[2023 Gib LR 245]

VAN THIENEN v. ENTAIN OPERATIONS LIMITED (previously GVC SERVICES LIMITED)

SUPREME COURT (Yeats, J.): March 30th, 2023

2023/GSC/016

Employment—dismissal—unfair dismissal—employee with stress-related anxiety dismissed after refusing to return to work from sick leave—appeal dismissed against Employment Tribunal's dismissal of his claim against employer under Employment Act, s.65B(1)(d)

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. He claimed that he had been victimized and bullied during that time. He spent some time on sick leave suffering from stress-related anxiety which he said was caused by the bullying and victimization. He was instructed to return to work and was summarily dismissed for gross misconduct when he failed to do so.

The appellant brought (amongst other claims) a claim for unfair dismissal. The Employment Tribunal dismissed the claim on the basis that the appellant had not been employed for 52 weeks, as required by s.60 of the Employment Act, and the case did not fall within one of the specified exceptions, namely that the reason for dismissal was specified in s.65B(1). Section 65B(1)(d) 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 court allowed the appellant's appeal and ordered that his claim for unfair dismissal proceed to a hearing before the tribunal (that decision is reported at 2020 Gib LR 292). The court held that s.65B(1)(d) included protection for employees who were exposed to situations which could be

harmful to their mental health and that the appellant had raised a *prima facie* case that s.65B(1)(d) was engaged.

The appellant's claims of bullying, victimization and unfair dismissal were in outline that (a) he was bullied by certain work colleagues and a line manager, and the respondent was consequently liable to compensate him pursuant to the provisions of the Employment (Bullying at Work) Act 2014; (b) he had been victimized with regard to a possible promotion by not being allowed to complete certain training and by not being afforded medical treatment. These claims were also brought pursuant to the Employment (Bullying at Work Act) 2014; and (c) he failed to return to work because he believed that if he did so he would be in serious and imminent danger and therefore pursuant to s.65B(1)(d) of the Employment Act he was unfairly dismissed.

The Tribunal Chairman dismissed all of the appellant's claims.

The appellant appealed. His general grounds of appeal included (a) that he believed the Chairman to be biased against him and that he had repeatedly asked the Chairman to recuse himself from hearing the claim but the Chairman had refused to do so; (b) his right to a fair hearing had been violated by the delays in his claim progressing to a final hearing; (c) the Tribunal was not functional or impartial, based on the fact that only a small number of lawyers acted as chairpersons, for fees far below their usual charge-out rates; (d) the Chairman failed to take account of a judgment of the English High Court which closely mirrored his case; (e) the Chairman did not properly take into account the fact that he was suffering from mental illness, and appeared to consider him not to be ill; (f) the Chairman allowed him to be cross-examined for a total of 18 hours over the course of four days, which was unacceptably harsh and exacerbated his mental health issues, and the Chairman shouted at him, argued and accused him of faking his illness; (g) the respondent was the subject of an adverse finding by the Gibraltar Regulatory Authority and the Chairman failed to consider the respondent's failure to properly disclose evidence; (h) the respondent disclosed a number of important documents during the last days of the hearing; (i) the appellant complained about the manner of the respondent's counsel's cross-examination and alleged that counsel colluded with the Chairman to extend the cross-examination; (j) the appellant complained about the respondent's solicitors, Hassans, also acting for the Civil Status and Registration Office in the appellant's application for British citizenship; and (k) the Chairman should have considered breaches of the contractual duty of care. In relation to bullying claims, the appellant submitted that (a) it was wrong for the Chairman to have decided that the appellant was not bullied when his work colleagues made him believe that they were keeping a file on his mistakes; (b) it was wrong for the Chairman to have concluded that the failure by his work colleagues to greet him was not bullying conduct; (c) the Chairman failed to take account of the cumulative effect of his treatment by his work colleagues; (d) the refusal to allow him to call expert evidence meant that the Chairman failed to appreciate that the conduct to which the appellant

was subject was bullying conduct; (e) the Chairman did not consider the appellant's line manager's intention when analysing whether her unjustified criticism amounted to bullying; and (f) the respondent's bullying at work policy was not easily accessible to its employees. In relation to the victimization claims, the appellant submitted that (a) the respondent had arranged for two other employees to receive treatment for mental health issues but the appellant had not been afforded the same assistance; and (b) the Chairman failed to consider that the appellant had been victimized by dismissal. In relation to the claims for unfair dismissal, the appellant submitted that (a) the Chairman did not consider the reasonableness of the decision to dismiss the appellant; (b) the Chairman ignored the evidence referred to by this court in the first judgment, in which the court held that the appellant's claim should have been allowed to proceed to a hearing because he had raised a *prima facie* case that s.65B(1)(d) of the Employment Act was engaged; and (c) the appellant complained that in assessing whether the measures proposed by the respondent for the appellant's return to work were reasonable, the Chairman said:

> "I am of the opinion that the ordinary man in the street would not have concluded in the indicated circumstances that the Claimant's belief that he would be placed in serious and imminent danger if he returned to work . . . was reasonable."

The appellant claimed that he was not an "ordinary man on the street" but a person who had suffered from mental illness as a result of being bullied.

The appellant obtained a copy of the recordings of the final Tribunal hearing but he did not have the means to outsource the preparation of a transcript and therefore prepared a transcript of parts of the recordings himself. He applied for permission to rely on the partial transcript, to which the respondent objected.

