IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M-101 OF 1987

BETWEEN THE JUNIOR DOCTORS ASSOCIATION

D.R LEROY POTTINGER

DR. HORACE CHAROO

DR. SHARON- EARLE-BROWN

PLAINTIFFS

A N D THE MINISTRY OF HEALTH OF THE GOVERNMENT OF JAMAICA

THE MINISTRY OF THE PUBLIC SERVICE OF THE GOVERNMENT OF JAMAICA

THE UNIVERSITY HOSPITAL OF THE WEST INDIES

THE ATTORNEY GENERAL OF JAMAICA

DEFENDANTS

Carl Rattray Q.C. and Andrew Rattray instructed by Rattray Patterson and Rattray for the Plaintiff.

Patrick Robinson and Douglas Leys instructed by the Director of States Proceedings for the 1st, 2nd and 4th Defendants.

Dennis Goffe instructed by Myers Fletcher Gordon Manton and Hart for the third Defendant.

12th, 13th, 15th, and 16th December, 1988. 30th November, 1989, 2nd February, 1990 and March 30, 1990.

CLARKE, J.

Doctors employed either by the Government of Jamaica through the Ministry of Health or by the University Hospital of the West Indies (the Hospital) who are not consultants are known as junior doctors. Since 1985 they have contended that their normal hours of work are from 8:30 a.m. to 5:00 p.m. on week days only and that when they work beyond those hours they are entitled to overtime pay. The Government of Jamaica and the Hospital dispute that contention. The most recent collective labour agreement, the one dated October 1, 1987 between the Ministry of the Public Service and the Junior Doctors Association, the negotiating body for the junior doctors, reserved for judicial determination the whole question of the junior doctors' entitlement to be paid overtime for work they do beyond the hours aforesaid.

The application for relief

The plaintiffs now bring proceedings by originating summons in which they say that the question as to the entitlement of the doctors to certain conditions of service in respect of which they seek declarations rests on the true construction of the Staff Orders of the Public Service, certain Ministry of Finance Circulars, the Minimum Wage Act and Minimum Wage Order 1975, the Labour Relations and Industrial Disputes Act, the Labour Relations Code, industrial practice in Jamaica and the Income Tax (Special Rate for Overtime Work) Regulations, 1983.

These are the declarations they ask for:-

(a) That the normal working hours of the Junior Doctors employed by the Ministry of Health in the service of the Government of Jamaica and the University Hospital of the West Indies are 40 hours exclusive of meal time subject to a working day of 8 hours exclusive of meal time;

(b) That doctors are entitled to be paid overtime for hours worked in excess of 40 hours at the usual premium rate;

(c) That the usual premium rate at which the doctors are entitled to be paid is:

(i) One and one half (1½) times their remuneration for work done in excess of 8 hours on a normal working day or in excess of 40 hours in any week;

(ii) Double time their remuneration for work done on a rest day as defined in the National Minimum Wage Order 1975 or on a Public Holiday.

The central issue

The defendants contend that the application must fail because the entitlements the doctors seek have no protection in law. The central issue is whether the Junior Doctors in the Government service or those employed by the Hospital or both groups of doctors have a legal right to any of the conditions of service in respect of which they seek the declarations.

Now, the first point of principle I make at this stage is this, that although a plaintiff maybe awarded a declaration in spite of the fact that he has no cause of action stricto sensu, his claim must be based on a right or interest that the law recognises and protects.

Whilst the categories of cases in which a Court or judge may grant declarations are not closed, a plaintiff cannot properly base his claim merely on the ground of general principles of morality or fair play: see for instance Cox v. Green [1966] 2 CH. 216. As Clauston J. said in Nixon v. Attorney General [1930] 1 CH. 566 at 574:

> "The declaration of right means in my opinion declaration of legal right, and I have no power to make any declaration even if I desired to make one except a declaration, as I read the rule, of a legal right ... [otherwise if there is no such right] the whole of the foundation of the jurisdiction to make such a declaration as is asked for is gone and it is impossible for me to grant the relief which is sought by way of declaration."

The plaintiffs must therefore show, if they are to succeed, that their claim on behalf of the doctors to a normal working day of 8 hour and to a normal working week of 40 hours, and to overtime at the rates aforesaid is founded either in contract and/or in some statutory provision(s).

