

IN THE INDUSTRIAL TRIBUNAL

EMPLOYMENT TRIBUNAL

26 JAN 2018

RECEIVED TODAY

Case No. 3 of 2014

BETWEEN:

MICHAEL JAMES ANTHONY TAMPIN

Complainant

-and-

GIBRALTAR GENERAL AND CLERICAL ASSOCIATION

Respondent

---

DECISION

---

*Charles Gomez Esq, assisted by Daniel Benyunes Esq, acting for the Complainant  
Sir Peter Caruana Q.C., assisted by Christopher Allan Esq, acting for the Respondent*

**Introduction**

1. The Complainant was employed in May 2001 as Branch Secretary of the Respondent, a registered union in Gibraltar. The title of Branch Secretary was changed to National Secretary, and then to General Secretary. To avoid any confusion, I will refer to this position as General Secretary throughout this Decision unless I am using quotations.
2. On 23<sup>rd</sup> October 2013 the Executive Committee of the Respondent (*"the Executive Committee"*) wrote to the Complainant terminating his employment on the grounds of redundancy (*"the Termination Letter"*). It was signed by each of the members of the Executive Committee, Wendy Cumming (President), Annabelle Desoiza (Vice-President), Anthony Morillo (Treasurer), Joseph Manuel Bonavia (Committee Member) and Charles Avellano (Committee Member), all civil servants except for Mr Morillo, who had retired already from the civil service. It stated:-

*"Dear Michael,*

*As you are aware, since the election of the new committee in March this year there have been several changes to the organisation of the GGCA and its workload. From conversations held you will know that there is now a full committee which is taking a much fuller participation in the day to day affairs of the Association. Primarily the committee members have taken on their respective duties to a much fuller extent than heretofore. The President has taken on a full time role and the Vice President and Treasurer have taken on their respective duties. As a result and in consequence the workload of the post of General Secretary to the GGCA has diminished to such a point that it is felt that the continuation of this post cannot be justified.*

*The committee has therefore reluctantly decided to discontinue this post and after much deliberation has decided to make the job, and therefore yourself, redundant.*

*You will be receiving a redundancy payment in accordance with the Employment Act of £49776 together with a month's salary in lieu of notice as well as the balance of annual leave owed to you.*

*We would like to take this opportunity to thank you for your hard work and service over the last thirteen years and wish you well for the future."*

3. In a letter addressed by the Respondent to its membership on 24<sup>th</sup> October 2013 it explained:-

*"Dear Member,*

*GGCA General Secretary*

*Many of you will have heard in the local press that our General Secretary, Mr Michael Tampin, is no longer an employee of the GGCA. This is true.*

*Since the new Committee was elected in March this year, we have found ourselves taking over many of the duties and responsibilities which we feel should be undertaken by elected representatives. Due to this, we could no longer justify maintaining the post of General Secretary within the GGCA. Mr Tampin was informed of this yesterday.*

*We apologise for the fact that this information has been disseminated to the membership via the press – we intended to send out a bulletin as soon as all the formalities had been observed. However, the news was leaked to the press yesterday evening, before we had a chance to send out a bulletin.*

*Kind regards*

*The GGCA Committee".*

4. A further letter was then addressed by the Executive Committee to the membership of the Respondent on 29<sup>th</sup> January 2014 stating inter alia:-

*"CONFIDENTIAL – TO GGCA MEMBERS ONLY*

*Dear Member*

*Mr Michael Tampin – legal action for unfair dismissal*

*Since the new Committee was elected last March, we made it clear that all the committee members would be taking a hands on approach to union matters and would be very involved in the running of the GGCA. We maintained this policy and as result, a restructure of the GGCA functions and responsibilities occurred. Where previously there had been little to no involvement from a committee, there were now five individuals taking part and working in every aspect of the union's affairs. Unfortunately, this meant that Mr Tampin's role within the GGCA changed and became increasingly unsustainable – by October 2013, we felt that there was not a sufficient workload to justify keeping the General Secretary post, especially at a salary of £49,776.00 per annum.*

*We faced a dilemma – on the one hand, we needed to be a fair and responsible employer, but on the other, we have a duty to safeguard the GGCA funds and to provide the best value for money for our membership. So we took the difficult decision to make Mr Tampin redundant. As we wanted to make sure that our treatment of Mr Tampin met the highest standards that could be expected of an employer, we decided that we would give Mr Tampin all redundancy monies as*

*calculated under the provisions of the Employment Act, even though, being over the age of 65 Mr Tampin was not legally entitled to such monies."*

**Grounds on which it is claimed dismissal was unfair**

5. The Complainant claims that the dismissal was unfair on the main grounds that:-
  - a. The position of General Secretary was a constitutional office with distinct duties to those of the Executive Committee and could not be abolished removed, reduced or otherwise made redundant by the Executive Committee without a valid amendment by way of special resolution under rule 9(1) of the Rules and Constitution of the Respondent ("the Constitution") as the Constitution could not operate without a General Secretary in the absence of any such amendment to the Constitution, and the Executive Committee had acted ultra vires;
  - b. The dismissal could not have been by reason of redundancy because:-
    - i. It was not a true redundancy situation but a deliberate attempt to forcibly remove the Complainant from holding the post and part of a personal vendetta against him; or
    - ii. Alternatively, the duties of General Secretary remained in existence and had not changed, and there had been no reduction or diminution in those duties so as to render that position redundant. Furthermore, and by virtue of the constitutional arrangements between the Executive Committee and the General Secretary, the General Secretary's duties could not be assumed by the former and the post still existed;
  - c. If there was a redundancy, there had been no consultation or opportunity for the Complainant to make representations prior to the decision to make him redundant and it was an implied term of the contract of employment that the Respondent would, and therefore the dismissal was procedurally defective;
  - d. Throughout his employment he had performed his duties in a competent and efficient manner and that the Respondent had never asserted otherwise.
6. The Complainant's claim that (a) it was a term of his contract that he was to be paid a tax free gratuity equivalent to 1 year's final salary on termination of his employment contract; and (b) that there was an agreement between him and the Respondent that he would remain in post until he reached the age of 70, are the subject of separate legal proceedings brought by the Complainant against the Respondent in the Supreme Court of Gibraltar being Claim No. 2014-T-073 for breach of contract whereby the Complainant seeks to recover damages for the amount of the gratuity and sums he alleges he would have earned had his employment continued until the age of 70 ("the Supreme Court Claim"). I do not therefore propose determining these grounds of complaint which fall to be determined in the Supreme Court Claim.

**Grounds on which it is claimed dismissal was fair**

7. The Respondent originally maintained in its Notice of Appearance that the dismissal was fair on the grounds that the Complainant, being male and over the age of 65 before the effective date of his dismissal, had no right in law to make a claim for unfair dismissal by virtue of section 60(1)(b) of the Employment Act ("the Act"). The Complainant was born on 25<sup>th</sup> June 1946, and was aged 67 at the time of his dismissal. The Respondent abandoned this ground earlier in these

proceedings, but as the matter went to the jurisdiction of the Tribunal to hear this complaint, I made a preliminary ruling that the Tribunal did have jurisdiction to hear this claim for unfair dismissal notwithstanding that the Complainant was aged over 65 at the time of his dismissal.

8. The remaining material grounds on which the Respondent asserted that the dismissal was fair are:-
  - a. The reason for the dismissal was that the post of General Secretary was redundant as there was insufficient work to justify the continuance of that post, and that the functions and duties of General Secretary had been redistributed amongst the members of the Executive Committee; and
  - b. The Respondent undertook a reorganisation of its operational structure consequent upon which its requirements for an employee to carry out the work of the kind carried out by the Complainant ceased or greatly diminished, and that the Respondent acted reasonably in treating this as a sufficient reason for the dismissing the Complainant.

#### **The issues to be determined**

9. The issues to be determined by the Tribunal in determining whether the dismissal was fair or unfair involve four questions:-
  - a. Was the Complainant dismissed?
  - b. If the Complainant was dismissed, has the Respondent discharged the burden of proving under section 65(1) of the Act that the reason, or the principal reason, for the dismissal was a reason falling within section 65 (2) of the Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Complainant held, so as to be a potentially fair reason for dismissal? If the Respondent cannot prove that, then the dismissal is automatically unfair.
  - c. Connected to the second question, is whether there could be a redundancy or reorganisation where the position of General Secretary still existed at the time of the Complainant's dismissal, and without the Constitution first being amended pursuant to rule 9(1) of the Constitution?
  - d. If the answer to these three questions is in the affirmative, did the Complainant act reasonably or unreasonably in treating the reason, or the principal reason, as constituting a sufficient reason for dismissing the Complainant.

#### **Applicable Law**

##### *Dismissal*

10. The onus of proof is on the Complainant to first establish that there was a dismissal by the Respondent.

##### *Reason for dismissal*

11. Section 65(1) and (2) of the Act provide:-

*"65.(1) In determining for the purposes of sections 59 and 70 whether the dismissal of an employee was fair or unfair, it shall be for the employer to show:-*

- (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and
- (b) that it was a reason falling within the next following subsection, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(2) In subsection (1)(b) the reference to a reason falling which this subsection is a reference to a reason which:-

- (a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
- (b) related to the conduct of the employee;
- (c) was that the employee was redundant;
- (d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under any enactment."

12. Section 65(1) imposes the burden of proof on the Respondent to establish the reason, or if more than one, the principal reason for the dismissal (*Maund v Penwith District Council* [1984] ICR 143). If the Respondent cannot do so, the dismissal is automatically unfair. This only requires the Respondent to show the reason for the dismissal, not that the reason is based on reasonable grounds: *Trust House Forte Leisure Ltd v Aquilar* [1977] IRLR 251, *Maintenance Co Ltd v Dormer* [1982] IRLR 491. It is then for the Tribunal to determine whether that reason engages one of the five potentially fair reasons [*West Midlands Co-operative Society v Tipton* [1986] IRLR 112].
13. If the Respondent discharges the onus of proving that the principal reason for dismissal was redundancy or a reorganisation, but the Complainant wishes to challenge whether that was the true reason and to show a competing reason, the Complainant only has to show, without actually proving, that there is a real issue warranting investigation and capable of establishing the competing reason. Once the Complainant, on evidence, establishes the existence of such an issue, the onus of proving which one of the competing reasons is the principal reason remains on the shoulders of the Respondent: *Maund, supra* (page 149 A-C). The Complainant cannot do this by merely asserting in argument that it was not the true reason; an evidential burden rests upon the Complainant to produce some evidence that casts doubt upon the Respondent's reason. The graver the allegation, the heavier will be the burden. Allegations of fraud or malice should not lightly be cast about without evidence to support them. But this burden is a lighter burden than the legal burden placed upon the Respondent; it is not for the Complainant to prove on a balance of probabilities what the reason for the dismissal is, but merely to produce evidence sufficient to raise and show that the issue exists or, to put it another way, that raises some doubt about the reason for the dismissal.

#### *Redundancy*

14. The principal reason the Respondent relies on for dismissing the Complainant is that the Complainant was redundant under Section 65(7)(c)(ii) of the Act because "the requirement of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish". To assess whether section 65(7)(c)(ii) is engaged, the question that needs to be determined is (i) Whether the requirements of the business for employees to carry out the work of a particular kind ceased or diminished, or were expected to cease or diminish? (ii) If so, was the dismissal of the Complainant caused wholly or mainly by the state of affairs identified in (i) above? (*Safeways Stores Plc v*

*Burrell* [1997] IRLR 200, *Murray and another v Foyle Mears* [1999] ICR 827). This is a question of causation and of fact for the Tribunal and does not depend on the terms of the Complainant's contract of employment or the function that he performed. Even if the work in question remains to be done, the Complainant is redundant if the Respondent has organised its affairs so that the work is done by fewer employees as there is a diminished need in the Respondent's organisation for employees to do that particular kind of work. It is a question of fact whether the Complainant's work, and that work alone, is being done by someone else, in which case there is no redundancy but the replacement of one employee by another; or has another employee undertaken the work of the Complainant additionally to his own, in which case there has been a reduction in the number of employees required to do the work and the Complainant's dismissal is attributable to redundancy. In other words, the Complainant can be made redundant even when his job still exists: *Safeways, McCrea v Cullen & Davison Ltd* [1988] IRLR 30. In *McCrea*, the work of management was formerly divided between the employee and the managing director, and was thereafter done by the latter. It was a redundancy because the employer no longer required two men to do the work of management.

15. In cases of diminution of work arising from a reorganisation it has been stated that:- "*Cases concerning redundancy arising out of a reorganisation always cause difficulties. Certain passages in some of the judgments in Johnson v Nottinghamshire Combined Police Authority [1974] ICR 170 and Lesney Products & Co v Nolan [1977] ICR 235 have been taken as suggesting that if a dismissal has been caused by a reorganisation the reason for dismissal cannot be redundancy. We do not think that this is the meaning of the passages, or what was intended. In truth a reorganisation may or may not end in redundancy; it all depends on the nature and effect of the reorganisation*": *Robinson v British Airways Ltd* [1978] ICR 304 at 308 per Phillips J. Adopted in *Safeway*.
16. It is a redundancy by way of re-organisation when the requirement for a dismissed employee to carry out the work has ceased because the whole of the duties previously performed by the dismissed employee are absorbed by remaining staff and not taken over by a new employee from outside: *Sutton v Revlon Overseas Corporation Ltd* [1973] IRLR 17, *Carry All Motors Ltd v Pennington* [1980] ICR 806, *Bromby & Hoare Ltd v Evans* [1971] NICR 113, *Amos & Others v Max-Arc Ltd* [1972] NICR 46. In *Bromby*, it was held that the issue did not depend upon the amount of the work to be done but on whether there was any longer a need for the employees to carry out that work which they performed, and as there was no longer a need because the work could be performed more efficiently by other means, such as self-employed workers, a redundancy situation was created.

*Re-organisation as "some other substantial reason"*

17. If I am not satisfied that the Complainant was redundant, I must then consider whether on the same facts there was a re-organisation comprising "*some other substantial reason of a kind such as to justify the dismissal*" of the Complainant holding the position which he held under section 65(1)(b) of the Act: *Gorman v London Computer Training Centre Limited* [1978] ICR 394; *Hannam v TNT-IPEC* [1986] IRLR 165. This is for the Tribunal to answer using its own common sense experience. It does not involve any question of fairness or unfairness, which is a separate question: *Priddle v Dibble* [1978] ICR 148 at 152 C-H as approved by the Court of Appeal in *Cobley v Forward Technology Industries Plc* [2003] IRLR 706.
18. The employer is entitled to say in such circumstances "*Well, that may be so, nonetheless in that case the same fact or reason constituted some other*

*substantial reason of a kind such as to justify dismissal*" – namely a business re-organisation: *Gorman*, page 399 B,C. The reason does not have to have "the correct label" at the time of dismissal, but it must have existed at that time and be the principal reason that operated on the Respondent's mind for dismissal. It is for the employer to show the reason in fact but it is a matter for the Tribunal whether the reason in fact amounts to a potentially fair reason: *Abernethy v Mott, Hay and Anderson* [1976] IRC 323; *Devis v Aktins* [1977] AC 931; *West Midlands Co-operative Society Limited v Tipton* [1986] IRLR 112 Per Lord Denning MR: "I do not think that the reason has got 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". – *Abernathy*, page 329C,D,E.