Held, dismissing the appeal:

(1) The right to appeal against a decision of the Employment Tribunal was set out in s.13 of the Employment Act, which stated: "An appeal lies to the Supreme Court on any question of law arising from any decision of, or arising in any proceedings before, the Employment Tribunal." Appeals could therefore only be brought on questions of law. The court could only interfere if satisfied that the Tribunal misdirected itself as to the law, or if there was no evidence to support a finding of fact or the decision was perverse in the sense that no Tribunal reasonably directing itself could have reached it (paras. 7–8).

(2) The transcript which the appellant had prepared could not be relied on at the hearing because it was not complete or agreed. The fact that there was no transcript was fatal to those parts of the appeal on which complaint was made that the Chairman's decisions on the evidence were wrong. Without a transcript the court was unable to consider whether the Tribunal erred in making findings of fact which were not supported by the evidence or were perverse. The witnesses prepared witness statements, but the evidence considered by the Chairman also included the evidence they gave

in the course of the hearing. Answers given under cross-examination were particularly important (paras. 10–11).

(3) The general grounds of appeal were dismissed. As to the Chairman's refusal to recuse himself from hearing the claims, other than the appellant's bare assertions, there was no evidence of any lack of impartiality or bias by the Chairman. In any event, the appellant withdrew his application for the Chairman's recusal prior to the final hearing. Although there had been delays in these proceedings, they were not all attributable to the respondent's conduct and it was not a basis for allowing the appeal. The appellant's assertion that the Tribunal was not functional or impartial was based on the fact that only a small number of lawyers acted as chairpersons for fees which he said were far below their usual charge-out rates. The short answer to this was that the Tribunal in this claim was properly constituted according to the law. Any complaint about the adequacy of the legal framework establishing the Tribunal and its functionality was not a matter for this appeal. The same applied to the appellant's complaints that the tribunal did not have jurisdiction over claims involving employers' breaches of their duty of trust and confidence or for tortious claims. The appeal with which this court was concerned was an appeal against the decision of the Chairman on points of law. The judgment of the English High Court which the appellant complained the Chairman failed to take account of was a claim in negligence, whereas the appellant's claims were for unfair dismissal and breaches of the Bullying at Work Act. The fact that the Chairman did not refer to or quote from the English case was not an error of law. What mattered was whether the Chairman properly directed himself as to the law which applied to the appellant's claims. There was nothing in the Chairman's judgment which suggested that he was of the view that the appellant was not suffering from a mental illness or that he was faking such an illness. The Chairman's task was to consider whether the appellant was subjected to bullying conduct, had been victimized or whether he had been unfairly dismissed. The fact that the Chairman did not make a positive determination on the appellant's mental health was not an error of law. There was no evidence of any improper action by the Chairman in respect of the cross-examination of the appellant. As to whether the duration of the cross-examination was inappropriate and caused unfairness, this could not be assessed without a transcript. It was unfortunate that the respondent disclosed documents at a very late stage but they were available before the hearing came to an end and could have been referred to if the appellant considered it appropriate. If he wanted to put any matter contained in those documents to any particular witness, he could have applied to have the witness recalled. He did not do so. The complaints about the manner of the respondent's counsel's cross-examination of the appellant could not be assessed without a transcript. The allegation that counsel colluded with the Chairman was baseless and deserved censure. The appellant's complaint about Hassans also acting for the Civil Status and Registration Office in the appellant's application for British citizenship did not affect this appeal. The appellant accepted that in his claim form he stated that his claim did

not include a breach of contract claim but he said that the Chairman should have considered breaches of the contractual duty of care. There was nothing in this point. The Tribunal had to consider the claims that were made (paras. 16–33).

(4) The grounds of appeal relating to bullying claims would be dismissed. The Chairman did not find that the appellant's work colleagues made him believe they were keeping a file on his mistakes. What the Chairman said was that he did not discard the possibility, which was not a finding of fact. The Chairman did find that one of the appellant's colleagues actually kept a file on the appellant of which the appellant became aware. However, the Chairman did not find that the file was used or that its use was threatened. In the circumstances, this could not amount to bullying conduct. The Chairman found that the appellant and his colleagues avoided each other as much as possible but that the Bullying at Work Act could not be interpreted so as to require employees to engage in social conversation and pleasantries. The court could not interfere with the Chairman's findings and, in any event, it did not seem that there was any misdirection or other error of law. The appellant alleged that the Chairman failed to take account of the cumulative effect of the treatment of the appellant by his work colleagues. The court had to consider whether the conduct complained of could be said to amount to bullying. As set out in s.4 of the Act, conduct had to be persistent behaviour which was offensive, intimidating, abusive, malicious or insulting. Nothing less than that would do. The Chairman correctly applied this criteria throughout his judgment. As to the complaint that the Chairman refused to allow expert evidence, such evidence was not necessary because determining whether the appellant had been bullied was a legal and factual determination. The issue was whether the conduct complained of amounted to bullying in the ordinary sense of the term. In the circumstances, there was no error of law in refusing to allow the appellant to call expert evidence. As to the complaint that the Chairman did not consider the appellant's line manager's intention when analysing whether her unjustified criticism amounted to bullying, the Tribunal had to decide whether objectively there was conduct which could amount to persistent unjustified criticism. If there was, the Tribunal then had to determine whether the conduct had the intention or effect of causing alarm, distress, humiliation or intimidation. The Chairman found that there had been no unjustified criticism. Whether or not the appellant had a proper or accessible bullying at work policy was irrelevant to this appeal. Having a policy could afford a respondent a defence to a bullying claim. However the defence only came into play if there was a finding of bullying conduct in the first place. Not having a policy did not give rise to any claim of itself (paras. 34–47).