Although the plaintiffs are asking for declarations common to the junior doctors it is important to recognise that the doctors form two groups, each group having separate employers. Those employed by the Government are civil servants who are annually paid and in respect of whom are applicable the Public Service Regulations and Staff Orders and certain Orders made and circularised by the Minister of Finance and the Public Service. On the other hand the doctors in the other group employed by the the Hospital are not civil servants although the affidavit evidence shows that the Junior Doctors Association negotiates with the Ministry of the Public Service and the Ministry of Health terms and conditions of service on behalf of all junior doctors.

Examination of Claim for the first declaration

Because of the dichotomous division of the junior doctors I will treat each group separately as I examine each declaration I am asked to make. With regard to junior doctors employed as civil servants it is important to examine the nature of the relationship at common law between civil servants and the Crown to see to what extent, if at all, statute, the Staff Orders and Circulars issued pursuant thereto have modified or abrogated that relationship.

At common law a civil servant holds office at the pleasure of the Crown, is dismissible at pleasure and in general he has no legal right to any of the conditions of his service. Although his relationship with the Crown may in exceptional cases be contractual, this is not usually the case because essentially his employment depends not on contract with the Crown but on appointment by the Crown: Inland Revenue Commissioners v. Hambrook [1956] 1ALL E.R. 807 at 812A. So, for instance, he cannot maintain an action for a declaration as to his entitlement to a pension from the Crown because he has no legal right to receive such a pension unless he has been specifically granted a retirement allowance by statute, in which case he may establish his rights by a declaration: Nixon v. Attorney General [1931] AC 184 and Wigg v. Attorney General for the Irish Free State [1927] AC 674.

However in Kodeeswaran v. Attorney General of Ceylon [1970] AC 1111 (P.C.) the appellant, a civil servant in Ceylon, sued the respondent, as representing the Crown, for the balance of salary due to him as an increment but which the government of Ceylon denied to him. The question the Judicial Committee of the Privy Council had to determine was whether the appellant was entitled to maintain his action.

The Board held that under the common law of Ceylon an action did lied at the suit of a civil servant for remuneration agreed to be paid to him by the terms of his appointment and remaining unpaid as arrears of salary which accrued during the currency of his employment. Their Lordships disapproved of the judgment of the Privy Council in the Indian case of High Commissioner for India v. Lall [1948] L.R. 75 I.A; 225 in so far as it adopted Lord Blackburn's reasoning in the Scottish case of Mulvenor v. Admiralty [1926] S.C. 842 to the effect that because the Crown has power to determine the employment of a public servant such a worker has no enforceable right to salary for services rendered. Their Lordships indicated that that portion of the judgment in Lall's case adopting Lord Blackburn's reasoning was given **per incuriam** as the current of authority to the contrary which their Lordships approved appeared not to have been cited to the Board in Lall's case.

Kodeeswaran's case was concerned with the question of the right of a crown servant to sue for arrears of pay and dealt with no other conditions of service. In my opinion that case appears to establish no more than this, that at common law a civil servant can maintain an action for arrears of salary due to him during the currency of his employment.

Therefore, the rule at common law, as I understand it, is that a civil servant has no legal right to any of the conditions of his service except, it would seem to arrears of pay earned during the currency of his employment.

Do the Staff Orders and the Circulars issued thereunder on which Mr. Rattray relied alter the common law position? Issued by the Minister with responsibility for the Public Service in his executive capacity, the Orders etc. set out the terms and conditions for civil servants and they deal with such matters as hours of work, leave of absence and salary and allowances.

So far from abrogating or modifying the common law doctrine the Orders and the Circulars made thereunder reflect, or at all events do not affect, the doctrine since Staff Order para. 1.3 (ii) stipulates that the provisions of the Staff Orders do not constitute a contract between the Crown and it servants.

There being no contract in that regard, unless constitutional or statutory provisions stipulate otherwise, the common law position would be applicable and would give no protection or recognition to the plaintiff's claim against the government to a 8 hours day 40 hours work week. However, as Mr. Robinson pointed out in argument constitutional and statutory provisions in the laws of this country and of other independent Caribbean States as well as of the United Kingdom have eroded much of the common law position.

The Constitutions of Jamaica and of other independent Caribbean countries which follow the Westminster model have established autonomous Police and Public Service Commissions and have entrenched the right of the individual to equality of treatment from any public authority. As a consequence the power to dismiss or remove vests only in those Commissions.

They can dismiss or remove only for cause because dismissal at pleasure or whim is the negation of equality of treatment: see Thomas v. Attorney General of Trinidad and Tobago [1982] AC 113 (P.C.)

