[2005–06 Gib LR 23]

CAMMELL LAIRD (GIBRALTAR) LIMITED v. ALVES-LEITE

SUPREME COURT (Schofield, C.J.): March 3rd, 2005

Employment—redundancy—availability of work—redundancy not established if employer recruits other employees in same category as dismissed employee and fails to consider him for similar vacancies in other departments

The respondent brought proceedings in the Industrial Tribunal claiming unfair dismissal by the appellant.

The respondent, who worked as a labourer in the appellant's shipyard, was given a week's notice of redundancy on the ground of a shortage of suitable work. However, five days after his dismissal, three men were re-employed to do similar work in the same department and it also emerged (though it was not raised by the respondent) that other labourers were also taken on in other departments during the respondent's notice period. The Tribunal found that the respondent was not redundant within the meaning of the Employment Ordinance, s.65(7)(c) and that fairness required that he be offered alternative work before dismissal. It concluded that he had been unfairly dismissed and awarded him £2,350. The respondent applied to have the hearing reopened so that he could provide evidence of his loss and, upon hearing further evidence, the Tribunal awarded him an additional sum of £13,905.09, being £15,450.10 for loss of earnings, less 10% for his failure to mitigate his loss.

On appeal, the appellant submitted that (a) the Tribunal was wrong to consider the issue of whether the respondent should have been offered alternative employment in another department, since it had not been raised by the respondent and amounted to a new and separate claim; (b) the Tribunal applied an incorrect test in determining whether the respondent was redundant, as it did not address the question of whether there had been a diminution in the need for the kind of work done by the respondent; and (c) the Tribunal had no power to reopen the hearing to determine the issue of quantum and the award should be reduced by the sum given for loss of earnings.

The respondent submitted in reply that (a) the issue of alternative employment arose out of facts that were within the knowledge of the employer and it was therefore appropriate for the Tribunal to consider it; (b) although the Tribunal did not address this question explicitly, the employer could not show that the requirement for this type of work had

diminished, since it had taken on workers to do similar work during the respondent's notice period; and (c) it was normal practice for a Tribunal to hear proceedings in two stages and to deal separately with claims for compensation.

Held, dismissing the appeal:

(1) It was proper for the Tribunal to consider whether alternative employment was available for the respondent in other departments, since this issue arose from facts admitted by the appellant in its evidence. This did not amount to an attempt by the respondent to introduce facts which he should have pleaded previously, since the facts were not known by him at the time of his appeal. In any event, in the present case, it was for the employer to satisfy the Tribunal that the employee was redundant within the meaning of the Employment Ordinance (paras. 11–12).

(2) The Tribunal had correctly identified the issues to be decided in determining whether the respondent was redundant and whether his dismissal was fair or unfair. These were, first, whether work of the type that the respondent did was still available and, secondly, in view of this, whether the appellant had acted reasonably in dismissing him. In the circumstances, it was inequitable for the appellant to dismiss the respondent whilst taking on other workers to do similar work in his own department and in failing to consider similar vacancies in other departments, and the Tribunal's conclusion that he had been unfairly dismissed could not be faulted (paras. 17–20).

(3) The Tribunal was entitled to reopen the proceedings to hear evidence of the respondent's loss, since it was empowered to regulate its own procedure by the Industrial Tribunal Rules, r.16 (paras. 22–23).

Cases cited:

(1) *Harvey* v. *Port of Tilbury (London) Ltd.*, [1999] I.C.R. 1030; [1999] I.R.L.R. 693, distinguished.

(2) *Safeway Stores plc* v. *Burrell*, [1997] I.C.R. 523; [1997] I.R.L.R. 200, referred to.

(3) *Selkent Bus Co. Ltd.* v. *Moore*, [1996] I.C.R. 836; [1996] I.R.L.R. 661, distinguished.

(4) *Stacey* v. *Babcock Power Ltd.*, [1986] Q.B. 308; [1986] I.C.R. 221; [1986] I.R.L.R. 3, applied.

Legislation construed:

Employment Ordinance (1984 Edition), s.59(1): The relevant terms of this sub-section are set out at para. 15.

s.65: The relevant terms of this section are set out at para. 15.

