In the Industrial Tribunal

Industrial Tribunal 17/2012

Between:

Juan Jose Medina Lopez

Complainant

and

Bismark Investment Limited
[Trading as "The Square Café]

Respondent

Ruling on a preliminary issue.

This Ruling is issued in respect of a preliminary application, on behalf of the Respondent, Bismark Investment Limited [trading as 'The Square Café] ['the Respondent'], seeking an extension of time, within which to file the Respondent's Notice of Appearance, pursuant to Rule 16 [2] of the Industrial Tribunal Rules 1974 ['the Rules'] and which application is resisted by Juan Jose Medina Lopez, the Complainant ['the Complainant'].

The parties have been ably represented by Counsel. The Respondent, by Kenneth Navas, Esquire, instructed by Messrs HLB Perez Rodriguez, Solicitors of 4, Giro's Passage, Gibraltar ['HLB']. The Complainant, by Andrew Cardona, Esquire, instructed by Messrs Phillips, of Suite One, International House, Bell Lane, Gibraltar ['Phillips']. Both Counsels are seasoned litigators before this Tribunal and I am indebted to them for their diligence, expertise and professionalism, not forgetting, their courtesy, grace and forbearance, in assisting the Tribunal in the discharge of its responsibilities. It has proved a pleasure and education to hear them. Furthermore, the passion with which Counsel have defended their respective clients has proved inspiring and I commended them both.

That said, the substantive proceedings were instituted by an Originating Application by the Complainant, dated the 21st day of August, 2012, alleging an unfair dismissal by the Respondent.

According to the records of the Tribunal and as I believe is accepted by the parties, the Originating Application was served upon the Respondent, at its' Square Café place of business at 2/1, Casemates [more properly, I believe, 'Grand Casemates'] Square, on the 24th day of August, 2012, the receipt of which was signed for by an unknown individual, presumably an employee of the Respondent.

Regrettably, the individual in question has not been identified, as might have assisted in further confirming the matter. However, the same is not material given the Respondent concedes such delivery.

Given that service, it is also common ground that under Rule 6[1] of the Rules, the Respondent should have entered an appearance within 14 days, that is, by the 6th day of September, 2012.

The Respondent failed to do so. He only did so over 5 months later, on the 19th day of February, 2013.

However, such failure was not immediately and automatically fatal, given, firstly, Rule 6[2] of the Rules permits an application for an extension of time, as per the present application, and, secondly, and even more beneficial to a defaulting party, Rule 6[3] of the Rules stipulates that a Notice of Appearance filed out of time is deemed to include an application for an extension of time, under Rule 16[2] of the Rules.

Prior to proceeding further, I think it is pertinent to point out the Tribunal may grant such an application, even though the grounds of the same are not stated, as to presumably, further, mean a regime of far greater flexibility and liberty, beyond the requirements raised by the persuasive ratio of the English and Welsh case authorities, decreed on the basis of UK statutory provisions, which may, or may not, be the same as our current Rules and I mention all of the same, as a supposition, which may require further consideration at some point, given such a possibility has not been specifically argued before me.

That digression aside, Rule 16 [2] of the Rules permits the Tribunal to extend time even when the time appointed has expired. Moreover, the Rules do not limit the period of expiration which may have passed, leaving the same open ended and, presumably, "*ad infinitum*".

The matter is reinforced by Rule 17[1] of the Rules, where it states an application for extension of time may be made either before or after the expiration of time and, once again, without limiting the length of the latter period.

The situation is further endorsed by dicta in the authority of St. Mungo Community Trust v Colleano 1980 1 CR 254 EAT ['St Mungo'] to the degree a response may be filed even after judgement in a substantive case.

Mr. Navas kindly referred me to the dicta of the learned Judge, Mr. Justice Waterhouse, at page 258 H to page 259 A, where the learned judge stated:

" .. *but we have reached the conclusion that it would be wrong for us to write into the rules a limitation on the time when an application under the rule 12 [1]* – (and which Mr. Navas helpfully added is equivalent of Rule 17 [1] of the Rules) – *may be made. If such a limitation had been intended, it could have been stated quite simply and clearly. Moreover, Rule 3 [3]* – (and which Mr. Navas, once again, helpfully added is equivalent of Rule 6 [3] of the Rules) – *expressly preserves, or establishes, the right of a respondent who has not entered an appearance to make the application without specifying any limitation as to when it may be made* .."

In the circumstances, it should seem the Respondent is at complete liberty to file out of time.

However, whilst accepting the same, Mr. Cardona for the Complainant objects and submits he should not be permitted to do so.

In the circumstances and under Rule 6 [3] of the Rules the Tribunal can only refuse an extension provided it has given the person wishing to enter an appearance an opportunity to show cause why the extension should be granted and Mr. Navas, in the full plenitude of that authority, has moved to show cause in resistance to Mr. Cardona's objection.

The parties agree that in such a situation the tests I have to apply and the hurdles to be surmounted are found in the case of Kwik Save Stores Limited vi Swain and others 1997 I CR 49 EAT ['Kwik'].

Moreover, for good measure, it is a three part test. Mr. Navas in his instructive skeleton arguments enumerated those tests. I believe they may be summarised as follows:

1. The explanation or otherwise for the delay;
2. The merits of the defence;
3. Possible prejudice to each party.

In dealing with those matters there should seem to be an understandable obligation for the Respondents to put before the Tribunal all relevant documents and other factual obligations.

