

LOFTUS

CIRCUIT APPEAL

D 5648]

] Consolidated

D 5649]

LOFTUS AND HEALY

.V.

AN BORD TELECOM

Judgment of Mr. Justice Barron delivered the 13th day of February 1987.

There are two issues in this case.

- (1) Did the Plaintiffs commit the assault which has been alleged?
- (2) If they did, was their dismissal by the Defendant nevertheless an unfair dismissal?

There is no doubt that an incident occurred on the morning of the 25th July, 1984 involving Patrick O'Leary. Whatever happened, he was sufficiently hurt to require a visit to hospital. In medical terms, his injury, if any, was not very serious and he was able to return to work the following day. As might be expected the only independent witness to the incident, Vincent Cowap, was not very convincing in his evidence. Nevertheless, he came forward at the time and is not now attempting to go back on the essence of what he originally said.

The Plaintiffs say that they were not in the portakabin at the time of the alleged evidence, but were engaged in loading a lorry. This is not borne out by the evidence of Ronnie Walker, the fork-lift driver who was assisting them in that operation. He says that they left the lorry driver to

complete the roping down of the loaded drums. The evidence of the lorry driver is of no value on their presence or non presence since he does not specifically remember the day in question. His evidence is however material as regards the general practice. It was the custom for him to complete the loading and then to drive up to the portakabin to get the necessary document relating to his load. It was his practice to drive up to the portakabin and there is no evidence to suggest that the Plaintiffs ever drove up with him. The evidence of the Plaintiffs and Cowap also establish that Cowap made out the relevant docket on instructions from Loftus. I am satisfied from the evidence that the two Plaintiffs would have been in the portakabin at the relevant time.

The Plaintiffs further say that they were told by Cowap that O'Leary had fallen in the canteen. This did not happen and I see no reason why Cowap should have told them an untruth. It has been submitted that I should not accept the evidence of Cowap because he told his local Union Representative on two separate occasions that he saw nothing. This evidence is not admissible to prove or disprove the truth of the evidence given by Cowap. If it was, I prefer the evidence from the other Union Representative present on one of these occasions that he did say that he had seen blows struck. Cowap's evidence was also challenged on the ground that it varied from the statement he made when the matter was investigated. This is so, but the subject matter of the omission, the fact that he saw O'Leary come into the portakabin, is not fundamental. I accept him as a reluctant but truthful witness, who saw part of what is alleged to have occurred.

There is a total absence of any evidence to suggest that Patrick O'Leary was involved in any other incident resulting in his being required to go to hospital. I am satisfied that whatever happened, it involved the Plaintiffs. There is only one full version of what this was, that of O'Leary himself. I accept that, as I do the evidence of Vincent Cowap which supports it. If there was an innocent explanation of O'Leary's subsequent action so far as the Plaintiffs were concerned, there was no reason why they could not say so. In the event, I do not accept their evidence.

Being satisfied that the assault was committed, the remaining question is whether or not the dismissal was an unfair dismissal.

The statutory provisions relating to the nature of an unfair dismissal are set out in Section 6 of the Unfair Dismissals Act, 1977. So far as they are material to the present proceedings, the provisions of Section 6 are as follows:

"6. (1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.

(4) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:

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

- (b) the conduct of the employee,
- (c) the redundancy of the employee, and
- (d) the employee being unable to work or continue to work in the position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute.

(6) In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal."

Subsections (2), (3) and (5) are similar to subsection (4) in that they also provide, without prejudice to the generality of subsection (1), that dismissals for reasons set out in those sections shall be deemed to be or not to be unfair dismissals as the case may be. They do not arise in the present case and they do not give any further assistance in the proper construction of the section than that which is already available from the subsections to which I have referred in full.

The onus of proof is on the employer. He must establish either that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) or from other "substantial grounds justifying the dismissal". Subsection (4) is without prejudice to the generality of subsection (1) and accordingly any dismissal which results wholly or mainly from one or more of the matters specified in

subsection (4) must be such that dismissal is justified. A dismissal will be deemed to be an unfair dismissal therefore unless it can be shown that it resulted wholly or mainly from substantial grounds (which in themselves justified the dismissal) of which those enumerated in subsection (4) are some though not necessarily all. Applying this test to the present case, it is not sufficient to show that the assault was the whole or the main ground for the dismissal. It must also be shown that it justified the dismissal.

In considering these matters regard must be had to all the circumstances. It is submitted that the employer must be shown to have acted reasonably and that the determination of this issue involves consideration not only of what the employer did before the dismissal, but also of the entirety of his actions up to and including the hearing of the proceedings. The word reasonable is used in the equivalent English statutory provision and the submission is based upon that fact. It is also supported by English decisions. I do not consider it appropriate to deal with the submission on this basis since the wordings of the two provisions are different. I have however had regard to the judgments cited insofar as they are relevant to the proper construction of Section 6 and in particular to West Midlands Co-op. v. Tipton 1986 1 All E.R. 513. It is not necessary to consider the English Act or the decisions based upon it to show that the employer has acted reasonably. If he does not do so, how can he establish that the reason he puts forward is the whole or the main reason for the dismissal or that what has occurred justifies dismissal?

The primary consideration is to determine the ground for

the dismissal. Facts may come to light after the dismissal which might alter the view which a reasonable employer should take of the matter. The reaction of the employer to the contesting of his decision may shed light on his reasons. There must obviously be many circumstances occurring after the dismissal which might be relevant. In my view, these matters should be admissible in evidence and the words "having regard to all the circumstances" in Section 6 (1) are intended to have this meaning.

In the present case the Plaintiffs rely upon lack of fair procedures. It is submitted that the Plaintiffs have been deprived of hearings to which they were entitled under the appropriate regulations applicable to their employment. This is by no means clear, but for the purpose of the submission I will accept that it is so. The question however is not whether the Plaintiffs were deprived of procedures to which they were entitled, but whether the denial to them of such procedures is such that the Defendant must be deemed to have failed to establish the assault as the whole or the main reason for and justifying their dismissal.

The evidence in the present case does establish that the Plaintiffs wrote to the Defendants on their own behalf seeking inter alia personal interviews to discuss the matter. These letters were not answered nor were the interviews granted. Solicitors for the Plaintiffs also wrote on their behalf. There were replies to these letters but only to indicate that to deal with the matters contained in them would be to breach established grievance and disciplinary procedures agreed between the Defendant and the Union of which the Plaintiffs were members. Under such agreement, all representations on

behalf of the Plaintiffs were required to be made directly between the Defendant and the Union. I am satisfied that the Union was instructed by the Plaintiffs to act on their behalf. In pursuance of such authority the Union through its officials was in constant and even daily contact with the Defendant in an effort to obtain a reprieve for its members. I am satisfied that in the course of so doing the agreed procedures were fully implemented. I am also satisfied that, notwithstanding the letters written by and on behalf of the Plaintiffs to which the Defendant did not reply, the Plaintiffs allowed the Union to conduct their defence in the manner in which it was conducted. I can find no basis upon which to uphold the submission that the absence of procedures to which the Plaintiffs would have been entitled, if they had not waived them, shows a further and unspecified reason for the dismissal.

It is further submitted that the actual circumstances of this case did not justify dismissal. Evidence was given in an effort to show that on other occasions a more lenient attitude was taken by the Defendant. Such evidence did not however show behaviour as serious as that in the present case. Further in the cases referred to what was done was done in the heat of the moment and was readily admitted. In my view the Defendant has established the onus of proof placed upon it in this regard. In the circumstances the application will be refused.

Henry Barron
13/2/57.