IN THE EMPLOYMENT TRIBUNAL

Case N° 25 of 2017

BETWEEN

HELEN CILLIERS

Claimant

–and–

GIBRALTAR HEALTH AUTHORITY

Respondent

EMPLOYMENT TRIBUNAL
18 SEP 2019
RECEIVED TODAY

Ramby de Mello for Helen Cilliers
Mark Isola QC for the Respondent

Mr de Mello is instructed by the Claimant to the extent and for the purposes of the application(s) dealt with in this decision and is therefore not responsible for having prepared and/or issued the Particulars of Claim, Witness Statement etc received from the Claimant by the Tribunal. On the other hand, Mr Isola QC has acted for the Respondent throughout.

DECISION

Background

By a Claim form received by the Employment Tribunal on the 10th August 2017, the Claimant, a consultant ophthalmologist employed with the Respondent, filed a claim for unfair dismissal against the Respondent. In the statement attached to the Claim form (which I note appears to have been prepared by a firm called Davies and Partners solicitors) the Claimant alleges that following a meeting with Dr Cassaglia, at which her union representative was present, she was summarily dismissed for gross misconduct, ie for failing to make certain disclosures when submitting her application form for employment with the Respondent. The Claimant appealed against her dismissal with the result that the Respondent's Appeal Board overturned the dismissal for gross misconduct and instead held the application for employment form to be voidable and rescinded the Claimant's employment without repayment of the remuneration she had received upto that date. The Claimant alleges that the true reason for her dismissal was that shortly after she commenced her employment she made certain protected disclosures to the Respondent relating to her concerns about patient care and safety.

By a Response form received by the Employment Tribunal on the 1st September 2017, the Respondent submitted that the tribunal had no jurisdiction to hear and determine the claim filed since the Claimant had not

been employed with the Respondent for the 52 week continuous employment period prescribed by section 60(1)(a) of the Employment Act (hereinafter referred to as "the Act"). Furthermore, the Respondent denied that the reason for the dismissal was that the Claimant had made a series of protected disclosures and that, in any event, even if the Claimant was dismissed for having made such disclosures, which was denied, this did not disapply the provisions of sections 60 and 62 of the Employment Act. The Respondent further stated that the reason for the Claimant's dismissal was her failure to make material disclosures in the form submitted when applying for her position which put her integrity and honesty in serious doubt.

On the 5th September 2017, a mediator was appointed to hear this case in accordance with the provisions of Rule 25(1) of the Employment Tribunal (Constitution and Procedure) Rules 2016 (hereinafter "the Rules").

On the 26th September 2018, the appointed mediator issued a conciliation certificate.

I must admit that I fail to understand why a conciliation certificate was not issued immediately by the mediator upon receipt of the Claim and Response forms. I say this because of the provisions of Rule 25(8) of the Rules which provides as follow:-

> *"If at any time during the period for conciliation, or during any extension of that period, the Mediator concludes that a settlement of a dispute, or part of it, is not possible, the Mediator shall issue a conciliation certificate".*

The Mediator on receipt of the "accepted documents" must or should have seen that the Respondent was claiming that the Tribunal did not have jurisdiction to hear and determine the case, and that on the face of it the Claimant had clearly not worked the required 52 week period. Consequently, it was perfectly justifiable in such circumstances to immediately conclude that a mediation was pointless. A lot of time was wasted, and I dare say concern and anxiety, on one or both sides has been needlessly incurred by not having taken this step. All of this could and should have been avoided. In any event the conciliation certificate should have been issued at worst on the expiry of the three month period after the 5th September 2017 as required by the Rules.

On the 10th October 2018, both parties were informed by the Tribunal of my appointment as chairman of this case.

On the 25th day of March 2019, the case came before me for the first time and, amongst other things, the following was ordered by consent:-

> *"There be a preliminary hearing on the question of whether, even if the Claimant could establish that the reason for the dismissal was that the Claimant had made a protected disclosure as defined in section 45A of the Employment Act 1954 ("the Act") (which the Respondent denies was the reason for the dismissal) the Employment Tribunal has jurisdiction to hear the Claim in light of the fact that the right not to be unfairly dismissed for making a protected disclosure under section*

65D of the Act does not apply to the Claimant as she was not continuously employed by the Respondent in accordance with section 60(1)(a) of the Act for a period of not less than 52 weeks ending with the effective date of termination of her employment, and if the Employment Tribunal so determines, that the Claim be dismissed".

