IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

I/T No. 7 OF 2007

BETWEEN:

ALAN CRUZ

Claimant

and

GIBRALTAR COMMUNITY
PROJECTS LIMITED

Respondent

DECISION

Introduction

1. The two persons directly affected by the outcome of this case are Mr. Cruz ("*the claimant*") and Mr. Pecino ("*the respondent's Managing Director*"). They have both had these proceedings hanging over their heads for a very long period of time. I have seen and heard both giving live evidence. I have also encouraged the thorough debate of the evidence for the sake of clarity and in the interests of justice[1].

2. It is for these reasons that this Tribunal wishes to address both witnesses in the order that they gave their evidence so that they understand directly from me the main reasons for my decision[2].

[1] I have also considered the considerable volume of documents filed by the parties.

[2] See rule 14 (1) of the Industrial Tribunal Rules and paragraph 1, page 4, of Bingham LJ's judgment (as he then was) in Meek v City of Birmingham District Council [1987] IRLR 250 (CA) dealing with the equivalent English statutory provision at that time: "*It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsman-ship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted*" [my underlining].

Mr. Pecino

3. You took the decision to dismiss the claimant[3]. Your reasons for doing so are contained in your letter of 18th January 2007.

4. I am entirely satisfied that you had available more than one reason for dismissing the claimant; that two of those available reasons fell within sections 65 (2) (b) "conduct" and (a) "capability[4]" of the EA; and, that the principal reason for his dismissal[5] (based on his conduct and capability) was that he presented an unacceptable safety risk towards your other employees to whom you owed a duty of care.

5. On the afternoon of 22nd June 2006 you received a simple and clear report from three of the claimant's colleagues through their charge-hand (Mr. Berllaque). The claimant did not contact you over this incident until the following day. I am satisfied that you had a short telephone conversation in which the claimant, agitatedly, limited his complaint of the incident to simply repeating to you what he told them: that they [his work colleagues] had tried to kill him ("the allegation").

6. I am satisfied that this telephone conversation reinforced the credibility of the initial report you had received. You knew your workers and their characters and better placed than anyone else to assess the credibility of that report. Furthermore, I am satisfied that you had entertained doubts about the claimant's mental health at that stage but reasonably decided to allow the weekend to pass and await developments.

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[3] On notice with four weeks' pay in lieu thereof – see sections 64 (1), (2) (a) and (5) (a) of the Employment Act (the "EA")

[4] As defined in section 67 (a) EA

[5] Section 65 (1) (a) EA, as read in conjunction with sub-section (2) (a) and (b) and (2) (b) respectively EA

7. Also, it is noteworthy and to your credit that you did not take any disciplinary action against the claimant, at the time or subsequently, for absenting himself from work for almost two days without permission.

8. During the claimant's admission to the KGV Hospital, you were invited to attend case conferences allowing you to monitor the claimant's evolution from an employment perspective over a period of two months and also gave you the opportunity of speaking to him directly.

9. I accept that you were hoping that the claimant, with treatment, would come to realise and acknowledge that the allegation he had made against his work colleagues was unfounded and untrue - in other words, the mistaken product of the claimant's mental state. Had that happened, I am also entirely satisfied that you would have been prepared to give the claimant the benefit of the doubt based on that reassurance that you were reasonably entitled to request for the sake of the respondent's employees and to support your potential decision of allowing him to resume his normal duties at some point in the future upon his recovery.

10. I accept that was not to be so because the claimant persisted in his allegation and even offered to apologise but on the wrong premise. Your refusal to accept that offer is beyond any sensible criticism.

11. I am also satisfied that most of the matters, if not all, contained in Dr. Aparicio's letters to you[5], you would have learnt directly from and would have been well acquainted with through the case conferences. That would have given you and anyone else in your position, considerable cause for concern against the background of the claimant's admission to the KGV Hospital.

