EMPLOYMENT TRIBUNAL

Case N° 17 of 2018

BART VAN THIENEN

Claimant

–and–

GVC SERVICES LIMITED

Respondent

DECISION

Background

On the 29th May 2018, the Claimant, a customer service retention agent, filed a claim alleging (i) unfair dismissal (ii) bullying and (iii) victimisation. In the Claim form the Claimant states that he was employed with the Respondent on the 15th May 2017 and that from that day on he was continuously bullied, that he was victimised with regard to a possible promotion and annual leave and that the Respondent created a situation in which he (the Claimant) was forced by the Respondent to be absent from work without leave thereby giving the Respondent the excuse to dismiss him (the Claimant) on the 7th May 2018 prior to the 52 week qualification period specified by the Employment Act being triggered.

On the 20th June 2018, the Respondent filed its Response Form with the Tribunal. In the form the Respondent confirms that the Claimant was employed between the 15th May 2017 and the 7th May 2018 and that the Claimant was dismissed following a period of unauthorised absence from his place of work. The Respondent denied that the Claimant had been bullied either generally or with regard to the specific instance raised in April 2018 and/or that he had been victimised with regard to any promotional post. In the Response form the Respondent also contended that the Tribunal did not have jurisdiction to hear the claim for unfair dismisal as the Claimant did not have the continuous period of service required under the Employment Act.

A chairman was appointed in 2018 to deal with this case but in late 2019 he decided to recuse himself and in consequence thereof, in January 2020 I was appointed as chairman.

The case first came before me on the 12th February 2020, at which time I ordered that the issue of whether this Tribunal had jurisdiction to hear the claim for unfair dismissal be dealt with as a preliminary point. Both parties have filed skeleton arguments and both parties addressed me on the preliminary point on the 26th February 2020. I conclude on the background by pointing out that the Claimant does not have, and has never had, legal representation in this case.

The Law

The right that every employee has not to be unfairly dismissed is contained in section 59 of the Employment Act (hereinafter "the Act") which provides as follows:-

> *"59(1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer.*
>
> *(2) This section applies to every employment except in so far as its application is excluded by or under any of sections 60 to 63".*

Section 59 has therefore got to be read in conjunction with the provisions of sections 60 to 63 of the Act in order to see whether the employee has acquired in his particular case the right not to be unfairly dismissed.

Insofar as this case is concerned, the provisions of sections 61 and 63 are not relevant and consequently I will not deal with them below. Similarly, with regard to section 60(2). This therefore leaves the following provisions as being relevant to the point in issue.

> *"60(1) Subject to the provisions of subsections (2) to (4) and of section 62, section 59 shall not apply to the dismissal of an employee from any employment if the employee:-*
>
> *(a) was not continuously employed for a period of not less than 52 weeks ending with the effective date of termination; or*
>
> *(b) .....".*

On the face of it, and as both parties agree that the Claimant was not employed for the 52 week period prescribed by section 60(1)(a) of the Act, this would mean that the Claimant has not acquired the right not to be unfairly dismissed. However, this is not the end of the matter since sections 60(3) and (4) and 62 of the Act provide exceptions to the 52 week requirement. Dealing with the first exception.

> *"60(3) Subsection (1) shall not apply to the dismissal of an employee if it is shown that the reason (or, if more than one, the principal reason) for the dismissal, or in a redundancy case, for selecting the employee for dismissal, was one of those specified in section 65A(1)(a) to (e), 65B(1)(a) to (e) or 65C(1)".*

Section 65A of the Act deals with maternity cases and therefore is clearly not applicable in this case.

Section 65B of the Act deals with health and safety cases and is relevant in the light of the submissions made by the Claimant to the extent of the following provision:-

"65B(1) The dismissal of an employee by an employer shall be regarded for the purposes of sections 59 and 70 as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee:-

(a) .....;

(b) .....;

(c) being an employee at a place where:-

(i) there was no such representative; or

(ii) there was such a representative but it was not reasonably practicable for the employee to raise the matter by those means,

brought to his employer's attention, by reasonable means, circumstances connected with this work which he reasonably believed were harmful or potentially harmful to health and safety;

(d) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, left, or proposed to leave, or (while the danger persisted) refused to return to, his place of work or any dangerous part of his place of work; or

(e) .....".

