GIBRALTAR SERVICES POLICE v. RISSO

SUPREME COURT (Alcantara, A.J.): May 13th, 1993

Employment—dismissal—unfair dismissal—conduct justifying dismissal —Industrial Tribunal to consider actions of reasonable employer in same circumstances and same line of business—may not substitute own view for employer's—injustice to employee irrelevant if dismissal fair

Police—disciplinary proceedings—grounds for dismissal—substantial indebtedness posing security risk—nature of employment relevant to reasonableness of dismissal

The respondent, a member of the Gibraltar Services Police, brought proceedings in the Industrial Tribunal for unfair dismissal.

Judgment was entered against the respondent in a number of debt actions in the Court of First Instance. The Gibraltar Services Police instituted disciplinary proceedings against him under its Code of Discipline, laying several charges of discreditable conduct, failing to report a relevant matter to the commanding officer, and disobedience of orders in not doing so, all relating to his appearances in court as a debtor. The respondent pleaded guilty to some of the charges and not guilty to others. He was convicted of all charges and given the option, under para. 119 of the Code, of enforced resignation or dismissal. He resigned.

The Industrial Tribunal found that the appellant had unfairly dismissed the respondent, since the discreditable conduct it alleged related to civil rather than criminal proceedings, and would not have amounted to conduct warranting dismissal in any other occupation.

On appeal, the appellant submitted that the Tribunal was obliged, under s.65 of the Employment Ordinance, to consider whether the Services Police had acted reasonably in treating the respondent's indebtedness as a sufficient reason for dismissal, and in doing so it had (a) wrongly taken into account the effect on the respondent; (b) considered the probable course of action which an ordinary employer would have taken; and (c) substituted its own first impression of what was fair.

Held, allowing the appeal:

The Industrial Tribunal had erred in finding that the respondent had been unfairly dismissed. The Tribunal had acknowledged that the reason for the dismissal was that the respondent had allowed himself to become indebted to the point that several judgments had been entered against him and was thus, in the eyes of his employer, as a police officer, a security risk. However, it had then failed to apply the correct test of whether that

reason justified dismissal, namely, what a reasonable employer in those circumstances, *in that line of business*, would have done. Instead, it had substituted its own view for that of the Services Police as to what was reasonable, taking into account injustice to the respondent, which was not a relevant consideration if the dismissal was otherwise fair. The order of the Tribunal would be set aside (page 65, line 22 – page 66, line 3).

Case cited:

(1) *Watling (N.C.) & Co. Ltd.* v. *Richardson*, [1978] I.C.R. 1049; [1978] I.R.L.R. 255, applied.

Legislation construed:

Employment Ordinance (1984 Edition), s.13: The relevant terms of this sub-section are set out at page 61, lines 29–30.

s.65(1): The relevant terms of this sub-section are set out at page 64, lines 8–15.

(2): The relevant terms of this sub-section are set out at page 64, lines 16–19.

N.P. Cruz for the appellant;
E.C. Ellul for the respondent.

ALCANTARA, A.J.: This is an appeal by the Gibraltar Services Police against the decision of the Industrial Tribunal dated February 14th, 1992, which found that a police officer had been unfairly dismissed by the Force.

Section 12(1) of the Employment Ordinance empowers the Governor to establish an Industrial Tribunal. Such a tribunal was established by virtue of the Industrial Tribunals Rules. Section 13 of the Employment Ordinance provides that "an appeal shall lie on a question of law from the tribunal to the Supreme Court against any decision of the tribunal." The procedure to be followed in the case of an appeal to the Supreme Court can be found in the Industrial Tribunal (Appeals) Rules, which came into force on August 9th, 1974.

The two grounds of appeal on questions of law on which the appellant, the Gibraltar Services Police, relies are as follows:

> "1. The Chairman misdirected himself in law by not applying the correct legal test, namely, that laid down in s.65 of the Employment Ordinance, in arriving at his determination.
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> 2. The Chairman misdirected himself in law in that he did not address himself to the issue of whether the dismissal was fair or unfair under the Employment Ordinance, but instead based his determination on whether the effect of the dismissal was fair or unfair."

The respondent is Mr. Damien Risso, at the time Police Const. Risso. Risso was dismissed from the Force on August 25th, 1990, following a disciplinary enquiry by the Gibraltar Services Police. He had been

charged with eight offences against the Code of Discipline of the Force. I will set out the eight offences charged:

"1. DISCREDITABLE CONDUCT, contrary to s.1 of the G.S.P. Code of Discipline, in that, on October 9th, 1989 you appeared before the Court of First Instance in respect of two summonses for non-payment of your debts and you entered into an agreement to pay the sum of these summonses by instalments, but you defaulted in these payments. By such actions you acted in a manner likely to bring discredit on the reputation of the Force.