19. There is "some other substantial reason" where there is a "discernible benefit to the employer". This hurdle is low. The benefits to the employer need not be considerable: it suffices that they are discernible: *Kerry Foods Ltd v Lynch* [2005] UKEAT/0032/05. If an employer dismisses due to a policy and the employer evaluates the policy as a matter of importance, a matter in which substantial advantage is discerned, then dismissal due to the application of the policy is "for substantial other reason". The test of this is subjective to the employer: *Banerjee v City & East London Area Health Authority* [1979] IRLR: "The hurdle over which the employer has to jump at this stage of an enquiry into an unfair dismissal complainant is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify dismissal, then it passes as a substantial reason, and the enquiry moves on to [Section 65(4) of the Act]": *Gilham v Kent County Council (No. 2)(C.A.)* 1984 ICR, 233, per Griffith LJ. So whether it is reasonable to regard this as a sufficient justification for the dismissal, is to be considered under section 65(5) of the Act.
20. A re-organisation of a business so as to increase business efficiency/achieve economies has been viewed by the courts as a reason amounting to "some other substantial reason" on many occasions: *Chapman and others v Goonvean and Rosotowrack* [1973] ICR 310; *Johnson v Nottinghamshire Combined Police Authority* [1974] ICR 170; *Lesney Products & Co Limited v Nolan* [1977] ICR 235. The grounds and benefits alleged by the Respondent for the re-organisation were:-
- a. It was the policy of the Respondent that the principal work of the Complainant be done by the elected officers of the Respondent who were directly accountable to the membership and to maximise its service to members;
  - b. This resulted in a significant diminution of the work required of the Complainant and the Respondent decided that the Complainant's salary was not justifiable in the light of the work that he was doing, and that the money so saved could be put towards further benefits for the members of the Respondent.

*The Respondent acted reasonably in the circumstances in treating it as a sufficient reason to dismiss the Complainant – the band of reasonable responses*

21. Once the Respondent has established a potentially fair reason, section 65(6) provides:

*"Subject to subsections (4) and (5) the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer,*



*shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case."*

22. In determining this question, which is a neutral question on which neither party bears the burden of proof, I must consider:-

- (1) The reasonableness of the Respondent's conduct, not simply whether I consider the dismissal to be fair;
- (2) In judging reasonableness of the Respondent's conduct, I must not substitute my decision as to what is the right course to adopt for that of the Respondent. The standard is that of the hypothetical reasonable employer. The fact that the Respondent is a registered trade union in Gibraltar does not make it subject to a different or higher legal test, or standard;
- (3) There is a band of reasonable responses whereby one employer might reasonably take one view, another quite reasonably another. A dismissal is only unfair if no reasonable employer would have dismissed;
- (4) The function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses, which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, if the dismissal falls outside the band, it is unfair;
- (5) Together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances whether the dismissal of the Complainant was such that a reasonable employer carrying on the Respondent's business would have regarded the dismissal as a reasonable response and whether, in all the circumstances of the case, the dismissal was carried out in a fair way.

*Iceland Frozen Foods Limited v Jones* [1982] IRLR re-stated in the joined cases of *HSBC (formerly Midland Bank) v Madden and Post Office v Foley* (2000) IRLR 8271 CA.

23. Accordingly, "the correct test is: was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal is unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair...": *British Leyland (UK) Ltd v Swift* [1981] IRLR per Lord Denning.

24. In considering the fairness of a redundancy dismissal the Tribunal is not entitled to question the commercial merits or business sense of the employer's decision to make the redundancy: *Moon and others v Homesworthy Furniture [Northern] Ltd* [1976] IRLR 298; *Campbell and others v Dunoon & Cowal Housing Association* [1993] IRLR 496.

#### *Procedural fairness*

25. Procedural unfairness namely the manner in which the decision was made, is only relevant to the extent that it affects the fairness of the reason shown by the Respondent for the dismissal: *Polkey v A E Drayton Services* [1987] IRLR 503.

26. There is no rule of law under Gibraltar law for consultation or warning in the case of the dismissal for redundancy of an individual employee absent an agreement or internal procedure to that effect, neither of which applied in the case, and the failure to consult and warn would not in itself render a dismissal unfair: (*Hollister v National Farmers' Union* [1979] ICR 542).



27. The position on dismissals for redundancy was summarised in *Mugford v Midland Bank Plc* [1994] IRLR 642 (page 406 (g) – (h) page 407 (a)) as follows:- "1. Where no consultation about redundancy has taken place with either the Trade Union or the employee the dismissal will normally be unfair, unless the Tribunal finds that a reasonable employer would have concluded that consultation would be utterly futile exercise in the particular circumstances of the case. 2. Consultation with the Trade Union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy. 3. It will be a question of fact and degree for the Industrial Tribunal to consider whether consultation with the individual and/or his Union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the Tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy".
28. These are only guidelines and not rules of law, and indicate the factors which a Tribunal might properly consider when determining whether or not the dismissal is fair. The Tribunal must ask whether the Respondent had been reasonable or unreasonable in deciding that his reason for dismissing the employee was a sufficient reason not whether the employee would nevertheless have been dismissed even if there had been prior consultation or warning. Whether the Respondent could reasonably have concluded that consultation or warning would be useless so that the failure to warn or consult would not necessarily render dismissal unfair is a matter for the Tribunal to determine in light of the circumstances known to the employer when it took its decision to dismiss, and is a question of fact.

#### *Compensation*

29. Where a dismissal is found to be unfair as a result of any procedural unfairness, a *Polkey* deduction can be applied by reducing the award of compensation to nil on the ground that the Complainant's failure did not affect the outcome: *Polkey*; *Fisher v California Cake & Cookie Limited* [1997] IRLR 212; *Parkinson v March Consulting Ltd* [1997] IRLR 308. If the Tribunal is unwilling to award no compensation, it can limit the award to a nominal amount by the application of the *Polkey* deduction [*Constantine v McGregor Cory Limited* [2000] UKEAT/236/99]. There is no need for an all or nothing decision. If the Tribunal considers there is doubt whether or not the Respondent would have been dismissed, that element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the Respondent would still have lost his employment.

#### **The Evidence**

##### *The Constitution*

30. Under rule 6.2(1) of the Constitution the General Secretary was designated the Respondent's Chief Executive Officer, a very senior position within the Respondent, and any organisation. The General Secretary was responsible to the Executive Committee with whom he would work in conjunction. The Executive Committee dealt with policy, and the General Secretary with the day to day management of the affairs of the Respondent and the implementation of such policy. The General Secretary's designated primary duties included under r 6.2 (2) of the Constitution:-
- a) Advising upon and implementing policy and other decisions of the Executive Committee;

- b) Being responsible for the efficient administration and management of those powers and functions of the Executive Committee detailed in Part 5 of the Constitution;
- c) Ensuring that minutes and decisions of all meetings were properly recorded;
- d) Acting as principal spokesperson for the Respondent; and
- e) Managing all offices and staff of the Respondent, and being responsible to the Executive Committee for finance.

31. The additional secondary duties of the General Secretary under the Constitution included receiving written notices of resignation from members of the Respondent (r 2.12); receiving from fully paid-up members' notice of change of method of payment of subscription (r 2.18); receiving payment of subscriptions from members which were not to be deemed to have been paid until received by the General Secretary on behalf of the Respondent (r 2.19); acting as secretary to each Sector Committee (r 3.3); being present in General Meetings (rule 4 (1) (c)); giving not less than four weeks' notice by circular approved by the Executive Committee to every Sector Member of the place and date of the General Meeting (r 4.2(2)); being required to call for motions not less than 2 weeks before the date such motions have to be received (r 4.9 (2)); notice of such motions setting out the terms thereof were to be given to the General Secretary r4.9(3), a notice was to be deemed not to have been given until it had been delivered to the General Secretary at the registered office of the Respondent (r 4.9 (4)); circulating the agenda for the General Meeting to each member not later than 1 week before the date on which a General Meeting was to commence it's sitting (r 4.11); receiving notices of special meetings stating the business to be dealt with by the meeting called by the Executive Committee or the relevant Sector Committee if it so determined, or if members numbering not less than one quarter of the members of the Respondent, so require (r 4.12 (1)); keeping a proper record of all decisions taken, and elections and appointments made, at each meeting. The record of the meeting was to be authenticated by the signatures of whoever was in the chair of the meeting at which the decisions were taken and the elections and appointments were made, and of the General Secretary (r4.13 (1)); being responsible for the safe custody of such record (r 4.13 (3)); the Executive Committee, subject to the provisions of the Constitution, would consist of the General Secretary, who was entitled to attend and speak but not vote (r 5.2 (2)); the result of any election was to be published by the General Secretary and circulated to all Sectors (r 5.9); members of the Executive Committee could at any time by giving six weeks' notice in writing addressed to the General Secretary resign from office or from the Executive Committee, as the case might be (r 5.10 (1)); calling for nominations from members no later than 4 weeks before the date such nominations had to be received for elections to the Sector Committee (r 5.11 (1)(a)); receiving notices of nomination not later than 2 weeks before the date of the election of members, not being an unemployed members, in elections for the Sector Committee: (r 5.11 (1)(d)); at the request of the President or of 3 other Voting Members of the Executive Committee, summoning a meeting of the Executive Committee (r 5.12 (4)); a quorum of the Executive Committee was 4 voting members or the Presidential Team and the General Secretary (r 5.13); the General Secretary could, with the approval of the Executive Committee, delegate any or all such duties whenever necessary or desirable to do so (r 6.2 (3)); the Executive Committee was to control the expenditure of the Respondent in conjunction with the President, the Treasurer and the General Secretary: r7.2; and that in the event that a member of the Presidential Team resigned or otherwise ceased to qualify for office, the Executive Committee was to elect a Voting Member to replace the resigning officer, provided that such a Voting Member was a Member of the largest branch of the Respondent (r5.4(2)).

32. The Executive Committee had power to engage and dismiss persons as employees of the Respondent and, in particular, was to appoint "a GGCA National Secretary in accordance with, and on the terms referred to in, these rules": r 6.1 (1)(a); r 5.2(c).

#### *Original Facilities Agreement*

33. An important component of how the Respondent carried on its activities as a registered trade union in Gibraltar was the Facilities Agreement entered into on 25<sup>th</sup> September 1985 between the Respondent and Her Majesty's Government of Gibraltar ("HMGoG") ("*the Original Facilities Agreement*"). This set out the rules for facility time, that is for HMGoG employees to take time off from their normal work and duties for HMGoG to attend to their trade union duties for the Respondent. It provided for an annual monetary payment ("*the Grant*") to be paid by HMGoG to the Respondent to facilitate the employment of a full-time trade union official to undertake the daily affairs and running of the Respondent provided that the Respondent adduced evidence each year of the employment of a full-time official (clause 5 (a) (2)). The provision of the Grant was conditional on members of the Executive Committee not involving themselves in any form of trade union activities during working hours except at the request of management when so required (clause 5(a)(5)). The former President of the Respondent from 2001 until March 2012, Mr Jose Luis Garcia ("*Mr Garcia*"), gave evidence that he had enjoyed facility time during working hours regularly even though clause 3.1(b) of the Original Facilities Agreement indicated to the contrary. Mr Morillo's evidence was that prior to the Complainant's dismissal the Grant was the equivalent of a HEO scale 3 salary, being approximately £35,500.00 per annum; that facility time was very limited and ad hoc, amounting to a fixed number of hours to attend Executive Committee meetings; with section representatives being afforded no facility time to attend monthly meetings; the Grant was applied to payment of the Complainant's salary as the Respondent's full time official. The Complainant was at the time of his dismissal being paid £49,776 per annum which meant that the amount being paid by the Respondent for employing the Complainant out of its own funds was approximately only £14,276.

#### *Background to dismissal*

34. On 8 February 2007 Ms Cumming was elected onto the Executive Committee and was tasked primarily to deal with negotiations relating to family friendly working hours for the civil service and to lead on a pay claim for the Crown Counsel grade. Whilst she discussed these issues occasionally with the Complainant, she felt, according to her evidence, that she was rarely included in meetings dealing with wider issues, and formed the view that the Executive Committee was called as and when the Complainant required it.
35. On 22<sup>nd</sup> June 2012 Ms Cumming was elected President of the Respondent. She decided to establish how the Respondent was being managed. Her evidence in chief was that by February 2013 she had realised that "*there were no functioning GGCA committee nor were there any sector representative meetings. It appeared to me that the Claimant had become accustomed to making decisions that were properly to be made by the Committee and that he would attend meetings without my knowledge. I was of the view that this had to change. However, in the 9 months I was initially elected president the only committee meeting I was able to hold was arranged to try and establish who exactly was on the Committee.*" Notwithstanding that Ms Cumming had been on the Executive Committee since 2007, her evidence is that she "*only became aware of how the GGCA was managed when I was elected president in 2012*", 5 years after she had joined the Executive Committee. Ms Cumming decided to resign as President on 1 March 2013 giving only these reasons as the reasons for her resignation, a matter to

which I will come back to. Ms Cumming acknowledged that as she attempted to establish a "hold on the management of the Union" her relationship with the Complainant began to break down, describing the working relationship "as fractured".

