[2020 Gib LR 292]

VAN THIENEN v. GVC SERVICES LIMITED

SUPREME COURT (Yeats, J.): November 4th, 2020

Employment—dismissal—unfair dismissal—period of employment—tribunal not to hear unfair dismissal claim if employment for less than 52 weeks, unless exception applies—exception in Employment Act, s.65B(1)(d) that employee, in circumstances of danger which he reasonably believed to be serious and imminent, refused to return to work—s.65B(1)(d) includes protection for employee's mental health—employee previously diagnosed with stress-related anxiety arguably placed in circumstances of danger if asked to work in situation which might trigger anxiety

The appellant brought a claim for unfair dismissal against the respondent.

The appellant had been employed by the respondent as a customer service retention agent for a period of 51 weeks. He claimed that he had been victimized and bullied during that time. He had spent some time on sick leave suffering from stress-related anxiety which he said was caused by the bullying and victimization. He had filed a grievance with the respondent, which led to an internal investigation. On the conclusion of the investigation in April 2018, adjustments were proposed to be made by the respondent and the appellant was instructed to return to work. He was summarily dismissed for gross misconduct when he failed to do so.

The appellant brought (amongst other claims) a claim for unfair dismissal.

Section 59 of the Employment Act provided:

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

Section 60 provided:

> "(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—
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> (a) was not continuously employed for a period of not less than 52 weeks ending with the effective date of termination . . .
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> (3) Subsection (1) shall not apply to the dismissal of an employee if it is shown that the reason (or, if more than one, the principal

reason) for the dismissal, or in a redundancy case, for selecting the employee for dismissal, was one of those specified in section 65A(1)(a) to (e), 65B(1)(a) to (e) or 65C(1)."

Section 65B provided:

> (1) The dismissal of an employee by an employer shall be regarded for the purposes of sections 59 and 70 as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
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> . . .
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> (d) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, left, or proposed to leave, or (while the danger persisted) refused to return to, his place of work or any dangerous part of his place of work . . ."

The tribunal dismissed the claim. It observed that the references to health and safety in s.65B probably did not extend to mental health but decided that, even if s.65B(1)(d) did extend to dangers to mental health, on the facts of this case the exclusion had not been made out.

The appellant appealed against the decision to dismiss the claim on the basis that the qualifying period of 52 weeks did not apply as his refusal to return to work was because he reasonably believed that there was a serious and imminent danger to his mental health if he returned. The appellant's grounds of appeal were that (a) the tribunal had erred in considering that the references to health and safety in s.65B of the Employment Act did not include harm to an employee's mental health; (b) the tribunal had erred in finding that prior to November 2019 he had never mentioned bullying, victimization or health; (c) the tribunal had erred in finding that the appellant had not stated that he believed he would be in serious and imminent danger if he returned to work as instructed or that he believed that a return to work would put his mental health and safety in serious and imminent danger; and (d) the tribunal had erred in finding that by implication at least the appellant suggested that after May 16th, 2018 (after a period of leave) it would be acceptable for him to go back to work but not before.

The respondent submitted that mental health was not caught by s.65B(1)(d).

Held, allowing the appeal and ordering that the appellant's claim for unfair dismissal proceed to a hearing before the tribunal:

(1) The tribunal had been entitled to hold a preliminary hearing to decide whether it had jurisdiction to hear the appellant's claim. Rule 47 of the Employment Tribunal (Constitution and Procedure) Rules 2016 provided that the tribunal could hold a preliminary hearing at which it could determine a preliminary issue, "preliminary issue" being defined in r.2(1) as including an issue as to jurisdiction. Section 13 of the Employment Act allowed for an appeal to be brought against any decision of the tribunal, which clearly included a decision made at a preliminary hearing. An

appeal to the Supreme Court lay on any question of law alone. In the present case no evidence was heard before the tribunal. The preliminary hearing was dealt with on the basis of submissions, with the tribunal applying the test of whether the appellant had advanced a *prima facie* case that he could engage one of the exceptions to the qualifying 52-week employment period. On this appeal, as the tribunal had not carried out a fact finding exercise, it was for the court to consider the grounds of appeal and itself determine whether they showed that the appellant's case, taken at its highest, was one which could succeed at trial. If so, then the tribunal would have erred in its approach as a matter of law and the appeal should be allowed (paras. 15–18).

(2) Section 65B(1)(d) did include protection for employees who were exposed to situations which could be harmful to their mental health. The circumstances at work would have to be such that there existed a risk to the employee's mental health which the employee reasonably believed to be both serious and imminent. The reasonableness of the belief would undoubtedly be key in many cases. The requirement that the employee was unable to reasonably avert the danger would also have to be met. The phrase in s.65B(1)(d), "in circumstances of danger," was to be interpreted without limitation. A circumstance of danger could be particular to an employee. While "danger" was usually associated with physical injury, that clearly did not need to be so. An employee who had previously been diagnosed by a medical practitioner as suffering from stress-related anxiety was, arguably, placed in a circumstance of danger if he was asked to work in a situation where his anxiety could again be triggered. When considering "serious and imminent," a risk that an employee had to take time off work due to stress-related anxiety could, depending on the facts, be "serious." A mental health illness could have devastating effects. "Imminent" also depended very much on the facts of the case but there could be situations which could immediately trigger a mental health breakdown (paras. 24–28).

