

IN THE INDUSTRIAL TRIBUNAL

Case No. 12 of 2011

FRANCIS DUARTE

Complainant

-and-

THE ADMINISTRATOR OF THE GIBRALTAR DEVELOPMENT
CORPORATION

Respondent

Mr. Joseph Cortes for the Complainant.

Mr. Johann Fernandez for the Respondent

Judgement

Background

The Complainant was employed as a painter and decorator with a company by the name of Topgem Constructions Limited ("Topgem") when on the 13th January 2011 he, together with all his fellow co-workers, was informed by a director of Topgem that their employment was being terminated with immediate effect since there was no money to pay them; the Notice of Termination form filed with the Employment and Training Board ("ETB") actually referring to the date of termination as being the 14th January 2011. In consequence of this, the Complainant filed an application in accordance with the provisions of the Gibraltar Development Corporation (Employer's Insolvency) Regulations 1991 for a payment to be made out of the Statutory Benefits Fund. The Complainants' application was considered by the Ministry of Employment, and, on the 27th April 2011, the Complainant was informed that he was to be paid the total sum of £8,146.88, of which the amount of £6,115.44 was in respect of redundancy. The Complainant was dissatisfied with the amount awarded to him with respect to the "redundancy" element of the payment and, in consequence thereof, on the 18th May 2011 he submitted to the Industrial Tribunal an Originating Application in which the grounds of relief sought are stated as being :-

"Do not accept £6,115.44 calculation of redundancy payment which is below statutory minimum."

On the 31st May 2011, the Respondent filed a Notice of Appearance contending that as the Complainant was a painter/decorator his employment conditions were governed by the Construction and Allied Trades Association ("CATA") agreement governing the construction trade

and that therefore the redundancy calculation had to be made in accordance with the provisions of the CATA Agreement and not the Conditions of Employment (Redundancy Pay) Order 2001.

It would appear that for one reason or another this case was not heard by the person(s) appointed Chairman in 2011 and that in essence the file gathered dust until my appointment on the 14th May 2014. Following my appointment, this case came before me on the 11th September 2014 for a preliminary matter, and was heard on the 19th December 2014. During the course of the hearing Mr. Francis Duarte and Mr. Paul Costa gave evidence; the evidence of both witnesses went unchallenged by either side, a refreshing novelty to the general rule in cases before me.

I point out at this stage that I have read the documents contained in the bundle submitted by Mr. Fernandez, as well as the documents submitted by the Complainant in the course of his evidence, and taken account of the oral evidence given before me and the skeleton arguments presented and submissions made to me by both parties.

Findings

As previously stated the Complainants' evidence went unchallenged and having heard the witness I accept his version of events as being accurate. I now set them out.

The Complainant was engaged by Topgem (in some documents referred to as "Topgems Limited") as a painter on the 27th April 1998. The ETB Notice of Terms of Engagement form produced, refers to "as per CATA" in various places including in the box titled "Industry Pay Agreement (where applicable)".

The Complainant attended work on the 13th January 2011 only to be told by the director of Topgem that there was no money to pay the workforce and therefore no employment for them. That same day the Complainant suffered a heart attack and had to be rushed to a hospital in Spain for medical treatment; he was therefore totally unawares of what happened or was happening with Topgem whilst he was hospitalised.

On the 25th January 2011, the Complainant signed an ETB Termination of Employment form completed by Topgem in which it is stated that:-

- (a) the reason for termination is "Insolvency"; and
- (b) details of payments made at the date of termination were - "None but outstanding w/e 26.10.10 £145.92 w/e 16.1.11 £318.4 Redundancy £6,028.32"; and
- (c) termination was effected the "14/01/11" - it appears that a "13" was changed to a "14" by someone.

The said form appears to have been signed on behalf of Topgem by a Ms Smith on the 14th January 2011; it being stated that her position was as an "Administrator". I originally wondered whether this indicated that Topgem had been put in Receivership/Administration at the time the form was filled in but it turns out that Ms Smith was the daughter of and the secretary to the director who used the title "administrator".

The Complainant could not recall the date he left hospital but as he signed the ETB form on the 25th January 2011 he must have been released by then. On being released the Complainant phoned Topgem and spoke to the daughter of the director who informed him that if there was any work for him in the future they would seek to employ him. The Complainant some week or two later phoned Topgem again, as he had heard they were employing people. On this occasion he spoke to the director of the company who whilst confirming that they were taking on people stated that there was no work for the Complainant.

It would appear that when the Respondent considered the application made by the Complainant for payment under the Gibraltar Development Corporation (Employers' Insolvency) Regulations 1991 no investigation was made as to whether the Complainants' employment had been terminated as a result of redundancy or insolvency.

Turning then to the law.

The Law

As previously stated the Complainant applied pursuant to Regulation 10 of the Gibraltar Development Corporation (Employer's Insolvency) Regulations 1991 ("the Regulations") for the payment of such monies as were due to him under the provisions of Regulations 7 thereof.

The Regulations apply when an employer is deemed to have become insolvent pursuant to the provisions of Regulation 3 thereof. The Administrator appointed to administer the Regulations, after presumably carrying out such enquiry as to insolvency as is provided for by Regulation II, determined that Topgem had become insolvent. It is not for me to consider otherwise. This being the case, it was for the Administrator to determine pursuant to the provisions of Regulation 7 of the Regulations what monies, if any, the Complainant was entitled to. The parties are in agreement as to part of the determination made by the Administrator but disagree as to the amount to be awarded with regard to "redundancy". The difference is important since it means in effect the Complainant getting £7,716.56 less. In essence the issue is whether it is the provisions of Regulation 7 (1) (c) (iv) (cc) or Regulation 7 (1) (c) (iv) (dd) that should be applied in calculating the amount of redundancy pay to be awarded to the Complainant. In the former case, the CATA Agreement would apply but in the latter case, the Conditions of Employment (Redundancy Pay) Order 2001 ("the Order") would apply.