Section 65C(1) of the Act is also relevant in the light of the submissions made by the Claimant:-

"65C(1)For the purposes of sections 59 and 70 the dismissal of an employee by an employer shall be regarded as having been unfair if the reason for it (or if more than one, the principal reason) was that the employee:-

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right; or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1) whether the employee has the right or not and whether it has been infringed or not, but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It shall be sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) *For the purposes of this section any right conferred upon an employee by sections 65A and 65B and the Employment (Maternity and Health and Safety) Regulations 1995 is a relevant statutory right".*

The phrase *"relevant statutory right"* that appears in sub-section (1) is defined by reference to the provisions of section 65A, which as stated above does not apply in this case, section 65B, which does apply in this case to the extent of sub-sections 65B(1)(c) and 65B(1)(d), and the Employment (Maternity and Health and Safety) Regulations 1995 which raises the following point.

The Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996 amended the Act (which at the time was called the Employment and Training Act) by inserting sections 62, 65A, 65B and 65C of the Act and makes reference to the Employment (Maternity and Health and Safety) Regulations 1995, which as far as I have been able to ascertain have never been brought into force. The matter becomes more mystifying if one notes that Regulation 19 of the Employment (Maternity and Parental Leave, and Health and Safety) Regulations 1996 is a provision which is very similar to that of section 65B(1) of the Act.

The upshot of all of the above is that whichever road one takes the Claimant has to bring himself within the exception provided by sub-section 65B(1)(c) and/or 65B(1)(d) if he is going to get round the 52 week requirement in section 60(1)(a) of the Act by relying on the provisions of section 65C of the Act.

Turning than to the second exception provided for by section 60(1) of the Act.

"60(4) Subsection (1) shall not apply to a case falling within section 65A(f)".

As referred to above section 65A is not relevant for the purposes of this case and therefore this exception is not relevant also.

The third exception provided for by section 60(1) of the Act is contained in section 62 which provides as follows:-

"62(1) Section 60(1) shall not apply to the dismissal of an employee if it is shown that the reason (or, if more than one, the principal reason) for the dismissal was that the employee:-

(a) had made a claim against the employer under section 52A to 52D or under the Employment (Maternity and Health and Safety) Regulations 1995 whether such claim had been referred to the Employment Tribunal or not;

(b) had given evidence or information in connection with any claim referred to the Employment Tribunal under any of those sections;

(c) had alleged that the employer committed an act which (whether or not the allegation so states) would give rise to a claim under any of those sections;

(d) is believed or suspected by the employer to have done or to be intending to do anything in paragraph (a), (b) or (c) hereof.

(2) Subsection (1) shall not apply if any allegation made by the employee was not made in good faith".

Sections 52A to 52D, which deal with equal pay and treatment, are not relevant to this case. As to the provisions of the Employment (Maternity and Health and Safety) Regulations 1995 the same point as made above applies, namely as to whether the Claimant can bring himself within the provisions of section 65B(1)(c) and/or 65B(1)(d) of the Employment Act.

The Claimant late in the day also raised a whistle blowing argument and therefore I set out below for the sake of completeness the provisions of section 65D of the Act.

"65D The dismissal of an employee by an employer shall be regarded for the purposes of sections 59 and 70 as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee made a protected disclosure as defined in section 45A".

With reference to the public interest disclosure argument the Claimant seeks to rely on section 45B(1)(d) and (f) and therefore I set out the relevant portion of sub-section (1).

"45B(1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:-

(a) .....;

(b) .....;

(c) .....;

(d) that the health or safety of any individual has been, is being or is likely to be endangered;

(e) .....;

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed".

That then are the relevant provisions of the law insofar as the various submissions made by the Claimant are concerned.

The Facts

The facts, insofar as the preliminary issue is concerned, are as follows.

