work. He then told him that *"they made me sign the statement I made which I thought would be going in the records, if not, I wouldn't have signed it."*

9. The Complainant then went on to explain that since the arrival of the Handbook employees *"cannot joke around this place anymore.....the book should be burnt"* He then explained he tried to call Mr Dominguez in order to get him to retract his statement. Mr Dominguez promised to do what he could.

10. Mr Bensadon then gave details to the Complainant of the information he had in front of him and explained that the oven should be cleaned after use and that the Complainant was told that "Eddie" would be going to buy a proper product for cleaning the oven and that he had been told not to use Flash. The Complainant replied to this by saying that Carlos (Portela) had not been there and could not have heard anything. He insisted there was a vendetta against him. Mr Bensadon then asked the Complainant whether he had not told Mr Dominguez to scrub his tongue as he was a whistle blower, to which the Complainant replied that he had not. The Complainant then explained that on the Saturday night Mr Serra, another employee, came to see him at his house saying that he had tried to convince Mr Bolaños to help him and had added that Mr Bolaños had told him that *"if you do something, the next one out is you."*

11. Mr Tampin then intervened to say that the Respondents had bought the Flash cleaner and wondered who it was that had said it was a poisonous substance. The Complainant was then asked by the Chairman why he had threatened Mr Dominguez but the Complainant denied he had. Mr Tampin then went on to say that the Chairman should not take into account incidents over a year ago and that although the Complainant was a blustery and bullish sort of person this gave employers no right to tell him *"if you don't like it there's the door."* Clear notice should have been posted in

the kitchen not to use certain cleaning products. Mr Tamplin explained that part of the Complainant's blustery character was because of his hearing problems and his tendency to shout.

12. Mr Tampin continued to say that, although what the Complainant had done was not right, he had given eleven years of his life to the Respondents and rarely taking sick leave and that what he had done was not a dismissible offence and that he should instead be given a final warning.

13. Mr Bensadon explained he needed time to arrive at his decision and that he wished to consult some of the other employees. The meeting was thus adjourned.

14. I have considered the statement the Complainant made on 7<sup>th</sup> March 2011 shortly before this hearing and I want to refer to certain passages of it. At paragraph 6 he says he is clear that the source of the problem and reason for his dismissal is a personality clash which exists between himself and Mr Young. The relationship between them was so bad that he tried to avoid entering his office.

15. Contrary to what he said at the disciplinary meeting, the Complainant at paragraph 16 of his statement admits to having, in the heat of the moment, insulted and threatened Mr Dominguez.

16. On 13th January 2010 Mr Bensadon wrote to the Complainant informing him that *"having been satisfied that you have been guilty of gross misconduct, I am of the view that you should be dismissed forthwith."* The letter ends by advising the Complainant of his right to appeal such decision to Mr Ramage, the General Director.

17. I have considered the statements made by the employees as well as that of Dr Beguellin and the petition presented by some of the employees to management to try and protect the Complainant's job.

18. In view of the uncertainty as to what exactly occurred in Mr Young's office at the meeting he had with the Complainant, it is to be regretted that a statement was not taken from Mr Young and that he was not available at the disciplinary hearing to be cross examined by the Complainant or Mr Tampin and at the present hearing. The same can be said for the employees who did make a statement but who were not present at the meeting and available to have their declarations tested. This is of particular importance as regards the statement of Mr Bolaños. His presence both at the disciplinary hearing and also at this hearing might have clarified the unresolved issue of whether he did ask the Complainant not to use Flash. This is of some significance as the Complainant's conduct in spraying the oven with Flash will have been exacerbated by insubordination if he was told not to use it but not otherwise.

