

THE INDUSTRIAL TRIBUNALS

BETWEEN

4/268 /132

Applicant/~~Appellants~~
XXXXXXXX

Respondent

Mr T Armour
Mr R Newton

AND

Keele University Students
Union

DECISION OF THE INDUSTRIAL TRIBUNAL

HELD AT SHREWSBURY ON 18 AND 19 DECEMBER 1984
28 AND 31 DECEMBER 1984

CHAIRMAN: MR A L GORDON MEMBERS: MR G E EVANS
MR N HOUGH

DECISION

The unanimous/~~majority~~ decision of the Tribunal is that the applications are dismissed.
XXXXXXXX

REASONS

1 The applicants, Mr Armour and Mr Newton contend that they have been unfairly dismissed by the respondents, the University of Keele Students Union. The applicants were employed as respectively the manager and assistant manager of the bars at the students union at the university. Mr Armour's employment commenced in 1968 and Mr Newton's in 1978. Mr Armour was not manager for the whole of the period of his employment but he was for the greater part of the nearly 16 years that he was employed by the respondents. They were both dismissed with effect on the 3 August 1984. They were required to leave their employment with immediate effect and to hand over the keys etc in their possession, but in due course they were each paid the appropriate payment in lieu of notice in accordance with the statutory provisions as to length of notice to which each was entitled together with holiday pay and all remuneration due to them up to the 3 August including certain overtime payments.

2 The respondents admit dismissal. Therefore it is for them to establish that the reason or principal reason for dismissal is a reason which under the provisions of section 57 of the Employment Protection (Consolidation) Act 1978 can make a dismissal fair. If that is established, then we have to apply section 57(3) as amended by section 6 of the Employment Act 1980 and decide whether in the circumstances including the size and administrative resources of the employer's undertaking (that, of course, is the respondents' undertaking) they acted reasonably or unreasonably in treating the reason for the dismissal as a sufficient reason for dismissal, and that question must of course be determined in

accordance with equity and the substantial merits of the case.

3 The respondents do not in their Notices of Appearance paragraph 4(b) state the reason for dismissal as being within one of the provisions of section 57 in so many words, but refer to a statement which was read out by a Mr Harris a member of the committee who chaired the extraordinary meeting of the committee held on the 3 August which decided upon the dismissal of the respondents. It is in these terms:

"We have carefully considered this matter both in terms of the main issue of stock report deficits and the other matters you wish us to take into consideration.

You have a clear responsibility for stock and cash receipts. The 5 deficit stock reports which have not been explained to our satisfaction are in the light of the warnings you have been given grounds for dismissal.

I am bound to tell you that the committee has decided that as from this date you are dismissed as a result of lack of capability in control of stock and cash in the period under review February/June 1984 as evidenced by professional stocktakers reports.

Mr Dorricott will make arrangements to pay you any outstanding entitlements at a future date.

We are bound to ask you to leave your keys today, after you have collected your personal property and after we have agreed the level of cash float.

All members of staff, on dismissal, have the right to appeal to a General Meeting."

This statement makes it clear that the respondents in this case contend that the reason for dismissal was a reason falling within sub-section (2)(a) of section 57, a reason which related to capability or qualifications (but qualifications do not arise in this case) of the employee for performing work of the kind which he was employed by the employer to do.

4 The evidence in this case took a full 3 days to hear, although not very many witnesses were called. The respondents called 3 witnesses, a Mr Dorricott who is the permanent secretary of the Students Union but not a member of the committee and who was not therefore a party to the decision to dismiss. Mr Dorricott is not actually an employee of the union, but of the university. The second

witness they called was a Mr Harris to whom I have already referred who became a member of the committee early in June of 1984 and who chaired the meeting of the 3 August, and their third witness was Miss Fricker who has since early June been and remains for a year no doubt the president of the students union. Miss Fricker had been a member of the committee prior to the new committee taking office in early June. Mr Harris had not. It would appear that there was a very large change in personnel amongst the committee members each year so that there was very little continuity apart from that provided by Mr Derricott in his position as an adviser. The only witness called on behalf of the applicants was Mr Armour. Mr Newton the other applicant did not give evidence. We do not think that it would be right to draw any inference adverse to the applicants because Mr Newton was not called to give evidence. It is unusual for an applicant in a case of this kind not to give evidence, and maybe if the applicants had been legally represented we would have been tempted to draw some sort of adverse inference from the failure to call Mr Newton, but we certainly do not think that it would be right to do so in the circumstances of the present cases.