(3) The appellant had raised a *prima facie* case that s.65B(1)(d) was engaged. The appeal would be allowed and the appellant's claim for unfair dismissal would proceed to a hearing before the tribunal. An employer's view as to whether a workplace was dangerous was immaterial. If the appellant could show that he reasonably believed the circumstances to fall within s.65B(1) then, on the face of it, all that was then required was that the respondent was shown to have dismissed him for his refusal to attend work. It was a requirement that in order to fall within s.65B(1)(d) an employee had to inform an employer that he believed there were circumstances of danger which were serious and imminent and which he could not avert and that he was refusing to return to work for that reason. It was reasonable for this to be read into s.65B(1) and it was also required by Directive 89/391/EEC. In the present case, it was undeniable that the appellant had raised with the respondent the bullying and victimization to which he said he was being subjected. This could quite properly be taken

as being a notification by the appellant that he was refusing to return to work because of circumstances of danger to his mental health which were serious and imminent. The appellant did not refer in any of the pleadings before the tribunal to his refusal to return to work being because he believed that there were circumstances of danger which were serious and imminent. Nevertheless, an employment tribunal should be concerned primarily with substance and not form. A failure to plead the precise statutory reference in the claim form was not required, although of course setting out the basis of a claim was necessary. By the preliminary hearing, the appellant had clearly set out that his claim was, *inter alia*, based on s.65B(1)(d). The tribunal therefore had before it the basis of the claim. The court considered the appellant's evidence, taken at its highest, set out a case for unfair dismissal. His claim should have been allowed to proceed to a hearing as he had raised a *prima facie* case that s.65B(1)(d) was engaged (para. 33; paras. 37–41; paras. 53–56; para. 60).

Cases cited:

(1) *Balfour Kilpatrick Ltd.* v. *Acheson*, [2003] UKEAT 1412_01; [2003] IRLR 683, considered.
(2) *Cruz* v. *Gibraltar Community Projects Ltd.*, 2010–12 Gib LR 340, followed.
(3) *Harvest Press Ltd.* v. *McCaffrey*, [1999] UKEAT 488_99; [1999] IRLR 778, followed.
(4) *Oudahar* v. *Esporta Group Ltd.*, [2011] UKEAT/0566/10/DA; [2011] I.C.R. 1406, considered.

Legislation construed:

Employment Act, s.59: The relevant terms of this section are set out at para. 6.
s.60: The relevant terms of this section are set out at para. 7.
s.65B: The relevant terms of this section are set out at para. 8.

Employment Tribunal (Constitution and Procedure) Rules 2016, r.2(1): The relevant terms of this provision are set out at para. 15.
r.26(1): The relevant terms of this provision are set out at para. 15.

Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC), art. 8(4): The relevant terms of this paragraph are set out at para. 23.
art. 13: The relevant terms of this article are set out at para. 39.

The appellant appeared in person;
D. Martinez for the respondent.

1 **YEATS, J.:** This is an appeal, brought pursuant to s.13 of the Employment Act, against a decision of the Employment Tribunal ("the tribunal"). The tribunal, by a judgment of its Chairman Joseph Nunez

dated April 17th, 2020, dismissed a claim for unfair dismissal brought by Bart Van Thienen ("the appellant") against his former employer GVC Services Ltd. ("the respondent"). The Chairman's decision followed a hearing on a preliminary issue, namely, whether the tribunal had jurisdiction to hear the claim. It is accepted that the appellant had not been employed for a period of at least 52 weeks—the qualifying period for the bringing of claims for unfair dismissal pursuant to s.60 of the Employment Act. The appellant was not able to persuade the tribunal that, at trial, he would be able to engage one or more of the exceptions to that qualifying period.

Background

2 The appellant's case is that he was bullied and victimized in his time as a customer service retention agent working for the respondent. (The respondent is part of a multi-national online gaming and betting group of companies.) The appellant spent some time on sick leave suffering from stress-related anxiety which he says was brought about by the bullying and victimization. He filed a grievance with the respondent and this led to an internal investigation. On its conclusion, he was instructed to return to work. He was then summarily dismissed for gross misconduct when he failed to do so. He had been employed for a period of 51 weeks.

3 His claim before the tribunal has three elements. The claim for unfair dismissal (which is what we are presently concerned with); a claim alleging that he was bullied at work and which is filed pursuant to the Employment (Bullying at Work) Act; and thirdly a claim that he was victimized with regards to a possible promotion and to a request for annual leave (also brought pursuant to the Employment (Bullying at Work) Act). The bullying and victimization claims remain as the appellant's ability to institute those is not in issue, although I understand that the outcome of this appeal is being awaited before they are progressed.

4 At the preliminary hearing before the tribunal, the appellant advanced numerous submissions, all of which were dismissed by the tribunal. In this appeal, the appellant relies exclusively on a single ground, that the qualifying period of 52 weeks does not apply as his refusal to return to work was because he reasonably believed that there was a serious and imminent danger to his mental health should he have returned.

5 Before I refer to the appellant's precise grounds of appeal, I will set out the relevant legal provisions.

The statutory framework

6 First, the right not to be unfairly dismissed is contained in s.59 of the Employment Act.

"59.(1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer.

(2) This section applies to every employment except in so far as its application is excluded by or under any of sections 60 to 63."

(Section 70 provides that a complaint by an employee against an employer on a breach of s.59 can be made to the Employment Tribunal.)

7 We then have to consider the exclusions referred to in s.59(2). For the purposes of this appeal, the only relevant exclusion is contained in s.60(1)(a). This states as follows:

"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 . . ."

This provides for a minimum 52 weeks' qualifying period of employment before the right not to be unfairly dismissed can be relied on by an employee. However, s.60(3) disapplies this qualifying period in certain circumstances. Section 60(3) provides:

"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)."

8 In this appeal, the appellant argues that the reason (or principal reason) for his dismissal was the reason specified in s.65B(1)(d). If he is right as to the reason for his dismissal, then the 52 weeks' minimum qualifying period for the bringing of a claim before the Employment Tribunal does not apply and his claim should proceed. Section 65B(1)(d) provides as follows:

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

. . .

