

INDUSTRIAL TRIBUNAL

Case No. 19 of 2009

INDUSTRIAL TRIBUNAL
- 6 APR 2011
RECEIVED TODAY

RENE JUNG

Complainant

-and-

TEN PIN BOWLING LIMITED

Respondent

Mr. Kenneth Navas for the Complainant
Mr. Jeremy Acton for the Respondent.

JUDGEMENT

BACKGROUND

On the 5th day of June 2009 (incorrectly referred to as the 12th June 2009 in the Respondents Notice of Appearance) the Respondent dismissed the Complainant, an assistant technician, on the grounds, according to what is set out in the Notice of Appearance filed by the Respondent dated 14th September 2009, that (1) he lacked the capability to perform work of the kind he was employed to do (2) conduct and (3) he could not continue working in the position he had without contravening health and safety legislation. By Originating Application dated the 1st day of September 2009 the Complainant alleged that he had "suffered discrimination on the ground of racial or ethnic origin, victimisation and harassment" and opined that "he was dismissed by the employer due to the colour of his skin".

The Complainant was originally represented by Mr. Nicolas Caetano but sometime in August/September 2010 Mr. Kenneth Navas took over the conduct of the case. The Respondent whilst represented throughout by the same firm nevertheless also had different counsel with the conduct of the case i.e. from Ms. Amber Turner to Mr. Jeremy Acton. I mention this because it has a bearing on what transpired prior to the commencement of the hearing on the 28th October 2010.

In the Notice of Appearance filed by the Respondent Ms Turner complains that "the originating application is insufficiently pleaded, imprecise and discloses no particulars of alleged breaches nor identifies person(s) alleged to have breached "the Act". On the 3rd November 2009, the parties came before me for the first time and Messrs Turner and Caetano asked for an adjournment of a month in order to allow time for the parties to "reconcile". This was granted and the case adjourned to the 7th January

2010. No mention was made about lack of particulars at this time. On the 7th January 2010, Mr. Caetano only appeared before me and requested a further adjournment by consent. The request was agreed to and the case adjourned to May. Again no mention was made about lack of particulars but this is not surprising as Ms Turner was not present. By application dated the 4th May 2010 the Respondent, now represented by Mr. Acton, applied for the Complaint to be dismissed on the grounds that:-

- (a) the acts relied upon by the Complainant to found his cause of action occurred outside the jurisdictional time limit prior to the filing of the Complaint provided for by Statute; and
- (b) the Claimant had failed to particularise his claim, the claim was vexatious and did not disclose an actionable case of discrimination and/or harassment and that the Complainant had no reasonable prospect of success with his claim.

The application came before me on the 11th May 2010 at which time Messrs Caetano and Acton appeared before me. At this hearing it transpired that:-

- (i) by e-mail dated the 30th November 2009 Mr. Caetano had provided Ms Turner with further and better particulars of the Complainants' case. This e-mail and/or its contents had apparently not been forwarded to the Tribunal and Ms Turner had not complained to Mr. Caetano that the contents thereof still had not particularised sufficiently the claim and/or that the claim was vexatious etc;
- (ii) Mr. Caetano had neither drafted nor agreed with Ms Turner and/or Mr. Acton an order of directions despite the fact that at the hearing of the 7th January 2010 he had undertaken to do so;
- (iii) the Complainant had not filed any witness statements either for himself and/or for any witness he might have; and
- (iv) Mr. Caetano had informed the Complainant that he was not required to appear that day and this explained the Complainants absence.

Mr. Acton pursued his application for the dismissal of the Complaint on the grounds referred to above, which application I refused to adjudicate on at that point since (a) without determining the chronology of events behind the Complaint made it was not possible to determine whether the Complainant had been filed out of time - it being noted that on the documentation before the tribunal it appeared that some events had occurred after the cut off dates relied upon by Mr. Acton - and (b) that as

the Industrial Tribunal Rules stood at the time I did not believe that I had the power to dismiss the Complaint on the grounds relied upon by Mr. Acton. The upshot of all that transpired that day was that I adjourned the case until the next day for the purposes of commencing to hear the evidence irrespective of whether or not witness statement(s) were filed by the Complainant. In the event, due to my mothers demise later on during the 11th May, the case did not continue on the 12th May; it being adjourned to a date to be fixed by the Secretary.

The case came before me again on the 4th October 2010 at which time Messrs Navas and Acton appeared before me. By this time the Complainant had filed witness statements and skeleton arguments. Mr. Acton again requested the dismissal of the Complaint and sought an order that the Complainant deposit £500 before being permitted to pursue his case. I refused Mr. Acton's submissions on the grounds that the Tribunal did not have the power to act as requested and the case was adjourned to the following day for the purposes of commencing the hearing. On the 5th October 2010 the parties appeared before me and requested an adjournment by consent, and this was granted.

The hearing of this matter finally commenced on the 28th October 2010 and continued on the 29th October, 1st, 2nd, 10th and 11th November, 3rd, 7th and 8th December. During the course of the many many hours of this very full hearing the following witnesses gave evidence; the Complainant, David Brett, Francis Buttigieg, George Russo and Dennis Ballester. The hearings at times produced quite heated exchanges between counsel themselves, between counsel and witnesses and, on the odd occasion between counsel and myself; a situation which only served to prolong the proceedings.

At the end of the Complainants' case Mr. Acton made two submissions; namely:-

- (a) that in law the Complainant could not rely on the same facts to pursue separate claims of harassment and discrimination and that as such claims had not been pleaded in the alternative, and as the Complainant was now out of time to amend his claim to plead harassment and discrimination in the alternative, the Complainant now had to be put to his election as to which of the two separate claims he was going to continue to pursue; and
- (b) that in accordance with the requirements imposed by section 13 of the Equal Opportunities Act ("the Act") the Complainant had failed to prove that the Respondent knew or suspected that the Complainant was going to do a protected act.

