IN THE EMPLOYMENT TRIBUNAL

Case N° 16 of 2019

Ahmed Mojahid

Claimant

–and–

Britannia Premium Cleaning Services Limited

Respondent

DECISION

Background

By a Claim form received by the Secretary to the Tribunal on the 25th April 2019, the Claimant filed a claim for unfair dismissal. The Claim Form filed gave no particulars whatsoever as to the grounds upon which the Claimant alleged he had been unfairly dismissed on the 11th February 2019; the form merely stating *"please speak to representative for details"*. Moreover, it would appear that the Claimant gave an address in the Claim Form which was untrue since apparently he had been evicted from that address some years before.

On the 30th May 2019, Mr John Viales, acting on behalf of the Claimant, e-mailed the secretary to the Tribunal setting out the basis of the claim for dismissal. The essence of the allegation was set out to be that Mr Paul Collado, the Managing Director of the Respondent, wanted to discuss an incident or incidents involving the Claimant, a cleaning operative, which had occurred at work and therefore asked to speak to the Claimant. The Claimant, who had a history of mental health issues, and who relied on the assistance of union representatives, believing that he had been advised by his union not to discuss anything with his employers without having his lawyer present, and his lawyer not being present, refused to attend the meeting with Mr Collado. Mr Collado, it was said, insisted on having the meeting with the Claimant despite the Claimant's protests and consequently a serious argument broke out between both men. The Claimant was then dismissed for gross misconduct and handed a letter to this effect the next day. The Claimant, it is said, then tried to appeal the decision but was unable to do so because the Respondent refused to provide him with a copy of its handbook. In the event, no appeal was filed and the Claimant asserts that the Respondent's duty of care to the Claimant meant that it should have informed him of time limits. Moreover, the Claimant asserts that his conduct did not amount to an act or various acts of gross misconduct which would have warranted immediate dismissal.

On or about the 19th June 2019 the Respondent filed its Response with a letter of explanation attached to it. The Response denies the claim and in essence the Response, as supplemented by a letter attached to it, sets out the following. On the 8th February 2019, the area for which the Claimant was responsible to clean was inspected and not only was it found to be dirty but also the Claimant was no where to be seen despite three separate visits made to the area by his line manager during the course of the day. On the 11th February 2019, the area was again inspected by the line manager and found to be dirty. When the Claimant was confronted by his line manager he became abusive and disrespectful to the manager who reported this to Mr Collado. As a result, the manager was requested to inform the Claimant to go and see Mr Collado upon returning to the depot. The manager did so but the Claimant failed to attend Mr Collado's office. The manager again requested the Claimant to attend the meeting but he again refused. Mr Collado on two separate occasions then approached the Claimant and asked him to come to his (Mr Collado's) office. The Claimant angrily refused to attend. At this point the Claimant was dismissed for gross misconduct and the next day the Claimant was handed a letter stating this and that he had a right of appeal. The Claimant's union was informed of events the same day.

That then is the case for each party as set out in the Claim form (as supplemented) and the Response (also as supplemented).

On or about the 18th February 2020, the undersigned was appointed as chairman of the Tribunal for the purposes of this case.

On the 10th March 2020, the first case management conference was held with the hearing finally taking place between the 23rd and 25th November 2020 inclusive. In the course of the hearing the following persons gave evidence before me; namely Alfred Debono, Ernest Collado, Paul Collado, Robert Montovio, Nicholas Poveda, Christopher Calderon and the Claimant, who gave his evidence through a Spanish interpreter.

With reference the witnesses called by the Respondent it is pertinent to point out that:-

(i) both Mr Montovio and Mr Poveda refer in their evidence to an incident that allegedly took place with the Claimant on the 13th February 2019. This incident is not material or of any relevance either with regard to what occurred on the 8th and/or 11th February 2019 and/or the decision taken to dismiss the Claimant; if anything its evidence to explain why the directors of the Respondent wished to deal with the Claimant's appeal on the papers. Their respective evidence both documentary and oral as to the events of the 13th February 2019, is therefore disregarded and their remaining evidence is only of value to the extent (if any) of credibility, viz a viz the Claimant; and

(ii) Mr Ernest Collado refers, both in his witness statement and in his oral evidence, to three separate incidents that occurred

with the Claimant on diverse dates and which lead him to make a report to the Royal Gibraltar Police with regard to the Claimant. All three of said events allegedly occurred on dates subsequent to the 8th and 11th February 2019 and therefore they are neither material or relevant as to what occurred on said dates in February 2019 and/or the decision to dismiss. This being the case all evidence relating to any one or more of these three incidents, whether documentary and/or oral, is also disregarded save as may be of value as to the credibility of either Mr Collado or the Claimant.

It is also pertinent to point out at this stage that whilst the Claimant was legally represented throughout the proceedings, the Respondent decided not to instruct counsel and was therefore represented by two directors of the Respondent company at all stages of the proceedings; neither being legally qualified.

I also point out at this stage that I have read the documents contained in the various bundles before me, as well as all the witness statements and the exhibits attached to those. I have also taken into account the oral evidence given before me spanning over two days and have read the skeleton arguments presented and all the authorities drawn to my attention by both parties. I thank both parties for all the assistance they have given me throughout the proceedings.

In this judgement I may quote from the verbal evidence given before me as set out in my notes but this does not signify that I have not taken the contents of the witness statements tendered into account when deciding as to the facts of the case.

The Law

Section 59 of the Employment Act ("the Act") provides every employee with the right not to be unfairly dismissed.

The employer, pursuant to section 65(1) of the Act, has the burden of showing what the reason or principal reason for the dismissal was and that it was a reason falling within section 65(2) of the Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Section 65(2) of the Act sets out the permitted reasons for dismissal, one of which, being a reason related to the conduct of the employee. If the Tribunal accepts the reason or principal reason for the dismissal given by the employer, and if said reason is a reason provided for in section 65(2) of the Act, the Tribunal then has to proceed to consider whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for the dismissal; such a question being determined in accordance with equity and the substantial merits of the case (section 65(6) of the Act). Thus, all the circumstances of the case, as well as the size and resources of the employer and any warning, consultation and investigation have to be taken into account.

In the case of British Home Stores Limited v Burchell (1980) ICR 3, approved by the Court of Appeal in W. Weddel & Co Limited v Tapper (1980) ICR 286, the Employment Appeal Tribunal set out guidelines for tribunals to apply when dealing with cases of alleged misconduct, which are as follows:-

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion".*

In the event that the Tribunal considers the Burchell test to have been met, it must also consider whether the dismissal fell within the band of reasonable responses of an employer.

