GENERAL MOTORS HOLDEN PTY LTD v BOWLING

HIGH COURT OF AUSTRALIA

BARWICK CJ, GIBBS, STEPHEN, MASON and JACOBS JJ

17 May 1976 — Melbourne 8 December 1976 — Sydney

Industrial law (Com) — Conciliation and Arbitration (Com) — Australian Industrial Court — Appeal — Conviction — Dismissal of Union shop steward — Onus of proof — Appeal by leave against conviction in Australian Industrial Court — Conciliation and Arbitration Act 1904 as amended (Com) ss 5(1)(a), (4), 114.

Industrial law — Victimization — Organization — Officer a member of — Offences — Onus of proof — Union shop steward — Dismissal of — "Substantial and operative factor" — Sole or predominant reason — Conciliation and Arbitration Act 1904 as amended (Com) ss 5(1)(a), (4), 114.

The Conciliation and Arbitration Act 1904-1976 (Com) by s 5(1) provides, so far as is material, as follows:—

"An employer shall not dismiss an employee, or injure him in his employment, or alter his position to his prejudice, by reason of the circumstance that the employee — (a) is or has been, or proposes, or has at any time proposed, to become, an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization; or . . . (f) being an officer, delegate or member of an organization, has done, or proposes to do, an act or thing which is lawful for the purpose of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization.

"Penalty: Four hundred dollars."

Section 5(4) provides: "In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge."

The Industrial Court of Australia by majority convicted the appellant company under s 5(1) of the Act for that on 5 February 1975 it dismissed Bowling by reason of the circumstances that he was a delegate of a registered organization, namely the Vehicle Builders' Employees' Federation of Australia.

On appeal to the High Court of Australia it was not in dispute that at the time of the dismissal on 5 February 1975 the respondent was a shop steward of the Union in the company's works at Elizabeth in South Australia. The matter in dispute was whether he was dismissed by reason of the circumstance that he was a shop steward, the company bearing the onus of proving that it was not actuated by reason of that circumstance (s 5(4)).

On 5 February 1975 Bowling was dismissed by the plant superintendent by payment in lieu of notice "on the basis of your unsatisfactory attitude to the job and to supervision". The Industrial Court held this was not the reason for the dismissal. Admittedly he had a bad work record, in particular in the period between 20 January 1975 and the date of dismissal. On 30 January the plant superintendent recommended dismissal to a senior officer of the personnel department. At this time the work force at the plant had reacted to what was known as the "gemini project" which involved the manufacture of an automobile designed in Japan, by a work-to-rule campaign leading to a slowing down of production in the plant. In addition it was suspected that some employees were engaging in industrial sabotage at the plant. Bowling's responsibilities as a shop steward did not involve him in taking any action in connection with these restrictions In the view of the Industrial Court the management regarded his recent actions as deliberate and calculated to cause loss of production Also, on 1 February,

Bowling took part in a demonstration calling for nationalization of the industry, which he favoured. He approached and denied to the management a report in the Adelaide *Advertiser* that he had stated that sabotage was taking place at the plant and that he sympathized with the saboteurs, but stated that he had merely said he could understand why they acted as they did. In essence the majority of the Industrial Court found that the plant superintendent regarded Bowling as a troublemaker and the reasons stated at the time of dismissal were not the real reasons actuating the dismissal. The majority focused attention on the events which occurred within the senior management after the plant superintendent made his initial recommendation. The matter was considered by the manager of South Australian operations who telephoned the company's director of manufacturing in Melbourne and it was ultimately decided by him and the director of personnel relations in Melbourne that dismissal should take place. At the hearing these two Melbourne directors were not called and this was regarded by the majority as virtually critical. On the appeal the question was whether the majority of the Industrial Court were correct in holding that the appellant had failed to discharge the onus placed upon it by s 5(4). The appellant did not seek to disturb the finding that a poor work record was not the reason for the dismissal. The appellant in the appeal argued that the real reason for dismissal was that Bowling deliberately disrupted production and thus set a very bad example to others.

Held, that the appeal should be dismissed, because: per Mason J, in whose judgment Gibbs, Stephen and Jacobs JJ concurred:—

(i) The difficulty which had originally been created by the failure to call the Melbourne directors left uncontroverted the possibility that Bowling's position as a shop steward was an influential, perhaps even a decisive, consideration in the minds of the directors in dismissing him.

(ii) In considering the interpretation of s 5 of the Conciliation and Arbitration Act 1904-1976 (Com), an employee is actuated by a particular reason or circumstance, if that reason or circumstance was "a substantial and operative factor" influencing him to take that action. Section 5(1) of the Act does not require that the particular reason be the sole or predominant reason actuating the employer.

