

INDUSTRIAL TRIBUNAL

Ind Tri 14/2011

KYLIE ESTELLA*Complainant*

-and-

MEDEX GIBRALTAR LIMITED*Respondents*

Monday the 15th day of April 2013
Before Eric C Ellul Esquire, Chairman

Mr Joes Cortes for the Complainant
No appearance by or on behalf of the Respondent

RULING

At a hearing for Practice Directions on 28th January 2013 when the Respondents failed to attend and no one appeared on their behalves, on the application on behalf of the Complainant for the hearing to proceed in the absence of the Respondents if they failed to attend without good cause, I ruled that the matter should be set down for full hearing and that notice should be given of this to the Respondents at their last known address and that their solicitors on the record should be informed. They were to be informed that if they failed to appear without good cause, the hearing would proceed in their absence.

The Respondents have failed to appear for today's hearing of this case and, neither they nor their solicitors have communicated with the Tribunal nor have they shown a good cause why they have failed to appear or be represented.

At first sight it would seem to be unfair and against the principles of natural justice for a tribunal to hear a case and give judgment in favour of a complainant where the respondent fails, for no good reason, to attend the hearing or otherwise defend his position and without having heard arguments by or on his behalf. However, the complainant is entitled to have his complaint heard and adjudicated upon by the tribunal. If the respondent fails to defend his position without good reason, this should not be allowed to block the exercise by the complainant of his legal right and entitlement and a tribunal

can thus hear and adjudicate upon the case even where the respondent fails, without good reason, to attend the hearing or otherwise defend his position.

This was made clear and confirmed recently in the case of T.J. Courier Express Limited v Maharjan (EAT 2010/1648/10/CEA) when the Employment Appeals Tribunal said "...*There is no error of law if an Employment Tribunal accepts one party's evidence and rules in its favour when the other party, without explanation, simply fails to attend the hearing*".

Accordingly, the hearing of the Complainant's application will continue in their absence of the Respondents..

The only facts of this case appearing in the pleadings are as follows :

- For the Complainant: "*There was no misconduct and no disciplinary hearing*".
- For the Respondents: "*The Claimant was dismissed for gross misconduct, including indiscipline, disobedience of legitimate instructions and absence from the work place without permission, improper use of company telephones generating unjustifiably high telephone costs*".

None of the statements made by the Respondents or the Complainant have been particularised.

In his opening address, Mr Cortes explained that the payment of the Complainant's wages were regularly made late. When the Complainant complained about this to the Labour Inspectors and the Union, the Respondents accused them of seeking political help. They were also told by the Respondents that they were lucky in being paid at all since their employees in Spain were receiving no pay whatsoever. Mr Cortes went on to explain that there was no truth or foundation in the allegations of absence from work or refusal to obey instructions, indiscipline, inappropriate use of company telephones or gross misconduct and that this was denied by the Complainant.

The Complainant was then sworn in and examined by Mr Cortes. In her evidence she explained that she worked at the Ferry terminal at the old Mons Calpe berth for the Respondents who operated the Algeciras/Gibraltar ferry service. She had been working there for one and a half years. Her duties consisted mainly of selling tickets to passengers and assisting them in whatever way was necessary, waiting for the arrival of the ferry and seeing it

off, collecting all monies received and accounting for it and maintaining contact by E Mail or telephone with the Respondents' head office in Algeciras.

A representative from head office would visit her at long and irregular intervals ranging between two or more months. Her hours of work were between 9.00 am and 7.00 pm but this would be split in shifts between her and her co-worker. She had a one hour lunch break but she often remained in her place of work for this. There were a number of arrivals and departures each day,

The Respondent's representative was brusque and even rude in his treatment of the Complainant. Whenever she complained to him about being paid late, he would respond that, if she did not like it, there was the door.

I asked her specifically about each and every allegation the Respondents had made in their Notice of Appearance and the grounds upon which they stated they would resist the Complainant's complaint.

As to the allegations of gross misconduct and indiscipline, the Complainant rejected all such allegations and maintained firmly that they were all untrue and that there had never been an occasion when any of this had occurred nor had there been any complaint at any time by the Respondents as to such behaviour by her.