Industrial Tribunal Rules (L.N. 1974/060), r.16(1): The relevant terms of this sub-rule are set out at para. 23.

N. Cruz for the appellant;
C. Gomez for the respondent.

1 **SCHOFIELD, C.J.:** Julio Alves-Leite (the respondent) was employed by Cammell Laird (Gibraltar) Ltd. (the appellant) from April 6th, 2001, until he was given one week's notice of termination of employment on September 4th, 2002. The reason given for such termination was "shortage of suitable work." In other words, the respondent was made redundant.

2 The appellant operated a ship repair facility and its claim was that the respondent was dismissed in the context of mass redundancies which occurred in the shipyard in the summer of 2002. Its case is that the respondent was on 2 redundancy lists of 35 and 20 employees in June and August that year but he was injured during those months and his employment was not terminated until his return to work on September 4th, 2002. The respondent made an application to the Industrial Tribunal, dated December 6th, 2002, claiming that the dismissal was unfair and set out his grounds as follows:

> "Purported ground for dismissal was 'shortage of suitable work,' given on September 4th, 2002. On September 16th, 2002, five days after the complainant's dismissal, three men were re-employed in the same department in the same capacity as the complainant . . ."

3 The respondent's application was heard on July 1st and 2nd, 2003, and in the following month the chairman delivered his ruling, in which he found that the respondent had been unfairly dismissed. There followed a further hearing at which the question of the amount of compensation was discussed and on June 2nd, 2004, the chairman made an award to the respondent of £16,255.09, which included a compensatory award of £15,450.10, less a reduction of 10% (*i.e.* £1,545.01) in respect of mitigation.

4 The appellant now appeals to this court against the award on the following grounds:

> "(1) The learned chairman erred in taking into account issues raised by the Tribunal on its own motion and not contained in the respondent's IT1 form nor by his counsel nor in evidence, namely, whether alternative employment should have been offered to the respondent.
>
> (2) The learned chairman erred in his interpretation of the correct legal test in determining whether a redundancy situation existed in the context of s.65(2)(c).
>
> (3) The learned chairman erred in his construction of the Industrial Tribunal Rules, r.16(1) in deciding that the Tribunal had

jurisdiction to hear new evidence on the respondent's loss of earnings after the conclusion of the evidence and delivery of his judgment on liability in August 2003."

Ground (1)

5 In the chairman's view, one of the issues for consideration was whether fairness would have required the employer to offer alternative employment to the respondent before dismissing him and, indeed, this consideration appears to be the main basis for his decision. This was an issue which was raised of the chairman's own motion and it was, and is, the appellant's argument that it was wrong for the chairman to take account of this consideration in view of the fact that it did not constitute a ground contained in the respondent's application form to the Tribunal.

6 Perhaps it is as well here to state briefly the factual basis for the chairman's decision. The evidence of Mr. Parry, the appellant's operational director, was that it is in the nature of their industry that there will be peaks and troughs in work and work of different kinds which require a greater or fewer number of workers. That to maintain profits and stability there needs to be a workforce which can be trimmed down when there is no work for them. The workforce in the appellant's shipyard was normally between 220 and 250 but that they have had up to 600 people working at one time. Mr. Parry said that there was a fall-off of work in August and early September 2002, which required workers to be laid off. The respondent worked as a labourer in the painter blaster section of the Marine and Maintenance Department of the shipyard and there was at the relevant time a reduction of work in that department. Accordingly, despite the fact that the respondent was a satisfactory employee, it was decided to lay him off. However, it came out during the course of Mr. Parry's evidence that other labourers had been taken on in other departments of the shipyard during the period of one week in which the respondent was serving out his notice. There was no communication between the relevant departments so as to cause the appellant to offer the respondent work as a labourer in another department. This new piece of information was considered by the chairman to be relevant. Indeed, the chairman based his decision on his view that the respondent should have been offered employment in another department of the shipyard and on the fact that there was no consultation with the respondent before his employment was terminated, which would have enabled employer and employee to discuss whether there was work available for him.