Roberts v General Motors-Holden's Employees' Canteen Society Inc (1975) 30 IIB 2085, approved.

Pearce v W D Peacock & Co Ltd (1917) 23 CLR 199 at 205, and *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617 at 634-5 and 646; [1972-73] ALR 921, applied.

Per Gibbs J: It would be wrong to think that there is any special difficulty in the way of an employer who seeks to prove that in dismissing an employee he was not actuated by the fact that the employee was a shop steward or other delegate of an organization. The onus of proving that the fact that the employee held the position was not a substantial and operative factor in the dismissal is to be discharged according to the balance of probabilities and is not to be made heavier by any presumption that if an employee who is dismissed for disruptive activities happens to be a shop steward the latter circumstance must have had something to do with his dismissal.

Per Barwick CJ dissenting: The offending reason for dismissal must be the holding of the office: that is to say, the reason that the employee had been appointed to the office. To establish a breach of s 5(1) of the Act, it must be shown that he held office in the organization which formed a significant reason for dismissal. Before resort can be had to the onus provision of the section there must be before the court evidence which reasonably warrants the conclusion that the circumstance that the employee had been placed in the appropriate office of his union was possibly a reason for his dismissal. If, on the evidence, there is no basis for concluding that that circumstance might be or might have been a reason for the dismissal, there is no room for requiring the employer to negative the proposition that that circumstance was such a reason. Put another way, it can properly be said, that if the evidence does not afford ground for concluding that that circumstance was possibly such a reason, the onus is by the absence of such evidence satisfied, on that state of the evidence it could not be concluded that that circumstance was a motivating reason. The greater effectiveness of the employee's personal activities on the industrial scene, derived from the fact that he was a shop steward, does not warrant the conclusion that objection by the employer to those activities could be regarded as an objection to his holding office in his union as a shop

steward. If it could be so regarded, s 5(1), so far from protecting the organization, which may very well not support or endorse the employee's activities, would provide a complete shield for the shop steward against dismissal. The more industrially objectionable his individual activities, the less chance the employer would have of being able to sustain his dismissal. Upon the majority's view, if the employer could not satisfy the Australian Industrial Court that the prominence in those activities which occupancy of the office of shop steward gave to the employee formed no part of the reason for dismissal, the employee could not be dismissed: or, if dismissed, would be bound to be reinstated as in fact the employee was in this case. If the employer has in all honesty to admit that it could not overlook the activities of the shop steward employee, whereas it might have borne like activities carried out by some inconspicuous workman, the majority reasoning must regard the onus as not satisfied. But, in my opinion, such a result is quite unjustified.

Appeal

The appellant, General Motors Holden Pty Ltd, appealed to the High Court of Australia by its leave from a judgment of the Australian Industrial Court from its conviction under s 5(1) of the Conciliation and Arbitration Act 1904 as amended (Com). A detailed statement of the facts appear in the dissenting judgment of the Chief Justice, which follows.

S E K Hulme QC and *K D Marks,* for the appellant.

M Harrison and *G B Thomas,* for the respondent.

Cur. adv. vult.

Barwick CJ. The appellant, who appeals to this court by its leave from a judgment of the Australian Industrial Court (the court) was charged before that court under s 5(1) of the Conciliation and Arbitration Act 1904, as amended (the Act), ultimately, after amendment of the complaint, with having dismissed an employee, Leslie Roones Bowling (the employee), by reason of the circumstance that the employee was a delegate of a registered organization. The employee was a shop steward elected by the members of the South Australian Branch of the Vehicle Builders' Employees' Federation of Australia (the Union). It is conceded by the appellant that the employee was a delegate within the meaning of s 5(1). Because of the size of the operations of the appellant at its Elizabeth plant in South Australia, and of the distribution of the members of the Union throughout the premises, there were a number of shop stewards elected for the plant. Each shop steward was assigned to a geographical area of the works. The employee was thus a shop steward whose duties as such were limited to the section of the works in respect of which he was appointed. As it happened, at the time of the occurrences to which reference is made in the evidence before the court, the employee was acting as shop steward in respect of certain other sections because of the absence of the shop stewards for those sections.

Rule 17A of the rules of the South Australian Branch of the Union prescribe the duties of a shop steward Apart from collection of

moneys due by members of the Union, those duties comprise: (1) the forwarding to the general secretary of the Union of the names and addresses of all employees in the shop; (2) reporting the arrival and departure of all employees; (3) interviewing new employees to try and induce them to become members of the Union — this function was unnecessary in the case of the employee because the appellant's works are a closed shop; (4) act as the medium of communication between the members in his section of the shop and the Union; (5) transact his business in the lunch-hour; (6) sign or initial pence cards, collect and leave the same at the Union office for audit.