With regard to these two submissions I (i) granted the Complainant leave to amend his claim so as to plead the claims of harassment and

discrimination in the alternative and (ii) dismissed the Complainants' claim on the grounds of victimisation. Thus, the position is, subject to the determination of the preliminary point referred to below that I first have to determine whether the claim for harassment on the facts alleged by the Complainant is made out and, if so, then the tribunal does not need to consider the claim for racial discrimination. Only if the Complaint of harassment is dismissed does the Tribunal need to consider the claim for racial discrimination. However, such considerations have to be placed on a back burner pending determination of another matter. As referred to above the Respondent has raised the preliminary point of whether in accordance with the provisions of section 68 (1) of the Act the Complainant presented his Complaint within three months beginning when the act(s) complained of are alleged to have been done. I therefore now turn to consider the evidence.

I point out at this stage that I have read the documents contained in the bundles before me as well as all the witness statements and the exhibits attached to those. I have also taken into account the oral evidence given before me spanning over many days and have read the skeleton arguments presented and all the authorities drawn to my attention by both counsel.

In this judgment I quote from the verbal evidence given before me as set out in my notes but this does not signify that I have not taken the contents of the witness statements tendered into account when deciding as to the facts. Having said this I point out that in the case of the Complainant's own witness statement I have treated its contents with considerable caution for the following reason. The Complainants' grasp of the English language is not good, despite his assertion at one point that it was perfect, and therefore it is clear to me that the statement was neither dictated or written by the Complainant. The Complainant in evidence stated that:-

"I wrote this witness statement. I understand all the words in this witness statement. I do not understand all the words. I wrote this statement in German and then I had it translated in English. Not all the statement in German. Just some of the words in German. I tell him what to put down. I told my counsel what happened and he wrote it down in English. I then read what he had written down. I asked questions of what certain words were and when he answered I translated this into German in my head and then said whether those words were right or wrong".

Having read the witness statement repeatedly I do not think that even this explanation of how the statement was created is correct and in saying this I do not mean to imply or suggest any wrong doing on the part of counsel.

Chronology of Events

In order to consider whether the Complainant filed his Complaint in time we first have to establish the chronology of the events that occurred. The following are my findings on this issue based on the evidence heard and taking into account the contents of the various witness statements and exhibits.

The Respondent has since the day the Leisure Centre opened in February 2008 administered the bowling alley situated within Kings Bowl. The Board of Directors of the Respondent is comprised of three members of the Russo family, Mr. Nicholas Russo, the Managing Director and his two sons, George, who is in charge of the day to day administration of the company from his offices (at the time) at the International Commercial Centre and, James who is in charge of finance and pay. Mr. Nicholas Russo is an experienced businessman whilst his sons have some business experience.

When the Kings Bowl operation commenced none of the directors and/or staff had any prior experience of running a bowling alley and therefore during the first eighteen months they were on a steep upward learning curve. During this time and on an ongoing basis the know how and technical expertise was provided by an English company by the name of Bowltech Limited ("Bowltech").

Mr. Dennis Ballester ("Ballester") was employed by the Respondent as a technician in 2007 just before the opening of the bowling alley but as he had no prior knowledge of or experience with the bowling machinery and associated computer technology he was trained by Bowltech personnel. At the time of the hearing Ballester (with Paul Macharro being the only other candidate) was possibly the only person within Kings Bowl who had been with the Respondent since the beginning of the commercial venture.

The Kings Bowl operation is made up of the bowling alley and a bar to service the persons watching bowlers and/or bowling.

At the opening of the Kings Bowl and until about December 2008 the manager at Kings Bowl was a person by the name of Nouar.

In December 2008 Mr. David Brett ("Brett") was employed as the manager of Kings Bowl; a position he held until June 2010 when he was dismissed by the Respondent. Brett has commenced proceedings against the Respondent with regard to said dismissal and I bear this very much in mind when referring to him in order not to use language which could affect those other proceedings.

As a result of the then assistant technician leaving the Respondent's employment in March/April 2009 the Respondent advertised the vacant

post. The Complainant applied for the post and was interviewed by Brett and Ballester. The interview was successfully passed by the Complainant and he was employed for an indefinite period as from the 15th April 2009 as an assistant technician. The Employment and Training Board contract filed states that his hours of work are 39 hours a week but it would appear that he also had to attend emergency call outs when on duty.

The Complainant is a German national whose first language is clearly not English; I found him to have difficulty in understanding what was said to him unless it was phrased in simple language and that his vocabulary was limited. This should have been obvious at the time of the interview, if indeed a thorough interview was conducted, or, very shortly after.

At the time the Complainant was employed he was working with and under the supervision of Ballester who by then held the post of Head Technician and both of them were under the instructions of Brett as manager.

In the course of the hearing it was evident, especially on Ballesters' side, that there was little love lost between Ballester and Brett and neither had a high regard of the other. It was also fairly clear that the relationship between Brett and Mr. George Russo ("Russo") had at the time been strained at the very least, for differing reasons on either side, whilst the relationship between Ballester and Russo was a close one with Russo thinking highly of Ballester.

The two principle witnesses in this case were the Complainant and Ballester and I found both of them to be prone to exaggeration with the Complainant decidedly sketchy in detail with regard to dates, contradictory as to number of occurrences, unsure as to sequence of events and Ballester having a distinct tendency to deny all and sundry and colour events in a manner which he believed would put him in the best possible light. I have therefore considered the evidence of both men with caution. In the case of Russo I found him to be a person who was not really aware of what was going on within the Bowling Alley and naively far too ready to accept without challenge what Ballester was informing him off about other staff etc. The evidence of both Brett and Mr. Buttiegieg I do not consider of much relevance to the issues that arise for determination since in the case of both men they were not present and/or did not witness any of the incidents that were alleged to have occurred between the Complainant and Ballester; both of them expressing opinions after the event based solely on what the Complainant had stated to them and therefore on the assumption that everything said to them by the Complainant was true. However, in the case of Brett his evidence with regard to Ballesters' dealings with other staff members past and present I considered to be relevant.

On the 29th May 2009, as a result of the fact that he was going on leave for a week at the end of that day Brett circulated an e-mail to the staff at Kings Bowl informing them that he was giving Ballester full responsibility with

regard to the direction of duties and "the ability to give warnings or even terminate your contract". A most surprisingly worded document to say the least using ill advised language as Brett appears to have accepted.

On the 29th May 2009, the Complainant finished work at his unusual time and was then off work for two days since he had worked his 39 hours that week.