19. There is not much more that can be said on the factual evidence in this case; either that contained in the several statements or in the oral evidence given at this hearing. There is really no great conflict or inconsistency in the evidence. The main conflict exists with the evidence as to whether Mr Bolaños told the Complainant not to use Flash. If he did and the Complainant heard this, then his act in spraying the oven with a copious amount of Flash will have been more reprehensible. If he was not told not to use Flash or if the Complainant did not hear this, then his act in spraying the oven as he did with Flash "for a joke" as he put it, is less reprehensible.

20. Having considered all of the evidence on this matter, I have come to the conclusion that Mr Bolaños did tell the Complainant not to use Flash for cleaning the oven and that the Complainant did hear this. Notwithstanding, he went on to spray an extra quantity of Flash into the oven to vent his annoyance with Mr Dominguez for reporting him to Mr Young and in this way to somehow get his own back on Mr Dominguez by preventing him from cooking his pizza.

21. Whilst still on the matter of the use of Flash, it is relevant to say that the oven did not suffer any permanent damage although it may have been out of action for immediate use by Mr Dominguez to cook his pizza.
22. Another of the contentious incidents contributing to the classification of the Complainant's conduct as gross misconduct arises, as set out in Mr Bensadon's letter to the Complainant of 13<sup>th</sup> January 2010, during the meeting the Complainant had with Mr Young in his office. We have only the written statement of Mr Bolaños on this where he says that, when he was asked by Mr Young why he had deliberately put Flash in the oven, the Complainant had shouted back *"to clean it"*. Mr Young then accused the Complainant of using the Flash on purpose so that Mr Dominguez could not then use it when the Complainant started shouting at him and after some time Mr Young told the Complainant to leave his office and go home. Mr Young was trying to get a word in but the Complainant was "shouting and raving" at Mr Young.
23. The Complainant's explanation in his latest statement of 7<sup>th</sup> March 2011 appears at paragraph 15 where he says *"As I entered the office Douglas (Mr Young) immediately, without asking me what had happened, accused me if wanting to poison everyone in the workshop. Every time I tried to get a word in he just kept on screaming "No, no, no. As a result I also raised my voice in an attempt to get him to hear what I had to say but he was having none of it and yelled "Go home and come back tomorrow, no, better yet go home and come back on Monday. I shouted back at him why he was taking such an extreme measure when he didn't even allow me to speak and that by instructing me to return on Monday I would be losing my attendance bonus. But these pleas were to no avail and Douglas simply said Go, go"*.
24. At the disciplinary hearing the Complainant explained the incident in Mr Young's office. He said that when he saw Mr Young he knew that their meeting was nothing to do with the oven but was rather something personal, a vendetta of some sort. Mr Young then sent the Complainant home until Monday. He admitted that he raised his voice although he never insulted anyone.
25. In his oral evidence at this hearing the Complainant said that when he went into Mr Young's office he kept on saying *"No, no, no"*. The Complainant asked him what he had done to deserve this.
26. There is nothing in the evidence of Mr Bolaños or that of the Complainant himself, the only two persons present apart from Mr Young himself, to suggest that the Complainant insulted or was abusive towards Mr Young. There is no doubt that tempers were flared and that emotions were running high with both parties and that there was a great deal of shouting. But there were no insults or threats, otherwise this would have come out in evidence and so I hold.
27. The other matter of complaint against the Complainant is that he both insulted and threatened Mr Dominguez. This is very clear from the written and oral evidence and the Complainant himself acknowledges having done so. The Complainant wrote a letter to Mr Ramagge on 14<sup>th</sup> December 2009 apologising to him for his conduct.
28. There is one final comment which needs to be made on the facts and that is that the conduct complained of by the Complainant, whilst reprehensible, was not connected to the performance by the Complainant of his duties nor involved any equipment or machinery connected with his work but rather company equipment, in the form of an oven, made available to employees by the Respondents for their personal convenience and comfort.

