BODYWORKS LIMITED v. DUDLEY

SUPREME COURT (Pizzarello, Ag. C.J.): January 12th, 1996

Civil Procedure—appeals—matters of fact—appellant may challenge lower court's factual findings as errors of law if demonstrably unsupported by evidence

Employment—sex discrimination—dismissal—pregnancy—pregnant employee dismissed because unable to continue duties for which employed entitled to claim dismissal by reason of sex discrimination contrary to Employment Ordinance, s.52B(2)—protection from dismissal not limited to final stages of pregnancy and post-natal period

Employment—dismissal—unfair dismissal—sex discrimination—issue of sex discrimination independent of unfair dismissal under Gibraltar law—employee dismissed for refusing alternative employment during pregnancy may claim sex discrimination even if dismissal not unfair

The respondent brought proceedings against the appellant in the Industrial Tribunal claiming that she had been unfairly dismissed or dismissed in consequence of sex discrimination.

The respondent was employed by the appellant, a health and fitness studio, predominantly as an aerobics and gym instructor but also to carry out clerical and receptionist duties from time to time, and working a mixture of morning and afternoon shifts. After two years she became pregnant and was advised by her doctor not to do exercises during her pregnancy. She was able to continue with low impact aerobics classes and told her employers that she planned to work until the ninth month of her pregnancy.

The appellant then advertised for both a receptionist and an instructor and filled the instructor's post. The respondent was asked if she would take on the reception work alone, but agreed only to continue with these duties on her afternoon shifts as she had done previously. She was then dismissed, with one month's notice, two months before she had planned to leave work, on the ground that she had refused to perform her duties.

The Industrial Tribunal found that, the respondent having agreed to take on the role of receptionist during her pregnancy, her job as aerobics and fitness instructor was filled by another person from outside the company. It found further that she was dismissed without previously being warned that she was failing to perform her duties, and that the dismissal was on the basis that she was unable to do so because of her pregnancy, a ground that amounted to sex discrimination. It made no finding as to whether she had been unfairly dismissed.

On appeal the appellant submitted that (a) the factual findings of the Chairman of the Industrial Tribunal were not substantiated by the transcript of the proceedings which took place before him; in particular his finding that the respondent had agreed to take on the reception duties instead of her classes, whereas in fact she had refused the job and was dismissed for this reason; (b) had the Chairman addressed the issue of unfair dismissal under s.59 of the Employment Ordinance, as he was required to do by the respondent's application, he would have concluded that the dismissal was fair; and (c) the respondent had suffered no discrimination on the ground of her sex within the scope of Council Directive (EEC) No. 207/76 since the protection afforded to pregnant women referred to in art. 2(3) applied only during the final stages of pregnancy and the early post-natal period covered by maternity leave and the respondent was effectively dismissed at least two months before she planned to take that leave.

The respondent submitted in reply that (a) the appellant could not appeal against the Chairman's findings of fact, since an appeal to the Supreme Court could rely only on issues of law; (b) since under the Employment Ordinance, ss. 52A and 52B which implemented Council Directive (EEC) No. 207/76, the issue of sex discrimination was separate from that of unfair dismissal, it was unnecessary for the Chairman to consider whether the appellant's treatment of her amounted to unfair dismissal; and (c) since the protection afforded by the Directive applied throughout an employee's pregnancy and not only in the final weeks and since the respondent had been dismissed for being unable to carry out the duties for which she was employed by reason of her pregnancy, her dismissal was an act of sex discrimination within the meaning of the Directive.

Held, dismissing the appeal:

(1) The appellant was entitled to appeal against the Chairman's findings of fact, since an appeal could lie on the basis of an error in law if there was insufficient evidence to support the factual findings of the Industrial Tribunal (page 202, lines 20–24).

(2) However, although there were inconsistencies between the Chairman's findings and the evidence in the transcript, these did not affect the validity of the Tribunal's decision. On the evidence, the respondent had not agreed to take on the receptionist's job full time. The appellant had regarded the two jobs as different functions, as evidenced by the fact that it had advertised separately for an instructor and a receptionist. Accordingly, her refusal to change her role with the appellant company was reasonable and did not entitle it to dismiss her. Since the appellant had, in effect, dismissed the respondent for being unable to carry out all the duties for which she was employed and that inability arose from her pregnancy, the dismissal was for that reason (page 203, line 35 – page 204, line 11).