The Jamaican civil servant has a statutory right to his emoluments, for the Civil Service Establishment Act and Orders made under it provide for his salary and where applicable his allowances such as housing and entertainment. Under that Act the allowances, be it noted, do not include "emergency duty allowance" or any of the conditions of service in respect of which the declarations relating to hours of work and overtime are sought.

The Minimum Wage Act and the Orders made under it and on which the plaintiffs also rely do not establish a normal working day of 8 hours or a normal working week of 40 hours for the category of workers in which junior doctors fall. Further, the National Minimum Wage Order 1975 as amended defines "normal working day" in relation to any worker as any day on which that worker is normally required to work for his employer but does not include (a) a rest day or (b) a public holiday. As Mr. Robinson submitted the expression "normal working day" is merely used in the Order in contradistinction to a rest day or a public holiday and in no way signifies what is normality as to hours of work. As to what constitutes normal working hours the Orders are silent. It is also clear that the Orders make no mention of normal working week or as to the hours that would constitutes a normal working week in respect of workers other than household workers.

So the minimum wage legislation does not vindicate the junior doctors disputed claim to a 8 hour a day, 40 hour work week.

True, under our Labour Relations and Industrial Disputes Act, industrial disputes between the government and civil servants can in certain circumstances be referred to the Industrial Disputes Tribunal which would then in general have power to make an award. Yet, our legislation stops short of legislation such as exists in the United Kingdom which enables the Crown as employer and representatives of its staff to conclude legally binding collective agreements which would give those representatives standing to sue for breaches of any conditions of service covered by those agreements.

Moreover, under that legislation a civil servant has a right to · · bring on action for unfair dismissal or to sue on his conditions of service with the result that the situation is vertually the same as that of the employee of any ordinary employer.

On the other hand none of our legislative enactments gives civil servants any entitlement against the Crown to normal hours of work or to normal working hours of 40 hours weekly with a working day of 8 hours. Nor as I said earlier is there any such legal entitlement under the Staff Orders and the Circulars made thereunder. Equally the common law gives no entitlement to any of the conditions of service of a civil servant except perhaps arrears of salary.

Nevertheless, even if the provisions of the Staff Orders and the relevant Circulars made under them are enforceable as a matter of law, I agree with Mr. Robinson that they do not as a matter of fact support the claim to normal hours, or for the particular hours so claimed as constituting working hours for junior doctors in the government service. Paragraph 4 of Circular dated 21st May, 1976, the last of the four Circulars in question, states that that Circular supercedes the other three Circulars previously issued.

As a matter of history the first Circular dated 12th April, 1973 established a 5 day working week with hours of work for annually paid staff commencing at 8:30 a.m. and concluding at 5:00 p.m. from Mondays to Thursdays and 8:30 a.m. to 4:00 p.m. on Fridays. Here the hours of work did not infact constitute a 40 hour working week but a working week of 41½ hours or 36½ hours excluding meal time. The second Circular dated 8th May, 1973 effected certain modifications in respect of weekly and daily paid staff - which would not apply to annually paid staff such as junior doctors. However, paragraph 2 of that Circular provided that where it was necessary arrangements should be made to reduce the work week of annually paid staff to 5 days of 40 hours exclusive of meal time. Therefore, up to the date of that Circular it is plain that a 40 hour week had not been established for annually paid staff. The third Circular of 3rd September, 1973 was concerned with determining matters related to overtime for weekly and daily paid workers working beyond a 5 day working week.

The aforesaid fourth and current Circular of 21st May, 1976 establishes for weekly and daily paid staff a work week of 5 days of 8 hours a day, 40 hours a week exclusive of meal time. It also stipulates that work performed by those categories of staff will attract overtime at the normal rates.

Paragraph 3 of that Circular appears at first blush to support the plaintiff's claim on behalf of the junior doctors employed as civil servants. It in fact does nothing of the sort. The paragraph reads as follows:

> "Where feasible, arrangements should be made to ensure that the work week of annually-paid staff is five days of 40 hours exclusive of meal time. This of course will not apply to those categories of employees the nature of whose duties are such that they may be and often are required to work in excess of 5 days and 40 hours per week. There has been no change in the existing policy where overtime is <u>not paid</u> where annually paid staffers required to work in the exigencies of the service in excess of a five day 40 hour week."