The band of reasonable responses principle was dealt with in Iceland Frozen Foods Limited v Jones (1982) IRLR 439 (re-stated in the joined cases of HSBC (formerly Midland Bank) v Madden and Post Office v Foley (2000) IRLR 827, CA) which held as follows:-

(a) The starting point is the wording in the section;

(b) In applying the section, an employment tribunal must consider the reasonableness of the employer's conduct, not simply whether they consider the dismissal to be fair;

(c) In judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what is the right course to adopt for that of the employer;

(d) In many cases, there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view, another quite reasonably take another; and

(e) The function of the employment tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses, which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, if the dismissal falls outside the band, it is unfair.

Even where an employer has established that the reason for dismissal is potentially fair, the dismissal may be found to have been unfair where the employer has failed to follow a fair procedure. Where an employer fails to comply with fair and proper disciplinary procedures in advance of dismissing an employee, the Tribunal is entitled to hold that the dismissal was procedurally irregular and that it amounted to unfair dismissal. Procedure is a factor but only one of the factors to be weighed in the assessment.

The legal position is very aptly set out in the leading case of Polkey v Dayton Services Limited (1988) AC 344, (HL):-

> *"The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An employment tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair; it is one of the factors to be weighed by the employment tribunal in deciding whether or not the dismissal was reasonable within section 98 (4). The weight to be attached to such procedural failure should depend upon the circumstances known to be employer at the time of dismissal, not on the actual consequence of such failure. Thus in the case of a failure to give opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an employment tribunal would be likely to hold that the lack of "equity" inherent in the failure would render the dismissal unfair. But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advanced it would make no difference ....."*.

Lord Bridge of Harwich at page 364 summarised the essence of procedural fairness as follows:-

"..... an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation .....".

Chronology of Events

It is required of me to establish to such an extent as is reasonably possible in the light of the evidence before me, the chronology of events in this case; the following being my findings based on the evidence heard and taking into account the various witness statements and exhibits etc produced.

It is the evidence of Mr Paul Collado that on the 8th February 2019, he received a telephone call from the Environmental Department to the effect that the area of Rosia/Camp Bay/Little Bay were not being cleaned and were dirty, and in consequence of this he instructed the area manager, Mr Debono, to go and inspect the area. That there was such a report, was questioned by Mr Viales but I find that such a report was made and that in consequence thereof Mr Debono was sent to inspect the area. Bearing in mind that the Respondent received the report early in the morning of the 8th February, it is safe to assume that the beaches had been found to be dirty by the Environmental Department the previous day; which if the case would raise the question of the Claimant's whereabouts on the 7th February.

It is the evidence of Mr Alfred Debono, the Claimant's line manager, that around 8.00 am approximately he went to Rosia Bay, Camp Bay and Little Bay and (i) found the area to be dirty (ii) took photographs on his mobile phone to show the state of dirtiness and (iii) did not find the Claimant at his place of work as he should have been. Mr Debono further stated that on two other occasions that same day he went to the said area looking for the Claimant but did not find him. Mr Debono also stated that he printed the photos taken and handed them in at the Respondent's office.

It is the Claimant's evidence that:-

(i) in his first witness statement:-

"On the 8th February 2018 I had a disagreement with Mr Debono over allegations made as to the cleanliness of an area in Camp Bay".

(ii) in his second witness statement:-

"I do not accept that the state of cleanliness at Camp Bay was my fault on Friday the 8th February 2019 or on Monday 11th February 2019. When Mr Debono was trying to reprimand me I did challenge his allegations. I did become defensive and very argumentative about this, but I did not become abusive. I am unsure why Mr Debono says he had been unable to locate me, but I know that I was working so the only explanation I can think of is that I was working in an area that Mr Debono did not check".

(iii) in his oral evidence:-

"On the 8th February I don't recall if anything happened".

"I was threatened by Debono on various occasions. In the work I was threatened with sacking by Debono. I was threatened on the beach prior to being sacked. A lot of employees had complaints about Debono".

"Debono reported me 2/3 times for not working and this was at 9 am when I had still not finished my route".

I note that the photographs which Mr Debono stated he had taken and printed have not been produced, and that Mr Paul Collado did not have any recollection of having seen any photographs. I also note that the Claimant does not deny that the area was dirty and indeed, by implication, accepts that the area was dirty. This together with the complaint made by the Environmental Department leads me to find that the area was dirty and therefore to uphold Mr Debono's evidence in this respect.

Being personally well acquainted with the area of Rosia Bay/Camp Bay and Little Bay, and bearing in mind that the area was found to be dirty on the 8th February 2019, and that the Claimant contradicts himself by stating, on the one hand, that on the 8th February he had an argument with Mr Debono, and then, on the other hand, going on to say that he is unsure as to why Mr Debono could not locate him on the 8th February, I find that on the 8th February 2019, the Claimant was not located at his place of work on three separate occasions by Mr Debono. I do not accept the possibility that Mr Debono may not have looked in the right area(s) in which the Claimant was working at the time(s) that Mr Debono carried out his three inspections. Moreover, it seems to me that the Claimant is confused with regard as to the date when he had his verbal confrontation with Mr Debono; this being on the 11th February and not the 8th February 2019.

It is the evidence of Mr Paul Collado that on the 8th February 2019, Mr Debono informed him that the inspected areas were dirty and that he (Mr Debono) had been unable to find the Claimant at his place of work on three occasions. Mr Collado further stated that in consequence of this he instructed Mr Debono to have the Claimant come and see him on the 11th February 2019 at 3.00 pm. On the other hand, it is the evidence of Mr Debono that Mr Collado did not tell him

(Mr Debono) that he (Mr Collado) wanted to see the Claimant at 3 pm on the 11th February until after he (Mr Debono) had told Mr Collado that the Claimant had been abusive and disrespectful on the 11th February.

I found the evidence of Mr Debono as to the sequence of events that occurred on the 11th February to be hazy and preferred the evidence of Mr Collado on this point and therefore I find that Mr Collado did inform Mr Debono on the 8th February 2019 that he wished to speak to the Claimant at 3 pm on the monday. In point of fact nothing turns on the point because at the end of the day the Claimant only got to know about the meeting on the monday. It is the evidence of Mr Debono that on the 11th February 2019, he went to Rosia Bay and found it to be dirty and that on heading to Camp Bay he found the Claimant on the roadway by the first tunnel with broom in hand. Mr Debono further stated that on informing the Claimant about the state of dirtiness of the area the Claimant had disputed the fact, virtually calling him a liar and becoming abusive and disrespectful.