As to the allegations of legitimate instructions being disobeyed, she also maintained that there was absolutely no truth in such allegations. The work was carried out by her and her co worker with little interference or intervention by the Respondents and there had never been a single occasion when she had refused to obey any instructions which may have been given to her by her employers.

As to the allegations of absence from work without permission, the Complainant explained that this was untrue. It was essential that she should be at work throughout the day as otherwise there would be no one to sell tickets or receive or see the ferries off and see to the needs of passengers. She explained that she was always on time when opening the office in the mornings at 9.00. She explained that her co-worker in the office also carried out her duties in a diligent and responsible manner and that at no stage had she been guilty of any improper or disrespectful behaviour. They worked well together and shared the work efficiently and managed the business in a proper and responsible manner at all times.

As to the allegation of improper use of company telephones, the Complainant again insisted that this was untrue. The telephones were used for work related matters in communicating with head office in Algeciras. She did admit that there were occasions when she did make some private calls but these were rare.

Because the Respondents continued paying the Complainant late and they did not react fairly to their protestations but, rather, treated them with disdain, she was advised to get in touch with the Labour Inspectors. She proceeded to do so. As a result of this, on 14th July 2011 the Complainant was summarily dismissed without prior warning or notice and was not given an opportunity to appeal the decision to dismiss.

When she subsequently issued her Originating Application in the Industrial Tribunal seeking compensation for unfair dismissal, the Respondents approached her by E Mail offering some settlement. The Complainant did not reply as she felt she could no longer trust them.

The Complainant then called a witness, Joelle Baglietto, of 1 Tarik House, Moorish Castle Estate, Gibraltar. She explained she works at the Coach Terminal, and also at the Ferry Terminal. Both Terminals are very close to each other. She is the one who opens the Ferry and Coach Terminals each morning. The Complainant always arrives on time as does her co-worker. She sees her every day at work and said that if the Complainant was ever required to work late, she would readily do so. The Complainant was always ready to lend a hand and was always courteous with everyone, including the passengers. She had never received any complaints against her. She was aware that the Respondents were having financial problems. They owed money to a number of persons and companies in Gibraltar. They would frequently cancel ferries. She had been told that the Respondents' employees in Spain were not being paid. She had also heard that the Gibraltarian employees working in Gibraltar were to be replaced by Spanish employees.

Sometime in July the Complainant and her co-worker went to see her complaining that they were always being paid late. She advised them to see a Labour Inspector. She said that it was because the Complainant complained to a Labour Inspector that she was dismissed.

In his closing address Mr Cortes briefly summarised the evidence and highlighted that the Complainant had suffered considerable loss and that she had been unquestionably unfairly dismissed.

The Respondents have failed to appear at this hearing and have given the Tribunal no reason for or explanation as to this. Every effort has been made by the Tribunal to serve them with notice of this and earlier hearings.

In the absence of any cross examination of the Complainant or her witness by the Respondents or presentation before the Tribunal of any facts or argument by them or on their behalves, I have no hesitation in accepting the evidence of the Complainant and her witness as the truth of this matter. The Complainant gave her evidence in a forthright and confident manner and without hesitation which both impressed me and was convincing.

Section 65 of the Employment Act places upon the Employer the onus of proving that the dismissal of the Employee was fair and that such dismissal was justified. The Respondents have failed to discharge such burden.

In the circumstances, I give judgment for the Complainant and hold that the Complainant was unfairly dismissed by the Respondents.

I now need to consider what award to make in order to compensate the Complainant for her unfair dismissal.

There are two awards which this Tribunal can make. The first one is under The Industrial Tribunal (Calculation of Compensation) Regulations 1992. This introduced a "basic award" in April 1992 of "not less than £2,200". In December 2008 the Government of the day amended this to restrict the basic award to £2,200, taking thus the discretion which the Tribunal had hitherto enjoyed of awarding a sum in excess of this in appropriate cases. In December 2012 the basic award was once again amended to "£2,200 or such higher amount as the Tribunal at its discretion shall determine", thus restoring it to what it had originally been at its inception in 1992. This award will reflect the particular circumstances of each case and the conduct of the parties.

The cost of living index in Gibraltar has since 1992 risen by about 60%. It is therefore necessary to consider the basic award as £3,520 as at today's date.