It is clear from the evidence given in support of the complaint that the employee interested himself in matters connected with the appellant's plant outside and beyond the duties of a shop steward. It may be taken that, being minded as a member of the Union to take a leading part in such matters, the employee gained influence with his fellow unionists in relation to such matters from the fact that he was a shop steward, though it might equally be said that, by his activities, unconnected with his duty as a shop steward, he consolidated his position as a shop steward. But, clearly, his influence in relation to such matters was not as a shop steward or because of his authority or duty as such.

The prosecutor, as under the relevant award it was entitled to do, gave the employee on 5 February 1975 written notice of termination of his services, paying him for the balance of that day and a week's wages in lieu of notice. The notice of dismissal assigned his "unsatisfactory attitude to the job and to supervision" as the basis of the notice of termination.

A number of incidents were evidenced before the court in which the employee had performed his duties unsatisfactorily and was at least negligent, if not deliberate, in failing to make connections to vehicles in the assembly line, which failure on occasions led to stoppages of work in the plant. He had been warned by foremen and a superintendent for his unsatisfactory work, his lateness in arrival at work, his taking of excessive time off, all of which cumulatively would have afforded good reason for a termination of his employment particularly if upon notice of payment of a week's salary.

Along with other unionists, the employee had been active in encouraging and supporting a current disruptive work-to-rule campaign which was achieving the objective of materially reducing production. He was active also on behalf of the employees of the appellant generally in ever recurring industrial issues. He was vocal in support of nationalization of the appellant's business of vehicle manufacture, he was publicly critical of the attitude of the prosecutor's management to its work force, and he actively opposed the Gemini project, a project of car manufacture. Incidents had occurred at the plant which it would seem might reasonably be suspected to involve acts of sabotage The employee was heard publicly to state his sympathy with the perpetration of acts of

sabotage; and was reported in a newspaper as having done so. But he had denied to the appellant's management that he had done so.

The court did not accept that the appellant had given notice of termination of the employee's employment solely because of the unsatisfactory nature of the employee's work. The majority in their reasons for judgment said: "In our view it would be quite reasonable and well within probability that the employer in dismissing [the employee] might be actuated by the circumstance that this zealous and restless employee held the office of shop steward and was likely to use it in a way regarded by the employer as detrimental to its interests." This sentence in those reasons seems to me to expose a fundamental error in the approach of the majority to the problem before them. Granted that the activities of the employee, to which I have referred, formed part of the basis of the appellant's giving of the notice of termination of the employment and granted that the position of the employee as a shop steward gave him prominence in those activities, it does not follow in logic or in law that the notice of termination could be suspected of having been given by reason of the employee being a shop steward within the meaning of s 5(1) properly understood. The offending reason must be the holding of the office: that is to say, the reason that the employee had been appointed to the office. In my opinion, to establish a breach of s 5(1), it must be shown that it was the fact that he held office in the organization which formed a significant part of the reason for dismissal. Activities in that office are expressly dealt with in par (f) of s 5(1). The terms of that paragraph emphasize, in my opinion, that it is something done in the capacity of an officer of the organization and within the ambit of the authority of the office which is relevant to the purpose of that paragraph. Whilst acts done within the terms of that paragraph may not exhaust the circumstances which may bring a case within the section as a whole, or within sub-s (1) in particular, the limited terms of that paragraph support the view I have expressed that it is the circumstance of holding the office so as to enable exercise of its function which is the relevant circumstance for the purpose of s 5(1).

What the majority of the court has quite evidently, and in my opinion erroneously, concluded is that the prominence which holding the office of shop steward might give to the employee in his non-shop steward activities, and any objection the appellant might have to those activities, could be put down to the circumstance of the employee being or holding the office of shop steward within the meaning of s 5(1), so as to warrant the conclusion that it was the circumstance that he held that office which formed a reason for his dismissal. The purpose of s 5(1) is, to my mind, both limited and obvious, namely, to ensure that members of the organization are not discouraged from accepting office in the organization by the possibility of their employment being terminated because they have become officers of the organization or by reason of the lawful exercise of the authority of such an officer. Section 5(1) generally, but particularly sub-s (1)(a) and (f), is enacted for the protection of the organization Section 5(1)(a) and (f) are designed to prevent the

organization being denied the services of its officers. They are not designed to afford a protection to the employee for his activities which fall outside his authority as an officer of the organization. No doubt on this view the section is of very limited operation: in my opinion, it was so intended, as I think its language indicates.