It is the evidence of the Claimant (as quoted above) that he did speak to Mr Debono and challenged his allegations as to the state of the area, that he did become *"defensive and very argumentative about this"* but not abusive.

Bearing in mind the contents of Dr Segovia's letter of the 6th March 2019, with reference statements made by the Claimant to him, and the Claimant's own admissions, as well as the unions actions later on that day in taking the Claimant to the police station and A & E, I find it credible that when confronted with the allegation that he (the Claimant) had not been cleaning and was missing from his work place a confrontation between both men quickly occurred.

I find that there was a verbal confrontation between the Claimant and Mr Debono on the 11th February in the area of Camp Bay and that the exchange of words concerned the state of cleanliness of the whole area on the 8th February. I further find that the only area that Mr Debono could or would have inspected on the 11th February prior to the confrontation with the Claimant would have been Rosia Bay.

I also find that contrary to the instructions given to him on the 8th February, Mr Debono, on finding the Claimant in the area of Camp Bay on the 11th February, did not inform the Claimant of Mr Collado's wish to see the Claimant at 3 pm. Presumably the exchange of words with the Claimant drove such an instruction from Mr Debono's mind.

In his witness statement Mr Debono states that *"at 3.10 pm Mr Mojahid came in to the canteen and when I prompted him to attend the meeting he refused to attend. I informed Mr Collado that Mr Mohahid refused to attend to his office as instructed"*. This is the first time he mentions having informed the Claimant of the intended meeting. In his oral evidence Mr Debono stated as follows:-

> *"I saw the Claimant at the depot at about 3.15/3.30 pm and told him about the meeting. This would have been on the 11th*

February. Collado wanted to have a meeting with the Claimant. The Claimant refused to attend the meeting. I asked him once and he refused. I told him not to be silly and to have the meeting but he refused so I went to Mr Collado and told him the Claimant had refused. The managing director insisted that he wanted to have the meeting now ..... I can't honesty remember if after I told Mr Collado the Claimant refused I went back to the Claimant to tell him that Mr Collado insisted on the meeting".

In his witness statement Mr Paul Collado stated that:-

"8. Mr Mojahid did not turn up for his meeting with me at 3.00 pm on Monday the 11th February 2019. I was advised he actually turned up at 3.05 pm and went directly to the canteen.

9. At 3.10 pm I asked Mr Debono to find Mr Mojahid and remind him that I was waiting in my office for our meeting. Mr Debono returned saying that Mr Mojahid was refusing to come to my office".

The relevance of this is that whilst Mr Collado obviously believed that Mr Debono had prior to 3 pm told the Claimant to attend his office that was not in fact the case. Had Mr Collado known this he may well have subsequently adopted a more measured course of action.

In his oral evidence Mr Collado stated as follows:-

"The first time I requested to see the Claimant I asked the manager to go and ask the Claimant to come and see me. He refused to attend to the office, he told Debono he would not come. At this point I went to see the Claimant in the canteen and that I did want to have a private word with him".

In his first witness statement the Claimant states as follows:-

"As a result of this disagreement I was advised that I should attend a meeting with the Managing Director, Mr Paul Collado, on the 11th February 2019.

I had asked my then lawyer to attend this meeting with me, but for some reason he was unable to. When I went to see Mr Collado on the 11th February, I tried to explain the situation with my lawyer but it was not being accepted by Britannia. Britannia tried to force me to have the meeting without my lawyer present. As set out above, I was not happy to have the meeting without my lawyer which, I understood from my Union Representative Mr Bousselham, I was also entitled to".

In his oral evidence the Claimant stated as follows:-

"On the 11th February I arrived at the deport at 3.15 pm. I arrived and I went to the place where we sit down to wait for 3.25 pm. Where we sit down to wait is through the garage in a hall

that is there and where we all sit down. There is a large garage and inside there is a canteen. I was sat in the canteen and four other people were there".

As stated above, I do not believe that the Claimant was informed by Mr Debono of the meeting requested by Mr Collado until after the Claimant arrived at the deport on the 11th February. Having said this, I do find that the Claimant was requested to a meeting with Mr Collado and that the Claimant refused to attend such a meeting, preferring instead to go to and remain in the canteen. I also find that as a result of this Mr Paul Collado did go to the canteen to speak to the Claimant.

With reference what then occurred in the canteen we have the following evidence.

In his witness statement Mr Paul Collado stated as follows:-

"On two separate occasions later, I personally went out and asked Mr Mojahid to come to my office as I wanted to have a quiet word with him in the privacy of my office. On the first occasion he simply looked at me and did not react. I returned to my office expecting him to arrive shortly in compliance with my instruction.

After a further 5 minutes I returned to the canteen and once again requested him to come to my office for a quite and private talk, but instead of doing so, he responded to me in Spanish, and in-front of many other employees as they tend to gather in the area after their hard days work, that he would not come to my office and questioned very aggressively, and threateningly, and loudly for all to hear, who the hell I thought I was. As a result of this, I informed him to leave Britannia premises and that I was terminating his employment".

In his oral evidence Mr Collado stated as follows:-

"At this point I went to see the Claimant in the canteen and that I did want to have a private word with him".

"He did not ask for a lawyer or a union representative to be present".

"I asked very politely to attend a meeting with me".

"If the Claimant had said at that time to me I would go to the meeting but I would be more comfortable with a union representative present I would have told him that all I was doing is investigate a matter and that I wanted to hear from him. That this was not a disciplinary meeting but if he chose to have a union representative present I would not have had a problem as has happened many other times with other employees".

"He got up in an aggressive manner and said to me "Tu quien coño te crees que eres, yo con tigo no voy a niungun lado". This

was on the third occasion that the Claimant was asked to come to a meeting. This is exactly what he said".

"The managing director went twice to ask his employee to come to my office. On the first occasion I was ignored. After 5/7 min I went back again and repeated my request politely asking him to come to the office. He then went onto say in the manner explained which I considered to be totally unacceptable and out of order and there is provision in the handbook for determination without notice which is what I did. There was no investigation to be done because this did not happen to a manager or supervisor, it happened to the managing director. He had disrespected me in front of others".

In his first witness statement, and after stating that he had tried to explain to Mr Collado that he wanted his lawyer present at the meeting, the Claimant states:-

"The situation quickly escalated and I was left feeling very frustrated and unsure as to what my options really were. I insisted that I would not attend any meeting without my lawyer present, as I had been advised and believed I was entitled to do. Nevertheless, it seems that as a direct result of my refusing to attend the meeting with Mr Collado without a lawyer, I had my employment terminated on the grounds of gross misconduct".

