INDUSTRIAL TRIBUNAL

Case No. 8 of 2013

BETWEEN:

GIAN NACIMIENTO

Complainant

-and-

SECRETARY OF STATE FOR DEFENCE

Respondent

Claire Pizzarello with Aidan Cleverly for the Complainant.
Mark Isola Q.C with Samantha Grimes for the Respondent

JUDGEMENT

BACKGROUND

By an originating application dated the 10th May 2013, the Complainant commenced unfair dismissal proceedings against the Respondent. The Complainant, a senior supervisor at the Defence, Estate and Support Department of the Ministry of Defence within Gibraltar was dismissed on the 13th February 2013 for gross misconduct. The Complainant in his Originating Application contended that (i) the dismal was unfair in that the Respondent did not have a fair reason for the dismissal and/or the Respondent failed to act reasonably and (ii) that he had been contractually wrongfully dismissed.

By Notice of Appearance dated the 30th May 2013, the Respondent confirmed that the Complainant had been dismissed for gross misconduct on the 13th February 2013 and (i) denied that the Complainant's dismissal was unfair and (ii) contended that the tribunal had no jurisdiction to hear the claim brought by the Complainant with respect to the contractual wrongful dismissal aspect of the claim.

Throughout this long process both parties have been represented by the same law firms; Hassans have acted for the Complainant and Isolas for the Respondent. Ms Pizzarello from Hassans has acted throughout for the Complainant and Ms Grimes from Isolas has acted for the Respondent.

Sometime in late December 2013, Mr A.J.P Lombard was appointed as Chairman for this case and on the 28th January 2014 he held a practice direction. At that hearing one of the orders he made was that:–

"there shall be a further directions hearing on the 16th September 2014 at 10 am, following the Complainant's criminal trial".

As to the mentioned *"criminal trial"* more later on but suffice to point out at this stage that on the 14th July 2014, the Complainant was found not guilty of one charge of theft of Military of Defence ("MOD") property.

At some point between the 28th January 2014 and the 3rd March 2015, Mr Lombard stepped down as chairman of this case and Mr Kenneth Navas was appointed in his place and stead. Mr Navas held a practice directions hearing on the 3rd March 2015 and made various procedural orders.

At some point between the 3rd March 2015 and the 20th April 2016, Mr Navas stepped down as chairman of this case and in consequence thereof I was appointed in his place and stead on the 27th April 2016.

On the 6th June 2016, I held a practice directions hearing and agreed procedural directions were ordered. Further directions hearings were held on the 24th November 2016, 16th January 2017, 1st March 2017, 11th April 2017 and the 12th June 2017; the Respondent has had problems in locating some of its witnesses and compiling its documentation.

At the hearing of the 1st March 2017, I ordered, with the consent of both parties and in consequence of both parties agreeing that the tribunal did not have jurisdiction to hear a contractual dismissal claim, that the Complainant be permitted to amend paragraph 20 of the Originating Application filed so as to remove the claim for wrongful contractual dismissal contained and to insert in said Application the sentence:–

"Further the Claimant submits that he was given no proper notice of termination or payment in lieu".

The hearing of this case finally commenced on the 9th October 2017; some 4 years and five months after the originating application was filed. The considerable and inordinate delay that has therefore occurred between the date of dismissal on the 13th February 2013, and the hearing of this case in October 2017, is unsatisfactory and has to be taken into account in my giving greater allowance than normal to witness's recollections of events, chronology, dates etc. In saying this I do not attribute blame to either party for the delays that have occurred.

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

In this judgement I may quote from the verbal evidence given before me as set out in my notes but this does not signify that I have not taken the contents of the witness statements tendered into account when deciding as to the facts of the case.

THE CASE FOR EACH PARTY

On the 14th March 2012, the Complainant together with men from his section were reviewing cabling within the Military of Defence tunnelling system as a result of a reported fault when a length of live cabling was found to have been removed by persons unknown. The Complainant immediately reported this theft and that men from his section had chased after unknown persons allegedly running away.

On the 16th March 2012, the Complainant was arrested by the Royal Gibraltar Police for theft of cabling, albeit from another tunnel, after the Complainant had before and during his police interviews admitted instructing his men to sell cabling which had been removed from the Military of Defence tunnelling system as it was allegedly no longer required and which was destined to be thrown away.

On the 19th March 2012, the Complainant was suspended from work, and on the 30th July 2012 disciplinary proceedings were commenced against him for gross misconduct.

By letter dated the 13th February 2013, the Complainant was informed that he was being dismissed with immediate effect for gross misconduct.

The Complainant contends that his dismissal was unfair in that:–

(i) the Respondent did not have a fair reason for the dismissal since the Complainant's conduct was not such as to warrant dismissal and/or the evidence against the Complainant was insufficient to substantiate a wrongdoing requiring dismissal and/or the decision to dismiss was based on a sub-standard disciplinary process; and

(ii) the Respondent failed to act reasonably and in particular failed to:–

- provide the Complainant with proper/clear information in relation to the disciplinary hearing;
- adhere to one set of disciplinary regulations;
- carry out a full investigation;
- properly interview the Complainant;
- consider all the evidence concerning the allegations;

- allow the Complainant legal representation at the disciplinary hearing(s).

To this, the Respondent counters that:–

(i) it had a fair reason to dismiss for gross misconduct and that it acted within the bands of a reasonable response in all the circumstances of the case; and

(ii) the Respondent did:–

- provide the Complainant with clear and proper information in relation to the disciplinary hearing;
- adhere as far as possible to its disciplinary regulations in all the circumstances of the case;
- permit the Complainant to make such representations as he wished and provide such evidence as he desired prior to the decision to dismiss being taken;
- consider all the evidence against the Complainant prior to the decision to dismiss being taken;
- not have to allow the Complainant's lawyers to attend the disciplinary hearing in line with the disciplinary procedures and accepted practice.

That then, is the essence of each party's case.

THE HEARING

The hearing of the case commenced on the 9th October 2017, and continued on the 10th to 13th October and the 23rd October 2017. In the course of all those days the following persons gave evidence before me; Flag Officer Sea Training John Clink, Mike J Smith, Richard Lawson, Peter Levick, Vanessa Laguea (nee Martinez), Inspector Michael Ruiz, Sera Fromow and Gian Nacimiento.

It is worthy to point out that for the first time to my knowledge an industrial tribunal in Gibraltar heard the evidence of one witness, Mr Clink, via video link. The experiment was not without its glitches and its downside but as both parties agreed to the procedure it was a worthwhile trial.

I also note at this stage that it was only when the Complainant was being re-examined by Ms Pizzarello that the issue of the Complainant suffering, and having suffered, from ME for many years was raised by him. Mr Isola has pointed out that it cannot be other than strange to say the least that this medical condition has only been mentioned by the Complainant very late

in the day, and then only in trying to justify the inconsistencies in what he said to the police in his interviews and to this Court. I have sympathy for such comments, as I would have thought it important for the Complainant to have raised awareness of this illness at least in his witness statement, but I bear in mind not only that Ms Fromow has confirmed that he suffers from it, and that as early as the 22nd June 2012 the Welfare Advisor wrote to HR (see statement of Vanessa Laguea) informing them that the Complainant suffered from this condition since 2009, so that this condition was known to the MOD, who I note have in any case not denied the Complainant suffers from it, and a note of which should be contained in his medical file; after all the Complainant was off sick with it for three months in 2010 and was given assistance by the MOD welfare officer. The importance of the Complainant suffering from ME is that apart from other symptoms it gives him short term memory loss and affects his concentration. As there is nothing to indicate that the Complainant has not been diagnosed with this condition, I have to take it into account when deciding on the credibility of this witness. I further take note that the Complainant's medical condition was quite clearly not brought to the attention of either Messrs Smith or Clink either by the Complainant himself and/or by the HR Department; which they should have done.

CHRONOLOGY OF EVENTS

It is encumbrant on me to establish to such an extent as is reasonably possible in the light of the evidence before me, the chronology of events in this case and the following are my findings on this issue based on the evidence heard and taking into account the various witness statements and exhibits etc.

The following chronology of events is not in dispute between the parties.

On the 13th March 2012, a telephone fault was reported within Witham's Way tunnel, which was assigned to the Complainant's section to investigate.

On the 14th March 2012, the Complainant together with men from his section were examining the cabling within the Witham's Way tunnel when live cabling was found to have been removed thereby causing the fault and men were said to have been running away from the scene. The Complainant reported the matter to the Gibraltar Defence Police ("GDP").

On the 14th March 2012, the GDP Deputy Chief Police Officer sent an e-mail to various persons within the MOD informing them that that morning personnel investigating faults at the Williams Way tunnel system had reported unauthorised persons within the area who had run away and that it had been ascertained that:–

> *"DE & S personnel have identified the theft of approximately 700 metres of 500 pairs copper cable over an unknown period to a value of approximately £6,000 – £8,000. Initial investigations have also*

revealed that the culprits had apparently cut through approximately 250 metres of 300 pairs copper cable ……..".

That same day Squadron Leader Putland replied to this e-mail and refers to *"the recent spate of thefts/criminal damage which appear to target the tunnels more generally require a coordinated police and security response"*. There would therefore appear to have been around this time more than one case of cabling within the tunnels systems disappearing.

On the 15th March 2012, the Complainant provided the GDP with a witness statement in respect of the previous days events.

On the 16th March 2012, the Complainant on hearing that three of the men from his section were being taken by the Royal Gibraltar Police for interviewing with reference the theft of cabling informed the police that he had authorised his section to remove unwanted cabling from the tunnels and to sell it. As a result the Complainant was taken to the police station for questioning. The Complainant after formerly being interviewed by the Royal Gibraltar Police, was arrested on suspicion of theft.

On the 18th March 2012, the Deputy Chief Police Officer e-mails various persons including Squadron Leader Putland informing them that *"a fourth person – Gian Nacimiento also a DE & S employee was arrested on suspicion of telecommunication cable but not related to the theft of the cable at hand"*.