Mr. Navas submitted they had. Mr. Cardona questioned the same, although I do not believe he went on to exemplify why it had not been discharged and was happy to simply allow the same to remain as a general, save unspecified rebuttal, further happy to rely upon what he moved to submit, as his arguments developed, was a shabbily run organisation, by the Respondent, hardly qualifying as 'a hands on' operation.

Be that as it may, the parties filed respective witness statements from both the Respondent's Managing Director, Mr. Jason Olivero and the Complainant himself. As to the relevant documents requirement, Mr. Navas submitted the only document fulfilling that requirement is the Termination of Employment form, which had been exhibited in the Respondent's bundle of documents.

Turning to the Kwik tests, I believe the evidence and submission show:

Delay:

In seeking to satisfy the first test and thus the reasons for the delay, Mr. Navas referred to Mr. Olivero's statements and explanations, as found in paragraphs 4 *'et sequi'* of that statement. In a nut shell, the envelop containing the Originating Application was delivered by hand to the Respondent's business premises at The Square Café, at 2/1, Casemates [and more properly, as I mentioned previously, I believe: 'Grand Casemates'] Square. It was first thought to have been delivered to Mr. Guy Olivero, a nephew of the Managing Director, who was at the time a junior member of staff. Subsequently, Mr. Navas conceded it seemed, Mr. Guy Olivero, was not the recipient of the envelope and the identity of the individual in question remains a mystery. However, who so ever received the communication seems to have placed the closed envelope in a box file set aside for the purpose of the storing of C.Vs., having assumed the same to be a C.V., because the Square Café premises of the Respondent rarely received any other documentation by hand, at those restaurant premises.

There the communication in question lay, until the 15th day of February, 2013, when Mr. Jason Olivero decided to empty that C.V., box file. Mr. Olivero deposed in his statement he only looked at box file in question, periodically, and when he required staff, or when the box was full and, presumably, he needed to dispose of the accumulation.

Certainly, on discovering the same and realising it was not a C.V., he made an urgent appointment with his solicitors, HLB, resulting in two communications from HLB to the Tribunal, on the 18th day of February and the 7th March, 2013, in the first enclosing the Response and, automatically, triggering Rule 6 [3] of the Rules and terminating the irregularity, which had existed over the pervious 5 months and 12 days. The second letter, out of an abundance of caution, requested an extension of time, within which to file the Response, under Rule 17 [1] of the Rules, even though, as stated previously, the same was not strictly necessary.

In seeking to mollify the consequences of the delay, Mr. Navas, referred to the dicta of Mummery J in Kwik, where the learned Lord Justice provided useful guidelines in relation to that part of the test, and, to that end, stated:

".. *The explanation for the delay, which has necessitated the application for an extension, is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The Tribunal is entitled to take into account the nature of the explanation and to form a view about it. The Tribunal may form the view that it is a case of procedural abuse, questionable tactics, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case, it is for the Tribunal to decide what weight to give this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.*

In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered... "

In those circumstances, Mr. Navas submitted the misfiling of the Originating Application fell within the dicta definition of: "*accidental or understandable oversight*", which should find favour with the Tribunal, given a full and honest explanation had been tendered, which should prove satisfactory to the Tribunal, and so, the Tribunal, should look no further in the exercise of its discretion; not least, when the Respondent had always intended to defend the claim.

By way of general observation, Mr. Navas added the Tribunal had to keep in mind the Respondent's operation was a 'café and churros' ['fritters'] establishment and not Barclays Bank Plc. Moreover, it was an operation mainly staffed by Spaniards, untutored in the importance and niceties of official communications, via brown envelopes, endorsed with "*Upon Her Majesty's Service*" or stamped with the '*Industrial Tribunal*' ink stamp.

Mr. Navas also submitted he considered the hand delivery of proceedings by the Tribunal, as casual.

On the other hand, Mr. Cardona, sought to qualify the interpretation of Mummery J's dicta and submitted objections to the benign scenario Mr. Navas sought to weave. In particular, he counselled as to the desirability and benefits of maintaining strict time limits and so the Tribunal's discretion had to be exercised with care, especially when time had expired by such a degree. He emphasised stronger grounds were required in such an occasion, pointing out that in the St. Mungo case, whilst it established a respondent has a right to make an application even after judgement, the dicta stated that such an application would result in a "*very heavy burden on a respondent*". Mr. Cardona submitted a similar stringent situation was required in this case when 5 months and 12 days had already expired, and, most especially, when in Kwik it stated that "*in general the more serious the delay, the more important it is for the applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest*".

Mr. Cardona also submitted the delay was also relevant to the prejudice the Complainant had suffered, as a result.

In the circumstances, Mr. Cardona rejected the delay had been due to an '*accidental*' or an '*understandable oversight*'. In proof thereof, he reminded the Tribunal about the pre-action letters of the 26th day of July and 7th day of August, 2013, issued by the Complainant's solicitors, one of which, at least, had reached the Respondent and so, at the very least, the Respondent had been on notice as to the Complainant's intention to issue proceedings. If only in the light of just that one receipt, the Respondent could not argue he did not expect proceedings and was not unaware of the same.

Indeed, given the proof of the delivery of the one letter which did come to light and which so arose following the discussions between Mr. Cardona and Mr. Navas, and not because the

Respondent had himself informed Mr. Navas, of the same, Mr. Cardona strongly suspected both had been received by the Respondent, as to further deminish the Respondent's argument.