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

I shall refer to this provision in this judgment as "s.65B(1)(d)."

The grounds of appeal

9 Rule 3(3) of the Employment Tribunal (Appeals) Rules 2005 ("the Appeal Rules") provides that a notice of appeal shall state the points of law on which the court's decision is sought. The template for notices of appeal contained in the rules has a section for the appellant to set out what part of the decision he wishes to appeal against and another section which requires him to specify the point of law. In his notice of appeal filed on May 5th, 2020 (both before the tribunal and in this appeal the appellant has appeared as a litigant in person), the appellant indicated that he was dissatisfied with the following part of the tribunal's decision:

> "Page 14, the paragraph where the Chairman wrote: 'I am not satisfied in my own mind that the health and safety references found in section 65B of the [Employment] Act were intended by the legislators to include and/or does include (as worded) the mental health and safety of employees (as distinct from their physical health and safety) but as the matter was not argued before me, and as I do not need to determine the issue for the purposes of this case, I leave it for another Tribunal to decide the point.'"

As to the points of law which fall for determination, the appellant set out what he considered to be the relevant statutory provisions in the Employment Act (largely what I have set out in the section above) and referred to a European Council Directive and a UK Employment Appeal Tribunal case.

Clearly, in his notice of appeal, the appellant is asking the court to review whether the references to health and safety in s.65B of the Employment Act extend to mental health and not just physical health and safety.

10 Strictly, a determination of this point of law takes him nowhere. This is because what the tribunal did was dismiss the application of the exception created by s.65B(1)(d) on the facts of the case. The tribunal did not make a determination on the legal point—as the Chairman quite clearly stated in his judgment. The Chairman concluded that even if, contrary to his passing observation, s.65B(1)(d) extended to dangers to mental health, then, on the facts of this case, the exclusion had not been made out in any event.

11 In his memorandum of appeal dated May 20th, 2020, the appellant restated the contents of his notice of appeal and (as required by the template for this document which is also contained in the Appeal Rules) set out the orders that he is seeking from the court. He set out the following:

(i) "[that] the Employment Tribunal judgment assumption that the health and safety references found in the Employment Act section 65B(1)(d) do not include mental health, is wrong."

(ii) "That a breach of [s.65B(1)(d)] by an employer constitutes an automatic unfair dismissal voiding the 52 weeks qualifying period requirement."

(iii) "That an employer has a duty of care and duty of mutual trust and confidence for an employee who complained frequently in writing about being bullied at work over a period of eleven months. That an employer's failure to deal appropriately with the bullying at work, eventually leading to a one month sick leave for mental health issues caused by the bullying, is a breach of that duty of care and duty of mutual trust and confidence by the employer. Such a breach would constitute a breach of the contract between employer and employee."

(iv) "That an employee after having been bullied at work repeatedly, resulting in a one month mental health sick leave, has undergone a health and safety risk. That such an employee has the right not to return to his place of work without convincing assurances from the employer that further bullying, the health and safety risk, is fully prevented. If the employee reasonably believed that the risk of bullying was not fully tackled by the employer and therefore refused to return to his normal place of work and was for that refusal to return to work summarily dismissed by the employer, this constituted an automatic unfair dismissal under [s.65B(1)(d)]."

(v) "That for the reasons (a) to (d) the conclusion/verdict [of the tribunal] is wrong and the Supreme Court is requested to give a new verdict keeping in mind the reasons and legal arguments for this appeal."

The appellant does not actually set out any grounds of appeal in his memorandum.

12 However, in his skeleton argument for the appeal (which he filed two clear business days before the appeal) the appellant set out four "errors" which he says the tribunal made and which should lead to his appeal being allowed. The four "errors" are the following:

(i) First, the appellant again sets out the passage at p.14 in the tribunal's judgment where the Chairman observed that the references to health and safety in s.65B of the Employment Act *probably* did not extend to mental health.

(ii) Secondly, that the tribunal erred in finding that prior to November 2019 he had never mentioned "bullying, victimisation or health."

(iii) Thirdly, that the tribunal erred in making the following finding:

> "[that the appellant had not stated] that he believed he would be in serious and imminent danger if he returned to work as instructed [or that] he believed that a return to work would put his mental health and safety in serious and imminent danger." [Quote from the tribunal's judgment at p.13.]

(iv) Fourthly, that the tribunal erred in finding that: "By implication at least [the appellant] suggested [that] after the 16 May [2018] it would be acceptable for him to go back to work but not before." [Quote from the tribunal's judgment at p.7.]

13 At the hearing, the appellant explained that it all amounted to the same complaint. That his failure to return to work was as a result of his belief that his mental health would suffer and therefore the qualifying period for the bringing of claims for unfair dismissal does not apply in his case.

14 Rule 9(2) of the Appeal Rules allows the court to grant permission to a party to argue any ground other than those set out in the memorandum of appeal. I shall proceed on the basis that "the errors" referred to by the appellant in his skeleton argument are his grounds of appeal (and I shall refer to them as "the grounds"). The appellant is a litigant in person and clearly tried to comply with the procedural rules for this appeal as best he could. It is of course unfortunate that the grounds were not set out in the memorandum. An effect of that was that the respondent did not reply in writing to the second to fourth grounds. Darren Martinez, who appeared for the respondent, did however make submissions at the hearing on all four grounds.

The procedure before the tribunal

15 Rule 47 of the Employment Tribunal (Constitution and Procedure) Rules 2016 provides that the tribunal may hold a preliminary hearing at which it can, amongst other things, determine a "preliminary issue." (It can do so either on the application of either party or of its own motion—see r.48.) A "preliminary issue" is defined in r.2(1) as being:

> ". . . as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed) . . ."

