

AMS

SUPREME COURT CIVIL APPEAL 86/ 2003

BETWEEN: BEATRICE McKENZIE
PAMELA WRIGHT
BETSY JONES
DESMOND CARTY
CARLTON CAMPBELL
ORRETT HARRISON

APPELLANTS

AND: THE ATTORNEY GENERAL
OF JAMAICA

RESPONDENT

Patrick Foster, Deputy Solicitor General, and Miss Stacian Bennett, instructed by the Director of State Proceedings, for the respondent.

July 18 and 19, 2005 and March 22, 2006

PANTON, J.A.

1. This appeal is from a judgment delivered by Mrs. Justice Cole-Smith in the Supreme Court on July 18, 2003, wherein she granted two declarations that had been sought by the Attorney General. By means of an originating summons, the

Attorney General sought the determination of the Court "on the following questions and the following relief, namely:

1. A declaration as to whether the respondents were entitled to earn and accumulate vacation leave and to be paid salary in lieu of vacation leave in relation to the period during which they were on interdiction.
2. A declaration as to whether Public Officers are entitled to earn and accumulate vacation leave and to be paid salary in lieu of vacation leave in relation to periods during which they are on interdiction".

2. The learned judge determined the matter in this way:

"The originating summons posed two questions and the answers are in favour of the applicant. The declaration sought is granted in the following terms:

'That the respondents as public officers were not entitled to earn and accumulate vacation leave and to be paid salary in lieu of vacation leave in relation to the period during which they were on interdiction'."

In arriving at this position, having heard submissions from the parties, she said:

"The important fact however to be addressed is whether a public officer who is re-instated is entitled to have all the rights of vacation attributed to him as if he was at work. This would defeat the purpose of an interdiction, which is to provide the public officer with a portion of his salary paid to him so as to enable him to attend the various criminal and procedural proceedings before re-instatement or ultimate dismissal. This is the intelligible way to interpret the relevant Regulations and Staff Orders".

3. The originating summons which was filed on September 3, 2001, arose from a set of facts sworn to by Patricia Richardson, Deputy Financial Secretary in an affidavit dated August 16, 2001. Ms. Richardson said that the appellants were customs officers governed by the Staff Orders for the Public Service. These officers were charged as long ago as 1993 with criminal breaches of the Customs Act. They were interdicted from duty and during the period of interdiction they received one-quarter of their pay. The charges were not established so the respondents were reinstated and given their full pay for the period they were on interdiction. Ms. Richardson referred the matter to the Solicitor General when the appellants sought salary in lieu of the vacation leave they would have earned during the period of the interdiction. Her understanding was that it had never been the policy or practice for public officers to be allowed to accrue vacation leave or be paid in lieu thereof while on interdiction. The Solicitor General advised the seeking of the Court's guidance in the matter.

4. Two of the appellants (Beatrice McKenzie and Pamella Wright) filed affidavits for the Court's consideration. They stated that they were arrested on June 24, 1993, and charged with breaches of section 210(1) of the Customs Act, specifically with being knowingly concerned in the fraudulent evasion of import duties relating to the importation of motor vehicles. On May 8, 1997, the prosecution withdrew the charges. That was not the end of the matter, as on October 22, 1997, disciplinary proceedings were instituted against them for negligence in the performance of their duties. More than two years later, the

Office of the Services Commission, by letter dated November 1, 1999, advised them that the charges had not been established. On November 9, 1999, they were advised that they were to be reinstated.

5. In the case of Beatrice McKenzie, she had made a written request in or about April, 1993, for all vacation leave due to her which had accrued since 1990. She intended to proceed on leave during July, 1993, and to travel overseas with her son. Her superior officers requested her to reorganize her vacation plans for August, instead of July, due to the exigencies of the service. This, she did, but she was arrested before she could proceed on leave.

6. The grounds of appeal have been set out in the judgment of Harris, J.A.(Ag.). They challenge the learned judge's interpretation of the relevant sections of the Public Service Regulations, 1961 (particularly sections 32 and 37) and Staff Orders 5.1, 5.19 and 29 which govern the terms and conditions of the service of a public officer. The appellants have put forward an interpretation of the provisions that would see them as public officers earning and accumulating vacation leave during the period of interdiction, so that if it turned out that there was no proper basis for the charges that led to the interdiction, they would not suffer any loss thereby.

7. The Deputy Solicitor General submitted that section 32(4) of the Public Service Regulations outlines the entitlements of an officer who is re-instated after interdiction. The right to earn or accumulate vacation leave is not one of

those entitlements, so the learned judge was correct in her ruling, he said. The relevant portions of section 32 are as follows:

"32. (1) Where –

(a) disciplinary proceedings; or

(b) criminal proceedings

have been or are about to be instituted against an officer, and where the Commission is of the opinion that the public interest requires that that officer should cease to perform the functions of his office, the Commission may recommend his interdiction from the performance of these functions.