Mr. Cardona also maintained the clear official nature of the communication and the model of its delivery should have placed the Respondent and his staff on notice, irrespective of the nature of their profession, or the nature of their commercial operation and the services they provided, or their nationality; most especially, when the staff member who received the same was required to sign for the envelope from the Tribunal. Mr. Cardona pressed it was reasonable to assume that all those circumstances should have placed the Respondent, or its staff, upon notice, as to the extraordinary nature of the communication, which was not one in keeping with a simple submission of an application for employment

Mr. Cardona, further submitted with equal emphasis that in pleading the absence of having a proper system in place, to receive and deal with official letters, including those by hand, or otherwise, resulting in 2 out of 3 letters not reaching the Managing Director, the Respondent was, in effect, seeking to profit from his own negligence and such a stance was wholly unacceptable.

In the circumstances, Mr. Cardona submitted the delay more properly fell under the definition of the dicta of Mummery J, which spoke of "*procedural abuse, questionable tactics ..... intentional default*" and, hardly, a 'one off', as the Respondent had attempted to portray.

In his response, Mr. Navas sought to place some distance between the St. Mungo case dicta and the present case, pointing to the difference between the current case and the summary judgement situation where the burden is *"very heavy*".

Mr. Navas re-maintained the Respondents simply did not expect the proceedings and he submitted it was not unusual for threats of litigation not to proceed. Hence, his client was simply not on alert for a communication from the Industrial Tribunal serving the Originating Application.

In Mr. Navas's view a proper process would have included delivery to the Respondent's registered offices, or its solicitors, and, to that end, referred the Tribunal to Section 376 of the Companies Act, which states service to a company: *"by leaving it at or sending it by post to the registered office of the company"*.

However, Mr. Navas went further and suggested that if the Complaint had been truly interested in knowing whether the correspondence had been received by the Respondent, the Complainant should have independently notified the Respondents, as to the issue of the proceedings. The fact he had not done so, indicated the Complainant, himself, had been negligent.

Merits:

Mr. Navas also maintained the Respondent had discharged the hurdle, as to proving the necessary merits of its case.

Mr. Navas borrowed the sentiments of Mummery J., in Kwik, when he stated:

" *... Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the Industrial Tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted on, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case ...*"

Mr. Navas also pointed out that Mummery J., in Kwik had stated that if the Tribunal was minded to refuse an extension of time, then similar considerations applied, as to those invoked, in respect of the setting aside of a default judgement, which the learned Judge, in reference to Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc. 1986 2 Lloyd's Rep 221 ['Alpine'], had expressed as: *"In our view similar considerations apply if an Industrial Tribunal is minded to refuse an extension of time .."*

Mr. Navas added those considerations had been set out by the case of Alpine as being: *"a real prospect of success"*.

However, Mr. Navas proceeded further and astutely pointed out that what had been seen in Alpine as requiring a "*real prospect of success*", in fact was interpreted and reduced, by

Mummery J, in Kwik, to a "*reasonable prospect of success*". In other words, no longer 'real' but only 'reasonable', and all given that in Kwik Mummery J., noted that in Alpine, the Court of Appeal decided the defendants had not shown they had a "*reasonable prospect of success*".

Indeed, not satisfied with such a reducing distinction, Mr. Navas pressed his point even further and sought to take the Tribunal to lower horizons, and further water down the test in question, by additionally pointing out that in respect of the Civil Proceedings Rules applied by the Supreme Court ['CPR'], and in particular CPR 24.2.3., and all by way of analogy to the application for summary judgement in High Court proceedings, the case of Three Rivers DC v Bank of England No 3 (2001) 2 All. E. R. 513 was clear authority for the proposition that whilst at trial of a substantial issue, the burden of proof, would be upon 'a balance of probability', as to mean a party hoping to be successful had to demonstrate his allegation or case was 'more probable than not', at a summary judgement application, and therefore, by analogy with the latter, at the current application for leave before this Tribunal, the test to be discharged was just one which was termed to be that of an: "*absence of reality*".

Mr. Navas moved on to also remind the Tribunal that neither did it mean the Respondent had to show his case would probably succeed at trial, given the hearing for leave, was not a summary trial. All the Respondent had to establish was that there was "sufficient merit to proceed to trial". Certainly, it did not require the conduct of a mini-trial – [See Lord Woolf, M.R., in Swain v Hillman (2001) 1 All.E.R. 91].

Accordingly, in the current matters before the Tribunal, Mr. Navas summarised the Tribunal's task as requiring the Tribunal to give "*some consideration*", to whether the Respondent has "*a reasonable prospect of success*", as to, actually, mean an "*absence of reality*".

In such a scenario, the Respondent rested the dismissal upon the alleged attempted thefts and faced with the same the Tribunal had to apply the test in British Home Stores Limited v Burchell 1978 1 RLR 379 ['Burchell'] in determining the fairness of the dismissal and so the Tribunal had to ask itself: '*was the belief by the employer in the misconduct of the employee a reasonable suspicion, amounting to a belief in the guilt of the employee*'?

That process of deduction involved three elements. Firstly: that the employer so believed. Secondly: that the employer entertained reasonable grounds upon which to so hold. Thirdly, the employer carried out as much investigation into the matter, as was reasonable in all the circumstances.