On the 19th March 2012, the MOD Human Resources Department ("HR") e-mail Squadron Leader Sussex templates of the suspension letters that should be sent out in respect of the Complainant and three others and a copy of Section 6 of the Discipline Manual which provides guidance on the action to be taken on suspension. On that same day Squadron Leader Sussex writes to the Complainant informing him that he is being suspended following his arrest on suspicion of theft and attaching a copy of *"Section 6 of Chapter 2 of Gibraltar Personnel Manual, Volume 5"*. Section 6 basically deals with the issues of when to suspend and what happens in such circumstances and withholding pay during suspension.

On the 24th April 2012, the Complainant met with the Welfare Officer who provided him with a copy of the "Major Offences Policy".

On the 16th May 2012, the Complainant was charged with theft by the Royal Gibraltar Police.

On the 27th June 2012, HR wrote to Squadron Leader Sussex with reference the Complainant and three other employees and after stating that *"disciplinary action may continue in parallel with any criminal investigations"* requests him to establish contact with Inspector Ruiz and to issue the "Departmental Charge" letter attached.

On the 3rd July 2012, Squadron Leader Sussex, quite rightly in my view, informs HR that:–

> *"as I have yet to see any report I am not going to assume that any charge letters will be issued. As and when a report is issued that actually provides some evidence then we can decide what course of action is required".*

That same day, HR reply asking Squadron Leader Sussex to contact Inspector Ruiz.

On the 11th July 2012, Inspector Ruiz wrote to Squadron Leader Sussex with reference the Complainant and informed him that the Complainant had been arrested by police and charged with one count of theft and that:–

> *"when interviewed under caution, Mr Nacimiento admitted having authorised the removal and the subsequent sale of the telecommunication cable from Maida Vale. He also admitted having received and retained the cash from the sale".*

This letter is forwarded to Squadron Leader Sussex under cover of an e-mail dated the 15th July 2012.

By letter dated the 30th July 2012, the Complainant is informed that:–

> *"On Friday 16th March 2012 you were arrested on suspicion of theft. I am required therefore to charge you with the major disciplinary offence of theft. This offence falls into the category of gross misconduct. Evidence supporting the charge is attached ……".*

and that a disciplinary hearing will be held at which:–

> *"You are entitled to be accompanied and assisted at the hearing by a Trades Union representative or work colleague and to call witnesses".*

Inspector Ruiz's letter of the 11th July 2012 is attached to this letter.

On the 7th September 2012, HR wrote to the Complainant informing him that it was intended to hold a disciplinary hearing during the week of the 24th September, the details of which would be confirmed and that he was entitled to *"the assistance of a recognised Trades Union representative or a work colleague".*

By letter dated the 18th September 2012, the Complainant was informed of the composition of the Disciplinary Board, and that the hearing would be held on the 3rd October 2012.

On the 24th September 2012, Hassans, the Complainant's lawyers, wrote to the MOD Command Secretary seeking that the disciplinary hearing be

abandoned on the grounds that it was against the MOD 's polices and procedures to have a disciplinary hearing whilst there were ongoing criminal proceedings. The reason for Hassans argument was that the procedure which the Complainant had been given stated as follows:–

> *"Once a matter has been referred to the GSP, you must take no disciplinary action in relation to the offence until police investigations are complete and any subsequent court action is concluded".*

The reference to the "GSP", who are now and have been for some years called the "GDP" indicates this as being an old document.

On the 28th September 2012, HR reply to Hassans informing them that the Gibraltar Proceedure Manual to which they have referred is out of date and that *"the current disciplinary regulations allow disciplinary action to go ahead"*. A copy of the current regulations was attached and the comment made that these had *"been available for staff to access electronically since 2010"*.

In the document attached to this letter the following relevant statement appears:–

> *"Once a police investigation has been initiated ..... no further investigation should be carried out by an officer other than a police officer. The line manager should, however, check with the GDP at monthly intervals on the progress of police enquires/investigations. Until the police investigation is completed and any resulting court case concluded, disciplinary action should not be considered without the agreement of the police.*
> *With the agreement of the police, if their investigation is incomplete, disciplinary action may be taken on charges related to, but not dependent upon, those which may be the subject of court proceedings".*

By e-mail dated the 1st October 2012, Hassans again re-iterated their view that the disciplinary hearing should not be continued with whilst the court case was ongoing and expressing the opinion that the latest version of the disciplinary manual, as quoted above, so provided.

On the 2nd October 2012 there was an exchange of e-mails between Hassans and HR in which both sides basically re-iterate their positions.

On the 2nd October 2012, HR ask Inspector Ruiz to confirm, which he does within the hour, that at an informal meeting on a previous unspecified date he had agreed to forward *"the 6 individual reports to enable the DE & ISS Department to move forward with the Disciplinary process"*. In his witness statement and in his evidence to this tribunal Inspector Ruiz stated that he had agreed that internal disciplinary proceedings could proceed alongside any criminal proceedings.

On the 3rd October 2012, the Complainant and the Trades Union convener, Mr Mario Alman, attended at the location of the proposed hearing with the intention of stopping the hearing on the grounds that it was against policy and procedures. Discussions then ensured with the outcome being that the disciplinary hearing was postponed until the next day. In the document that had been earlier produced to the Complainant it is stated that locally employed civilians are exempt from the provisions of those regulations and that:–

> *"Disciplinary action may continue parallel with any criminal investigations and appropriate action is to be taken at the earliest opportunity where sufficient evidence exits to support a disciplinary charge".*
>
> *"In such cases, Line Managers should consult with the police and take into account any advice regarding the impact of early disciplinary proceedings on the potential criminal case".*

On the 4th October 2012, Mr Richard Lawson and Ms Sharon Simpson, the Disciplinary Board, held the disciplinary hearing at which the Complainant and Mr Alman are present together with a Ms Greenaway as notetaker. A record of the disciplinary hearing was produced and a copy provided to the Complainant for his comments; the Complainant approving said minutes with extensive comments by way of an attached document on the 22nd October 2012. It is to be noted that whilst dated the 22nd October 2012 neither the record or the comments made to it appear to have been handed in by the Complainant until the 23rd October 2012.

On the 22nd October 2012, Mr Lawson and Ms Simpson met and made their determination. The board concluded that:–

> *"From the evidence provided the panel concluded that Mr Nacimiento was aware of the defined process for the disposal of MOD equipment but decided to implement his own process without authority. In all probability Mr Nacimiento has personally benefited from the sale of such equipment due to his failure to account for monies received".*
>
> *"It is the panel's opinion that the disposal and subsequent sale of telecommunications equipment from Maida Vale was unauthorised by Mr Nacimiento's line manager. The Panel believes that therefore Mr Nacimiento has as not met the standard of behaviour (in terms of integrity and honesty) expected by the MOD. It is also the panel's view that Mr Nacimiento has lost the confidence and trust of the department and his position has become untenable".*

The Board recommended dismissal and the restitution of £477.65.

On the 23rd October 2012, after the Complainants signed record (with attached comments) of the 4th October 2012 hearing was received, HR made a file note commenting on some of the contents of the Complainants

amendments to the disciplinary record of hearing. These were provided to Mr Lawson and to the Deciding Officer, Mike J. Smith.

On the 14th November 2012, Mr Mike J. Smith was appointed as the Deciding Officer and presented with *"all the relevant evidence gathered for the disciplinary case together with the record of the disciplinary hearing ..... also ..... a report from Mr Richard Lawson (Hearing Officer) and Ms Sharon Simpson (Panel Member) dated 22nd October 2012 ..... Mr Lawson also sent through to me his own observations and recommendations ".*

On the 14th November 2012, HR provided Mr Smith with a note on the procedure he should follow with respect to the Complainant.

On the 19th November 2012, Hassans wrote to Mr Smith complaining about the different disciplinary procedures provided to the Complainant, about how the Complainant had been told he could not be represented by his lawyer at the disciplinary hearing even through another employee had been allowed to have his lawyer present and other matters.

On the 20th November 2012, at the request of Mr Smith, HR wrote to Mr Lawson raising two issues with him.

On the 12th December 2012, HR reply to Hassans letter of the 19th November 2012. In said letter HR deny that another employee was allowed to have his lawyer present at a disciplinary hearing, confirmed the position with respect to the various procedures and refuted some of the other allegations made.

On the 12th December 2012, Mr Smith wrote to the Complainant informing him that (i) he had 10 days in which to put further representations forward and (ii) that he would be interviewed on the 18th December 2012, or, if the Complainant preferred, the 7th January 2013. Attached to this letter where a copy of Mr Lawson's/Ms Simpsons findings and an extract of the regulations regarding interviews by Deciding Officers.

On the 13th December 2012, the Complainant via e-mail confirmed that he would prefer to have the interview in January since Hassans were compiling documentation to submit to Mr Smith.

Under cover of a letter dated 21st December 2012, Hassans forwarded to Mr Smith a bundle of documentation relating to the case inclusive of various Royal Gibraltar Police interview records etc.

On the 7th January 2013, the Complainant accompanied by Mr Alman appeared before Mr Smith. At the interview Mr Smith confirmed that he had not had the opportunity to review the documentation provided by Hassans but that he would do so and would refer it to Mr Lawson as well. Mr Alman then addressed Mr Smith. A record of the interview was produced.

On the 9th January 2013, the Complainant submitted to Mr Smith a note trying to explain his actions and apologising for those actions.

By letter dated the 14th January 2013, the Complainant was informed that the documentation provided by Hassans was being forwarded to Mr Lawson for further review.

On or about the 24th January 2013, Mr Lawson and Ms Simpson reviewed the documentation submitted by Hassans and concluded that no further investigation was necessary and that their "original views and recommendations still stand".

On the 4th February 2013, the Complainant was advised that Mr Smith was ready to interview him for the purposes of conveying his final decision.

On the 13th February 2013, Mr Smith met with the Complainant in the presence of Mr Alman, and advised him that he was being dismissed with immediate effect and the reasons for such a dismissal. A file note of this interview was prepared and signed by Mr Smith and a letter handed to the Complainant which stated that:-

> *"I have decided that your conduct has fallen well short of the standards expected of a Crown Servant and that you can no longer be trusted as an employee. You are therefore dismissed with immediate effect".*

The letter also informed the Complainant of his right to appeal to the Commander British Forces.