(5) The grounds of appeal relating to the victimization claims were dismissed. Pursuant to s.5 of the Bullying at Work Act, an employer victimized his employee if he treated him less favourably than he would treat another employee in the same circumstances. That was not the case

on the Chairman's findings, namely that the other two employees for whom the respondent arranged treatment for mental health issues were in a materially different situation to the appellant, namely they wished to return to work while they were still certified as being unfit to do so and they therefore had to be referred to medical professionals to be reassessed. Section 7(c) of the Bullying at Work Act prohibited the victimization of an employee by dismissal. A victimization claim was not part of the appellant's claims before the Tribunal, nor did it feature in his notice of appeal to this court. The Chairman could not therefore be criticized for not addressing this claim. Secondly, the Chairman found that the dismissal arose because of the appellant's refusal to return to work. In the circumstances, there could be no victimization, as the appellant had not pointed to any other employee (who also refused to return to work) being treated more favourably than him (paras. 48–50).

(6) The grounds of appeal relating to the claims for unfair dismissal were dismissed. The reasonableness of the decision to dismiss was not a consideration on this appeal. The appeal concerned the claim for unfair dismissal brought under s.65B(1)(d) of the Employment Act. The Tribunal only had to consider whether the reason for the appellant's dismissal was because of the circumstances set out in that provision. If it was, then the dismissal would have been automatically unfair. The appellant's case was that he notified the respondent that the reason he did not want to return to work was because he feared a mental breakdown if he did so. In the first judgment, the court held that 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) of the Employment Act was engaged. However the assessment was for the Tribunal. As with any matter of evidence that had been raised in this appeal, the court was unable to consider whether the Chairman made any error of law because it did not have all of the evidence. The appellant needed to satisfy the Tribunal on a balance of probabilities and clearly the Chairman determined that he had not done so. The Chairman applied an objective test, as required by s.65B(1)(d) of the Employment Act, in assessing whether the measures proposed by the respondent for the appellant's return to work were reasonable, *i.e*. would the ordinary man on the street find the proposal for the respondent's return to work (taking into account the Chairman's findings of fact) reasonable? This was a correct direction and was not an error of law (paras. 51–55).

Cases cited:

(1) *Cassaglia* v. *Stagnetto*, 2021 Gib LR 148, followed.

(2) *Cruz* v. *Gibraltar Community Projects Ltd.*, 2010–12 Gib LR 340, followed.

(3) *Green* v. *DB Groups Servs. (UK) Ltd.*, [2006] EWHC 1898 (QB); [2006] IRLR 764, distinguished.

Legislation construed:
Employment (Bullying at Work) Act 2014, s.4: The relevant terms of this section are set out at para. 41.

Employment Act, s.13: The relevant terms of this section are set out at para. 7.
s.65B(1)(d): The relevant terms of this provision are set out at para. 51.

The appellant appeared in person;
D. Martinez (instructed by Hassans) for the respondent.

1 **YEATS, J.:** Bart Van Thienen ("the appellant") appeals against a decision of the Employment Tribunal ("the tribunal") of December 9th, 2021 by which his claims against Entain Operations Ltd ("the respondent") were dismissed. The appellant's claims were that he had been bullied, victimized and unfairly dismissed by the respondent. The respondent is his former employer.

2 For a number of reasons, this case has suffered from serious delays. The claim form was filed on May 29th, 2018 and the judgment in this appeal is being handed down almost five years later. Although the appellant attributes some fault for the time the case has taken to progress on the respondent—by saying that it withheld disclosure of material necessary for the hearing of his claim—the reality is that the principal reasons for the delay are not related to the respondent's conduct.

3 On November 4th, 2020, I handed down a judgment in an appeal brought by the appellant against the decision of the tribunal summarily dismissing his claim for unfair dismissal following a preliminary hearing (reported at 2020 Gib LR 292). The tribunal had found that the appellant was not entitled to bring the claim for unfair dismissal because he had not been in the respondent's employment for a period of at least 52 weeks. I determined that, *prima facie*, an exception to the qualifying period applied and ordered that the claim be heard by the tribunal. (I shall refer to that judgment as "the first judgment.")

4 A short background to the claims is the following. Between May 15th, 2017 and May 7th, 2018, the appellant worked for the respondent as a customer service retention agent. (The respondent is part of a multi-national online gaming and betting group of companies.) The appellant's case is that throughout a large part of his time working for the respondent he was bullied and victimized. From on or about March 13th, 2018, the appellant took 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 the conclusion of the investigation on April 25th, 2018, the appellant was instructed to return to work. He was then summarily dismissed on May 7th, 2018 for

gross misconduct when he failed to return to work. He had been employed for a period of 51 weeks.