The matter came before me for hearing on the 4th June 2019.

Agreed Facts

For the purposes of the preliminary point(s) raised, the parties are agreed that the Claimant was employed under a fixed term contract as from the 9th January 2017 for a period of one year ending on the 8th January 2018, subject to earlier termination by either party upon giving 1 month's notice of termination to the other. The Claimant's employment was terminated on the 15th May 2017 with one month's wages paid in lieu of notice making the 15th May 2017, the effective date of termination under section 64(5)(a) of the Act. On the effective date of termination the claimant had been employed for less than the 52 week qualifying period prescribed by section 60(1)(a) of the Act.

I pause here to point out that the preliminary point(s) referred to below assume that the Claimant did make a protected disclosure and that this disclosure was the reason or the principle reason for her dismissal, both of which allegations the Respondent denies.

The Case For Each Party

It is contended by the Respondent that section 65D of the Act does not create a stand alone right to claim for unfair dismissal independent of section 59. Mr Isola contends that section 65D of the Act has to be read in conjunction with section 59 and consequently any claim brought must not be precluded by the provisions of section 60(1) of the Act and, if so precluded, then has to come within one of the exceptions specified in section 60(2) to (4) of the Act. Thus, as there is no specific disapplication of the qualifying service period in section 60(2) to (4) inclusive, where the reason for the dismissal is that a claimant made a protected disclosure pursuant to sections 45A to 450 of the Act, it follows that a claim under section 65D cannot be brought where the claimant has not been employed for fifty-two or more weeks. To find otherwise would run counter to the clear scheme provided for in Part VI of the Act.

In support of his submissions Mr Isola points out that:-

(i) had it been the draftsman intention to exclude the qualifying period restriction in section 65D cases then all that was required was an amendment to section 60(3), an amendment which after all had been made in cases relating to sections 65A (1)(a) to (e), 65B (1)(a) to (e) and 65C (1) dismissals;

(ii) section 70(1), which is specifically referred to in section 65D, could not be read in isolation and had to be read in conjunction with section 59 and consequently everything came back to the qualifying period restriction imposed by section 60(1)(a) of the Act.

With regard to the Claimant's alternative proposition to the effect that there has been a drafting error since it cannot have been Parliament's intention to prevent whistle blowers from claiming unfair dismissal when employed for less then 52 weeks, Mr Isola takes a neutral stance limiting himself to simply drawing my attention to the relevant case authorities on the subject.

Turning then to the Claimant's submissions, which are two fold and put forward in the alternative since Mr De Mello accepts that the Claimant cannot have it both ways.

Firstly, it is submitted by the Claimant that this tribunal does have jurisdiction to hear her claim since no qualifying service period is necessary in order to acquire the right to complain of unfair dismissal, which is automatically unfair because she made a protected disclosure under section 65D of the Act. Mr De Mello lays the ground work for his submissions by drawing my intention to the provisions of sections 45M and 45N of the Act. It is contended by Mr De Mello that when read together these provisions provide as follows.

An employee who has made a protected disclosure, and who as a result has suffered a detriment which is short of a dismissal, can present a complaint to the Employment Tribunal irrespective of whether or not they have the qualifying period of service prescribed by section 60(1)(a), and if such a complaint is well founded, the Tribunal can impose the remedies prescribed by section 45O of the Act. Mr De Mello therefore submits that if no qualifying period of employment is required to present a complaint under section 45N when subjected to a detriment which does not amount to a dismissal for making a protected disclosure, it would be strange indeed if a person making a protected disclosure under section 65D, who is actually dismissed as a consequence thereof, cannot bring a claim because they do not have the qualifying period of service required by section 60(1)(a) of the Act. It, Mr De Mello argues, could not have been the intention of Parliament that a person who suffers less grievous harm from an employer because of making a protected disclosure should have a remedy when a similarly placed employee suffering a dismissal does not have the same remedy. Such a situation would plainly be at odds with the scheme of the Act and lead to an absurdity. Such an absurdity, the argument goes, would not arise if section 65D is interpreted as being a free standing provision since in such a case persons making a protected disclosure who are dismissed for so doing would be entitled to bring a complaint to the tribunal irrespective of how long they had been employed. Such a construction is supported by the way that section 65D was incorporated into the Act as this indicates that the draftsman intended section 65D, by referrence to sections 59 and 70, and by deliberate omission to section 60(3), to give free standing effect to section 65D. Thus, it follows section 65D provides the Claimant with another route to claim the statutory right under section 59(1) not to be unfairly dismissed because she made a qualifying disclosure without requiring the qualifying period of employment prescribed by section 60(1)(a). By asserting a claim under section 65D the Claimant was entitled to bring a complaint to the tribunal under section 70 of the Act.