In his second witness statement the Claimant states:-

"Again I reiterate what I have already said in my first witness statement, the only reason I was refusing to attend a meeting with the Managing Director, Mr Paul Collado, was because I had been advised by my union representative and believed I was entitled to have my lawyer present if I was going to be reprimanded. This was so I could have a witness to the procedures being followed as well as assistance with arguing my position properly.

Further, if at any point I became disrespectful to anybody it was because I became very frustrated and anxious. I was unable to understand why I was being forced to have a meeting where I believed I was going to be wrongly reprimanded, without my lawyer (or anybody else) present to assist me. In the circumstances, I believe the situation was possibly deliberately escalated very quickly in order to provoke a bad reaction from me".

In his oral evidence the Claimant stated that:-

"He was disrespectful to me on two occasions. The last time I finished at 3.15 and I went to go and sign out. Collado came and instead of calling me by name shissed towards me and with his fingers gestured for me to come over as if I was a dog. He went away and then two minutes later he came back and again shissed in my direction making the same gestures with his fingers. He told

me tomorrow don't come to work. I stated you are not anyone. The next day I was sacked without any explanation".

"I do not remember when it was that Mr Collado was disrespectful to me, it was on two occasions. These two occasions were before I was sacked, before the 11th February. The first time was a month before I was sacked. The second time was 2/3 days I was sacked".

"The second occasion was on the same day that I was sacked. On this occasion he shissed me and with two fingers indicated for me to come towards him. At the same time on this second occasion that Mr Collado was disrespectful to me I spoke to Mr Bousselham who was present when this happened. Mr Collado was disrespectful to me when I was in the garage. When Mr Collado shissed me and gestured for me to go forwards to him I did not approach him at all. The only thing he said tomorrow do not come in to work. I spoke to Mr Bousselham before this".

"On the 11th February I arrived at the depot at 3.15. I arrived and I went to the place were we sit down to wait for 3.25 pm. Where we sit down to wait is through the garage in a hall that is there and where we all sit down. There is a large garage and inside there is a canteen. I was sat in the canteen and four other people where there, Bousselham was there, Santi a Spanish guy, Juan also Spanish and Brian a llanito. Paul Collado then came in. He said come I want to talk to you. I did not want to sit down with him. As Bousselham was present I asked whether I had any right to have the union lawyer present when I sat with Mr Collado. He had gone out and then he came back. Again he shissed and gestured saying that he wanted to talk to me. I told Mr Collado that I would talk to him when I had a lawyer there. He left and then came back a third time. On the third time he said tomorrow you do not come to work and I said you are not anyone and that is all. He left".

The Claimant and Mr Collado agree that the events took place in the canteen, that Mr Collado went to the canteen twice and spoke to the Claimant, that there were other people present at this time, that, leaving aside the exact wording, the Claimant told Mr Collado that he was no one and that at some point Mr Collado informed the Claimant that his employment was terminated.

What the Claimant and Mr Collado do not agree on is (i) whether Mr Collado "shissed" the Claimant and gestured disrespectfully at him to come over with his fingers (ii) whether the Claimant told Mr Collado that he would not attend the meeting unless his lawyer was present and (iii) the exact wording used by the Claimant when he told Mr Collado that he was no one and whether this was said before or after the Claimant was dismissed.

I pause to point out that the Claimant did not use the word *"shissed"*; it is the best word I can find to describe the sound used.

I have difficulty believing that Mr Collado would have *"shissed"* at the Claimant and gestured with fingers in the disrespectful manner stated by the Claimant, who did give various different accounts of how things transpired, in the circumstances prevailing simply because it was Mr Collado who on both occasions went to the canteen in search of the Claimant and approached the sitting Claimant. This more so if after the first occasion the Claimant had failed to react to the conduct alleged. Moreover, it was not as if Mr Collado was trying to keep secret from the workforce his desire to meet with the Claimant or the Claimant was walking past Mr Collado and/or was in a group of people talking. Indeed the very fact that other people were present would have made Mr Collado, if anything, careful not to disrespect the Claimant in front of the union representative and/or co-workers. I do not accept this part of the Claimant's evidence.

I also have difficulty in accepting that the claimant informed Mr Collado that he would not attend a meeting unless his lawyer was present. The Claimant in his evidence contradicted himself various times with regard to the issue of his lawyer, with Mr Viales in the end clarifying that the Claimant was referring to the union lawyer and not to a personal lawyer. In any event, if the Claimant did state he wanted his lawyer present why would Mr Collado deny it? And why would the Claimant want a lawyer present when his union representative was siting beside him in the canteen? And would such a representative have advised that the Claimant could have a union lawyer present? And why would the Claimant believe that the meeting was to reprimand him unless it was true that he had not cleaned his designated areas on the 8th February and/or was at his place of work on the 8th February? Mr Bousselham, the union representative, was present in the canteen when events happened and therefore he, and on the strength of what he saw/heard, the union would have been supportive of the Claimant if his version of the events was correct but this was not the case. In my opinion all of this is indicative, and I so find, that the Claimant did not inform Mr Collado that he wished a lawyer present at the meeting. In my opinion, and I so find, the Claimant gave no explanation whatsoever as to why he was refusing to attend the meeting.

The events, after the Claimant was informed by Mr Collado that he was dismissed, are somewhat bizarre but they are the events as stated by the Claimant in his evidence and I see no reason not to accept them.

In his oral evidence the Claimant stated as follows:-

> *"I went to the union with Mr Bousselham. Bousselham asked the union to conduct a urine test on me. That had nothing to do with it. The union said that they could not get a lawyer for me and I asked why. I am a member of the union paying every week so why could I not have a lawyer. They could not help me. I went to talk to a lawyer".*
>
> *"The union, Julian, accompanied me to the police station in Casemates. I don't understand why the union instead of helping*

me with Collado conducted me to the station at Casemates. I was then taken to Coaling Island. I do not remember what happened at Coaling Island because of the medication".

It would appear from the letter previously mentioned from Dr Segovia that the police for one reason or another conducted the Claimant to St Bernards Hospital where he was seen by a psychiatrist and prescribed medication. The brief reference in the letter to the Claimant admitting to the use of illicit drugs on the 11th February 2019 is noted.

The actions of the union representative and the police all indicate that the Claimant was in a state, whether as a result of substance abuse or actions or words, which caused them to have concerns about the Claimant's state and/or well being. A state which perhaps goes someway to explain the confrontations with Mr Debono and/or Mr Collado.