The management of the appellant's business at the Elizabeth plant recommended the dismissal of the employee. However, evidently because the management realized that industrial trouble might follow the employee's dismissal, the matter of his dismissal was referred to the directorate, which accepted the recommendation, aware no doubt of the employee's activities and his prominence in employee agitation in the plant. The appropriate personnel of the management gave evidence, but the directors did not. The majority decided to uphold the complaint, not because they were satisfied that it had in fact been made out but because of a failure on the part of the appellant to satisfy the onus which the court considered was placed upon the appellant by s 5(4). They took the view that that onus could only be satisfied by the evidence of the directors, accepted by the court, in denial that the circumstance that the employee held his known office formed part of the reason for the employee's dismissal.

Now, leaving s 5(4) on one side for a moment, there is, in my opinion, no shred of evidence in the transcript of evidence which would justify the conclusion that a reason for the employee's dismissal was the fact that he held the office of shop steward or, as I expressed it earlier, that he had been appointed to that office. Clearly, no objection was made to his being a shop steward: or, for that matter, to his performing any of the proper duties of that office. To take exception to the employee's industrial activities, activities which were his personal and in no sense representative activities, was not to object to his being a shop steward, even if his occupation of that office made those personal activities industrially more effective.

The majority of the court thought that it was "permissible to contemplate that . . . the broadcast and news item concerning [the employee's] alleged statements about sympathy for saboteurs and criticism of the defendant's attitude to its workers . . ." which turned the scale in the directors' mind when accepting the management's recommendation for the employee's dismissal. "It [ie the employee's reported statement] was calculated to intensify any anxieties that the directors might have had about the informant as a shop steward at Elizabeth." The sentence further indicates, to my mind, the radical error in the majority judgment, in that no separation was effected between the fact of the holding of the office and the industrial activities of the employee, unconnected as they were with his office of shop steward or with its duties. Nothing in the evidence given in the case suggests that the directors or the management of the appellant had been concerned with the appointment or continuance in office of the employee as a shop steward. The sentence I have quoted attributed to the employee's industrial conduct a significance for the directorate of the appellant which, in my opinion, nothing in the evidence or for that matter in logical inference supported

I now turn to s 5(4) and the use which may properly be made of it. The precise terms of that subsection are:—

"s. 5(4) In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge."

It is a little difficult to state what are the elements of the offence against s 5(1)(a) other than the reasons for the appellant's action: but, presumably, if effect is to be given to the provision, the dismissal itself is the other, and indeed the only other, element of the offence.

In my opinion, before resort can be had to this onus provision, there must be before the court evidence which reasonably warrants the conclusion that the circumstance that the employee had been placed in the appropriate office of his union was possibly a reason for his dismissal. If, on the evidence, there is no basis for concluding that that circumstance might be or have been a reason for the dismissal, there is no room for requiring the employer to negative the proposition that that circumstance was such a reason. Put another way, it can properly be said, in my opinion, that if the evidence does not afford ground for concluding that that circumstance was possibly such a reason, the onus is by the absence of such evidence satisfied: on that state of the evidence it could not be concluded that that circumstance was a motivating reason.

As I have indicated, the greater effectiveness of the employee's personal activities on the industrial scene, derived from the fact that he was a shop steward, does not warrant the conclusion that objection by the employer to those activities could be regarded as an objection to his holding office in his union as a shop steward. Of course, if it could be so regarded, s 5(1), so far from protecting the organization, which may very well not support or endorse the employee's activities, would provide a complete shield for the shop steward against dismissal. The more industrially objectionable his individual activities, the less chance the employer would have of being able to sustain his dismissal. Upon the majority's view, if the employer could not satisfy the court that the prominence in those activities which occupancy of the office of shop steward gave to the employee formed no part of the reason for dismissal, the employee could not be dismissed: or, if dismissed, would be bound to be reinstated as in fact the employee was in this case. If the employer has in all honesty to admit that it could not overlook the activities of the shop steward employee, whereas it might have borne like activities carried out by some inconspicuous workman, the majority reasoning must regard the onus as not satisfied. But, in my opinion, such a result is quite unjustified. It would come about by a failure to confine the section within its properly intended bounds, and from an illogical step in regarding such an admission, as proof that it was the circumstance that the employee had been elected shop steward which formed an operative reason for the dismissal

Being of this opinion, I have no need to canvass other matters in the reasons for judgment of the majority. It suffices, in my opinion, that an occasion had not arisen on the evidence before the court for resort to the onus provision in s 5(4). I may say in passing that there is much to be said for the view that, in any case, the basis of the management's recommendation to the directorate was the effective reason for the dismissal and that the reference to the directorate was not indicative of any objection to the employee holding the office of shop steward, but, on the contrary, was indicative of a realization that he must be dismissed, not because of but despite the fact that the employee was a shop steward and of the understandable caution on the part of the employer faced with the possibilities of industrial reprisal.

