

**[2010–12 Gib LR 340]****CRUZ v. GIBRALTAR COMMUNITY PROJECTS LIMITED**

SUPREME COURT (Dudley, C.J.): July 13th, 2012

*Employment—dismissal—unfair dismissal—unfair dismissal if disciplinary procedure unfair in failing to give opportunity for employee to respond—unfair if fails to assess capacity of mentally ill employee to undergo procedure, or fails to fully disclose psychiatrist’s opinion, or adopts written procedure with no opportunity for oral submissions*

The appellant brought proceedings against the respondent in the Industrial Tribunal for unfair dismissal.

The appellant was a “special employee” of the respondent, a publicly funded company. “Special employees” included individuals with, *inter alia*, mental health and drug abuse problems. Whilst he was cleaning windows from a scaffold, the appellant’s fellow employees had moved the scaffold and pulled on a hose attached to the appellant’s hand, putting him in fear of falling. The appellant alleged that he was being bullied and made fun of, informed the police and, in an agitated manner, accused fellow employees of trying to kill him. He did not return to work the following day, but went on a “drug binge,” hospitalizing him for a month. During that period, the appellant maintained his complaint, but informed the respondent that he was prepared to apologize to his fellow employees and return to work if so required.

After discharging himself from hospital, the appellant intended to return to work, but was suspended on health and safety grounds. He signed an authority form, permitting his medical records to be disclosed to the respondent. The respondent sought further information from a consultant psychiatrist on the potential risk that the appellant posed to fellow employees; his opinion was that the appellant might pose a risk to fellow employees given his schizoaffective disorder, recent drug use and related paranoia. The respondent wrote to the appellant to inform him that it would start disciplinary proceedings against him and informed him in general of the consultant psychiatrist’s concerns. The disciplinary procedure did not provide for first ascertaining whether the appellant was, given his mental state, fit to undergo the process and was a written process, not allowing him to make oral representations, or allowing someone else to do so on his behalf. The appellant made written submissions, but was dismissed from his employment.

On his application to the Industrial Tribunal alleging unfair dismissal, the Tribunal held that the dismissal had fallen within the range of

reasonable decisions open to the employer and rejected his application. The Tribunal also proceeded on the basis that the dismissal procedure followed had been fair, the appellant having been informed of the general concerns of the consultant psychiatrist and being given the opportunity to make written submissions.

On appeal, the appellant submitted that the Tribunal's decision was one which no reasonable Tribunal, properly directing itself, could have made, as the respondent's disciplinary procedure had been manifestly unfair in (a) failing to ascertain whether the appellant was, given his mental state, fit to undergo the process; (b) failing to provide him with all the relevant material being relied upon, especially the opinion of the consultant psychiatrist; and (c) denying him the opportunity to make oral representations, or allowing someone else to do so on his behalf, by adopting an entirely written procedure.

The respondent cross-appealed, submitting in reply that the Tribunal had been entitled to proceed on the basis that the procedure followed had been fair, the general concerns of the consultant psychiatrist having been conveyed to the appellant, who had been given the opportunity to make written submissions.

**Held**, allowing the appeal:

The Industrial Tribunal had erred in dismissing the appellant's claim for unfair dismissal. Given the unfair manner in which the disciplinary proceedings had been conducted, the Tribunal's decision upholding the dismissal had been one which no reasonable Tribunal, properly directing itself, could have made. A legitimate dismissal had to fall within the range of reasonable decisions which an employer might make, which was, *inter alia*, predicated upon a fair process. The Tribunal should have found that the respondent's disciplinary procedure had been manifestly unfair in (a) failing to ascertain whether the appellant was, given his mental state, fit to undergo the process; (b) failing to provide him with all of the relevant material being relied upon, especially the opinion of the consultant psychiatrist; and (c) denying him the opportunity to make oral representations, or allowing someone else to do so on his behalf, by adopting an entirely written procedure. Had those steps been taken, the appellant would have had the opportunity to respond fully to the alleged risk he posed to other employees and it had not been sufficient merely to inform him by letter of the consultant psychiatrist's general concerns. The parties would be given leave to apply for a further hearing to determine whether the matter should be remitted to the Tribunal, or whether an award should be made by the court (paras. 19–26).