On the 11th February 2019, there was an exchange of messages between the Union and the Respondent with regard to the dismissal.

On the 12th February 2019, the Claimant was seen by Mr Calderon who, eventually, handed the Claimant an envelope containing an ETB termination form, a letter of termination, a payslip and a wages cheque.

The ETB Notice of Termination states that the reason for termination was *"gross misconduct"*. The letter of termination is dated the 12th February 2019, and confirms that the Claimant's employment was terminated on the 11th February for gross misconduct. The gross misconduct is said to be that *"you refused to follow instructions given to you by your Managing Director on three occasions yesterday"*. The letter concludes by stating that:-

"As per staff handbook you have the right to appeal in writing within days of receipt of this letter".

As will be noted there is an omission as to the number of days before which the appeal in writing had to be filed. This is to say the least unfortunate.

On the 12th February 2019, the Respondent wrote to the Union setting out events and the reason for the Claimant's dismissal. That same day the union wrote to the Respondent confirming that they were willing to represent the Claimant in an appeal.

On the 13th February 2019, the Claimant attended at the offices of the Respondent and handed in a sick note.

On the 14th February 2019, the Respondent wrote to the union informing them, amongst other things, that:-

"Furthermore and after receiving advise from my lawyer, no director is willing to sit with Mr Mojahid to deal with the appeal

in person, as you can well imagine they are concerned about their safety and in fear of possible reprisals from Mr Mojahid.

I would suggest we conduct the appeal via correspondence".

There does not appear to have been a reply to this letter and in the event the union, for reasons which have not surfaced, did not file or follow up an appeal for the Claimant.

That then is the chronology of events of this case and my findings in respect of them.

Each Party's Case

The Respondent is a cleaning company contracted by the Government of Gibraltar since 2018 to undertake the cleaning of streets and beaches in Gibraltar. The Respondent has a workforce of some 150, which during the summer period is materially increased. The Respondent took over said responsibilities from Master Services (Gibraltar) Limited (hereinafter "Master Services") and in consequence thereof the employees of Master Services, including the Claimant, were transferred into the service of the Respondent on the same terms and conditions of employment as previously. At the time of the transfer of employees Master Services did have in operation an Employee Handbook ("the Handbook"). Clause 2.1 of the Handbook provides as follows:-

"This section of the Handbook contains terms and conditions of your employment with the Employer. Taken together, the Handbook, the E S Notice of Terms of Employment and (if any) a letter of appointment comprise your contract of employment with the employer, subject to any amendments that, from time to time, the Employer may make after due consultation and negotiation with the Trade Union. Any amendments will be notified to you in writing".

The provisions of the Handbook were still in force at the time of the events in February 2019, albeit that the Respondent was in negotiations with the union to revise its provisions.

Section 4 of the Handbook sets out the provisions governing *"Grievance and Disciplinary Procedures*", with Clause 4.1 dealing with the grievance procedure and Clause 4.2 dealing with the disciplinary procedure.

Clause 4.2.2 titled "Principles", provides as follows:-

- *The procedure is designed to establish the facts quickly and to deal ..... with disciplinary issues.*

- *No disciplinary action will be taken against you until the matter has been investigated.*

- *After establishing the facts it may then be decided that the matter is of a minor nature and that the problem can be resolved informally without recourse to the formal procedure.*

- *At each stage of the procedure you will have the opportunity to state your case.*

- *You have the right to be accompanied by an employee of your choice or a Trade Union representative.*

- *You have the right to appeal against any disciplinary action taken against you including dismissal.*

- *The Employer reserves the right to instigate disciplinary action at any stage of the procedure if the alleged conduct or performance is serious enough to warrant it".*

Clause 4.2.3.2 of the Handbook deals with gross misconduct and starts of by stating that *"for any act of gross misconduct the penalty is summary dismissal"*. The clause then goes on to set out the procedure to be followed in gross misconduct cases, namely:-

"(a) Where an employee is accused of an act of gross misconduct he may be suspended from work on full pay for a brief period pending the outcome of the investigation into the alleged offence.

(b) The Director will enquire into the breach of the rule allowing anyone, who can make a useful contribution, the opportunity to speak to him. If the breach of rule is considered to be Gross Misconduct, then the employee will be informed in writing of the allegations made against him and a Disciplinary Hearing convened where the employee will be given an opportunity to state his case, and to be accompanied by a Trade Union representative or another member of staff of their choice.

(c) If the complaint is upheld, the employee will be informed of the Disciplinary Action to be taken against him, will receive a written statement of the decision, the reasons upon which it is based and notified of the right to appeal.

(d) Once summary dismissal has been confirmed, the Contract of Employment will be regarded as terminated. However the employee concerned will have a right of appeal to another Director.

(e) The appeal must be lodged, in writing, within 3 working days of receipt of confirmation letter of dismissal and should state the ground(s) of appeal. It will be heard no earlier than 3 working days thereafter ....."

I pause here to point out that Mr Viales strongly castigates the Respondent for not having followed with regard to the Claimant the

procedure set out above in paragraphs (a) to (c). It is Mr Viales's contention that the procedure set out in these three paragraphs (hereinafter all three paragraphs being collectively referred to as "the Gross Misconduct Procedure") had to and should have been followed by the Respondent irrespective of whether or not the instruction disobeyed by the Claimant was that of the managing director of the Respondent company. It is not disputed by the Claimant that two of the examples of gross misconduct contained in the Handbook are *"refusing to carry out a reasonable instruction from Supervisors, Service Managers or any other official of the Employer"* and *"violent or abusive behaviour"*. The Respondent, on the other hand, contends that said paragraphs are not applicable in this particular case and that the provision of the Handbook that is pertinent in this case is contained in Clause 5.1.2, titled *"Immediate Termination"*, which provides as follows:-

> *"The Employer is entitled to terminate your employment with immediate effect and without service of any notice in the case of gross misconduct or for any other good and sufficient cause"*.

Those then are the relevant provisions in the Handbook.

In the skeleton arguments submitted on behalf of the Respondent, repeated in closing arguments, it is stated that the reasons for the dismissal were twofold; namely:-

(1) on the 8th February 2019, the Claimant had failed to clean the areas of Camp Bay and Little Bay and was not at his assigned work area on the three sepearte occasions that Mr Debono had visited the location; and

(2) on the 11th February 2019, the Claimant had been abusive and disrespectful to Mr Debono and when asked by Mr Paul Collado to a meeting in his office the Claimant had refused to attend and had aggressively and threateningly questioned who Mr Collado was in the presence of other employees.