5 In outline, his claims of bullying, victimization and unfair dismissal are the following:

(i) The appellant claimed that he was bullied at work by certain work colleagues and a line manager, and that the respondent was consequently liable to compensate him for this pursuant to the provisions of the Employment (Bullying at Work) Act 2014 (which I shall refer to as the "the Bullying at Work Act").

(ii) Secondly, the appellant claimed that he had been victimized with regards to a possible promotion by not being allowed to complete certain training and by not being afforded medical treatment. These claims were also brought pursuant to the Bullying at Work Act.

(iii) The third claim was for unfair dismissal. The claimant says that the reason why he failed to return to work was that he believed that if he did so he would be in serious and imminent danger and therefore, pursuant to s.65B(1)(d) of the Employment Act 1932 ("the Employment Act"), he was unfairly dismissed.

6 The appellant's claims were heard by the tribunal chairman, Mr. Joseph Nuñez ("the Chairman"). For the reasons set out in a detailed 98-page judgment, the Chairman dismissed all of the appellant's claims.

The approach to an appeal from the Employment Tribunal

7 The right to appeal against a decision of the Employment Tribunal is set out in s. 13 of the Employment Act. This states as follows:

> "An appeal lies to the Supreme Court on any question of law arising from any decision of, or arising in any proceedings before, the Employment Tribunal."

8 Appeals can therefore only be brought on questions of law. In *Cruz* v. *Gibraltar Community Projects Ltd.* (2), Dudley, C.J. had this to say (2010–12 Gib LR 340, at para. 20) (with which I would respectfully agree):

> "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."

Transcript of the evidence before the tribunal

9 The appellant obtained a copy of the recordings of the final hearing in the tribunal. He did not however have the means to outsource the preparation of a transcript and so the appellant embarked on the exercise of preparing a transcript of parts of the evidence himself. As this had not formed part of his record of appeal, he applied for permission to rely on the partial transcript he had prepared and this came before me on September 26th, 2022. The respondent objected to the use of the transcript because it was incomplete and only selective parts of witnesses' evidence had been included. Mr. Martinez submitted that it would be unfair on the respondent if that was all that the court had before it. If a witness's evidence was required on a particular issue, then all of that witness's evidence on the issue should be included and not just that which the appellant considered went in his favour. The appellant said that he had done what he could in the time that he had.

10 I ruled that the transcript that the appellant had prepared could not be relied on at the hearing of the appeal because it was not complete or agreed, but I indicated that I would adjourn the hearing if the appellant wanted time to prepare either a full transcript or to agree transcripts of parts of the relevant evidence. (Given time, Mr. Martinez was willing to engage in order to agree transcripts.) The appellant however insisted on proceeding with the appeal on October 3rd, 2022 despite my repeated warnings that this would not afford the parties sufficient time to prepare the necessary transcripts. In the event, no transcripts were agreed and none were therefore included in the record of appeal.

11 The fact that there is no transcript is fatal to those parts of the appeal on which complaint is made that the Chairman's decisions on the evidence were wrong. Without a transcript, this court is unable to consider whether the tribunal erred in making findings of fact which were not supported by the evidence or were perverse. The witnesses prepared witness statements, but the evidence considered by the Chairman also includes the evidence they gave in the course of the hearing. Answers given under cross-examination are particularly important.

The grounds of appeal

12 The appellant is a litigant in person. I would respectfully observe that he is clearly an able individual who has been extremely thorough in his approach to his claim and the appeal.

13 The appellant's grounds of appeal are in effect set out in his notice of appeal. (The document entitled "Memorandum of Appeal" simply refers to legislation and authorities.) The notice of appeal is 21 pages long and is in narrative form. The appellant then produced a 133-page skeleton argument for the hearing which is also in narrative form. In the skeleton, he makes

further complaints which are not set out in the notice of appeal. The complaints are so numerous that it is not feasible to list or summarize these in any meaningful way.

14 A large number of the complaints (grounds of appeal) made in the notice of appeal, relate to findings or evaluation of the facts by the Chairman. Similarly, in his skeleton argument, the appellant attempts a near line-by-line analysis and critique of the Chairman's judgment. As already explained, I am unable to consider challenges to findings or evaluation of the facts as I do not have all of the evidence considered by the Chairman. Therefore, all complaints/grounds which relate to findings or evaluation of the facts are dismissed. In this judgment, I will only focus on the complaints which are not exclusively matters relating to findings or evaluation of facts.

15 As the appellant has not particularized his grounds of appeal, I have unpicked his complaints and have set them out in headline form. I have then divided these into four groups: grounds which are of a general nature; grounds which relate to the bullying claim; grounds which relate to the victimization claim; and grounds which relate to the unfair dismissal claim.

(1) General grounds of appeal

16 *The Chairman's refusal to recuse himself from hearing the claims*. The appellant asserts that he repeatedly asked the Chairman to recuse himself but the Chairman refused to do so. The appellant says that he believed the Chairman was not being impartial and was biased against him.

17 Other than the appellant's bare assertions, there is no evidence of any impartiality or bias being exhibited by the Chairman. (The fact that, for example, the Chairman chose to hold a hearing on a preliminary issue on jurisdiction despite the appellant's protestations is not evidence of partiality or bias. It is the task of the judge to take case management decisions.) In any event, as Mr. Martinez pointed out, the appellant withdrew his application for the Chairman's recusal prior to the final hearing.