Furthermore, r.26(1) requires the chairperson to consider the documents in the claim "to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal." The chairperson can then set the

matter down for a preliminary hearing. The tribunal was therefore perfectly entitled to hold a preliminary hearing to decide whether or not it had jurisdiction to hear the appellant's claim.

16 The tribunal then went on to determine whether it had jurisdiction by asking whether the appellant had advanced a *prima facie* case that he could engage one of the exceptions to the qualifying period. At p.9 of his judgment, the Chairman stated:

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

I understand this to mean that the burden was on the appellant to show that his evidence, taken at its highest and without consideration of the other side's evidence, was such that at trial the tribunal could find that it was more likely than not that an exception to the qualifying period was engaged. In my judgment, no criticism can be made of the tribunal's approach.

The nature of this appeal

17 Section 13 of the Employment Act allows for an appeal to be brought against any decision of the tribunal. This clearly includes a decision made at a preliminary hearing. An appeal to the Supreme Court lies on any question of law alone. In *Cruz* v. *Gibraltar Community Projects Ltd.* (2), Dudley, C.J. set out the test that the Supreme Court would apply to appeals from the tribunal on points of law. The learned Chief Justice said (2010–12 Gib LR 340, at para. 20):

> "20 By virtue of s.13 of the Employment Act 1932, an appeal lies from the Industrial Tribunal to the Supreme Court on questions of law. Of course, when hearing an appeal from the Tribunal it is not for this court to substitute its view for that of the Tribunal, in that on questions of fact the decision of the Tribunal is final. This court can only interfere if satisfied that the Tribunal misdirected itself as to the law, or if there is no evidence to support a particular finding of fact or the decision is perverse in the sense that no Tribunal reasonably directing itself could have reached the conclusion it did."

When referring to "questions of fact," the learned Chief Justice would have been referring to questions of fact determined after hearing the evidence in the claim. In this case no evidence was heard before the tribunal. The preliminary hearing was dealt with on the basis of submissions, with the tribunal applying the *prima facie* test as has just been discussed. So how should this court determine the appeal?

18 It seems to me that in this appeal it is not a question of reviewing the tribunal's decision in the way envisaged by the Chief Justice because the tribunal did not carry out a fact finding exercise. It is for this court to consider the grounds of appeal and itself determine whether these show that the appellant's case, taken at its highest, is one which could succeed at trial. If I consider that they do, then the tribunal erred in its approach as a matter of law and the appeal should be allowed.

The first ground of appeal

19 This can be set out in the following way: the tribunal erred in considering that the references to health and safety in s.65B did not include harm to an employee's mental health.

20 As has already been observed, the Chairman did not come to a firm conclusion on the matter and decided that even if s.65B(1)(d) included a danger to mental health, the exception was not made out on the facts of the case. Nevertheless, this having been raised by the appellant, it was the respondent's submission that mental health is not caught by the provision and I must therefore address the point in this appeal. If s.65B(1)(d) does not extend to dangers to mental health then the appeal fails without more.

21 The appellant submits that the matter was settled in the Employment Appeal Tribunal in the UK. He relied on *Harvest Press Ltd.* v. *McCaffrey* (3). That case concerned an employee who failed to attend for a shift at his place of work because he was concerned about a fellow employee who had been abusive towards him. The Employment Appeal Tribunal there dealt with the interpretation of the phrase "circumstances of danger" in s.100(1)(d) of the English Employment Rights Act 1996 (which is in identical terms to s.65B(1)(d)) and whether it meant danger generated by the workplace itself or was of more general application. The Employment Appeal Tribunal agreed with the first tier Employment Tribunal that s.100(1)(d) covered any danger "however originating." Morison, J. said ([1999] IRLR 778, at paras. 15–17):

> "15. As to the submission that the circumstances of danger referred to in section 100(1)(d) means the circumstances of danger generated by the workplace itself, it seems to us that that is too narrow a view of words which are quite general. It seems to us clear that premises or the place of work may become dangerous as a result of the presence or absence of an employee. For example, premises might become unsafe as a result of the presence of an unskilled and untrained employee working on dangerous processes in the work-place where the danger of a mistake is not just to that employee, but to the colleagues who are working with him. It seems to us that the circumstances of danger contemplated by section 100(1)(d) would be apt to cover such a situation and it seems to us that had a fellow

> employee walked out because of the presence of an unskilled and untrained operative in those circumstances, he would be entitled to the protection of the legislation.
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> 16. Another example might be the absence of an inspector or foreman who had specific safety responsibilities and who was required to be there as a result of the dangerous processes which were being carried on. Again, we can contemplate circumstances in which a fellow employee would be entitled to say that his workplace was dangerous as a result of the absence of the specific person in charge of the safety responsibilities at that place of work. Another example might be where there was a foolhardy employee who, not through lack of training, but through determination to indulge in horseplay, persisted in adopting dangerous practices in the place of work so as to render the place at work dangerous. It seems to us that that might again be a situation in which fellow employees would be entitled to say to their employer; 'so long as this person is at the workplace, my workplace is dangerous and I will not be willing to stay there during this time'. Again, it seems to us that that falls within the words 'in the circumstances of danger' and there is nothing in the statute to indicate that these examples would be outwith the protection granted by section 100.
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> 17. Accordingly, we reject the ground of appeal, which is the second ground. We agree with the Employment Tribunal who concluded that the word danger is used without limitation in section 100(1)(d) and that Parliament was likely to have intended those words to cover any danger however originating."