**Case cited:**

(1) *Iceland Frozen Foods Ltd. v. Jones*, [1982] IRLR 439; [1983] I.C.R. 17, followed.

*N. Cruz* and *Ms. C. Borrell* for the appellant;

*S.P. Triay* for the respondent.

1 **DUDLEY, C.J.:** This is an appeal from the decision of the Industrial Tribunal dated October 28th, 2010 dismissing a claim by Alan Cruz for unfair dismissal against Gibraltar Community Projects Ltd.

### **Background**

2 Community Projects is a Government of Gibraltar publicly funded company with some 70 employees, of which some 10 to 15 were described at the Tribunal hearing by the managing director of the company, Michael Pecino, as “special employees.” Special employees include individuals with intellectual disabilities, mental health problems, or substance and alcohol abuse problems. Mr. Cruz, who at the time of his dismissal had been employed by Community Projects for over 10 years, was, according to Mr. Pecino’s evidence before the Tribunal, one such employee, having a history of mental illness.

3 On June 22nd, 2006, an incident took place at St. Joseph’s Middle School where Mr. Cruz and fellow employees had been deployed to clean windows. In his ruling, the learned chairman accepted the evidence of Mr. Cruz as to what transpired and rejected that of his work colleagues. Essentially, Mr. Cruz, who does not like heights, was working on a high movable scaffold hosing down and cleaning windows and, because he repeatedly dropped the hose, at the suggestion of a workmate he tied it to his wrist. His workmates removed the brakes of the scaffold whilst he was still on it and moved it to reposition it. As they did so, the one that had suggested that he tie the hose to his wrist pulled hard on it, surprising and scaring Mr. Cruz, who felt that as a consequence of this he could have easily fallen. Following the incident, Mr. Cruz left and reported the matter to the police. The tenor of that report is set out in a letter from the Royal Gibraltar Police to Mr. Cruz’s solicitors, the relevant passage of which reads:

“Mr. Cruz alleged that he was being bullied and made fun of by two of his co-workers whilst he was working at the top of scaffolding.

Mr. Cruz informed the officer that he only wanted the persons concerned warned to stop their behaviour and he endorsed the officer’s pocketbook to that effect. The persons in question were duly advised as to their conduct and the officers left the area.”

4 The following day, Mr. Cruz did not go to work, but called Mr. Pecino, and the learned chairman found that, in that conversation, Mr. Cruz, in an agitated manner, alleged that his work colleagues “had tried to kill him.”

5 Mr. Cruz did not return to work and the learned chairman found that that weekend he went on a “drug binge” leading to his admission to the

King George V Hospital on June 26th, 2006, where he remained until August 25th, 2006.

6 During Mr. Cruz's period of hospitalization, in what in my view was very creditable conduct and well beyond what would be required of a reasonable employer, Mr. Pecino attended several of Mr. Cruz's case conferences. The learned chairman accepted Mr. Pecino's evidence that during those conferences Mr. Cruz persisted in his allegation that his colleagues had tried to kill him, but that with a view to returning to work he was willing to lie by apologizing to his colleagues, if Mr. Pecino wanted him to. I wholly agree with the learned chairman's conclusion that Mr. Pecino's refusal to accept that offer was beyond any sensible criticism.

7 On August 25th, 2006, Mr. Cruz unilaterally decided to discharge himself from hospital with the intention of returning to work after the weekend. Mr. Pecino, having concerns for the safety and welfare of Mr. Cruz's workmates, suspended Mr. Cruz from work with pay on that day. The learned chairman categorized Mr. Cruz's conduct as dictating terms to his employer over his return to work and the timing thereof, and classified it as unreasonable behaviour. Nothing material turns on this, but I respectfully disagree. If it was open to Mr. Cruz to self-discharge then it was a course he was perfectly entitled to take and indeed, *qua* employee, he was perfectly entitled to indicate that he intended to return to work. Indeed if he had self-discharged and evinced an intention not to return to work he could have been criticized for being absent from work without permission. That is not to say that I do not share the learned chairman's conclusion that Mr. Pecino's decision to suspend Mr. Cruz was, in the circumstances, reasonable.