36. The Complainant's evidence acknowledged this breakdown in their relationship. He recalled that following a meeting of the Gibraltar Trade Council, some seven months after Ms Cumming had been first elected President in 2012, she began shouting and waving the Constitution at him, and demanding to know where all the Sector Committees were and why they were not involved as were those of the other main union Unite. The Complainant tried to explain, but Ms Cumming replied that she was the President, and would do her own thing from then on. The Complainant believed their relationship deteriorated from that moment.
37. The continuing breakdown in their relationship became self-evident on a Facebook Group Page of the Respondent's members Ms Cumming posted on as President of the Respondent on 28<sup>th</sup> February 2013, where she made very serious allegations against the Complainant and the manner he was conducting himself, and performing, his duties as General Secretary. Her exact words (emphasis in bold added by me):-

**"Wendy Cumming..."Hi, for all the new members of the group, I'd just like to set out the issues that I have been facing as President of the GGCA and which have led to me reaching out to the membership via facebook.**

**Since my election as President last summer, I have been increasingly disheartened to see how the Union has been run for the past 12 years. There is no functioning committee. There are no committee meetings. There are no section rep meetings. Decisions are not taken by a committee, but by the paid official, who often attends meetings with the CM, government ministers and heads of department alone, without the knowledge or the ratification of a committee of elected members.**

*Throughout the last 9 months, the main areas I have acted to concentrate on have been:*

*the change of working hours;*

*the setting up of a benevolent fund;*

*the reactivation of the Gibraltar Trade Council (made of up GTA, GGCA and Unite).*

**However, I have found that my efforts in these areas have been held back by the National Secretary. I have come to realise that, for financial reasons, his position is compromised and he is not always willing to act in the best interests of the membership. For this reason, I was, until last week, trying very hard to regroup the committee. I managed to hold one committee meeting where the main question asked was "who is in the committee? This discussion was to be continued (and the rules and constitution reviewed) in another committee meeting which I had arranged for this Monday at 9am.**

*However, on Friday morning, I was informed that I had been transferred to the HR Department. I was told I had to report to HR at 9am. When I got there, I had no desk, no phone and no computer and the HRM was not in the office. So why the rush? Just before I was sent back to the Income Tax Office, "to tie up loose ends" I was told that, due to a conflict of interests, I would have to resign as President of the GGCA.*

*I will be in the Income Tax Office until the beginning of next week. **If anyone wants to discuss my departure from the union, or any other matter related to the above, please reply to this post or contact me.** I have already spoken with a number of members who have asked for a EGM. I have scheduled one for Friday the 1<sup>st</sup> March at 1.15pm at the GGCA premises."*

38. That posting, unsurprisingly, having pointed the finger of blame primarily at the Complainant, resulted in an inter-change of messages on the Facebook Group Page on 29<sup>th</sup> February 2013 attacking the Complainant's performance/conduct between primarily, Ms Cumming and Mr Morillo (both later involved in the decision to dismiss the Complainant), but included others with whom neither Ms Cumming nor Mr Morillo demurred in respect of the equally serious allegations they made against the Complainant. Ms Cumming's was still President at the time of these exchanges, and had instigated this exchange by making the initial posting on 28<sup>th</sup> February 2013, and inviting members to contact her to discuss the reasons for her departure. They did not hold their punches as the exchanges show (emphasis in bold added by me):-

Tony C L Morillo: "*Wendy I will be there and am willing to stand for treasurer if needed. **TIME FOR CHANGE***"

Wendy Cumming: "*Also, to make sure that ppl understand the point – on fri, when I tried to step up the committee meeting for Mon, **the National Secretary denied the meeting request – as President, I was denied access to the GGCA premises, together with the committee members who had been invited to attend.** Let's hope this doesn't happen on Friday!!!*"

Wendy Cumming: "*Thanx for the support, I really appreciate it. Hopefully, if there is another meeting, we can accommodate the family friendlies (i'm off too, but am on annual leave, lol). I just have to act quickly and call a meeting soon cos I've already been asked to resign and I imagine I'll start to feel the pressure soon"*

Tony C L Morillo: "*Hi Guys lets not forget that we do not have a **NATIONAL SECRETARY** we have a paid employee who is there to do as the committee instructs"*

Tony C L Morillo: "***He is subordinate to the committee who in turn are answerable to the membership. We need to take back what is ours!! The building/premises belong to us and he is no one to deny the members entry"***

Wendy Cumming: "*Hi, just trying out the fb group facility to see if I can get some advice re union issues taking place at the moment....."*

Wendy Cumming: "*Ur welcome, hoping to get some feedback on how to deal with this situation ☺"*

Tony C L Morillo: "*what do you need"*

Wendy Cumming: "*I need to tell the membership what's happened, but not sure how..."*

Tony C L Morillo: "*How sensitive is what you want to say. Is the usual route of a bulletin not appropriate?"*

Wendy Cumming: "*Not sure if, when I go to the office, the bulletin will actually get out. **I tried to arrange a committee meeting for today, but my request***

**was declined. Then, before I could deal with this, my transfer to HR was arranged and the CS told me in no uncertain terms that I had to cancel the committee meeting and report to HR at 9am this morning. Then, today, I had no desk, computer or phone and the head of dept was not present, so there was no obvious need for the transfer to happen so suddenly. However, I was told that as I had been transferred to HR, due to a conflict of interest, I would have to resign as president of the GGCA"**

**Tony C L Morillo: "Sounds like bullying. I wonder in whose interest it is for this to happen??? I take it that the committee meeting was stopped by MT or HR or CS?? Sounds like someone wants you out of the picture for some reason. I am on this course all week. Happy to chat to you any time. We must not forget that MT is our employee, he is there to do as the president/committee tell him to do. Otherwise he is in breach of his contract"**

**Wendy Cumming: "I know, but I was trying to get a committee going to deal with a number of issues regarding MT (to include change of hours and benevolent fund) and all of a sudden I've been transferred!!!!"**

**Tony C L Morillo: "Alternatively prepare your bulletin on email and use the facility we have in our offices. Or fax it from the ITO. Additionally if they knew that you were the President they should have thought better of a move to HR and should have consulted you. Certainly no President that I know of has been so shabbily treated. I would like to know what was going to be discussed at today's Committee meeting"**

**Tony C L Morillo: "Ah. It is about time that he was put in his place. I would send an e-mail to the likes of Kevin Balloqui etc. People who we know have the GGCA at heart and ask them to pass the word. How strong is the committee and how many committee members are there. Will they back you up?? I am going to look at our constitution to see what, if anything, it says"**

**Wendy Cumming: "Ok, thanks very much. Committee as currently stands is myself, Julian, Kathy Ghio and Natalie Tavares. Julian contends that Jose Luis is also a committee member because, even though he resigned as president, he still stated that he wanted to remain in the committee"**

**Wendy Cumming: "I say that only Julian, Kathy, Natalie and I are in the committee, the rules say only 5 civil servants can serve on the committee, and that would have to be me (president), Julian (vice president), treasurer (vacant post) and the two ordinary committee members, Kathy and Natalie"**

**Wendy Cumming: "The problem is that no committee meetings have been held for years, so the committee has been completely disempowered"**

**Mark Galliano: "Its called a dictatorship Wendy..."**

**Mark Galliano: "The Committee has only been there to just be legit in my eyes..."**

**Wendy Cumming: "I agree completely Mark, and I wish I had backed Charles more strongly at the time - but I was a bit naïve then"**

**Mark Galliano: "Don't worry Wendy im sure Charles won't hold it against you... If he does let me know and ill knock him about a bit! Lolol"**

**Wendy Cumming: "I now, it seems that anyone who wants to change the status quo in the union gets the axe!!!!"**



**Tony C L Morillo: "Wendy you need to call a committee meeting even if it is outside working hours and away from the GGCA premises. Appoint a treasurer and then inform MT of the decisions taken. If he does not comply then it is a disciplinary matter and a warning should be given. Will the others support you in this. I know I will. I am also willing to serve as Treasurer if you need me. There must be something hidden in those accounts when there is so much secrecy and vindictiveness going on. All the more reason to have these matters brought to light".**

Wendy Cumming: "Do u think people will turn up?"

**Tony C L Morillo: "Wendy I am free most evenings if you want to chat. We have lost OUR union to someone who only looks out for their own interests. We need to do something about it".**

Tony C L Morillo: "Wendy are the committee behind you???"

Wendy Cumming: "I know that Kathy is. Not sure about the others. The reason for the meeting I wanted to have today was to see if natalie would become an active member".

Tony C L Morillo: "We need to talk face to face"

Wendy Cumming: "ok, will be in the office on weds"

Tony C L Morillo: "I am on the course at bleek house all week I will try to get away on Wed morning"

Wendy Cumming: "Ok, lets talk then. My main problem is that I feel that, if I refuse to resign from my post as president, I will be "punished" at work - lets face it, it happens!!!"

Tony C L Morillo: "Chin up to every problem there is a solution. We will find the solution. See you Wednesday 11ish"

**Lawrence Llamas: "a year ago I was part of the GGCA plot to sabotage the promotions planned at HR. all good. I distributed an email prepared by the GGCA amongst members. Recently MT said in a meeting with HR that the GGCA had nothing to do with that email, therefore throwing me into me into a pit of wolves, not only is that not true and I have witnesses and physical proof of where the email started"**

**Mark Galliano: "MT promises that there are no cadets in the GGCA and I know for a fact there are a couple that go to the premises and pay cash off the books and he actually fights for them too! Two faced!!!"**

**Lawrence Llamas: "My main concern is that Wendy has been transferred to shut her up, that is crystal clear. Therefore it means that we are left with the players who obviously play govt's game!!!"**

Lawrence Llamas: "Why do we want players? Surely the membership wants an unbiased committee"

Mark Galliano: "Membership has not been bias in years!!!"

**Angellque Spiteri: "We need a united union with the committee working towards the same goals with everyone having the freedom to discuss"**



**matters and question any issues without the fear of being "punished" in any way. Wendy dared to question certain sensitive matters and has paid the price...do we really need to live in fear?? If the union cannot reason within themselves then how are they going to get anything done for the benefit of it's member???** A strong woman speaking out....**VERY SCARY"**

Wendy Cumming: **"My concern is that, if I call for an EGM, that it will be sabotaged (facility will be refused and the premises will not be made available). I'm not being paranoid - this already happened on Mon this week, when the committee meeting I had arranged had to be cancelled. Will members attend a meeting outside working hours?? I'm not so sure about this. Maybe it might be better to inform ppl via this group first"**.

39. As a consequence of allegations appearing in the media that Ms Cumming had been transferred by HMGoG to HMGoG HR to prevent her carrying out her trade union activities for the Respondent, the Chief Secretary of HMGoG issued a bulletin of circulars on 12<sup>th</sup> March 2013 ("*the HMGoG Bulletin*") seeking to clarify what HMGoG considered were erroneous statements appearing in the press with respect to Ms Cumming and her trade union activities (emphasis in bold added by me):-

*"In light of recent erroneous statements appearing in the press over the last few days, the following is issued in clarification of the facts:*

- 1) **Ms Wendy Cumming was transferred from the Income Tax Office to the Human Resources Department. She agreed to this transfer some months ago in consultation with the Human Resources Manager.**
- 2) *This happened following on from requests from the Human Resources Department for support in the form of legal expertise.*
- 3) *Given that Ms Cumming had been associated with a possible move there for some months now, the decision to move her at this point came about as a result of consultation with her as well as ongoing developments within that department. Even though Ms Cumming might have preferred the transfer to have taken place at a later stage, the exigencies of the service required earlier action and she accepted this.*
- 4) *The Human Resources Manager (Ag) was in the process of making arrangements for Ms Cumming to be adequately accommodated in her new environment.*
- 5) *Ms Cumming has, in any case, been allowed to complete urgent pending work which she has been engaged in at the Income Tax Office before the physical move can be fully completed.*
- 6) **There is no question of any attempt at censuring Ms Cumming's contributions in social networks or elsewhere. She was simply informed that a position in the Human Resources Department is incompatible with an executive role in any of the Trade Unions, given that she would now be expected to advise on and participate in negotiations on Civil Service staff management issues in representation of the official side. The rule has historically been that individuals at the Human Resources Department cannot hold executive posts in the Union. There is no objection, however, to Ms Cumming continuing to belong to any Union - as is the case with most officers at the Human Resources Department. Indeed, there were no objections to her addressing any handover meeting, as she seems to have done so. Moreover, should Ms Cumming wish to continue playing an executive role within the GGCA, she can request a move away from her new place of work through the established channels and this**

*request will be considered in the usual manner and taking account of the exigencies of the service.*

**7) Government wish to make it clear that any internal issues being played out within the GGCA constitute a matter solely for its members, with Government playing no role whatsoever."**

41. Immediately after these Facebook Group Page postings and the HMGoG Bulletin, Ms Cumming resigned as President on 1<sup>st</sup> March 2013. Ms Cumming, in her witness statement, reiterated her dissatisfaction with certain limited aspects of the Complainant's conduct and discharge of his duties without referring fully to the more serious allegations of financial impropriety/self-interest contained in the Group Facebook Group Page exchanges (emphasis in bold added by me):-

*"30. From the period of January to 1<sup>st</sup> March 2013 (when I resigned as President of the GGCA) I felt that my position within the GGCA was becoming increasingly untenable. **Even though, as the elected leader of the Union, I had all the responsibilities and liabilities inherent to the position, I did not have access to information on union affairs, I was deliberately left out of meetings and I did not have a functioning committee for collective decision making and support**".*

42. Ms. Cumming was re-elected President on 13<sup>th</sup> March 2013. By 22<sup>nd</sup> March 2013 the new Executive Committee comprised of Ms Cumming, Ms Desoiza as Vice-President, Mr Morillo as Treasurer, Katherine Ghio (who resigned in May 2013 and was replaced by Mr Bonavia in July 2013) and Charles Avellano (who resigned in February 2014). The Executive Committee decided, according to Ms Cumming's evidence, that it would *"take a hands on approach to the management of the (Respondent) and that the Complainant's knowledge and experience would be an invaluable resource to them and that it would be in everyone's interests to work with him going forward."* Ms Cumming explained that the Executive Committee became more actively involved in the Respondent's affairs, which included taking over the duties of the General Secretary as part of its policy to take full control of the management and operation of the Respondent affairs in what she believed would maximise the Respondent's service to its members, and what she understood to be the most democratic manner of operating and managing the Respondent with those democratically elected by the membership to the Executive Committee ("the Policy"). She omitted to mention the more serious allegations she had made/acquiesced with/encouraged in the Facebook Group Page against the Complainant, and which had led to the Policy. She further explained in her witness statement:-

*"20. I personally took a more active role with the GGCA, dedicated as much time as I could to its needs. I soon found that the hands-on approach adopted by the Committee began bearing fruit, with the Committee members meeting every week and each member taking on different areas of the GGCA's work.*

*21. This resulted in a significant diminution of the work of the National Secretary, to the extent that the Committee queried whether paying an employee £49,776 per annum was justifiable in the light of his duties. The Committee's consensus was that the salary paid to the Claimant could be put towards benefits for the membership."*

43. When asked why the exchanges on the Facebook Group Page were so different to her Witness Statement, including the material omission of the alleged conflict of interest/misconduct on the part of the Complainant, Ms Cumming explained that she had been told that she had to resign as President of the Respondent if she wanted to take up the post of Crown Counsel in the Human Resources Department as there was a conflict of interest. She believed the Complainant had

a conflict of interest because of financial issues affecting him just before the election in 2013, as he was not keen to progress the changes to working hours and had told her that he was holding back as he did not wish to take an adversarial position with HMGoG until he had been offered his accommodation for sale by HMGoG, which the Complainant denied as totally untrue. Therefore, she had told the closed Facebook Group Page that the Complainant was not acting in the best interests of the Respondent because of his own personal interests. That did not really answer why she had omitted to mention this in her Witness Statement, but simply repeated the serious allegations she had previously made against the Complainant. Nor was this explanation minuted in any subsequent meetings of the Respondent including when she gave notice on 1<sup>st</sup> March 2013 that she would be resigning as President. When she was re-elected with the new Executive Committee, Ms Cumming explained that she wanted to ensure that the Executive Committee was in control, and that they controlled the General Secretary given the support they had received from the membership. The Complainant could assist, but he would not be the decision maker, the Executive Committee would be. That support was based on the serious allegations made against the Complainant on the Facebook Group Page, and assumed that the Complainant was guilty of the alleged serious misconduct/impropriety/failure to properly discharge his duties he had been accused of by her and others. Despite those serious allegations she had made/encouraged/been privy to on the Facebook Group Page, Ms Cumming's evidence on cross-examination was that she was willing to work with the Complainant and saw the alleged conflict of the Complainant as relevant to her decision to resign as President, but not to the decision to make the Complainant redundant, because she had lost faith only in his personal integrity, and not in his professional capacity. That distinction is of course difficult to understand and follow, and not borne out by the actions and conduct of the Executive Committee that followed the serious allegations made against the Complainant on the Facebook Group Page.