12. The claimant's unilateral decision to leave hospital on 25th August 2006 and return to work after that weekend, without doubt, raised serious

[5] 21st September 2006; 13th October 2006; and, 27th November 2006

issues and concerns that you reasonably dealt with by suspending him from work. I find that the claimant was at fault at that stage for provoking and engendering a loss of trust and confidence on your part that was very significant and fast becoming virtually irreparable, which objectively speaking is fully understandable. I saw clear evidence of the remnants of that loss of trust and confidence at the hearing itself, so many years after these events, when I stopped an exchange between you and the claimant when you were giving evidence.

13. I am not satisfied at all, from an employer's perspective, that the claimant's self- discharge from the Hospital automatically justified him dictating terms to the respondent over his decision to return to work and the timing of it. That was unacceptable behaviour which the claimant was attempting to foist upon the respondent.

14. You have been subjected to considerable criticisms for not investigating the incident of 22nd June 2006. It is clear that there were two aspects to this incident. This criticism has some justification from a purely health and safety perspective. If Mr. Cruz had fallen from the scaffold he was working on, we could have ended up having a Coroner's Inquest as opposed to an Industrial Tribunal case. It matters little, in my view, what type of scaffold it was. The window cleaning operation, as you yourself recognised in evidence, was unsupervised and fraught with inherent dangers. Mr. Cruz was working from a substantial height of somewhere between 4.8 and 6 metres from the ground. The scaffold was being moved with the claimant on top and while holding the water hose. You rightly accepted in cross-examination that you would not have done that yourself.

15. Notwithstanding, I am entirely satisfied that your omission is irrelevant to this case. I say so because the claimant did not know of this at the time and, therefore, could not have influenced and/or affected his decision to leave his place of work on the Thursday nor, indeed, his decision not to return to work the following day at all. There was no operative casual link between them. Hindsight is of no assistance to the claimant.

16. Furthermore, having looked afresh at the operational aspects of the incident itself, based on the information requested by the Tribunal before the hearing[6], I am satisfied that even if you had investigated this aspect of the incident at the time, it would have not altered the course of events that followed because you would have still been faced with exactly the same allegation that the claimant had made and the events that followed, which were beyond your control.

17. You have also been considerably criticised for the way in which you gathered the evidence and also the evidence that you obtained about the incident.

18. It will be readily apparent to you that I entirely reject the conclusion of Messrs Vitale, Rodriguez and Cortes (the "*witnesses*") when they all say at paragraph 3 of their respective written statements of 31st October 2006 that this cleaning operation "*thus* [imposed] *no danger*". It is beyond any sensible argument that it clearly did and this was clearly a self-serving assertion on their part.

19. However, that said, I am satisfied that their written evidence on the allegation made by the claimant was entirely consistent with your own direct perception of it when you spoke to the claimant on the Friday and subsequently at the Hospital. I find this has been proved on a balance of probabilities.

20. I am satisfied that you obtained the evidence at the time that you thought appropriate and as dictated by the circumstances. I suspect that if you had done so at an earlier stage, you would have been open to or subjected to the same criticism that you were out from the outset to close doors in order to rid yourself of the claimant. This, in view of my findings

[6] See the Tribunal's letter of 27th September 2010 paragraphs (1) to (5) and the photographs exhibited as AC 19 (A) to (C)

above, would not have been true prior to 25th August 2006[7]. As from that date, I am satisfied that you were well within your right and had more than ample grounds to proceed in the way that you did. The written statements you obtained from the witnesses simply confirmed what Mr. Berllaque had told you on the afternoon of the incident and what the employees had said to you a week or so later after the incident. There was nothing complicated or difficult about the reports which you had received requiring a different and, perhaps, a more scientific approach. I find it was not an unreasonable approach on your part.

21. It is to be regretted that you did not provide the claimant with copies of Dr. Aparicio's letters. You ought to have done so. Firstly, the claimant was entitled to that information as of right. That is why you required his consent in the first place in order to obtain it. Secondly, it would have fully informed the claimant of the situation from the consultant's expert point of view and he would have been free to act upon that information in the manner of his choosing.