In my opinion, the appeal should be allowed and the orders of the court set aside.

Gibbs J. I have had the advantage of reading the reasons for judgment prepared by my brother Mason. I agree that the conclusion reached by the majority of the Industrial Court, that the appellant failed to discharge the onus of proof cast upon it by s 5(4) of the Conciliation and Arbitration Act 1904, as amended (Com), cannot be disturbed. The facts that the notice of dismissal given by the plant superintendent stated reasons which were not the real reasons for the dismissal, and that the two directors who made the final decision to dismiss the respondent were not called to give evidence, support that conclusion. However, it would in my opinion be wrong to think that there is any special difficulty in the way of an employer who seeks to prove that in dismissing an employee he was not actuated by the fact that the employee was a shop steward or other delegate of an organization. The onus of proving that the fact that the employee held the position was not a substantial and operative factor in the dismissal is to be discharged according to the balance of probabilities and is not to be made heavier by any presumption that if an employee who is dismissed for disruptive activities happens to be a shop steward the latter circumstance must have had something to do with his dismissal. If in the present case evidence had been given by the directors responsible that the employee was dismissed because he was guilty of misconduct or because his work was unsatisfactory, and that in dismissing him they were not influenced by the fact that he was a shop steward or indeed that he was dismissed in spite of that fact, and that evidence had been accepted, the onus would have been discharged.

I would dismiss this appeal.

Stephen J. I have read and am in agreement with the reasons for judgment of Mason J and would dismiss this appeal accordingly.

Mason J. This is an appeal by the appellant company against a conviction in the Australian Industrial Court under s 5 of the Conciliation and Arbitration Act 1904, as amended, for that on 5 February 1975 it dismissed the informant respondent by reason of the

circumstance that he was an officer or delegate of the Vehicle Builders' Employees' Federation of Australia (the Union), an organization of employees registered under the Act.

It is not in dispute that at the time of the dismissal from the appellant's employment on 5 February 1975 the respondent was a shop steward of the Union in the appellant's works at Elizabeth in South Australia. What is in dispute is whether he was dismissed by reason of the circumstance that he was a shop steward, the appellant bearing the onus of proving that it was not actuated by reason of this circumstance (s 5(4)).

The respondent was dismissed by Mr Rosenboom, the plant superintendent, who at the time read from a written text saying to the respondent: "You are hereby given notice that your services will be terminated forthwith and that you will be paid for the balance of the day and a week's pay in lieu of notice on the basis of your unsatisfactory attitude to the job and to supervision."

Unfortunately for the appellant, all three judges of the Industrial Court who heard the case found that the reason stated by Mr Rosenboom was not the reason why the respondent was dismissed. The respondent had an unsatisfactory work record, in particular in the period commencing on 20 January 1975, when work resumed after the Christmas vacation, and the date of his dismissal. On at least four, and perhaps six, occasions on 24 January he failed to tighten the nut holding the shock absorber, with the result that the shock absorbers tripped a safety switch which stopped the assembly line. He was reprimanded by the foreman. On the next working day, 28 January, the respondent twice placed the wrong axle assembly on vehicles and improperly connected brake pipes to rear axle assemblies on more than one occasion, again causing delays in the assembly line. He was once more reprimanded by a foreman and given a final warning by another foreman, a warning which was repeated by the plant superintendent. On 29 January he was late arriving for work. On the next day he was late for work following a lunch-time meeting of shop stewards. On 31 January he did not go to work at all, giving as an excuse that his father was ill and that he had to help his mother. After the incident on 30 January the plant superintendent decided to recommend the respondent's dismissal. He made this recommendation orally to his immediate superior and to a senior officer of the personnel department.

At this time there was very considerable friction between the work force and the management at the Elizabeth plant. This was largely associated with what was known as "the Gemini project", the manufacture of an automobile designed in Japan which the work force felt would lead to a reduction in staff and a loss of jobs. The work force had reacted to the project by introducing a work-to-rule campaign which substantially slowed production in the plant. The management was disturbed by the campaign and by the consequential loss of production. In addition it believed that some workers were engaging in industrial sabotage at the plant so as to further reduce production

The respondent's responsibilities as a shop steward did not involve him in taking any action in connection with the campaign or with industrial sabotage but the management, according to their Honours, regarded his actions on 24 January and onwards as deliberate and calculated to cause loss of production.