8 Upon Mr. Pecino's request, Mr. Cruz signed a "Form of Authority for Disclosure of Medical Records" dated September 7th, 2006, which allowed for the provision of information and the preparation of a report by the Mental Health Services for the benefit of Community Projects. The letter, *inter alia*, gave authority for the report to deal with the danger, which given his mental condition Mr. Cruz posed to other employees.

9 By letter dated September 21st, 2006, Dr. Aparicio, a consultant psychiatrist with the Gibraltar Health Authority, stated that Mr. Cruz suffered from a schizoaffective disorder which "is chronic and is subject to fluctuations that often have to do with the level of compliance with appropriate medication" and which "if not treated . . . would probably have the effect of a confrontation with his colleagues/employees, fed by his symptoms." The long-term prognosis is described as being dependent on compliance with medication and consumption of illegal drugs.

10 Mr. Pecino wrote to Dr. Aparicio seeking further clarification in relation to two urine drug tests conducted upon Mr. Cruz whilst

hospitalized, with one having been found positive for cannabis. More significantly he also posed the following question:

“As you are aware, Mr. A. Cruz has accused one of his workmates of attempting to kill him, this matter is under a separate investigation. Being in the knowledge of Mr. Cruz’s medical condition, his use of illegal drugs and of his clear conviction that someone tried to kill him, in your opinion, would you consider that this situation might put his workmates in danger.

In view of the situation . . . would you consider that such a situation could repeat under another section of the company and with other employees.”

11 By letter dated October 13th 2006, Dr. Aparicio replied to those queries on the following terms:

“Yes, his workmates could be at risk from retaliation from Alan, given his schizoaffective condition, and very especially if his paranoia remains fuelled by continued cannabis use (or other drugs). During his stay in KGV Alan gave very little indication that he would refrain from drugs in the future.

Yes, his paranoia could be directed to other individuals as well, and the situation be repeated in a different setting.”

12 By letter dated November 21st, Mr. Pecino informed Dr. Aparicio that he had decided to initiate disciplinary proceedings against Mr. Cruz, pointed out that normally the person facing a disciplinary hearing would have the opportunity of cross-examining witnesses and inquired whether in view of Mr. Cruz’s medical condition “this situation of confrontation might put members present at the disciplinary hearing in danger.” By letter dated November 27th, 2006, Dr. Aparicio, *inter alia*, said:

“Given this state of things, there is the possibility that Alan could display paranoid delusions in the community at any time, and it would be dangerous for those who were the target of his paranoia (his workmates) to be subject to cross-questioning by Alan, since this would feed his paranoia with them further.

Also, Alan may not be fit to question them if he is currently mentally unwell, and the utility of such a questioning would be unreliable.”

13 Thereafter, on December 19th, 2006, Mr. Pecino wrote to Mr. Cruz informing him that he would be conducting disciplinary proceedings against him on Friday, January 5th, 2007, that the charge related to his having wrongly and falsely accused his work colleagues and informing him that Dr. Aparicio had confirmed that his work colleagues would be at risk of retaliation given his schizoaffective disorder and his use of illegal drugs. He then went on to state:

“The company is obliged to provide its employees with a safe environment at work, and the company is committed to providing for the health, safety, and welfare of all of its employees, and which is a management responsibility, so that those in its employment are not exposed to risks to their health, safety and welfare. The company cannot comply with its health and safety policy to achieve a healthy and safe workplace and to take reasonable care of its employees if it retains you in its employ.”