5 The respondents have, of course, to establish the reason for dismissal. There is no positive onus of proof either way under section 57(3) as amended. One of the matters that we have to take into account in applying section 57(3) as amended if it arises are the procedures adopted by the respondents. The respondents' procedures have been seriously criticised in the present case and we will say more about that in due course. It has to be born in mind that the statutory provisions do not actually refer to procedures and it is clear from the decision of the Employment Appeal Tribunal in the case called Iceland Frozen Foods Ltd v. Jones (1983) ICR 17 that the substance of the case and matters of procedure should not be put in watertight compartments and that the tribunal should look at all the circumstances including procedures. In other words, the approach which has certainly often been the approach of industrial tribunals to ask itself when applying section 57(3) (or the statutory predecessors thereof) two questions, namely (i) Was dismissal prima facie reasonable on the facts, and then if it answered that question in favour of the employers, (ii) Was the procedure proper and if not did it make any difference (British Labour Pump Co Ltd v Byrne) is not really the correct approach.

6 In very many cases which come before these tribunals there is no dispute as to the reason or principal reason for dismissal, it being accepted that it was a section 57 reason, maybe conduct, maybe capability, maybe redundancy, and the essential question leaving aside remedy which the tribunal has to decide is the application of section 57(3) as amended. In the present cases, however, it is not accepted that the reason or principal reason for the dismissals was the reason relied upon by the respondents and therefore we have to make a positive finding on that point. There is a great deal of documentary evidence in this case which

in a sense makes it easier to keep the statement of the reasons for our conclusions relatively brief, because the documents do to a large extent speak for themselves. The essential background to the cases is that from February 1984 until the date of dismissals there were regular and quite significant deficiencies disclosed by the stocktakes professionally carried out approximately once a month, except the very last stocktake relating substantially to the month of July in which there was a surplus. The formal written stocktakers report relating to that stocktake was not available until after the 3 August but it is not in dispute that both the applicants and the respondents were when the decision to dismiss was announced aware as a result of a verbal message from a representative of the stocktakers that there would be a surplus disclosed by that report. The principal stocktakers involved were a firm called David Hall & Co, although the respondents have since changed to another firm called North West Computer Services who did make a report relating to a period when the applicants were still employed by the respondents, but that report was not to hand when the decision to dismiss was made. There was also one report from a firm called Michael Fallows & Co who were brought in as a sort of check to the reports being made by David Hall & Co. The figures shown in David Hall's reports are summarised on the last page but two of the Exhibit R2 which contains that firm's stock reports from September 1982 until their last report for the period ended the 2 August 1984. That summary shows that from September 1982 until January, that is the 31 January 1984 there were both surpluses and deficits but substantially they cancelled each other out, and on the basis of the evidence before the tribunal did not seriously concern the then committees. The real problem arose from February 1984 onwards, and everyone in this case has accepted that it is not mere coincidence that this has happened since the installation of metered pumps instead of the more old-fashioned free-flow pumps in the respondents' bars. It has, in effect, been accepted that the probabilities (no-one obviously can say it is a certainty) but the probabilities are that there had been deficits, probably regular deficits before that but these were concealed by the fact that with the free-flow type of supply there was probably short measure in a large number of the pints and half pints of draft beer being sold to the persons using the bar.

7 It is clear that it was plainly impossible for the applicants even when they were both on duty, and they were not both on duty whenever the bars were opened, personally to supervise the bar staff employed by the union. There were a number of bars in regular use, although the actual number depended upon the particular day and of course also on whether it was term time or vacation. But clearly it would have been possible for bar staff who, apart from one supervisor (there was only a supervisor in 1984) were students themselves employed on a part-time basis, to use the colloquial expression, have "fiddled" without any actual knowledge or connivance by either of the applicants. This "fiddling" could have been done by not recording sales on the till and pocketing the cash received or, by giving drinks to friends.

and others without receiving payment at all, or maybe in other ways such as, for example presumably stealing a bottle of spirits (or by a combination of these). This is not therefore one of those cases, and industrial tribunals are not unfamiliar with them, where there is simply a club steward and one other person (very often the steward's wife) who have complete control of the bars and therefore if there is a deficit, then prima facie (unless there has been something like a break-in) they must be responsible not necessarily because they have been dishonest but in some way either in the actual serving in the bar or of course in failing properly to check that the deliveries purporting to be made by the breweries and other suppliers have in fact been made. Stocktaking is based on the records provided as to purchases and therefore a short delivery can be one of the reasons which can produce a deficit.