44. Mr Morillo's evidence-in-chief was in a similar vein (emphasis in bold added by me):-

*"5. After being elected as treasurer the GGCA's committee begun weekly meetings in order to maximise the service provided to its members. The Committee wanted to be proactive and get fully involved in the running of the union. **We soon found that the Claimant had become accustomed to doing a lot of the Committee's work himself.***

*6. **We found that the Claimant had previously attended meetings on behalf of the GGCA and made decisions arising out of those meetings.** As a Committee we felt it was important that the persons elected by the membership should be present at these meetings and should be the ones taking the decisions. Before long it became apparent that in order to increase the Committee's efficiency we would need to absorb a lot of the functions allocated to the National Secretary under the Constitution. This resulted in the National Secretary undertaking a significantly reduced day to day role, to the extent that we questioned whether we could justify his salary and benefits to the membership."*

45. As in the case of Ms Cumming, Mr Morillo's evidence-in-chief did not refer to the more serious allegations being made against the Complainant on the Facebook Group Page prior to his election onto the Executive Committee. The agenda for "Change", as Mr Morillo had previously put it on that Facebook Group Page, was the basis on which Ms Cumming, at the very least, had sought re-election and Mr Morillo had supported her on. They had manifested their agenda on the Facebook Group Page, and who it was aimed at. Mr Morillo admitted on cross-examination that there was in fact no fact-finding mission after the election by the Executive Committee. The allegations on the Facebook Group Page had already alleged as

fact that the Complainant attended meetings on his own, and took decisions which were part of the Executive Committee's remit, constituted allegations of fact made previously on the Facebook Group Page. Mr Morillo acknowledged that in his mind the Executive Committee were the elected representatives of the Respondent, who were told by its members what to do, and it was their duty to implement their wishes. It was for the General Secretary to support the Executive Committee, and not vice versa. Too much power had been placed by the Constitution in the General Secretary. The election in 2013 was to change the way the Respondent was run. The very important functions of the General Secretary were absorbed into the Executive Committee without changing the rules of the Constitution, because of the mandate given by the membership to change the way the Respondent was run so that the Executive Committee would be actively involved in the day-to-day running of the Respondent. That's why he believed they were voted onto the Executive Committee. They wanted "change", as he put it again on cross-examination. The reason it was decided that the Complainant was not needed is because the Executive Committee believed that they should be doing his work as they were the decision-makers and should adopt a hands on pro-active approach. This attempted explanation on cross-examination failed to mention, as in the case of Mr Morillo's witness statement, the serious personalised attacks and accusations on the Facebook Group Page against the Complainant, and which must have formed the basis of the alleged mandate of the membership for change and the essential justification for the Policy. Why state in the Witness Statement that the Executive Committee had only discovered after their election in March 2013 that the Complainant had become accustomed to doing the very things he stood accused in the Facebook Group Page? Mr Morillo's additional explanations on cross-examination simply reinforced that the underlying reasons and thinking behind the Policy was that change was required as a consequence of the Complainant's misconduct/impropriety and not properly discharging his duties.

46. Likewise Ms Desoiza's evidence-in-chief (emphasis in bold added by me):-

*"5. After being elected onto the GGCA's Committee we **set about ensuring that the Committee was fully aware and in control of the affairs of the GGCA.** We began to meet on a weekly basis and all the committee members were allocated tasks to deal with. We wanted to increase efficiency and the service provided to members.*

*6. The Committee's more active role was effectively a re-organisation of the way in which the GGCA was run. We attended meetings and took decisions on matters arising as a committee. **We soon found out that we had taken on much of the work previously carried out by the Claimant prior to the elections.** Although the work the Claimant was doing was still there, because it was now spread between the elected Committee it meant that there was no need for the Claimant to be doing the work. We soon realised that he was redundant and that the GGCA could save on his salary and various benefits without disrupting the service provided to members."*

47. Ms Desoiza clearly supported the need for "Change" and the Policy. She explained on cross-examination that the duties of General Secretary were being carried out by the Executive Committee on the basis of its mandate in a democratic election by the members that voted it in in 2013, and that the Complainant's duties were re-arranged to give members what they had voted for. She accepted that there was no manifesto which members had voted for the removal of the General Secretary. The only apparent manifesto was that contained in the Facebook Group Page allegations.

48. Mr Bonavia's evidence-in-chief, following his election in July 2013 onto the Executive Committee, some 3 months after Ms Cumming, Mr Morillo and Ms Desoiza, confirmed that he was in support of the Policy:-

*"5. After being elected onto the GGCA's Committee I noticed that the Committee members were already working to re-organise the way in which the GGCA had historically been managed. The Committee was very involved in the day-to-day running of the GGCA's affairs and were distributing work between the elected members of the Committee.*

*6. We were taking on work previously done by the National Secretary, such as attending official meetings and we were making decisions as a committee. In addition, and in order to increase our efficiency, we started taking on many of the duties allocated to the National Secretary under Rule 6.2 of the Constitution.*

*7. It became apparent to me that working together as a committee resulted in greater efficacy and increased service to our members. Our greater involvement as a committee necessarily meant that the requirement for the Claimant to carry out the work was reduced to the extent that the Committee had to query whether the employment of a National Secretary on the Claimant's salary represented good value to the GGCA's members."*

49. Immediately after Ms Cumming's election as President, and of the new Executive Committee, the Complainant was invited to a meeting of the Executive Committee to discuss their working relationship. It was concluded, according to Ms Cumming's evidence, that they all wished to work together for the benefit of the membership, and that in accordance with the Policy, the Complainant was tasked with preparing a database for historical personal injury claims. The Complainant's evidence as to what transpired after the election of Ms Cumming as President and new Executive Committee in March 2013 was markedly different. He felt that from March 2013 their relationship had ended. Shortly after her re-election, he met with her to offer her his continuing support and services, and to work with the new Executive Committee. He felt there was not much evidence of reciprocation, and that there was no relationship at all. That is hardly surprising given what Ms Cumming had alleged about the Complainant on the Facebook Group Page, and which allegations were no doubt repeated in the course of her discussions to be re-elected. The Complainant considered Ms Cumming's evidence to the contrary in her witness statement to bear no resemblance to what actually transpired from then on. He felt used and humiliated by the way he was treated by the Executive Committee on a daily basis, and felt that he had been marginalised. He had understood that his duties could evolve, but his duties were gradually taken away from him, and he felt this was despicable on the part of a Trade Union. He was prepared to accept whatever role was given to him, and which he would do to the best of his ability. Instead he was left to compile a database of various claims, sit on various boards, and deal with issues at the Customs Department and Social Services. If he was taken to a meeting, it was to take notes and not to participate, and even his participation in those meetings ended 3 to 4 weeks after March 2013. He was allocated ad hoc jobs compared to what he had been used to doing in the 13 years before, and despite the experience/knowledge he had acquired over 13 years as the Respondent's General Secretary.
50. The Complainant was uncomfortable working in the Respondent's offices from March 2013 as it was obvious to him that he was being ignored and marginalised. There were two doors leading into the Executive Committee room, one via the corridor and the other via the main staff office. Before the elections in March 2013, the Executive Committee members would normally enter via the main staff office, and speak to staff as they did so, including the Complainant who worked



from there. Ms Cumming had been an Executive Committee member before her resignation on 1<sup>st</sup> March 2013. After the elections in March 2013, the new Executive Committee members began entering the Executive Committee room via the corridor and avoided any inter-action with the Complainant. On the very few occasions that Ms Cumming or Mr Morillo entered via the main staff office, which usually had 3 to 4 staff in it, they would have a conversation with the other staff members, but not the Complainant. Ms Cumming and Mr Morillo were, of course, two of the main contributors to the Facebook Group Page allegations. It was obvious to the Complainant that Ms Cumming did not want to speak/interact with him so he just got on with his duties. Whilst he was unhappy with the reduction in his role, he did not express this personal dissatisfaction as he wished to continue in that role and carry out his functions to the best of his ability. He had worked for the Respondent for 13 years, and was very proud of what he had achieved during that long period of service as the Respondent's General Secretary.

51. Nor was his growing sense of isolation and of being marginalised a case of being over sensitive or paranoid. It was confirmed by Mr Garcia. He explained that when he decided to step down as President, it was because of the pressure and demands of the post, which involved hard work and in particular his private time, and that the Executive Committee was undermanned. If he needed facility time, it was regularly granted. There were very few volunteers, and those who volunteered had their own personal agendas. He did not point the finger of wrongdoing at the General Secretary. He had encouraged Ms Cumming to put herself forward for the position of President in 2012, and from which one can reasonably infer that he was predisposed towards her. Following her re-election in March 2013 Mr Garcia continued working in the Respondent's premises until May 2013 in-putting data collected for the civil service review. He observed that when the new Executive Committee was elected in March 2013, it held a number of meetings with members, but the Complainant was not invited to these; the Complainant was totally ignored; the Complainant sat at his desk in the corner of the Respondent's offices and the Executive Committee members, three in particular, would not even acknowledge his presence there; the Complainant was waiting to be given jobs to do because the Executive Committee had redistributed his duties to themselves. Under the Constitution, which he wrote and looked at frequently in the 10 years he was President, the daily management of the affairs of the Respondent was based on the UK Prospect Rules (a civil service union). The General Secretary had functions under the Constitution, the practical reason for which lay in the Original Facilities Agreement because HMGoG did not want civil servants neglecting their normal duties, and therefore paid for someone else to do that trade union work on full-time day to day basis. He nevertheless acknowledged that clause 6.2 of the Constitution did not require the Executive Committee to meet with the General Secretary, and that this was merely a different way of running the Respondent.
52. Mr Garcia was present at the meeting on 1<sup>st</sup> March 2013 when Ms Cumming tendered her resignation as President, and was persuaded by those present to stand again. That meeting was the day after the second set of postings by Ms Cumming on the Facebook Group Page. Immediately after that meeting Mr Garcia heard a conversation taking place outside the Respondent's offices in the stairwell between several people who were commenting that the Respondent needed "*to get rid of*" the Complainant. They were members of the Respondent, but he could not say, one way or the other, whether they were members of the Executive Committee. This exchange was hardly surprising given the attacks and accusations levelled at the Complainant on the Facebook Group Page, by none other than the President, and which formed the platform for her subsequent re-election and the Policy. Mr Garcia then heard, sometime after that, in the "*grapevine*" not that the Executive Committee was contemplating redundancy, which came as a shock to him when he heard that that was the reason given by

the Respondent for the Complainant's dismissal, but that the Executive Committee wanted to dismiss or encourage the Complainant to leave its employ. It was clear to Mr Garcia from what he had heard that the Complainant's employment would end by one means or another. He informed the Complainant of this. Despite the Complainant confirming that he had been informed of these rumours by Mr Garcia before Mr Garcia left, which was in May 2013 – Mr Garcia said the Complainant's response when informed of this intention to dismiss him was that the Respondent would not do this given his commitment to it - the Complainant's evidence is that he did not go to the President to complain because he believed the Executive Committee would use him in whatever role they chose. Mr Garcia also gave evidence that when the Complainant was asked what his future intentions were at a meeting of the Executive Committee, the members of the Executive Committee were taken aback by his response that he was committed to remaining at work until he reached the age of 70, namely until 25<sup>th</sup> June 2016.

53. The Complainant believed that Mr Morillo wanted him dismissed because of various prior incidents with him including where Mr Morillo had employed someone on behalf of the Respondent who was paying her own salary with no deductions for PAYE/social insurance, including awarding herself bonus' without ratification by the Executive Committee. This, he said, was an example of Mr Morillo not being in control as Treasurer of the Respondent's finances, and having no proper accounting procedures in place. That employee was dismissed by the Complainant without a disciplinary hearing on the instructions of the Executive Committee for misconduct in 2001. As early as 2002 the Complainant had also been belittled and bullied by Mr Morillo, culminating in an incident that resulted in Mr Morillo's resignation from the Executive Committee in 2002. Their relationship prior to 2013 had certainly been marked by incidents. Mr Garcia also added that Mr Morillo was a malcontent against the Complainant because the Complainant had not secured an upgrade of Mr Morillo's status from that of an Executive Officer to an accountant, and was one of the main proponents of the Complainant's dismissal. Mr Garcia's evidence was entirely consistent with the allegations made by Mr Morillo against the Complainant on the Facebook Group Page, and which evidence his disdain for the Complainant.
54. The Complainant's evidence is that he had refused funding of £95,000 for Ms Desoiza to instruct a UK-based QC represent her in a claim she had against her local employer, HMGoG, in respect of her position as Registrar of the Supreme Court and Admiralty Marshall because, as the Complainant explained to Ms Desoiza, the Respondent had its own local lawyer who was able to act on her behalf. Ms Desoiza declined that offer, and funded her own litigation at her sole expense. Mr Garcia confirmed that for this reason Ms Desoiza was also a malcontent against the Complainant. Because of that refusal to fund her litigation, the Complainant believed that Ms Desoiza, coupled with her close friendship to Ms Cumming, was happy to support Ms Cumming's in the dismissal of the Complainant.

#### *Decision to dismiss*

55. Ms Cumming also stated in her evidence-in-chief that:

*"22. After a period six months, the decision was taken by the Committee to make the Claimant redundant. It was not because there was a diminution in the type of work that was required of the National Secretary but because there was a diminution in the requirement of the National Secretary to undertake that work, which has now been split between the GGCA Committee members, in a manner that increased the GGCA's efficiency.*



23. Although the rules and Constitution specifically state that the GGCA Committee shall appoint a National Secretary, the decision taken by the Committee to make the claimant redundant was deemed to be in the best interests of the GGCA members as it would mean that greater financial resources could be made available to members.

24. The Committee has, since the 23<sup>rd</sup> October 2013, split the functions and roles of the National Secretary between the committee members and the GGCA's administrative staff. Although there is no one-person who answers to the title of National Secretary, the committee and staff at the GGCA continue to discharge the functions of the National Secretary in a manner according to the Rules and Constitution. The absence of the Claimant, or any other person with the title of National Secretary has not impeded the work of the GGCA which has, since I took over as president, functioned on Committee members taking facility time to undertake union duties.