By the letter dated the 22nd February 2013, the Complainant gave notice of his decision to appeal against the finding and the penalty imposed on him. This letter which is just over two pages long and sets out his appeal submissions contains amongst other comments the following statements:–

> *"I have been charged with theft. There has been no evidence to show that I had cable disposed of unnecessarily and that did not require replacement ..... As such I contend that the charge of theft was wholly inappropriate and the whole issue should have been dealt with differently .....".*
>
> *"There has been no comment made on the appalling handling of the case by my line manager, Squadron Leader Paul Sussex and Personnel Branch. Even the head of HR has provided the wrong information to my lawyer. Much evidence was not considered at my Disciplinary Hearing .....".*
>
> *"Likewise it seems that I am being discriminated against by being the only one found guilty and being dismissed from my employment. The other 3 members of staff that were suspended were found guilty and yet they have been allowed to return to work".*

On the 25th February 2013, the HR case officer, wrote to the Complainant informing him of the date of the appeal hearing and that he could be accompanied and assisted by a trades union representative or work colleague and that he had ten days from the date of receipt of the summary record of the hearing in which to submit his comments on the same. On that same date HR also forwarded to the Commander British Forces a note on the process to follow with regard to the appeal hearing with the comment.

> *"HR considers that Mr Nacimiento's grounds of appeal have all been covered at the Disciplinary Hearing and at the interview with the Deciding Officer".*

This comment is as surprising as it is inappropriate to have been made and the HR officer in question should really have known better than to make it. Having said this I do not believe that it would have influenced the Commander British Forces decision.

The original appeal hearing date set was adjourned at the Complainant's request since Mr Alman was unavailable to attend. It is to be noted that Mr Alman was allowed to attend the appeal hearing even through by this date he had retired from the MOD.

On the 15th April 2013, Hassans wrote to the Commander British Forces setting out their submissions on behalf of the Complainant, in particular that there was no evidence to support a charge of theft and that the disciplinary board had not had the complete facts when deciding on the matter.

The appeal hearing was heard on the 15th April 2013 at which time the Complainant and Mr Alman appeared before the Commander British Forces. A record of the hearing was kept, which record was approved by the Complainant on the 23rd April 2013 subject to two and a half pages of comments.

By letter dated the 7th May 2013, the Commander British Forces informed the Complainant that his appeal had been unsuccessful.

Turning then to the various relevant events on which there is a difference of opinion between the parties.

The Complainant has from the very beginning freely admitted that on two occasions the money he received from the sale of the cabling removed from the tunnel system was used for the benefit of his men but denies strenuously ever having received a benefit himself. Turning then to analyse aspects of both these occasions.

The first occasion arose in August 2011 and in his witness statement the Complainant explains it as follows:–

"By early August 2011 I had sufficient money to buy the summer clothing for the civilian crew which I bought myself from Cotton Leisure at Watergardens at a cost of approx £750. This included approx 4 x t shirts and 4 x shorts per civilian crew member.
Before distributing the clothing to the civilian crew I took all the purchased items into the stores in Building 210 to show the Store Manager Staff Sergeant John Whalley. Mark Sacristan was present at the time. I did this in inorder to let him know that I had purchased clothing for the civilian staff and notify him of where I had purchased the items from. Staff Sergeant John Wally did not adversely comment on or question the purchase of these clothes items so I proceeded to distribute the clothing ……..".

I pause here to point out that neither Staff Sergeant Whalley nor Mr Sacristan appeared before the tribunal, and neither where any witness statements produced in respect of them. In the case of Mr Sacristan there was produced to me a copy of the Record of the Police Interview with him on the 4th April 2012 and a copy of the witness statement he gave to the Royal Gibraltar Police on the 21st March 2013. Both these documents can carry very little evidential weight, if any, since they were not originally produced for the purpose of this Tribunal but rather for the criminal case and neither side has been able to question Mr Sacristan, and in any event Mr Sacristan gives contradictory statements. Thus, for example, in his police interview Mr Sacristan stated as follows:–

"DC 84 – have you been given uniforms by Mr Nacimiento?
MS – No
DC 84 – Okay, also they mentioned that everyone at the department got a xmas bonus of £140 do you deny this.
MS – Yes".

and yet in his witness statement he states:–

"A few years back the day to day uniform detailed above was a local purchase from Cotton Leisure which Mr Ernest Peralta and Mr Gian Nacimiento was the ones who obtain these uniforms. After Mr Peralta left the MOD, it was solely Mr Nacimiento in charge for obtaining these uniforms".

"I was issued with day to day uniform by Mr Nacimiento with my appropriate size, this was done to everyone in the department in the rest room area, we were not required to sign for the new uniform as Mr Nacimiento had a list of the department's staff size".

It is indeed a pity that Staff Sergeant John Walley did not give evidence to this tribunal and it is to be noted that Mr Sacristan in his witness statement does indicate, and I put it no higher than that, when he refers to the uniforms being handed out in the rest room that the Complainant's version

on that point as set out in the portion of the witness statement quoted above is correct.

In the Record of Disciplinary Hearing the following note appears with respect to what was purchased from Cotton Leisure:–

> *"Following the discussion with Capt Levick, Mr Nacimiento went to Cotton Leisure Limited, a local clothing shop and obtained quotes before purchasing two t-shirts, two pairs of shorts and a luminous vest for everyone in August 2011. He produced the receipt from the shop to confirm this".*

I pause here to point out that the receipts produced were not the original receipts, these having been thrown away by the Complainant as he admitted to the Tribunal, but rather copies which the Complainant had obtained from the shop once the disciplinary proceedings had been commenced against him. As stated two Cotton Leisure receipts have been produced and these show the following:–

(a) Receipt Dated 2/8/2011 – Customer: MOD

3 Click Shorts
3 Dickies Shorts
4 T – Shirts
Total £112.85.

(b) Receipt Dated 15/8/2011 – Customer: Cash

50 T – Shirts
22 Dickies Shorts
4 Click Shorts
7 High Vis Vest T – Shirt
Total £646.80

In the Notes which the Complainant produced correcting the Record of the Disciplinary Hearing the Complainant states:–

> *"I had in fact bought four t–shirts per person and not 2 as stated in the record. A total of 54 t–shirts are listed on the receipts which supplied 13 personnel that worked out, one individual received 2 t–shirts together with a couple of hi–vis t–shirts".*

It is noted with interest, that whilst the reference is to 13 personnel there were in fact 14 persons in the team.

In his evidence to this tribunal the Complainant stated:–

> *"I did take the clothes to Sergeant Whally to the stores for him to see".*

"I got four t-shirts and two shorts for each employee. Some of the employees said they did not want four blue t-shirts and if I could change one for the high vision t-shirt. There are two receipts one is just to get the sizes. The shop gave me the different sizes and I got the right sizes from the shop. The second invoice shows all the equipment that I bought as the items mentioned in the first invoice are included in the numbers given in the second invoice".

"I went to Cotton Leisure as it is a working clothing shop. I did not receive a uniform. I did not receive £140".

The numbers in the Cotton Leisure receipts do not tally with any of the different versions given at various times by the Complainant as to who got what and that goes to the detriment of the Complainant's credibility. Moreover, what this incident does show is that monies obtained from the sale of MOD property were utilised for the purchase of clothing for persons working in the Complainants section and that at that time the Complainant was not authorised to utilise the monies in such a manner and that he destroyed the receipts with respect to the purchase.

The second occasion arose towards the end of 2011.

In his witness statement the Complainant states:–

"By December 2011 we had enough monies for the winter clothing and since we were approaching the holiday season, I decided to distribute £140 to each civilian crew member, totalling £2,100. £140 would allow each crew member to purchase all the required winter clothing needed".

"The crew were each given £140 in cash on the 22nd December in the presence of Mr R Fawden (acting Union Convener at the time). Mr R Fawden ..... also received £140 towards work clothing".

In the Record of Disciplinary Hearing the following note appears with respect to this issue:–

"He added that in December 2011 there was sufficient money for some winter clothes but due to previous problems with sizing and clothing preferences, he gave each individual (15) an envelope containing £140 for the purpose of purchasing their own winter clothing".

In the notes which the Complainant produced for the purposes of correcting the Record of Disciplinary Hearing the Complainant states:–

"I explained that the fact that many individuals had asked for clothing to be exchanged for different sizes had been a headache for me as a senior supervisor and that for the winter period I have given each individual £140 with instructions to buy the necessary winter clothing to the comfortable size".

In the course of his first police interview the Complainant stated the following when asked about the £140:–

"D C Victory: *Okay when you are talking about, that you gave £140 to each person.*

Mr Nacimiento: *Yes*

D C Victory: *which ..... Who ..... persons ..... what are these persons, are talking about.*

Mr Nacimiento: *all the civilian guys*

D C Victory: *all the civilian guys*

Mr Nacimiento: *all the civilian guys*

D C Victory: *so £140 plus 12*

Mr Nacimiento: *plus 12?*

D C Victory: *the 12 employee there*

Mr Nacimiento: *more than 12 its 15 of us".*

and later on:–

"Mr Nacimiento: *15 employees in my department every single civilian in my department right, the guys that are working with me downstairs got £140 from me".*

In his evidence before this tribunal the Complainant stated:–

"When I gave out the £140 I had more than £2,100 in the drawer. I think it was something like £2,400/£2,600. I gave out all the money at that time. This is my clear recollection. Each man received £140. There were 16 people paid out. There were 13 in the team plus Sacristan plus Ronny Fawden and Alan McWilliam. I paid out all the monies".

"I have previously mentioned 14 guys I paid out but it was in fact 16. There is an inconsistency as I had not mentioned 16 before".

" I stated that I had paid out £2,100 in my statement. It is divided by 14. On this day I left Fawden and McWilliam out".

"I didn't pay myself £140. £2,100 divided by £140 is 15".

"The payment of £140 was made at the end of November. I am very clear about this. If it is paid on the 22nd December they may think it was

a xmas bonus. I didn't pay it on the 22nd December it was clearly at the end of November".

"I refer in paragraph 30 to the 22nd December as the date on which the monies were given out. This says the 22nd December. I have contradicted myself".

"The members of the team are Fawden, McWilliam, Banda, Davies, Peralta, Moreno, Vallejo, Gomez, Wink, Saccone, Bagu, Raquena, Sacristan, Santos. This is the team. This number adds upto 14. £2,100÷15=£140 but if its only 14 in the team it means £150. I was not the 15 man and I did not benefit by receiving £140".