18 *Delay*. The appellant complains about the delays in his claim progressing to a final hearing and says that his right to a fair hearing has therefore been violated.

19 The Chairman set out a detailed chronology in his judgment. Although there have clearly been delays, these are most certainly not all attributable to the respondent's conduct. In the circumstances, it is no basis for allowing an appeal against the respondent. The fact that there have been delays in the tribunal (and indeed in this court when it dealt with the appeal on the preliminary issue) is not a matter which makes the respondent liable to the appellant.

20 *The functionality of the Employment Tribunal.* The appellant asserts that the Employment Tribunal is not functional or impartial. He bases this assertion on the fact that only a small number of lawyers act as chairpersons for fees which he says are far below their usual charge-out rates. Further, that the fees allowed in any particular case are decided by a "politically appointed" Director of Employment and this creates a system which is "open to amateurism, abuses, favouritism, bias, corruption and even political interference."

21 The short answer to this is that the tribunal in this claim was properly constituted according to the law. Any complaint about the adequacy of the legal framework establishing the Employment Tribunal and its functionality is not a matter for this appeal. The same applies to the appellant's complaints that the tribunal does not have jurisdiction over claims involving employers' breaches of their duty of trust and confidence or for tortious claims. The appeal with which this court is concerned is an appeal from the decision of the Chairman of December 9th, 2021 on points of law.

22 *Failure to take account of case law*. The appellant complains that the Chairman failed to take account of the judgment of the English High Court in *Green* v. *DB Group Servs. (UK) Ltd.* (3) which the appellant says closely mirrored his case. That judgment concerned a claim for personal injury brought by an employee against her former employer. It was a claim in negligence. Here, the appellant's claims are for unfair dismissal and for breaches of the Bullying at Work Act. The fact that the Chairman did not refer to or quote from the *Green* case in his judgment is most certainly not an error of law. What matters is whether the Chairman properly directed himself as to the law which applies to the appellant's claims.

23 *Failure to consider the appellant's mental illness*. As I understand it, the appellant complains that the Chairman did not properly take into account the fact that he was suffering from a mental illness and that the Chairman appeared to be "of the conviction" that the appellant was not actually ill. The appellant says that the Chairman did this without requesting or considering any medical evidence.

24 This may have been the appellant's perception, but there is nothing in the Chairman's judgment which suggests that he was of the view that the appellant was not suffering from a mental illness or that he was faking such an illness. It is also true to say that there was no positive finding or acceptance that he was suffering from a mental illness.

25 The Chairman's task was to consider whether the appellant was subjected to bullying conduct, had been victimized or whether he had been unfairly dismissed. The fact that the Chairman did not make a positive determination on the appellant's mental health is not an error of law.

26 *Cross-examination of the appellant*. The appellant complains that the Chairman allowed his cross-examination to go on for a total of 18 hours over the course of four days. The appellant says that the cross-examination was "unacceptably harsh" and exacerbated his mental health issues. It is averred that on several occasions the Chairman shouted at him, argued and accused him of faking his illness. This was in contrast to the questioning of the respondent's witnesses which the appellant says was conducted with "kid gloves." Further, that the repeated questioning led him to wrongly admit that he had lied about a particular matter involving his line manager.

27 Clearly, these are very serious allegations to make. Other than for the appellant's bare assertions, there is no evidence of any improper action by the Chairman. As to whether the duration of the cross-examination was inappropriate and caused unfairness, this cannot be assessed without a transcript.

28 *Respondent's disclosure failures*. It is said that the respondent was the subject of an adverse finding by the Gibraltar Regulatory Authority and that the Chairman failed to consider the respondent's failure to properly disclose evidence. As I understand it, this issue was brought to the Chairman's attention and it would have formed part of his evaluation of the evidence.

29 The appellant also complains that the respondent disclosed a number of important documents as the hearing was coming to an end. Mr. Martinez accepted that a number of documents were first disclosed during the last days of the hearing. However, of these, only sixteen pages had not previously been provided (this included three pages of emails which had been sent to the appellant in the course of his employment). Mr. Martinez submitted that there had been sufficient time to have any witness recalled if the appellant had considered it to be necessary.

30 Whilst it is clearly unfortunate that documents were provided at a very late stage, the fact is that they were available before the hearing came to an end and could have been referred to if the appellant considered it to be appropriate. If he wanted to put any matter contained in those documents to any particular witness, he could have applied to have the witness recalled. He did not do so.

31 *Respondent's counsel's conduct*. In his skeleton argument, the appellant complains about the respondent's counsel's behaviour in the tribunal. As I understand it, the complaints relate to the manner of his cross-examination of the appellant. This cannot be assessed without a transcript. There is also an allegation that counsel colluded with the Chairman behind the appellant's back. The appellant says that his cross-examination was extended from a planned two-hour session to an eventual eighteen hours and jumps to the conclusion that this could only have happened because counsel and judge colluded in the respondent's absence. I consider this to be a totally baseless

allegation which is deserving of censure. Raising points such as this only served to distract the court from the more arguable issues it should have been considering in the appeal.