(2) An officer so interdicted shall... be permitted to receive such proportion of the salary of his office as the Commission shall recommend to the Governor-General.

(3)...

(4) Where disciplinary proceedings against an officer under interdiction from duty result in his exculpation, he shall be entitled to the full amount of the salary which he would have received had he not been interdicted..."

8. It seems that the focus, rather than being on the entitlements after reinstatement, ought to be on the entitlements prior to the interdiction. In that regard, the Staff Orders are of importance. Staff Order 5.1, dealing with leave of absence, states:

"Public Officers shall be entitled to leave as set out in this Chapter. However, the grant of leave shall be subject to the exigencies of the Service and to the provisions of these Orders."

The entitlement to leave is unqualified. However, the grant of leave is qualified to the extent that it is subject to the demands of the public service. A public officer may not proceed on leave at any time that he wishes; there has to be some consideration given to the proper functioning of his office. In addition, if there is an emergency requiring the presence of the officer, the grant of leave is subject to that situation.

9. Staff Order 5.19 directs attention to Schedule A at the end of the Chapter. The Schedule indicates the extent to which leave may be accumulated. However, the said Staff Order provides that "officers who accumulate leave should clearly understand that there can be no guarantee that when the maximum leave is accumulated such leave will be granted as from the date it is requested". In respect of accumulation beyond the maximum, Staff Order 5.24 sets out the conditions that are to be satisfied.

10. As noted earlier, section 32(1) of the Public Service Regulations provides for the interdiction of the officer while section 32(2) provides for the reduction in "salary". If it was intended that the interdiction was to have the effect of reducing or erasing the entitlement of leave, the necessary language would have been employed. Section 32(4) goes on to provide that where the officer on interdiction has been exculpated, he is to be paid the full amount of salary which he would have received had he not been interdicted.

11. In my view, the interdiction of an officer affects only his salary in the first instance. If he is found guilty on the charges which gave rise to his interdiction, then his entire status in the public service would be affected and consequently he would lose other entitlements. This is so because the interdiction would have been proven as properly done. If he is found not guilty, then it means that he was interdicted on charges that have not been substantiated. He becomes entitled to his full salary, as stated in section 32(4). The reason for the absence of any statement as to any other entitlement is that the officer had not lost anything else. There is no provision that dictates that the officer should have lost any other entitlement. In that situation, therefore, no other entitlement having been lost, the officer is entitled to receive all benefits that would have accrued, had it not been for the interdiction.

12. In my opinion, the legislature did not use any words that would bring about the result contended for by the Deputy Solicitor-General. It is unthinkable that the legislature would have intended that a public officer who has been wrongly accused should, on vindication, be further unjustly treated by the withdrawal of his entitlements.

In the circumstances, I am of the opinion that the appeal ought to be allowed, and a declaration made that the appellants are to be regarded as having been entitled to earn and accumulate vacation leave during the period that they were on interdiction.

K. HARRISON J.A.

I have read in draft the judgments of Panton, J.A. and Harris, J.A. (Ag.). I agree with their reasoning and conclusions and have nothing further to add.

HARRIS, J.A. (Ag.)

This is an appeal from a decision of Mrs. Justice Cole-Smith, making a declaratory order that the appellants were ineligible to earn and accumulate vacation leave and be paid salary in lieu thereof during a period of interdiction.

The appellants are public servants and at the material time were assigned to the Department of Customs. On June 24, 1993 they were arrested and charged with breaches of section 210 of the Customs Act. After 13 attendances at the Corporate Area Resident Magistrate's Court the charges against them were withdrawn on May 8, 1997.

On October 26, 1997 disciplinary charges were instituted against them in relation to the circumstances which had resulted in their arrest. They were interdicted from duty during the period which the criminal and disciplinary charges were pending. During the period of interdiction, they received one quarter ($\frac{1}{4}$) of their salaries.

None of the charges laid against them was established. They were reinstated on November 1, 1999. At that time they were paid the additional salaries which had been withheld. On resumption of duties, they claimed that

they were entitled to receive payment in lieu of vacation leave which they would have earned, had they not been interdicted.

The respondents subsequently issued an Originating Summons in which the following declarations were sought:-

1. "A declaration as to whether the Respondents were entitled to earn and accumulate vacation leave and to be paid salary in lieu of vacation leave in relation to the period during which they were on interdiction.
2. A declaration as to whether Public Officers are entitled to earn and accumulate vacation leave and to be paid salary in lieu of vacation leave in relation to periods during which they are on interdiction."

The learned trial Judge made the following order:

"The Respondents as public officers were not entitled to earn and accumulate vacation leave and be paid a salary in lieu of vacation leave in relation to the period during which they were on interdiction."

Five grounds of Appeal were filed. They are as follows:-

GROUND 1

"The learned trial Judge failed to properly consider and evaluate or evaluate properly the submissions particularly the submissions presented on behalf of the 1st, 2nd, 3rd and 4th Respondents which were not the submissions made on behalf of the 6th Respondent as stated in her judgment."