"I have always said that the £140 was given for clothing from day one. It was not a cash bonus it was for clothing".

"No mention is made of clothing. I told the guys what the monies were for. It was for clothing and not a max bonus".

"In relation to the money given before xmas I gave £140 to each person. I gave money to all civilian staff. I mentioned 15 but when I got here I said 16 but I don't know why. I did not keep £140.

Here again what this incident does show is that monies obtained from the sale of over 2,000 kilos of cabling being MOD property were utilised for the benefit of MOD personnel and that at that time the Complainant was not authorised to sell the cable and/or utilise the monies in such a manner and that the Complainant did not keep receipts to account for the monies received. Moreover, two questions arise from this incident; namely was the £140 paid in November or xmas and did the Complainant receive £140. Both those matters go to the credibility of the Complainant. I have come to the conclusion taking the evidence as a whole including what the Complainant said in evidence to the tribunal that (a) the £140 was distributed around xmas time and not at the end of November and (b) that on the balance of probabilities the Complainant did receive £140.

Another issue on which there was a divergence of opinion related to the following evidence.

A director of Atlas Recycling Limited provided the Royal Gibraltar Police with a witness statement to the effect that three members of the Complainant's work section had:–

- on the 22nd February 2012 sold him 546 kilos of copper cable.
- on the 27th February 2012 sold him 309 kilos of copper cable.
- on the 1st March 2012 sold him 670 kilos of copper cable.
- on the 2nd March 2012 sold him 320 kilos of copper cable.
- on the 5th March 2012 sold him 536 kilos of copper cable.

The three persons concerned during the course of police interviews implicated the Complainant to the extent that he was the one that had instructed them to remove the cabling and sell it. The Complainant however denies any knowledge of this particular amount of cable being sold to Atlas Recycling Limited and/or having received any monies in respect of it. In his evidence to the Tribunal the Complainant stated:–

> *" I never saw the money referred to by Bagu that Atlas gave them. I do not know anything about Atlas. None of the money from Atlas did I receive. If the Bagu team were getting money from Atlas then it follows that I was not getting that money as I received no money from Atlas".*
>
> *"I don't know anything about Atlas. I have said this from day one".*
>
> *"The Atlas receipts cannot have been from my group".*
>
> *"Bagu says the groups went to Atlas three times. They did not give me money from Atlas or of them going to Atlas I know nothing".*

There would appear to be two possibilities that could explain this inconsistency; namely either the Complainant is lying or members of the Complainant's team had gone rogue and were busy carrying on a side business of their own behind the Complainant's back. The issue is important for the purposes of the credibility of the Complainant. In his witness statement the Complainant does not refer to any sales of copper cable after December 2011 but in his evidence to the tribunal he stated that:–

> *"The selling of cable stopped at end of November and continued in the middle of February".*

The Complainant therefore confirms that he at the very least knew that copper cable was being taken from the tunnel system and sold. Such knowledge is further confirmed by the fact that the Complainant produced from a box kept in his house the sum of £360, which he admitted came from the sale of copper cable. In his witness statement the Complainant refers to this as follows:–

> *"At about 3pm I was accompanied home by Nathan Victory and Timothy Milan to collect MOD monies stored in my personal cash box for safe keeping as there was no provision in my office to store the monies gathered safely".*

The keeping of "MOD monies" at home without the knowledge and/or consent of MOD line managers because there was no provision is his office to store the monies raises, at the very least, questions as to the soundness of the Complainant's judgment and at worst that he was concealing those monies at home. This explanation was changed somewhat in his evidence to the Tribunal since the Complainant stated:–

"The monies were kept in my locker. In my locker there was no monies when I was arrested. The money was in my safe box in my house. In my desk the monies were in a small money box. When I was arrested I had £360 in my house ..... the money box was mine so I took it home. One of the days when I was leaving at 4.30 the crew came in late they gave me the money and as I was leaving I took it home and put it in the box and soon after I was arrested".

The Complainant changed this version of events when he stated:–

"My box was in my house. The box was mine, it was empty and I took it home. The box left the office at the beginning of the year. It was empty and I took it home. No money came into me until the beginning of March before I was arrested".

and

"The cash box was at home that is why the money could not be held at the office".

None of this explains why the Complainant did not take the £360 back to his office seeing that:–

"The locker is a side drawer of my desk. It is locked. I have the key. It is in my office".

The aspect of this portion of evidence given by the Complainant which has remained consistent throughout is that at the time of arrest he had £360 which belonged to the MOD since it derived from the sale of copper cabling. The figure of £360 is not referred to in any of the receipts issued by Atlas Recycling Limited during the period 22nd February 2012 to 5th March 2012 and indeed is much less a figure than the total paid out by Atlas during this period. This would tend to support the Complainant's statements that he knew nothing about the sales to Atlas. But it does not explain from where these monies came or when or how many kilos of copper cabling they represented. What it does confirm is that in March 2012 the Complainant and his men were still, at least to the extent of £360, removing cabling and selling it without the knowledge and/or consent of and/or without accounting to the MOD for it; and this was some 9/10 months after Captain Levick had taken up his post in Gibraltar; indeed he left Gibraltar two months later. If the Complainant did not know before then certainly by this time, which was some 8/9 months after the date when he first approached Captain Levick with regard to the possibility of selling cable, he would/should have known that he did not have the MOD's consent/authority to do what he was doing. Whilst on the question of knowledge/consent it is interesting to note that according to the Complainant they stopped removing cabling for a period because of a change of procedure introduced by the MOD. In his police interview of the 16th March 2012 when being asked about the Atlas receipts the

Complainant in support of his contention that the cabling could not have come from the Maida Vale tunnelling system stated:–

"yes but they can't enter the tunnel due to new procedures around getting keys out .....and .....and".

In his evidence to the tribunal the Complainant explained this statement by stating:–

"They put in a new procedure so someone allocated keys to different persons who would authorise. This was implemented at the beginning of the year. That is why we stopped removing cable until February/March".

This statement suggests the concealment of activities. If everyone within the MOD knew what they were doing as the Complainant contends, why would this change of procedure affect their modus operandi? It is a statement indicative of someone wishing to conceal what was going on and that therefore the Complainant understood perfectly well that he did not have the MOD's authority/consent to remove for the purposes of sale the cabling.

The matter on which there was the greatest divergence of opinion concerned what allegedly Peter Levick was told by the Complainant with regard to the removal and sale of the cabling.

Mr Levick arrived in Gibraltar on the 10th June 2011 as the troop commander of 642 Signal Troop (the troop referred to in the Atlas receipts) and took charge of the Information System Services Department which was composed of a military and a civilian contingent. The civilian contingent, comprised of 12 civilian staff (according to Mr Levick), was headed by the Complainant. Mr Levick was therefore the Complainants immediate line manager. Mr Levick remained in Gibraltar until the 20th May 2012. In his first witness statement Mr Levick stated:–

"At no time during my time in Gibraltar did Naci speak to me about selling the disused copper. At no time was this raised by Naci and at no time did I say that I would seek permission from management or indeed give my permission for such disposals".

"I had absolutely no idea that Naci had been instructing his team to take and sell cabling. Naci certainly never alluded to this, nor anyone else in his team".

"I categorically deny that I was aware that Naci was taking, selling cabling and then handling the cash".

"No one had the authority to disregard the disposal process. Furthermore the MOD is not an organisation that handles cash. It

deals in contracts. Naci certainly was not permitted to handle cash, and neither was I as his manager".

"I understand, that around the time of his arrest, Naci alleges that he asked me to write a letter to verify that he had spoken to me about the sale of the cabling to generate money for the team. I have no recollection of this conversation having taken place but my view is that Naci could never have asked me for such a letter as I was never aware of the actions he was taking".

In his second witness statement Mr Levick stated that:–

"As part of the investigation of the scrap metal I discussed the possibility of using the revenue from the scrap copper to fund the overtime budget line for the DE & S locally employed civilians (LEC's). The reason for my proposal was because there was no overtime funding for LEC's and sufficient workload to warrant LEC overtime. I discussed this with my line manager at the time Duncan MacKinnon who stated that all the revenue obtained from the copper, because of the Military of Defence (MOD) contract for the disposal of metal would end up in the Headquarters British Forces (HQBF) funds and would never be transferred to DE & S budget. Due to the fact that I had just arrived in Gibraltar I bounced the idea of Warrant Officer (WO2) Steve Lewis who was my foreman at signals. I do not recall having discussed this with any other person. My idea was quickly scrapped within the same day by Duncan Mackinnon".

"At no time since my arrival in Gibraltar have I been proposed by Mr Nacimiento or any other member of staff the possibility of selling the scrap cables in order to fund anything for the department".

In his evidence to the Tribunal Mr Levick stated the following in relation to this issue:–

"I had not seen the cabling used before for funding. I have never seen this before in any of my previous posts. I do not accept that I told Complainant I had seen this done in Cyprus. I have never served in Cyprus".

"I mentioned the matter to Duncan Mackinnon, He had an office close to me and I went to speak to him about things. It was done face to face. It was the preferred way of doing things. I did not discuss the idea with anyone else at all".

"I did not discuss my intentions. I asked Lewis whether the concept idea had ever been discussed before. I discussed the concept of whether wire had been used to fund objects. The idea to fund overtime was only discussed with Mackinnon".

" I was keen to try and improve the prospect of overtime. There is no MOD funding for it. At the time overtime was very thin on the ground, something like 4 hours in a month".

"I did not have a conversation with the Complainant about the removal of cable to fund the purchase of equipment. The conversation never happened. I discussed overtime at length with the Complainant and told him I would try to generate more overtime for him".

"During summer of 2011, I had only arrived and I was not aware of any new uniforms having been bought. I did not notice any new uniforms, I tried to go round to see the team".

"I was not aware of the removal of cable or any jokes or innuendo of any sale of cable. At no time was there any discussion about the sale of copper cable and at no time was there any joke. I would not make jokes or laugh at the prospect of someone stealing cable".