7 When the issue of alternative employment was raised by the chairman, Mr. Cruz, for the appellant, argued that this involved the consideration of a new and separate claim. His argument is that the issue should not have been considered because it was not mentioned as a

ground of appeal in the form presented to the Tribunal. At the very least, he says, the form should have been amended. The argument is that his client should have been given forewarning of the issue raised in the pleadings which were before the Tribunal.

8 Mr. Cruz has cited the cases of *Harvey* v. *Port of Tilbury (London) Ltd.* (1) and *Selkent Bus Co. Ltd.* v. *Moore* (3) in support of his argument.

9 In *Harvey*, the appellant was dismissed on the ground of redundancy and he lodged a complaint of unfair dismissal. His complaint made no mention of his concern that his back problems might have been a factor in his dismissal. The employer's notice of appearance made it clear that his history of back disorder and corrective surgery, which affected his ability to perform the full range of his duties, had played a part in his selection for redundancy. At that stage, the appellant did not consider the possibility of a claim under the Disability Discrimination Act, which had recently come into force. Some five months after he had first seen the employer's notice of appearance and after seeing a disability employment adviser, the appellant sought to amend his originating application by adding contravention of the Disability Discrimination Act to his complaint of unfair dismissal. There was a three-month time limit for presenting a complaint under the Disability Discrimination Act which the appellant had breached. The Tribunal chairman treated his application as an application to add a "free-standing" disability discrimination complaint rather than adding a disability component to the existing unfair dismissal claim. His decision was upheld by the Employment Appeal Tribunal.

10 In *Selkent*, the respondent was dismissed by his employer and presented a complaint of unfair dismissal. His originating application made no mention of the claim that his dismissal had been for a reason connected with his trade union activities. In its notice of appearance, the employer admitted dismissing the respondent and contended that it was for a reason relating to his conduct. In the meantime, the respondent wrote to the Tribunal secretary seeking to add a reference to his contention that his dismissal was as a result of his trade union activities to his originating application. Copies of the application were sent to the employer's solicitors but before they could raise an objection, the Tribunal chairman granted the application to amend. When the employer objected to that approach, it was advised to raise the matter at the start of the Tribunal hearing. The hearing was adjourned on the ground that the employer wished to appeal against the decision to amend. On appeal, it was held that the Tribunal chairman had erred in granting the application to amend. In deciding whether to exercise its discretion to grant leave to amend, a Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment

against the injustice and hardship of refusing it. The Employment Appeal Tribunal held that the amendment pleaded facts which were not previously pleaded in support of a new case of automatic unfair dismissal for trade union reasons, and fresh primary facts would have to be established. No explanation was provided as to why those facts, which must have been within the respondent's knowledge at the time, were not alleged in the original application. Moreover, the refusal of leave to amend would not cause hardship to the employee since it would not prevent him from pursuing his claim of unfair dismissal. Indeed, he would suffer greater hardship if the amendment were granted because of the increased costs that would inevitably ensue.

11 In my judgment, the present case is distinguishable from the two cases cited. Unlike in *Harvey*, the respondent here does not seek to introduce a completely separate and "free-standing" ground. The chairman extended the scope of his consideration of the existing ground on the basis of facts which came to his attention at the hearing. The respondent was challenging the reason given for his dismissal that there was a shortage of work. He complained that three men were re-employed in his department five days after his dismissal. These were facts which were within his knowledge at the time he framed his grounds of appeal. Further facts emerged to the effect that other workers were taken on in other departments. There was thus a further factual basis for the respondent's ground of appeal that there was no shortage of work for him. It did not, as in the case of *Harvey*, involve adding a new ground of appeal. Furthermore, the chairman was not dealing with a ground which had a statutory time limit attached to it, which time limit had been breached. Unlike *Selkent* (3), the facts which gave rise to the new considerations were not within the respondent's knowledge until he heard them from the appellant. These were facts which were peculiarly within the appellant's knowledge. Furthermore, there was no issue of increased costs which ensued from the chairman's consideration of the new issue. Fresh primary facts would not need to have been established because the facts were admitted.