The main complaint by the Complainant is of late payment of her wages and a brusque and even rude attitude by the Respondents, a disregard for her genuine protestations and sudden and unfair dismissal. None of the accusations made by the Respondents in their Notice of Appearance such as absence from work, late arrival, indiscipline, disobedience, gross misconduct

have been made out and all these are vehemently denied by the Respondent. The Complainant is a young and resourceful person and has been able to find alternative employment more lucrative than her employment with the Respondents. She had been employed by the Respondents, as I have said, for a year and a half.

The Complainant had been employed for 18 months by the Respondents as opposed to the 12 months which her co-worker had been employed. It is therefore right that her basic award should be higher than the £5,500 awarded to her co-worker. In my judgment, £6,000 is a fair and proper compensation in this case and I so rule.

The second award which this Tribunal can make is a compensatory award which is aimed at compensating the Complainant for the losses suffered by her as a direct result of her unfair dismissal and loss of her job.

The Complainant was earning £975 per month with the Respondents after deduction of tax and payment of her social insurance. Following her dismissal in July 2011 she remained unemployed for two months. Over this period she received unemployment benefit of £150 every two weeks, that is, a total of £600. She then found employment in October 2011 with an insurance company earning £1,200 after tax and social insurance. She has retained this job to the present day.

Since dismissal in July 2011 to the present date the Complainant will thus have earned an approximate net amount of £22,200, that is,

£600 unemployment benefit - August and September 2011
£21,600 with the insurance company – October 2011 to April 2013 (18 months
X £1,200)

If she had remained employed with the Respondents and not been dismissed, her employment would have ceased in any event with the closure of the Respondent's business activities in Gibraltar in January 2012. Given the background to the closure, which appears to have been concerned with lack of volume of work, it would be too speculative and remote to consider whether the Complainant may have continued to be employed in Spain by the Respondents. The terminal in Algeciras will have also closed down in January 2012 and it is most unlikely that the Respondents would have wanted to or been able to employ the Complainant elsewhere or that the Complainant herself would have wanted to be so employed.

It is therefore only proper and reasonable to proceed on the basis that the Complainant will have, in any event, lost her job in January 2012 with the closure of the Respondents' business in Gibraltar. In order to establish how much the Respondent would have earned had she not been dismissed by the Respondents, the proper period of employment to use to calculate such sum is thus from July 2011, the date of dismissal, to January 2012, the date of the closure of the business in Gibraltar, that is, a total period of 6 months. At the rate of £975 per month she was earning, the Complainant was thus deprived by virtue of her unfair dismissal by the Respondents from earning £5,850.

Over the same period of 6 months, the Complainant has earned £600 unemployment benefit during August and September 2011 and £4,800 with the insurance company between October 2011 and January 2012 (4 months at £1,200 a month), that is, a total of £5,400. The direct loss to the Complainant as at January 2012 will thus have been £450 (£5,850 - £5,400).

The above figures and dates are approximate but serve to establish quite an accurate and, certainly, useful table of the Complainant's losses as a direct result of her unfair dismissal. In one sense, the Complainant's losses continue during such time in the future as she is earning less than what she was earning with the Respondents. However, realistically, since the Respondents ceased their business in Gibraltar in January 2012, even if she had not been dismissed when she was in July 2011, she would have lost her job 6 months later in January 2012 and that would have been the end of the matter. It is thus not justifiable or right for the Complainant to continue to be compensated for the loss of a job which ceased to exist in January 2012.

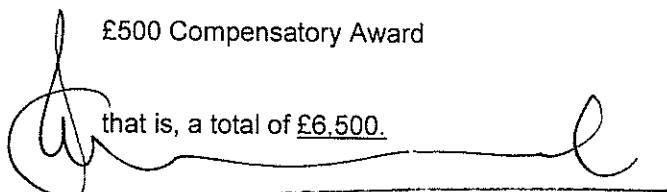
In the circumstances, the fair and proper course to do in trying to do justice in this case to both the Complainant and the Respondents and having regard to the fact that the figures and periods relied upon are only approximate, is to round up the loss suffered by the Complainant of £450 to £500.

I thus enter judgment in favour of the Complainant for :

£6,000 Basic Award

£500 Compensatory Award

that is, a total of £6,500.


Eric C Ellul

Chairman