"I was at no time aware that the Complainant or his team were taking cables from the tunnels or anywhere else in Gib and if I would have known disciplinary action would have been brought".

"If I had known about it and allowed it to happen of course I would be liable to have disciplinary proceedings against me. It was not true that I knew what the Complainant and his team were doing".

The upshot of the totality of Mr Levick's evidence is that he is adamant that he did not discuss with the Complainant either the sale of cabling and/or what to do with the monies generated by said sales and that the only thing he discussed with the Complainant was the issue of generating more overtime for the Complainant's men. Mr Levick does however accept that he discussed with his foreman and line manager the possibility of selling the scrap copper wire for the purposes of generating funds which were to fund the overtime budget for the Complainant's section. I find it coincidentally curious that Mr Levick should be considering shortly after his arrival in Gibraltar the sale of copper wire, let alone for the purposes of funding an overtime budget for just one section of men, when he is aware, as he confirms in his first statement, that:–

"The MOD is an organisation which is strictly governed and organised with a great reliance of protocols, processes and procedures. There was a written disposal process for every form of unused, unneeded, or broken items. No one had the authority to disregard the disposal process".

Mr Levick had to be summoned to appear before this Tribunal and, according to both Mr Lawson and Mr Smith was reluctant to assist their investigation/enquires, and showed a hesitation/reluctance to fully co-operate during the course of giving evidence. It is also not lost on me the point made by counsel that it was most certainly in the best personal

interests of Mr Levick for him to deny all knowledge of anything to do with the sale of the cabling; otherwise he may have been facing disciplinary procedures himself.

In his witness statement the Complainant has the following to say on this issue:–

> *"A few days later I went to speak to my Officer Commanding Captain (Capt) Peter Levick about the waste cables being thrown away. I sat in his office for a good 30 min discussing the possibility of selling the waste cable and using the monies to buy much needed clothing and equipment for the civilian crew. He approved of my suggestion, saying that it was a very good idea and further mentioned that he was aware that in Cyprus the monies retained from selling the waste cable were used for parties and other events, Capt Levick went on to mention that he would inform himself if this could be done in Gibraltar and that he would get back to me".*
>
> *"A few weeks later I approached Capt Levick and asked him if there had been an up date on what had been previously discussed regarding the waste cable. It was then that Capt Levick informed me he had sent an e-mail to Command and was awaiting a reply".*

I pause here to point out that no such e-mail has been produced to this Tribunal and there is no evidence whatsoever to corroborate that an e-mail was sent to Command with regard to this matter.

> *"At approx 4 pm on Monday 26th March 2012 I met with Capt Peter Levick at his office in South Dispersal and requested that he write a letter to verify my intentions regarding the scrap cable and confirming that, before selling some of the scrap cable to generate money for the department, I had requested permission from him, he had thought this suggestion a good idea, and had said he would get back to me. To my request, Captain Pete Levick replied that I would have my letter before my meeting on Thursday with the Welfare Officer".*
>
> *"On Thursday 29th March 2012 I called Pete Levick regarding my request for a letter on Monday 26th March 2012. Captain Pete Levick said he had had a good chat with Linda Avellano (Welfare Officer) and that he had informed her of everything that had happened".*

I pause here to point out that no letter from Mr Levick was produced to this Tribunal and Mr Levick denies that he ever spoke to the Complainant about writing such a letter. Turning then to the evidence given to this Tribunal by the Complainant on this issue:–

> *"When I spoke to Lewick about my idea I understood him to be very forthcoming. I sat down and spoke to him on various occasions, 3 in total, during which we had loads of discussions he mentioned about Cyprus and the army lads in Cyprus would recover the cable and the*

money collected would go for do's and other parties. I spoke to him about the cable. The cable was thrown into the skip, there was a contract at the time with the Italian. The one who called for them to collect the skip was John Whalley, whenever the skip was full I would tell him. The Italian guys employees would come and collect the skip. One was a Moroccan but it was not the same persons all the time. I noticed the MT drivers were now coming to empty the skip i.e. MOD personnel. They came to take the skip and remove the cable from the Estate. I approached Whalley and spoke to him. I asked why MT drivers taking cable away. He replied that the contract with the Italian had terminated. As I had good connections with the MT supervisor I found out they were throwing the cable away. I then went to Lewick and come forward with the proposal for clothing and any other equipment we needed at the time. I never discussed overtime with Levick. I discussed overtime with Mckinon".

"Levick said to me that he did not know if it could be done but he would find out".

"Levick said he approved of my suggestion. I know he never approved anything. He never gave permission".

"When I sat down with Levick and I spoke to him, I had already told him about the cable and the contract he mentioned Cyprus and he said that he did not know but would find out. I was led to believe that he was getting approval. He was a good man don't get me wrong. We were trying both to help the guys get things done. I remember him coming to the office and he told me it could be a good idea for using it for overtime. The retaining of the monies and what we could do with it was a result of my conversation with him".

"A few months later I asked him and said he had not yet done anything".

"I did speak to Captain Levick and I know what happened. I know what I did".

"I did approach Levick a second time. Why would he have known about the overtime if I had not spoken to him and Whalley".

In the corrections to the Disciplinary Hearing Notes which the Complainant made the following is stated:–

"I then went to Capt Levick and suggested that instead of having the waste cable being disposed of in this manner that we should use the waste cable to procure clothing, individual protective equipment and some testing equipment for the workers. He said that it was a good idea and that this is what was being done in the Cyprus Sovereign Bases where he had served. He told me he would be looking into it further. I followed up a couple of weeks later and he said he had already emailed

someone in the command. I took this as a yes, and assumed that the permit was with no doubt being granted".

Strange that the Complainant did not approach Mr Levick after this to enquire whether a reply to the e-mail had been received and at no other point earlier, then or later did the Complainant refer to the purchase of "testing equipment".

In her evidence to this Tribunal Ms Fromow, the Complainant's partner, stated that:–

"I had the impression he had approval because he told me that. He had spoken to Levick and as the Complainant said to me and as the Complainant has always said Levick was going to seek approval from the Command. He had written an e-mail and was waiting a response and that Levick thought it a fantastic idea".

"I don't know when Levick spoke to the Complainant, it was a while before he spoke to me I don't know when".

"He did not have permission from Levick in the end it was that Levick was going to get permission. He clearly had not got permission from Levick".

A police statement made by Warrant Officer Lewis dated the 26th June 2012, was produced as an exhibit in the course of the hearing. In this statement Mr Lewis states as follows:–

"During 2011 I held a discussion with my line manager Capt Pete Levick in relation to using the revenue from the scrap copper to fund the overtime budget for the DE & S locally employed civilians (LEC 's). The reason we had this discussion was because there was no funding for LEC overtime and a sufficient workload to warrant LEC overtime. This idea never materialised due to the fact that funds would not be included in our DE & S budget".

I have come to the conclusion taking the evidence as a whole that the Complainant did speak to Mr Levick about the possibility of selling the cabling and that Mr Levick did indicate to the Complainant that he would find out whether this was possible and hence the subsequent conversation by Mr Levick with Messrs Lewis and Mckinnon with regard to overtime. Such a conclusion does not mean, and indeed I do not find, that Mr Levick at any time stated or indicated to the Complainant that he should proceed to remove and sell cable and/or that there was any likelihood that permission for such an activity could or would be given and/or that Mr Levick knew about or shut his eyes to the sale of the cabling that was going on. It seems to me that arising from his conversation with the Complainant Mr Levick thought about the possibility of using the proceeds of selling cable to fund the overtime budget and hence why he discussed the matter with his foreman and line manager.

The Law

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

(a) was the Complainant dismissed? The onus of proof is on the Complainant to prove that there was a dismissal.

(b) if so, and pursuant to section 65 (1) and (2) of the Employment Act ("the Act") what the principal reason or reasons for the dismissal were and thereafter whether that/those reason(s) are permitted reasons for the purposes of the Act, and, if so, whether in the circumstances of the case the Respondent acted reasonably in treating it/them as sufficient reasons to dismiss the Complainant; and

(c) whether the procedure used for the dismissal was fair and reasonable.

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

I turn therefore to what are said to be the principal reason(s) for the dismissal of the Complainant.

Mr Isola has submitted that the reason for the dismissal was gross misconduct as a result of the wrongful unauthorised misappropriation of MOD property for the benefit of the Complainant and others, which destroyed any trust and confidence the Respondent had in the Complainant. So what is the evidence as to this.

Mr Richard Lawson was appointed as the Hearing Officer with respect to the disciplinary case brought against the Complainant, which according to the letter of the 30th July 2012 was for *"the major disciplinary offence of theft"*, a charge which falls *"into the category of gross misconduct"*. In his witness statement Mr Lawson stated:–

> *"Following on from the meeting I considered the evidence and the representations made by Mr Nacimiento and I considered that his explanations had not been adequate. Mr Nacimiento was the manager of a team and his conduct had fallen below the standard expected of someone of his experience and level. Mr Nacimiento also in my view he accepted that he should not have taken steps to sell the cabling and he admitted that he did not have the approval he needed to take such action. He further admitted that his line manager was actually unaware of what he was doing. I regarded that Mr Nacimiento knew he should not have disposed of the cabling without approval but he went ahead*

anyway without that authorisation. Furthermore Mr Nacimiento had kept thoroughly inadequate written records to substantiate the steps he had taken. However, even if records had been kept in place this would not have negated the fact that Mr Nacimiento took MOD Property, disposed of it at his own will and then sold it for cash".

In his evidence to this Tribunal Mr Lawson stated that:–

"I believe that the Complainant didn't have implicit authority. I genuinely believed he committed an act of gross misconduct. I had reasonable grounds for that belief".

In the Disciplinary Panel's recommendations of the 22nd October 2012, chaired by Mr Lawson, it is stated:–

"From the evidence provided the panel concluded that Mr Nacimiento was aware of the defined process for the disposal of MOD equipment but decided to implement his own process without authority. In all probability Mr Nacimiento has personally benefited from the sale of such equipment due to his failure to account for monies received.
It is the panel's opinion that the disposal and subsequent sale of telecommunications equipment from Maida Vale was unauthorised by Mr Nacimiento's line manager. The panel believes that therefore Mr Nacimiento has as not met the standard of behaviour (in terms of integrity and honesty) expected by the MOD. It is also the panel's view that Mr Nacimiento has lost the confidence and trust of the department and his position has become untenable".