Once those grounds were discharged the Tribunal should not examine the employer further. It was not necessary for the Tribunal to share the same view. Nor should the Tribunal examine the quality of the material, which the employer had before him, as to see if it would lead to a given conclusion upon a balance of probabilities.

In applying all that to the evidence before the Tribunal, Mr. Navas stated the belief of the Respondent in the events of May 18th had been established. The discrepancy in the events between the Respondent and the Complainant could not dislodge the existence of such a belief by the Respondent; not least, when the Respondent did not accept the Complainant's version of events and intended tackle them at trial.

According to Mr. Navas, the crunch events were those of May 18th. Whilst the Respondent already harboured suspicions, it could not act upon them. Whether the Complainant worked shifts; held keys; was responsible for opening and closing; or worked certain days and not others, as alleged by Mr. Cardona, whilst not accepted, they all, in any event, pre-dated the events of May 18th.

Furthermore, the fact no action was taken previously, was due to insufficient evidence to substantiate the nagging suspicion. However, as of May 18th, the Respondent had reasonable grounds upon which to sustain that belief and the likely need by the Complainant for money, in respect of the adoption of his daughter, plus the previous irregularities with money, as expressed by the Managing Director, Mr. Jason Olivero, in paragraphs 18 to 27 of his statement were all relevant to the context and reason for the Respondent's belief.

In addition, the Respondent carried out as much reasonable investigation as was reasonable in all the circumstances of the case. The investigation was conducted by the Head Waiter and included two conversations with the Complainant and consultation with Mr. Olivero.

In response to my question, Mr. Navas conceded the cash till had not been checked, as a precaution and double security to ensure money was, indeed, missing, on that day and as might have confirmed the suspicions of that day; not least, when the Respondent's evidence stated Mr. Olivero undertook reconciliation exercises [presumably of sales and income] twice a day. However, Mr. Navas explained such failure was due to the fact, that, at that stage, when challenged, the Complainant did not mention a specific amount of cash, as in, for example, £50.00, nor, for that matter, identified the 'gifting client', neither did he produce the gifted money from his pocket. All the Respondent had was a complaint from an independent customer, who had seen the Complainant pocket money, and who then went to the trouble of

walking over to another of the Respondent's sister establishments to complain to the Managing Director, Mr. Olivero, very concerned and wishing to ensure the Managing Director was aware of the incident in question.

Mr. Navas concluded by submitting that having discharged that onus, in demonstrating those three requirements, the Respondent could not be examined further. In the circumstances, the Respondent certainly enjoyed '*a reasonable prospect of success*'.

In response Mr. Cardona submitted that the analogy with the test to be applied in determining an application to set aside a default judgement had to be approached with caution. The effects were fundamentally different. If I understood him correctly, he explained one was more draconian than the other, given if the application was not granted and the Respondent was not permitted to defend the action, trial on the merits could, nevertheless, still take place and so would not, necessarily, result in the case being decided in favour of the Complainant and against the Respondent, further given the Tribunal would still have to scrutinize the Complainant's case. In effect, the Tribunal would assume or ensure the proper defence and postulation of the Respondent's case, in the absence of the Respondent being able to do so himself.

Mr. Cardona equally pointed out that in drawing an analogy with the procedure and considerations applicable in setting aside judgements, Mummery J., in Kwik had pitched the level of comparison as only being 'similar'.

At the same time, Mr. Cardona did not believe the submissions as to 'reasonable' and 'real' assisted. However, he agreed the Tribunal had to avoid a mini trial. Neither did he believe the Respondent had a meritorious defence, nor one with a real prospect of success and, very interestingly, in respect of the submissions made by Mr. Navas, Mr. Cardona suggested the term "*absence of reality*" carried no meaning, unless you knew what *'reality'* meant, in such circumstances, and which, in any event, he submitted was, in fact, defined as "*better than merely arguable*" – [see: International Finance Corp v Utexafrica Sprl (2001) CLC 1361 and ED & F Man Liquid Products Ltd v Patel (2003) EWCA Civ 472].

Mr. Cardona accepted the correct approach, in respect of the question of fairness of the dismissal was established by Burchell's case, which he also summarised to be: [1] employer's belief in the guilt of the employee; [2] reasonable grounds upon which to sustain that belief; [3] reasonable investigation.

However, Mr. Cardona submitted the Respondent never had a genuine belief in the guilt of the Complainant. He simply wanted to be rid of him, due to the Complainant's assertion of his rights, as to minimum wages, in a situation of the failure to provide wage slips – [an allegation which Mr. Navas interjected to reject on behalf of the employer, save without evidence on record, as to the same].

Mr. Cardona also pointed out that in considering that whole issue, it was pertinent to point out that in respect of the previous alleged theft incident, with the £5.00, not only was no action taken by the employer but, ironically, the responsibilities of the Complainant, within the business were, in fact, increased, as to, in turn, question the relevance of that incident, in the first place, to the subsequent events.

Furthermore, the fact the Complainant was also offered the opportunity to work out his notice period hardly supported the Respondent's alleged lack of confidence in the Complainant, arising from a belief in having suffered theft at the hands of the Complainant, as to justify an immediate dismissal.

Mr. Cardona also questioned the reasonableness of the grounds upon which the Respondent held his belief. To equate an employee was stealing, because he was involved in an adoption process, when that employee had requested to work less hours, because of that very adoption was hardly tenable. Furthermore, the grounds of suspicion lacked particularity and so were unreasonable; most especially, when it was perfectly plausible for money to be accidentally lodged behind the tray of the cash register.

