**[1980–87 Gib LR 196]**

## FABRI CONSTRUCTIONS LIMITED v. EL HARRACK

Supreme Court (Alcantara, A.J.): March 29th, 1984

*Employment—dismissal—unfair dismissal—Regulation of Wages and Conditions of Employment Ordinance (cap. 139), s.31 limited to criminal proceedings—Attorney-General's consent to civil proceedings for unfair dismissal unnecessary*

An employer appealed against the ruling of the Industrial Tribunal that it had unfairly dismissed its employee.

At the hearing of the employee's complaint of unfair dismissal, the Tribunal ruled as a preliminary matter that s.31 of the Regulation of Wages and Conditions of Employment Ordinance (*cap.* 139) (which required an individual commencing proceedings under the Ordinance to obtain the consent of the Attorney-General in certain circumstances) did not apply to the complaint of unfair dismissal.

On appeal, the employer submitted that (a) s.31 did apply, and it was therefore necessary for the employee to obtain the consent of the Attorney-General; (b) the word "proceedings" was clear and unambiguous, it referred to both criminal and civil proceedings, regardless of the marginal note to the section which read "Restriction on the right to prosecute"; and (c) the appearance of the word "proceedings" on more than one occasion in relation to civil complaints in the Industrial Tribunal Rules confirmed that interpretation.

The respondent submitted that the application of s.31 had always been restricted to criminal proceedings and it had not, therefore, been necessary for him to obtain the consent of the Attorney-General to his civil proceedings for unfair dismissal.

**Held**, dismissing the appeal:

(1) It was not necessary for the employee to obtain the consent of the Attorney-General to commence proceedings for unfair dismissal. From the time of its first enactment in 1953 (when the Regulation of Wages and Conditions of Employment Ordinance applied only to criminal proceedings), s.31 continued to apply only to criminal proceedings—even after the incorporation of civil proceedings for unfair dismissal as a separate part of the Ordinance in 1974. There was nothing to suggest that it was the intention of the legislature at that time that s.31 should apply to civil proceedings. It was this legislative intention which had to be considered

when choosing between possible interpretations of the section (paras. 7–9).

(2) While the marginal note to s.31 could not be used as an aid to interpretation, the court would use it in a more limited sense to confirm that its chosen interpretation of the section was correct. The weight of authority was against the use of marginal notes as an aid to construction, as they had not been considered, voted on or passed by the legislature during the process of enactment. They could nevertheless be used in certain circumstances, such as to resolve complete ambiguity or, as in the present case, to confirm the court's solution (paras. 10–11).

**Cases cited:**

(1) *Boaler, In re*, [1915] 1 K.B. 21, *dicta* of Kennedy, L.J. applied.

(2) *Limb & Co. (Stevedores)* v. *British Transp. Docks Bd.*, [1971] 1 W.L.R. 311; [1971] 1 All E.R. 828; [1971] 1 Lloyd's Rep. 99, followed.

**Legislation construed:**

Regulation of Wages and Conditions of Employment Ordinance (Laws of Gibraltar, *cap.* 139), s.31: The relevant terms of this section are set out at para. 2.

*A.V. Stagnetto* for the employer;
The employee did not appear and was not represented.

1 **ALCANTARA, A.J.:** This is an appeal from the Industrial Tribunal on the interpretation of s.31 of the Regulation of Wages and Conditions of Employment Ordinance. The notice of appeal is couched in this form: "That the Tribunal erred in law in holding that s.31 of the Regulation of Wages and Conditions of Employment Ordinance (*cap.* 139) does not apply to a complaint for unlawful dismissal."

2 The facts giving rise to this appeal can be briefly stated thus: at the resumed hearing of a complaint by an employee for unfair dismissal against his employers, the Tribunal was persuaded by counsel for the employers to rule on a preliminary point of law. The resumed hearing had been ordered by the Supreme Court in a previous appeal to enable the employee to adduce further evidence in support of his original complaint. The preliminary point was a submission by counsel, relying on s.31 of the Ordinance, that the Tribunal had no jurisdiction to deal with the complaint, or rather deal further with it, in view of the fact that the Tribunal had already adjudicated on it at a previous hearing. The submission was based on the admitted fact that the consent of the Attorney-General to proceed on this matter had not been produced or sought. Section 31 of the Ordinance reads: "No proceedings shall be instituted under this Ordinance except by or with the consent of the Attorney-General."

3 After hearing arguments for both parties, the chairman of the Industrial Tribunal gave the following considered decision:

> "As a result of a Civil Appeal No. 2 of 1982, the Chief Justice has directed that the complainant may be given a further opportunity to call evidence that he was unfairly selected for dismissal. Mr. Stagnetto for the respondents [the appellants in the present appeal] has submitted that s.31 of the Regulation of Wages and Conditions of Employment Ordinance applies to this case and has referred me to the law. Mr. Nuza, representing the complainant, has submitted that s.31 does not apply to this case and has referred me to ss. 28(k) and 29(b) of the Ordinance. Rule 4 of the Industrial Tribunal Rules 1974 states quite clearly how a complainant can commence proceedings by originating summons. I am not satisfied that s.31 of the Ordinance does not apply in this case."