32 *Respondent's solicitors' conduct*. In his skeleton argument, the appellant complains about Hassans also acting for the Civil Status and Registration Office in the appellant's application for British citizenship. The appellant says that this meant that Hassans was privy to information on his finances which they would not otherwise have had, and which enabled them to wear him down. This claim ignores the fact that it is the tribunal which regulates the steps to be taken in the proceedings and not the respondent. In any case, whether or not Hassans should have acted in both matters is not a matter which affects this appeal. Any professional conduct issues can be dealt with by the regulatory body. (Mr. Martinez confirmed that complaints had in fact been made and had been dismissed although the appellant says that he is not aware of this.)

33 *Failure to consider a claim for breach of contract*. The appellant accepts that in his claim form he stated that his claim did not include a breach of contract claim but yet he says that the Chairman should have gone on to consider breaches of the contractual duty of care and so on. There is nothing in this point. The tribunal had to consider the claims that were made.

(2) Grounds of appeal relating to bullying claims

34 *That it was wrong for the Chairman to decide that the appellant was not bullied when his work colleagues made him believe that they were keeping a file on his mistakes*. One of the issues raised by the appellant before the tribunal was that his work colleagues were keeping files on his mistakes and that this formed part of their bullying conduct. At p.46 of his judgment, the Chairman made the following finding:

> "[I conclude] that no Camp 2 member forwarded any of the mistakes made by the Claimant which they came across to team leaders/ supervisors/members of other teams within customer services. In saying this, I do not discard the possibility that one or more Camp 2 members may have been verbally egging the Claimant on to think this by saying that they were collecting or appearing to collect and send on mistakes and/or that in conversations held between individuals that there could have been gossiping about this or that error. If there is one thing that is certain about this case is that the level of gossiping amongst all employees within the building was extremely high. Having concluded that Camp 2 members did not transmit to third parties the Claimant's alleged or actual mistakes it follows that there was no conduct which, viewed objectively, could have caused alarm, distress, humiliation or intimidation. The Claimant in any event does

> not state that he was alarmed, distressed, humiliated or distressed [presumably the Chairman meant intimidated] by this in the documentation created at the time."

35 The appellant says that the fact that he was made to believe that a file was being kept was bullying conduct because the intention can only have been to cause alarm, distress, humiliation or intimidation. In *Cassaglia* v. *Stagnetto* (1), I made the following observation (2021 Gib LR 148, at para. 84):

> "There are two different elements to s.4(1). First, there has to be conduct. Secondly, the conduct must have the purpose or effect of causing alarm *etc*. In my judgment, the conduct has to be viewed objectively. Is the conduct complained of behaviour which, objectively, could cause alarm, distress, humiliation or intimidation? If the answer is yes, then a subjective test needs to be applied to whether it had the purpose or effect of causing those sentiments. When looking at purpose you look at what the perpetrator intended. When looking at effect, you look at what the victim felt. Only one of either purpose or effect is required to satisfy s.4(1) although of course both will be present in many cases."

Therefore, if the appellant's work colleagues' conduct (viewed objectively) was behaviour which could cause alarm, distress *etc*., then, if the purpose was to cause those sentiments, it does not matter whether the appellant was in fact alarmed, distressed, humiliated or intimidated.

36 All that said, the Chairman does not actually find that the appellant's work colleagues made him believe they had this file. What the Chairman says is that he does not "discard the possibility." That is not a finding of fact. A finding of fact has to be on the balance of probabilities—that is, more probable than not. In the circumstances, this ground of appeal cannot succeed.

37 Linked to this ground is a conclusion by the Chairman at p.51 of his judgment that one of the appellant's work colleagues did actually keep a file on the appellant and the appellant found this out. (He also concluded that the appellant himself kept a file on other team members.) However, the Chairman does not find that the file was used or that its use was threatened. In the circumstances, this cannot amount to bullying conduct. (Finding out that a colleague has a file on you, which is then deleted, cannot be bullying conduct—not least because such behaviour would not be persistent).

38 *That it was wrong for the Chairman to conclude that the failure by his work colleagues to greet the appellant was not bullying conduct*. Two passages in the Chairman's judgment need to be referred to. The first is at

p.33 where the Chairman is setting out the law which he considered applied to the bullying claims:

> "I conclude on the law of bullying by pointing out two things. In my opinion the words 'alarmed, distressed, humiliated and intimidated' that are referred to in section 4(1) of the Bullying Act are powerful words that must be given their ordinary meaning and such meanings must not be trivialised by being applied to minor upsets or differences of opinion or non-social behaviour (eg failing to greet someone or not speaking to them other than for work related matters); although having said this each case is dependent on its own facts. Moreover, in my opinion the word 'persistent' has to be given its natural everyday meaning: that is constantly repeated and enduring."

He then made the following findings at p.50:

> "After considering the evidence given, I have concluded that almost certainly the Camp 2 members did as much as possible within the confines of the working environment and their respective duties to ignore and not speak to the Claimant, a person they clearly did not like or trust, and that the Claimant, who himself admits to trying to keep away from them, did likewise with reference the Camp 2 members. The Bullying Act cannot be interpreted in my view to force employees to engage in social conversation and pleasantries whilst at work when they do not wish to do so. Having said this, I have also concluded that there was conversation between the respective persons with regard to work-related matters, such conversation undoubtedly being short and direct and in line with the tension that there was within the team. Other than not being greeted or spoken to socially the Claimant has not alleged any other exclusionary conduct. This being the case I have concluded that there was no conduct persistent or otherwise that could be said to have excluded the Claimant from employees of the Respondent (other than Camp 2 members) or from his work or his environment whilst at work."