On the 13th March 2018, the Complainant is given a sick note for *"stress related anxiety"*. The sick note is renewed on the 21st, and again on the 29th March 2018 for the same reason as in the first case. The Claimant is therefore on sick leave between the 13th March 2018 and the 10th April 2018 inclusive.

On the 6th April 2018, whilst on sick leave, the Claimant raises a grievance with the Respondent with regard to the contents of minutes of a meeting he had held on the 8th March 2018 with his team leader and departmental manager.

On the 11th and 12th April 2018, the Claimant does not return to work, I assume this was because he was not on shift and therefore not required to work.

On the 13th April 2018, the Respondent agreed to the Claimant's request that he be suspended on full pay whilst his grievance was investigated. The suspension is to last until the 20th April, but it was subsequently extended until the 25th April 2018, as the grievance investigation had not been completed.

On the 17th April, the Claimant requested annual leave for the period 8th to 15th May 2018 as he required to go to Belgium.

On the 22nd April 2018, the Respondent confirmed the leave request but only for the period 10th to 14th May 2018.

On the 24th April 2018, the Claimant had a meeting with a Mr Maman with regard to his grievance complaint.

On the 25th April 2018, Mr Maman wrote to the Claimant confirming the outcome of the grievance investigation conducted, stating what steps were to be followed by the Respondent and including the statement that:-

> *"I believe the above brings a solution enabling you to return to work on Friday 27th April 2018 safe in the knowledge that all relevant managers will be aware of what the expectation is regarding conduct going forward".*

On the 27th April 2018, the Claimant informed the Respondent that he wished to appeal the result of the investigation, that in order to prepare the appeal properly he required all of the five days provided in the complaints procedure in which to submit the appeal and requesting that his suspension on full pay continue until the 7th May 2018, so that he could work on the appeal.

On the 27th April 2018, the Respondent informed the Claimant that the appeal did need to be filed by 6 pm on the 7th May 2018 and that the request to continue on suspension could not be granted because as the investigation had been completed internal company regulations only permitted suspension on full pay whilst a complaint was being investigated.

Between the 28th and the 30th April 2018, the Claimant did not attend work.

On the 30th April 2018, the Respondent wrote to the Claimant pointing out that he had not attended work and that:-

> *"At the moment you are currently absent without leave. If you are absent without leave for 3 days or more it could adversely affect your continued employment with the organisation. I would urge you to read clause 10 of your attached contract. We will expect you back in the office for your next shift".*

In a statement made to the Tribunal the Claimant stated that he was confused, perhaps because at the time he was drinking in excess, as to when he had to return to work and that he thought his request to extend his suspension on full pay had been granted.

On the 1st May 2018, the Claimant wrote to the Respondent stating:-

(i) that the e-mail he had received was confusing to him, that it did not specify a particular date on which he had to return to work, that he interpreted the e-mail to mean that it had been agreed that he was on suspension until the 8th May;

(ii) the e-mail was not his appeal to the investigation since:-

- *"I need much more time for that and you will receive my appeal on the 7th May before 6 pm although only 5 working days is a ridiculously short time for an appeal as I have to go through thousands of e-mails".*

- *"I already assured you some days ago that I will definitely need every day till 8th May to go through thousands of e-mails for a proper documented appeal. That you now revoked the suspension that I am convinced was granted initially is pure sabotage of my right to appeal and defend myself".*

(iii) that, significantly enough:-

> *"During the time of preparing my appeal I consider myself to be on extended suspension until 8th May. On that date I will go on the requested annual leave till the 16th May. Till then I definitely can't go back to all the bullies without an acceptable solution it will be worse than ever and the risk of revenge is 100%".*

It is clear to me from this e-mail that (i) if the Claimant did not know before he most certainly knew then that he was required to go back to work immediately (ii) he refused to go back to work because he needed the time to prepare his appeal document (iii) he unilaterally decided that his next working day was the 16th May (iv) he disregarded the Respondents decision as to the days on which he could take leave and (v) by implication at least, he suggested that after the 16th May it would be acceptable for him to go back to work but not before.