The Respondent points out with regard to the first allegation that by asking the Claimant to attend the offices of Mr Collado on the 11th February 2019, the Respondent had commenced, in accordance with the provisions of the Handbook, the investigative process to determine whether the Claimant had failed in his duty to clean properly and whether the Claimant had been at his assigned place of work on the day in question. Such an investigate process not having been completed because of the Claimant's unilateral decision to refuse Mr Collado's request to come to his office. Notwithstanding this, the Respondent, in the light of the report received from the Environmental Department, and the statements made by Mr Debono, had sufficient evidence to conclude that the Claimant had indeed failed to clean properly and had been missing from his place of work, both together amounting to gross misconduct. This is how I understand the Respondent's submissions to be with regard to the events of the 8th February.

With reference the events of the 11th February 2019, the Respondent submits that in the light of Mr Debono's report as to the abusive and disrespectful attitude adopted by the Claimant' towards Mr Debono, and after having witnessed personally the conduct of the Claimant towards Mr Collado at the canteen, Mr Collado was perfectly justified and had sufficient information in his possession to conclude that the Claimant had committed acts of gross misconduct towards Mr Debono (abusive behaviour) and towards himself personally (failing to carry out a reasonable instruction and/or abusive behaviour) and therefore to summarily dismiss the Claimant. The summary dismissal, it is contended, was a fair sanction open to management in the circumstances considering the grossly insubordinate nature of the Claimant's behaviour and was therefore a decision which fell within the band of reasonable responses that a reasonable employer in the business of the Respondent would have adopted.

With reference to the question of whether the Respondent acted fairly upon the summary dismissal taking place, the Respondent points out that the Claimant was issued with a letter of dismissal in which he was informed of his right to appeal (albeit that the letter omits to state the time period in which the appeal had to be filed by), the Claimant's Union was informed of the dismissal and knew about the right of appeal, indeed they initially gave notification of appeal but later did not follow it up, and although the Claimant knew about his right of appeal he did nothing to pursue it. All of this, in the circumstances of the case showed that the Respondent had procedurally acted fairly with respect to the Claimant, before as well as after the summary dismissal. The Respondent further submits that if the Tribunal should find this not to be the case the Respondent would in the alternative submit that the Claimant's actions and conduct were so heinous that they justified the Respondent's actions in departing from having held a fair disciplinary procedure.

The Claimant, on the other hand, submits that the Respondent on the 11th February 2019, acted procedurally unfairly towards the Claimant and therefore unfairly dismissed the Claimant. It was submitted that:-

(1) the letter of dismissal handed to the Claimant was in English, a language the Claimant does not read or understand, and the contents of it where not explained to the Claimant;

(2) the Respondent in full contravention of the provisions of the Handbook failed to institute and/or follow the Gross Misconduct Procedure thereby denying the Claimant his right to defend himself against the allegations made and/or to have a trade union representative or colleague present his case;

(3) the Claimant was never clearly informed by the Respondent or had it explained to him in a language he could understand that he had a right of appeal and that such an appeal had to be lodged within a three day period; and

(4) at the time of the events in February 2019 the Claimant did not have a copy of the Handbook and was not provided by

the Respondent with such a copy until well after the claim before the Tribunal had been filed.

The Claimant submits that for all of these reasons the Respondent did not follow a fair and reasonable procedure when dismissing the Claimant and that consequently the Claimant was unfairly dismissed.

I have carefully considered the Respondent's submissions on the matter but I do not accept the argument that the reasons for the dismissal of the Claimant were two fold and of a cumulative nature. It does not seem to me that the events of the 8th February 2019 and/or the abuse and disrespect shown by the Claimant to Mr Debono had anything to do with the principal reason for the dismissal. Indeed, if those events did form part of the reason for the dismissal then this only re-enforces the Claimant's submissions with regard to the failure to adhere to the disciplinary procedure in the Handbook. In my opinion, and I so find, the sole reason for the dismissal was the failure of the Claimant to comply with the instructions of the managing director to attend at his offices together with the disrespectful comment made by the Claimant to the managing director in front of other employees. I have come to such a conclusion based on the following:-

(a) in a report dated the 11th February 2019, Mr Paul Collado stated as follows:-

"On 2 separate occasions I, as Managing Director of Britannia Premium Cleaning had asked Mr Mohajid to come to my office. On the first occasion he simply looked at me and did not react. I returned to my office expecting him to arrive shortly and comply with my instructions. After a further 5 minutes I returned to the canteen and once again instructed him to come to my office. In front of other employees he told me in Spanish that he would not come to my office and who the hell I thought I was. As a result of this I informed him to leave Britannia premises and that I was terminating his employment".

(b) in the dismissal letter dated the 12th February 2019, signed by Mr Paul Collado, it is stated that:-

"You refused to follow instructions given to you by your Managing Director on three occasions yesterday and according to the Staff Handbook this constitutes gross misconduct".

(c) in an e-mail dated the 12th February 2019, sent by Mr Paul Collado to the Union it is stated that:-

"At 3.10 pm I asked Alfred to find Mr Mojahid and bring him to my office. Alfred came back stating that Mr Mojahid had refused to come to my office.

On two separate occasions I, Managing Director and Owner of Britannia, went to the Canteen and asked Mr Mojahid to come to my office to which he refused, this in front of a number of other member's of the workface.

Please be informed that Britannia considers this to be an act of Gross Misconduct as per the Staff Handbook and Mr Mojahid's employment with Britannia will be terminated".

(d) in a file note composed by Mr Paul Collado and dated the 26th the February 2019 it is stated:-

"Employee was then especially requested to attend meeting with Managing Director by Managing Director himself on two occasions.

Employee was dismissed when he failed to attend meeting on grounds of gross insubordination"; and

(e) the evidence given by Mr Paul Collado in his witness statement and orally to the Tribunal.

In my opinion it is clear from all the documentation and the evidence submitted that the principal reason for the dismissal was that given in the dismissal letter of the 12th February 2019.

It is the contention of the Respondent that Clause 5.1.2 is intended to override the provisions in section 4 relating to the procedure to be followed in gross misconduct cases. I am afraid that I do not agree with such an interpretation of clause 5.1.2 which, as mentioned above, states as follows:-

"The employer is entitled to terminate your employment with immediate effect and without service of any notice in the case of gross misconduct or for any other good and sufficient cause".