I draw the following inescapable conclusions from the paragraph in the context of this and earlier Circulars:

(a) Up to 21st May, 1976, the dates of the fourth Circular, a work week of 5 days of 40 hours for annually paid staff in the civil service had not been established. Otherwise the first sentence of the paragraph would be otiose and would not be prospective in its scope;

(b) junior doctors though annually paid staff would not, in any event, be properly included in any arrangement for the establishment of a 8 hour a day 40 hour work week. The reason is that belong to a category of annually paid staffers in respect of whom it is a notorious fact that by virtue of the nature of their duties they may be and often are required to work in excess of a 5 day 40 hour work week;

(c) Those annually paid staffers whose work is not such that they may be and often are required to work in excess of a 5 day 40 hour week would still not be paid overtime where they are required to work in the exigencies of the service in excess of a 5 day 40 hour week.

In my opinion paragraph 3 of the 1976 Circular is consistent with Staff Order 3.1 which states:

> "The hours of work of public officers shall be as determined by the Minister responsible for the Public Service for each category of staff. No permanent alteration of the determined hours of work of any category of public officers may be effected unless the minister responsible for the

> Public Service so approves, but Heads of Departments may require any or all of the staff of their Departments to work temporarily for longer hours than those determined whenever the public interest makes this desirable."

It is therefore plain that the Minister of the Public Service or his Permanent Secretary is the competent authority to detemine hours of work of civil servants. Yet, there is no evidence that any such determination has been made in respect of annually paid staff which includes junior doctors. The 1976 Circular is the last Circular on the point and it made no such determination.

Whereas, Staff Order 3.1 prohibits any permanent alterations of the determined hours of work without the approval of the Minister, it allows a Head of Department where the hours of work have been determined, (and only in such case) to require in the public interest his staff to work temporarily for longer hours than the determined hours.

The Circular of 20th July, 1985 from the Permanent Secretary on which the Plaintiffs rely therefore flies in the face of and is ultra vires the 1976 Circular and Staff Order 3.1 which purports to rely on.

The Circular of 20th July, 1985 provides in part:

> "...
>
> In accordance with Staff Order 3.1 it has been decided that Medical Officers should with immediate effect work longer hours in excess of their normal working hours, the periodicity of such hours to be determined by the Head of their Institutions or Unit.
>
> This measure has become necessary in the present situation to safeguard the public interest, and will be for a period of two (2) weeks..."

There is no foundation for the operation of that Circular since the combined effect of the 1976 Circular and Staff Order 3.1 are "(a) that the normal working hours for junior doctors in the civil service and for other annually paid civil servants have not yet been fixed; (b) normal working hours for civil service junior doctors comprising a 8 hour day 40 hour work week cannot properly be fixed in any arrangements made subsequent to the 1976 Circular unless by a Circular issued by the competent authority superceding the 1976 Circular.

Now, do junior doctors employed by the Hospital have normal working hours? The defendants say that they do not. The plaintiffs have not proved that the normal working hours that they say these doctors have are 40 hours a week. Dr. Pottinger deposes that their normal working hours are 8:30 a.m. to 5:00 p.m. on week days. But if one excludes meal time then on that basis those hours amount not to 40 hours but to 37½ hours. Then too, unless statute otherwise provides, the parties to a contract as in the case of the junior doctors employed to the Hospital are free to negotiate their own terms including terms as to normal hours of work. Statute in no way proscribes that right. But neither does statute so far as these doctors are concerned provide for normal working hours. Indeed, as Mr. Goffe submitted the law does not uniformly provide for normal working day or week for all categories of workers in Jamaica. The law has not done that except in the case of specified categories such as household workers.

I have examined the exhibited specimens of the contracts between the Hospital and the junior doctors it employs. None of the contracts provides for normal working hours. This is not surprising because of the nature of the work doctors do. It is therefore plain that junior doctors employed by the Hospital as well as those employed in the civil service do not have normal working hours.

Application for Second and Third Declarations

There is no general automatic right to overtime in Jamaica. Overtime is only payable if the employee has a contractual or statutory right to it and the employer has a correlative contractual or statutory obligations to pay it.

The plaintiffs have not shown that junior doctors are entitled by way of contract to overtime pay. However, the plaintiffs say that the doctors have a statutory right to overtime pay by virtue of the provisions of the National Minimum Order 1975 (as amended) and the Income Tax (Special Rate for Overtime Work) Regulations 1983 made under the Minimum Wage Act and the Income Tax Act respectively.