In the alternative Mr De Mello submits that as result of the absurdity that results if section 65D is not seen to be free standing it follows that there has

been an omission/mistake made by the draftsman which this tribunal should correct by inserting a reference to section 65D in section 60(3) of the Act. If this is done it would not distort the equilibrium of sections 59 to 69 of the Act and fits in with the scheme of the Act.

I trust that I have done justice to both counsel by faithfully setting out above their respective material submissions.

The Law

The starting point in this voyage of discovery is section 59 of the Act, which provides the right to present a claim for unfair dismissal as well as specifying the exclusions applicable to the exercise of said right.

> *"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".*

Turning therefore to the exclusions prescribed by sections 60 to 63 of the Act.

Section 60(1) of the Act is the provision which applies to this particular case as it contains the requirement to be employed for a particular length of time before the employee can exercise the right not to be dismissed unfairly provided for in section 59(1).

> *"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 or before the effective date of termination attained the age which, in the undertaking in which he was employed, was the normal retiring age for an employee holding the position which he held, or, if a man, attained the age of sixty-five, or, if a woman, attained the age of sixty".*

Section 60(1)(a) clearly provides that an employee has to be continuously working for their employer for 52 weeks before they can claim the right not to be unfairly dismissed provided for by section 59(1) of the Act.

The provisions of section 60(2) are in no way relevant to the facts of this case and therefore I omit from quoting them here. Similarly, with regard to sections 61 and 63 of the Act.

Subsections 60(3) and 60(4) do have an indirect relevance to this case in that there is no reference in either subsection to the provisions of section

65D of the Act, which section is the one that deals with protected disclosures.

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

I pause here to point out that section 65A deals with dismissals in maternity cases, section 65B deals with dismissals in health and safety cases and section 65C deals with dismissals in relevant statutory right cases. None of these three sections deals with dismissals arising from a protected disclosure. I further point out that according to my research it was the Employment (Maternity and Health and Safety) Regulations 1996 that amended the Act (then referred to as the Employment and Training Ordinance) by inserting the following subsections and sections which appear in the Act today; ie subsections 60(3) and (4), subsection 62(1)(a) and sections 65A to 65C inclusive.

Section 62 also contains an exclusion to the provisions of section 60(1).

> "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".*

I pause to point out here that sections 52A to 52D inclusive of the Act deals with sex discrimination cases, whilst the Employment (Maternity and Health and Safety) Regulations 1995 (the year would appear to be an error as the year of the Regulations is 1996) deals with maternity and parental

leave cases. As pointed out above the Employment (Maternity and Health and Safety) Regulations 1996 were responsible for introducing into the Act the various provisions referred to.

These then are the exclusions to the right to claim for unfair dismissal provided for by section 59(2) of the Act. There is no reference whatsoever in any of those sections to either protected disclosures and/or section 65D of the Act.

Section 65D of the Act provides as follows:-

> *"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".*

I pause here to make two observations. Firstly, to point out that sections 45A to 45O inclusive and section 65D were introduced into our laws by virtue of The Employment (Public Interest Information) Act 2012. In other words, the amendments were made some sixteen years after the introduction of subsections 60(3) and 60(4) and sections 65A to 65C of the Act. Secondly, to draw attention to the similarity of the wording in section 65D to parts of sections 65B(1) and 65C(1).

Section 45A deals with various definitions/interpretations relating to protected disclosures and therefore has no relevance to the point in question but sections 45M and 45N(1) are relevant in the light of the Claimant's submissions.

> *"45M(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
>
> *(2) This section does not apply where:-*
>
> *(a) the worker is an employee; and*
>
> *(b) the detriment in question amounts to dismissal (within the meaning of section 64).*
>
> *45N(1) An employee may present a complaint to the Industrial Tribunal that he has been subjected to a detriment in contravention of section 45M."*

In order to complete the picture, I set out below the provisions of section 70 of the Act, which prescribes the procedure for claiming remedies in unfair dismissal cases.