(3) The respondent was entitled under Council Directive (EEC) No. 207/76 not to be dismissed for a reason related to her sex. Since the legislation implementing the Directive adopted the terminology used in it, the court would apply the approach of the European courts, which had held that the protection afforded by the Directive existed throughout pregnancy and not only during the final weeks of gestation and the early post-natal period. Consequently, the Industrial Tribunal had correctly found that the respondent had been dismissed for a reason which amounted to sex discrimination (page 204, lines 12–32; page 205, lines 1–21).

(4) Since the issue of unfair dismissal under the Employment Ordinance was independent of that of sex discrimination, it was unnecessary for the Tribunal to have found the dismissal to be unfair, and indeed the facts did not support such a finding (page 205, lines 21–30).

Cases cited:

(1) *Handels-og Kontorfunktionaerernes Forbund i Danmark* v. *Dansk Arbejdsgiverforening*, [1990] E.C.R. I–3979; [1992] I.C.R. 332; [1991] I.R.L.R. 31, considered.

(2) *Webb* v. *EMO Air Cargo (UK) Ltd.*, [1993] 1 W.L.R. 49; [1992] 4 All E.R. 929; on appeal, [1994] I.C.R. 770; [1994] 2 C.M.L.R. 729; [1994] 4 All E.R. 115, considered.

Legislation construed:

Employment Ordinance (1984 Edition), s.52A, as added by the Employment (Amendment) Ordinance, 1989:

"(1) For the purpose of the provisions of this Part, the principle of equal treatment means that there shall be no discrimination whatever on grounds of sex either directly or indirectly by reference in particular to marital status or family status.

. . .

(3) The said provisions shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."

s.52B(2), as added by the Employment (Amendment) Ordinance, 1989:

"The principle of equal treatment shall apply—

(a) with regard to access to all types and to all levels of vocational guidance, vocational training and retraining, and

(b) with regard to working conditions, including the conditions governing dismissal."

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

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

Council Directive (EEC) No. 207/76 of February 9th, 1976 on the implementation of the principle of equal treatment of men and women

as regards access to employment, vocational training and promotion, and working conditions, art. 2(3):

"This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."

art. 5(1): "Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex."

A.J. Isola for the appellant;
K. Azopardi for the respondent.

PIZZARELLO, Ag. C.J.: This is an appeal against the decision of the Industrial Tribunal given on October 27th, 1994. The notice of appeal reads:

"1. That the Chairman must have misdirected himself in law by not applying the correct legal text, namely that laid down in s.59 of the Employment Ordinance and ss. 52A and 52B of the Employment (Amendment) Ordinance, in arriving at his determination.

2. That the Chairman must have misdirected himself in law in that he did not address the issue of whether the dismissal was unfair under the Employment Ordinance or whether there was in fact any form of sexual discrimination.

3. That the Chairman's determination in fact and in law is, in all the circumstances and taking into account all the evidence laid before the Tribunal, unsatisfactory and/or unsafe."

The facts as found by the Chairman of the Industrial Tribunal are as follows: There are two complaints made by Mrs. Lesley Dudley. She claims for unfair dismissal and for an act of discrimination. Mrs. Dudley has a degree in Biology but was unable to find a job. Initially she did exercises only as a hobby but when Bodyworks Ltd. had difficulty in finding an instructor she was asked if she could take on the job. It was a condition that she should obtain qualifications as an aerobics instructor, which she did. She was engaged under a contract of employment from January 29th, 1992. At first she worked shifts from 7.30 a.m. until 2.30 p.m. and from 2.30 p.m. until 10.00 p.m. After a year her hours were changed to 9.30 a.m. until 2.00 p.m. and 2.30 p.m. until 8.00 p.m.

In February 1994 she became pregnant. She took one week's holiday in April. She was advised not to do exercises by the doctor, though she was able to do assessments and re-assessments. In May 1994 Bodyworks advertised for two employees; an instructor and a receptionist. When Mrs. Dudley was asked what her plans were she said that she would work until the beginning of November 1994. In June she was asked if she would do the receptionist job and agreed on July 26th, 1994 to work from

2.30 p.m. until 8.30 p.m. as a receptionist but this was not formalized. She did not refuse to carry out her duties but asked to do low impact classes and this was agreed to by Bodyworks. Other members of the staff were willing to cover for her. Of the two jobs advertised in May, the instructor's job was filled but there was no receptionist taken on and Mrs. Dudley was left to do the receptionist job.