22 Mr. Martinez submitted that this case only decides that the "circumstances of danger" referred to in s.65B(1)(d) do not have to arise from the workplace itself but can include dangers which emanate from the actions of another employee. It is not, it is argued, authority for the proposition that danger can include a danger to the mental health of an employee as opposed to his physical health and safety. He points to the fact that all the examples cited by Morison, J. are situations involving a danger to the physical well-being of the employee. Mr. Martinez may be right as to the nature of the examples given by the learned judge, but there the tribunal was concerned with a danger to the physical health and safety of the employee and the judge gave examples of dangerous situations which were relevant. The examples were clearly non-exhaustive.

23 Section 65B(1)(d) and its English equivalent derive from Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC), ("the Directive"). In particular, para. 4 of art. 8 which provides as follows:

> "4. Workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices."

No real assistance can be gleaned from the Directive in so far as the question I am now considering is concerned. (I do however observe as an aside that the Directive appears to focus only on evacuation scenarios whereas s.65B(1)(d) extends to returning to a dangerous workplace.)

24 It seems to me that, for present purposes, two phrases in s.65B(1)(d) need to be considered. The first is "in circumstances of danger." How is this phrase to be interpreted? As has just been observed, in *Harvest Press* (3) it was said that it was to be interpreted without limitation. I would respectfully agree as, importantly, in my judgment, a circumstance of danger can be particular to an employee. For example, an employee with hearing loss who is unable to hear audible signals may be exposed to a risk in a workplace which may not be dangerous at all for an employee with good hearing.

25 I accept that the word "danger" is usually associated with physical injury, but this clearly need not be so. "Danger" is defined in the Oxford English Dictionary as being "liability or exposure to harm or injury; risk, peril." It appears to me that an act or situation can be a risk to a person's mental health as well. It can expose him to harm.

26 Applying these propositions to our case, an employee who has previously been diagnosed by a medical practitioner as suffering from stress-related anxiety is, arguably, placed in a circumstance of danger if he is asked to work in a situation where his anxiety can again be triggered.

27 The second aspect of s.65B(1)(d) which is particularly relevant is the phrase "[which he reasonably believed to be] serious and imminent." Dealing only with the words "serious and imminent" for the purpose of this analysis, a risk that an employee has to take time off work on stress-related anxiety could, depending on the facts, be "serious." A mental health illness can have devastating effects. As to "imminent" this would again very much depend on the facts of the case but it would seem to me that there can be situations which could immediately trigger a mental health breakdown.

28 In conclusion therefore, I find that s.65B(1)(d) does include protection for employees who are exposed to situations which could be harmful to their mental health. Of course, the circumstances at work would have to be such that there exists a risk to the employee's mental health which the employee reasonably believed to be both serious and imminent. The reasonableness of the belief will undoubtedly be key in many cases. The

requirement that the employee was unable to reasonably avert the danger would also have to be met.

The tribunal's conclusions on s.65B(1)(d)

29 The second and third grounds of appeal both relate to factual conclusions that the tribunal reached having considered the documentation and heard submissions from the parties at the preliminary hearing. I will first set out what the tribunal found.

30 At p.11 of his judgment, the Chairman explains how the appellant alleged that he was dismissed for two matters falling within s.65B of the Employment Act. The first, that he brought to his employer's attention that there was bullying and victimization going on which was harmful to employees' health and safety, including to his own health. (This would fall under s.65B(1)(c) but is no longer being pursued in this appeal.) The second, that he was dismissed when he refused to return to work because he believed that his health and safety was in serious and imminent danger if he returned as a result of the bullying which he alleged was taking place. The respondent's reply to these claims was to say that the appellant had not, until November 2019, raised these issues. (The claim form was filed in the tribunal on May 29th, 2018.) Further, that the documentation showed that the respondent had clearly refused to return to work because he required time to prepare his appeal against the outcome of the investigation which had been carried out.

31 The Chairman then went on to apply the test set out in *Oudahar* v. *Esporta Group Ltd.* (4) which requires a two-step approach. (The case relates to the English equivalent provision to s.65B(1)(e) but I agree that the principles carry over to a consideration of s.65B(1)(d).) First, to determine whether the criteria set out in the section is met as a matter of fact. Secondly, whether the employer's reason (or principal reason) for dismissing the employee was because the employee left, proposed to leave or refused to return to work.

32 The first part of the test was set out in Mr. Martinez's written submission in this appeal, as follows (words in square brackets added):

> "Were there circumstances of danger which the employee reasonably believed to be serious and imminent, and which he could not reasonably [be expected to] avert? Was it the case that the employee left, or refused to return to his place of work or any part of it while the danger persisted?"

In my judgment, this is a correct formulation of the test.

33 In any event, it is clear that that the employer's view as to whether or not the workplace was dangerous is immaterial. If the appellant can show that he reasonably believed the circumstances to fall within the section

then, on the face of it, all that is then required is that the respondent is shown to have dismissed him for his refusal to attend work.