On Saturday, 1 February, the respondent took part in a demonstration calling for nationalization of the industry, a course which he greatly favoured. On Monday, after being reprimanded by the plant superintendent for taking excessive time off (45 days) in the previous 12 months, he fitted incorrect shock absorbers to a vehicle and was once more given a final warning. On the Tuesday he was again reprimanded for late arrival at work. On the Wednesday there appeared a report in the Adelaide *Advertiser* attributing to him a statement that sabotage was taking place at the Elizabeth plant, the comment "I sympathize with the saboteurs" and a reference to harsh working conditions and repressive management attitudes. On his arrival at work that morning the respondent sought out the plant superintendent and informed him that the newspaper article was inaccurate in various respects and that it conveyed a misleading impression. He denied that he had said that he condoned the actions of saboteurs and asserted that he had merely said that he could understand why they had acted as they did. The respondent's remarks were conveyed by the plant superintendent to the personnel department.

It was later that day that the plant superintendent dismissed the respondent. In evidence he maintained that the respondent was dismissed because he was "a bad operator". However, the judges in the Industrial Court, after hearing the evidence of the foremen, which conflicted significantly with that of the plant superintendent, concluded that the management exaggerated the respondent's shortcomings as a worker. In essence, the majority (Smithers and Phillip Evatt JJ) and Woodward J, who dissented, found that the plant superintendent regarded the respondent as a troublemaker.

Woodward J said: "I formed the opinion that Mr Rosenboom felt that he was on safer ground, when giving evidence, in relying simply on the informant's work record, but that, in truth, he was influenced by a belief that Mr Bowling had deliberately disrupted production on several occasions in the short period since work had resumed for the year and was thus setting a very bad example to others. When this culminated in apparent defiance and threats to a foreman, the die was cast."

His Honour went on to say that he saw no reason for thinking that the respondent's position as a shop steward or any of his activities as a shop steward played any part in prompting the plant superintendent to recommend his dismissal and in so doing his Honour drew a distinction between the normal and lawful activities of a shop steward and any activities by way of deliberate disruption of the assembly line which the plant superintendent may have attributed to the respondent

On the other hand, the majority, although finding that the reasons expressed by the plant superintendent were not the real reasons actuating the respondent's dismissal, focused attention not so much on his state of mind as on the events which occurred within the senior management of the appellant after the plant superintendent made his initial recommendation for dismissal. In this connection it appears that the recommendation was considered by Mr Gould, the manager of the appellant's South Australian operations. On the morning of 5 February, Mr Gould telephoned the appellant's director of manufacturing in Melbourne and in the course of conversation discussed events of the previous fortnight, the report in the Adelaide *Advertiser* and the conversation which had taken place between the respondent and the plant superintendent. The Melbourne management was comprehensively informed of developments, including labour relations at the Elizabeth works, by means of a system of telexes sent regularly or continuously from South Australia to Melbourne. According to Mr Gould it was his recommendation to the director of manufacturing that the respondent should be dismissed, that the question was then considered by the director of manufacturing and the director of personnel relations in Melbourne and that the two directors thereupon decided that dismissal should take place.

The two directors were not called. This circumstance was regarded by the majority as significant because, as they saw the matter, the critical issue was whether the two directors "were actuated by the circumstances that the informant was a shop steward, and in the nature of things they and they alone actually knew what factors influenced their minds in making the decision to dismiss". Their Honours, after considering a number of matters which might have actuated the directors in deciding to dismiss the respondent, concluded that "it would be quite reasonable and well within probability that the employer . . . might be actuated by the circumstance that this zealous and restless employee held the office of shop steward and was likely to use it in a way regarded by the employer as detrimental to its interests".

Section 5(1) of the Act provides, *inter alia:*—

"An employer shall not dismiss an employee, or injure him in his employment, or alter his position to his prejudice, by reason of the circumstance that the employee—

(a) is or has been, or proposes, or has at any time proposed, to become, an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization; or

. . .

(f) being an officer, delegate or member of an organization, has done, or proposes to do, an act or thing which is lawful for the purpose of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within

the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization.

Penalty: Four hundred dollars."

Section 5(4) provides: "In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge."

The two subsections are, broadly speaking, designed to protect an officer, delegate or member of an organization against discrimination by his employer. They have a legislative history which extends back to the turn of the century when the trade union was a more fragile institution than it is today and when it stood in need of a large measure of protection from employers. The importance which s 9 of the Conciliation and Arbitration Act 1904-1915 (the ancestor of the present s 5) then had may be ascertained from the dissenting judgment of Isaacs J in *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199 at 205, where his Honour said of s 9: ". . . it is designed, among other things, to preserve organizations, so that the method selected by Parliament for settling disputes shall not be thwarted. The provision casting the onus on the defendant employer means that the fact that the dismissed employee was a member of an organization must not enter in any way into the reason of the defendant . . ." The majority decided for the employer because there was evidence to support the magistrate's finding that the employer was not actuated by the reason alleged in the charge.