A discussion ensured between counsel as to the whether the reasonable ground to sustain that belief in the Complainant's culpability was 'subjective' or 'objective'. An adjournment was granted and, during the interval, an agreement was reached between counsel, the terms of which were expounded by Mr. Navas, and in which he confirmed, it was accepted it was, in fact, a combination of both, namely: 'subjective' and 'objective'.

Simply put, the employer had to establish those grounds were in the employer's mind ['*subjective*'] and, if so, that it was reasonable for him to have that in mind ['*objective*']. The latter depended upon circumstances, for example; [a] the report from the customer and [b] the investigations by Mr. Lopez, the Head Waiter. The two grounds of Burchell's case of [1] reasonable grounds to sustain belief and [2] reasonable investigation have to work back to front and the latter considered first.

That settled, Mr. Cardona questioned whether a reasonable investigation had, in fact, taken place. He referred the Tribunal to the dicta of Stephenson LJ in W Weddel & Co Limited v Tepper 1980 1 RLR 96 ['Weddel']:

" ... [[employers] do not have regard to the equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, 'gathered further evidence' or, in the words of Arnold J in the Burchell case, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means that they must act reasonably in all the circumstances and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries, or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably. .."

Mr. Cardona emphasised the Respondent had *'jumped to conclusions'*. No reasonable investigation had been carried out. The Complainant had not been given time to explain himself. The identity of the gifting client had not been requested. The fact the Complainant had subsequently proved that he was innocent via the statement of V. Aguilera who admitted gifting the Complainant £50.00 towards his adoption expenses, clearly proved the deficiencies in the actions of the Respondent.

Mr. Cardona referred the Tribunal to an extract of the ACAS Code of Practice, to demonstrate what a reasonable investigation should entail and to include:

1. *require employees to be informed of the complaints against them and supporting evidence before a meeting;*
2. *give employee a chance to have their say before management reaches a decision;*
3. *provided employees with the right to be accompanied;*
4. *provide that no employee is dismissed for a first breach of discipline except in cases of gross misconduct;*
5. *require management to investigate fully before any disciplinary action is taken;*
6. *allow employess to appeal against a decision.*

Mr. Cardona argued that 'at the very least' a reasonable employer would have given the Complainant written particulars, together with details of what the witness had said. The Respondent's decision to dismiss there and then was unreasonable; particularly, in view of the

fact the Complainant gave an explanation for his denial of the accusation. Mr. Cardona explained that in the previously mentioned Weddel case, the defendant had stated he was not guilty, save failed to give an explanation, and the decision to dismiss was, nevertheless, held to be unreasonable. However, in this case and ironically, the Complainant gave an explanation, which furthermore, was in consonant with what the Respondent employer knew. Quite simply, it was not a reasonable investigation.

Mr. Cardona pressed the matter home by repeating his submission that, although, the Complainant had denied the allegation and explained his actions, he was, nevertheless, dismissed, without further investigation and, whilst he accepted the 'Café' was a small undertaking and not Barclays Bank Plc., it did not obviate the Respondent from the obligation to observe a proper procedure, and, in particular, none at all.

Mr. Navas, once again interjected to request caution. He raised the absence of precise particulars, and pointed out that, as a result, the Tribunal did not know what had taken place. However, Mr. Cardona swiftly turned that on its head by wryly observing, it simply proved the existence of the lack of investigation, he was complaining about and so, of itself, was an acceptance of the fact the dismissal was unfair: '*ab initio*' and so the Respondents had no merits to defend.

Mr. Cardona further raised the matter that in the Notice of Termination form, filed by the Respondent, on the 30th day of May, 2012, the Respondent had stated the Complainant "*left at his own request*", when it was clear the Complainant was dismissed. Mr. Cardona questioned why the Respondent filed an erroneous formal document with the ETB, as to no doubt question the credibility of the Respondent. At best, it showed a frivolous attitude, in keeping with the negligent operation which the Respondent seemed to operate.

Mr. Navas once again interjected to remind the Tribunal the Complainant had said he was walking out when told he was to be dismissed and so, to that degree, there was reason for that particular entry, in the form in question.

Prejudice:

Mr. Navas submitted the Respondent would be clearly prejudiced if its' application was refused because it would be unable to defend its' claim as to liability, contributory conduct, and quantum, whereas the only prejudice to the Complainant would be the prejudice in

allowing the Respondent t defend the claim, which for obvious reasons could not be taken into account as a factor.

Mr. Cardona argued submissions of '*prejudice*' were common ground to all applications of this nature. He repeated he did not think the Complainant would automatically obtain judgement in his favour. He would have to establish the issue of liability and extent of his loss. Mr. Cardona also repeated the Tribunal would adopt an inquisitorial role, a not unusual situation. He argued for certainty. Furthermore, he also strongly believed it would encourage others, adding, for good measure: "*pour encourage les autres*", from Voltaire's 'Candide', and all of which, Mr. Cardona, uttered in such redolent and perfect French, as to immediately transport me back to '*la belle France*', the land of my paternal Lombard ancestors and cradle of my ancestral family.

That split second flight of mind passing and permitting me to re-gather myself, Mr. Cardona moved on to submit the Complainant's loss had been mitigated by his ability to find new employment within a week of his dismissal and that moreover his losses had crystallized on the 4th day of January, 2013.