14 Following that passage, which could suggest that Mr. Pecino had already concluded that Mr. Cruz was to be dismissed, the letter goes on to state that Mr. Cruz was not to attend the disciplinary hearing but that written submissions could be provided. It is noteworthy that Mr. Pecino did not enclose with this letter the correspondence passing between himself and Dr. Aparicio, nor was Mr. Cruz invited to comment upon it or seek alternative medical opinion.

15 Mr. Cruz made written representations and stated, *inter alia*, that he had not alleged that his colleagues had tried to kill him, but rather that he had accused them of pulling a hose tied to his wrist when he was on the scaffold, that he was not a violent person, that he had been to Community Projects’ premises to collect his salary and that the health and safety of workmates had not thereby been compromised.

16 On January 18th, 2007, disciplinary proceedings took place when Mr. Pecino took a decision which the learned chairman accurately described as a “decision on the papers.” By letter dated January 18th, 2007, Mr. Cruz was informed of the outcome of that process, namely that his contract of employment was terminated, but that if dissatisfied with the decision he could appeal to another director of the company. As part of the disciplinary process Mr. Pecino found that the allegation made by Mr. Cruz that his work colleagues had tried to kill him was ill-founded and that an allegation of discrimination made against Mr. Pecino was consistent with the allegation made against his work colleagues and Mr. Cruz’s “change of mood.” Mr. Pecino thereafter went on to state:

“There is no allegation that you were under the influence of drugs on the day of the incident. At the meeting with the Community Health Team, it was explained to me that this change in your character/behaviour was due to the fact that you had failed to take your prescribed medication for your mental condition. I have had confirmation from your medical practitioner that your positive result for cannabis was as a direct consequence of cannabis use, and not passive inhaling as you had previously suggested and continue to suggest. Given your condition, the failure to take the prescribed medication for that condition fuelled by continued cannabis use or the use of other illegal drugs exposes your workmates to a risk that the company



cannot expose them to, given its obligation to ensure the health, safety and welfare of all of its employees. Whilst I note there have been no acts of violence by you on the company's premises or to your workmates, there is nevertheless a very real risk to them because of your condition that the company cannot expose them to."

Mr. Cruz did not appeal Mr. Pecino's decision, but in due course lodged a claim for unfair dismissal.

### The ruling

17 In his ruling, the learned chairman took the view that it was a matter of regret that Mr. Pecino had failed to provide Mr. Cruz with copies of the correspondence passing between him and the consultant psychiatrist, being information to which Mr. Cruz was entitled as of right. However, given Mr. Cruz's knowledge of his condition and the fact that the thrust of the consultant psychiatrist's views were contained in the letter to Mr. Cruz of December 19th, 2006, he determined "not without any anxiety" that that failure had not resulted in any obvious disadvantage or unfairness. The learned chairman noted that there was no provision in the disciplinary procedures of Community Projects allowing a representative of an employee to appear without the employee and expressed the view that he doubted that such a facility would, in the context of employment law, guarantee an excluded employee the right to a fair hearing.

18 The learned chairman expressed surprise that in his written representations Mr. Cruz had failed to deal with that part of Mr. Pecino's letter of December 19th, 2006, raising the issue of his work colleagues being at risk of retaliation, given his schizoaffective disorder and his use of illegal drugs. He went on to conclude that—

"if the claimant's attitude over his medication, cannabis use and the clear effects of the latter on his condition had changed at all during that period, the absence of any representations from the claimant to that effect are noteworthy and significant. In these circumstances, I can only conclude on all the material before me that you had sufficient grounds for the decision that you took albeit it is a borderline one."

19 Although the decision of the learned chairman is challenged on various grounds, and indeed Community Projects lodged a notice of cross-appeal seeking that the decision be affirmed on additional grounds, in argument it became apparent that the fundamental issue in this case is whether the learned chairman, on the facts as he found them, was entitled to properly conclude that the dismissal of Mr. Cruz fell within the band of reasonable responses which a reasonable employer might have adopted (*Iceland Frozen Foods Ltd. v. Jones* (1)). Certainly the learned chairman properly identified the test and referred to the *dicta* of Browne-Wilkinson,

J. (as he then was) in the *Iceland* case ([1982] IRLR at 441) that—“the correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.”