12 Before me, Mr. Cruz has cited a number of other cases in support of his argument. However, as pointed out by Mr. Gomez, these are all cases in which a complaint of discrimination was made under the English Race Relations Act, under which the onus is upon the applicant to prove his case. In other words, in such an application the facts upon which the application is founded must be within the knowledge of the applicant and provable by him before he makes his application. This is distinguishable from the present case where the onus is upon the employer to show the reason for the dismissal and that the reason falls within the provisions of the Employment Ordinance (see s.65). The facts surrounding an employee's dismissal are within the knowledge of the employer and all

those facts may not be within the employee's knowledge. In this case, it was not until the evidence developed that the Tribunal, and the respondent, understood the significance of the facts placed before it. Mr. Cruz has complained of an ambush, but if he was ambushed at all it was by facts which were within the knowledge of his clients. In the circumstances, it was proper for the chairman to consider those facts and any new issues arising from them. True it is that Mr. Cruz could have invited an amendment of the application form, but it was by then clear what were the issues before the Tribunal and which had to be addressed by the appellant. To require an amendment would have been merely a matter of form. Mr. Cruz did not seek an adjournment and adequately dealt with the new issue raised.

Ground (2)

13 The second ground of appeal is that the chairman applied an inappropriate test in determining whether a redundancy situation really existed. Mr. Cruz has referred me to the case of *Safeway Stores plc* v. *Burrell* (2) in which it was established that the correct approach for determining what is a dismissal by reason of redundancy in terms of s.139(1)(b) of the English Employment Rights Act, 1996 (which is in substantially the same terms as s.65(7)(c)(ii) of our Employment Ordinance) involves a three-stage process: (1) Was the employee dismissed? If so, (2) had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so, (3) was the dismissal of the employee caused wholly or mainly by that state of affairs? It was held that in determining stage (2) whether there was a true redundancy situation, the only question to be asked is, was there a diminution/cessation in the employer's requirements for employees (not the applicant) to carry out the work of a particular kind, or an expectation of such a diminution/cessation in the future?

14 Mr. Cruz argues that the chairman did not address the question of whether there was a diminution/cessation in the employment requirement for employees to carry out the particular kind of work carried out by the respondent. Instead, contrary to the principles laid down in the *Safeway* case, he concentrated on whether the respondent could have been found other work within the shipyard. The evidence of the appellant, which was uncontested in this regard, was that there had been a diminution in the appellant's requirements for workers carrying out the kind of work carried out by the respondent and, in bypassing stage (2) of the process laid down in the *Safeway* case, the chairman fell into an error of law in determining that the respondent was not redundant.

15 Let us look at the provisions of the Employment Ordinance which are relevant to this case. Section 59(1) reads:

"In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer."

Section 65 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 (or, if there was more than one, the principal 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—

(a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;

(b) related to the conduct of the employee;

(c) was that the employee was redundant;

(d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under any enactment.

(3) Where the employer has fulfilled the requirements of subsection (1) then, subject to sections 67 and 68 the question whether the dismissal was fair or unfair shall be determined in accordance with the following provisions of this section.

(4) For the purposes of sections 59 and 70 the dismissal of an employee by an employer shall be regarded as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee had exercised, or had indicated his intention to exercise, any of the rights specified in section 60(2) or section 62.

(5) Where the reason or principal reason for the dismissal of an employee was that he was redundant, but it is shown that the circumstances constituting the redundancy applies equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer, and either—

(a) that the reason, (or, if more than one, the principal reason) for which he was selected for dismissal was that he had exercised, or had indicated his intention to exercise, any of the rights specified in section 60(2) or section 62; or

(b) that he was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in his case,

the dismissal shall be regarded as unfair.

(6) Subject to subsections (4) and (5) the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case.

(7) In this section, in relation to an employee,—

(a) 'capability' means capability assessed by reference to skill, aptitude, health or any other physical or mental quality;

(b) 'qualifications' means any degree, diploma or other academic, technical or professional qualifications relevant to the position which the employee held; and

(c) any reference to redundancy or to being redundant shall be construed as a reference to the existence of one or other of the following—

(i) that the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business; or

(ii) that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish."