The words *"with immediate effect and without service of any notice"* are the pivotal words in the clause. Clause 5.1.2 comes immediately after the clause which sets out the period of notice which the employer has to give to an employee upon terminating his employment, such notice period being dependent on the length of continuous employment with the employer. So all that clause 5.1.2 is doing is stating/confirming the obvious, that in a gross misconduct case in which an employee is found guilty and which the penalty is dismissal such a termination does not require the employer to give the notice prescribed in clause 5.1.1. Clause 5.1.2 does not state, and should not be interpreted as stating, as the Respondent contends, that in a gross misconduct case the employer can summarily dismiss without undertaking the Gross Misconduct Procedure. In my opinion there will be extremely few, if any, situations in which the Gross Misconduct Procedure to one extent or another need not be followed but notwithstanding this, clause 5.1.2 does not in my opinion provide a route by which the provisions of the Gross Misconduct Procedure can be bypassed.

It has also been forcefully submitted by the Respondent that in the circumstances of this particular case, as the acts of misconduct were witnessed by the managing director because they occurred to him, there was nothing further to investigate, and in any event the Claimant had been given the opportunity to explain matters by the managing director and had decided not to do so without offering any explanation as to why he was so refusing.

In my opinion, and with all due respect to the Respondent and to Mr Collado, it seems to me to be totally irrelevant to the issue at hand that the events were witnessed and/or occurred to the managing director. The fact that the managing director was involved does not excuse or do away with the need, rather it re-inforces the need, to follow the Gross Misconduct Procedure. The procedure is designed to safeguard the interests of the employee and to protect him from the false, malicious or hasty actions of senior managers, including directors of the employer. The procedure applies in all situations and the only question open is to what extent it applies in the light of the circumstances of the case. In this case, the Claimant was not informed, either in writing or at all, of the gross misconduct allegations being made against him and/or that such allegations could lead to his dismissal and/or given, in the light of those allegations, the opportunity to consider whether to mount a defence to them or to have a colleague or union representative state his case or to have another director investigate and decide on whether summary dismissal was the correct penalty. The incidents of the afternoon of the 11th February 2019, occurred within a very short space of time between, on the one hand a Claimant who was already in an obviously agitated and indignant state of mind and had already had a verbal confrontation with Mr Debono, and, on the other hand a managing director who, understandably, was obviously feeling more and more that this authority was been seriously challenged in front of other employees and who therefore felt with, I dare say some growing anger, that he had to be seen to be asserting his authority and take decisive and immediate steps to impose order. It was a situation which quickly and surely escalated and could only end in an explosion; the summary dismissal. It was an impromptu decision taken by Mr Collado on the spur of the moment. This need not have happened since all that was required was for Mr Collado to step back and allow the disciplinary procedure to have been commenced and left to take its course. Mr Collado was too personally involved in events and literally became the investigator, judge and jury. There was no semblance or independence brought into the equation even though there where two other directors on the Board, albeit either directly or indirectly being family members of Mr Collado.

The Respondent has also submitted that the Claimant's gross misconduct was heinous misconduct (utterly odious or wicked) and therefore an exception to the requirement that the Respondent follow a fair dismissal procedure. In my opinion failing to comply on three occasions with the managing directors instruction for the Claimant to attend his offices and/or the Claimant telling the managing director that he was no one in front of other employees in an insulting manner

is not heinous misconduct. Substantially more was required for the Claimant's conduct to be classed as heinous misconduct.

I now turn to the Claimant's submissions.

In the course of setting out his case before the Tribunal the Claimant has:-

(i) stated both in his witness statement and in oral evidence that prior to February 2019 he had suffered from mental health issues which had necessitated his having to spend time at Ocean Views Hospital and making use of the Coaling Island Community Health Services - all these occasions being whilst he was employed with Master Services;

(ii) stated in oral evidence that whilst working for Master Services he had spent time undergoing treatment at Bruces Farm;

(iii) stated both in his witness statement and in oral evidence that he has suffered from depression and anxiety for which he was prescribed medication; and

(iv) stated both in his witness statement and in oral evidence that prior to and at the time of the incidents in question he was homeless and regularly slept rough.

The Claimant has also produced by way of exhibits the following:-

(a) a Gibraltar Health Authority Joint Contract of Care which appears to be dated the 28th December 2017 and in which reference is made to the multi-disciplinary psychiatric team preparing a plan for the care of the Claimant whilst being a resident at KGV Hospital;

(b) a letter dated the 6th March 2019 from Dr Segovia in which he confirms that (i) the Claimant was sectioned in 2016 and 2017 at Ocean Views Hospital (ii) on the 11th February 2019 he had been seen by the consultant psychiatrist on duty at St Bernards Hospital after being taken there by police (iii) on the 11th February 2019, the Claimant had been prescribed Olanzapine (treats certain mental/mood conditions including depression) and discharged from hospital (iv) on the 19th February 2019, the Claimant had been prescribed Zopliclone (a sleeping pill) as well as the Olanzapine and (v) on the 6th March Dr Segovia found the Claimant to have capacity to make decisions and was fully responsible for his actions; and

(c) a letter dated the 28th November 2019 from Dr Morrison - Griffiths in which she states that (i) the Claimant suffered from anxiety and depression and has self harm feelings (ii) the Claimant had had many assessments by the mental health team (iii) the Claimant had been under the care of Bruce's Farm and (iv) the Claimant suffers from high blood pressure which required monitoring and medication.

The Respondent has not contested, and I have no reason whatsoever to disbelieve, and do believe, that the Claimant in 2016 and 2017 did spend time at Ocean Views Hospital, that the Claimant did have and does have a history of mental health issues and suffers from anxiety and depression, and that at the time of the incidents in February 2019 he was homeless and sleeping rough.

Notwithstanding the above, the point at issue is whether on the 11th February 2019, the Respondent was aware or had reason to believe or should reasonably have been aware of the Claimant's mental health issues. Why is this important? In his letter of the 30th May 2019, Mr Viales asserted that *"given that the Claimant suffers from some mental health issues, any misunderstanding should not have been allowed to escalate by his employers ..... Britannia owes its employees a general duty of care and in the Claimant's circumstances this extends to having due regard to his mental health"*. I assume that what Mr Viales is saying is that a greater duty of care is owed by employers to employees with mental health issues than to employees who do not have such issues; no authority for such a submission being advanced. Hence in his cross-examination of all of the Respondent's witness Mr Viales was at pains to question them on what they knew about the Claimant's mental/general condition as at February 2019.