2. OFFENCE, contrary to s.18 of the G.S.P. Code of Discipline, in that, on October 9th, 1989, you appeared before the Court of First Instance as a defendant in relation to two summonses for non-payment of your debts and you failed to report the matter in writing to the officer commanding the Force.

3. DISOBEDIENCE TO ORDERS, contrary to s.3 of the G.S.P. Code of Discipline, in that, on October 9th, 1989, you appeared before the Court of First Instance as a defendant and failed to report the matter to the officer commanding the Force. By such action you disobeyed a lawful order as stated in s.18 of the G.S.P. Code of Discipline.

4. DISCREDITABLE CONDUCT, contrary to s.1 of the G.S.P. Code of Discipline, in that, on August 6th, 1990, you appeared before the Court of First Instance in relation to summons No. JS 151 J for non-payment of your debts, in favour of Turner Finance Ltd. For such reasons you acted in a manner likely to bring discredit on the reputation of the Force.

5. DISCREDITABLE CONDUCT, contrary to s.1 of the G.S.P. Code of Discipline, in that, on August 6th, 1990, you appeared before the Court of First Instance in relation to summons No. JS 146 J for non-payment of your debts, in favour of Turner Finance Ltd. For such reasons you acted in a manner likely to bring discredit on the reputation of the Force.

6. DISCREDITABLE CONDUCT, contrary to s.1 of the G.S.P. Code of Discipline, in that, on August 6th, 1990, you appeared before the Court of First Instance in relation to Summons No. JS 176 J for non-payment of your debts, in favour of Shell Co. (Gibraltar) Ltd. For such reasons you acted in a manner likely to bring discredit on the reputation of the Force.

7. DISCREDITABLE CONDUCT, contrary to s.1 of the G.S.P. Code of Discipline, in that, on August 6th, 1990, you appeared before the Court of First Instance in relation to summons No. JS 141 J, for non-payment of your debts, in favour of the English Outfitters Ltd. For such reasons you acted in a manner likely to bring discredit on the reputation of the Force.

8. DISCREDITABLE CONDUCT, contrary to s.1 of the G.S.P. Code of Discipline, in that, on August 6th, 1990, you appeared before the

Court of First Instance in relation to Summons No. JS 156 J for non-payment of your debts, in favour of the English Outfitters Ltd. For such reasons you acted in a manner likely to bring discredit on the reputation of the Force."

At the disciplinary hearing, the respondent pleaded guilty to offences 1, 4, 5, 7 and 8 and not guilty to offences 2, 3 and 6. The hearing was chaired by Chief Insp. Ballester. The respondent was assisted at the hearing by Police Officer Hosken, who was the representative of the Gibraltar Services Police Association. The respondent was found guilty of the three offences to which he had pleaded not guilty and was convicted.

Chief Insp. Ballester then informed the respondent that he would be recommending that the respondent should be dismissed from the Force, but that before so doing he would give the respondent the option to resign. This is provided for in the Code of Discipline, which states at para. 119:

"*Scale of Punishment*: An offence against discipline may be punished by—

(a) dismissal;

(b) being permitted to resign as an alternative to dismissal, either forthwith or at such date as may be ordered…"

There was an adjournment of 15 minutes to enable the respondent to consult with his next friend, the representative of the Association, Police Officer Hosken. The respondent took the option of resigning. It is common ground for the purposes of the appeal before the Industrial Tribunal and the present appeal that resigning under para. 119(b) of the Code of Discipline is legally equivalent to a dismissal. It is a form of punishment.

The respondent, as I have already stated, was dismissed from the Force on August 25th, 1990. On December 5th, 1990, Police Officer Hosken, the Association's representative, wrote to the officer commanding the Gibraltar Services Police, no doubt on the respondent's behalf, complaining about the respondent's gratuity. I quote from his letter:

"Mr. Risso's gratuity is being withheld from him because he is a non-participant of the UKDPS and the ruling for non-participant of the scheme is that any person dismissed from his employment is not eligible for his gratuity."

It is fair to say that the respondent did not lose his gratuity. He never had a gratuity to lose in the present circumstances, because he had not joined the new pension scheme which came into force after he had joined the Force.