On Saturday the 30th May 2009 the Complainant was at home in Spain by his self minding his child as his wife was at work. There is a dispute between the Complainant and Ballester as to whether the Complainant was on call that weekend. Ballester was also not at work that Saturday but he was contacted by the staff at Kings Bowl for an emergency call out that morning. The fact that Ballester rather than the Complainant was contacted suggests to me that the Complainant was not considered to be on call. In any event, suffice to say that Ballester attended Kings Bowl at around 11 am and telephoned the Complainant at home requesting that he also attend Kings Bowl. What was said in the course of that telephone conversation is also in dispute but the outcome was that Ballester fixed the monitors that were causing the problem (it was more an ITT problem than a mechanical one) within a 30 to 45 minute time span and the Complainant did not attend and, I would observe, had he attended would have been unable to do anything other than watch Ballester due to the nature of the problem.

Ballester in the course of the Saturday morning telephoned Brett to inform him about the Complainants failure to attend Kings Bowl as he had requested. It is obvious that Ballester was not pleased at the Complainants failure to attend.

At about 6.14 pm on Saturday afternoon due to the reaction from staff members received Brett circulated an e-mail to the Kings Bowl staff in which he retracted / clarified his e-mail of the previous day to them with reference to Ballester and the issue of being sacked.

At about mid-morning on the 1st June 2009 Ballester approached the Complainant as a result of which there was an exchange of words between the two men which scaled into physical contact between them and ended with the Complainant leaving his place of work. What was said between them and how there came to be physical contact between them is a matter of dispute. On the Complainant leaving his place of work Ballester telephoned Brett in order to inform him of his version of the events that had transpired.

Ballester did not work that afternoon but he did speak to Brett about the mornings incident in the course of the late afternoon and later on he did e-mail to Brett a statement containing not only his version of events but also his views as to what should happen to the Complainant viz a viz his

employment with the Respondent. I would point out here that not a single report or other document has been produced by the Respondent complaining of the Complainants' lack of English or his difficulty in understanding or obeying instructions or his work not being upto the required standard. A somewhat surprising state of affairs bearing in mind the Respondents position as set out in the Notice of Appearance, which incidentally does not coincide fully with what the tape transcript provides is Russo's reason for dismissing the Complainant, and as expressed by Ballester.

That same afternoon the Complainant also spoke to Brett and gave him his version of the events that had transpired that morning. Brett requested the Complainant to provide him with a statement of events.

On the 2nd June 2009 both Ballester and the Complainant were at work. According to Ballester nothing transpired between them that day but according to the Complainant there was another incident.

On the 3rd June 2009 Ballester and the Complainant were both at work. According to the Complainant there was another two incidents between them but according to Ballester there was a very minor exchange between them. Ballester was not at work in the afternoon but did appear just before 5 pm.

On the 4th June 2009, both the Complainant and Ballester were at work.

In the course of that day:-

- (a) the Complainant during the evening sent Brett an e-mail attaching his report as to the events of that week;
- (b) Ballester spoke to Brett with a view to ascertaining what he was doing with respect to the Complainant; and
- (c) Ballester telephoned Mr. Nicholas Russo to complain about Bretts' failure to deal with the Complainant and to explain how he was feeling about this. During this conversation Mr. Nicholas Russo informed Ballester that he would deal with the matter and that he should attend a meeting the next morning with his son(s).

On the 5th June 2009, whilst the Complainant went to work Ballester left his house armed with the statement he had sent Brett on the 1st June 2009 and made his way to Russo's office at the International Commercial Centre. At the meeting that eventually took place that morning between Ballester, Russo and James Russo, Ballester after handing over his statement elaborated on and/or explained its contents. Russo then told Ballester to go back to work and that he would deal with the situation.

Later on that morning Russo attended at Kings Bowl and called Ballester and the Complainant into the managers office. At the time the Complainant was armed with a tape recorder and he proceeded to tape what was said during the course of the meeting that transpired. The tape recording has been produced and therefore there is little dispute as to what was said but some dispute as to the interpretation to be placed on what was said. The end result of the meeting was that Russo informed the Complainant "I am going to have to ask you to leave. Ok... I think the misconduct that you have brought to Dennis the importance of it is not acceptable okay. I am going to have to ask you to leave". The Complainant was then accompanied to his locker and he then left Kings Bowl.

That same afternoon Brett returned to work unaware of what had occurred earlier on in the day.

Between the 7th and 9th June 2009, Mr. Francis Buttigieg ("Buttigieg"), on behalf of the Complainant, sought a meeting with Russo.

On the 9th June 2009, Brett wrote to Buttigieg requesting that he put in writing the reasons for his request for a meeting with Russo and also spoke to Buttigieg on the matter.

On the 10th June 2009, (though the letter is actually dated incorrectly the 10th May 2009). Buttigieg wrote to Brett informing him that he wanted to speak to Russo about the Complainant and requesting their co-operation in preparing statements as to what had transpired with the Complainant.

Between the 10th and 23rd June 2009, Buttigieg telephoned Kings Bowl on several occasions and left messages but received no replies.

On the 23rd June 2009, Buttigieg and the Complainant attended Kings Bowl but failed to manage to speak to Russo although they did speak to Brett.

On the 29th June 2009 the Complainant appealed against his dismissal by way of e-mail sent to Brett but addressed to Russo.

Around July 2009, Buttigieg finally managed to speak to Russo. At that meeting Russo handed to Buttigieg a cheque for the monies due to the Complainant following his dismissal but not the notice of termination which the Complainant required in order to apply for unemployment benefit in Spain.

On the 13th August 2009, the Claimants' then solicitor wrote to the Respondent demanding submission of the missing Notice of Termination. That same day the Respondent replied in writing stating that "the Termination of Employment document was deposited at the Employment Service on the 16th June 2009" and that a copy was at Kings Bowl. I stop

to point out here that in my opinion the manner in which the Respondent treated the Complainant with regard to the payment of the monies due to him and the handing over of the Notice of Termination was shoddy at best and unacceptably malicious at worst.

On the 18th August 2009, the Complainant applied for unemployment benefit in Spain.