The protection of trade unions and their representatives from discrimination and victimization by employers does not require an interpretation as extreme as that favoured by Isaacs J. It would unduly and unfairly inhibit the dismissal of a union representative in circumstances where other employees would be dismissed and thereby confer on the union representative an advantage not enjoyed by other workers, to penalize a dismissal merely because the prohibited factor entered into the employer's reasons for dismissal though it was not a substantial and operative factor in those reasons. The Australian Industrial Court did not apply Isaacs J's interpretation. In the light of what was said by Barwick CJ and Walsh J in connection with the words "for the reason that" in s 66B(2)(d) of the Trade Practices Act 1965-1971 in *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617 at 634-5 and 646; [1972-73] ALR 921 at 929-30 and 937, the Industrial Court has held (see *Roberts v General Motors-Holden's Inc* (1975) 30 IIB 2085) that an employer is actuated by a particular reason or circumstance, if that reason or circumstance was "a substantial and operative factor" influencing him to take that action. The Industrial Court has thereby rejected, rightly in my opinion, the notion that sub-s (1) is speaking of the sole or predominant reason actuating the employer.

The question then is whether in the light of the facts as I have recounted them the majority in the Australian Industrial Court were correct in holding that the appellant had failed to discharge the onus

placed upon him by s 5(4). The appellant set out to satisfy the onus by proving that the respondent was dismissed because of his poor work record and his attitude to the job. The finding that this was not the reason for his dismissal, based as it was on an assessment of the credibility of the appellant's witnesses, cannot be disturbed, and indeed Mr Hulme QC for the appellant has not sought to disturb it.

The existence of this finding makes it difficult, though not impossible, for the appellant to succeed. To succeed the appellant has to show on the evidence that he was not actuated by the consideration set out in s 5(1)(a). In the circumstances of this case he will not achieve this objective unless the evidence establishes the real reason for the dismissal, notwithstanding that the appellant failed to put it forward at first instance, and that it lies outside the ambit of s 5(1)(a). The appellant now says that the real reason for the dismissal was correctly identified by Woodward J as the belief on the part of Mr Rosenboom and Mr Gould that the respondent deliberately disrupted production and was thus setting a very bad example to others. This belief, says the appellant, was not aided or assisted by reference to the respondent's position as a shop steward or to activities in which he participated as a shop steward.

Section 5(4) imposed the onus on the appellant of establishing affirmatively that it was not actuated by the reason alleged in the charge. The consequence was that the respondent, in order to succeed, was not bound to adduce evidence that the appellant was actuated by that reason, a matter peculiarly within the knowledge of the appellant. The respondent was entitled to succeed if the evidence was consistent with the hypothesis that the appellant was so actuated and that hypothesis was not displaced by the appellant. To hold that, despite the subsection, there is some requirement that the prosecutor brings evidence of this fact is to make an implication which, in my view, is unwarranted and which is at variance with the plain purpose of the provision in throwing on to the defendant the onus of proving that which lies peculiarly within his own knowledge.

I would, for my part, accept the finding that the principal reason for the dismissal was that the appellant considered the respondent to be a troublemaker, to have deliberately disrupted production and thereby to be setting a bad example to others. Even so, this finding does not carry the appellant the whole distance.

It is to my mind a very considerable leap forward to say that this finding in itself is a comprehensive expression of the reasons for dismissal and that they were dissociated from the circumstance that the respondent was a shop steward. No doubt this is an advance which could be made if officers of the appellant had said in evidence: "We dismissed him because he was a troublemaker, because he was deliberately disrupting production and setting a bad example and we did so without regard at all to his position as a shop steward", and that evidence had been accepted. Yet this evidence was not given and, even if it had been given, there may have been a question as to its reliability. Once it is said that the appellant dismissed him because he was deliberately disrupting production and was setting a bad example

it is not easy to say without more that this had nothing to do with his being a shop steward. Although the activities in question did not fall within his responsibilities as a shop steward his office gave him a status in the work force and a capacity to lead or influence other employees, a circumstance of which the appellant could not have been unaware. It would be mere surmise or speculation, unsupported by evidence, to suppose that the appellant's management, if concerned as to the bad example he was setting, divorced that consideration from the circumstance that he was a shop steward.