8 The tribunal is in no doubt that the reason why on the 3 August the respondents' committee decided to dismiss each of the applicants was because they honestly believed that they were both of them failing properly to perform their duties. A failure properly to perform duties may relate to capability or may relate to conduct or it may be a combination of both factors. Cases of this kind are quite common. Shrewsbury tribunal have consistently directed themselves on these lines. Subject to questions of procedure, if the poor performance made it reasonable to dismiss it will be fair and it matters not whether it was due to conduct or lack of capability or a combination of the two, nor does it matter that the employer thought that it was due or principally due to capability but the tribunal think it was conduct or principally conduct or vice versa. This direction has not yet been challenged on appeal. The respondents have established to our satisfaction that the reason, not merely the principal reason but the sole reason, for the dismissal was a reason relating to the capability of each of the applicants for performing work of a kind which they were employed to perform, and therefore we proceed to consider the application of section 57(3) as amended. The Committee thought, rightly or wrongly, that the reason for the deficits was that the applicants (both of them) both lacked capability properly to perform ~~their~~ duties.

9 Considerable criticism has been made as to the procedures adopted by the respondents. The details do appear in the documents; and it is not necessary therefore to go in to a great deal of detail in this decision, but there are four meetings of the committee which I should mention. There was a meeting on the 13 April of what I will refer to as the old committee which meeting was attended by both applicants. They had been informed by a memorandum of the 10 April from Mr Derricott of this meeting and in that memorandum they were reminded, because of course they knew the basic facts on that point already, that the stocktaker's report for the period to the 29 March showed a deficit of £1,123.12 which followed a report for the previous month showing a deficit of £742.41. Following that meeting the applicants were sent a memorandum dated the 13 April also signed by Mr Derricott which I do not propose to

read out when giving this decision but it is an important document and naturally the tribunal has borne in mind the whole of its contents. There was a further meeting of the committee on the 13 June, and I quote from the top of the minute of it "to discuss the situation concerning the bar." That was a meeting of the new committee, and the applicants were invited to attend that committee meeting, and did attend although they were not of course present during the whole of the meeting. The committee decided that it would not make a final decision at that time as to whether or not the applicants should be dismissed. They have been criticised in this case for adopting that line, it being pointed out by Mr Bamford on behalf of the applicants and correctly pointing out that on the basis of the first two numbered sentences of the memorandum of the 13 April a situation had arisen (because there had been two further deficits) which on the basis of that memorandum could have led to dismissal. It has been suggested that the reason, or at any rate one of the reasons, an important reason, why no decision to dismiss was made on the 13 June was because it would have been very inconvenient to the respondents to have dismissed the applicants at that time just over a fortnight before the end of the summer term and, of course, of the academic year, when the bars were likely to be exceptionally busy. It was also suggested that the committee desired to avoid the possibility of an appeal by the applicants to a general meeting of the students that term. Undoubtedly it would have been very inconvenient to have dismissed the applicants at that time, and it was certainly very much easier from the practical point of view to dismiss during vacation, especially the long vacation, but whilst it may be that the possible inconvenience could have had some influence on some of the committee, we are satisfied that the main reason why the new committee decided not to take any drastic action at that stage was because they felt it would be premature to do so, more particularly as the great majority of them were new to their responsibilities and really had little opportunity of exercising a considered judgement. We do not doubt that if the respondents had at that stage decided on dismissal, Mr Bamford would have seriously criticised their action as premature and unfair, and we do think that there would have been a lot of weight to be attached to such a criticism.