On the 1st May 2018, the Respondent, by way of reply, informed the Claimant that (i) he (the Claimant) was expected to be back at work the next day (ii) if he (the Claimant) continued to be absent without leave the Respondent reserved the right to invoke clause 10 of his contract and (iii) that the reason for refusing some of the days on which he (the Claimant) had requested leave was justified. If there was before there could at this point now not be any confusion as to the contents of this communication.

On the 2nd May 2018, the Claimant failed to turn up for work and nothing was heard of him until the 4th May when there was a flurry of e-mail exchanges.

On the 7th May 2018, by e-mail timed at 12.37 hrs the Claimant informed the Respondent that, amongst other things:-

> *"So what then with my loss of income of 18 days of sick leave at half pay? "My stress related anxiety" was a direct consequence of the bullying and that loss of income is a punishment for me being victim of bullying. Now I have been put on leave without pay although I was made to believe that my suspension would continue. The company is doing its best apparently to make me a criminal instead of a victim. I'm the bad guy now apparently.*
>
> *As part of my appeal I have been preparing a timeline of all relevant events and communication regarding my bullying. Unfortunately Danielle and Emma are now refusing to send me copies of certain documents I asked for my appeal and I don't want to send an incomplete timeline. Under the Data Protection Act the requested information should have been provided so the company is breaching the law now."*
>
> and
>
> *"Whilst my appeal might now be considered without me being given an honest chance to fully prepare it, I think that the way forward is to let things settle a bit and then organise a meeting in which progress can be discussed. As informed before, tomorrow morning early I leave for annual leave and will be back in Gibraltar 16th May. I am willing to meet on that day with HR. I will have spent same quality time with my family in Belgium then far away of all the present issues so could come to a meeting with a fresh mind".*

On the 8th May 2018, the Respondent wrote to the Claimant informing him that clause 10 of his contract had been invoked as he had failed to attend work on the 27th to 30th April, the 2nd and 3rd May and the 5th and 6th May and that consequently his employment was terminated as from the 8th May. The letter includes the following paragraph:-

> *"As per clause 10.1 of your Employment Contract (which has been highlighted to you on more than one occasion) 3 days or more of unauthorised absence is grounds for gross misconduct which can lead to your dismissal without notice or pay in lieu of notice. Therefore you have left us with no option but to invoke this clause and terminate your contract."*

On the 11th May 2018, the Claimant wrote to the Respondent stating, amongst other things, that:-

"From a legal point of view the Gibraltar Employment Act states that an employee cannot claim to be unfairly dismissed if he was not continuously employed for a period of not less than 52 weeks. But it also states that the 52 weeks requirement is voided when the dismissal of an employee by an employer if the reason for it was that the employee alleged that the employer had infringed a relevant statutory right. The statutory right of all employees not to be subjected to bullying and victimisation is the one I mentioned before. I'm not a lawyer but I think this is clear enough. The Gibraltar Employment (Bullying at Work) Act 2014 doesn't even have this 52 weeks requirement.

For all of those reasons I appeal the termination of Employment and repeat my proposal to meet on 16.5.2018 when I will be back in Gibraltar. I also demand that my appeal against the Bullying investigation Outcome is properly investigated. Obviously there will be no need to meet if I will still be sacked, for that I ask you to review the decision most urgently. I propose "leave without pay" for the days you claim I have not been authorised but I felt forced to take off. If the dismissal is not fully revoked then there is no reason for me to return to Gibraltar by 16.5.2018 and I will rebook my return flight at a later date so I can spend some extra time with my family and friends in Belgium".

It is clear from the above passage that the Claimant was aware at that stage of the provisions of section 65C of the Act, as well as of section 60(1) of the Act, and that this was the reason he believed that the 52 week qualifying requirement did not apply to his case.

At no time after the 27th April 2018 and before the 7th May 2018, did the Claimant file his appeal document not withstanding that ostensibly this was the reason for his wishing time off work.

It is for the Claimant to persuade me that prima facie one or more of the exceptions contained in section 60(1) of the Act apply in this case and that consequently this Tribunal has the necessary jurisdiction to consider and determine the claim for unfair dismissal.