4 The matter is now before me, but before I proceed with it, I would like to make an observation. I think it would have been preferable if the chairman had either reserved his decision on the point until the additional evidence, if any, had been adduced or refused to deal with the question of s.31 as a preliminary point, although accepting it as a possible defence. This would have obviated a situation which could now arise, should I dismiss this appeal, of the complaint having to be referred back to the Industrial Tribunal for further evidence.

5 The submission of counsel for the appellant is that on the ordinary or literal interpretation of s.31, the word "proceedings" found therein must refer to all proceedings, whether criminal or civil. The meaning, according to him, is clear and he is not prepared to concede that there can be any ambiguity. Further, he says that taking the Ordinance as a whole, that is the proper interpretation of the section, having regard to the Industrial Tribunal Rules 1974, where the word "proceedings" appears on more than one occasion in relation to complaints. This, he argued, confirms that it was the intention of the legislature that civil proceedings (in the form of complaints) should be caught by s.31, regardless of the marginal note to the section which reads: "Restriction on right to prosecute."

6 I shall deal with the question of the marginal note at a later stage. I shall now deal with the interpretation of s.31 disregarding the marginal note. I have always been of the view that the term "proceedings" takes its meaning from the context in which it is used, and not only can it mean criminal, civil or both, but it also can be used to denote steps in an action. I have been able to find a case where the term "legal proceedings" was defined. It is the case of *In re Boaler* (1), where it was held that the words "legal proceedings" in the context of the statute which the court was examining, did not include criminal proceedings. Kennedy, L.J. had this to say on the interpretation of statutes ([1915] 1 K.B. at 31):

"There is no sort of doubt, in regard to the proper principle of interpreting a statutory enactment, that a judicial tribunal which is called upon to interpret is bound as a general rule, if the effect of the words of the enactment, read in their ordinary and natural sense is clear and unambiguous, to give to those words that effect and no other. The Legislature must be intended to mean what it has plainly expressed. 'It matters not in such a case what the consequences may be. Where, by the use of clear and unequivocal language, capable of only one meaning anything is enacted by the Legislature, it must be enforced even thought it is absurd and mischievous. If the words go beyond what was probably the intention effect must, nevertheless, be given to them.'"

7 Dealing with the specific words "legal proceedings," Kennedy, L.J. added this (*ibid*., at 32–33):

"The present case is not that case. It is, in my view, impossible to say that the meaning of the expression 'legal proceedings' is in itself and by itself clear and unambiguous. The words, taken by themselves, have a sufficient and a natural meaning if they are read as referring either to civil proceedings or to criminal proceedings; or they may be inclusive and signify both civil and criminal proceedings . . .

In the present case this court has to consider the true meaning in this statute of the general words 'legal proceedings.' We are therefore at liberty, and indeed in the performance of our judicial duty are bound, in ascertaining that which we have to try to ascertain, namely, the intention of the Legislature, to consider, in choosing between possible interpretations, the context itself, the accord or want of one or other interpretation with well recognized principles in regard to the interpretation of statutes, and, further, if other things are equal, the comparative reasonableness of the legislation as it is interpreted in one way or in the other."

8 Applying the test of that case to the one now before me, I find that the Regulation of Wages and Conditions of Employment Ordinance was passed in 1953. Section 31, as it now stands, was to be found in that Ordinance. Section 26 dealt with the appointment of inspectors and their power to ensure that employers complied with the provisions of the Ordinance. Section 31 fitted nicely as at the time there was no procedure by way of civil complaint, and could only be interpreted to mean that before a prosecution was initiated the consent of the Attorney-General had to be forthcoming. This is understandable in order to protect employers from being prosecuted by private persons or individuals without good reason. At that time, s.31 would have been interpreted as referring to criminal proceedings alone. It was not capable of being interpreted otherwise.

9 In 1974 legislation was passed dealing with unfair dismissal. For reasons which I have not been told and which I cannot guess, it was incorporated into the Regulation of Wages and Conditions of Employment Ordinance, as Pt. VIIA. It consisted of s.19, now known in the Ordinance as ss. 28A to 28S. None of them gives rise to any criminal action. Quite the contrary, some of them deal with civil claims for unfair dismissal. I cannot agree, however, that because there has been an amendment to the principal Ordinance, s.31 can now take a new meaning and including the new Pt. VIIA, I come to the conclusion that the word "proceedings" in s.31 relates exclusively to criminal proceedings.

10 Reverting now to the question of the marginal note to s.31, I would like to quote from 44 *Halsbury's Laws of England*, 4th ed., para. 819, at 497:

> "Marginal notes are not considered by Parliament at any stage of the proceedings on a Bill and on that ground the weight of authority is against their use as an aid on construction. However, some authorities suggest that they may be used, at least for the purpose of determining the mischief which an enactment is seeking to cure."

11 One case in which the marginal note was used is the case of *Limb & Co. (Stevedores)* v. *British Transp. Docks Bd.* (2), for the purpose of confirming a particular interpretation. In that limited sense, I am prepared to make use of the marginal note to s.31—not as an aid to construction, but to confirm that my construction is the correct one. I accordingly dismiss the appeal.

*Appeal dismissed.*

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