However, if the application were to be granted the Complainant would be further prejudiced in having had to submit the current application and the costs thereby incurred, thereby reducing the net effect of any compensation by the fact the Tribunal cannot award interest.

Furthermore, the Complainant was made aware of the Respondent's defence 5 months after the event when his own recollection of the events and the availability of witnesses could be compromised.

Accordingly, Mr. Cardona opposed the application. No satisfactory explanation had been tendered for the substantial delay and there was no real prospect of success in defending the claim. Mr. Cardona moved for the application to be refused with costs.

Mr. Navas in responding, regretted the fact that although the Complainant conceded his loses crystallised on the 4th day of January, 2013, no attempt was made to quantify the value of that loss and it would prove highly prejudicial for the Respondent to have a judgement against it as an unfair employer, regardless of the value of the claim.

He also pointed out that if the Complainant had agreed to the application, which it could have done, even upon the basis of all rights reserved in relation to the substantive claim, no loss

would have been occasioned to the Complainant. If the Complainant was, so, sure as to its case, why had it gone to the lengths of objecting to the application, even at the risk of being out of pocket? Such a reality could only but support: [1] the merits of the Respondents case and [2] that the Complainant hoped to face an undefended claim.

Decision:

Having considered the matter, I have decided to accede to the application and allow the Notice of Appearance to be filed out of time, to the degree of the delay when it should first have been filed, to date.

In reaching this decision I have considered the various tests I have to have in mind, as per the various authorities, and as set out before. However I should wish to deal with the issue of 'prejudice' first, even though it was named as the third consideration, in Kwik, given, in my modest opinion, I believe that is the most important.

'Prejudice'

Needless to say, 'Justice' must be our paramount endeavour and guiding consideration, and whilst procedure and certainty is a vital part of such a process, as I believe was first demonstrated by the Emperor Justinian, in his codification of Roman Law, in 529 and 534 AD.

Moreover, I also bear in mind the more recent dicta of Sir Thomas Bingham M. R., in Costello v Somerset County Council (1993) 1 WLR 256 at page 263 ['Costello'], as quoted in Kwik, to the effect: ".. *The first principle is that rules of court and the associated rule of practice, devised in the public interest to promote the expeditious despatch of litigation must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met* ..".

Nevertheless, 'Justice' must not fall foul and victim to the technicality of procedure. To once again employ the observation of the learned Master of the Rolls in Costello: ".. *a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent, for which an award of costs cannot compensate* .."

Accordingly, to prevent the Respondent from defending this action would, in my modest opinion, effectively silence him and cast him out of the process, in circumstances where he wishes to defend the complaint, and, furthermore, alleges he can do so, plus having, in my view, provided proof of the same – [in the words of CPR 24.2.3: "*sufficient merit to proceed*"] - and so, to so deny the Respondent, would prove an injustice.

The latter will not be redressed by the Tribunal assuring an inquisitorial role, as Mr. Cardona astutely and firmly suggested; not least, given the inherent limitations in such a situation. For example, the Tribunal's presumed inability to negotiate a settlement with the Complainant on behalf of the Respondent, should the Tribunal deem such a possibility an adequate course of action, in the circumstances and in the best interests of the Complainant. Whilst such a proposition might be novel and, perhaps, far fetched and an untenable situation, nevertheless it grabbed counsel's attention, when I floated the possibility, as an example of what I viewed as a fundamental incongruity in Mr. Cardona's otherwise, beguiling proposition, and which Mr. Navas kindly described as: "*an interesting situation*" – an interesting one, indeed, if may add.

As counsel will recall at an early stage during the proceedings, I mused and wrestled with my concern that Justice must take precedence over procedure and despite the fact Mr. Cardona countered that suggestion, he, nevertheless, graciously and elegantly, and to this credit conceded to the same, "*when in the balance*". I believe this is one such "*balance*".

Moreover, I am encouraged in such a conclusion, by a report in the Gibraltar Chronicle, of the 14th day of June, 2013, by a local barrister Moshe Levy, in respect of a recent Privy Council case, in which the Privy Council was quoted as having elegantly expressed the view; "*finality is a good thing, but justice is better*". I could not agree more.

'Delay':

I accept the explanation for the delay was '*accidental*' and an '*understandable oversight*'. I accept that in a fluid café environment of much movement of people and activity of service, resulting in the coming and going of an ever changing clientele, with the added bustle of, presumed, stock deliveries and collections, added to the fact the majority of the staff are of Spanish origin and, perhaps, not accustomed to our official Anglo-Saxon brown envelopes endorsed with official lettering and ink stamps, and the importance, not say alarm, all that carries in our culture, it might be an easy consequence for such a communication to be unintentionally misplaced, as the Managing Director of the Respondent stated occurred in this

case, going to the degree of indicating and explaining where the envelope was actually deposited, and why it lay in such a receptacle for so long, and how it was, subsequently, accidentally discovered.

However, I do not accept that in this impersonal age of 'emails'; 'twitter' and 'hash tags', excreta, the delivery by the Tribunal, by way of a hand recorded presentation to the Respondent's appropriate place of business, where the Respondent had employed the Complainant, and which has been the historic normal and accepted method of communication by the Tribunal to date, without the same, to my 16 years judicial experience as a Chairman of the Tribunal, ever leading to a comparable situation of loss or misplacement, could be dismissed as 'casual', as Mr. Navas submitted. Most especially, when as a result of my questions, during the proceedings, to the Secretary of the Tribunal, Mrs. Denise Moreno, she confirmed that a note on the Tribunal file, undertaken by the previous long standing Secretary, Mrs. Dianne Savignon, indicated the Originating Application had also been sent by post.