22. It is also to be regretted that you did not provide the claimant with copies of your[8] letters to Dr. Aparicio subsequently issued after the claimant signed his Form of Authority dated 7th September 2006.

23. Balancing those two significant short-comings, in terms of fairness, against (1) the claimant's own experience with and knowledge of his own condition and (2) the contents of paragraph 2 of your letter of 19th December 2006, I find, and not without any anxiety, that the claimant was not subjected to any obvious disadvantage and unfairness by your failure to provide all those letters. This Tribunal, it should be known, does not condone such practices and considers that it is not a good industrial practice, in the context of disciplinary matters, for that to happen in any case as a general rule or matter of course. It is not good from the employer's and/or employee's

[7] See further paragraph 7 above

[8] 27th September 2006 and 21st November 2006

perspective and carries inherent risks of unfairness as this case has potentially demonstrated.

24. I am not satisfied that you did this deliberately. If I had been, I would have had no hesitation in holding it against you. I am inclined to hold that you did not disclose those letters because you did not properly apply your mind to the potential consequences and risks of not doing so. You have considerable experience of dealing with ordinary disciplinary matters[9] but, this case was the first experience you had of dealing with, on any view, a difficult and complicated moving situation.

25. You have also come under considerable fire from counsel for the claimant for holding a disciplinary hearing without the claimant being present or having a representative appearing on his behalf. It is perhaps better to call it a decision on the papers.

26. I find that your approach was consistent with the information you had from Dr. Aparicio and you gave your reasons for that decision in your letter of 19th December 2006[10]. I also find that the questions you asked were within that band of reasonable questions that could and might have been asked in the circumstances of this case.

27. Looking at your written disciplinary procedures, there is no provision allowing a representative to appear without an employee. I doubt whether such a facility would prove to be an effective alternative in guaranteeing an employee's right to have a fair hearing, in the context of employment law, when excluded from participation. I do not, however, rule it out as a possibility. Further, I also doubt whether any representative would have been confident and assertive enough to feel comfortable in attending and

[9] See exhibit MP 11

[10] "*But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done*" per Mr. Justice Phillips at paragraph 18, page 6, in East Lindsey District Council v G E Daubney [1977] ICR 556 (EAT).

representing an employee on his own. I simply do not know but, I consider that in this case hindsight cannot come to the assistance of the claimant[12].

28. The issue is whether you had reasonable grounds for doing so in the unusual circumstances of this case. The balance is fairly levelled because an employee's right to attend a disciplinary hearing and defend himself is an important right to every employee and one which Employment Tribunals and Appeal Courts rightly and consistently uphold in favour of employees. It is not, however, an absolute right. Each case must be decided on it own facts and circumstances.

29. I find, and not without any anxiety, that the situation as you saw it between 25th August 2006 and your letter of 19th December 2006 had not really changed significantly. I note though, with considerable surprise, that the claimant did not deal at all with paragraph 2 of your letter of 19th December 2006 in his undated letter which you received on 3rd January 2007.

30. If the claimant's attitude over his medication, cannabis use and the clear effects of the latter on his condition had changed at all during that period, the absence of any representations from the claimant to that effect are noteworthy and significant. In these circumstances, I can only conclude on all the materials before me that you had sufficient grounds for the decision that you took albeit it is a borderline one.

31. Finally, I entirely reject the submission made against you that you brutally and unfairly dismissed the claimant. It was certainly a very tough line that you took as from 25th August 2006 and you certainly took two very tough decisions against the claimant for which, on all the evidence before me, you had sufficient grounds[13]. I, therefore, find that you were within that

[12] The other suggestion made that security measures for the hearing could have been taken is a similarly unattractive suggestion, and with hindsight, in the circumstances of this case.