10 There was a further meeting on the 28 July called to consider further deficits which had been shown on the stocktakers' reports, and the applicants were called to that meeting. Again, it was suggested that a decision had already been made to dismiss, but we do not accept that. We think that this was a meeting sensibly and properly called to see if there was any reasonable explanation for the continuing deficits and that no decision was made then or indeed until the 3 August which was the day when the applicants were notified of their immediate dismissal. Nor do we think there is any significance to be drawn from the fact that it was decided to hold that further meeting on the 3 August. Obviously it was desirable that there would be no undue further delay and it simply happened that the 3 August was a reasonably convenient date, albeit being the

long vacation it would have been too much to expect that there would not be a considerable number of members of the committee, including as it happened, the President Miss Fricker who was in the United States, who could not attend that meeting. In our view and we think it right to emphasise this, the committee (both the old committee and the new committee) did their utmost to ensure that the applicants had fair hearings, were given full opportunity of stating their cases and giving any explanations they could of what on the face of it was obviously an unsatisfactory situation, and in our view the respondents' procedures cannot reasonably be criticised. We are in no doubt that the committee which made the decision genuinely and completely honestly believed that the applicants were not doing their work properly and had been given quite a long period of time to try and show that they could, although indeed the committee could not really put their fingers upon where it was that things were going wrong. It is clear, of course, that there could have been dishonesty somewhere. It was not then and never has been suggested that any of the committee believed that there was any dishonesty by either Mr Armour or Mr Newton and the fact that they were given their appropriate payments in lieu of notice is, of course, indicative that these are not cases in which the respondents were at one time suggesting that there had been dishonesty, albeit when the proceedings were brought decided to rely upon the capability head of section 57 and not the conduct head of it.

11 So we have to turn to consideration of section 57(3) as amended. It is quite clear that we are in this case dealing with what can be called, and we do not intend any offence, amateur employers. Industrial tribunals are not unused to dealing with amateur employers comprising club committees. All sorts of clubs, working men's clubs and Conservative clubs, Labour clubs, golf clubs, perhaps in some parts of the country (though not here) yacht clubs, and more particularly I myself as Chairman have sat on a very considerable number of such cases and undoubtedly we have heard a significant number of such cases in which the committees have behaved in a manner which is quite contrary to normally accepted practices and have sometimes assumed that because something has apparently gone wrong it must be the steward's fault, and it is certainly far from unknown in cases of this kind for the steward to be called in and told he is sacked without being given any chance whatsoever to explain. But these respondents certainly did not fall into that error. They did their best in our judgment to give the matter careful consideration and a fair hearing to the applicants.

12 It is obvious to ~~those~~ of us, all of us it is not just myself, who have heard this type of case that the respondents through their committees lacked experience and expertise in bar management. There are quite a lot of questions which we ourselves would we think from our experience of hearing these cases have thought to ask and other steps which we would have taken before deciding on dismissal. For example, and this is simply an example, it would certainly have

been sensible and helpful to have sought guidance from the brewery or breweries who supplied beer as to what allowances should be given to the bar managers for spillage and wastage as a result of the need to draw off (apparently a half pint of stale beer each time when a bar was to be opened) from (the applicants allege but we do not necessarily accept this) all the "pulls". Breweries have much expertise in these matters. They do, normally at least, not merely supply beer and other bar goods but also run managed houses, and have obviously far more expertise than these respondents and indeed far more expertise than the committee of the average small club, albeit the knowledge of these matters of a conventional club committee is likely to be considerably greater and wider than that of a committee of students. It could be that if the respondents had been what I call professional employers we would have taken the view that they should have made certain further enquiries before deciding that enough was enough and that the time had come when they should terminate the applicant's employment. But it does seem to us that these two cases are very much cases in which we should bear in mind the amendment to section 57 contained in section 6 of 1980 Act (not the onus of proof amendment but the amendment requiring us to take into account all the circumstances including the size and administrative resources of the respondents' undertaking) which we think must be regarded as simply the students union, not the university. We have accordingly come to the conclusion that the respondents reasonably and honestly took the view that both the applicants were not reasonably capable of performing their contractual duties and that it was reasonable to terminate their employment on that ground.