16 By s.59(1) an employee has a right not to be unfairly dismissed. In determining whether the dismissal was fair or unfair, by s.65(1), the onus is upon the employer to show that it was for a reason falling within sub-s.(2). In this case, the employer sought to show that the reason was that the employee was redundant (see s.65(2)(c)). Section 65(7)(c) then gives us a definition of redundancy.

17 Consideration of these provisions in this case involved an answer to two questions: (1) Was the respondent dismissed because he was redundant?

If so, (2) was his dismissal fair or unfair? The chairman correctly identified the issues when he said:

> "The issue before this Tribunal is whether under s.59 of the Employment Ordinance the claimant was unfairly dismissed on the premise of redundancy given that there was at the time of his dismissal still work of the type that the claimant was employed to do. Further, the Tribunal must determine whether, in the light of this, the employer acted reasonably in deciding to dismiss the claimant."

18 The Chairman then analysed the facts and concluded that the appellant had failed to satisfy him that the respondent was redundant and also that the appellant acted unreasonably within the meaning of s.65, sub-ss. (4), (5) and (6), in not offering the respondent alternative employment. Therefore, he said, the dismissal was unfair.

19 The Chairman did not refer to the *Safeway* case (2) and to the three-stage process set out therein, although, I am told, the case was cited to him. Be that as it may, it is difficult to see how the appellant could satisfy him on stage (2) of the process referred to in that case when, during the period that the respondent was serving out his notice, it was taking on workers to carry out labouring work, which was the kind of work that the respondent was employed to do. But even if the chairman was wrong on a strict interpretation of the *Safeway* case, the chairman still had to consider the question of whether the dismissal was fair or unfair by reference to s.65(6). The *Safeway* case is relevant only to the question of whether there was a situation of redundancy. It is not relevant to the second issue of whether the dismissal was fair or unfair.

20 On this second question the chairman was undoubtedly correct. It must be inequitable for an employer to lay off an employee when at the same time it is taking on outside employees to do work of a kind which he is employed to do. And it mattered not that the taking on of new workers occurred after he had been given notice of termination and during the period that the respondent was serving his notice (see *Stacey* v. *Babcock Power Ltd.* (4)). I respectfully agree with the chairman that if the appellant had had a proper system of communication between the various departments of its organization and had consulted the respondent over his dismissal, he would have been offered alternative employment and the appellant would not have recruited a new employee. Most certainly it is in the interests of the appellant to have as large a workforce available to it with the greatest degree of flexibility of recruitment and dismissal as is possible. But the interests of the workers demand that flexibility does not lead to unfairness. In deciding that the dismissal of the respondent was unfair, the chairman was right to point out that the appellant should have had a system of communication between departments in place so that a worker was not dismissed when there was alternative work available to him.

Ground (3)

21 During the hearing on July 1st and 2nd, 2003, the respondent did not produce evidence of loss. After the chairman delivered his ruling, in the following month the respondent applied to re-open the hearing in order that he could give evidence of loss. Against the objection of the appellant, the chairman heard further evidence from the respondent and found that, in addition to the basic award of £2,200 and £150 for statutory protection, the respondent should receive a compensatory award of £15,450.10, less £1,545.01 for failing to mitigate his loss. It is the appellant's case that the chairman erred in re-opening the hearing and that the award should be reduced by the amount awarded by way of compensation.

22 Mr. Cruz argues that the Tribunal should define the manner in which it intends to conduct its proceedings and likens the Tribunal proceedings to a civil case where the court determines in advance of any hearing whether it will split consideration of issues of liability and quantum. The Tribunal, having previously failed to define the manner in which it intended to conduct the proceedings, did not have power after the first hearing to reopen the case. Mr. Gomez responds that it is normal practice for Tribunal proceedings to be heard in two stages with the substantive issue as to liability being dealt with separately from any compensatory claim.

23 Mr. Cruz has produced no authority in support of his arguments and in the face of r.16(1) of the Industrial Tribunal Rules, which provides that "the tribunal may regulate its own procedure," he found it difficult to press them strongly. I consider that the chairman was entitled to adopt the procedure he adopted. He dealt with this case fairly and judicially.

Conclusion

24 It follows from the above that I dismiss the appeal. The costs thereof, to be assessed if not agreed, will go to the respondent.

Appeal dismissed.