The above then are the facts for the purposes of the preliminary point.

The Case for Each Party

The Claimant has referred to English not being his native language and that therefore he either does not understand things properly or is unable to express himself properly. The Claimant does himself a disservice since having read his correspondence and having heard him I have little doubt that his grasp of the English language is good and better than a lot of English speakers.

The Claimant is constantly at pains to point out that he is not legally represented and that he does not have a legal mind or knowledge of the law. This, he explains, is why he has not raised issues when he originally filed his claim and why some of the submissions he now puts forward were made very late in the day.

In my view the Claimant is more legally savvy than he makes out to be and very obviously has and does spend a great deal of his time looking at employment legislation and matters connected with it. His approach is what I would term to be a scattergun approach to which issues he attaches all the same points irrespective of there relevance to the point in issue but I do need to deal with all the issues he has raised.

The first point raised by the Claimant is that if he had been dismissed in the normal way the Respondent would have had to give him the statutory minimum notice of one month, and therefore this would have taken him over the 52 week qualifying period prescribed by section 8(2) of the Act. In support of this submission the Claimant draws my attention to the law in the UK which provides that an employee dismissed with no notice or with a period of notice less than the minimum prescribed can extend the effective date of termination to the date on which the proper statutory notice would have expired. An interesting submission based on section 97(2) of the UK's Employment Rights Act which provides:-

> *"Where:-*
>
> *(a) the contract of employment is terminated by the employer; and*
>
> *(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),*
>
> *for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination".*

However, this is not in my view a submission which has any validity for two reasons. Firstly there is no provision similar to section 97(2) in the Act and none can be implied in to the Act, and secondly because in the case of Lancaster & Duke Limited v Wileman (2019) ICR 125, it was held that section 97(2) had to be read in conjunction with section 86(6) of the same Act and that therefore:-

> *"by referring to the notice required by section 86, section 97(2) of the Employment Rights Act 1996 incorporated the entirety of section 86, including subsection (6); that in doing so, which section 97(2) provided for the effective date of termination to be deemed to be the later date allowed by the statutory minimum period of notice provided by section 86(1), that was subject to the employer's right to give no notice, as expressly provided by section 86(6) where the employee's conduct entitled the employer to dismiss without notice".*

In other words, even in the UK the Claimant's submissions would not have succeeded since the Respondent was ostensibly entitled to dismiss the Claimant without notice following the Claimants' failures to attend work.

The second point that is raised by the Claimant is that pursuant to the provisions of section 60(3), as read with section 65C(1) and (4) of the Act, the 52 week qualifying period does not apply because he had been dismissed for alleging that the Respondent had infringed his statutory right not to be subjected to bullying,

and that as bullying caused stress and other mental health problems to the victim this meant that health and safety legislation was brought into play, and consequently that he was entitled to rely on the provisions of section 65C(1) of the Act. It is submitted by the Respondent that the Claimant cannot rely on the provisions of section 65C(1) of the Act because section 65C(4) defines what right is a *"relevant statutory right"* and bullying is not such a right for the purposes of section 65C of the Act. I agree with Mr Martinez, that bullying for the purposes of section 65C of the Act is not a *"relevant statutory right"* in itself and cannot be considered by means of health and safety legislation to be some type of indirect "relevant right". Bullying does without a doubt have mental health consequences for a victim but this is itself does not make it a *"relevant statutory right"* for the purposes of section 65C of the Act. What is proposed by the Claimant is stretching the interpretation to be given to the clear wording of section 65C beyond reason. In my view the Claimant has to bring himself within the provisions of section 65B, which he relies on in its own right, if section 65C is going to apply at all and as stated below, and for the reasons given, the Claimant cannot do so. I cannot therefore accept that this submission has any validity.