> *"70(1) A complaint may be presented to the Employment Tribunal by an employee against an employer that:-*

(a) action specified in the complaint has been taken by the employer or by a person acting on the employer's behalf;

(b) that such action constituted a breach of section 59 on the part of the employer or of the person acting on the employer's behalf; and

(c) the complainant is the person who was dismissed or was refused engagement, as the case may be.

(2) Where on a complaint relating to dismissal the tribunal:-

(a) finds that the grounds of the complaint (as specified in subsection (1)(a) to (c) are well-founded; and

(b) considers that it would be practicable, and in accordance with equity, for the complainant to be re-engaged by the employer or to be engaged by a successor of the employer or by an associated employer,

the tribunal shall make a recommendation to that effect, stating the terms on which it considers that it would be reasonable for the complainant to be so re-engaged or engaged.

(3) Where in such a complaint the tribunal finds that the grounds of the complaint are well-founded, but:-

(a) does not make such a recommendation as is mentioned in subsection (2); or

(b) makes such a recommendation, and (for whatever reason) the recommendation is not complied with,

the tribunal shall make an award of compensation, to be paid by the employer to the complainant, in respect of the dismissal.

(4) The tribunal shall not entertain a complaint presented under this section unless it is presented before the end of the period of three months beginning with the effective date of termination unless the tribunal is satisfied that in the circumstances it was not practicable for the complaint to be presented within that period".

<u>Stand Alone Argument.</u>

As stated above it is Mr De Mello's submission that the Claimant can bring a complaint for unfair dismissal notwithstanding that she does not have the 52 week qualifying period because Section 65D of the Act is a free standing provision.

Both counsel have in the course of their respective submissions referred me to the Court of Appeal case of MRS Environmental Services Limited v Marsh and another (1997 1 AER 92). The facts of that case were as follows.

On the 11th November 1991, the respondents had commenced employment with a local authority in its street cleansing undertaking. On the 31st March 1993, the local authority purported to dismiss them and the next day contracted out the street cleansing work to the appellant company. The respondents claimed compensation for unfair dismissal pursuant to section 67 of the Employment Protection (Consolidation) Act 1978, and their claim was upheld by the industrial tribunal. The appellant company appealed contending that although section 54 of the 1978 Act conferred a general right not to be unfairly dismissed, the respondents were excluded from that right under section 64 of the Act as they had not been continuously employed for two years. The respondents contended that they were not so excluded from the right not to be unfairly dismissed by virtue of article 4(1) of Council Directive (EEC) 77/187 and regulation 8(1) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 which provided that when an employee was dismissed for reasons connected with the transfer of an undertaking the employee would be treated as unfairly dismissed. The Court held that Regulation 8 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 did not confer a free standing right not to be unfairly dismissed by reason of the transfer of an undertaking and that as the respondents had not been continuously employed for a period of two years it followed that they were not entitled to compensation for unfair dismissal.

I pause here to point out that the provisions with regard to the right not to be unfairly dismissed and the exclusions to said right contained in the Employment Protection (Consolidation) Act 1978 correspond to the relevant provisions contained in the Act, and consequently in the passages quoted below from the judgement of Phillips L. J. when he refers to particular sections of the UK 1978 Act I have taken the liberty of inserting beside in square brackets the corresponding provision contained in the Act.

The appellant's in the MRS case contended, in a nut shell that Regulation 8 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 did not purport to confer any right to complain of unfair dismissal and that the source of that right remained section 54 of the Employment Protection (Consolation) Act 1978, and that those categories of people who are excluded from that right remained excluded, so that as the respondents fell into one of the excluded categories (ie had not been continuously employed for two years) they were not entitled to claim for unfair dismissal. On the other hand the respondents contended that the words in Regulation 8(1) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 that, an employment shall be treated for the purposes of Part V of the 1978 Act .... as unfairly dismissed were not to be interpreted as excluding employees with less than two years qualifying service from the protection of being able to claim for unfair dismissal. The similarly of the arguments advanced and of the legislation involved make the MRS case highly relevant for the purpose of the arguments before me.