25. The workload previously (being) handled by the National Secretary has been effectively distributed and the Committee has not felt the need to employ someone as National Secretary since the Claimant's departure."

56. On cross-examination, Ms Cumming said that the first discussion concerning dismissal took place in late summer 2013, which was well after the Complainant said he was made aware by Mr Garcia on or prior to May 2013 of the Executive Committee's desire to dismiss him or encourage him to leave. Ms Cumming explained that as the Executive Committee got more involved in carrying out its duties, the Complainant's duties decreased, and it became increasingly obvious that it was not viable to retain him. She could not say who had proposed this initially. As to the meeting on 16<sup>th</sup> October 2013, Ms Cumming could not even recall whether there had been any discussion about whether to make him redundant or not, but believed that it was possible that very little was minuted because there had been many prior discussions not involving formal committee meetings, and a decision had already been taken in effect. The decision was unanimous.

57. Ms Annabelle Desoiza's evidence in chief as the Vice-President was that (emphasis in bold added by me):-

"6. ....We soon realised that he was redundant and that the GGCA could save on his salary and various benefits without disrupting the service provided to members.

7. On or around 23<sup>rd</sup> October 2013 the five Committee Members, being Wendy Cumming (president), Anthony Morillo (treasurer), Joseph Manuel Bonavia (voting member), Charles Avellano (voting member) and myself, **met to discuss the Claimant's future and a unanimous decision** was taken to make him redundant for the reasons outlined above. The Committee decided to make a payment to him equal to one year's salary (which is what he would have received had we believed that he was entitled to a redundancy payment). The Claimant was then called into the GGCA premises and was informed in front of the Committee of its decision to make him redundant. The treasurer explained that the Claimant would be paid a total sum of £65,401.61, which included the sum of £49,776.00, being a redundancy payment equivalent to 1 year's salary (tax free).

8. There is no person employed by the GGCA with the title "National Secretary". **The duties of the National Secretary (as outlined by the GGCA's Constitution) are split between the Committee with the assistance of GGCA's administrative staff."**

58. Apart from the fact that Ms Desoiza got the date wrong as to when the Executive Committee met to discuss and agree the dismissal, namely on 16<sup>th</sup> October 2013, she gave the distinct impression in her Witness Statement that that meeting was to discuss the Complainant's future. There was no reference to any prior impromptu/informal discussions. On cross-examination Ms Desoiza had no idea, despite being the Vice-President, of who on the Executive Committee came up with the idea of abolishing the position of National Secretary, or when this was first discussed. She said it was possible that she signed the minutes of the 16<sup>th</sup> October 2013 in the last few days, but she could not remember. Her recollection was not only extremely poor, but she appeared totally disinterested, or oblivious, to the importance of the decision to dismiss the Complainant, the Respondent's General Secretary, and CEO of 13 years.

59. Mr Anthony Morillo's evidence-in-chief was that (emphasis in bold added by me):-

*"7. The Committee discussed the need for a specific person to discharge the role of National Secretary and given that between March 2013 to October 2013 the union had ran smoothly with the decreased input from the Claimant a decision was taken that if he were to be made redundant then the money used to cover the cost of employing him could be made available to service the members' needs. In essence, although there was still the same amount of work, the active management by the Committee meant that the work was spread evenly around the elected committee members. There was no longer a need for someone to be employed under the title 'National Secretary' to discharge those functions. It is noteworthy that in the 16 months since the Claimant's departure the GGCA has run smoothly and no one else has been employed in the role of National Secretary.*

**8. In October 2013 the Committee met and took the decision to make the Claimant redundant.** *The Committee decided that as a union, the GGCA should give to the Claimant a redundancy payment equivalent to one year's salary even though we believed that he was not entitled to this under Gibraltar law as a gesture of good will and because as a union, it must treat its members and employees in accordance with the standards expected of it. The Claimant was then called into the board room and was informed in front of the Committee of its decision to make him redundant. I explained to the Claimant that he would be paid a total sum of £65,401.61, which included the sum of £49,776.00, being 1 year's salary (tax free). The Claimant asked what the payment of £49,776.00 was. I replied that this was a redundancy payment. The Claimant made no mention about a gratuity nor did he say that he had a contract until he was seventy years old."*

60. Mr Morillo's evidence on cross-examination was that the Executive Committee began discussing the possibility of dismissing the Complainant informally at the end of August 2013/beginning of September 2013 as they had begun noticing that there was less and less work for the Complainant to do as the Executive Committee was taking over his duties, and hence the reference in the letter of dismissal to "*after much deliberation*", as they were considering whether they could use his experience in some other way or retain him in a different role. That was almost 3 months after Mr Garcia first heard the rumours that the Executive Committee wanted the Complainant to leave or resign, and well after the Complainant noticed the reduction in his duties. Ms Cumming had mentioned at that stage to Mr Morillo that the Complainant might have some personal issues in his private life, which Mr Morillo believed worked in his favour by delaying a decision as to which direction the Respondent should be going. At the end of the day, Mr Morillo explained, the Executive Committee had reorganised his workload, and they decided to make him redundant, as he was by then doing very little work having had his duties taken over by the Executive Committee. Mr Morillo

had taken over the Complainant's financial duties and accounts generally. Mr Morillo could not swear that it was him who had suggested the dismissal, but said it could have possibly been him or someone else. If the costs of employing the Complainant, at that stage a mere £14,276 in light of the Grant, was a material consideration with the monies to then be applied to servicing the needs of the Respondent's members, it is difficult to comprehend how this was not properly minuted, and weighed up, against the loss of the General Secretary, the designated CEO under the Constitution.

61. The Minutes of the Executive Committee meeting on 16 October 2013 in relation to the Complainant's dismissal stated: *"MJAT to be made redundant 23<sup>rd</sup> October 2013 at 12.30pm. TM to recalculate payment termination forms and letter, change date and figures and all to sign. CA to bring P7 before Monday"*. Mr Morillo admitted that this was a very short meeting despite the number of matters discussed including the dismissal, and that the meeting could have taken an hour but could not say how long approximately had been spent discussing the Complainant's dismissal. All the documentation for the termination such as the P7A had to be done properly. The Executive Committee had reluctantly come to the decision that the Complainant must be made redundant. There had been prior informal discussions about the dismissal, but none were minuted because they were impromptu discussions. He was fairly sure Ms Cumming would have been present throughout as a full-time official, but it was possible she was not present in some of their earlier discussions. There was discussion as to whether to retain or dismiss him, and they were unclear which option to pursue. There were no objections to his dismissal on 16<sup>th</sup> October 2013. Mr Morillo admitted he had been a firm proponent from the beginning of the Complainant's dismissal, but could not say who the prime instigator was as a collective unanimous decision had been taken by the Executive Committee and no one single individual was seeking this throughout. The minutes of the Executive Committee meeting of the 16<sup>th</sup> October 2016 had been prepared by Denise Viagas, and a few days after they were presented to him to sign, and he signed them. His explanation for the Complainant's dismissal was that the Executive Committee had decided that the Executive Committee/Treasurer had not been functioning in reality without any committee meetings being called, and they had wanted to adopt a more hands-on approach. The Executive Committee realised 6 to 7 months after their election there was no need for a General Secretary.
62. Mr Morillo then admitted, unexpectedly, during cross-examination that during the general review of civil servant terms in 2012, the Executive Committee was involved, and his real criticism was aimed at the other committee members for not doing enough. The Complainant's work for the Respondent had been high calibre, taking on more work than he should have and there was no question of him being a bad worker or being lazy. If he had given that impression in his evidence he apologised.
63. Mr Bonavia's evidence in chief – a committee member following his election onto the Executive Committee in July 2013 was that:-

*"7. It became apparent to me that working together as a committee resulted in greater efficacy and increased service to our members. Our greater involvement as a committee necessarily meant that the requirement for the Claimant to carry out the work was reduced to the extent that the Committee had to query whether the employment of a National Secretary on the Claimant's salary represented good value to the GGCA's members.*

*8. On or around 23rd October 2013 the five Committee Members, being Wendy Cumming (president), Annabelle Desoiza (vice-president), Anthony Morillo (treasurer), Charles Avellano (voting member) and myself, met to discuss the*

*Claimant's future and a unanimous decision was taken to make him redundant. This was because we felt that there was no need for him to carry out work that was now being done by the Committee. The Committee decided to make a payment to him equal to one year's salary (which is what he would have received had we believed that he was entitled to a redundancy payment). The Claimant was then called into the GGCA premises and was informed in front of the Committee of its decision to make him redundant. The treasurer explained that the Claimant would be paid a total sum of £65,401.61, which included the sum of £49,776.00, being a redundancy payment equivalent to 1 year's salary (tax free).*

**9. Although there is no person employed at the GGCA with the title of National Secretary, the role still exists and its functions are being discharged by the Committee members with the help of the GGCA's administrative staff."**

64. On cross-examination Mr Bonavia confirmed that he had not signed the minutes of the Executive Committee meeting of 16 October 2013, and could not even remember that meeting/being there even though the issue of dismissal of the Complainant was the first item on the agenda, because that decision was, in his mind, a progressive decision to dismiss over period of time. He did add that if his name was mentioned on the minutes then he must have been present. Mr Bonavia was not at the stage of life where he could be forgiven for the lack of recollection of important events. This decision involved the dismissal of an employee of 12 years' service, none other than the Respondent's CEO under the Constitution. He explained that "*Bits and bobs*" of work had been given to the Complainant to do, but the Complainant was not contributing in a positive way as he do not accept the Respondent should be run in a democratic manner, and was not happy that Executive Committee had taken over his role and duties. When Mr Bonavia was dealing with the restructure of his department, the Complainant was not very positive or giving proper advice. When asked why these criticisms of the Complainant were not included in his witness statement, he explained that he did not believe these were relevant.

#### *Failure to warn and consult*

65. Mr Tampin described how he was handed the dismissal letter in a brown envelope at the meeting with the Executive Committee on 23<sup>rd</sup> October 2013, which lasted no more than 20 minutes. He read it at the meeting, and was shocked to read its contents. He had expected his employer, as a trade union, to have consulted him before dismissing him.
66. Ms Cumming acknowledged that it was possibly a good thing to have consulted the Complainant as a "*ticking box*" exercise, but it would not have made any difference to the decision to dismiss him.
67. As far as Ms Desoiza was concerned, there was no legal requirement to warn or consult the Complainant about his dismissal, and she could not see what the Executive Committee would have consulted him about. The Complainant had been paid his notice, statutory redundancy compensation and outstanding holiday pay. What else did he want, she asked rhetorically. When asked what tasks the Complainant did, she did not know specifically and had not asked anyone. She was Vice-President, and displayed a complete disinterest in not only the fate of the Complainant, but the detailed reasoning for his dismissal. This was very indicative that Ms Desoiza and Ms Cumming were also on the same page, and there was no independent thought process operating on the issue of dismissal. Ms Desoiza acknowledged that there were no complaints about how the Complainant did his work, but that his duties were redistributed to give members what they had voted for, implicitly referring back to the campaign initiated by Ms

Cumming as from 28<sup>th</sup> February 2013 on the Facebook Group Page, and the serious allegations about the Complainant's conduct.

68. When Mr Morillo was asked why the Complainant had not been consulted about his dismissal he stated that the only requirement to consult in law was when five or more employees were to be made redundant. He believed that the Complainant was aware that something was afoot, as he had expressed his concerns to him. That coincides with what Mr Garcia had communicated to the Complainant about the intended dismissal. Mr Morillo had advised the Complainant that if he felt threatened in any way he should discuss the matter with the Executive Committee. Whilst he stated that with hindsight, and as a matter of courtesy, they should have consulted the Complainant, later Mr Morillo said that he believed that even with hindsight, there was no alternative to termination and therefore no purpose to consultation, as they could not find anything for the Complainant to do.
69. Mr Bonavia was unclear whether as a good trade unionist the Complainant should have been consulted before his dismissal. He explained that the Executive Committee had met with the Complainant on 23 October 2013 when he was handed the dismissal letter, and the decision was unanimous. Explaining why he did not consider it appropriate to allow the Complainant to make representations, he explained that the decision was a progressive one discussed over time, as it was clear the Executive Committee would take a major role in which he participated. The Complainant was not dismissed, he maintained, but made redundant. He did not know whether there was any need to warn the Complainant about the impending decision to make him redundant. In his view, the Executive Committee had been elected democratically to represent the interests of its members, and deal with their issues.

#### *New Facilities Agreement and de facto interim arrangements*

70. In paragraph 24 of Ms Cumming's Witness Statement, she stated that the dismissal of the Complainant/the absence of a General Secretary "*has not impeded the work of the GGCA which has, since I took over as President, functioned on Committee members taking facility time to undertake union duties*". The extent and nature of the facility time that Ms Cumming was able to secure for herself early on was not clear from her Witness Statement. Mr Morillo, on cross-examination, explained that Ms Cumming had spoken to the Chief Secretary of HMGoG shortly after she was re-elected President in March 2013 about facility time, and had secured 100% facility time, informally, for herself. He also confirmed that the Executive Committee had wanted to renegotiate the Original Facilities Agreement, and in the interim had secured facility time on an informal basis whilst the Original Facilities Agreement was re-negotiated. The minute of the Executive Committee meeting of 16<sup>th</sup> October 2013 stated "*facility time for Committee Members 25%...also facility time for section representatives*". Ms Desoza's evidence was that as a consequence of the dismissal of the Complainant, she had been spending, informally, 50% of her working time doing trade union duties, subsequently formalised under the New Facilities Agreement referred to in paragraph 72 below. In January 2014, the Grant was abolished according to Mr Morillo, and which followed the dismissal of the Complainant.
71. The negotiations culminated in a new facilities agreement on 8<sup>th</sup> January 2016 between HMGoG and the Respondent ("*the New Facilities Agreement*"), over 2½ years after the Complainant was dismissed, and which provided inter alia:-
  - a. "*Where Committee Members and Section Reps spend an appreciable portion of their time on representational activities, management, in applying the normal rules of performance and promotability, will take account of*



*knowledge and experience gained and time spent in the course of such activities*"(clause 8(a)). This was meant to ensure that any career minded civil servant was not prejudiced by taking significant facility time to engage in trade union duties;

- b. Under clause 4, the President would enjoy 100% facility time, the Vice-President 50%, the Treasurer 50%, and ordinary committee members between 25% to 50% depending on the workload of the Respondent. This constituted a substantial and material increase in facility time for the Executive Committee, and indicated the value HMGoG attributed to the Respondent as a negotiating partner, and which would be at a potential cost to HMGoG of between approximately £127,000 to £153,000 (without including the cost of the Treasurer when an active civil servant) being £60,000 for the existing President, £39,000 for the Vice-President, the Treasurer (nil at the time as Mr Morillo had retired from the civil service and was not earning a salary), and for ordinary committee members, in the case of Mr Bonavia, an executive officer, at a cost of between £7,500 to £15,000, Mr John Escumalha between £8,000 to £16,000 and for Mr Daniel Sisarello, a HEO in the audit office, earning approximately £46,000, between £12,500 to £23,000;
- c. Under clause 6(a)(1) HMGoG provided for a clerical officer on secondment to the Respondent at the expense of HMGoG.