34 The Chairman then went on to say that in order to answer these questions he considered the documentation that was before him and in particular the correspondence exchanged between the parties between April 25th, 2018 and May 8th, 2018. From that he came to the following eight conclusions:

> "(a) at no time did the Claimant state that he believed he would be in serious and imminent danger if he returned to work as instructed. Yes he referred in an e-mail to his belief that he would be subjected to bullying if he returned to work but he at no time stated either that this was the primary reason for his failure/refusal to return to work or that he believed that a return to work would put his mental health and safety in serious and imminent danger, he had had after all been away from his workplace since the 13th March;
>
> (b) [This is relevant only to s.65B(1)(c).]
>
> (c) the Claimant's apparent and repeated principal reason for not returning to work was that he required the time off work to prepare and present his appeal against the decision made by Mr Maman with regard to his grievance complaint and/or to a lesser extent that he was confused and/or had misunderstood as to when he was required back at work;
>
> (d) the Claimant was clearly not prepared to put into effect the solution proposed by Mr Maman as set out in the letter of the 25th April 2018 for reasons which basically are not detailed in the correspondence but which one assumes related to the Claimant's belief that his grievance had not been properly dealt with/considered and that he would be subjected to bullying. Be that as it may, the point is that the Claimant at no time stated or implied that the solution proposed would put him in serious and/or imminent danger and/or explained his reasons as to why Mr Maman's plan going forwards was unworkable or impractical or would not prevent his being bullied;
>
> (e) the Claimant was by the 1st May 2018 fully aware that he had failed to attend work on days when his employer expected him to be back at work and that he was required to be at work by the next day and that failure to do so could result in dismissal;
>
> (f) the Claimant attempted to impose on his employer the date until when his suspension would continue to apply, the dates on when he was going to take leave and further discussions as to what was going to be done with regard his grievance notwithstanding that it was made clear to him that he was putting his employment at risk.

(g) the Claimant was at least by the 11th May 2018 fully aware not only of the provisions of section 60(1) of the Act but also of section 65C of the Act (and it is therefore natural to assume section 65B as well) and yet whilst he refers to bullying and victimisation being relevant statutory rights he did not allege that a return to work would put him or his co-workers in harm's way and/or in serious and/or imminent danger. Moreover, the Claimant at no stage stated or alleged that he wished to go to Court to enforce his statutory right not to be bullied and/or stated that he was refusing to return to work for reasons of danger; and

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

35 In relation to the appellant's case on s.65B(1)(d), the Chairman then reached the following determination at p.14 of his judgment:

". . . nothing has been put before me to prima facie indicate that the principal reason for the claimant's dismissal was that the respondent had been informed or was aware that the claimant had refused to return to work because (i) [this relates to the case on s.65B(1)(c) which is not being pursued in this appeal] or (ii) he (the claimant) had refused to return to work because he (the claimant) reasonably believed that by doing so he would be placed in serious or imminent danger. I am not persuaded that prima facie the reason for the claimant failing to return to work was that he believed that his health and safety was in serious and imminent danger. On the face of what is before me there is nothing to indicate that the claimant believed this to be the case since he did not at the time or immediately after events allege that his dismissal was for such reasons, let alone state that his refusal to return to work was for health and safety considerations."

The second and third grounds of appeal

36 I have set out the appellant's second ground of appeal as being that the tribunal erred in finding that prior to November 2019 he had never mentioned "bullying, victimisation or health." The appellant is actually referring to a passage at p.11 of the tribunal's judgment where the Chairman sets out the claimant's case on s.65B(1)(d) and the respondent's reply. In that passage, the Chairman was simply rehearsing the arguments

and not setting out his own conclusion. What the appellant is in reality doing is complaining about the Chairman's conclusion contained at para. (a) on p.13 which I have quoted above. This is the same complaint as that set out in ground 3 so I shall deal with both as one.

37 Before I go on to look at the correspondence and documentation in this case I will deal with whether it is in fact a requirement that in order to fall within s.65B(1)(d) an employee must inform the employer of his reasons for leaving or refusing to return to work. I consider that it is. Not only is it reasonable for this to be read into the section but the Directive also requires it.

38 In this regard I have considered the UK Employment Appeal Tribunal case of *Balfour Kilpatrick Ltd.* v. *Acheson* (1). Although it was not relied on by the parties to this appeal, it is referred to in *Oudahar* v. *Esporta* (4). The case concerned the dismissal of a large workforce which took industrial action to protest against unsafe working conditions. The facts and conclusions in that case need not concern us. I would simply refer to the observation by Elias, J. (as he then was, and now a member of our Court of Appeal) in his judgment ([2003] IRLR 683, at para. 54) that the Directive required workers to immediately inform the employer of serious and immediate dangers to health and safety. He determined that, in so far as there was a conflict between the Directive and the statutory provision (the s.65 equivalent), the tribunal should construe the section compatibly with the Directive. He held that the English equivalent to s.65B(1)(e) should be read so as to also include the words: "or to communicate these circumstances by any appropriate means to the employer." The effect of what the judge held was to extend the protection for employees. If they were dismissed for complying with the obligation to inform the employer of serious and immediate dangers to health and safety, then the dismissal would also be caught by s.65B and such a dismissal would be unfair. The relevance of this case to the question I am considering is simply that it highlights the importance of the duty on employees to inform employers of such dangers.

39 Workers' obligations are set out in section III of the Directive. In particular, art. 13(1) and 13(2)(d) provide as follows:

> "1. It shall be the responsibility of each worker to take care as far as possible of his own safety and health and that of other persons affected by his acts or Commissions at work in accordance with his training and the instructions given by his employer.
>
> 2. To this end, workers must in particular, in accordance with their training and the instructions given by their employer:
>
> . . .

(d) immediately inform the employer and/or the workers with specific responsibility for the safety and health of workers of any work situation they have reasonable grounds for considering represents a serious and immediate danger to safety and health and of any shortcomings in the protection arrangements . . ."

40 How does this apply to s.65B(1)(d)? As has been observed at para. 23 above, s.65B(1)(d) derives from art. 8(4). In that article, only leaving the workplace is referred to. (Clearly, it concerns the evacuation of a workplace in circumstances of danger.) Section 65B(1)(d) is however drafted to also include a refusal to return to the place of work whilst the danger persists. In an evacuation scenario there is no question of there being a requirement to inform the employer prior to leaving the workplace. That would be nonsensical. There must however be an obligation to inform the employer as soon as possible thereafter in accordance with art. 13(2)(d). The same would apply to a refusal to return to the workplace 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.