The third point that is raised by the Claimant is that pursuant to the provisions of section 60(3), as read with either section 65B(1)(c) or 65B(1)(d) of the Act, the 52 week qualifying period does not apply. In essence the Claimant alleges that he was dismissed for bringing to the employers attention the bullying and victimisation that was occurring within the work place which was harmful or potentially harmful to the health and safety of other employees as well as himself, and/or that he refused to return to work because he reasonably believed that his health and safety was in serious and imminent danger if he returned to work due to the bullying that was taking place. The Claimant further submits that the Respondent was fully aware of the bullying and victimisation claims that he was bringing and of the consequences to his health these were having, and that not only did the Respondent do nothing to resolve the problem but rather proceeded to manufacture a reason for this dismissal. Mr Martinez replies to this argument by firstly pointing out that the Claimant had never raised either of these points prior to November 2019, and that the facts of the case, as recorded in correspondence/documentation filed with the tribunal, clearly showed that the Claimants refusal to return to work was throughout that he needed the time to prepare his appeal, and not that he was in serious and imminent danger if he returned to work, and secondly that at no time did the Claimant allege that he reasonably believed that he was dismissed for bringing to the employers attention circumstances which were harmful or potentially harmful to the health or safety of other employees. In any event, Mr Martinez submits, all the evidence produced showed that the Claimant was dismissed for refusing to accept lawful instructions and for refusing to return to work. Mr Martinez further urges me to apply the provisions of section 65B(d) in two stages; namely:-

(1) Firstly, to determine whether there were circumstances of danger which the employee reasonably believed to be serious and imminent? If so, could the Claimant have reasonably refused to return to his place of work or any dangerous part of his place of work? and

(2) Secondly, if both said questions are answered in the affirmative, to determine whether the employers sole or principal reason to dismiss

was that the employee left or proposed to leave or refused to return to his place of work or any dangerous part thereof.

In support of this submission Mr Martinez referred me to the Court of Appeal case of Oudahar v Esporta Group Limited (Appeal N° UKEAT/0566/10/DA) which considered section 100(1)(e) of the Employment Rights Act 1996, a provision equivalent to section 65B(1)(d) of the Act. In this case the Court of Appeal concluded, as follows:-

"In our judgement employment tribunals should apply section 100(1)(e) in two stages.

Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if additional words inserted by virtue of ***Balfour Kilpatrick*** *are relevant) did he take appropriate steps to communicate these circumstances to his employer by appropriate means? if these criteria are not satisfied, section 100(1)(e) is not engaged.*

Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.

In our judgement the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e).

We reach this conclusion for the following reasons.

Firstly, it seems to us to be the natural way to read section 100(1)(c)-(e). Each subsection is directed to some activity on the part of the employee: the bringing of matters to the attention of the employer (section 100(1)(c)), leaving or proposing to leave or refusing to return (section 100(1)(d)), or taking or proposing to take steps (section 100(1)(e)). In each case the statutory provision directs the Tribunal to consider the employee's state of mind when he engaged in the activity in question. In no case does it direct the Tribunal to consider whether the employer agreed with the employee.

Secondly, it seems to us that this reading gives effect to the protection which Parliament must have intended to afford to an employee, having regard to the provisions of the Framework Directive which we have quoted. Section 100(1)(c)-(e) do not protect an employee unless he behaves honestly and reasonably in respect of matters concerned with health and safety. It serves the interests of health and safety that his employment should be protected so long as he acts honestly and reasonably in the specific circumstances covered by the statutory provisions. If an employee was liable to dismissal merely because an employer disagreed with his account of the facts or his opinion as

to the action required, the statutory provisions would give the employee little protection".

In order to answer both of these questions I have to consider the documentation that was put before me as referred to above. In the correspondence that was exchanged between the parties between the 25th April 2018 to the 8th May 2018, it is clear to me that on the face of the documentation:-

(a) at no time did the Claimant state that he believed he would be in serious and imminent danger if he returned to work as instructed. Yes he referred in an e-mail to his belief that he would be subjected to bullying if he returned to work but he at no time stated either that this was the primary reason for his failure/refusal to return to work or that he believed that a return to work would put his mental health and safety in serious and imminent danger, he had after all been away from his workplace since the 13th March;

(b) at no time did the Claimant state that other employees were or would be placed in harms way or that there were circumstances potentially, harmful to them;