39 The appellant says that failing to greet a work colleague can be bullying conduct and that he was affected by this behaviour. Further, that it is the cumulative behaviour that has to be looked at and not just different incidents in a vacuum. I will address cumulative behaviour in the next ground of appeal. In so far as this ground is concerned, in the passage from p.33 that I have quoted, the Chairman makes it clear that every case has to be decided on its own facts. I agree. In terms of his findings in this case, he concludes at p. 50 that both sides did what they could to avoid each other and that the Bullying at Work Act does not force employees to "engage in social conversation and pleasantries." I cannot interfere with the Chairman's findings and, in any event, it does not seem to me that there was any misdirection or other error of law in this passage.

40 *That the Chairman failed to take account of the cumulative effect of the treatment of the appellant by his work colleagues*. The appellant refers to the *Green* case (3) (which as has already been noted above was a personal injury case before the English High Court). There, the claimant contended that she had suffered a psychiatric injury because of bullying by her fellow employees. Owen, J. said the following ([2006] EWHC 1898 (QB), at para. 9):

> "As to the first, the questions to be determined when considering whether alleged bullying and harassment give rise to a potential liability in negligence were addressed by Gray J. in Barlow v Borough of Broxbourne [2003] EWHC 50 QB. His analysis, with which I respectfully agree, and which is directly applicable to this case, is to be found in paragraph 16 of his judgment:
>
> > '(i) whether the claimant has established that the conduct complained of in the Particulars of Claim took place and, if so, whether it amounted to bullying or harassment in the ordinary connotation of those terms. In addressing this question it is the cumulative effect of the conduct which has to be considered rather than the individual incidents relied on . . .'"

41 The appellant's claims before the tribunal were not claims in negligence in respect of which "the ordinary connotations" of bullying and harassment were to be taken into account. The claims were claims under the Bullying at Work Act. As I observed in *Cassaglia* v. *Stagnetto* (1), the court has to look at whether the conduct complained of amounts to bullying under that Act and not whether the conduct could be said to amount to bullying. When summarizing that the behaviour in that case was not persistent and was not therefore bullying under the Act, I said (2021 Gib LR 148, at para. 206):

> "Whether or not the behaviour could, outside of the legalities of this case, be regarded as bullying conduct is irrelevant. The statutory criteria is not met."

Prior to an amendment made in 2022, s.4(1) and s.4(2)(a) of the Bullying at Work Act provided as follows:

> "**Meaning of bullying.**
>
> 4.(1) A person ('A') subjects another person ('B') to bullying where A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.
>
> (2) In subsection (1) the reference to conduct includes—
>
> (a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting . . ."

(Section 4(2) now has "means" in place of "includes" but this has no impact on this appeal.)

42 The statutory criteria are therefore clear. Conduct has to be persistent behaviour which is offensive, intimidating, abusive, malicious or insulting. Nothing less than that will do. The Chairman correctly applied this criteria throughout his judgment.

43 *Refusal to allow the calling of an expert*. The Chairman refused to allow the appellant to call expert evidence and the appellant says that this meant that the Chairman failed to appreciate that the conduct the appellant was subjected to was indeed bullying conduct. The appellant submitted that the respondent's strategy was to minimize the bullying incidents as "perceptions disagreements, tensions etc." and an expert would have assisted the tribunal from falling into the trap of thinking that these euphemisms for bullying were not in fact bullying.

44 Mr. Martinez's response, with which I agree, was that expert evidence was not necessary because determining whether the appellant had been bullied was a legal and factual determination. I would again refer to my observations in *Cassaglia* v. *Stagnetto* (1). The court has to look at whether the conduct complained of amounts to bullying under the Bullying at Work Act and not whether the conduct could be said to amount to bullying in the ordinary sense of the term. In the circumstances, there was no error of law in refusing to allow the appellant to call expert evidence.

45 *That the Chairman did not consider the appellant's line manager's intention when analysing whether her unjustified criticism amounted to bullying*. The appellant criticizes the following observation made by the Chairman at p.56 of his judgment:

> "even if it were to be seen as unjustified criticism it would not in my opinion be criticism that could cause a person to be alarmed distressed, humiliated or intimidated by it for the purposes of the Bullying Act."

The appellant says that the Chairman failed to consider that intention to cause those sentiments is sufficient.

46 I agree that the tribunal had to decide whether objectively there was conduct which could amount to persistent unjustified criticism. If there was, the tribunal then had to determine whether the conduct had the intention or effect of causing alarm, distress, humiliation or intimidation. That said, the point is a non-starter because the Chairman actually finds that there was no unjustified criticism. The quote the appellant complains of is preceded by the following:

> "In my opinion there is nothing in this report to justify a conclusion that either it was a bad or a materially inaccurate report and/or that it contained unjustified criticism."

47 *That the respondent's bullying at work policy was not accessible to its employees*. The appellant says that the evidence before the tribunal was that the respondent's bullying at work policy was not easily accessible to its employees. In my judgment, whether or not the respondent had a proper or accessible bullying at place policy is irrelevant in this appeal. Having a policy can afford a respondent a defence to a bullying claim (see s.6(5) of the Bullying at Work Act). The defence only comes into play if there is a finding of bullying conduct in the first place. Not having the policy does not give rise to any claim of itself.