Regulation 7 (1) (c) (iv) of the Regulations provides as follows:-

“where the contract was terminated by the employer:-

- (cc) any amount payable by virtue of any determination of a joint industrial council registered under section 9 of the Employment Act;
- (dd) any redundancy pay in accordance with the provisions of an Order made under section 36 of the Employment Act.”

Mr. Fernandez argues that the first situation should apply whilst the Complainant states that the second situation applies.

Turning then to the first situation.

Section 9 (1) of the Employment Act (“the Act”) provides for the Minister, were he recognises in the case of any group or class of employees where there is adequate machinery between employers and trade unions to regulate their conditions of employment, to register said machinery as a Joint Industrial Council.

Section 9 (3) of the Act provides

“Upon such registration the group or class of employees to whom it relates shall be excluded from the field of any reference to the Board made in accordance with section 34 and the Minister shall take such action as may be necessary to abolish or modify any particular conditions of employment order in force affecting that group or class of employees”.

Section 2 of the Act states that:-

“conditions of employment order means an order made by the Minister under section 36.”

It would appear to me that the clear intention behind said provisions is that in the case of a registered Joint Industrial Council, the provisions of a Conditions of Employment Order are not to apply to the group or class of employees regulated by that Joint Industrial Council and, indeed, the Minister is not to refer matters relating to conditions of employment of persons regulated by a Joint Industrial Council to the Conditions of Employment Board for its recommendations. This, however would not appear to give the Joint Industrial Council carte blanche since Section 10 of the Act provides that the power of the Joint Industrial Council to determine the conditions of employment of the employees under its jurisdiction is subject to the provisions of the Act and of any other law in force from time to time.

At a first glance there would appear to be a clear contradiction between the provisions of sections 9(3) and 10 of the Act. I do not think that the legislature intended that there be a contradiction and, consequently, I would resolve the inconsistency by interpreting section 10 as providing that the conditions of employment which the Joint Industrial Council can implement cannot be below the minimum set by statute for all persons working in Gibraltar. To decide otherwise would be to admit the possibility that the Joint Industrial Council can set conditions of employment for those persons working in the trades concerned which are below the minimum provided by statute for all other employees in Gibraltar.

The legislature provides for minimum terms and conditions of employment as, for example, the following provisions of the Act serve to illustrate:-

“37 (2) No conditions of employment order shall have effect so as to prejudice any rights as to conditions of employment conferred on any employee by or under any law other than this Act or by or under any existing contract.”

“37 (3) If a contract between an employee to whom a conditions of employment order applies and his employer provides for conditions of employment less favourable to the employee than those specified in the order, it shall have effect as if for those conditions there were substituted the conditions specified in the Order.”

I cannot imagine that it was ever the intention of the legislature to exempt the Joint Industrial Council from such minimum terms and conditions.

On the 7th October the Construction and Allied Trades Association and Unite the Union entered into an Agreement (“the CATA Agreement”) with regard to the building construction and painting trades which the Minister subsequently recognised as a Joint Industrial Council. It is accepted by both parties that the Complainant’s conditions of employment are governed by the CATA Agreement. The CATA Agreement provides for such matters as standard rate of wages, holidays, working hours, overtime, pension scheme, termination of employment, sick pay etc and, redundancy.

Clause 18 of the CATA Agreement deals with redundancy payments and refers the reader to Appendix C of the Agreement. Paragraph 1 of Appendix C states:-

“When an employee is made redundant, the employer shall pay a redundancy payment in respect of the duration of that employment always provided that the term of continuous employment is not less than eight weeks”.

Paragraph 3 of Appendix C then proceeds to set out the method of calculation of the redundancy payment.

I have for two reasons come to the conclusion that the Administrator erred in applying the CATA Agreement when considering the amount to be paid to the Complainant with respect to redundancy.

Regulation 7 (1) (c) (iv) (cc) of the Regulations refers to “any determination of a joint industrial council.” I do not interpret the word “determination “ as being a reference to the CATA Agreement as Mr. Fernandez does. It seems to me that the word should be given its every day ordinary meaning and in that context it does not seem to me that the Joint Industrial Council has determined with reference the Complainant and his circumstances the amount payable to the Complainant. Even if I am wrong in so concluding, I am of the opinion that as the CATA Agreement provides for redundancy pay that is less than the statutory minimum, and as the terms of the CATA Agreement is only binding on the industry and not the Administrator, the provisions of the CATA Agreement are not applicable in this particular case.

Regulation 7 (i) (c) (iv) (dd) of the Regulations refers to “an order made under section 36 of the Employment Act.” The Order was made under section 36 of the Act and provides that the Order shall apply to all employees in any undertaking or any branch or department of an undertaking of which no other statutory provision is made for compensation by reason of redundancy. Mr. Fernandez has sought to argue that the words no other statutory provision does not apply in this case since the CATA Agreement is made by the Joint Industrial Council which is a creature of statute and therefore determines terms of employment. I do not accept such a submission since it in effect seeks to elevate the power and jurisdiction of the Councils to levels far higher than in my opinion were ever intended by the legislature. Moreover, if the powers to be intended that the Order not apply to cases such as the present one, then the Minister, as provided by Regulation 9 (3) of the Regulations, would have introduced the necessary exception into the provisions of Rule 3(2) of the Order.

Conclusion

I determine for the reasons given above that the Complainant is entitled to the sum of £7,716.56 which is the difference between the amount which he should have been in fact paid and the sum which he has already been paid.

Dated this 12 day of February 2015.



Joseph Nuñez

Chairman