In the course of his judgment Phillips L. J. held as follows. At page 101, he states:-

> *"Section 67, if read in isolation, suggests that anyone who has been unfairly dismissed is entitled to complain to an industrial tribunal. When read in the context of the other provisions of Pt V [Pt VI], it is apparent*

this is not the case. It seems to me clear, if section 54 [59] is to have any effect at all, that those entitled to complain of unfair dismissal are those upon whom s 54 [59] confers the right not to be unfairly dismissed. Thus, in relation to any complaint, two separate requirements have to be satisfied before a complaint can be made (i) the complainant was unfairly dismissed within the provisions of ss 55 to 63 [64 to 69] and (ii) the complainant had a right not to be unfairly dismissed under s 54(1) [59(1)] and subject to the exclusions provided for by s 54(2) [59(2)].

Thus, those who have been employed for less than the period specified in s 64(1) [60(1)] had no right to complain, unless dismissed for an inadmissible reason, ie one relating to trade union membership".

At page 102, he goes on to say:-

"Having given the matter further consideration I remain of the conclusion that s 60 [70] of the 1978 Act gives rise to no free standing right to complain of unfair dismissal without reference to the provisions of s 54 [59] and s 64 [60]. So to find would run counter to the clear scheme of this part of the Act. Sections 57, 58, 59 and 60 provide for different circumstances in which dismissal will be unfair, but none of those sections confers a right not to be unfairly dismissed. No significance is to be attached to the difference between dismissal which is 'regarded' as unfair (ss 58 and 59) and dismissal which is treated as unfair (s 60). The difference in language is attributable to the fact that the 1978 Act consolidates provisions from different statutes.

This conclusion is supported by the fact that s 64 [60] contained its own exception in respect of inadmissible reason's – namely those relating to trade union membership. Had it been the draftsman intention that the right not to be unfairly dismissed by reason of pregnancy should not be subject to the exclusion in s 64(1) [60 (1)], the obvious way of achieving this would have been to provide that, in the case of a s60 [70] dismissal, pregnancy was not an inadmissible reason. Indeed just such a method was subsequently adopted to achieve this end ....".

and a bit later on:-

"Having reached this conclusion, I consider that precisely the same effect must be given to the identical phraseology that has been adopted in reg 8 of the 1981 regulations. That regulation did not confer a free standing right not to be unfairly dismissed by reason of the transfer of an undertaking. By amending Pt V of the 1978 Act, it conferred the right on those who enjoyed the right not to be unfairly dismissed by virtue of s 54 of that Act and not on that category excluded by s 64(1). That exclusion was permitted by art 4(1) of the directive and the respondents fall into the excluded category".

The MRS case, dealing as it does with provisions that correspond to equivalent provisions in the Act, is materially pertinent to the first of the issues that arise in this preliminary point hearing. The case is authority for the view that section 70 of the Act gives rise to no free standing right to complain of unfair dismissal without reference to the provisions of section 59 of the Act. Such a view is supported by the wording of section 70(1) in

that paragraph (b) not only refers to a breach of section 59 but through the use of the words *"such action"* and *"and"* makes the provisions in paragraph's (a) and (c) cumulative for the purposes of the subsection. In other words, there has to be a breach of section 59 before the provisions of section 70 can come into play. It follows from this that before a complaint can be provided to the tribunal a claimant has to comply with the provisions of section 59(2), and therefore in turn with the provisions of section 60(1)(a) of the Act unless one of the exclusions provided for in sections 60(2) to 60(4) inclusive or sections 61 or 63 inclusive apply.

Section 65D clearly provides that the dismissal of the employee must be regarded in the light of sections 59 and 70 of the Act. In my view if the draftsman intended that section 65D provide a free standing right to claim for unfair dismissal in protected disclosure cases he would not have included a reference to the whole of section 59 in the provision. By introducing a reference to section 59(1) and (2) the draftsman was in my opinion stating that section 65D was not to be regarded as being a free standing provision. Mr De Mello has forcefully argued that any interpretation of section 65D other than one which makes it a free standing provision creates an absurdity and that there are public interest considerations which necessitate the protection of whistle blowers. I do not disagree with that and have much sympathy for the argument but in my view the meaning of section 65D is plain and unambiguous and its words have to be given their plain meaning. The fact that such a meaning does cause difficulties when viewed in relation to the scenarios covered by sections 45M and 45N of the Act does not mean that the tribunal has to fill the gap created by the different sections by interpreting section 65D in a manner which in essence materially amends the explicit wording of section 65D. I say this because it seems to me that in order to make section 65D free standing to the extent of providing for the Claimant's circumstances you would need to interpret into the section words so as to make the provision read something along the lines of:-

> *"The dismissal of an employee by an employer shall be regarded for the purposes of section 59(1) 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 and for the purposes of a claim brought under this section the provisions of section 60(1)(a) shall not apply".*

This in my view is going beyond interpreting section 65D and more akin to judicial legislation as it requires constructing section 65D afresh. In any event, we do no need to go down that course in order to remove the absurdity to which Mr De Mello has drawn our attention to.