LIMITATION AND EXTENTION OF TIME

This being the chronology of events I turn to consider the submissions made by the Respondent with regard to limitation. Mr. Acton has referred me to section 68 (1) (a) of the Act which mandatorily states that a Tribunal is not to consider any complaint presented to it outside of a three month period of the date on which the act complained of is alleged to have been done. This being the case, argues Mr. Acton, and working backwards from the date of filing of the claim, the last date on which the events complained of can have occurred so as to be within the limitation period is the 2nd June 2009. Hence, the argument goes, the only events which the Tribunal can consider for the purposes of the Complaint filed are those which occurred between the 2nd to 5th June 2009. But, once arrived at that point, Mr. Acton then proceeds to squeeze even further the dates on which the Complainant can rely in furtherance of his claim. Mr. Acton does this by referring me to the e-mail of the 30th November 2009 in which Mr. Caetano sets out his further and better particulars and refers specifically to the events of the 1st to 3rd June 2009 only. Thus, submits Mr. Acton, the Complaint filed never sought to rely on any events that might have occurred on the 4th or 5th June and consequently the Complainant should not, following his oral evidence, now be allowed to rely on any events relating to those days. The upshot of all of this is that according to Mr. Acton the Complainant can only rely on facts that occurred on the 2nd and/or 3rd June 2009. Mr. Navas, quite properly in my view, concedes' that pursuant to the provisions of section 68 (1) (a) of the Act the cut off date bearing in mind that the Originating application was filed on the 1st September 2009 is the 2nd June 2009. However, Mr. Navas nevertheless argues that the Respondents actions prior to the 2nd June 2009 are caught by the Complaint since, pursuant to section 68 (4) (b) of the Act, the harassment/discrimination complained of were "continuing acts". Moreover, submits Mr. Navas, in the alternative, in the event that the Tribunal concludes that the events relied upon by the Complainant dating prior to the 2nd June 2009 are time barred, then the Tribunal should for a variety of reasons extend the time as permitted by section 68 (3) of the Act on the basis that it is just and equitable for it to do so. To Mr. Navas's submissions Mr. Acton counters that the principle of "continuing acts" is not applicable in this case since even taking the Complainants case at its highest the events complained of are unconnected or isolated incidents which cannot amount to a "continuing act".

With reference the submissions made concerning “continuing acts” I have considered the following cases:-

Barclays Bank plc v Kapur (1991) ICR 208
Calder v James Finlay Corporation Limited (1989) IRLR
55 Littlewoods Organisation PLC v Traynor (1993) IRLR
154
Amies Y Inner London Education Authority (1997) ZAER
100
Owusu v London Fire and Civil Defence Authority (1995)
IRLR 574
Hendricks v Metropolitan Police Commissioner (2003)
IRLR 96.

There is no doubt that the distinction between a continuing act and a series of single acts is often a fine one and that it is not always easy to categorise an incident(s) as falling within one or the other. Having said this, the question that I have to ask myself is whether the Complainant has proved that the incidents alleged prior to the 2nd June 2009 are interlinked, are discriminatory and that the Respondent was responsible for that continuing state of affairs.

I have come to the conclusion, bearing in mind the evidence placed before the Tribunal, that the Complainant has not proved those three limbs with reference acts alleged to have occurred prior to the 30th May 2009. I say this because without going any further, even assuming without so deciding that the acts complained of prior to the 30th May 2009 were interlinked and discriminatory, there is absolutely no evidence to prove and/or indicate that the Respondent was responsible for the continuing state of affairs that occurred with regard to events prior to the 2nd June 2009. In evidence the Complainant stated the following in the course of his evidence.

“I don’t want to complain about my colour or anything because if I complain about that I lose my job. As I don’t want to lose my job that is why I didn’t want to tell him about my colour. I was the only one who was black there. I did not know I had to write down about my colour”.

“He punched me and I felt pain. If I say something I lose my job. If I punch him back I lose everything”.

“I did not report the punching because I did not want to lose my job. He had a lot of power”.

“I did not tell Brett about racism in the e-mail because I know Dennis has more power than Brett”.

"I don't want to lose my job by mentioning racism in the e-mail all I want Russo was to help me by stopping Ballester because I know Dave cannot stop him".

"I wrote the e-mail because I did not feel good. I thought that by writing to Mr. Brett he would speak to Mr. Russo and then we would have a meeting and then Ballester would stop from saying these things to me.

A number of things are clear from this evidence. Firstly, that even as late as the e-mail of the 4th June 2009 to Brett the Complainant, ostensibly for fear of losing his job, had not complained of being a victim of anything let alone of racial discrimination/harassment to anyone let alone to someone in seniority within the Respondent company. Thus, neither the managers nor the directors of the Respondent were aware of the Complainants suspicions of the motives behind Ballester's actions. True Brett was, according to the Complainant, aware that he (the Complainant) was having problems with Mr. Ballester but, in the Complainants own words, "I never told him anything because I did not want to lose my job" whilst in the words of Brett "I recall him mentioning some of these issues to me on a personal level although never formally" and "I was not aware of 90% of what was going on between Ballester and Jung". True also that Brett had, contrary to what was his duty and responsibility as the manager, and without the knowledge or the approval of the Respondent, warned the Complainant not to make complaints about or in respect of Ballester and this may explain why until the 4th June 2009 the Complainant never formally complained about Ballesters alleged conduct. Nevertheless, the result is that if not even the manager of the Respondent, let alone the directors of the Respondent, formally or at all knew about or suspect the nature and extent of the Complainant's allegations against Ballester and/or the Complainant's belief that those problems were racially motivated how can it be said that there is evidence to prove and/or to infer from that that the Respondent was responsible for the continuing state of affairs. Secondly, it would appear from those quoted passages of evidence that the Complainant had some belief that Russo would intervene to stop Ballester in his actions and therefore it would appear that even the Complainant did not believe that the Respondent, as distinct from Ballester, was responsible for Ballester's continuing acts. Save for Bretts' improper/wrong, by his own admission, decision to inform the Complainant not to make complaints about Ballester ostensibly because Russo would take Ballesters' side there is no evidence in my view to show that had the Complainant at any time formally complained to any of the three directors of the Respondent company about racial harassment / discrimination on the part of Ballester and/or that such complaints would have been ignored and/or the Complainant penalised. Moreover, it is noteworthy that the Complainant did not report formally or informally, to Brett at any time the nature and extent of Ballesters alleged racially motivated acts; indeed the first time the Complainant mentioned the word "discrimination" officially was in his e-mail of the 29th June 2009