#### *Understanding of the Constitution*

- 72. The Respondent's witnesses attributed little or no importance to the Constitution. Whilst the Executive Committee Meeting of 16<sup>th</sup> October 2013 assigned Ms Desoiza to review and advise on the tenancy agreement for the Respondent's offices being rented at a low annual rent of £780.00, it did not appear to attach any importance to reviewing or considering the Constitution in a similar manner when considering the Complainant's dismissal. Ms Cumming, the President, had been practising as a lawyer in Gibraltar since 2002, been appointed an Official Receiver and been a member of the Respondent since 2005/2006. She could not remember precisely when she had first read the Constitution, but it was quite late on. She could confirm that she had seen it before the Complainant was dismissed. When she did read it, she did so as President and not the Respondent's lawyer, as she was a trade union leader and not the legal representative of the Respondent. She admitted that she was not sure how the Constitution functioned and did not have a perfect understanding of it, but was familiar with it. In her view, the importance of the role of General Secretary was determined by the Executive Committee, and if the post and duties of General Secretary were split up and absorbed between the Executive Committee, the Executive Committee members became de facto General Secretary irrespective of what the Constitution said. Most important in her mind, was that neither the Executive Committee nor sector committees were properly functioning. She believed that the Constitution did not fit like a glove, but had not considered calling a special meeting of the Respondent to change the rules pursuant to rule 9 of the Constitution. This explanation rode on the back of the Policy, which in itself was based on the allegations she had made on the Facebook Group Page.
- 73. Ms. Desoiza, the Vice-President of the Respondent, a qualified lawyer since 1997 and former Registrar of the Supreme Court and Admiralty Marshall, was unclear in her evidence as to whether she had read the Constitution before the Complainant's employment was terminated. When asked whether if she had read the Constitution she would have appreciated, as an experienced lawyer, that the Constitution needed to be amended pursuant to rule 9.1, she answered repeatedly that the Constitution was for the members, and not its employees. When asked whether the membership were consulted about the change in the

Constitution, she accepted that they were not asked even though the Constitution specified the duties and role of the General Secretary. In her mind the duties of General Secretary were being carried out by the Executive Committee on the basis of its mandate received in a democratic election by the members that voted it in. She accepted there was no manifesto which members had voted for the removal of the General Secretary. The General Secretary's principal duties under r 6.2 of the Constitution were being carried out in turn by the members of the Executive Committee and some of the Respondent's employees the Policy was being implemented. As a consequence, the Complainant had not been replaced, and his duties simply redistributed to others.

74. Mr Bonavia first read the Constitution after the Respondent's dismissal.

#### *Benefits for the Respondent*

75. Mr Morillo explained that the monthly income from members subscriptions had increased from £16,000 at the time of the Claimant's dismissal to approximately 16,500 to £16,700 at the time of the hearing. The Respondent's financial balance at the time of the Complainant's dismissal was £400,000, which Mr Morillo attributed to the Complainant's efforts in a big way and good management, and at the time of the hearing in March 2016 was £534,000.

76. Mr Morillo also explained that there were more annual training courses available costing £7000 inclusive of flights in the previous year, a proposed refurbishment of the offices which was at its very initial stages with architects drawings but no quotes for the cost of the works, advertising had increased and efficiencies had been made, so that generally there had been better investment in infrastructure and personnel. Rent for the Respondent's offices was a mere £65 per month. Information technology improvements had cost £2000 in the previous 12 months.

77. Ms Cumming in answer to Mr Gomez' questions that the cost to the taxpayer was significantly higher, that the Respondent's finances had not increased appreciably over three years since the Complainant's dismissal, and that the only beneficiary was Ms Cumming who could now devote herself to a full-time trade union career, and was no longer working as a civil servant, explained that the membership had grown, negotiating rights with Master Services, the Bus Company, Rock Hotel, Kings Bastion had been agreed, and that the Respondent was growing as a trade union. She was working harder for the Respondent than as a civil servant, doing the job of a full-time union official in much the same way as the Complainant had been doing. Ms Cumming's confirmed that with the Complainant as General Secretary the Respondent's membership had grown from 530 to 1200, and that by the time of the hearing it stood at approximately 1800 to 1900 members.

#### **Findings and determination**

79. There was a dismissal of the Claimant by the Respondent on 23<sup>rd</sup> October 2013, as the Complainant alleged, and the Respondent admitted. The Complainant was an employee of the Respondent and as such could be dismissed at the will of the Executive Committee pursuant to rule 6.1(1) of the Constitution, fairly or unfairly, and that is the question I have to determine.

80. The Respondent's alleged potentially fair reason for dismissal was redundancy, or a reorganisation of the manner in which the Respondent's affairs were run, as it alleged that the requirements for the Complainant to discharge his duties as General Secretary had diminished by reason of the Respondent's Executive Committee reorganising its operational structure and redistributing his duties to the Executive Committee and its remaining employees, leaving the Complainant with less and less duties to carry out, and there was no longer a need for the



Complainant to do this particular work. The position of General Secretary still existed with its distinct duties under the Constitution, but I accept that the Complainant could have been made redundant notwithstanding that no special resolution had been passed by the Respondent's membership for that post to be abolished under r 9(1) of the Constitution at the time of his dismissal: *Safeways, Robinson and Bromby, supra*. If I had not so found, then the effect of the Respondent's actions was to reorganise its affairs in such a way that there were less duties for the Complainant to do such as might potentially constitute a "substantial ground" under section 65(1)(b), and those facts existed at the time of the dismissal even if the incorrect label had been used. However, and even though the threshold for establishing discernible benefits to the Respondent is low and the test subjective (*Kerry Foods, Gilham, supra*) to establish this as a potentially fair reason, I would not have so found. The Policy was entirely misconceived, based as it was on the allegations levelled at the Complainant on the Facebook Group Page as General Secretary without having any regard to the shortcomings of the Executive Committee itself, the Constitution, how it functioned, why it was structured in that manner and any reputational damage that might be caused to it as a registered trade union by acting in this manner. If economies/efficiencies were in mind when this decision was taken this would have been calculated and recorded somewhere, but no such documentary evidence was adduced. The minute of the Executive Committee Meeting of the 13<sup>th</sup> October 2013 was silent on this. By the time of the hearing in March 2016 the Respondent's witnesses could refer to increased subscriptions and membership, but by then the substantial informal increases of facility time for the Executive Committee had meant that the Executive Committee was spending far more time carrying out trade union duties, but at the expense of the taxpayer. There was no discernible need to get rid of the General Secretary who, by virtue of the Grant, was only costing the Respondent £14,276 per annum and performed an important function under the Constitution.

81. The Complainant challenged whether either of those reasons could be the true principal reason, and alleged that the redistribution of his duties to others was simply a device/pretext to engineer his forced removal from his position as General Secretary as part of a personal vendetta on the part of the Executive Committee and that it had acted in bad faith given its animosity towards him and the attacks it had made on his integrity and conduct. I am satisfied that the Complainant showed that this was a real issue warranting investigation and had raised serious doubt about the principal reason for the dismissal put forward by the Complainant, and which was capable of establishing a competing reason, for the following reasons:-

- a. The Facebook Group Page exchanges of the 28<sup>th</sup> February 2013 and 29<sup>th</sup> February 2013 evidenced that both Ms Cumming and Mr Morillo, two important and leading members of the Executive Committee that took the ultimate decision to dismiss, had made, encouraged and participated in, serious allegations of misconduct/unsatisfactory performance by the Complainant of his duties, and other general personalised attacks on him ("*the FGP Allegations*"). These FGP Allegations constituted the underlying reasons Ms Cumming gave for wanting to regroup the Executive Committee/get a hold on management/put the Complainant in his place, and in effect, for the Policy. Not all the FGP allegations could be attributed to her or Mr Morillo on 29<sup>th</sup> February 2013, but neither Ms Cumming nor Mr Morillo demurred when anyone else added to their attacks against the Complainant in the Facebook Group Page, and which Ms Cumming had instigated with her initial posting on 28<sup>th</sup> February 2013 as the President of the Respondent, a position of utmost seniority and responsibility within the Respondent. At their most serious, it was alleged that for personal financial reasons the Complainant's position had been compromised and

he was not always willing to act in the best interests of the Respondent's members as he was putting his own personal interests before that of the Respondent's members; that the Respondent's members interests had been lost to the Complainant who was putting his own interests before those of the membership; anyone who tried changing the status quo in the Respondent was removed; that Ms Cumming's efforts at changing working hours, setting up a benevolent fund and reactivating the GTA, all important issues to its membership, had been held back by the Complainant because of his own personal/financial reasons; that the Complainant made decisions that should have been made by the Executive Committee and attended important meetings with HMGoG without the knowledge or ratification of the Executive Committee; that the President was rarely included by the Complainant in meetings dealing with wider issues and had been deliberately left out of these by him; that the Executive Committee was called as and when the Complainant required it even going so far as to suggest, in the case of Mr Morillo, that these actions/omissions on the part of the Complainant might be an attempt by him to conceal financial irregularities in the Respondent's accounts; the clear implication that Ms Cumming's sudden transfer to the HMGoG HR Department and request that she resign as President were so that the Complainant could remain in effective control of the Respondent and do the bidding of HMGoG, coinciding as it did with the Complainant's refusal to permit an Executive Committee meeting on the Respondent's premises following HMGoG's request for Ms Cumming to stand down as President. The disparaging references to the Complainant being "*the paid official*" and a "*dictator*" illustrated a marked contempt and animosity by at least two important members of the Executive Committee for the Respondent's senior official full-time official since 2001.

- b. When asked on cross-examination why the more serious of the FGP Allegations were not mentioned in her Witness Statement as also being the cause of her resigning as President, or in any subsequent minutes of the Respondent giving notice of her resignation on 1<sup>st</sup> March 2013 or after she was re-elected, Ms Cumming's tried to explain these omissions in the manner set out in paragraph 43 of this Decision. She simply repeated the serious allegations she had previously made against the Complainant, and effectively stated that the new Executive Committee took control consequent on those allegations/the mandate it received in those elections, which mandate was based on the FGP Allegations. Despite their serious nature, and attacking his professional integrity for, amongst other things, allegedly putting his own personal financial interests before his professional duties and the interests of the Respondent's members and possible financial impropriety, Ms Cumming maintained that she was willing to continue working with the Complainant and saw the alleged misbehaviour on his part as relevant to her decision to resign as President, but not to make the Complainant redundant, as she had lost faith only in his personal integrity, but not his professional capacity to properly discharge his duties. I do not accept that Ms Cumming could genuinely have believed that. Such serious allegations were relevant not only to her decision to resign as President, but most importantly, to her decision to dismiss the Complainant. If she had lost faith in his personal integrity because he put his own personal financial interests before his professional duties and the interests of the Respondent's members, she had lost faith in his professional integrity. The FGP Allegations formed the basis/platform on which she was re-elected, and the alleged mandate from the membership for the Policy, and the gradual removal and redistribution of the Complainant's duties as soon as she was elected.

- c. Despite the FGP Allegations made by Mr Morillo on the 29<sup>th</sup> February 2013, or in which he partook in or did not demur with, and the level of hostility/contempt he showed for the Complainant, Mr Morillo also omitted to include, or make any reference to these more serious allegations in his Witness Statement. When questioned on why these were omitted, Mr Morillo gave the explanation in paragraph 62 of this Decision, that during the general review of civil servant terms in 2012 his real criticism was aimed at other Executive Committee members for not doing enough. You would certainly not have gleaned that from the Facebook Group Page comments he made, or from his Witness Statement. The Complainant's work for the Respondent, Mr Morillo continued, had been high calibre, taking on more work than he should have and there was no question of him being a bad worker or being lazy. If he had given that impression in his evidence he apologised. In my mind, that apology was late in coming, and wholly inconsistent with his Witness Statement and the FGP Allegations, as were material parts of his evidence. It was nevertheless consistent with Mr Garcia's explanation that when he decided to step down as President, it was because of the pressure and demands of the post, which involved hard work and in particular his private time, and the Executive Committee was undermanned. If Mr Garcia needed facility time, it was regularly granted, but there were very few volunteers, and those who volunteered had their own personal agendas. In other words, the fault lay with the Executive Committee, and not the General Secretary, in Mr Garcia's mind. Mr Garcia's credibility was not questioned, and these admitted failings were never referred to, or questioned, in the FGP Allegations which underpinned the Policy and the alleged mandate from the membership. This would also explain why there was no functioning Executive Committee, Executive Committee meetings, section meetings, and why more often than not, the Complainant would step into that vacuum, and attend meetings on his own would have been part of his daily functions as CEO in any event. The fact that facility time under the New Facilities Agreement was substantially increased for the Executive Committee also indicated that that lack of facility time had been identified by the new Executive Committee as a major issue that needed to be addressed if the Executive Committee was to be able to function effectively. HMGoG acceded to this, informally initially, and then formally in the New Facilities Agreement.
- d. The HMGoG Bulletin indicated that the internal attacks that had been made by the President, and others, at the Complainant had not gone unnoticed when it stated: "7) *Government wish to make it clear that any internal issues being played out within the GGCA constitute a matter solely for its members, with Government playing no role whatsoever*".
- e. The FGP Allegations had shown, in the way spontaneous social media has a habit of doing so well, precisely what at least Ms Cumming and Mr Morillo thought was the problem, namely the improper conduct/unsatisfactory discharge by the Complainant of the Respondent's affairs, despite his role as General Secretary being the exercise of the duties of a Chief Executive Officer. The need "*to take back their own Union*", was effectively from the General Secretary, based as it was on the unsubstantiated and unproven FGP Allegations of impropriety/misconduct on his part as to the manner in which he had conducted himself, and performed his duties as CEO. Mr Morillo's prior history with the Complainant certainly indicated why he would have disliked the Complainant and with which Mr Garcia concurred, but the FGP Allegations made it clear what he thought of the Complainant. Ms Cumming had already admitted that her relationship with the Complainant was fractured