<u>Mistake/Omission Arguement</u>

As referred to above, it is Mr De Mello's alternative submission that the absurdity created by section 45M and 45N when considered in the light of section 65D is such that there has clearly been a drafting error which this tribunal should move to cure.

I pause to point out here that apart from the cases referred to below I have also read and taken account of the cases of R (Edison First Power Limited)

v Central Valuation Officer (2003 4 AER 209), Duport Steels Limited v Sirs (1980 1 WLR 142), Wentworth Securities v Jones (1980 AC 74), and Western Bank v Schindler (1977 CHI), as well as the passages from the 6th and 7th editions of Bennion on Statutory Interpretation to which I was referred.

Mr De Mello has referred me to the Court of Appeal and House of Lords judgements in the case of Inco Europa Limited and others v First Choice Distribution (a form) and others (1999 1WLR 270 and 2000 1 WLR 586 respectively). The facts of the case are of no relevance to this case but there was a jurisdictional issue that had to be considered by the courts which is material to the issue that I am being asked to decide.

In the Inco case, as the result of an amendment contained in a 1996 act amending a large number of statutes, including a 1981 act, the amendment in effect abolished a right of appeal to the court of Appeal from a decision refusing or allowing a stay of an action in arbitration cases. The court was therefore concerned with the question of whether the draftsman had intended or made an error when drafting the provision which removed the right of appeal and, if the latter, whether the Court should interpret the amending provision in a manner which involved reading words into that provision; ie that the right of appeal had not been removed.

In the course of the Court of Appeal judgement of Hobhouse L.J. he stated the following:-

> *"In general terms, it is undoubtedly correct that the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the amended statute itself as if it were a free standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute. However, in certain circumstances it may be necessary to look at the amending statute as well. This involves no infringement of the principles of statutory interpretation; indeed it is an affirmation of them. The expression of the relevant parliamentary intention is the amending Act. It is the amending Act which is the operative provision and which alters the law from that which it had been before. It is the expression of the parliamentary will as to what changes in the law Parliament wishes to make. In the present case this approach is further justified by the reference in the amended Act 1981 back to the Act of 1996 and by the terms of the Act of 1996 itself".*

And later on:

> *"It is therefore the case that, if the effect of section 107 and Schedule 3 has been to abolish a right of appeal which previously existed in relation to the Act of 1975, it is an intention which either has never come to the notice of or has not been thought worthy of comment by those most intimately concerned with the drafting of and bringing into effect of this highly important measure to update the law of arbitration of this country".*

And later on:

"Thus the exclusion of a right of appeal, particularly when, as in section 9, questions of discretion cannot arise, serves no rational purpose save, possibly, a desire for "sudden death solutions which finds no support from the report which gave rise to this Act or any other part of the statutory context of section 9.

Accordingly, as a matter of construing the phrase "consequential amendments", the conclusion to which one is driven is that a removal of a right of appeal (with leave) from a decision whether or not to stay litigation covered by an arbitration clause would not be consequential upon anything contained in the Act of 1996. It would be a radical and additional provision. In my judgement such a change in the pre-existing law is not achieved by wording such as that used in section 107 of the Act of 1996. In my judgement the effect is that the amendment to section 18(1) of the Act 1981 must be understood as giving effect to the exclusions (and restrictions) on the right of appeal to the Court of Appeal laid down in Part 1 of the Act of 1996 and no more".

There was an appeal which was considered and confirmed by the House of Lords. Lord Nicholls of Berkenhead concluded that *"for once the draftsman slipped up"* and in the course of the judgement he delivered stated at page 592 as follows:-

"I freely acknowledge that this interpretation of section 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, Statutory Interpretation, 3rd ed. (1995), pp. 93-105. He comments, at p. 103:

"In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role".

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in

Jones v. Wrotham Park Settled Estates [1980] A.C. 74, 105-106. In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching."

In accordance with the statements made in the Inco cases I have gone back to basics and sought to ascertain what the intention of Parliament was when sections 45A to 45O and section 65D were introduced into the Act, by looking first at the amending act and then at the proceedings of Parliament.