13 It was emphasised right at the beginning of this case that it was not suggested that any valid distinction could be drawn between Mr Armour's case and Mr Newton's case. We can quite see that there are cases involving a manager and an assistant manager, or for example a club steward and assistant steward, in which a distinction could be drawn, and it might be said that the assistant could not reasonably be regarded as at fault because he was merely following the procedures laid down by his immediate superior. But this case has not been put before the tribunal as being such a case and the only reasonable approach in these circumstances is to reach the same conclusion as to both applicants. Criticism has also been made of the appeal procedures. The applicants had a right of appeal to a general meeting of the students, and there was an emergency general meeting held in October at which that appeal was rejected by a substantial, albeit not by any means overwhelming majority. We do not think that there is any reason to take the view that there was anything improper in the way in which that meeting was conducted. It is a very odd, and we would have thought exceedingly unsatisfactory form of appeal, one which is quite different from any form of appeal which any of us had previously encountered, and we have all been sitting on these tribunals for a very long time (myself indeed before the right not to be unfairly dismissed was first enacted with effect on the 28 February 1972) but if you are going to have a right of

appeal in this form, then it does not seem to us that really it could have been handled in any different way. Certainly it would have been wholly impracticable to have dealt with the matter at an ordinary general meeting of the students union. The only reasonable course was to hold an emergency meeting which was in fact done. It must be borne in mind of course that in most cases where a decision is made by a committee, that decision is final. It would certainly be very unusual (we have never known such a case) for an employee of a club to have a right of appeal against dismissal from the club committee to a general meeting of the club which is perhaps the nearest analogy we can think of to the present cases. Possibly thought could be given to trying to arrange some more practical method of dealing with an appeal, but that is the method which was provided for. It would certainly not be right to find that there was anything wrong and unfair in providing no other method, and it is not therefore a factor which we regard as relevant to our conclusions.

14 We have also naturally borne in mind that it would seem that deficits are still continuing despite the appointment of a new manager and assistant manager, and it maybe that something that no-one has thought about is responsible for these deficits, or that indeed there is still, and always has been, pilfering on quite a large scale in some form by student bar staff. But we are not concerned in this case to make a decision as to whether or not either Mr Armour or Mr Newton actually lacked capability properly to perform his work, only whether the respondents reasonably and honestly believed that to be so which we think they did. It is, indeed, obvious from his own evidence that Mr Armour also lacked expertise in certain fields. His method of dealing with the till roll and cash takings left it seems to us much to be desired, but equally there was an amateur approach we think by the respondents' committees over, it would seem, many years, in the way in which cash receipts were handled. A manner not in accordance with the common practice in clubs, and other places where there are cash receipts taken, eg in a shop till. But perhaps the explanation for this is partly because much to our surprise we learnt that in a sense notwithstanding his 16 years with the respondents Mr Armour is also an amateur without other experience in the licence trade, and indeed except for the last 3 years or so appears to have been holding down or trying to hold down two full-time or nominally full-time jobs. So may be, but it is really speculation not relevant to our decision, he had got into some slack habits owing to many years of trying to do more than any reasonable person could do day in day out year in year out.

15 For these reasons we are quite satisfied that the respondents have established that the reason for dismissal was a reason within section 57(2)(a) and we also find that they acted reasonably in dismissing for that reason dismissal being within the reasonable responses of a reasonable employer and decided upon in a reasonable manner with procedures appropriate to this rather specialised form

of organisation. For these reasons it is our duty to dismiss both these applications.

16 For the sake of completeness I add a few words. We accept unhesitatingly the evidence on matters of primary fact given by all three witnesses for the respondents. They are all persons of considerable education which the applicants are not. We do not accept their evidence for that reason. We have all had cases in which witnesses of education have been obviously either unreliable or even telling deliberate lies and we have preferred the evidence of other witnesses in the same case without their educational (or social) advantages. But the respondents' witnesses were clear and careful and plainly we thought trying to be absolutely accurate in their evidence and fair to the applicants. Without, it is hoped, causing offence to anyone else, the Chairman thinks it right to observe that he thought Mr Harris was, in lawyer's language, one of the best and most intelligent but absolutely fair witnesses he has ever heard in the course of 40 years litigation experience as an advocate or in judicial office.

A L Gordon

CHAIRMAN

Decision entered in Register
and copies sent to parties on

28 JAN 1985

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M. Pusa
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for Secretary of the Tribunal