which was a date well passed that on which he was dismissed. To this Mr. Navas will undoubtedly draw my attention to section 47 (1) of the Act and say that the Respondent is vicariously liable for the acts of Ballester and that therefore the issue of knowledge or approval on the part of the Respondent to the acts complained off by the Complainant is irrelevant. The Respondent does not accept that it is vicariously liable in any manner, shape or form. In my view section 47 (1) of the Act is not applicable were the issue in discussion concerns whether or not certain conduct can be said to constitute "continuing acts". Moreover, it is not applicable in this case since the acts complained of (viz a viz in the context of "continuing acts") are not acts done in the course of Ballesters employment and certainly there is no evidence to show or imply that they were in the knowledge of or approved by the Respondent. This being the case it does not seem to me to be necessary to proceed to consider the other two limbs of whether the acts complained of were interlinked and/or discriminatory. I realise that by so doing I may be criticised for considering the limbs back to front but there does not seem to me to be any point in going through the stages when to my mind the third limb is so patently not made out. Bearing the above in mind, it is my determination that all alleged acts complained of by the Complainant relating to the period prior to the 30th May 2009 are, assuming that they did take place, to be considered to be a series of single acts and therefore cannot be taken in to account as they fall outside the prescribed time limit.

This therefore leaves the question of whether the incidents of the 30th May and 1st June 2009 can be said to be continuing acts. With regard to both these incidents, unlike the prior ones referred to above, the matters came to the formal attention of management in the form of Brett since the incident of the 30th May was reported to Brett by Ballester and the incident of the 1st June 2009 was reported to him by both the Complainant and Ballester. With regard to both these incidents they are clearly interlinked but are they discriminatory and/or has the Complainant himself alleged that they were discriminatory in nature? As far as I can see from the Complainants' witness statements and his oral evidence the Complainant does not allege that Ballester acted in a racially discriminatory and/or harassing manner with reference the events of the 30th May 2009 and with reference to the events of the 1st June 2009 he complains that:-

- (i) he was shouted at, repeatedly;
- (ii) he was told his English was bad;
- (iii) he was told he had the brain of an ant; and
- (iv) he was grabbed by both wrists.

Moreover, as can be seen from the contemporaneous note made by the Complainant himself and contained in Exhibit "RJ4" the Complainant only complains of:-

- (i) being shouted at;

- (ii) being called an arsehole in the past but not on that day;
- (iii) not being treated with respect;
- (iv) being put down all the time; and
- (v) being grabbed by both arms.

Assuming for the moment that these alleged acts occurred, can it be said and/or inferred that they were discriminatory or harassing in nature? With all due respect to the Complainant it is quite clear to me that at face value such acts cannot be said to be racially discriminatory or harassing in nature and as I understand at Mr. Navas concedes this to be the case. But were they intended to be such by Ballester?

One of the main points at issue in this case is whether Ballester was racially motivated in his treatment of the Complainant and not whether he is simply an uncouth and generally unpleasant arrogant bully of a man. The Complainants' view is that:-

“It is very important to note that Mr. Ballester did not treat any other of the employees in this way. There were about 10 other employees whom he dealt with on a day to day basis but none of them was from a racial or ethnic minority or black. The only way in which he treated others equally to me was in the fact that he also shouted at others.

Even though other employees were not treated anywhere near as badly as me, Mr. Ballester was feared and hated by the other employees so imagine how I felt”.

(Para's 91 and 92 of the Complainants' witness statement.)

And in evidence (and by way of some examples) the Complainant stated -

“I can feel it because no one do it to me before that is why I knew the insulting, shouting, punching, hitting was because of my race”.

“Because I was the only one he did it to. I think it was based on race. Nobody do it to me before. He gave me a feeling like a slave”.

“I think he treated me as a slave because I am black. I think this is the main reason”.

“I was very close with him. He shouted at others too but what he did to me was worse than the others. Sometimes he would not call my name he would whistle at me with finger calling me. I feel really bad about this”.

“Why someone push you and tell me to walk faster. He made me feel it was my blackness that made him do these things to me but not to anyone else. I got the feeling. I was the only person who worked close to him.

“I am the only employee who worked with Ballester. I was the only black person working in the place”.

“I was working with him from morning to evening all the time really close. I only see that he pushes me”.

“I am the only one he punched. I thought it was because of my skin”.

“The first time I liked him during the first week. Then he showed me his face and treat me like a dog and then I don’t like him. Lots of other employees don’t like Mr. Ballester because he was nasty to them. I was the only one who work close to him”.

“Ballester is nasty to everyone but to others in a different way. He say things to me that he does not say to others being as they are white. He looked for a dog and I was his dog He is working with me for 5 hours and with others he is 5 minutes.”

It is clear from the Complainants own evidence that (1) the Complainant was the only person who on a daily basis spent most, if not all, of his working time with Ballester (2) that Ballester was generally unpleasant to one degree or another to all employees at work and (3) that the Complainant believed that all or some of Ballesters’ unpleasantness towards him was racially motivated because of the fact that he was subjected to it with a greater intensity for longer periods of time.

Brett in his witness statement with respect to Ballester states that:-

“I have never received or heard a good thing said about him by staff or clients except for the fact that he has a vast and intimate knowledge of all the machinery at Kings Bowl.

I have however heard many, many bad things said about him and I have seen with my own eyes that all of the criticism that I have heard and/or received about him is entirely justified.

The Gibraltar Bowling Association have never liked Mr. Ballester and constantly complained about him in particular his rude and confrontational manner”.

and in evidence stated that:-

“On several occasions Ballester would whistle to his assistant and not ask him and in an unpleasant manner demand for him to go and stand there. He would invade your personal space by walking up into your face and then take hold of your elbow and lead you to where he wants you”.

(NB: Stated with reference to the employee who took over the Complainant's job).