As stated above section 65D was introduced into our law by virtue of the Employment (Public Interest Information) Act 2012 (hereinafter referred to as "the Amending Act"). The preamble to the Amending Act states that the purpose of the act is *"to provide protection for employees and other workers who disclose information in the public interest"*. The Amending Act amends the Act by:-

(1) inserting a new Part IVA in the Act;
(2) introducing new sections into the Act as part of the new Part IVA; namely sections 45A to 45O inclusive; and
(3) introducing section 65D under Part VI of the Act.

The heading of Part IVA is *"Public Interest Disclosure"* whilst the heading of Part VI is *"Termination of Employment"*. The draftsman when introducing section 65D into Part VI of the Act was therefore aware that he was dealing with termination of employment considerations. This is reinforced by the fact that section 65D itself refers to sections 59 and 70 of the Act, provisions which the draftsman must have considered when drafting section 65D. When looking at section 59 the draftsman cannot but have then looked at the provisions of section 60(3) and in particular noticed the references to sections 65A to 65C inclusive. This, plus the fact that the Amending Act inserts the protected disclosure provisions (ie section 65D) immediately behind section 65C, makes it logical to presume that the drafter was well aware of the exclusion contained in section 60(3) with regard to sections 65A to 65C of the Act. This is not a case where the draftsman is conducting consequential amendments to one or more pieces of legislation and/or amending complex provisions in a lengthy piece of legislation or removing rights previously enshrined in legislation. The draftsman was dealing with a focused and narrow issue and was guided by the wording already in existence in the sections of the Act; for example notice the similarity in the wording of sections 65B(1) and 65C(1) with section 65D with regard to the following words which appear in all three sections:-

"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 ………".

and which, to a lesser degree, also appear in section 60(3).

A consideration of the Amending Act therefore suggests that we are not dealing with a possible drafting error in the case. However, as required by the Inco case, I have gone further and obtained a copy of the Hansard report of the Proceedings of the Gibraltar Parliament for the 21st September 2012. In the afternoon session the Employment (Public Interest Information) Act 2012 underwent the second and third readings. In the course of the second reading, and as a result of an amendment proposed by the opposition to clause 45B, the mover of the Bill, the Hon JJ Bossano, had the following to say which is of direct relevance to the matter under consideration. At page 10 of the report the Hon JJ Bossano stated:-

> *"Let me say that I have got here the UK law that was passed in 1998. The Hon. Member has spent many years in the United Kingdom. I have never come across anybody in the United Kingdom arguing that the UK law should be changed since 1998, which is in fact 14 years, because there was a danger that this law might be used for anything other that what it was intended. In fact, the provisions are identical, down to the last full stop and comma – the fact, the United Kingdom law, section 43B, 'Disclosures qualifying for protection', broken down in (a) to (f) are an exact replica, because of course it has been copied from it – of 45B(1)(a) to (f). So the answer is we see no reason to depart from what has been in place in the law of the United Kingdom since 1998 and in which, in our view, is long overdue and should have been here, and the previous Government should have done in the 15 years they were there. It came into the legislation of the United Kingdom two years the 1996 election".*

It is clear from this that the Governments intention was to replicate into the laws of Gibraltar the law of the United Kingdom with regard to whistle blowing. The law in the UK on the subject is contained in the Employment Rights Act 1996. Section 103A of that act provides that:-

> *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".*

Carrying on from there section 108 of the same act which deals with the qualifying period of employment, provides in subsections (1) and (3) (ff) as follows:-

> *" (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination".*

and

> *" (3) Subsection (1) does not apply if:-*
>
> *(ff) section 103A applies".*

In other words, in the UK there is no requirement for a minimum period of service before a claim for unfair dismissal can be brought in a whistle blowing case. This being the case, and as the mover of the Bill in the

Gibraltar Parliament is clearly stating that the intention was to follow the UK law on the subject, it logically follows that the intention of the legislature was that there be no minimum qualifying employment period in such cases in Gibraltar. However, the matter is put beyond doubt when a few minutes later the Hon JJ Bossano stated as follows:-