The witnesses responded as follows:-

Debono:- he knew the Claimant was homeless and sleeping rough. He knew the Claimant took tablets but not for what condition. He did not know the Claimant suffered from anxiety/depression or had been suicidal in the past;

Ernest Collado:- he did not know the Claimant had mental health problems or suffered from anxiety or depression. He did not know the Claimant was homeless and sleeping rough. He did not know the Claimant had been suicidal in the past.

Paul Collado:- he did not know the Claimant had mental health problems or suffered from anxiety/depression. He did not know the Claimant took medication and he was unaware that Debono knew the Claimant took medication. He did not know the Claimant was homeless or sleeping rough or that he had been suicidal in the past or that he had spent time in Ocean Views.

Montovio:- in February 2019 he did not know the Claimant was homeless or that he had any mental condition.

Poveda:- he was not aware the Claimant suffered from anxiety/ depression or that he was homeless or sleeping rough. He did not know the Claimant suffered from depression.

Calderon:- he did not know that the Claimant suffered from anxiety/depression or had mental health problems. He was aware that the Claimant was homeless in 2016/2017 but not in February 2019.

The evidence, which I fully accept, is to the effect that the Respondent and its officers were unaware and did not have any reason to believe that the Claimant had in February 2019 mental health issues or was suffering from depression/anxiety and/or that the Respondent was aware or should have been aware or had reason to believe that prior to February 2019, the Claimant had suffered from mental health issues and/or depression/anxiety. This being the case I cannot see how at the time of the incidents in question the Respondent could have been under a greater duty of care than normal to ensure that any course of conduct taken with respect to the Claimant and/or any action taken against the Claimant took account of his mental health issues, whether past or present. In order for such a greater duty of care to exist it seems to me that the employer must first be aware and/or have reasonable cause to believe or not shut his eyes to the employee having mental health issues. As was stated by Mr Justice Yeats in the case of Bart Van Thienen v GVC Services Limited (2020/CIVAP/001) at page 19 in relation to section 65B of the Act:-

> *"The same would apply to a refusal to return to the work place or a dangerous part thereof. I therefore conclude that there is an obligation on the employee to inform the employer that he believes there are circumstances of danger which are serious and imminent and which he cannot avert and that he is refusing to return to work for that reason. Section 65B(1)(d) must be read in that way to be compatible with the Directive".*

In that case the allegation was that the employee had refused to attend their work place because to do so would prejudicially affect their mental health. I appreciate that Section 65B of the Act deals with situations which are completely different to that with which we are concerned with in this case but the general proposition in my opinion is the same one; the employee must inform the employer that he has mental health problems if he wishes the employer to take account of those problems when adopting a particular course of conduct in respect of the employee. In this case the Claimant at no time stated that he had informed or otherwise made aware the Respondent of his past or present mental health and all the evidence given by the Respondent is to the effect that the Respondent did not know or have reason to believe that the Claimant had mental health problems. Consequently, I am unable be agree with Mr Viales's submission to the effect that the Respondent owed the Claimant a greater duty of care than to other employees because of his mental health state and/or his vulnerable situation. I also do not accept Mr Viales's submission that the Respondent should have carried out some sort of investigation/enquiry to see what the mental/social circumstances of the Claimant were before deciding on the disciplinary course to be taken with regard to the Claimant's misconduct. No authorities have been cited to support such a submission and I have found none.

Mr Viales in his closing submissions raised the following point. The Respondent for reasons of maliciousness or ignorance had failed to acknowledge and accept that the Claimant suffered from mental health problems as a result of their erroneous definition of what a mental health problem constituted and therefore the treatment afforded to the Claimant by the Respondent was discriminatory in nature as it placed the Claimant at a disadvantage with other employees when its came to disciplinary matters. Apart from there being no factual basis on which Mr Viales can base such a submission, I am unable to agree with Mr Viales's submission for the simple reason stated above; in my opinion the Respondent did not know and had no reason to believe that the Claimant had been or was suffering from a mental health problem at the time of the events in question.

Conclusion

As stated above in assessing whether the Claimant was unfairly dismissed under the terms of the Act the Tribunal has to consider the following matters.

Is the Claimant eligible to claim for unfair dismissed? I find that as he is within the age limits and was employed for a sufficient length of time the Claimant is eligible.

Was the Claimant dismissed? I find that the Claimant was dismissed.

What was the reason for the dismissal? I find that the reason for the dismissal was the Claimant's failure to comply on three separate occasions with the reasonable instruction of the managing director for the Claimant to attend at his office together with the insulting statement of the Claimant to the managing director in front of other employees.

Was the reason for the dismissal one falling within the provisions of section 65(2) of the Act?. I find that it is as the reason(s) was related to the conduct of the Claimant.

Did the Respondent act fairly? I find that the Respondent did genuinely believe that the Claimant had failed to comply with reasonable instructions given to him and that he (the Claimant) had insulted the managing director in front of other employees. I also find that there were good reasonable grounds for such a belief on the part of the Respondent, and that in all the circumstances of the case as much investigation as was required was conducted to confirm that an act of gross misconduct had been committed.

Was the dismissal within the band of reasonable responses which a reasonable employer might have adopted in the circumstances of the case? I find that it was.

Did the employer carry out a fair and proper disciplinary procedure?. I find it did not for the following reasons:-

(i) the Respondent did not advise the Claimant prior to dismissal that he was at risk of dismissal if he carried on with his misconduct;

(ii) the Respondent did not notify the Claimant of the allegation(s) against him and/or of the case against him prior to dismissing him;

(iii) the Respondent did not follow parts of its own Gross Misconduct Procedure and therefore the Claimant was not given the opportunity to put his case forward personally or through a representative;

(iv) the letter of dismissal was in a language the Claimant did not understand and no translation was offered to him;

(v) the letter of dismissal did not state the period within which the appeal had to be filed;

(vi) prior to deciding not to hold an appeal hearing, the Respondent did not confirm with the union or the Claimant whether the Claimant was aware that after the Union had agreed to represent him at the appeal it had withdrawn its representation of the Claimant; and

(vii) the Claimant was not advised of his right to be accompanied by a colleague or union representative at the meeting with the managing director and/or at the appeal hearing.

In the light of the above, I find that the failure by the Respondent to undertake a reasonable dismissal procedure renders the dismissal of the Claimant by the Respondent unfair. Bearing this in mind we will now proceed to set down a date for the hearing of submissions on the issue of compensation. In this regard I wish to make it absolutely clear at this stage to both parties that in my opinion the Claimant's conduct was blameworthy and actually caused or contributed to the dismissal and that such a matter will have to be taken into account for the purposes of quantum.

Dated this 20th day of January 2021.

Joseph Nuñez
Chairman