

THE HIGH COURT

[2004 No.18786 P]

BETWEEN

JOHN CARROLL

PLAINTIFF

AND
BUS ATHA CLIATH-DUBLIN BUS

DEFENDANT

Judgment of Mr.Justice Clarke delivered 4th August, 2005.**1. Introduction**

1.1 The plaintiff ("Mr.Carroll") has been employed by the defendant ("Dublin Bus") as a bus driver since 1984. There are two substantive issues in this case. Mr.Carroll is currently out sick in disputed circumstances which give rise to the first of the issues. As a result of the length of time during which he has been out sick he is no longer receiving any form of pay. Furthermore Mr.Carroll is the subject of a purported decision to dismiss him which dismissal was notified by letter of 10th October, 2004. That purported dismissal is the other issue in these proceedings.

1.2 Therefore the relief claimed by Mr.Carroll falls under two headings:-

(a) In circumstances which it will be necessary to analyse in significantly more detail, Mr.Carroll claims that as and from the 22nd August, 2003 (being the date of a certificate from his general practitioner Dr.Neasa McDonagh to the effect that he was fit for work subject to certain limitations) he ought to have been allowed resume work on what are called "rehabilitative routes" subject to those limitations and should have been, from that date, therefore, in receipt of wages. A variety of reliefs arising out of that assertion are claimed. ("the rehabilitation issue")

(b) Declaratory relief is sought to the effect that the purported dismissal referred to above was a nullity together with related reliefs and certain reliefs concerning the conduct of an appeal against the decision to dismiss. ("the disciplinary issue")

1.3 Furthermore, it should be noted that an underlying aspect of both of the above matters is an allegation by Mr.Carroll that Dublin Bus was motivated by malice. This is a matter to which I will return towards the end of this judgment.

1.4 Finally Mr.Carroll claims damages for personal injuries arising out of depression and stress which he claims flow from the above circumstances.

2. The Interlocutory Application

This matter has already been before me as an application for interlocutory relief. As appears from the judgment then delivered (Carroll v. Bus Atha Cliath-Dublin Bus (Unreported, High Court, Clarke J., 27th January, 2005)) Mr.Carroll then sought the payment of salary, an order which would require that he be permitted to return to work and orders connected with the dismissal process.

3. The Rehabilitation Issue

3.1 In relation to the rehabilitation issue at the interlocutory stage and having referred to the decision of Groarke J. in Rodgers v. Dublin Corporation I indicated that "an employer is not under any legal obligation to seek alternative work for an employee who is no longer medically fit to perform the duties for which he was originally employed" subject to two conditions:-

1. that the difference between the work which the employee concerned is now able to do compared with the work for which he was employed must be material so that an overly narrow or technical objection to his ability to carry out such duties might well, therefore, not entitle an employer to treat the employee as being unfit for the duties for which he was employed; and
2. while no term would ordinarily be implied into a contract of employment to the effect that an employer would be under an obligation to make light work available such a position could, of course, be displaced by the existence of an express term, or perhaps a well established custom and practice amounting to a term of the contract.

3.2 As I pointed out in the judgment at the interlocutory stage there was no evidence of a relevant express term in Mr.Carroll's contract. That continues to be the position after the full plenary hearing. As I further pointed out at the interlocutory stage there was conflicting evidence as to the existence of custom and practice amounting to a contractual term. I have now had the opportunity of hearing detailed oral evidence concerning the position. Under this heading the issues appear, therefore, to be the following:-

1. Is there a term in Mr.Carroll's contract of employment (on the basis of a sufficiently well established custom and practice) to the effect that he is entitled, in certain circumstances, to be given rehabilitative work;
2. In the event that there is, what are the precise obligations of Dublin Bus to Mr.Carroll under such term;
3. Are Dublin Bus in breach of any such obligations; and
4. If they are, what relief is Mr.Carroll entitled to. I deal with each in turn.

4. The Contract

4.1 There can be little doubt on the evidence that Dublin Bus has, for some time, taken the entirely appropriate step of making what might loosely be called rehabilitative duties available to employees. The precise parameters of any such duties and the entitlement of employees to avail of them are, however, a matter of controversy. In that regard I had the benefit of the evidence of a Mr. John O'Hanlon who was a member of a joint working party on the subject of what were called "rehabilitated duties" in Dublin Bus depots. That working party consisted of representatives of the two recognised trade unions (SIPTU and NBRU) and of Dublin Bus. The working party reported on the 1st June, 1994. It is clear from the evidence of Mr.O'Hanlon and, also by inference from the report of the joint working party, that the principal focus of concern of that working party was the question of abuse of the then existing

system. Some aspects of the report are worth noting.

4.2 Firstly the report draws attention to the fact that the relevant national agreement (that is the relevant agreement between employers and the unions representative of workers within CIE) provides as follows:-

"Vacancies on the Aer Lingus service (Dublin City services) are not advertised and the filling of such vacancies is not covered by clause 20. Vacancies on the Aer Lingus service are filled following consultation between the Staff Relations Manager and the Chief Medical Officer, and the position is kept under review to ensure that only the most deserving cases are placed on this route as a first step towards resettlement". The route referred to is now commonly called the "Airlink" route. It seems clear on the evidence that Airlink is the only route in respect of which a formally recorded agreement exists. In substance the clause of the national agreement referred to above provides that the ordinary allocation procedures applicable within Dublin Bus do not apply to the Airlink route.

However it is clear from its report that the joint working party was concerned not only with the Airlink route but also with other routes. This is clear from two portions of the report. Firstly in its very last lines the report refers to an appeals board which could decide what duty a driver would be accommodated with "(including Aer Lingus)". It is therefore clear that the report was concerned with routes beyond the Airlink route.