The suggestion that the respondent's position as a shop steward was not associated with the reason for dismissal in the minds of Mr Rosenboom and Mr Gould is based partly on the assumption that one need not look beyond the consideration which they gave to the matter of dismissal. Yet it is clear enough from the evidence that the effective decision to dismiss the respondent was not made by them in South Australia but by the two directors in Melbourne after they had consultation with Mr Gould, not with Mr Rosenboom. The finding by Woodward J that the effective decision to dismiss was taken in South Australia is at variance with the evidence given by Mr Gould who said in cross-examination:—

> Q.—Is it not true that the ultimate decision to dismiss rested with someone at your Melbourne office? A.—May I add that it would be a corporate decision based on my recommendation.
>
> Q.—There would be someone ultimately responsible at your head office in Melbourne, would there not? A.—Yes, that would be correct.
>
> . . .
>
> PHILIP EVATT J: What do you mean by corporate decision? A.—A discussion amongst directors in relation to this particular case.
>
> MR HARRISON: That is not just the general manager but the directors of the board? A.—The company directors.
>
> Q.—It would be at that level that the decision was made? A.—That is right, based on my recommendation.
>
> . . .
>
> Q.—You told each one . . . ? A.—I spoke to the director of manufacturing and he in turn would have discussed it with the director of personnel relations.
>
> Q.—Your understanding is that it is these two men who determined the dismissal of Mr Bowling; admittedly on your recommendation? A.—Yes, that would be correct.
>
> PHILIP EVATT J: And that recommendation you passed on orally to the director of manufacturing? A.—That is right.
>
> WOODWARD J: How many recommendations for dismissal have you made to either of those gentlemen since you have been in your present position? A.—It would be quite a number; I could not state specifically.
>
> Q More than ten? A It would not be more than ten

> MR HARRISON: Why do you need to seek instructions from either of these directors in relation to some employees but not others? A.—At that particular time there was considerable industrial pressure throughout the industry. In this case we anticipated we could have industrial problems and therefore it was referred to the Melbourne office.

In the light of this evidence it is impossible to treat the directors in Melbourne as having no more than a power to veto a decision arrived at in South Australia.

The unexplained failure of the appellant to call the two Melbourne directors then becomes significant. It left uncontroverted the possibility that the respondent's position as a shop steward was an influential, perhaps even a decisive, consideration in their minds. To a lesser extent the appellant's omission to tender the telex messages, other than the telex despatched at 4.13 pm on 5 February which recorded the dismissal and events subsequent thereto, creates another difficulty. I acknowledge that the appellant in its evidence disclosed the evidence of telex messages and that the respondent was at liberty to subpoena them. But to say this is no answer to the criticism that, the onus being on the appellant, it was for the appellant to show that the telex messages, comprehensive as we know them to be, did not support the existence of a reason falling within s 5(1)(a).

It appears from the evidence that the reason why the question of dismissal was referred to the Melbourne directors for decision was concern over the troubled state of industrial relations at Elizabeth. This in itself disposes of the possibility that the matter was referred to Melbourne to ensure that dismissal did not involve any discrimination against the respondent because he was a shop steward, a fact which, had it been established, might conceivably have enabled an inference to be drawn as to what motivated the directors.

We are left, then, with a reason for the dismissal which does not exclude the possibility that it was associated with the circumstance that the respondent was a shop steward. If this was no more than a slender possibility the circumstance might be discarded as one which was not a substantial and operative factor in the dismissal. However, I have already said enough to indicate why the possibility cannot be so regarded — the respondent's office as a shop steward endowed him with a special capacity to influence others and was therefore not easily dissociated from his ability to set an example to others.

It was suggested that even if the appellant's management had regard to the respondent's position as a shop steward in dismissing him, that was not enough to bring the case within s 5(1)(a). The short answer to this suggestion is that s 5(1) does not proscribe the circumstances which it lists as the sole or predominant reasons for dismissal. It is sufficient if the circumstance is a substantial and operative factor. And it does not cease to be such a factor because it is coupled with other circumstances or because regard is had to it in association with other circumstances not mentioned in the section.

The appellant sought to give emphasis to the distinction to be drawn between s 5(1)(a) and s 5(1)(f) and argued that the activities of

a shop steward fall under par (f) and not par (a). So much may be conceded, but this does not avail the appellant in the present case because we are concerned not with activities undertaken by the respondent in his capacity as a shop steward but with activities otherwise undertaken and the example that he set to others in which his position as a shop steward was of particular significance.

In the result I would dismiss the appeal. In reaching this conclusion I should not wish to be taken as endorsing all that appears in the majority judgment, for I should not be disposed to concur with all the considerations that find expression there.

Jacobs J. I agree with the reasons for judgment of Mason J and with his proposed order that the appeal be dismissed with costs.

Order

Appeal dismissed.

Solicitors for the appellant: *Moule, Hamilton & Derham.*

Solicitors for the respondent: *Harrison & Partners.*

JOHN HAMMOND
BARRISTER