She was told by Mr. Wittaker, manager for Bodyworks, that she should leave in September 1994 but the situation was left in the air. She believed that she was entitled to two months' maternity leave after being in the job for two years. On August 23rd, 1994, Mrs. Dudley was given one month's notice of termination. She was not told that she had not been carrying out her duties, although this was the reason given for her dismissal. In fact, she was never warned that she was not carrying out her duties, nor was she told that she could take sick leave instead of maternity leave. The two were considered to be quite separate.

The staff were happy to fill in for her for a short period. Mr. Wittaker believed he had acted reasonably. The company had no policy on maternity leave. Her pregnancy prevented her from carrying out all her terms of employment and accordingly she was dismissed.

For Mrs. Dudley, Mr. Azopardi took the point that the third ground of the appeal was not sustainable because this is an appeal on fact and no appeal can lie on fact. I ruled and maintain that where there is no evidence on which to found a fact, that is revisable by an appeal court as a matter of error in law.

The transcript of the hearing before the Industrial Tribunal runs to 128 pages but it is incomplete because it has not been possible to transcribe some of the tapes, as is evident from notes on the transcript which allude to that fact, and there are gaps in parts of what has been transcribed. There are no Chairman's notes and the hearing took place over a period of four or five afternoons. Nevertheless, it is the working document to which I have to address my attention and both counsel agree that, bad as it is, it is what we have.

Mr. Isola's appeal based on fact relies on the transcript which he maintains shows that the Chairman was quite mistaken in some fundamental findings of fact, the primary one being the fact that Mrs. Dudley agreed to do the receptionist's job. There is no evidence, he submits—and for this purpose the transcript is good enough—for the Chairman to find that Mrs. Dudley did so, and he took me through the transcript to make his point.

The Chairman was also mistaken, suggested Mr. Isola, when he inferred that the staff were willing to cover throughout the nine-month period. The fact is that cover was provided in the first six weeks gladly, but not after that. Mr. Isola also submitted that it was not right for the Chairman to hold that Mrs. Dudley was left to do the job of receptionist. She never did, and this appears to be so from the transcript. Mr. Isola was

also critical of the finding that she believed she was entitled to two months' maternity leave, whilst she quite clearly accepted in cross-examination that she was wrong because that was not in the contract. So how could the Chairman have found that she believed this? As for her not being given a warning, the manager knew her situation and she knew theirs—she was pregnant and she was offered alternative employment.

Well, there appears to be a fair record of the evidence-in-chief of Mr. Wittaker, but precious little of the cross-examination. Regarding the receptionist's job, his evidence was the same as that of Mrs. Dudley and so the criticism that the Chairman's findings of fact run contrary to what appears in the transcript, is sound. However, the other criticisms are not fully justified and it does not seem to me that the points made by Mr. Isola invalidate the judgment of the Industrial Tribunal. For instance, on the issue of staff cover, the Chairman's finding shows he was aware that the cover was for a short period. As for the receptionist's job, the Chairman is not wrong if his statement is confined to reception work during the afternoon shifts, which is what she did. As for maternity leave, this seems to have had no bearing on the Chairman's decision. However, I shall not dismiss Mr. Isola's submission without first examining the situation a little more.

In the Chairman's findings there is no clear statement of Mrs. Dudley's job description. It was agreed by both counsel that there were four main areas of work and this is substantiated by the transcript, such as it is. The substance of her work was (a) reception work; (b) assessments and re-assessments; (c) computer inputting; and (d) high and low impact aerobics classes, gym exercises and general fitness classes, and I note that Mr. Wittaker stated that "aerobics is almost the major job that we do." As for her working day, she was working shifts and her hours of work were these: Mondays, Wednesdays and Fridays—9.30 a.m. to 2.00 p.m.; and Tuesdays and Thursdays—2.30 p.m. to 8.30 p.m. The following week the shifts reversed and then it was Mondays, Wednesdays and Fridays—2.30 p.m. to 8.30 p.m.; and Tuesdays and Thursdays—9.30 a.m. to 2.00 p.m. There was no reception in the mornings and all the receptionist work was in the afternoon from 2.30 p.m. to 8.30 p.m.

So what is involved in the Chairman's findings that Mrs. Dudley agreed to do the receptionist job? There is no doubt that the general terms of her employment included receptionist work. So the employer's suggestion that she should be available to do all the receptionist work is sensible all round and, as I understand it from counsel and from the transcript, Mrs. Dudley did agree that she should do those duties when her shift work was in the afternoons, since reception was only in the afternoons. Where the employer and Mrs. Dudley part company is that what the employer wanted was for Mrs. Dudley to do her hours every day of the week in the afternoons and certainly she did not (according the transcript) agree to this. Since Bodyworks had advertised for the job of

receptionist and for an aerobic instructor at the same time, there seems to be a clear distinction between the two jobs, and the advertisement in fact refers to "both positions." Therefore what the employer was in effect asking her to do was to change her job.