However, correspondingly, I also accept the provisions of Section 376 of the Companies Act speaks about service upon the registered offices of companies like the present Respondent, and that did not take place in this instance.

In the circumstances, I trust the Secretary of the Tribunal will take note and incorporate an appropriate amendment and extension to the mode of future service of documents, by the Tribunal, as to improve matters and so attempt to prevent any future repetition. As Mr. Navas rightly pointed out, in this day and age, the details of the registered offices of companies are on line and so is "*but a click away*", as he graphically and rightly, and succinctly put it.

In saying all this, I recognise the difficulty posed by the postal transmission of the Originating Application by the Tribunal to the Respondent, which, in the normal course of business, it is to be assumed the Respondent received and all, of course, in addition to the hand delivery method actually also employed and delivered.

Moreover, there is also the fact that one and, possibly, two pre-action letters were despatched by the Complainant's solicitor, one of which certainly reached the Respondent.

Furthermore, there is Mr. Cardona's astute argument, as to the fact the Respondent lacked a proper system, which safeguarded the safe and proper receipt of official documentation, and which Mr. Cardona took to the height of 'negligence', and so should not be permitted to

enable the Respondent to profit from the same, and all of which, brings me to also re-dwell upon the disregard by the Respondent of at least one pre-action letter, if not two, in what might indicate a '*devil may care*' attitude.

However, in explanation to the same, there is Mr. Navas's submission to the effect the Respondent did not really expect proceedings to materialise.

In the circumstances, it may be the Respondent inhabited what with respect I should describe as a '*fool's paradise*', no doubt thinking the matter would simply die a natural death.

In the end, given nothing is perfect and mistakes do arise – indeed, even multiple mistakes - I have accepted the misplacement of the Tribunal communication was a genuine unintended mistake, as opposed to "*procedural abuse, questionable tactics ... intentional default*".

Moreover, in such a situation the fact the Respondent may or may not have received postal communications, in respect of intended proceedings does not assist, if for no other reason, because the Originating Application sent by hand, was left unopened and simply placed in the CV box, as to mean the Respondent did not [could not] link one with the other. It might have been different if the evidence had been that the envelope had been opened and discarded, but that was not what was said to have occurred and so 'mistake' it must be.

The issue of the postal delivery of the Originating Application can only but be left to one side, given there is no evidence it was received and so it may not have been received.

When all is said and done, I do not think I can reach a different conclusion, as temptingly urged upon me by the suppositions posed by Mr. Cardona, as to the Respondent's real wish to rid itself of the Complainant, when he tried to re-vindicate his rights, and as supported by a failure to act to the pre-action letter[s?], or the postal [and also hand delivered] communications from the Tribunal; most especially, when, rightly or wrongly, there were allegations of theft in the background, and the Respondent's Managing Director has explained exactly what occurred, and what went wrong, as to lead to the misfiling of the Originating Application.

Furthermore, as established and responsible business men, running several businesses and contributing to this economy and affording employment to numerous individuals, I do not think the Respondent would have been deliberately cavalier about legal proceedings, once those had been issued, as to deliberately challenge and defy that process, which I should

suggest would be required to comply with "*abuse, questionable tactics ... intentional default*".

Moreover, I think it is further telling that the Respondent's Managing Director immediately rushed to see the Respondent's solicitors when he discovered his failure. If the Respondent had been bent upon defiance, as to "*intentional default*", why then the panic and rush, at that stage? Did the Managing Director's nerve fail him, at that moment, in time, over 5 months after his attitude of defiance and possible '*devil may care*' display? After all, he could have, conceivably, continued to defy the matter, pushing the scenario to further limits, to see where that took him, given, if that was his real attitude, to that date, it had already gained him 5 months and nothing had happened.

However, he did not and, instead, he proceeded in what seemed to me to be speed and urgency, as to indicate, what I further believe, carried an element of 'panic', at a genuine mistake and, in any event, I so interpret, given, in my modest opinion, it all has a general ring of truth about it, despite a possible 'slap dash' operation and some discrepancies.

In the words of Mummery J, in Kwik: *" .. In each case it is for the Tribunal to decide what weight to give to this factor in the exercise of its discretion .."*

'Merits':

For the purposes of the application and bearing in mind the requirements in question, I also accept the Respondent has discharged the requirements as to the necessity of '*a sufficiency of merits*' in its defence, and that the deciding set of events, where those of May 18th, as coloured by past events, even though there is a discrepancy between what exactly occurred on that day between the Respondent and the Complainant.

Irrespective of the later, it seems to me that on that day, the Managing Director of the Respondent clearly came to believe in [1] the underlining allegations of theft, and [2] that he had reasonable grounds for the same, as evidenced by the reports he had received from both the Head Waiter and the independent client, who had sought him out in her or his concern, and [3] that he had carried out as much investigation as was reasonable, in the circumstances.