It is clear from all of the above that insofar as Mr Lawson was concerned the real reason for the dismissal was that the Complainant had committed an act of gross misconduct (ie the unauthorised sale of cabling) and in doing so had lost the trust and confidence of his employer.

Mr Mike Smith was appointed to review the record of the disciplinary hearing and to decide whether the findings of the disciplinary panel should lead to the dismissal of the Complainant. In his witness statement Mr Smith states as follows:–

"On the 13th February both Mr Nacimiento and Mr Alman attended to hear my decision. I set out my principal reasons for my decision, summarised as follows:–

- *the disciplinary process concluded that Mr Nacimiento had not met the standard of behaviour expected and that Mr Nacimiento had lost the trust and confidence of the Department, making his position untenable.*

- *it was felt that the additional evidence provided and considered both by the Hearing Officer and by me actually*

strengthened the case against Mr Nacimiento, in particular the record of interview with the police.

- *Mr Nacimiento had admitted that he had authorised his staff to remove the cabling and to sell what was MOD property without any authority from his own line manager. In my view this behaviour was totally unacceptable and in breach of MOD disposal regulations.*

- *Mr Nacimiento claimed that he did not benefit personally but I note that he had very poor records accounting for the sale of the cabling and the purchases made etc. Unfortunately this raised real doubts in my mind. There was also a significant sum of money that remained at this time unaccounted for and I was also conscious of this.*

- *Mr Nacimiento was an experienced manager yet he had encouraged and instructed his junior staff to undertake inappropriate activities in relation to MOD property".*

"Overall I felt that Mr Nacimiento's behaviour had fallen well short of the standard required and that the MOD could no longer have trust in him. I considered that his position was untenable".

In his written reasons for the decision taken dated the 13th February 2013, Mr Smith states, amongst other things, as follows:–

"My principal reasons for dismissal are as follows:–

(i) The disciplinary hearing process has reviewed the case thoroughly, has closely examined the evidence and interviewed a number of witnesses. It has concluded that Mr Nacimiento has not met the standard of behaviour (in terms of integrity and honesty) expected by the MOD. It also considers that Mr Nacimiento had lost the confidence and trust of the Department and that his position had become untenable .....;

(ii) .....;

(iii) Mr Nacimiento freely admitted that he had authorised his staff to remove and sell MOD property (telecommunications equipment) without any authority from his line management chain. Such behaviour is totally unacceptable and in breach of MOD regulations for disposal activity;

(iv) Mr Nacimiento has claimed that he did not benefit personally from the sale of the equipment but the detailed evidence available notes the very poor accounting of sales and receipts and therefore, this raises real doubts over his claim. There is

also a significant sum of receipt money that remains unaccountered for.

(v) Mr Nacimiento is an experienced Line Manager yet it is clear that he has encouraged/instructed junior staff to undertake inappropriate activities in relation to the removal and disposal of MOD property when, given his position, his behaviour should have been setting an example to those more junior than him;

(vi) .....

In his evidence to this Tribunal Mr Smith stated as follows:–

"I took account of the evidence put before me. There was a discrepancy in the money received and money spent. I knew the monies were not reconciled. At the end of the day there was no clear record of monies received or spent. Any one of the reasons would have been enough to dismiss. The reasons are not cumulative".

"The issue for me was not really about personal gain. Any one of the reasons by themselves would have been enough to dismiss".

"I do not accept the Complainant was at the time trying to assist the Department. He was acting without authority to conduct such activity and as an experienced line manager he was encouraging his staff to carry out the activity without authorisation. The latter is more serious than the former".

"The main reason for my deciding dismissal was warranted was two fold; para 4(3) and 4(5). If I had to rank these it was para 4(5) but each on their own was bad. It was loss of trust in the MOD and break of trust from his own employees".

I pause to point out that the reference to para's 4(3) and 4(5) are references to the reasons given in Mr Smith's written decision (see above).

"On a totality of the evidence the receipts were being given to the Complainant. The lack of receipts raised doubts in my mind about his assertion that he had not benefited from the sales. This was not one of the main reasons it was just another thing".

The above evidence shows that in sofar as Mr Smith was concerned there was more than one reason for the dismissal and that the two main reasons were firstly Mr Nacimiento encouraging/instructing junior staff to dispose of MOD property without authorisation or through proper procedures, and secondly, Mr Nacimiento removing and selling MOD property without authority and in breach of MOD regulations. It is to be noted that neither of these grounds refer to "theft" and that may well be explained by the fact

that Mr Smith, as he stated in evidence, considered it immaterial whether or not the Complainant actually benefitted from the sales.

In his letter to the Complainant dated the 13th February 2013, Mr Smith states:–

> *"I have decided that your conduct has fallen well short of the standards expected of a Crown Servant and that you can no longer be trusted as an employee. You are therefore dismissed with immediate effect".*

In making the above point I bear very much in mind the statement made by Lord Denning MR in the case of Abernethy V Mott, Hay and Anderson (1976) IRLRA (see also West Midlands Co-operative Society Limited V Tipton (1986) IRLR 112):–

> *"I do not think that the reason has to be correctly labelled at the time of the dismissal. It may be that the employer is wrong in law in labelling it as dismissal for redundancy. In that case the wrong label can be set aside".*

In my opinion the Respondent should have adopted the focused and more pragmatical line taken by Mr Smith rather than simply rely on a charge of theft. But that is neither here nor there since for whatever reason the Respondent sought simply to rely on the charge of theft as the ground of misconduct justifying the reason for the dismissal. The ground referred to in para 4(3) of Mr Smith's written decisions is in my opinion a finding in essence of theft (especially if read with the subsequent paragraph) although arguably it has been formulated by Mr Smith using a different label. However, one may interpret Mr Smith's findings, the end result is that Mr Smith determined there had been gross misconduct. I therefore find that the principal reason for the dismissal was gross misconduct arising from the theft of MOD cabling and for instructing Junior staff to engage in practices contrary to MOD practices and procedures without authority.

Having found that the dismissal was as a result of gross misconduct the question arises as to whether such misconduct is a reason provided for in section 65(2) of the Act. I find, and the Complainant has not argued to the contrary, that gross misconduct does come within the provisions of sub-section (2) (b).

Having decided the above, the question that then arises is whether the Respondent acted reasonably in treating the misconduct as a sufficient reason to dismiss. In considering this question I bear in mind that the case authorities dictate that it is not for this Tribunal to substitute its own opinion for that of the Respondent when determining whether certain conduct was reasonable or not but rather whether a reasonable employer might have acted as the Respondent did.

Ms Pizzarello on behalf of the Complainant has submitted that:–

(i) the Complainant did not commit an act of misconduct as permission to carry out the act was implied by his superior and there was no personal gain involved; and, in the alternative;

(ii) if there was misconduct on the part of the Complainant, the Respondent acted unreasonably in treating it as a sufficient reason for dismissing the Complainant.

I am afraid that I do not accept either of these alternative submissions for the following reasons:–

(i) I do not accept that Mr Levick or anyone else implicitely or otherwise stated or indicated to the Complainant that he could or should proceed to remove cabling for the purposes of sale and not hand in or account for the monies received from such sale and/or instruct his staff to do so. Even taking the Complainants evidence at the highest and accepting that a conversation of sorts did take place between the Complainant and Capt Levick in July 2011, as I have concluded, it is hard to imagine that the Complainant, let alone anyone else, would in November 2011 or indeed February/ March 2012, think they had implicit or any authority to continue their activities when neither Mr Levick or anyone else had authorised/recognised what was being done and the Complainant was not chasing Mr Levick for a reply as to whether authorisation had been forthcoming;

(ii) I do not accept, as I have stated above, that the Complainant did not personally gain from the sale of the cabling and in any event other persons did most certainly gain from the sales and the Complainant at the very least facilitated this;

(iii) having come to the conclusion that there was gross misconduct, and adopting the Complainant's own admissions in the course of giving evidence before the Tribunal to the effect that:–

"If I had gained from the cable sales it would be dishonest and very serious. This would constitute gross misconduct";

"Not accounting for money is a serious matter";

"If what I have said is not materially found to be true I accept that I cannot be trusted and it is serious";

"If I attempted to deliberately conceal what I was doing or the monies received I accept that this would be serious and gross misconduct and I couldn't be trusted";

it is may opinion that the Respondent's actions in dismissing the Complainant were reasonable.

I am of the opinion that there was as reasonable basis upon which the Respondent could determine that there had been a justifiable collapse in the Respondent's trust and confidence in the Complainant and therefore I am also of the opinion that the dismissal of the Complainant was well within the band of reasonable responses that an employer could reasonably make in all the circumstances of the case. The point made by the Complainant that none of the other MOD employees disciplined at the same time as himself were dismissed is borne in mind but there is a significant difference between the cases of the other men and that of the Complainant; not only was the Complainant the person who thought of, initiated and directed the scheme but he was also the line manager of the other men and therefore the burden of responsibility, and its consequences, fall more heavily on his shoulders.

It is also worthy of note that in the document titled UK Major Discipline Policy the following statement appears:–

> *"In the case of gross misconduct, only exceptional factors, such as duress or coercion or diminished mental competence, should be accepted as justifying a lesser penalty than dismissal".*

As a long standing employee of the MOD, the Complainant should and/or would have known this and none of the stated exceptions applied in the Complainants case.

Having said all of this, the point is that it is not upto this Tribunal to substitute its views for that of the Respondent when deciding whether the Respondents conduct was reasonable. There is in my opinion little or no evidence to justify a conclusion that no reasonable employer might have acted as the Respondent did.

Having concluded that the Complainant was dismissed, that he was dismissed for gross misconduct, that this is one of the permitted reasons provided for in Section 65(2) (b) of the Act and that the Respondent potentially acted reasonably in dismissing the Complainant, I now turn to consider whether the procedure used by the Respondent for the dismissal was fair and reasonable. In doing so I bear in mind the following authorities.