[13] "*...we do not think it the correct approach to deal separately with the reasonableness of the substantive decision to dismiss, and the reasonableness of the procedure adopted. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances*" per Mr. Justice Browne-Wilkinson (as he then was) at

available band of reasonable responses that any reasonable employer could or might have taken in the unusual circumstances of this case albeit at times very near the borderline of what is permissible procedurally speaking[13].

32. I am sure that you will take your own lessons from this case and bear in mind my observations as an independent and impartial employment tribunal.

Mr. Cruz

33. You worked for this company for over ten years as a craft operative. I am satisfied that you are a pleasant and intelligent man. I am also satisfied that you have a clean work record and that hitherto you have not been an aggressive and/or violent person. That has been openly acknowledged by Mr. Pecino. Firstly, in his letter of 19th December 2006 and subsequently in these proceedings.

34. Furthermore, I reject the suggestion made by Mr. Pecino that I should attach little or no weight to all those signatures that you obtained on 26th October 2006 confirming that you have never been seen to be violent and that you have always demonstrated to be a good colleague. I am satisfied as to the truth of that and that is to your substantial credit.

35. I am also entirely satisfied that you have made very substantial efforts to mitigate your financial losses over the last several years since your dismissal and, that you have not been successful through no fault of your own. That is to your substantial credit as a hard working individual. The incident of 22nd June 2006 proves the point. You went on that scaffold and

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paragraph 27, page 9, in Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT). See further paragraph 28. See section 65 (3) as read in conjunction with sub-section (6) EA

[13] "*...the range of reasonable responses approach applies to the conduct of investigations, in order to determine whether they are reasonable in all the circumstances, as much as it applies to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason*" per Mummery LJ at paragraph 25, page 13, in J Sainsbury plc v Hitt [2002] EWCA Civ 1588 with which Ward LJ and Jonathan Parker LJ agreed.

performed the difficult task of cleaning all those windows at the top of St. Joseph's School probably because your three other colleagues could not do so because of their health, their age in respect of two of them and smaller size. You had the necessary height and reach. You were also the strongest and at no time did you complain about that.

36. I believe that you were probably not happy working in the environment of your section and, in any event, probably not happy doing the work you did for the respondent. I find support for both propositions in the fact that you asked for and were granted the three month reinstatement option on several occasions so that you could try better fortune elsewhere. No one else had this facility extended the same number of times as you did. I am also satisfied that you did try in earnest on each occasion but unfortunately these did not work out for you.

37. I cannot be certain of what active steps you may have taken to have you transferred out of your section prior to the incident of 22nd June 2006 but, it is also to your credit that you stuck it out in this job for over a decade despite your anxieties regarding your working environment as you saw it.

38. You have already heard the main reasons for my decision but, I would like you to consider the rest of what I intend to say.

39. I am satisfied that you were not under the influence of drugs at the time of the incident of 22nd June 2006. I also accept from you that you did not feel unwell at the time and, that it is a pattern with your mental condition that you anticipate its onset and generally deal with it in a reasonable way by seeking help. Like Mr. Pecino, however, I myself entertain some doubt that you were not unwell at the time, particularly because there is no other evidence covering this point.

40. I am satisfied that a few days before this incident you probably did ask Mr. Pecino for the three month reinstatement option and that he refused it. I am also entirely satisfied that you did call him an hour before the incident to

repeat that request. I do not accept Mr. Pecino's evidence in this respect because his recollection/denial of it was not clear to me in his evidence. Furthermore, there is independent support for it in the documentary evidence, which I will now refer to.

41. In paragraph 1 of his letter to you of 19th December 2006 he says, inter alia, that: "*You also informed me recently that I was discriminating against you*".

42. In the 4th clarification of your letter in response you state: "*The fourth clarification is that I only said that you was discriminating me in a telephone call made an hour before the incident, and it was because I asked you for a three month leave to try to make it in another job, your answer was no and it was then that I said it, because that was a right within the company contract I withdrew such a remark immediately, And apologised for saying so but you obviously kept it inside you because you remembered it recently*" [my underlining].