Secondly it was clear from the totality of the evidence that a driver being assigned to the Airlink route was required to move depot to Summerhill from where Airlink operated. It is clear from the report of the joint working party that it was concerned not only with such arrangements but also arrangements entered into at local level which would necessarily have involved drivers being accommodated within their own depot and, thus, not necessarily with an Airlink route.

4.3 On that basis, and on the basis of the totality of the evidence, I am satisfied that there was an established custom and practice within Dublin Bus amounting to a term of each employee's contract that there would, at least in certain circumstances, be the possibility of an employee who was not fit for all of the duties of his grade being accommodated with a rehabilitative route. That begs the question as to the precise circumstances in which any such entitlement might arise to which I now turn.

5. Entitlement to Rehabilitative Duties

5.1 In this context it is necessary to refer to a number of routes which appear to exist in each bus depot and which are referred to as "universals" and "bogeys". These routes form part of the ordinary rostering which it is necessary to put in place to cover the routes which Dublin Bus needs to provide for its customers. The relevance of such routes to the issues with which I am concerned is that they involve, typically, a lengthy break in the middle of the roster or other circumstances which might be regarded as placing drivers with particular difficulties in less stressful circumstances. Insofar as universals are concerned such routes are less predictable in that the purpose of having such routes available is, frequently, to provide cover for unforeseen difficulties such as breakdowns and the like. At a more general level the overall purpose of all such routes is to provide additional services at peak times. The reason why such routes are potentially relevant for rehabilitative purposes with particular reference to Mr. Carroll is that they do provide a relatively lengthy break in the middle of the day.

It was also clear from Mr. O'Hanlon's evidence that a full list of all such universal and bogey routes as were operating at the time of the 1994 joint working party was available to that working party. Indeed part of the concern which that working party was established to address was that certain employees, having been assigned, for genuine rehabilitative purposes, universal or bogey duties had remained on those duties far beyond the time when such duties were required for rehabilitation. Furthermore it was the case that it would appear that certain drivers having been assigned duties for rehabilitative purposes were, contrary to the rehabilitative nature of the duties concerned, working overtime. It is, however, clear that all such duties were considered to be potential rehabilitative routes.

5.2 In that context it is finally necessary to refer to a statement issued by Dublin Bus on the 7th August, 2003 which drew attention to the fact that the only formally agreed rehabilitative route was the Airlink route. In substance, however, I am satisfied that that statement merely confirmed the factual position, as noted in the report of the joint working party, that the only route that was the subject of a written agreement concerning its rehabilitative status was the Airlink route. Given that I am satisfied, for the reasons indicated above, that universal and bogey routes were established by custom and practice to be rehabilitative routes it does not seem to me that that statement amounts to a revocation of that position. It should also be noted that the original replying affidavit filed on behalf of Dublin Bus in this case is, at a minimum, bald on this topic.

5.3 It was accepted by Mr. Carroll in evidence that a driver did not have an entitlement, as a right, to be put on a rehabilitative route. In this he was undoubtedly correct.

5.4 It is clear that the Chief Medical Officer of the CIE Group played a central role in such matters. Apart altogether from the evidence concerning his involvement with Mr. Carroll's case it is clear from the report of the joint working party that, so far as the medical side of any relevant issue was concerned, the Chief Medical Officer's view was final. It seems clear, therefore, that any entitlement of a driver to be considered for a rehabilitative route was dependent upon a recommendation to that effect being given by the Chief Medical Officer.

5.5 Secondly it is clear that Dublin Bus was under no obligation to make additional rehabilitative routes available so that the entitlement of a driver was to be considered for any such route if a suitable route was available.

5.6 In substance I am therefore satisfied that a driver was entitled, as a matter of contract, to be assigned a rehabilitative route subject to the following conditions:-

1. That the Chief Medical Officer had recommended that the driver concerned was suitable for such route;
2. That there was such a route available; and
3. That there was no other good reason why the driver should not be assigned such route.

5.7 Finally I am satisfied that the driver concerned had an entitlement to be assigned such route but only for a reasonable period to enable rehabilitation. Such period was, in substance, to be a matter for the Chief Medical Officer. The period might be specified in advance. Alternatively the case might be subject to review by the Chief Medical Officer after a defined period.

6. Application to Mr. Carroll's Case

6.1 Mr. Carroll has suffered from difficulties in relation to his back for some time. He has also, at certain periods, suffered from a groin

difficulty.

While an amount of evidence was led by Dublin Bus concerning the fact that Mr.Carroll suffered, from time to time, from other difficulties (and in particular difficulties with his digestion) it does not appear to me that there is any evidence that suggests that those additional matters had or have any impact on his ability to carry out his duties. Furthermore, insofar as there was evidence that Mr.Carroll suffered, at times, from depression or allied conditions, same appears to derive from the difficulties with his employment which are the subject of these proceedings and those conditions do not, on the medical evidence, amount to any independent basis for regarding Mr.Carroll as unfit for work.

6.2 Therefore in substance the only issues which have impacted upon Mr.Carroll's fitness or otherwise for work were his problems relating to his back and his groin.

It is necessary at this stage to refer to the fact that Mr.Carroll, in conjunction with a significant number of other drivers, has commenced proceedings against Dublin Bus arising out of a contention that Dublin Bus drivers have been negligently exposed to injurious levels of "whole body vibration". Those proceedings are ongoing. I was given the pleadings in a case of McDonnell v.