41 So, did the appellant inform the respondent that his reasons for [not] returning to work were because of circumstances of danger which he believed to be serious and imminent and which he could not avert? That the appellant raised the bullying and the victimization which he says he was being subjected to with the respondent is undeniable. There are countless references in the emails exchanged and in the records of meetings between the appellant and the respondent's management. Extracts from these are contained in the appellant's evidence and are quoted in his submissions. The witness statement which the appellant prepared for the proceedings before the tribunal extends to 206 pages without exhibits. He makes detailed accusations of bullying incidents at work. It is not the purpose of this appeal to consider the veracity or accuracy of these claims. I will nevertheless set out some of the references in the appellant's witness statement by way of example:

(i) At para. 199 of his witness statement, the appellant sets out a lengthy email he sent on April 6th, 2018 to Danielle Wood, a member of the respondent's human resources department. At p.124 of the witness statement, the email is quoted as stating:

"My present situation at this moment is simply dramatic. Whatever way I decide, I will lose. If I go back to work after my sick leave, Susana's bullying will start again immediately as she now found out that she's getting away with it. This will lead to me becoming sick

> again and lose more income. If I leave the company myself then I will lose my right of unemployment benefits. Whatever way, I always lose. This is destroying the quality of my life entirely and e.g. leads to nightmares that are a result of my stress related anxiety."

(ii) At para. 201, the appellant refers to the fact that he received an email in reply from Ms. Wood on April 9th, 2018 and then says in his evidence:

> "I definitely wanted to meet with HR before I had to return to work the following day. I feared that returning to Susana Martin's team without any guarantees would make me collapse again, leading to further sick leave and, I feared, most probably the end of my employment with GVC."

(iii) At para. 206, the appellant sets out the minutes of the meeting he had with Ms. Wood on April 9th, 2018. The minutes show the following exchange (at p.129 of the witness statement):

> "DW: What do you want to happen then? If you can't see solutions what do you want to happen?
>
> BVT: Move departments where I don't work with bullying people. Imagine tomorrow I have to make that 8 hours working with Susana, I'm not going to make that 8 hours, I'm going to collapse again."

There are other examples.

42 As I have already stated, the Chairman considered the correspondence exchanged between April 25th and May 8th, 2018 in order to determine the question. The significance of April 25th, 2018 start date is that it is the date of the letter sent by Roni Maman, the individual who carried out the investigation on behalf of the respondent. The letter communicated to the appellant the result of the investigation and informed him of the adjustments that the respondent would make so as to enable his return to work. It is therefore the failure to return to work following Mr. Maman's proposals which is material.

43 The measures proposed by Mr. Maman involved holding regular meetings by junior managers in the relevant teams and asking certain individuals to refrain from approaching particular work areas unless it was for urgent business.

44 The appellant wished to appeal the outcome of the investigation. On April 27th, 2018, he wrote to the respondent saying that he required the full five-day period for submitting the appeal and requesting that his suspension on full pay continue until May 7th, 2018. In this regard, at para. 263 of his witness statement he says:

> "I feared that an immediate return to the toxic work environment would be detrimental to my mental health that was already in a bad state. Therefore I asked for my suspension with full pay to be extended for the five working days for the appeal . . ."

45 The respondent replied on the same day confirming the five-day period for the submission of the appeal and as to the suspension stated:

> "[the respondent's bullying policy] states that the complainant may be suspended on full pay while the investigation is being conducted. The investigation has taken place and an outcome has been delivered. Therefore, we will expect you back on the next shift on the rota."

In his witness statement at para. 265, the appellant explains that he did not realize at that stage that the suspension had not been extended. The email from the respondent did not say he had missed work that same morning and so he assumed that the reference to his next shift meant after May 7th.

46 The appellant did not attend work and on April 29th, 2018 received a call from his line manager questioning why he had not done so. At para. 267 of his witness statement he says:

> "My mental state that had slightly improved since the longer absence from work collapsed again and I felt very depressed. I drank a lot of alcohol that night to be able to sleep and keep away the nightmares. This phone call confirmed to me that I would never be able to go back to work without a full solution of the bullying problem being implemented. Going back to get bullied again would be like mental suicide and I knew I could not do that anymore."

47 The respondent sent the appellant an email on April 30th, 2018 advising him that he was absent without leave and informing him that an unauthorized absence of three days or more could lead to his dismissal. The appellant replied on May 1st, 2018 explaining, amongst other things, that he had thought the suspension on full pay had been approved; that he needed more time to prepare his appeal; and finished with the following:

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

48 At para. 275 of his witness statement, the appellant then refers to an email in reply of May 1st, 2018 from the respondent requiring him to return to work and says the following:

> "The choice they offered me continued to be the same; return to the bullies which would make me sick again and then get sacked or

simply get sacked for not returning to a toxic environment that was a clear and imminent danger to my mental health and safety."

49 There are then further references in his evidence to what he thought the consequences would be of his returning to work at that point in time and how that would have caused him to suffer a mental breakdown.

50 The appellant wrote to the respondent on May 7th, 2018 appealing against the outcome of Mr. Maman's investigation. He complained that he had not been given access to information that he needed to fully prepare his appeal and invited the respondent to meet with him on his return from his leave on May 16th, 2018.

51 On May 8th, 2018, the appellant was dismissed for having failed to attend work on diverse dates between April 27th, 2018 and May 6th, 2018. The appellant then wrote on May 11th, 2018, appealing against his dismissal and referring to the following in the context of unfair dismissal:

". . . the 52 weeks' requirement is voided when the dismissal of an employee by an employer if the reason for it was that the employee alleged that the employer had infringed a relevant statutory right. The statutory right of all employees not to be subjected to bullying and victimisation is the one I mentioned before."