### **Applying the Law to the Facts**

Section 65(1) of the Employment Act ("the Act") imposes on an employer the burden of showing the reason for dismissing an employee and that such reason was related to :

- (a) the capability of the employee to carry out the work for which he was employed
- (b) the conduct of the employee or
- (c) the impossibility of the employee continuing to work in his position without the contravention of some enactment

Section 65(6) requires an employer to show that in dismissing the employee he acted reasonably and in accordance with equity and the substantial merits of the case.

The case of *Burchell* referred to above elaborates on this and places a further onus on the employer :

- (a) to establish belief in the fact of the misconduct
- (b) to show that he had reasonable grounds for such belief and
- (c) to carry out at the time of forming such belief such investigation into the matter as was reasonable

**The First question for the Tribunal is :**

Have the Respondents satisfied the letter and the spirit of Section 65(6) of the Act and the *Burchell* test?

In very abridged and succinct form, the conduct of the Complainant in this case was that, after being told by a senior employee not to use Flash to clean the oven, he deliberately used a copious amount of it out of anger at one of his colleagues for having reported him for not cleaning the oven after use and thus preventing him from using the oven to cook his pizza. He then shouted at his superior officer in his office when this matter was put to him and, on coming out of the office, insulted and threatened the employee who had reported him for leaving the oven in a dirty state.

**The Second question for the Tribunal is:**

Does this conduct amount to gross misconduct so as to entitle the Respondent to summarily dismiss the Complainant?

Before dealing with this particular question, there are two further matters which need to be considered. In the first place, the Respondents produced an Employees' Handbook sometime in November 2009, a month or so before the incident in this case occurred on 10 December. In the Handbook the Respondents set out a number of acts which they describe as acts of gross misconduct which "*will normally result in summary dismissal.*" Among these appear three examples which could be of relevance to the present circumstances; *violent, abusive or intimidating conduct; reckless or serious misuse of company property; deliberate damage to company property.*

**The Third question for the Tribunal is :**

Should a Tribunal uphold a dismissal carried out for breach of a specific company rule as above even though the conduct in question would not otherwise be considered sufficiently gross to warrant summary dismissal?

The Respondents introduced to the employees an Employees' Handbook in November 2010 which, *inter alia*, set out a number of acts and circumstances which would be considered by the Respondents to amount to gross misconduct for which the sanction would be instant dismissal.

#### **The Fourth question for the Tribunal is :**

Even if the answer to the three questions posed above are in the affirmative, are the Respondents entitled strictly to implement the right of summary dismissal without having regard to the subjective circumstances concerned with the Complainant?

The Complainant at the time of dismissal had some 13 years of employment with the Respondents. It was made clear during the course of the hearing that no previous conduct of the Complainant was taken into account. The present conduct complained of is thus the first and isolated act of misconduct committed by the Complainant.

In giving my judgment, I will endeavour to answer each of the above questions.

#### **The Answer to the First Question**

1. The Complainant has maintained throughout that his first objectionable act in deliberately spraying an excessive amount of Flash into the oven contrary to direct instructions from his superior was by way of a joke. This clearly was not, in my judgment, the case. He was motivated by anger at Mr Dominguez having reported to Mr Young the fact that he had left the oven in a dirty state. In so doing he also wanted to get back at Mr Dominguez by making it impossible for him to cook his pizza as he had planned.
2. The second act complained of, using abusive language at Mr Young in his office, I hold has not been established by the evidence of Mr Bolaños, the only witness to that particular incident who has made a statement on this apart from the Complainant himself. There is no doubt that the Complainant shouted at Mr Young, his superior and can undoubtedly be said to have acted disrespectfully and even rudely.
3. The third act complained was the insult and threats to Mr Dominguez. This is undoubtedly the most serious offence committed by the Complainant and he admits to it. Having had the benefit of seeing and hearing the Complainant giving evidence in Court and being cross examined, one wonders whether the description of his conduct as "*blustery*", which is what Mr Bensadon put to the Complainant at the disciplinary hearing and to which the Complainant agreed, is not a realistic and incisive insight into his true character. The adage "*the bark being worse than the bite*" comes to mind. This does not, however, minimise the seriousness of his action. Certainly, the recipient of his insults and threats, Mr Dominguez, appears not to have taken them very seriously. After the incident Mr Dominguez has visited the Complainant at his home and has not reported the incident to his superiors and certainly, the Complainant has made no move whatsoever to carry through his threats.
4. I hold that the Respondents did not act reasonably and in accordance with equity as required by Section 65(6) of the Act in concluding that these acts by the Complainant amounted to gross misconduct justifying summary dismissal.
5. Applying the Burchell test, which is only a guideline and does not create any rigid rule of law or procedure, there is no doubt that the Respondents acted honestly and with integrity in the genuine belief in the fact of the misconduct. However, in my view, their judgment that they had reasonable grounds for such belief was defective. In my judgment, the Respondents failed to satisfy the third leg of the Burchell test in that a full and reasonable investigation appears not to have been undertaken. The two crucial witnesses who might have been able to clarify the incident at Mr Young's