43. In paragraph 2 of his letter of dismissal of 18th January 2007 Mr. Pecino responded: "*I have referred to your allegation of discrimination, because it was made in very close proximity in time to the false allegation made against your workmates*" [my underlining].

44. I have little doubt that that is tantamount to an admission otherwise a clear rebuttal would have followed instead and what you say must have been true.

45. If the three month reinstatement option had been your contractual right, as you thought and stated, the refusal by Mr. Pecino, as a matter of law, could have amounted to a fundamental breach of your contract of employment and your conduct after the incident of 22nd June 2006 could have amounted to an acceptance of that breach by conduct. That was a theoretical possibility and I put it no higher because the contract of employment could have terminated the moment you did not turn up for work

and you could have potentially stood dismissed by the employer. I am not at all satisfied on the papers[14] before me that this was your contractual right to demand and certainly less in the manner that you did[15]. The point was not argued and pursued fully before me either.

46. I am satisfied that you laboured under a misapprehension over your right to demand the three month reinstatement option. Furthermore, I am satisfied that you did not take well the refusals by Mr. Pecino and were deeply hurt by them. You are a sensitive human being, like so many other human beings, and as you acknowledged in evidence, words can hurt you the most. It is something you had not expected from him or understood because he had accommodated you on various occasions and with your private studies. It is true that he did not give you any explanations and this probably did not help matters. Hence, it stands to reason why you reacted in the way that you did bearing in mind you were somewhat fed up of your work and working environment.

47. I find that the incident of 22nd June 2006 happened in the manner that you described it in this Tribunal and in the way that you showed all of us present. I have already said that it was a dangerous and unacceptable way of operating, thus imposing a serious danger to you. I have rejected the evidence of your three work colleagues in that respect.

48. I am satisfied that you reported the incident to the Police to have an independent record of it and that the difference between what you said to your colleagues when leaving the site (and later Mr. Pecino) and what you told the police is so substantial because you had no intention of getting your colleagues into trouble with the police. I am sure that you did not want them

[14] See paragraph 2 of Messrs Triay & Triay's letter of 27th September 2010 and fax from the respondent to 6 Convent Place dated 12th May 1999.

[15] There are also conditions which the claimant obviously did not meet when the request was made

arrested and charged over this incident. Your actions prove this and are independently recorded in the RGP's letter of 15th April 2010[16].

49. However, I am satisfied that this incident provided you with a platform to make your point and take a stand but you took it too far in the accusation that you made to your colleagues and subsequently to Mr. Pecino. Perhaps you did not anticipate that your colleagues would take your accusation seriously enough to tell the managers and you probably misjudged the seriousness of situation you had brought about after the incident.

50. The reason why I say this is because you did not bother to personally report the incident to Mr. Pecino on the day it happened after you had been to the police. You did not bother to come in the following day either in order to do so. You did not bother to come to work either. All you did was to have a short and agitated telephone conversation the following day, which is not an acceptable way to behave. Bearing in mind that Mr. Pecino operated an "open door" policy to all his workers including you, which you acknowledged in evidence, gives away your underlying motivations for this behaviour.

51. In the absence of any explanations from you as to why you behaved in this fashion and what motivated you to behave in this way, I am convinced that you could not face up to Mr. Pecino with what was an unfounded accusation against your work colleagues. Although you had had a low moment with Mr. Pecino, you must have realised to some extent that you could get into serious trouble if you were confronted by Mr. Pecino. You knew, as you said in evidence, that he was a manager that played it strictly by the book and was unlikely to take well to any kind of nonsense from anyone. Alternatively, I find that your mind was set entirely on having a break from work.