“In the first couple of weeks with Paul, Ballester was the same aggressive behaviour/management style. After 2 or 3 meetings with Russo where he Ballester was clearly advised about his behaviour and manner with Paul.....”

“Paul had informed me that Ballester had yet again shouted at him and mistreated and wasn't prepared to accept it.....”

“Russo did make it clear to Ballester that this was not to happen”.

“He is an inconsiderate individual to his assistant technicians. I have witnessed on several occasions Ballester treating his assistant technicians something like a puppy dog. Nolan is one such technician. Paul who works there now is scared stiff of Dennis. We have had meetings with Russo about this”.

“Lots of staff issues with Ballester. There are wide ranging issues”.

“There were definitely other meetings concerning other employees with regard to Ballester.”

As stated above I exercise caution when considering the evidence of the Complainant and Brett when it comes to Ballester's alleged actions/behaviour but even so it is clear to me from it that Ballester treats all his subordinates badly and that his management style leaves a lot to be desired, to put it mildly. I do not accept Ballester's assertions that if there is any conflict with other employees it stems solely from his desire to protect the machinery and ensure that they carry out their duties. It is also clear to me that because Ballester and the Complainant had to spend most of their working day together that it was inevitable that the Complainant should bear the brunt on a daily basis of the majority of the man's uncouthness, insensitivity and general rudeness. But was such behaviour racially motivated as the Complainant felt? This question has taken up a lot of my time/consideration more so because in my view Ballester seems personally incapable of recognising what constitutes racial discrimination (eg. in evidence he stated “I find it very difficult to believe racists exist in Gibraltar”). Having said this, I have come to the conclusion that his

actions could be called many things but were not intentionally race specific and/or racially motivated.

Mr. Navas has submitted that the Tribunal should in any event permit the Complainant to rely on alleged acts that occurred prior to the 2nd June 2009 on the grounds that it is just and equitable to do so as referred to in section 68(3) of the Act since:-

1. the length of the delay is insignificant;
2. the cogency of the evidence is not going to be affected by granting an extension going back to the 15th April 2009;.
3. the conduct of the Respondent following the Complainants' dismissal was deplorable;
4. the Complainant filed his complaint with the Respondent on the 4th June 2009;
5. the Complainant did not delay in seeking advice from Unite the Union and its solicitors and from Dignity at Work;
6. the prejudice to the Complainant would be significantly greater than to the Respondent if the extension is not given; and
7. the Complainants' case is very meritorious.

With all due respect to Mr. Navas I do not find any of his reasons for granting an extension of time on the "just and equitable" ground to be very persuasive at all bearing in mind that no explanation whatsoever has been provided as to why the Complainant waited until the 1st September 2009 to file his complaint. The Complainant was in possession of all information/documentation necessary to file a Complaint within a week or two of his dismissal, and in any event by the 29th June 2009 when he appealed by e-mail to the Respondent against his dismissal on the grounds of discrimination, and was in contact with Dignity at Work and the Union and their solicitors in early June 2009 and thus had advice at his disposal. Yet no complaint was filed till nearly the very last possible moment in time using even the last benchmark date of the 5th June 2009. What is more I am of the opinion that section 68(3) of the Act is not a provision which can be relied upon by the Complainant where a complaint has been filed within time, as is the case here, for the purposes of incorporating into a complaint acts which would otherwise fall outside the scope of the complaint filed. The sub-section specifically refers to the situation where a "complaint or claim is out of time" and this is not the situation with which we are confronted here where the Complaint is filed in time but the Complainant is seeking to rely on events occurring prior to the statutory period of time. I

do not believe that the legislature was seeking in section 68 (3) of the Act to give complainants a second bite at the cherry in cases when they could not rely on the provisions of section 68(4) since the legislature was seeking to address a completely different scenario in section 68 (3) of the Act.

THE COMPLAINED EVENTS

I now therefore turn to consideration of the events of the 2nd to 5th June 2009.

With regard to the 2nd June 2009 at paragraph 64 of his witness statement the Complainant states:-

“That day Mr. Ballester kept up his insulting and abusive manner. In particular he spoke to me in a raised voice and abusive manner on the telephone when instructing me to do a job.”

whilst in oral evidence he had very little to say about any incident on this day. I pause here to note that in his contemporaneous note for the 2nd June (see Exhibit RJ4) the Complainant states:-

“I called him to give the reports from the Lanes via telephone, no good morning nothing he said wait I am coming soon and hanged up the phone. Then he came had his coffee gave me work and told me that he have to speak to Dave. I did not see him much that day because he left me alone”.

Ballester when referring to the 2nd June 2009, stated in evidence as follows:-

“Jung came back to the office on the Tuesday doing everything he wanted to do and I wouldn't know what he was upto and I did not think this was fair. I avoided taking to Jung on Tuesday as I did not want to confront him on the matter.”

In my view the version of events set out in Exhibit RJ4 for the 2nd June 2009 is most likely to be closest to what actually occurred that day.

With reference the 3rd June 2009 at paragraph's 67 and 68 the Complainant stated as follows:-

“At 3.00 pm I called him to ask if he knew where one of the torches was. This time he was his usual nasty self saying that it was not my place to ask questions about where things were - that that was his job.

At 4.30 pm he came back shouting at me asking what I had done that day - implying that I had not done anything. He insulted me calling me an asshole again

whilst in oral evidence the Complainant stated:-

“I see one torch of the two expensive ones we have is missing. So I phone him and tell him this. I called him on the mobile at 3 pm and told him this. He started shouting at me. Its not your job to call me if something is missing. Really unfriendly to me. He comes about 4.50 pm and started again to shout at me. It was not my job to phone him if something was missing. He started shouting at me again and saying bad words to me so my bad feeling back to me. Arsehole and brain of ant is what he called me. He gave me the feeling that he was the master and I was the slave”.

I pause here to note, again with reference to Exhibit RJ4, that in his contemporaneous note for this day the Complainant states:-

“I called him at 3 pm to tell him that one of the torches is missing and asked if he knows where it is or if he has it. In this conversation he was then again unfriendly; I am not supposed to ask him where the stuff is he has to ask me where the stuff is. Then he told me not to be excited and I should have a look for the torch tomorrow.