> *"In addition, there is a very important area here, in terms of the work of the Employment Service. I am sure that anybody on that side who was previously working in the Employment Service will know that the problem that exists with people who are not paid the legal wage is that there is no protection in the law of Gibraltar against an employer that is not paying the legal minimum wage. For example, we have got a legal minimum wage now of £5.70 and if somebody is paid less, the Labour Inspectors, if they can find the evidence, can require the employer to pay it and in fact we can prosecute it, because it is a criminal offence not to be doing it. They are breaking the legislation which is there to protect good employers against bad ones, as well as protecting employees. But the employee who reports this is not protected against dismissal in the first 52 weeks of his work, so nobody will come forward, and even after the 52 weeks they do not come forward. So people get told quite openly, 'If you don't like the wage, there is the door', and there is nothing they can do because we do not protect them.*
>
> *With this law somebody can, in their first week of employment, go to the Employment Service and say, ' This is what my employer is doing', and if he gets sacked, even though he has not had 52 weeks of continuous service, this law gives him immediate protection. That, I hope, will have an immediate effect in ensuring that those employers who have not been able to get to comply with the law in the past will comply with the law in the future".*

It is abundantly clear from these statements that the intention of the Government was for section 65D of the Act not to be restricted by the requirements of section 60(1)(a) of the Act. Looked at in this light it seems to me that the draftsman when drafting the Bill forgot to take account of the need to amend section 60(3) of the Act by including a reference to section 65D therein.

Support for such a proposition is provided by the absurdity that is introduced into the scheme of things by having provisions which gives the Claimant in this case, had she received a detriment short of dismissal, the right to file a claim against the Respondent, and yet because she was actually dismissed appear not to afford her such a right. It cannot have been the intention of Parliament to have such a material discrepancy and there is no logical reason for such a discrepancy to exist, which goes against the scheme of the Act. This is especially so bearing in mind that sections 65A, 65B and 65C are all excluded from the restriction imposed by section 60(1)(a) by being referred to in section 60(3) of the Act.

As stated above, I do not accept Mr De Mello's submissions that section 65D provides for a free standing right to claim for unfair dismissal but I do accept the argument that there has been a drafting error when the Amending Act was enacted which has remained unnoticed until now and which would

have been cured by Parliament had it been noticed when the Bill was going through its readings.

Having come to such a conclusion, I turn to consider as required of me by Lord Diplock in the Wentworth Securities v Jones case and by Lord Nicholls of Berkenhead in the Inco case, the following questions:-

(i) what was the intended purpose of the Amending Act – clearly this was to protect whistle blowers against employers who then seek to subject them to some detriment and/or who unfairly dismiss them by replicating into our laws the UK provisions on the matter, including that there be no qualifying service restriction in such cases;

(ii) did the draftsman give effect to the wishes of the legislative – clearly he did not having previously found that section 65D does not provide for a free standing right to claim for unfair dismissal and consequently, bearing in mind the clarity of what the legislature intended to bring into effect as referred to above, it could only be a drafting error that section 60(3) of the Act was not amended. A view supported by the fact that the draftsman did legislate in the Amending Act that a qualifying period of employment was not required in cases were a detriment short of dismissal is imposed;

(iii) if the error had been noticed in the course of the readings of the Bill would an amendment have been introduced - I have no doubt from the statements of the Hon J.J.Bossano in Parliament that it would. It was certainly the intention of Government not to have a qualifying restriction and the opposition did not query or challenge or oppose the intention of Government on this point when expressed by the mover of the Bill; and

(iv) is the alteration to the language of section 60(3) too far reaching and therefore not a matter in which this tribunal should interfere - in my opinion adding a reference to section 65D in section 60(3) is not a far reaching change to the language of the provision or to the scheme provided for by Part VI of the Act.

Decision

In the light of the above, the answer to the preliminary question before me is that if the Claimant can establish that the reason or, if more than one, the principal reason for her dismissal was that she made a protected disclosure as defined by section 45A of the Act then and only then this tribunal has the jurisdiction to hear and determine the claim for unfair dismissal filed. It follows from this that if it is found that the Claimant did not make a protected disclosure, as defined by section 45A of the Act, or if the reason or the principal reason for her dismissal was a reason unconnected with any protected disclosure she may have made, then the claim filed by the Claimant has to be dismissed.

Having decided as I have the next matter to consider is any application the Claimant may wish to make with regard to the possible amendment of the Claim form filed. The secretary in consultation with the parties will set a

mutually convenient date for the hearing of such an application if counsel are unable to agree between themselves the way forward.

Dated this 13th day of September 2019.

Joseph Nuñez
Chairman