(c) the Claimant's apparent and repeated principal reason for not returning to work was that he required the time off work to prepare and present his appeal against the decision made by Mr Maman with regard to his grievance complaint and/or to a lesser extent that he was confused and/or had misunderstood as to when he was required back at work;

(d) the Claimant was clearly not prepared to put into effect the solution proposed by Mr Maman as set out in the letter of the 25th April 2018 for reasons which basically are not detailed in the correspondence but which one assumes related to the Claimants belief that his grievance had not been properly dealt with/considered and that he would be subjected to bullying. Be that as it may, the point is that the Claimant at no time stated or implied that the solution proposed would put him in serious and/or imminent danger and/or explained his reasons as to why Mr Maman's plan going forwards was unworkable or impractical or would not prevent his being bullied;

(e) the Claimant was by the 1st May 2018 fully aware that he had failed to attend work on days when his employer expected him to be at work and that he was required to be at work by the next day and that failure to do so could result in his dismissal;

(f) the Claimant attempted to impose on his employer the date until when his suspension would continue to apply, the dates on when he was going to take leave and further discussions as to what was going to be done with regard to his grievance notwithstanding that it was made clear to him that he was putting his employment at risk;

(g) the Claimant was at least by the 11th May 2018 fully aware not only of the provisions of section 60(1) of the Act but also of section 65C of the Act (and it is therefore natural to assume section 65B as well) and yet

whilst he refers to bullying and victimisation being relevant statutory rights he did not allege that a return to work would put him or his co-workers in harms way and/or in serious and/or imminent danger. Moreover, the Claimant at no stage stated or alleged that he wished to go to Court to enforce his statutory right not to be bullied and/or stated that he was refusing to return to work for reasons of danger; and

(h) on the face of the correspondence and without having heard evidence on the point, the reason for the dismissal was prima facie that the Claimant had failed to attend work on various days after being instructed to do so. The Claimant alleges that his dismissal was engineered by the Respondent but the fact is that the Claimant does not dispute that he did not attend his place of work on the days in question and/or that his contract did not permit his dismissal on those grounds.

I am not satisfied in my own mind that the health and safety references found in section 65B of the Act were intended by the legislators to include and/or does include (as worded) the mental health and safety of employees (as distinct from their physical health and safety) but as the matter was not argued before me, and as I do not need to determine the issue for the purposes of this case, I leave it for another tribunal to decide the point. Suffice it is for me to say that in my opinion the exception to section 60(1)(a) of the Act provided for by Section 65B(1)(c) or (d) of the Act is not triggered in this case. Moreover, if I am wrong in this, nothing has been put before me to prima facie indicate that the principal reason for the Claimants dismissal was that the Respondent had been informed or was aware that the Claimant had refused to return to work because (i) he (the Claimant) had brought to the employers attention circumstances which he reasonably believed were harmful or potentially harmful to health and safety or (ii) he (the Claimant) had refused to return to work because he (the Claimant) reasonably believed that by doing so he would be placed in serious and imminent danger. I am not persuaded that prima facie the reason for the Claimant failing to return to work was that he believed that his health and safety was in serious and imminent danger. On the face of what is before me the there is nothing to indicate that the Claimant believed this to be the case since he did not at the time or immediately after events allege that his dismissal was for such reasons, let alone state that his refusal to return to work was for health and safety considerations.

The next point raised by the Claimant is that the principle reason for his dismissal is that he made a protected disclosure as defined by section 45A of the Act, and is therefore relying on the provisions of sections 45B(1)(d) and/or 45B(1)(f) of the Act. The Claimant accepts that this is a point raised for the first time at the hearing but submits that he is nevertheless entitled to make it. It is the Claimant's contention that he was dismissed for disclosing to his employer that the health and/or safety of an individual, namely himself, was being or was likely to be endangered and/or that such information had been or was likely to be deliberately concealed by his employer, and that consequently he had made a protected disclosure as provided by section 45C(1) of the Act. In reply to this Mr Martinez submitted that as section 65D of the Act was not one of the exceptions referred to in section 60(3) of the Act the qualifying 52 week period applied and therefore the Claimant could not rely on the provisions of section 45 et seq of the