At 10 minutes before 5 pm he came and pointed with his fingers at me that I should follow him, that in the back and shouted at me again. He wants to know what I have done today but he did not ask me in a nice way, he shouted like always. So he gives me again a bad feeling because he did not learn anything about our conversation and is not showing at all my respect. Then he wanted to sign the rota (my working hours) but you Dave told me last Friday that it is not necessary anymore to have a rota so I was confused about that because now I don't know what is right and what is wrong. And so I told Dennis that Dave told me that I don't need it and then he told me “who” did that say (again shouting) so I told him that Dave told me that. Then afterwards he was quiet and told me what I have to do tomorrow”.

Mr. Ballester in oral evidence stated:-

“On Wednesday he still came back. There was an incident on the Wednesday when I asked Jung to give me time sheet so that I would sign his time sheet. He had gone to the front of the bar where we normally have it as I say we kept it when he returned

he said I have not got it. I did tell him I did see and I need to sign it. His reply was David knows. So I felt a bit undermined in my position there”.

In my estimation the version of events set out in Exhibit RJ4 for the 3rd June 2009 is likely to be the closest version of events to that which actually transpired.

With reference the 4th June 2009 the Complainant states at paragraph 70:-

“The abuse and insults from Mr. Ballester continued and I could not take it any more”.

whilst in oral evidence he had very little to say about this and there is no mention whatsoever in the contemporaneous notes found in Exhibit RJ4.

With regard to the 4th June 2009 Ballester made no reference whatsoever to any incident of any nature having occurred between the Complainant and himself.

In my view whilst there were no incidents between the Complainant and Ballester there was undoubtedly some abuse from Ballester.

With regard to the incident of the 5th June 2009 this is caught on the tape recording made by the Complainant and is therefore fully set out in the transcript produced.

Before dealing with the issues raised by the Complainant’s allegations concerning the incidents of the 2nd to 5th June I pause to deal with a relevant matter concerning the credibility of the Complainant.

With regard to the issue of tape recordings the Complainant stated the following in the courses of his evidence:-

“I attended a meeting with Mr. Russo and Mr. Ballester. I did not tell anyone that I was going to record the meeting. I also recorded Mr. Ballester may be one week because no one believe what he say to me. I started to record him. Nothing came out in the recording due to the noise of the machines. Mr. Buttigieg told me to record him so I bought a machine which cost me Eur 100 - I recorded Mr. Ballester for 6/7 hours every day and at night time I would listen to the tape but nothing could be heard above the noise of the machines.”

“I planned the recording of Mr. Russo. The recording was on all the time in the final week. I did not tell anyone about the recording. The recording was on when I was in the machine room and when I was not in the machine room. As nothing

was heard on these tapes each night I would delete them and start again the next day.”

“I did not record this. Maybe it was not 10 days before. Maybe it was 3/4 days before I started recording. I don’t know when I started recording coz I don’t remember as it’s a long time. After this (referring to the 1st June incident) I started to record.”

“I started recording after I had written an e-mail to Mr. Brett.”

“I did the recording because no one believed me. He is working with me for 5 hours and with others he is 5 minutes.”

I have great difficulty with all of this evidence given by the Complainant for a great variety of reasons including the following:-

- (a) if the Complainant was taping Mr. Ballester for 6/7 hours a day during anything between 3 to 10 days prior to the 5th June inside as well as outside the machine room and if, as the Complainant alleged, Mr. Ballester was constantly mocking, degrading, insulting, threatening etc why then did nothing incriminating come out on the tape recordings thereby supporting the Complainants allegations. It seems to me therefore that either the Complainant is lying as to taping events prior to the 5th June or nothing incriminating came out on the tapes and that is why the Complainant erased them in which case the allegation of Mr. Ballester’s constant wrongful behaviour is denied or the machine was malfunctioning but if that is the case why did it suddenly work on the 5th June?
- (b) the Complainant states that it was Mr. Buttigieg who had advised him to tape Mr. Ballester. Yet Mr. Buttigieg in his witness statement states that he was first approached in early June 2009 by the Complainant. This being the case it follows from this that if the Complainant is telling the truth then he cannot have tape recorded prior to or on the 1st June and if the Complainant is mistaken as to who advised him to tape record Mr. Ballester then why has he attributed the idea to Mr. Buttigieg?
- (c) I find the Complainants’ references to having to tape Mr. Ballester “because no one believe what he say to me” somewhat curious. If Mr. Ballester whilst at work was as constantly open and loud in his remarks as the Complainant would have us believe then why did he conclude that he had to tape those open and loud remarks in order to prove to people that they were being made, and indeed why has not a single witness been brought before the Tribunal to confirm even just one event?

I can only resolve these discrepancies in my mind by concluding that the first and only tape recording occurred on the 5th June 2009. Such a conclusion means that I have to treat the rest of the Complainants evidence with even greater caution than I had already alluded to at the beginning of this judgement.

I have been referred to a number of cases including the following cases which I have considered:-

Barton -v- Investec Henderson Chrosthwaite Securities Limited (2003) ICR 205.

Abbey National PLc -v- Chagger (2008) 2AER 157.

Zafar -v- Glasgow City Council (1998) IRLR 36

Shamoon -v- Chief Constable of the Royal Ulster Constabulary (2003) IRLR 285.

Nagrajan -v- London Regional Transport and others (1999) IRLR 572.

Wong -v- Igen Limited (2005) IRLR 258.

Rihal -v- Ealing LBC (2004) IRLR 642.

James -v- Eastleigh BC (1990) 2AC 751.

O'Neil -v- Governors of St. Thomas More Upper School (1996) IRLR 372.

Reed and Bull Information Systems Limited -v- Stedman (1999) IRLR 299

HARRASSMENT

Turning then back to the incidents of the 2nd to 5th June for the purposes of considering whether the allegations of harassment have been made out.

Section 14 of the Act provides:-

“14(1) A person (“A”) subject another person (“B”) to harassment where on an equal opportunities ground A engages in conduct which has the purpose or effect of:-

- (a) violating B’s dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

and

“14 (5) Conduct shall be regarded as having an effect specified in sub-section (1) or (2) only if, having regard to all the circumstances, including the perception of the other person, it should be reasonably considered as having that effect.”