The National Minimum Wage Order 1975 (as amended) undoubtedly applies to junior doctors employed by the Hospital. Mr. Robinson however, argued with force that that Order does not apply to junior doctors in the civil service. I do not consider it necessary to decide the point and I will assume for the purposes of these proceedings that the Order also applies to junior doctors in the civil service. I will therefore examine the Order to see whether it gives the rights contended for by the plaintiffs.

Paragraph 4(1) of the National Minimum Wage Order as amended by the National Minimum Wage (Amendment) Order 1988 provides:

> "... with effect from the 6th day of June, 1988, the national minimum wage for workers other than household workers is hereby fixed at the rate of -
>
> (a) $2.00 per hour for work done by those workers during any period not exceeding -
> (i) 8 hours on a normal working day; or
> (ii) 40 hours in any week;
>
> (b) $3.00 per hour for work done by those workers during any period in excess of 8 hours on a normal working day or in excess of 40 hours in any week;
>
> (c) $4.00 per hour for work done by those workers during any period on a rest day or a public holiday."

What is manifest about the Order is that it is designed to create a national minimum wage not to require the payment of overtime, which is a word that is not defined or mentioned in the Order. Indeed, our minimum wage legislation does not create any legal requirement for the payment of overtime except where overtime is expressly dealt with, as in the case with the earlier and Specialist National Minimum Wage (Garment-Making) Order 1974 which expressly defines overtime work and makes a minimum wage payable in respect of such work to certain categories of workers in a garment-making establishment.

The construction the plaintiffs put on the clear and unambiguous words of paragraph 4(1) of the Order has only to be stated to be rejected. They ask that I construe the sub-paragraph to mean that the second and third rates of remuneration provided therein signify remuneration for overtime on the basis of time and a half and double time respectively.

The sub-paragraph permits of no such interpretation. I agree with the defendants that it would be impermissible to extrapolate from the rates a formula of time and half of remuneration for work done in excess of a 8 hour a day on a normal working day or 40 hours in any week and double time for work done on a rest day. The Order plainly fixes minimum rates below which an employee should not be paid and as junior doctors are paid above those rates the defendants have not breached the law.

Now, the doctors are paid what is called an emergency duty allowance. This is regulated by a duty roster by which they are required to perform duties for specified hours beyond 8 hours a day or 40 hours a week. They receive the allowance even if they perform no emergency duties, provided that they are on call to perform emergency duties beyond the aforementioned hours.

The plaintiffs contend that emergency duty and overtime are one and the same, that is it is work done in excess of 8 hours per day or 40 hours per week and that the employers are obliged to pay the doctors for the work they do beyond those hours. Regulation 3 of the Income Tax (Special Rates for Overtime Work) Regulations 1983 provides:

> "Where an employer pays wages for overtime work in accordance with the Regulations ... income tax shall be levied at the lowest rate applicable under section 30 of the Income Tax Act ... upon that part of the wages which is attributable to such overtime work."

That Regulation proceeds on the basis that an employee is already legally entitled to overtime and that the employer has a corresponding obligation to pay wages for such overtime work. The right to overtime pay must be established by either contract or statute before the employee can as a matter of law take advantage of the concession conferred by Regulation 3. The plaintiffs have failed to establish that right. The approval of the Minister of Finance for the 30% tax concession granted under the Regulations to be applied to the emergency duty allowance is an administrative arrangement and in no way establishes any legal entitlement in the doctors to overtime pay for work done in excess of 8 hours a day or 40 hours a week.

Finally the plaintiff contend that by virtue of custom and industrial relations practice in Jamaica the doctors have a legal right to be paid overtime for hours worked in excess of 8 hours a day or 40 hours a week.

Clive Dobson, Vice President of the National Workers Union states in his affidavit that by custom and practice in the field of industrial relations overtime is paid at time and a half of normal pay for time worked in excess of the normal working day and double time on week-ends and public holidays. He deposes as to the rates at which overtime is payable according to custom and industrial relations practice. He makes no attempt to address the question of entitlement to be paid for overtime work. Custom is only relevant in interpreting a contract if it exists. As I said before, as far as junior doctors employed by the Government are concerned their is nothing by way of contract or the Staff Orders that would give them a right to overtime pay. I have also indicated that the contract between the Hospital and the junior doctors it employs makes no provision for overtime. Nor as I have found is there any statutory right to overtime on which junior doctors whether employed by the Government or the Hospital can rely.

What it comes to then, is that the application for the declarations fails because the entitlement that the plaintiffs seek on behalf of the junior doctors have no protection in law.

Accordingly I dismiss the summons with costs to the defendants to be taxed if not agreed.