in 2012. Whilst the only members of the Executive Committee involved in the FGP Allegations were Ms Cumming and Mr Morillo, they were the two more experienced Executive Committee members, having been on the Executive Committee since 2007 in the case of Ms Cumming, and at least between 2001/2002 for Mr Morillo. Ms Desoiza, the Vice-President, was a good friend of Ms Cumming, and also stood for election onto the Executive Committee on the basis of the need for change, which confirmed that she had embraced the thinking behind the FGP Allegations and the consequent Policy. She also had her own separate grievance against the Complainant following his refusal to finance her litigation against HMGoG which ultimately cost her £95,000, and was also described by Mr Garcia as a malcontent against the Complainant for that reason. If that was not sufficient, she did not even know what specific tasks he carried out, and had not asked, despite being Vice-President. Such disinterest in the purported reasons for the dismissal, namely the redundancy/reorganisation following the redistribution of the Complainant's duties, indicates the extent to which there was no real deliberation, and this was a decision arrived at earlier than the Respondent's witnesses cared to admit. The FGP Allegations were the reason for the Policy, and the removal of his duties. Whilst Ms Desoiza acknowledged that there were no complaints about how he did his work, his duties were re-arranged to give members what they had voted for. What they had voted for on the totality of the evidence was based on the FBP Allegations. Ms Desoiza stated in her Witness Statement that the meeting on 23<sup>rd</sup> October 2013 was to discuss the Complainant's future. There was no reference by her to any prior impromptu/informal discussions. On cross-examination Ms Desoiza said she had no idea of who on the Executive Committee came up with the idea of abolishing the position of General Secretary, or when this was first discussed. She said it was possible that she signed the minutes of the 16<sup>th</sup> October 2013 in the last few days before the hearing, but she could not remember. The vagueness of her recollection of these events leading to the decision to dismiss, and the decision itself, further evidenced that she was a willing accomplice to the dismissal and the FGP Allegations were the real reason for the Policy, the removal of the Complainant's duties, and ultimate dismissal. Mr Bonavia was equally unclear about the important events leading to the dismissal of the Respondent's CEO. He was unclear whether the Complainant should have been consulted. In explaining why he did not consider it appropriate to allow the Complainant to make representations, he explained that the decision was a progressive one discussed over time, as it was clear the Executive Committee would take a major role in running the Respondent, and that the Complainant was not dismissed but made redundant. He did not know whether there was any need to warn the Complainant about the impending decision to make him redundant. In his view, the Executive Committee had been elected democratically to represent the interests of its members and deal with their issues. On cross-examination Mr Bonavia confirmed that he had not signed the minutes of the Executive Committee meeting of 16 October 2013, and could not even remember that meeting or being there, even though the issue of dismissal of the Complainant was the first item on the agenda, because that decision was, in his mind, a progressive decision to dismiss the Respondent taken over a period of time. He did then add that if his name was mentioned on the minutes then he must have been present. Mr Bonavia's lack of any proper recollection of the alleged discussions that led to the decision to dismiss also indicates either that he was happily led to that decision on the basis of essentially the FGP Allegations which was the thinking behind the Policy, even if he only joined the Executive Committee in July 2013. Mr Charles Avellano, the only other member of the

Executive Committee involved in the dismissal, never gave evidence. In my view this incoherent and vague evidence was strongly indicative that following the FGP Allegations, the dismissal was inevitable after a transitional handover period, and there was never any serious discussion thereafter about the decision to ultimately dismiss the Complainant. The cost of the Complainant, when one applied the Grant, was very low and therefore not a pressing issue.

- f. Both Ms Cumming and the Complainant agree that there had been a breakdown in their relationship in 2012. The Complainant's evidence (paragraph 36 of this Decision) that after shouting at him she had told him that as President she would do her own thing from then is precisely what Ms Cumming did. Her conduct/disrespect for him both then, and thereafter, in the form of the FGP Allegations, the removal of his duties, ignoring him in the office, not affording him an opportunity to properly respond to the FGP Allegations before an independent and impartial decision-maker, failing to consult or warn him about his dismissal, were entirely consistent with Ms Cumming doing her own thing, not involving the Complainant in any genuine discussions and blaming him for all the problems of the Respondent.
- g. Mr Morillo could not have genuinely believed what he said in his Witness Statement that it was only after the Executive Committee were elected in 2013 that they discovered that the Complainant had become accustomed to doing a lot of the Executive Committee's work himself, and that the Complainant had previously attended meetings on behalf of the Respondent and made decisions arising out of those meetings on his own, being precisely what the Complainant had been accused of in the FGP Allegations. There was no fact-finding mission on the part of the accusers. The FGP Allegations constituted the agenda for "Change" on which Ms Cumming had sought her re-election as President and for the Policy. Mr Morillo confirmed this contradiction in his evidence on cross-examination by acknowledging that the Executive Committee, as the elected representatives of the Respondent, were told by its members what to do, and it was their duty to implement their wishes. It was for the General Secretary to support the Executive Committee, and not vice versa. Too much power had been placed by the Constitution in the General Secretary. The election in 2013 was to change the way the Respondent was run. The very important functions of the General Secretary were absorbed into the Executive Committee without changing the rules of the Constitution, because of the mandate given by the membership to change the way the Respondent was run so that the Executive Committee would be actively involved in the day-to-day running of the Respondent. That's why he believed they were voted onto the Executive Committee. They wanted "change", as he put it again on cross-examination. The reason it was decided that the Complainant was not needed is because the Executive Committee believed that they should be doing his work as they were the decision-makers and should adopt a hands on pro-active approach. That was a nice way of putting it, but the reality is that the Policy, and the alleged mandate, had been based on the FGP Allegations. Mr Morillo's inconsistent and incoherent evidence is because it was difficult for him to explain the decision to dismiss without accepting that there existed an inconvenient nexus between the decision to dismiss following the intentional removal and redistribution of the Complainant's duties, and the FGP Allegations. The FGP Allegations constituted the platform on which Ms Cumming sought re-election as President, and which the Executive Committee had clearly adopted and supported, and which led directly to the "change" and the gradual removal of the Complainant's duties by



reason of the Policy, based as it was on the FGP Allegations and the alleged mandate that flowed from them.

- h. After her election as President in March 2013 Ms Cumming did not genuinely wish to work with the Complainant. There is little doubt on the evidence that once Ms Cumming was elected with the other Executive Members, the Complainant's days were numbered, and that the decision to dismiss the Complainant was a foregone conclusion early on and did not happen in the accidental and unexpected manner described by the Respondent's witnesses in their evidence. The dismissal was a question of when, not if, after the elections in March 2013. Nor do I accept in light of the FGP Allegations that the decision to dismiss the Complainant was reluctantly arrived at by the Executive Committee as stated in their letter of dismissal. My reasons for so finding are:-
- (i) The FGP Allegations demonstrated a strong hostility towards the Complainant, and had been instigated and driven by Ms Cumming, as President;
  - (ii) The Complainant being tasked with preparing a database for historical personal injury claims was indicative of no more than an orderly handover exercise for someone who had been at the helm since 2001, combined as it was with an immediate reduction of his more important daily duties/role/profile as CEO, and the prelude to his ultimate dismissal;
  - (iii) The Complainant's evidence was in marked contrast to that of Ms Cumming who felt that his relationship with her had ended, that he had been marginalised not only by being restricted to ad hoc duties including attending meetings to take notes but not to participate (which attendance stopped shortly after March 2013), and made uncomfortable working in the Respondent's offices as he was being visibly ignored by Ms Cumming and other Executive Committee members. They were using a different entrance to enter the Executive Committee room to avoid contact with the staff, and even when they did enter via the main staff office, both Ms Cumming and Mr Morillo would speak to the other staff members but not the Complainant. Nor would this have gone unnoticed by the other junior employees of the Respondent. Mr Garcia, who had originally encouraged Ms Cumming to stand as President in 2012, and whose general credibility as a witness, and his recollection of these specific events until he left in May 2013, was not materially challenged, observed that the Complainant was not invited to a number of meetings with members, was totally ignored, sat at his desk in the corner of the Respondent's offices, with Executive Committee members, three in particular, not even acknowledging his presence there. The Complainant was waiting to be given jobs to do because the Executive Committee had redistributed his duties to themselves. Ignoring and marginalising the Complainant in this manner was not only deliberate and intentional, but entirely consistent with the hostility shown towards the Complainant, and the serious nature of the FBP Allegations.
  - (iv) Mr Garcia's evidence that immediately after the meeting on or about 1<sup>st</sup> March 2013 when Ms Cumming tendered her resignation as President he heard a conversation outside the Respondent's offices between members of the Respondent that the Respondent needed "to get rid of" the Complainant, was consistent, at the very

least, with the effect the FGP Allegations could be expected to have had on the wider membership, if not the Executive Committee, and the effect they had had. One can reasonably assume that those FGP Allegations were repeated verbally in Ms Cumming's resignation speech, and her bid to be re-elected President in 2013, and thereafter.

- (v) Mr Garcia's evidence that he heard rumours later in the "*grapevine*" that the Executive Committee were contemplating dismissing or encouraging the Complainant to leave as his employment would end by one means or another, was confirmed by the Complainant to have been communicated to him by Mr Garcia before he left in May 2013. Mr Garcia's evidence in this respect was, of course, hearsay and to which I would not normally attribute much weight given the nature of the hearsay, but such rumours were entirely consistent with both the FGP Allegations, and the behaviour of Ms Cumming and the Executive Committee immediately after their election in March 2013 in reducing the Complainant's role/profile and duties, and effectively ignoring/marginalising him. Such behaviour could well have encouraged the Complainant to resign given the manner in which he was being treated, and the rumours were consistent with the Executive Committee's actions.
- (vi) That the Executive Committee was considering the Complainant's dismissal early on and contrary to the Respondent's witnesses evidence, is supported by the inconsistencies and vagueness in their evidence as to the decision-making process that led to the decision to dismiss the Complainant. The only documentary evidence of that important decision, namely the minute of the meeting of the 16<sup>th</sup> October 2013, simply stated "*MJAT to be made redundant 23.10.2013 at 12.30pm*". Nothing could be gleaned from that as to what was discussed, or in understanding the reasons for the dismissal. Nor were there any prior minutes showing any deliberations as to the Complainant's future. Ms Cumming could not even say, as President and the person who led on the FGP Allegations, who initially proposed that the Complainant be made redundant. She could not even recall whether there was any discussion at the meeting on 16<sup>th</sup> October 2013 about his redundancy, saying that it was possible that very little was minuted because there had been many prior informal discussions since the first discussion in late summer 2013 and a decision had already been taken in any event before that meeting. She could say that the decision was unanimous. Ms Desoiza did not refer to prior informal discussions, and had no idea of who came up with the idea to make the Complainant redundant or when it was first discussed. It was even possible she had signed the minutes of the meeting of 16<sup>th</sup> October 2013 in the few days before the hearing. She had no idea what duties the Complainant carried out, and she had not asked, despite being the Vice-President. Mr Morillo could not say whether it was him who had come up with the idea of making the Complainant redundant, although it was possible, and this was first discussed by the Executive Committee at the end of August/beginning of September 2013. The discussions leading up to this decision had been impromptu and informal discussions since August 2013 and therefore not minuted. He could not say how long had been spent discussing the Complainant's dismissal on 16<sup>th</sup> October 2013. He admitted he had been a firm proponent of the dismissal, but could not say who the prime instigator was as it was



a collective decision, but unanimous. Mr Bonavia could not even remember the meeting, being there, but could recall that the decision had been a progressive one taken over time. He had not signed the minutes of the meeting of the 16<sup>th</sup> October 2013 but could recall that the decision was unanimous. Nobody could remember when the meeting started on 16<sup>th</sup> October 2013 or anything that was said. The vagueness, and evasiveness, of the Respondent's witnesses as to the manner in which it was determined that the Complainant should be dismissed after 12 years of service as the Respondent's CEO, and their deliberations, two of whom were qualified lawyers, leads me to one inescapable conclusion, namely that there was never any serious discussion between the members of the Executive Committee about the Complainant's dismissal after the FGP Allegations. As soon as they were elected (with the exception of Mr Bonavia who was elected in July 2013 but appears to have bought into the thinking behind the Policy), the Executive Committee began taking over the Complainant's duties and ensuring an orderly handover of his duties/information during a transition period, which included the compilation of databases on existing claims. The only real discussion would have been how to explain the dismissal after that transitional period. The fact that the Complainant had been accused of serious misconduct/bad performance in the FGP Allegations before he was steadily stripped of his duties so that there was little or nothing left for him to do was not mentioned in the Respondent's Witness Statements because it would reveal the clear nexus between the FGP Allegations and the dismissal, and what occurred between those two events.

- (vii) The failure to warn or consult the Complainant about the intended dismissal, or to discuss whether to retain him (with the exception of Mr Morillo who said there was discussion as to whether to retain or dismiss him, and the Executive Committee were unclear which option to pursue, but then said that whilst they should have consulted him, there was no alternative but to dismiss), was also indicative that the decision to dismiss the Complainant had already been decided. Ms Cumming said it would have been a good thing as a "*ticking*" exercise, but it would have made no difference to the decision. Ms Desoza could not see what they would have had to consult the Complainant about. Mr Bonavia was unsure. The reality is that retaining him in any alternative role after the elections in March 2013 was simply unacceptable to the Executive Committee given the reasons why his duties had been reduced immediately after the elections. They did not wish to do so as the purpose of any genuine consultation might have defeated the very intention and underlying reason behind the dismissal, namely to be rid of the Complainant.
- (viii) Whilst unclear from Ms Cumming's evidence, it was clear from Mr Morillo's evidence on cross-examination that Ms Cumming had secured, informally, 100% facility time for herself shortly after her re-election in March 2013. She was therefore able to spend her entire working time as a full-time union official. This was not what the Constitution had been based on given the terms of the Original Facility Agreement, and the need for a full-time union official who was not a member of the Executive Committee.

- (ix) The fact that the Executive Committee had little or no regard for the Constitution, despite two of them being qualified lawyers, was indicative of the disregard for the duties/role of the Complainant, and the single-minded belief that following the FBG Allegations and their election they enjoyed a mandate from the Respondent's membership to make the changes they had argued for, and to dismiss the Complainant. Ms Cumming was not sure how the Constitution functioned. Mr Bonavia first read it after the dismissal. Ms Desoiza was unsure if she had read it before the Complainant's dismissal, but was of the opinion that the Constitution was a question for the Respondent's members and not its employees. This was despite the fact that under the Constitution the Complainant was the Respondent's CEO, responsible to the Executive Committee for the implementation of its policies and the daily management of the affairs of the Respondent, and to advise the Executive Committee. It was a very important role, and held by the Complainant since 2001. Under the Original Facilities Agreement HMGoG had agreed to pay a Grant of £35,500 per annum for the Respondent to employ a full-time trade union official as it did not want civil servants neglecting their normal working duties, and therefore paid for someone else to do that trade union work on a day to day basis. The Grant had been applied to paying the major part of the Complainant's salary, leaving a small balance of only £14,276 to be paid by the Respondent. On the back of the FGP Allegations, the Respondent effectively replaced its full-time General Secretary under the Constitution with a full-time President, and more active Executive Committee as a consequence of it negotiating increased facility time with HMGoG, having gradually removed the duties from the General Secretary during a transitional period and without any special resolution being passed under r 9(1) of the Constitution.