Act. When making this submission Mr Martinez will not have been aware of the recent decision I made in the case of Helen Celliers v Gibraltar Health Authority (Case N° 25 of 2017) to the effect that section 60(3) of the Act has to be interpreted as including a reference to section 65D of the Act, and that consequently the qualifying period provided for in section 60(1) of the Act does not apply to a case alleging contravention of section 65D of the Act. This being the case, Mr Martinez's submission cannot be accepted. As is the case with section 65B of the Act, I am not sure in my own mind that the reference to health and safety in section 45C(1)(d) was intended by the legislators to encompass anything other than physical health and safety. But here again this is not a point I have to decide on.

In essence the Claimant is relying of the provisions of section 45M when making this submission since it is this section which provides the Claimant with the right to bring a complaint to the Employment Tribunal under section 45N of the Act. Section 45N(3) requires the complaint to the Tribunal to be made within three months of the date of the act or failure to act to which the complaint relates. So we have a situation here where the Claimant is alleging that the 52 week qualifying period does not apply to the claim he has filed for unfair dismissal because he made a protected disclosure to his employer but, even if that were to be the case, the Claimant did not file any complaint alleging a breach of section 45M in the Claim form, as read with section 45C (which in turn is to be read in conjunction with section 45B(1)(d) and (f)), let alone one within three months of the date of the Act (or failure to act) carried out by the employer. Moreover, there is no reasonable reason, and none had been offered, as to why a whistle blowing allegation was not made until the 20th February 2020, this being the date of the Claimant's skeleton arguments when this argument was clearly first raised by the Claimant. In all the circumstances this is not a submission which can be entertained.

The next point raised by the Claimant is that the 52 week qualifying period does not apply to this case because he was dismissed for having alleged that the Respondent had committed an act which would give rise to a claim against the Respondent under section 52A to 52D of the Act or under the Employment (Maternity and Health and Safety) Regulations 1995 as provided by section 62(1) of the Act. As stated above, as far as my research shows, there are no Employment (Maternity and Health and Safety) Regulations 1995 which have ever been enacted, and certainly none in force at this time. The Claimant cannot therefore rely on those regulations and, as stated above, the Claimant cannot rely on the provisions of section 65B of the Act either. Moreover, sections 52A to 52D deal with the principle of equal treatment of sexes and its application, the principle of equal pay and the non application of laws which run contrary to the principle of equal treatment and pay, and therefore here again the Claimant cannot hope to engage these provisions in the light of the facts on which he bases his complaint for unfair dismissal. This argument is therefore dismissed as well.

The final argument raised by the Claimant was that the 52 week qualifying period does not engage in this case because the procedure followed by the Respondent was totally unfair in that the Respondent had a lack of written procedures and that he had been provided with the Respondents bullying at work policy, the contents of which were only 10% in compliance with the law, late in

the day. As Mr Martinez pointed out, the issue of whether or not a procedure was followed and, if so, whether it was fair or not, are not issues which can be taken into account by a tribunal when deciding whether it has the necessary jurisdiction to be able to hear and determine a complaint filed in the first place. If the Claimant cannot comply with the 52 week qualifying requirement, or, if the Claimant cannot bring himself within one of the exceptions provided to that 52 week qualifying requirement then the complaint for unfair dismissal has to be dismissed irrespective of whether or not the procedure followed by the employer in the course of the dismissal was fair or otherwise. This being the case this argument is dismissed as well.

Conclusion

In the circumstances of all of the above, I find that:-

(i) the Claimant does not comply with the 52 week qualifying requirement prescribed by section 60(1)(a) of the Act; and

(ii) the Claimant was not able to persuade me that there was a prima facie case that either the Claimant could engage any of the exceptions prescribed by section 60(2) to (4) and section 62 of the Act and/or that the principal reason for his dismissal was one of the exceptions prescribed by sections 60(2) to (4) and 62 of the Act.

This being the case I have no alternative but to dismiss the claim for unfair dismissal filed by the Claimant, and I now do so.

Dated this 17th April 2020

Joseph Nuñez
Chairman