office, Mr Bolaños and Mr Young himself, were not invited to attend the disciplinary hearing of 7<sup>th</sup> January 2010 for cross examination by the Complainant or Mr Tampin on his behalf. Indeed, a statement was not even taken from Mr Young. This has been explained by Mr Bensadon when he explained that at the time Mr Young was away from Gibraltar and I can also understand his concern to deal with the matter speedily for the sake of all concerned.

6. This was a failing in the investigation which was carried out and it deprived the Complainant from clarifying what were serious accusations against him and which, unchallenged as they went, contributed to his summary dismissal with the consequential loss to him.

### **The Answer to the Second Question**

1. As I have stated above in the chapter on The Law on Gross Misconduct, gross misconduct is a term of art without a specific legal narrow definition. However, it can be classified in general terms as a very serious offence involving such serious conduct as dishonesty, violence and bullying, serious insubordination or deliberate damage to company property of a serious nature. The list is not exhaustive and each individual case must be considered according to its own special circumstances.

2. The conduct of the Complainant, whilst reprehensible and not to be ignored and deserving of an appropriate sanction, was not, in my judgment, of a sufficiently serious nature with sufficiently damaging consequences to other employees or the Respondents themselves, to have warranted classification as gross misconduct and summary dismissal. The Respondents' own Employees' Handbook, introduced to the employees a mere few short weeks before the incident of 10<sup>th</sup> December 2009, does not classify in its table the type of offences committed by the Complainant as gross misconduct and sets the appropriate sanction as deserving of a final warning. Only for repeat offences of a similar serious nature, does it set the appropriate sanction as summary dismissal.

### **The Answer to the Third Question**

1. Where a company rule prohibits a particular and well defined act to be committed by an employee under pain of instant dismissal, such as, for example, smoking within the company premises, a Tribunal should uphold a dismissal carried out for breach of that specific rule even though such conduct would not otherwise be considered sufficiently gross to warrant summary dismissal. Of course, if the rule is of a general or vague nature such as requiring employees "to behave properly", a Tribunal would be justified in looking into the rule and deciding what the particular rule meant and whether in the particular circumstances there has been a breach of the rule.

2. This was the case in *Singh v London Country Bus Service Ltd (1976) IRLR 1786* where the company reserved the right to dismiss summarily without notice any employee guilty of "serious misconduct or misbehaviour". The Tribunal was entitled to look into and consider and adjudicate upon what constituted "serious misconduct or misbehaviour".

3. In this particular case the Complainant is accused of disobeying the instructions of Mr Bolaños not to use Flash, of abusive language towards a senior member of management, Mr Young, although I have decided that there is no evidence to support this and to having insulted and threatened Mr Dominguez.