When the matter came before the Industrial Tribunal, counsel for the respondent, in opening, identified the case for the respondent thus:

"The question for you, Sir, would be, at the end of the day, whether such action on the part of my client, in becoming indebted to a

number of persons and in being sued for the debts, is indeed conduct unbecoming a member of the Gibraltar Services Police. My argument would be that it is by no means conduct which would warrant dismissal from the Force."

What did the Industrial Tribunal have to consider and decide? The matter is set out in s.65 of the Employment Ordinance, the relevant part of which reads:

"(1) In determining for the purposes of sections 59 and 70 whether the dismissal of an employee was fair or unfair, it shall be for the employer to show—

(a) what was the reason … for the dismissal; and

(b) that it was a reason falling within the next following subsection, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(2) In subsection (1)(b) the reference to a reason falling within this subsection is a reference to a reason which—

…

(b) related to the conduct of the employee…"

This legislation is explained in 16 *Halsbury's Laws of England*, 4th ed. (Reissue), para. 325, at 338–339, which reads:

"Whether an employer acted reasonably or unreasonably in treating a reason as a sufficient reason for dismissing an employee must be determined in accordance with equity and the substantial merits of the case. The key consideration for the tribunal is therefore the reasonableness or otherwise of the employer's conduct, not the injustice to the employee.

In adjudicating on the reasonableness of the employer's conduct, an industrial tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry, to determine whether a reasonable employer could have decided to dismiss on those facts."

The above is supported by the case of *N.C. Watling & Co. Ltd.* v. *Richardson* (1) ([1978] I.C.R. at 1056):

"What the authorities, including *Vickers Ltd.* v. *Smith*, have decided is that in answering that question ['Was the dismissal fair or unfair?'] the industrial tribunal, while using its own collective wisdom is to apply the standard of the reasonable employer; that is to say, the fairness or unfairness of the dismissal is to be judged not by the hunch of the particular industrial tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved."

Reverting to the submission made by counsel before the Industrial Tribunal, I think that counsel for the respondent was inviting the

Chairman to rule on two matters. First, on whether the respondent was in breach of the Code of Discipline and, secondly, on whether, accepting that there had been breaches of the Code of Discipline, the punishment was commensurate with the offences.

In so far as the first matter is concerned, I do not think it was really open to argument that the respondent had been properly convicted. He had pleaded guilty to five charges of discreditable conduct, not just of having a debt but of acting in a manner likely to bring discredit on the reputation of the Force. I think that the submission of counsel found sympathy in the mind of the Chairman. This is what the Chairman said in his conclusions:

> "However, his disreputable conduct appears to have been because he owed money, which was more of a civil case than a criminal case, although the case against him was that his debts were such as to bring the Force into disrepute. In any other occupation, however, his debts would not have constituted a cause for dismissal, but the police considered he had become a security risk—open to the possibility of bribery. For this reason, he was taken from his job and put on permanent guard duty at the North Gate.
>
> On balance, I consider that he was unfairly dismissed, but by not going to see the welfare officer when he was advised to do so, I think he contributed to his own dismissal."

It is quite true that the mere fact of being indebted is not necessarily disreputable conduct. How often do you delay in paying, say, an electricity bill? You are then in debt. But that was not the case here. The debts had proceeded to judgment and the respondent had been summoned to court on judgment summonses, not just for not paying one debt, but a number of them.

Counsel for the appellant submits that the Chairman misdirected himself into taking into account matters which he should have disregarded. First, he took into consideration the "loss" of the gratuity. This is a matter which swayed the Chairman in granting compensation "in the interest of justice" of a sum of £2,180. It is clear from the authorities that injustice to an employee arising from a fair dismissal is not a matter to be taken into consideration. Secondly, the Chairman did not consider what another police force or disciplined body would have done in the circumstances, but instead directed his mind to what other employers generally would have done in case of an employee who has fallen into debt. This is not the test set out in the case of *Watling* (1), which is how "a reasonable employer in these circumstances, *in that line of business*, would have behaved." [Emphasis supplied.] I have little doubt that a member of a police force cannot be allowed to find himself in the hands of creditors. Thirdly, the Chairman really decided the case before him by a hunch of what was fair. This, counsel says, comes out clearly in the Chairman's conclusion that "on balance, I consider that he (the respondent) was unfairly dismissed."

I agree with the submissions of counsel for the appellant. I am satisfied that the Chairman of the Industrial Tribunal misdirected himself and I allow the appeal.

Appeal allowed.