82. Having found that there were two competing reasons for the Respondent's dismissal, the question for me to determine is, am I satisfied that the Respondent's principal underlying reason for the dismissal was redundancy, and which is a question of fact for me to determine? I am not. The first point for the tribunal is the purely factual question: what was the reason for the Complainant's dismissal as General Secretary? As was said by Cairns LJ in *Abernethy v Mott, Hay & Anderson* [1974] ICR 323, 330B: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee". I find that the alleged reason advanced by the Respondent was a pretext, and it was not the principal reason for the Complainant's dismissal. The Executive Committee's actions and behaviour after March 2013 were driven by the serious FGP Allegations, none of which had been substantiated, and which had been instigated by Ms Cumming, as President of the Respondent, expressly supported by Mr Morillo and embraced by the other members of the Executive Committee. The fact that the FGP Allegations were then played down subsequently in the witness statements of the Respondent's witnesses is indicative that they realised how prejudicial these spontaneous outbursts on social media had been to the purported reason for dismissal relating as they did to serious accusations of misconduct/dissatisfaction with the Complainant's performance of his duties. The subsequent treatment of the Complainant by the Executive Committee immediately after March 2013 by reducing his duties/profile, and marginalising and ignoring him to a material degree, demonstrated that that continuing hostility towards him and was the real cause of his dismissal.

83. The Complainant maintains that at no point did he accept a payment from the Respondent on the grounds of redundancy but accepted the payment of £49,776 as a part payment for the loss of his employment and as a payment on account of the basic award and damages to which he was entitled for unfair dismissal as he explained by letter dated 31st December 2013 to the Respondent. I do not accept, or find, that such conduct on the part of the Complainant constituted acquiescence in his dismissal by reason of redundancy, in law or in fact.
84. Having failed to show a potentially fair reason to dismiss the Complainant under section 65(1) of the Act, the Respondent is unable to discharge the burden of establishing the principal reason for the dismissal. In the absence of a potentially fair reason for the dismissal, there is no requirement to consider the fairness or otherwise of the reason for that dismissal pursuant to section 65(6) of the Act: *Post Office Counters v Heavey (1990 ICR 1, 6B)*. The dismissal is unfair.
85. If I had held otherwise, and that the principal reason for the dismissal was a redundancy, I would have found that the Respondent had acted unfairly in treating either reason as sufficient to dismiss the Complainant without warning or consulting him about his dismissal. On a redundancy, consultation is one of the basic tenants of good industrial relations practice, and normally takes place before a final decision to dismiss is reached. The fact that the Respondent is a major trade union in Gibraltar would not deprive it of the protection of the "*band of reasonable responses*" test, namely the hypothetical reasonable employer. However, the hypothetical reasonable employer would have warned and consulted the Complainant about this dismissal but the Respondent had closed its mind to any possibility other than the dismissal of the Complainant. The Complainant had been General Secretary since 2001, and his position still existed under the Constitution. No special resolution had been passed to abolish that position. At the time of his dismissal, the New Facilities Agreement had not yet even been agreed, and would not be until 8<sup>th</sup> January 2016, over 2 years later. The Grant of £35,500 was still being paid to the Respondent to employ a full-time trade union official by HMGoG, and would have continued but for his dismissal. The continuing cost to the Respondent of employing the Complainant was a mere £14,276. There was £400,000 in the Respondent's coffers. The purpose of giving as much warning as possible of an impending redundancy, and consulting with him, was so that a fully informed decision could be taken, allow him to understand the grounds of his dismissal, explain his own personal situation, give him an opportunity to comment on the decision prior to any decision to dismiss, to consider possible alternative solutions to redundancy including alternative work with the Respondent and to satisfy themselves that none was available before dismissing for redundancy. Mr Morillo stated that the Executive Committee had in fact had a discussion about whether to retain or dismiss him, and they were unclear which option to pursue. If so, why not discuss this with the Complainant as the most affected party? The Complainant had already indicated that he was willing to take on whatever role he was given. No reasonable steps were taken by the Respondent to see if he could fit into any other position within the Respondent before he was dismissed which would include exploring with the Complainant the possibility of jobs in subordinate posts even if it amounted to a demotion. The Complainant's advisory role under r 6.2(1)(a) of the Constitution was still required, especially as neither Ms Cumming and Ms Desoiza appeared to consider that their legal qualifications meant they should understand/advise on the terms of the Constitution. The Complainant would no doubt have suggested that the Executive Committee's negotiations to substantially increase facility time for themselves, with the ultimate overall cost of running the Respondent increasing at taxpayers expense, would address what both Mr Morillo and Mr Garcia had highlighted were the previous shortcomings of the Executive Committee as being the principal problem, and which was still being addressed at the time of the Complainant's dismissal. HMGoG had been willing early on to

improve the terms of the facility arrangements, by giving Ms Cumming 100% facility time, and increasing it for others to 25% by 16<sup>th</sup> October 2013, albeit on an informal basis until the New Facilities Agreement was signed. The reactivation of an efficient Executive Committee did not require the Respondent to be dismissed.

## Remedies

### *Re-engagement*

86. I am first required to consider whether it would be practical, and in accordance with equity, to make a recommendation for re-engagement, and if so, the terms on which I consider it would be reasonable to do so: section 70(1) of the Act. Given the breakdown in the relationship between the Complainant and the Executive Committee, and in particular Ms Cumming, having both of them working full-time in a small office such as the Respondent's if I were to make such a recommendation, as well as the fact that the Complainant intended retiring on 25<sup>th</sup> June 2016 when he reached the age of 70, it would not be practical or equitable to make such a recommendation. Therefore I must make an award for compensation: section 70(3) of the Act.

### *Compensation -general*

87. At the time of his dismissal, the Complainant was earning £49,776 per annum. He was paid £49,776 by way of statutory redundancy compensation ("SRP"), 19 days annual leave and 3 months wages in lieu of notice. The wages in lieu of notice meant, in essence, that the Complainant was paid wages up to and including the 24<sup>th</sup> January 2014. The Complainant was engaged a month later by HMGoG on a 2 year fixed term consultant's contract at the end of November 2013 in relation to the MOD rundown in areas he had acquired expertise on whilst working for the Respondent, at an annual salary of £24,000. He had expected to continue working for the Respondent until 70, namely to 25<sup>th</sup> June 2016.

88. Notwithstanding the repeal of the Industrial Tribunal (Calculation of Compensation) Regulations 1992 ("*the Repealed Regulations*") under regulation 4 of the Employment Tribunal (Calculation of Compensation) Regulations 2016 ("*the New Regulations*"), paragraph 5 of the New Regulations provides that any calculation of compensation on a complaint which on the date of the commencement of the New Regulations, namely on 13<sup>th</sup> October 2016, had not been determined, is to be determined in accordance with the provisions of the Repealed Regulations. I will therefore determine this compensatory award on the basis of the Repealed Regulations.

89. Under section 71(1) of the Act:-

*"Where in any proceedings on a complaint brought under section 70, the tribunal makes an award of compensation to be paid to a party to the proceedings (in this section referred to as "the party in default") to another party (in this section referred to as "the aggrieved party") the amount of compensation shall be calculated in accordance with the provisions of section 72 and in relation to payments provided for in subsection (2) of that section shall be such amount as the tribunal considers just and equitable in all circumstances having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates, insofar as that loss was attributable to action taken by or on behalf of the party in default".*

90. Section 72 of the Act provides:-

*"72(1) Where a tribunal has determined that compensation shall be awarded to a person who has presented a complaint under section 70, the tribunal shall award a basic payment of the prescribed amount.*

*(2) Where in accordance with subsection (1) a tribunal has determined that compensation shall be awarded, the tribunal may award an amount in compensation of any loss suffered by the person and in determining that loss in accordance with the relevant provisions of section 71, no account shall be taken of any payment made by virtue of subsection (1) of this section.*

*(3) The maximum amount of compensation that may be awarded by virtue of subsection (2) shall not exceed the prescribed amount."*

91. Regulation 2 of the Repealed Regulations provides that:-

*"The amount of the basic award provided in section 72 (1) of the Act shall be £2,200 or such higher amount as the tribunal, at its discretion, shall determine."*

92. Regulation 3 of the Repealed Regulations provides that the prescribed amount for the purposes of section 72 (3) of the Act is the lesser of either (a) 2 years' pay for the Complainant (£99,552.00); or (b) the amount which is 104 times the amount specified as weekly remuneration in the Schedule to the Conditions of Employment (Standard Minimum Wage) Order 1989 (the weekly minimum wage with effect from 1<sup>st</sup> August 2017 is £251.55 (£6.45 per hour x 39) x 52 x 4)(£52,322.40). So the maximum upper limit that I can awarded by way of the compensatory award is £52,322.40.

#### *Basic Award*

93. I must make a basic award of at least £2,200. Any higher amount is at my discretion to determine. Whilst it is uncapped, and there is no statutory framework as to how I should exercise my discretion in determining a higher amount than £2,200 (if any), the Tribunal should:-

- a. Give effect to the ordinary meaning of the word "basic" in the general context of the relevant statutory provisions, even if it is uncapped. The general scheme of the Act is to provide for the compensatory award in section 71(1) to compensate for the financial "loss" actually suffered subject to the statutory cap. The basic award is to provide for what it says, a basic amount of compensation, that is a "base" sum, with the proviso that it cannot be less than £2,200;
- b. It is otherwise an unfettered discretion, but like any judicial discretion, should not be exercised in an arbitrary or capricious manner, or at a whim.

94. The FGP Allegations, posted on the Facebook Group Page of the Respondent's members, were deeply hurtful, humiliating and accusatory. The Complainant was never allowed to properly defend himself against the FGP Allegations, and which unfairly attributed all or at least most of the blame for the problems of the operation of the Respondent at the door of the General Secretary despite the admitted shortcomings of the Executive Committee, as highlighted by both Mr Garcia and Mr Morillo. The manner in which he was treated from at least the 28<sup>th</sup> February 2013 to the date of dismissal without any proper form of discussion, and being isolated and marginalized in the hope in all probability that he might resign in frustration at his treatment, lacked any humanitarian approach for a long serving senior employee of 12 years of dedicated service. The underlying reasons for that treatment were the FGP Allegations. Obtaining almost immediately after

Ms Cumming's election full-time facility time for her as President, and subsequently increased fixed facility time for each of its other Executive Committee members, indicated that the Executive Committee saw the need to renegotiate fixed, and substantially increased, facility time to replace the prior ad hoc arrangements as a very important issue to address given the evidence of the lack of dedication and commitment of former members of the Executive Committee. It was eventually substantially increased, and fixed, under the New Facilities Agreement. That necessity did not appear in the FGP Allegations as an important issue that needed to be addressed by the Executive Committee. Taking into account all these factors, and the equity of the situation, I consider an increase of £4,000 to be an appropriate higher amount taking into account the Complainant's long record of service for the Respondent since 2001, and the aggravating circumstances surrounding, and leading up to, his dismissal, making a total basic award of £6,200.

#### *Compensatory award*

95. In calculating the Compensatory Award the Tribunal must ignore the Basic Award made of £6,200: section 72 (2).
96. The onus is on the Complainant to establish the loss he has suffered as a consequence of the dismissal which can be divided into two. Firstly, he must prove his loss of earnings from the date of dismissal to the date of the hearing commencing 7<sup>th</sup> March 2016 consequent on the dismissal and insofar as it is attributable to actions of the Respondent, and his estimated future loss of earnings consequent on the dismissal insofar as it is attributable to actions of the Respondent. This also involves the Tribunal taking a view as to how long the Complainant would have been employed but for the unfair dismissal and taking a view as to whether the Respondent would have continued in employment indefinitely, or for a limited period, or whether there was a realistic chance that he would have been dismissed, so that he would have suffered little or no loss which can be attributed to the fact that the dismissal was unfair. The Complainant was in effect paid his full wage up to and including the 23<sup>rd</sup> January 2014 by reason of the pay he received in lieu of notice. By the end of November 2013 he had already secured a consultancy with HMGoG at an annual salary of £24,000 for 2 years which ended at the end of November 2015, although I do not have a specific date of when the consultancy began, and therefore expired. I will assume it commenced 30<sup>th</sup> November 2013 and ended 30<sup>th</sup> November 2015. The Complainant had earned £3,500 approximately between the 30<sup>th</sup> November 2013 to 23<sup>rd</sup> January 2014, whilst working for HMGoG. Accordingly, for the purposes of calculating his loss the starting date is 24<sup>th</sup> January 2014, with a credit of £3,500 in favour of the Respondent. The Complainant intended working until he reached 70, namely 25<sup>th</sup> June 2016, and absent any other grounds for dismissal, terminating by reason of age alone would have been unlikely given the duty to consider provisions of the Equal Opportunities Act 2006, his good state of health at the time of the hearing, and the activities of the Respondent as a registered trade union. I see no reason, why the Respondent acting fairly, should have dismissed the Complainant before his 70<sup>th</sup> Birthday. His actual loss from 24<sup>th</sup> January 2014 to 25<sup>th</sup> June 2016, 2 years and 5 months at £4,148 per month amounts to £120,292 less the credit of £3,500 leaving a net figure of £116,792. From this I must deduct his earnings as a consultant for the period 24<sup>th</sup> January 2014 to 30<sup>th</sup> November 2015 amounting to approximately £44,000 (22 months at £2,000 per month) leaving a net figure of £72,792. Secondly, the loss of any statutory industrial rights which I award at £150. No evidence has been adduced of any loss of pension rights or expenses incurred, or for not enjoying a mobile phone or overtime as a consultant for HMGoG. The total loss is £72,942.



97. Those losses should where appropriate be reduced, firstly, to take into account any sums paid by the employer on an ex gratia or compensatory basis, namely the sum of £49,776 already paid by the Complainant to the Respondent as SRP, leaving a net balance of £23,166. Secondly, deducting any sums earned or which should have been earned by way of mitigation if reasonable mitigating steps had been taken by the Complainant to find alternative employment (section 71(2)). The Respondent has not argued that the Complainant has failed to mitigate his loss, and I have deducted already what he earned as a consultant working for HMGoG. Thirdly, any reduction on a finding that the Complainant had caused or contributed to his own dismissal (section 71(3) of the Act). I make no such finding as he did not. Fourthly, any Polkey deduction. I made no finding justifying such a deduction. The resulting sum does not exceed the maximum permitted.
98. Lastly, I should consider what is it "*just and equitable*" to award as the overriding duty on the Tribunal is to award what is "just and equitable" in the circumstances, and not just the loss. The sum arrived at of £23,166 is just and equitable.
99. The total award I have made in relation to the basic award is £6,200 and the compensatory award is £23,166 amounting in total to an award of £29,366 to be paid by the Respondent to the Complainant following my finding that the Complainant was unfairly dismissed by the Respondent.



**Mark W. Isola QC**  
**Chairperson**

25<sup>th</sup> January 2018