4. Whilst the offence of abusive language towards Mr Young has not been proved, the offences of disobedience and abusive language and threats made to Mr Dominguez have both been sufficiently made out. Although both these offences may be of a sufficiently specific, clear and unequivocal manner which at first sight may not

entitle the Tribunal to look further into the matter, the answer to the Fourth Question must be looked at first before arriving at a final answer.

### **The Answer to the Fourth Question**

1. Even in a case such as the present one where there may exist specific rules couched in clear and unambiguous language, the Tribunal, whilst perhaps not entitled to question the right of the Respondents to have such rules, can still consider whether they should be strictly implemented against the Complainant, having regard to the subjective circumstances concerned with the Complainant.

2. There is good authority for such proposition of law and this is to be found in the case of *Taylor v Parsons Peebles NEI Bruce Peebles Ltd 1981* IRLR 119.

3. In that case the company policy was to dismiss an employee for fighting with another employee. The Appellant was dismissed for fighting with a fellow employee and on appeal, Lord McDonald, after stating that the tribunal had considered dismissal as the only possible penalty continued,

*"So expressed, this does not in our view state the proper test. The proper test is not what the policy of the respondents as employers was but what the reaction of a reasonable employer would have been in the circumstances. The reaction would have taken into account the long period of service and good conduct which the appellant was in a position to claim. It is not to the point that the employer's code of disciplinary conduct may or may not contain a provision to the effect that anyone striking a blow would be instantly dismissed. Such a provision, no matter how positively expressed, must always be considered in the light of how it would be applied by a reasonable employer having regard to the circumstances of equity and the substantial merits of the case."*

4. Tolley, in Volume 1 at paragraph 6027, considers the appropriateness and criteria for imposing the sanction of summary dismissal and, relying to some extent on the case of *Trust House Forte (Catering) v Adonis (1984)* IRLR 382, sets out the following matters which an employer should take into account when considering what the appropriate sanction is :

- (a) the extent and significance of the misconduct itself
- (b) the worker's previous record
- (c) the worker's length of service
- (d) matters raised in mitigation by the worker
- (e) the worker's ranking in the company and
- (f) previous sanctions imposed on other workers for similar offences

5. As in the case of Taylor, the Complainant had a long period of service when dismissed; some thirteen years' employment. He had a good record. It was stated by Mr Bensadon that the Complainant's previous record was not being taken into account so he had an entirely clean slate. Additionally, the offences for which the Complainant was charged in this case were not of such a serious nature as in the Taylor case which involved fighting with a fellow employee. Also, as I have mentioned above, the offences committed by the Complainant were not concerned with the carrying out of his duties or seriously damaging company property connected with the operation or the commercial activities of the company.



6. None of these matters were taken into account by the Respondents when arriving at the decision to impose the ultimate sanction upon the Complainant of summary dismissal. A sanction giving the Complainant a final warning would have been the more appropriate course for the Respondents to have taken in this particular case.

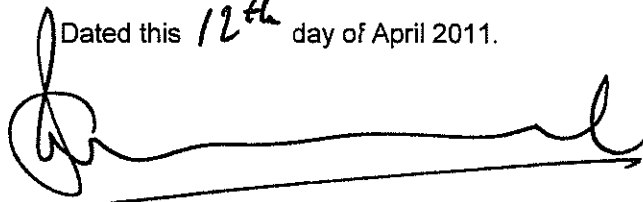
7. For all the reasons set out above, the decision of the Tribunal is that the Complainant has been unfairly dismissed.

There was an application by consent by Counsel for both parties at the conclusion of the taking of the oral evidence to adjourn submissions on compensation until a decision on the substantive issues of law and of fact had been given.

This matter therefore stands adjourned until a new date has been given for further submissions or application by Counsel.

I wish to end by thanking both Counsel and their juniors for the invaluable and courteous assistance they have provided to the Tribunal.

Dated this 12<sup>th</sup> day of April 2011.

A handwritten signature in black ink, appearing to be 'Eric C Ellul', written over a horizontal line.

Eric C Ellul  
Chairman