As the Chairman pointed out in his judgment, by that stage the appellant must have been aware of the provisions of s.60(1) of the Employment Act and of s.65C. (Section 65C deals with protection from dismissal in "relevant statutory right cases.") The reference by the appellant to infringement of statutory rights being an exception to the 52 weeks' qualifying period bears this out. Yet, he did not mention s.65B(1)(d).

52 There is then an exchange of correspondence by email between the appellant and the respondent with regards to the appeals—both against the investigation and the dismissal. No reference is made there to the reasons why the appellant refused to return to work.

53 What is however clear from the above summary of the correspondence and evidence is the following:

(i) That, prior to April 25th, 2018, the appellant had expressly stated to the respondent that a return to work without any changes being made would harm his mental health because of the bullying.

(ii) The appellant was dissatisfied with Mr. Maman's proposals.

(iii) In his evidence, the appellant clearly sets out his fears with regards to returning to work notwithstanding Mr. Maman's proposals.

(iv) In his email of May 1st, 2018 the appellant says:

"Till then I definitely can't go back to all the bullies without an acceptable solution it will be worse than ever and the risk of revenge is 100%."

54 The tribunal was right, as a starting point, to look at April 25th, 2018 and see what the appellant had said after that period. Proposals had been made by Mr. Maman and these could well have satisfactorily dealt with the appellant's concerns. However, the appellant was dissatisfied with the proposals and made that clear in his communication of April 27th, 2018 by which he said he wanted to appeal. More importantly, in the email of May 1st, 2018, he states that he believed that the bullying would continue and that it would be worse than before. That prospect having been raised, the tribunal should also have considered the previous correspondence and statements by the appellant to the respondent. If read with that context in mind, then it can quite properly be taken as being a notification by the appellant that he was refusing to return to work because of circumstances of danger to his mental health which were serious and imminent. The email of May 1st, 2018 cannot be seen in a vacuum.

55 The appellant does not refer in any of the pleadings before the tribunal to his refusal to return to work being because he believed that there were circumstances of danger which were serious and imminent. Nevertheless, an employment tribunal should be concerned primarily with substance and not form. A failure to plead the precise statutory reference in the claim form is not required, although of course setting out the basis of a claim is necessary. If the basis of a claim is not set out, claimants, in particular those acting in person, should be given the opportunity to clarify their case. I am not privy to what may have been said at the initial case management hearings and whether the appellant was asked to clarify his case or not. But, by the preliminary hearing, the appellant had quite clearly set out in section 3 of his skeleton argument that his claim was, *inter alia*, based on s.65B(1)(d). The tribunal therefore had before it the basis of his claim.

56 In my judgment, the appellant's evidence, taken at its highest, sets out a case for unfair dismissal—for example see para. 267 of his witness statement where the appellant expressly states that on April 29th, 2018 he believed that he could not return to work due to the harm to his mental health he was likely to suffer from the bullying. He had brought this to his employer's attention by his email of May 1st, 2018 (taken together with previous notifications). His dismissal followed his refusal to return to work. The appellant's claim should have been allowed to proceed to a hearing as he had raised a *prima facie* case that s.65B(1)(d) is engaged.

57 The appellant did not challenge the Chairman's findings contained in paras. (c)–(h) at p.13 of his judgment and which I have quoted at para. 34

above. These do not in my judgment affect the result of this appeal as I have determined that there is a *prima facie* case that s.65B(1)(d) applies. No doubt there will be challenges to the reasonableness of the appellant's belief and the genuineness of his claimed reason to refuse to return to work. Was it because of the bullying and harm he believed he would suffer as a result, or did the appellant want time off to prepare his appeal and/or go on annual leave on days which had not been authorized? Could he not reasonably have averted the circumstances of danger following Mr. Maman's proposals? Why was the basis of his claim not expressly set out in the claim form? These and other matters will have to be assessed at a hearing. The factors at paras. (c)–(g) will no doubt be relevant to those questions.

58 My findings and conclusion in this judgment should not be taken as reflecting on the ultimate merits of the appellant's claim or on the allegations that he is making. I simply find that, in my view, the appellant has a *prima facie* case on jurisdiction. (Clearly, in this case jurisdiction and the substantive claim are one and the same because s.65B(1)(d) does not just provide an exception to the qualifying period. If it applies, then the dismissal is automatically unfair.)

59 In light of the above, it is not necessary to consider the appellant's fourth ground of appeal.

Conclusion

60 For the reasons contained in this judgment the appeal is allowed and I shall order that the appellant's claim for unfair dismissal proceeds to a hearing before the tribunal.

61 I shall also now deal briefly with other matters raised by the appellant in his appeal. He seeks orders from this court that I enter some form of summary judgment against the respondent as he asserts that its defence is "entirely frivolous, vexatious, [and] without any merit." In this appeal, I have simply been dealing with whether the tribunal has jurisdiction to hear the appellant's claim. I have concluded that it has. It is for the tribunal to now carry out its assessment of the evidence. The appellant also asks that this court take over all of his claims presently before the tribunal (including therefore his victimization and bullying claims) saying that the tribunal has lost credibility and appears to be biased. I see no basis for making such an order. The Chairman is vastly experienced and undoubtedly able to take the appellant's claims forward to a conclusion notwithstanding his preliminary findings.

62 Finally, the appellant also seeks costs for the time that he has employed in preparing his case before the tribunal and in this appeal. He is a litigant in person. He has not engaged solicitors at any time. There are

no costs that he can properly recover (no issue fee having been paid for the filing of the appeal).

Appeal allowed.