[16] The fact that Mr. Pecino did not have this information from the RGP cannot reasonably be held against him. He asked the RGP – see RGP's letter of 26th October 2006 (exhibit MP 2)

52. That leads me to your admission to the KGV Hospital. It is clear to me that your admission was provoked by self-induced intoxication through drugs. That weekend you went on a "*drug binge (cocaine and hallucinogens)*", which is what you said in evidence confirming what Dr. Aparicio stated in paragraph 1 of his letter of 13th October 2006.

53. I am certain that by this stage, you had realised that you had crossed the wrong line with Mr. Pecino. You had probably decided that it was better to take time out and that things would cool down after a while and you could then return to work, as had been the case on other occasions when you had suffered relapses. You made another error of judgment in persisting with your allegation to Mr. Pecino and, misinterpreted his intentions when he asked you to recant from it. He was giving you a fair chance and regrettably you blew it.

54. You made a further error of judgment when you decided quite unilaterally to leave hospital and return to work the following Monday. I find that this conduct on your part was totally unreasonable and you were wrongly forcing your way back to work as if nothing had happened. That adds further weight to my conclusions above that you had no real issues against your colleagues. Your motivations were different but that is something that Mr. Pecino did not know and could not have known. Also, there is no good reason in my mind why he would have been obliged to tolerate if he had known or suspected it. He did not have to put up with this on any account.

55. I find that the accusation you made against your colleagues was a serious and troubling one from their point of view and that of Mr. Pecino even if the police had taken no action. It was at least a substantial nuisance or a serious indication of possible future trouble within the company and notwithstanding that you had never been violent. It was singularly out of character for you and an act of gross/serious misconduct on your part that could have led to your dismissal in any event.

56. Ultimately, there is little that you can really complain about for not having had any of Dr. Aparicio's letters. You are an intelligent man who regrettably suffers from a debilitating mental condition. You know that you are obliged to take the medication that is prescribed to you and with the frequency that you are told. You also know fully well that you cannot consume cannabis or other drugs because that tends to nullify the effectiveness of the treatment that you take. You also know that your condition suffers variations even when you take the medication and are free from drugs. That means that regular monitoring is another absolutely necessary requirement for you to comply with. Your attitude to this, even when giving evidence, did not clearly come across as one of full and total commitment[18].

57. The risks that you take, and you are not getting any younger, are simply going to spoil or mess up your very worthwhile life and the opportunities that it offers you. You are blessed with intelligence, the power of words and gentleness that you should put to better use with hard work and not in the way you have displayed[19], which has resulted in your unfortunate dismissal. This employer did not have to put up with risks willingly taken by you and the potential consequences to others even if to you they seemed non-existent or remote.

58. I also trust that you will take heed of my words in the same way I have just said to Mr. Pecino. I am going to refer you to Mrs. Emily Adamberry-Olivero, MBE, of the Psychological Support Group because there is a very worthwhile project in the pipe-line called the Club House which should go a long way to ensuring that this community gives the necessary support and structure to our citizens in not dissimilar circumstances to your own and outside the available medical facilities that you already make use of. Your

[18] Any misgivings in this respect are fully addressed by the response from Antonio Segovia, Consultant Psychiatrist, at the Community Mental Health Team, dated 17th February 2010 in response to the claimant's solicitors' letter of 24th March 2010

[19] See the sixth clarification of the respondent's letter (exhibit MP 7) as against Dr. Aparicio's conclusion at paragraph 2 of his letter of 13th October 2006, which Mr. Pecino brought to the claimant's attention in paragrapg 2 of his letter dated 19th Decmber 2006

case provides a good example why this project should happen sooner rather than later.

59. I wish you all the very best in life and do not despair because there is light at the end of the tunnel even though it may not seem so to you at the moment.

In all the circumstances, this claim is dismissed[19].

Dated this 28th day of October 2010

Stephen Bossino
Chairman

Counsel
N Cruz Esq. for the claimant
J Acton Esq. for the respondent

Instructing Solicitors

Messrs Cruz & Co for the claimant
Messrs Triay & Triay for the respondent

[19] See sections 70 (2) and (3) EA