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.

21 Evidently at the heart of this case lies the failure by Mr. Pecino to provide Mr. Cruz with a copy of the correspondence passing between Mr. Pecino and the consultant psychiatrist and not affording Mr. Cruz the opportunity to make representations at the disciplinary hearing. Given that Community Projects’ decision to dismiss was in very large measure premised upon the opinions expressed by the consultant psychiatrist, not to provide that material to Mr. Cruz was, in my view, undoubtedly procedurally unfair and I disagree with the conclusion reached by the learned chairman that the letter of December 19th, 2006, to the extent that it afforded a summary of the consultant’s views, was sufficient, or that it was somehow not necessary given Mr. Cruz’s awareness of his mental condition. The learned chairman himself properly identified in his ruling that provision of the material—“would have fully informed the claimant of the situation from the consultant’s expert point of view and he would have been free to act upon that information in the manner of his choosing.”

22 I agree with that conclusion, but the corollary to it is that in failing to provide the correspondence Mr. Cruz was materially prejudiced. Aware of what was being said about his mental state, Mr. Cruz could legitimately have sought clarification as to what level of risk he posed to others and why he was allowed to be in the community. Community Projects would then have had to factor that evidence into the decision-making process. That Mr. Cruz would have done so or not is of no consequence, but rather that he was deprived of the opportunity.

23 However, the most fundamental procedural flaw was the failure to afford Mr. Cruz the opportunity to make oral representations at the hearing. The learned chairman noted that Community Projects’ disciplinary procedure made no provision allowing a representative to appear for an employee without the employee being present and went on to say that he doubted that such a facility would, in the context of employment law, be an effective alternative in guaranteeing an employee’s right to a fair



hearing. I disagree. In this case, strict adherence to the written disciplinary procedure undoubtedly resulted in an unfair process. It may well have been that in the circumstances it was reasonable not to allow Mr. Cruz to attend, but there was no good reason (other than the terms of the disciplinary procedure) not to allow a trade union representative or suchlike to appear and make representations on Mr. Cruz's behalf. If circumstances are such that strict adherence to a procedure makes a process unfair then it is incumbent upon an employer to deviate from it so as to make it fair. This was one such case.

24 Procedural fairness in this case was particularly important, given that the reason underpinning the disciplinary process was Mr. Cruz's mental health. Whilst Community Projects properly had legitimate concerns in relation to safeguarding other employees, proceeding with the disciplinary process without first ascertaining whether or not Mr. Cruz was fit to undergo the process, failing to provide him with all of the relevant material being relied upon and failing to afford him the opportunity of making oral representations or allowing someone else to do so on his behalf resulted in an unjust process. Moreover, these procedural failings need to be seen in the context of certain findings of fact made by the learned chairman which I set out, albeit at the risk of some repetition:

(a) That Mr. Cruz had worked for Community Projects for over 10 years. That he was a pleasant and intelligent man with a clean work record and had not been aggressive or violent.

(b) That the learned chairman was satisfied as to the truth of a document produced by Mr. Cruz, signed by numerous workmates, confirming that he had never been violent and had always demonstrated that he was a good work colleague.

(c) That Mr. Cruz was a hard-working individual.

(d) That the events of June 22nd, 2006 transpired in line with Mr. Cruz's evidence.

25 I do not ignore that Mr. Cruz was admitted into hospital following a drug binge, but looking at all the circumstances of the case I am of the view that although the learned chairman properly identified the "range of reasonable responses test," in applying it he reached a conclusion that no Tribunal reasonably directing itself could have reached. This was not a borderline case, but rather and by some margin the manner in which Community Projects dealt with Mr. Cruz was outside that range.

26 Absent agreement, I shall, on a date to be fixed by the Registry on application, hear the parties as to whether I should remit the matter to the Industrial Tribunal or make an award and as to costs.

*Appeal allowed.*