Where does this take the case? In my view, Mrs. Dudley was not unreasonable in resisting the employer's request. That was not what she was employed for and if her pregnancy did not enable her to fulfil all the different duties in the job she was employed for, then her dismissal arose directly from that and the employer cannot take any comfort from their perception that she has refused the job offered. The terms of the letter of dismissal are clear on this.

Does this lead to a claim against Bodyworks pursuant to Part VA of the Employment Ordinance? I believe it does. I am of the view that Mr. Azopardi's submission that this case is governed by the principles of Council Directive 76/207/EEC, as they have been applied in *Webb* v. *EMO Air Cargo (UK) Ltd.* (2), is right. The proper case law to be considered is that which arises out of a consideration of European Community law principles and for this reason, Council Directives are to be given legislative effect by the legislature of the respective countries of the EC, and such legislation will differ in its detail.

In England the Directive has been given effect to by statutory enactment which makes detailed provision for its implementation in England, but the legislature in Gibraltar has thought fit to give effect to the Directive by legislation which reproduces, almost verbatim, the expressions used in the Directive itself, as the law of Gibraltar. If the legislature had thought fit to bring in more detailed or other provisions it would have done so and if the legislature had wished to follow English practice, procedure and laws they would have done so as well. Since the legislature has not done so, it seems to me that the principles laid down by the Council Directive 76/207/EEC have got to be interpreted in Gibraltar in like manner as in the European Community courts and of course *Webb* v. *EMO Air Cargo (UK) Ltd.* is the latest in the line of cases.

Mr. Isola sought to extract from the *Webb* case the principle that a woman is protected only during the three months of maternity leave which encompass the late stage of pregnancy, childbirth and maternity, because she is prevented, on a purely temporary basis, from performing the work she has been engaged to do. Otherwise, he submits, when a woman is pregnant she can just sit down doing nothing and no one can dispense with her services. The distinction is made clear by the decisions which hold that there is a difference between pregnancy and illness (see *Handels-Og Kontorfunktionaerernes Forbund i Danmark* v. *Dansk Arbejdsgiverforening* (1)).

Mr. Azopardi submits that the case of *Webb* does no such thing. He accepts that after maternity leave if the mother goes ill, even if it is a result of the pregnancy, then her rights might be lost, but she is protected

from the inception of pregnancy. In *Webb* (2), as in the case of Mrs. Dudley, the contract was for an indefinite period and the European Court of Justice ruled on the facts of that case that there was discrimination when she was prevented on a purely temporary basis from performing her work and the temporary period was not three months' maternity leave, but the period commencing with the pregnancy. Otherwise, no sense can be made of the House of Lords' reference to art. 2(3) of Council Directive 76/207/EEC and the remarks made thereafter ([1994] I.C.R. at 797):

> "Furthermore, by reserving to member states the rights to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity,' article 2(3) of Directive (76/207E.E.C.) recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which followed pregnancy and childbirth . . . ."

I agree with Mr. Azopardi's interpretation and consider that the Chairman had a sufficient grasp of the facts, notwithstanding that he made some errors and that there are sufficient facts which justify him in law coming to the conclusion that she was dismissed because she was pregnant, a ground which amounted to sex discrimination. I do not read into the Chairman's finding that he came to any conclusion as to unfair dismissal. He appears to me to have set a finding on that ground firmly to one side. To read into the word "unreasonable" in the last sentence of his finding, "it would be unreasonable for her to carry out duties as a fitness instructor when she was near her full term of pregnancy," an indication that he had s.59 of the Employment Ordinance in mind, is to read something which is not there. I consider that the Chairman was well aware of the difference between unfair dismissal and sex discrimination because of the way he concluded his explanation as to compensation.

Finally, as to compensation, in so far as there is a punitive element because a dismissal is unfair or is sex discrimination, I think every case should be considered on its merits. Where the Chairman has decided that Mrs. Dudley was going to work until November and no longer (although the transcript suggests Mrs. Dudley would come back, he has not accepted that as a finding of fact) then a compensatory award of a full year's salary does not seem to me to be justified. But the matter had not been argued in full and, as there is no appeal as to the amount of compensation in the appeal notice, I am bound not to alter it. The appeal is dismissed.

Appeal dismissed.