Placed in the shoes of the Managing Director and faced with a situation where there had been previous suspicions as to missing money, in circumstances which were open to interpretation as to possible theft or conspiracy to steal, and having, moreover, it should seem, at least, once

caught out the Complainant, in respect of the £5.00., in addition to the incident on May 18th, it further seems to me that there can be few matters as unnerving and detrimental, and requiring swift action, than the repetition of an allegation of theft, in confirmation of a suspected previous allegation and general periodic discrepancies with money, and all, importantly, in circumstances of a business which constantly operates in ready cash, delegated to employees, and so the scrupulous honesty of employees must be of utmost importance in such a situation, and in the classical phrase a: "*sine qua non*".

Rightly or wrongly, the circumstances of the adoption and the perceived expense arising from such an endeavour conspired against the Complainant, at least in the mind of the Managing Director of the Respondent.

I accept the offer to work out the notice undermines the allegation the Complainant was summarily dismissed because of theft and the fear it carried in the Respondent's mind, and, therefore, the importance in peremptorily terminating his employment.

I also accept the ideal scenario of method and manner provided by ACAS, and being one clearly not followed in this instance, and all of which is further supported by the dicta of Weddel's case.

However, at this stage and for the purposes of the present application it does not undermine matters sufficiently and the fact of the matter was some enquiry was undertaken, in what was a fluid and rapidly developing situation, in what must have been unpleasant and stressful scenario, and all of which reached a head, when the Complainant was dismissed, and at the same time, as per the counter allegation, he decided to walk out.

Whilst the Complainant was not bound to give an explanation, having denied the allegation, it should certainly have assisted, all round, if he had. It must be a matter of regret he did not, although I accept he must have been, understandably, furious, especially if innocent, as he alleges.

In all the circumstances, it seems to me that for the purposes of this stage of the proceedings, it is clear it was the issue of theft, which loomed large on the minds of the Respondent's Managing Director and senior staff, the latter being a colleague of the Complainant, and not a wish to be rid of an employee and colleague, who had wished to re-vindicate his rights, in respect of pay and less hours, and all by way of a conspiracy and cabal, as to be rid of a

strident employee, and as I submit would be necessary if Mr. Cardona's interpretation is correct.

I further accept that for the purposes of this stage of the proceedings, it was reasonable for the Managing Director of the Respondent to be perturbed by the same and to deem immediate dismissal, as being the appropriate course of action, upon the enquiries and consideration and procedure undertaken.

Had there been no allegations of theft in the background and once again for the purposes of this stage of the proceedings, a different treatment might have been appropriate. But, as I mentioned before, an allegation of theft is destructive and the procedure which might be appropriate to a Barclays Bank Plc scenario, might not be to a corner café, faced with a requirement of immediacy, to stem a perceived situation.

As also mentioned previously, if we had been at another stage in the proceedings, the Weddel's dicta might have pushed me in another direction, which might have denounced the fact sufficient enquiries were not undertaken, within a measured process, including the possibility to appeal and thus the immediate dismissal which followed, might have been deemed as unfair.

Even if that might have been so, I am, nevertheless, encouraged in my current decision by the fact that, at this stage of the proceedings, I must not conduct a mini trial and I must proceed by way of analogy to the criterion employed, when pondering about setting aside a summary judgement, where the yard stick is: "*absence of reality*".

At this stage in the proceedings, I cannot say there is an "*absence of reality*" either in the actions, or the reasoning of the Respondent, in response to the evidence and facts and situation facing him in his business, and, in all that regard, the evidence of the Managing Director of the Respondent, to the effect that, following the Complainant's dismissal, thefts have ceased, must be an important consideration to countering that "*absence of reality*" test, and, indeed, in confirming the reality and pertinence of the fears in question, even if only upon an '*ex post facto*' basis.

However, that said I must also add I am not at all sure, as matters currently stand, that if I were faced at trial, with the exact kind of evidence before me, as at present, I should come to a similar conclusion.

In such a situation, I might well be attracted by Mr. Cardona's submission that the Respondent, in the rush of things: "*jumped to conclusions*", and, to that degree, did not act reasonably. Therefore, might be required and called for so that the dismissal could be decreed as fair was a more extended procedure, of longer duration and enquiry, permitting a pondered investigation and consideration, even if the Complainant had to be suspended upon full pay, and all so as to permit the Complainant ample opportunity and facility to put forward his case and evidence.

In moving to a conclusion I note this matter is set down for directions for the 10th day of July, 2013. However, as I often plea, I should urge the parties to attempt to mediate this matter, as between themselves and explore the possibility of settling the same.

In case it might prove of assistance to the parties, I should also wish to record my suggestion to Mr. Cardona that the possible prejudice which he felt would arise to the Complainant, in respect of a grant of this application and the loss of interest, which the Complainant might suffer, upon a successful prosecution of the substantive claim in this matter, if it were to so proceed, might be resolved via the undoubted discretion which is vested in the Chair, as to the level of the Basic Award, which is stipulated at a figure of: "*not less than £2,200.00*" , which was first decreed many years ago. So much so and for example, I estimate the relative value of such a sum from 1997, when I first sat as Chairman, to today to be worth between: £2,992.00 to £4,004.00

Accordingly, whilst I have had occasion in the past to, for example, reflect the cost of living increases in that figure, in the awards I have decreed, I notice two different brother Chairmen have also raised the level of that figure, most recently in respect of two decisions last month. As counsel are aware, my views is the Tribunal must do justice and interpret the provisions in fulfilment of that sacred Trust.

Anthony J. P. Lombard.

Chairman.

June 20th, 2013