In the case of Polkey v Dayton Services Limited (1988) AC 344 (HL) Lord Mackay of Clashfern adopted the analysis of Browne–Wilkinson J. in the case of Sillifant v Powell Duffryn Timber Limited (1983) IRLR; namely:–

> *"The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An industrial tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair; it is one of the factors to be weighed by the Industrial Tribunal in deciding*

whether or not the dismissal was reasonable within s. 57(3). The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of the dismissal not on the actual consequences of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an Industrial Tribunal would be likely to hold that the lack of "equity" inherent in the failure would render the dismissal unfair. ..... Where in the circumstances known at the time of dismissal, it was not reasonable for the employer to dismiss without giving an opportunity to explain but facts subsequently discovered or proved before the Industrial Tribunal show that the dismissal was in fact merited compensation would be reduced to nil ..... An employee dismissed for suspected dishonesty who is in fact innocent has no redress; if the employer acted fairly in dismissing him on the facts and in the circumstances known to him at the time of dismissal the employee's innocence is irrelevant".

In the Polkey case Lord Bridge of Harwich opined that:–

"But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of ..... misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation .....".

In the case of British Home Stores Limited v Burchell (1980) ICR 3, Arnold J, opined that:–

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not

be examined further. It is not relevant as we think that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employers had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities ..... . The test, and the test all the way through, is reasonableness; and certainly as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion".

Ms Pizzarello has submitted that the manner in which the Complainant's dismissal was handled shows that the decision to dismiss the Complainant was unreasonable. Ms Pizzarello bases such a submission on the two fold proposition that the Respondent did not follow either the ACAS' s Code of Practice on Disciplinary and Grievance Procedures or the Respondent's own disciplinary procedure.

With reference to ACAS Ms Pizzarello has referred me to the following guidance:–

"If criminal proceedings do commence an employer may decide to put their investigation on hold until the criminal proceedings have concluded. However, if they believe it reasonable to do so, an employer may still carry out their own investigation. If an employer does continue with its own investigation, the investigator should be careful not to prejudice the criminal proceedings ..... While taking this into account, an investigator should investigate the matter as thoroughly as is reasonable and, if required, make a recommendation based on the facts available to them at that time".

Clearly the ACAS code does not prevent disciplinary proceedings being run parallel with criminal proceedings provided always that the investigator does nothing to prejudice the criminal proceedings. In this case there is nothing to indicate that the criminal proceedings were prejudiced by the investigation and/or dismissal.

With regard to the Respondent's own disciplinary procedure Ms Pizzarello refers me to the fact that prior to the date of the 4th October 2012, the date of the disciplinary hearing, the Complainant had on:–

1. the 24th April 2012, been provided by the Welfare Officer with a copy of some of the pages of the Major Offences Policy in which the following is stated:-

   "*Criminal Offences: The Department is primarily concerned with the civil contractual relationship existing between employer and employee and the impact of gross misconduct upon that relationship. However, many acts of gross misconduct are also potential criminal offences against the Department or its employees and are matters for the police and the Crown prosecuting authorities which operates*

independently ..... Disciplinary action may continue in parallel with any criminal investigations and appropriate action is to be taken at the earliest opportunity where sufficient evidence exists to support a disciplinary charge .....
In such cases, Line Managers should consult with the police and take into account any advice regarding the impact of early disciplinary proceedings on the potential criminal case .....".

I pause here to point out that this document does not exclude the possibility of disciplinary proceedings being run in parallel with criminal proceedings. The Complainants arguement with respect to this document is that by implication its contents did not apply to him as a locally employed civilian since the document states at paragraph 4:–

"This policy also applies to all civilian staff in the MOD, including casual and fixed term appointees, except the following categories:–

- *Locally Engaged Civilian Staff: local delegated discipline procedures apply in each overseas business unit".*

The Complainant contends that he believed himself to be an LEC and therefore this procedure did not apply to him. The Respondent's position is set out in the second witness statement of Vanessa Laguea, that is:-

"The UK policy does on Page 2 state that it does not apply to LEC' s and that local delegated discipline procedures apply in each overseas business unit. I can however firmly say that this UK policy was applicable to all LEC's in Gibraltar as this was the management decision taken at that time".

I note that whilst the Complainant states that he did not believe this document applied to him he did not see fit at that stage to go back to the Welfare Officer or Human Resources to query which other document therefore applied to him.

2. On an unspecified date prior to the 24th September 2012 the Complainant was handed another handbook relating to major offences. Section 4 of this handbook states that:-

> *"Once an matter has been referred to the GSP, you must take no disciplinary action in relation to the offence until police investigations are complete and any consequent court action is concluded. Alternatively the case my be handed back to line management to be handled under internal disciplinary procedures ".*

I pause here to point out that this quoted passage is clearly contradictory to the earlier above quoted passage and clearly provided

that disciplinary procedures should not be put into effect until the GSP investigations are complete and consequent court action concluded. Whilst stating this, it is borne in mind that in the Complainant's case no GSP investigation was taking place, it being handled by the RGP, but the consequent Court action had not been concluded.

3. Under cover of a letter dated the 28th September 2012, Mrs Whitaker produced to Hassans "current regulations (Chapter 2 para 1.7) which have been available for staff to access electronically since 2010". Paragraph 1.2 of these Regulations state that:-

> *"It is important that all LEC employees have ready access to the rules governing the conduct expected of them. It is the manager's responsibility to ensure that volume 7 of the Gibraltar Personnel Manuel and this volume, are available to staff and their representatives".*

The reference to the Gibraltar Personnel Manual would support Mrs Whittaker's assertion that these were the disciplinary rules applicable in Gibraltar. Having said that it clearly also refers to its applicability to LEC's.

In these regulations the following statement appears:-

> *"When there is reason to suspect that a criminal offence has been committed, line managers in consultation with the Personnel Officer, must refer the matter to the GSP. GSP investigations may result in prosecution and they must be conducted very thoroughly. They inevitably take time to complete and disciplinary action, if justified, may not be taken until Court action is complete or the GSP hand the case back to the line management".*
> *and*
> *"Once a police investigation has been initiated, whether by line management, or by or on behalf of an individual complainant, no further investigation should be carried out by an officer other than a police officer. The line manager should, however, check with the GSP at monthly intervals on the progress of police enquires/investigations. Until the police investigation is completed and any resulting court case concluded disciplinary action should not be considered without the agreement of the police.*
> *With the agreement of the police, if their investigation is incomplete, disciplinary action may be taken on charges related to, but not dependant upon, those which may be the subject of Court proceedings".*

I pause here to note that these regulations in my opinion strongly suggest that disciplinary proceedings should not be proceeded with until the police investigation is completed and Court action (if any) concluded and that if with the agreement of the police the disciplinary proceedings are continued with it should be for

"charges related to but not dependent upon" those which are the subject of the Court proceedings. In other words, and using the Complainants case by way of an example, as the RGP had arrested the Complainant for theft the Respondent should only continue disciplinary proceedings on the basis of, for example, contravening MOD regulations on the disposal of MOD property or failing to account for MOD monies etc.

4. On the 3rd October 2012, before the Disciplinary Hearing commenced, the Complainant was handed a new document entitled "UK Major Discipline Policy". In this document it is stated that:-

   "This policy also applies to all civilian staff in the MOD, including casual and fixed term appointees, except the following categories"

   Locally Engaged Civilian Staff: local delegated discipline procedures apply in each overseas business unit."

I pause here to point out that this document is merely the complete version of part of the document referred to above as having been handed to the Complainant on the 24th April 2012 but without including any reference as to whether disciplinary proceedings could run in parallel with police/court proceedings.

It cannot be anything other than extremely regrettable that the Complainant was not advised of or handed the proper and applicable disciplinary offences regulations. It is therefore not surprising that Mr Lawson should have recommended to his superiors that *"A Disciplinary Policy for locally employed civilians in Gibraltar needs to be defined and appropriately communicated and made available to all staff"* or that Mr Isola has conceeded that the Complainant was mistakenly provided with incorrect forms of policy. This being the case, the question that arises is whether these errors placed the Complainant in an unfair or unreasonable position with regard to the disciplinary proceedings.

In the notes to the Record of Disciplinary Hearing which the Complainant submitted to the Respondent on the 22nd October 2012, the following statements appear:-

"Mr Alman pointed out that being given 24 hours to digest and consider my contribution to this disciplinary process was entirely unfair.
Mr Alman pointed out that 2 separate policies had been given to me by two different members of the HR organisation. A third copy had been provided to my lawyer directly by the Head of Civilian HR, Mrs Whittaker, with the comments that the procedures I had been referring to where out of date. Mrs Whittaker then provided

my lawyer with a procedure that she claims is current and has been available since 2010 on the intranet".

In his evidence to the Tribunal Mr Lawson stated as follows:-

"The hearing was adjourned in order to clarify a policy the Complainant at the time or his wife or Mr Alman were questioning the validity of the certain number of policies that they had been given over a certain period of time. I said I could not comment I will need to check with HR. The main reason was that Mr Nacimiento was very upset and that he was not in the proper frame of mind to have the hearing".

In my opinion the inexcusable and negligent acts of providing the Complainant with contradictory regulations did not place the Complainant in a materially unfair or unreasonable position since:-

(i) the Complainant had been given the applicable procedure on the 28th September 2012, some 5/6 days before the hearing;

(ii) the hearing of the 3rd October 2012 was adjourned to the next day order to enable the Complainant to further prepare himself and he had already had sufficient notice of the date of the hearing to prepare himself;

(iii) on the 4th October 2012 the Complainant was afforded all the opportunity of putting his case forward as well as calling such witnesses as he desired;

(iv) the issue of which manual applied did not materially affect in any way the case of the Complainant or the submissions he wished to make in his defence; and

(v) at the time the hearing panel were satisfied that the Complainant had been given earlier the proper manual.

Ms Pizzarello has also submitted that the disciplinary hearing should not have taken place because of the on going criminal proceedings as this contravened the Respondent's own disciplinary processes. This is clearly not the case if one accepts Mrs Whittaker's assertion that the document attached to her letter of the 28th September 2012 are the correct disciplinary regulations to follow since in said regulations the following statements appear:-

"Until the police investigation is completed and any resulting Court case concluded, disciplinary action should not be considered without the agreement of the police.
With the agreement of the police, if their investigation is incomplete disciplinary action may be taken on charges related to,

but not dependent upon, those which may be the subject of court proceedings".