(3) Grounds of appeal relating to the victimization claims

48 In the course of his judgment, the Chairman observed that there was no Gibraltar case law on the victimization provisions in the Bullying at Work Act and that those provisions were not based on any foreign legislation. The appellant points out that the provisions are in fact similar to s.13 of the Equal Opportunities Act which he says is based on a UK Act (presumably he is referring to s.27 of the Equality Act 2010 of the United Kingdom). The appellant may or may not be correct, but what is important is whether the Chairman misdirected himself on the law. If the Chairman applied the law correctly, then it does not matter that case law in England or elsewhere could have assisted him in achieving that same result.

49 *The failure to offer treatment for his mental health issues*. At the time that the appellant was employed with the respondent, the respondent arranged for two other employees to receive treatment for mental health issues they were suffering from. The appellant asserts that he was victimized as he was not afforded the same assistance. He says that the only difference between his situation and that of the other two employees was that it was clear that he would be taking proceedings against the respondent under the Bullying at Work Act. Ultimately, this was a matter which depended on the evidence. The Chairman found that the situation the other two employees were in was materially different to that of the appellant and dismissed his claim—the difference being that the others wished to return to work during a period in which they were still certified as being unfit to do so. They therefore had to be referred to medical professionals to be re-assessed. I am unable to disturb that finding of fact. Pursuant to s.5 of the Bullying at Work Act, an employer victimizes his employee if he treats him less favourably than he would treat another employee in the same circumstances. That is not the case here on the Chairman's findings.

50 *Victimization by dismissal*. Section 7(c) of the Bullying at Work Act prohibits the victimization of an employee by dismissal. At p.119 of his skeleton argument, the appellant says that "[a] point the Chairman has eluded to evaluate in his judgment is victimisation by dismissal." Two issues arise. The first is that this victimization claim was not part of the appellant's multiple claims before the tribunal. Indeed, it did not even

feature in his notice of appeal to this court. It was simply included deep into the skeleton argument. No criticism can therefore be levelled at the Chairman for not addressing this claim. The second and perhaps more fundamental point is that the Chairman found that the dismissal arose because of the appellant's refusal to return to work. In the circumstances, there can be no victimization as the appellant has not pointed to any other employee (who also refused to return to work) being treated more favourably than him.

(4) Grounds of appeal relating to the claims for unfair dismissal

51 *That the Chairman did not consider the reasonableness of the decision to dismiss the appellant*. As I noted in the first judgment, the appellant originally advanced numerous submissions in support of his claim for unfair dismissal but these were all rejected by the tribunal at a preliminary hearing. He then appealed to this court only on the basis that his dismissal was unfair because his refusal to return to work was as a result of him reasonably believing that there was a serious and imminent danger to his mental health should he have returned. The appeal was allowed, but the upshot was that the claim for unfair dismissal was brought exclusively pursuant to s.65B(1)(d) of the Employment Act which 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 . . ."

As can be seen, the reasonableness of the decision to dismiss is not a factor at play in this provision. It is not a consideration. All that the tribunal had to consider was whether the reason for the appellant's dismissal was because of the circumstances set out in subpara. (d). If it was, then the dismissal would have been automatically unfair.

52 *That the Chairman ignored the evidence referred to by this court in the first judgment*. The appellant's case is that he notified the respondent that the reason he did not want to return to work was because he feared a mental breakdown if he did return. The appellant says that there was evidence to substantiate this and submitted that the Chairman ignored the references that I made to this evidence in the first judgment.

53 In the first judgment I did indeed hold that 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) of the Employment Act was engaged. However, I then went on to say the following (2020 Gib LR 292, at para. 57):

> "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."

I also added the following (*ibid.*, at para. 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.)"

Therefore, although I did set out examples of evidence which could show that s.65B(1)(d) may have been engaged, the assessment of that evidence was for the tribunal. As with any matter of evidence which has been raised in this appeal, I am unable to consider whether the Chairman made any error of law because I do not have all of the evidence myself. In any event, the paragraphs of the first judgment that I have quoted make clear that I was not drawing any conclusion beyond the finding that there was a *prima facie* case. The appellant needed to satisfy the tribunal on a balance of probabilities and clearly the Chairman determined that he had not done so.

54 *Application of an objective test by the Chairman*. In assessing whether the measures proposed by the respondent for the appellant's return to work were reasonable, the Chairman said the following at p.96 of his judgment:

> "I am of the opinion that the ordinary man in the street would not have concluded in the indicated circumstances that the Claimant's belief that he would be in placed in serious and imminent danger if he returned to work with Mr Asnar and/or Mr Amrani was reasonable."

55 The appellant complains that he was not an "ordinary man on the street" but was instead a person who had suffered from mental illness as a result of being bullied. The appellant's complaint misunderstands the Chairman's reference to an "ordinary man on the street." The Chairman was simply applying an objective test as required by s.65B(1)(d) of the

Employment Act. Would the ordinary man on the street find the proposal for the respondent's return to work (taking into account the Chairman's findings of fact) reasonable? This was a correct direction and was not an error of law.

Conclusion

56 For the reasons set out in this judgment, the appeal against the decision of the Employment Tribunal dated December 9th, 2021 is dismissed.

Appeal dismissed.