It is the Complainants case as put by Mr. Navas that the harassment suffered by him was on an equal opportunities ground; namely his racial or ethnic origin which the Complainant defines as being Black African or Black Afro-European. Mr. Navas referred me to what he considers were many instances of harassment that were race specific but none of these instances are alleged to have occurred during the period of the 2nd June 2009 onwards and therefore cannot be taken into account. However, Mr. Navas has also referred me to other instances of harassment which whilst not race specific can, he submits, be objectively interpreted as being race specific because they are consistent with and reinforce the instances of race - specific harassment which are based on the assumed inherent inferiority of black people and in particular the Complainant. Of these non-race specific instances the only ones that are alleged to have occurred during the period 2nd June 2009 onwards are:-

- (i) Insults - constantly calling him an arsehole;
- (ii) Mocking his intelligence - inter alia calling him stupid and thick telling him he had the brain of an ant.
- (iii) Constantly shouting at the Complainant;
- (iv) Constantly criticising the Complainants work and putting him down;
- (v) Unfair and flawed disciplinary procedure; and
- (vi) Discriminatory dismissal - dismissing the Complainant for reasons which had not been explored at the disciplinary meeting.

With reference to (i) to (iv) above, bearing in mind the evidence given by the Complainant as set out in Exhibit RJ4, his witness statement and his oral evidence with regard to the period 2nd June 2009 onwards, as well as the contradictions that arise therein and the caution with which I have to treat the Complainants evidence I am of the opinion that:-

- (i) at the time the Complainant did not himself interpret Ballester's behaviour to be related to an equal opportunities ground; and
- (ii) objectively considered the conduct as found (see above) cannot be reasonably said to be related to an equal opportunities ground.

With reference to (v) and (vi) above there is little doubt that had this been a straight forward unfair dismissal case the Complainant would have most certainly had a tough time defending its actions but this is not such a case and no matter how ill advised Mr. Russo' actions and procedures were there is nothing whatsoever to suggest within them that these were motivated by or related to or reasonably considered to

be based on the Complainants black African and/or black-afro European race.

In the circumstances of the above I dismiss the claim for harassment filed by the Complainant and turn to deal with the alternative claim of discrimination on the ground of racial or ethnic origin.

DIRECT DISCRIMINATION

Section 9 of the Act provides:-

- “9 (1) A person (“A”) discriminates against another person (“B”) if on the grounds of racial or ethnic origin, A treats B less favourably than A treats or would treat other persons.
- (2) A person (“A”) discriminates against another person (“B”) if A applies to B a provision, criterion or practice:-
- (a) which A applies or would apply equally to persons not of B’s racial or ethnic origin;
 - (b) which puts persons of B’s racial or ethnic origin at a disadvantage when compared to some or all others;
 - (c) which puts B at that disadvantage; and
 - (d) which A cannot show to be an appropriate and necessary means of achieving a legitimate aim.”

Here again, as put by Mr. Navas, it is the Complainant case that the discrimination suffered by him was as a consequence of his racial or ethnic origin which as previously stated is considered to be Black African or Black Afro-European. The Complainant himself put the matter in simpler fashion; i.e. the harassment was because he was black. In my view for the purposes of this case such distinctions as there may be meld into on another indistinguishably and have no relevance in this case.

Mr. Navas has referred me to what he considers were the instances of race specific acts which show that the Complainant was treated less favourably than the Respondent would treat other persons. However, as in the case of the claim for harassment, the instances referred to by Mr. Navas allegedly occurred during the period prior to the 2nd June 2009 and therefore cannot be considered by this tribunal even assuming that they did indeed occur as alleged. Mr. Navas has also referred me to other non-race specific instances which he submits can be objectively interpreted as being direct racial discrimination. Of these non-race specific instances which Mr. Navas has referred me to the only ones that can be said to have occurred during the period 2nd June 2009 onwards are the following:-

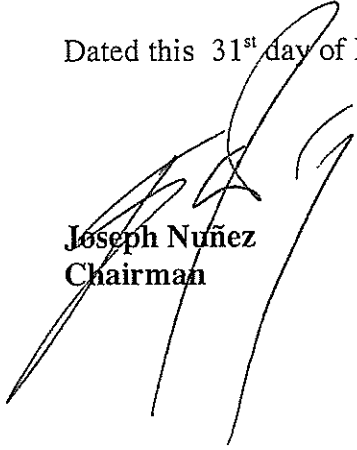
- (i) Insults - constantly calling him an arsehole;
- (ii) Mocking his intelligence - inter alia calling him stupid and thick and telling him he had the brain of an ant;
- (iii) Constantly shouting at the Complainant;
- (iv) Constantly criticising the Complainants work and putting him down;
- (v) Failure to deal with the Complainant's grievance;
- (vi) Failure to provide a verbal or written warning;
- (vii) Unfair and flawed disciplinary procedure; and
- (viii) Discriminatory dismissal.

With reference to the above, and bearing in mind all the evidence given by the witnesses including the evidence given by the Complainant as set out in his witness statement, in Exhibit RJ4 and his oral evidence and the caution with which I have to treat the Complainants' evidence and Ballesters evidence for the reasons stated above, the question I have to ask myself is whether the Complainant would have received the same treatment from the Respondent but for his racial or ethnic origin. With regard to such a question and applying a simple pragmatic and commonsensical approach it is in my opinion that: -

- (a) insofar as Ballester is concerned, all the evidence shows, and I so determine, that he treats all subordinates/work colleagues equally badly and that his behaviour whilst leaving a lot to be desired off, to put it mildly, was not to an operative or material extent race specific or racially orientated;
- (b) insofar as the Respondent itself is concerned, and it is a regrettable thing to say about an employer, it is clear ,and I so determine, that it would have dealt with any other employee in the same ill advised manner as it dealt with the Complainant on the 5th June 2009 and subsequently had another employee been involved instead of the Complainant and that said actions were not dictated or influenced materially or otherwise by any considerations of race and/or ethnic origin.

Having so concluded I find that as the Complainant was not treated less favourably than any other employee (hypothetical or existing) the claim for direct discrimination on the grounds of race and/or ethnic origin has to be dismissed.

Dated this 31st day of March 2011



Joseph Nuñez
Chairman