Disciplinary proceedings can therefore run in parallel subject to two proviso's being complied with; namely the agreement of the police to the disciplinary action continuing and that the disciplinary charges are related but not dependent on those being the subject of the Court proceedings. Ms Pizarrello has strongly asserted that the police did not give their approval to the disciplinary proceedings. It is certainly true that there is no indication whatsoever as to whether the RGP, who were in charge of the criminal case, were ever consulted on, let alone gave their agreement to the disciplinary action against the Complainant and the other men. It is also true that according to Inspector Ruiz's evidence to this Tribunal *"two GDP seconded to the RGP and they led the investigation, advised by senior officers of the RGP"*. But the Regulations clearly in my opinion are to be interpreted as referring to the GSP (now the GDP) needing to approve rather than the police body who was actually in charge of the criminal investigation. So did the GSP (GDP) approve?

Inspector Ruiz in his evidence to the Tribunal stated:-

"I agreed that internal proceedings could proceed with criminal proceedings. The GDP did not have any problem with the disciplinary proceedings continuing provided we did not have to produce any criminal docket".

"I took the decision after consulting with my senior officers. It was taken late September/early October. I confirmed to HR by e-mail to Vanessa Martinez".

I accept this evidence, which follows the statement made in his witness statement to the effect that:-

"We discussed and I agreed that internal disciplinary proceedings could proceed alongside any criminal proceedings".

The first of the two above-mentioned proviso's is therefore met.

The second proviso, namely that the disciplinary charge should be related to but not dependent on the subject matter of the criminal proceedings is in my opinion not met. The letter of the 30th July 2012 to the Complainant is perfectly clear:-

"On Friday 16th March 2012 you were arrested on suspicion of theft. I am required therefore to charge you with the major disciplinary offence of theft. This offence falls into the category of gross misconduct"

and in my view arguably breaches the proviso contained in the disciplinary regulations. In this respect it is to be noted that in the Record of the Disciplinary Hearing of the 4th October 2012 it is stated that:-

"Mr Alman, speaking initially on behalf of Mr Nacimiento advised the panel that he had several concerns about the Disciplinary Hearing taking place prior to the Court proceedings as they are based on the same charge of "theft" and asked for these to be noted in the minutes".

It is not known whether the MOD charge was the same charge of theft as in the criminal case since the MOD charge is not particularised to one particular event of the many that could have been preferred.

Having said this, it is my opinion that this breach of the disciplinary procedure is not in itself one of such seriousness as would render the dismissal unfair.

Ms Pizzarello has also strongly attacked the Respondent's decision to proceed with the disciplinary proceedings on two further inter related grounds; namely that no appropriate investigation had been conducted and that the failure to await the hearing of the criminal proceedings precluded the Complainant from being able to rely on evidence to be presented at said court proceedings. The basis of the first submission is that Mr Levick the Complainant's line manager did not conduct any investigation, that Inspector Ruiz, who was not fully involved in the RGP investigation simply relied on information given to him by the investigators and that Mr Lawson carried out some investigations without the Complainants knowledge. The basis of the second submission is that the police evidence in the docket prepared for the criminal trial raised substantial inconsistencies which only came to light after the disciplinary hearing had been held and which would have been accentuated further in the course of the criminal case.

It is true that Mr Levick did not conduct any investigation, but this is not surprising as he was conflicted. In any event the Respondent can hardly be criticised for this seeing that the Disciplinary Regulations which applied provided that:-

"Once a police investigation has been initiated, whether by line management or by or on behalf of an individual complainant, no further investigation should be carried out by an officer other than a police officer".

It is also true that Inspector Ruiz was not directly involved in the RGP investigation but in the evidence to this Tribunal he confirmed that he summarised the Complainants record of interview with the RGP, possibly having read all three of them, and this formed the basis for the paragraph in his letter of the 11th July 2012 to the effect that:-

"When interviewed under caution, Mr Nacimiento admitted having authorised the removal and the subsequent sale of the telecommunications cable from Maida Vale. He also admitted having received and retained the cash from the sale".

This is a brief but accurate statement and one that the Complainant does not deny. I do not see on what basis Inspector Ruiz can be criticised.

Mr Lawson in his evidence to this tribunal stated that he had received a copy of the charge letter, Inspector Ruiz's statement, a small docket of information the contents of which he could not recall and the file of the Complainant, and that he had:-

- spoken to Mr Sussex to discuss the disposal process and whether the men where provided with equipment/clothing;
- spoken to Captain Levick briefly with regard as to whether he had given the Complainant authorisation to remove the cabling;
- interviewed the five other men of the Complainants section charged with a disciplinary offence;
- read the police interviews of all the persons concerned;
- spoken to the existing crew of the Complainant's section.

I accept Mr Lawson's evidence and it seems to me that there was little further he could have investigated viz a viz the disciplinary process. Should he have conducted those investigations and/or informed the Complainant that he had done any of those things? According to the disciplinary procedure Mr Lawson should not have spoken to Mr Sussex or Mr Levick or to the other members of the Complainants section who were not being disciplined and he would have been better advised to ask these persons to attend before the Disciplinary Panel. Can this breach be said to be serious enough as to render the dismissal unfair? Bearing in mind that the purpose of the disciplinary hearing is to assess the evidence to ensure that it supports the charge, and to ensure that the deciding officer has a full and clear picture of both the case in support of the disciplinary charge and the employee's response to that case, and that Mr Lawson had been flown out from the UK and did not know the processes applicable in Gibraltar, and that as far as is known none of the persons concerned provided any evidence which was not already known to the Complainant, I am of the opinion that this breach though regretable cannot be said in itself to be serious enough as to render the dismissal unfair.

Turning then to Ms Pizzarello's submission that the failure to await the termination of the Court proceedings unfairly prejudiced the Complainant. It is true that at the time the Disciplinary Hearing was held the panel had not seen the witness statement given to the RGP by Peter Levick, Stephen Lewis, Stacey Cooper, Paul Banda, Gianni Moreno, Inspector Ruiz and PS Adrian Sodi nor RGP police interviews held with the Complainant, Nathan Bagu, Shaun Requera, and Raymond Gomez. But, as was confirmed by Mr Lawson and Mr Smith, both men subsequently independently considered this documentation and both men arrived at the conclusion, and I accept

their evidence on the matter, that this evidence if anything strengthened the case against the Complainant in their respective eyes. In such circumstances it could hardly be said to be prejudicial to the Complainant that all this documentation was not made available to the hearing panel on the 4th October 2012. Moreover, it must not be forgotten that at the end of the day the Attorney General decided not to proceed with the criminal prosecution and therefore, as it turned out awaiting the outcome of the criminal proceedings would not have provided the hearing panel or the deciding officer with any further information/evidence on the matter.

Ms Pizzarello has also submitted that the hearing panel failed to properly consider mitigating factors when deciding on the penalty to impose on the Complainant and that the penalty imposed was inconsistent with that imposed on the other employees. I do not accept that mitigating circumstances were not taken into account. In the Disciplinary Panel's recommendations the following statements appear:-

> *"The panel have noted the various welfare reports and Mr Nacimiento's exemplary career history to date, which the panel have taken into account in making its recommendation".*
>
> *"After reviewing all the evidence presented before the panel, taking into account any mitigating circumstances and welfare reports the following are recommended for Mr Nacimiento ……".*

Moreover, it is clear that the hearing panel did not accept the Complainants assertion that he had implicitely or otherwise received authorisation and/or encouragement from Mr Levick to dispose of the cabling by private sale and/or that the Complainant did not personally benefit from the sales. There were no other mitigating factors to take into account other than those which were taken into account.

I also do not accept that there is anything particularly inconsistent with the penalty imposed on the Complainant when compared to the other men of his section if account is taken of the fact that the idea to sell the cable was that of the Complainant, the Complainant was the supervisor of the other men, the Complainant directed the other men as to the cable to be sold and to whom, the Complainant received the proceeds of sale and decided when and in respect of what to distribute said proceeds and the Complainant failed to keep receipts or to properly account for what was being done.

As previously quoted a procedural failure by the employer does not render the dismissal unfair; it is one of the factors to be weighed up in deciding whether or not the dismissal was reasonable. That being the case we are left with, on the one hand, the following stated failures of:-

- the Respondent providing the Complainant with the wrong disciplinary manual;

- the Respondent contravening its own procedural manual in that:-

- Mr Lawson conduced interviews of personnel which he should not have done; and

- the MOD allegation of theft was a charge related to and arguably dependent on the criminal charge;

whilst, on the other hand, we have the following procedural positives:-

(a) the Complainant had had many months to prepare his defence before the hearing panel on the 4th October 2012;

(b) the hearing panel adjourned the case for a day to enable to Complainant to compose himself;

(c) the hearing panel allowed Mr Alman on behalf of the Complainant to fully address the hearing panel and to call such witness as they deemed fit;

(d) the Complainant was given the opportunity to read and comment on the notes of the disciplinary hearing;

(e) the hearing panel did consider and read the further docket of evidence provided by Hassans;

(f) the hearing panel was composed of two members unconnected with the Complainant and/or the department concerned;

(g) the Complainant had sufficient time to prepare his case before the Deciding Officer;

(h) the Complainant and Mr Alman were allowed to address the Deciding Officer;

(i) the Complainant's note of the 9th January 2013 was considered by the Deciding Officer;

(j) the Deciding Officer did consider the docket of evidence presented by Hassans;

(k) the Complainant had the opportunity to appeal against the Deciding Officers' decision and did so;

(l) the Complainant was given sufficient time in which to prepare his submissions for the appeal;

(m) the Complainant and Mr Alman were allowed to appear before and make submissions to the Commander British Forces; and

(n) the Complainant was given the opportunity the comment on the notes of the appeal hearing and did so.

Taking all of the above into consideration and weighing up all the circumstances of the case I have concluded that notwithstanding the procedural errors mentioned the Respondent followed an overall fair and reasonable procedure.

DETERMINATION

I have determined that the Complainant was fairly dismissed and therefore I dismiss the claim for unfair dismissal filed by the Complainant.

Dated this 8th day of March 2018

Joseph Nuñez
Chairman