GROUND 2

"The learned trial Judge failed to properly consider and give due weight and consideration to the submissions made by Counsel on behalf of the 1st, 2nd,

3rd and 4th Respondents in particular the distinction made between a period of interdiction and a period of vacation."

GROUND 3

"The learned trial Judge erred in finding that a period of interdiction and vacation leave are equatable."

GROUND 4

"The learned trial Judge failed to evaluate or properly evaluate the relevant Sections of the Public Service Regulations 1961 and the Staff Orders."

GROUND 5

"The learned trial Judge erred in law in her interpretation of the relevant sections of the Staff Orders and Public Service Regulations to wit Section 5.1, 5.19 and 29 of the Staff Orders and Section 32 and 37 of the Public Service Regulations."

Mr. Miller argued that the learned Trial Judge accepted Respondent's submissions by rendering a period of interdiction equivalent to a period of vacation leave. He further submitted that vacation leave is voluntary, involving an intermission from duty, while interdiction incorporates the compulsory removal of an officer from duty pending investigations into charges against him, which, is somewhat penal.

It was argued by Mr. Foster that interdiction is not punitive by nature. He submitted that it was a process imposed upon a public officer, administratively, in the public interest, while he faces criminal or disciplinary charges, in that, he

was removed from work pending proceedings against him. It was also his submission that a period of interdiction and vacation leave are periods of absence of the employee from work with the consent of the employer.

The learned trial Judge, in dealing with the issue as to whether vacation leave is synonymous with a period of interdiction, declared as follows:-

"The Solicitor General equates interdiction and vacation leave as they involve the employee being away from work with the employer's consent. An interdiction is recommended and compulsory absence while vacation is requested and voluntary absence."

This submission she accepted.

It is perfectly true that vacation leave and a period of interdiction amount to absence from work. It is equally true and there can be no dispute that both comprise absence from work with the employer's approval. However, it does not necessarily follow that an employee's absence from work with the employer's consent, on vacation leave, corresponds with his absence by virtue of interdiction.

In considering this issue, I think it apt to refer to certain provisions of the Public Service Regulations and the Staff Orders of 1976 made under these Regulations.

Section 32 (1) of the Public Service Regulations state:

- "32 – (1) Where ---
- (2) disciplinary proceedings; or
- (3) criminal proceedings,

have been or are about to be instituted against an officer, and where the Commission is of the opinion that the public interest requires that that Officer should cease to perform the functions of his office, the Commission may recommend his interdiction from the performance of these functions."

Chapter V of the Staff Orders deals with the entitlement of public officers to leave. It also stipulates certain pre-requisites and conditions governing vacation leave.

What is the meaning to be ascribed to the words, "vacation leave" and the word "interdiction?" The golden rule of construction is that words should be given their natural and ordinary meaning. A well-known dictionary may be utilized in aiding the construction of words.

In ***Marquis Camden v. Commissioner of Inland Revenue [1914] 1 KB 649 at 649 & 650 Eady J*** said:

"It is the duty of the court to construe a statute according to the ordinary meaning of the words used, necessarily referring to dictionaries or other literature for the sake of informing itself as to the meaning of any words."

Reference to the Oxford English Dictionary 1st Edition ("the dictionary") Volume XII, an authoritative dictionary, reveals several definitions of the word 'vacation.' As it is a word commonly used to denote a period of leisure, a respite from ordinary duties, I am content to adopt the dictionary's first definition of the word, which is, "freedom, release from occupation, business or activity." That dictionary, Volume VI primarily defines the word "leave" as "permission asked for, or granted to do something."

In my view, "vacation leave" ought to be interpreted as a period of absence from work or duties for recreation or rest, permitted upon request. This is the meaning which Chapter V. of the Staff Orders intends to convey.

The dictionary Volume V describes "interdiction" as "the action of forbidding by, or by authority; authoritative or peremptory prohibition." I think this is the meaning of "interdiction" within the purview of section 32 (1) of the Public Service Regulations.

A public officer may elect when he proceeds on vacation leave. This clearly denotes that he does so devoid of compulsion or constraint. I am mindful that by Order 5.23 of the Staff Orders, a Permanent Secretary may direct an officer to proceed on vacation leave at any time. However, such officer is not compelled to take leave if he does not so desire.

In contrast, an officer who is placed on interdiction is bound to cease performance of his duties. He does not have the option to choose whether he remains on duty. He is compulsorily removed from duty.

Further, an officer on vacation leave is entitled to receive his full salary. On interdiction he is not accorded the right to the receipt of full salary by virtue of sections 32 (2) and (3) of the Public Service Regulations which read:

"32(2) An officer so interdicted shall subject to the provisions of regulations 36 and paragraph (3) hereof be permitted to receive such proportion of the salary of his officer as the commission shall recommend to the Governor General."

Section 32 (3) states:-

"The proportion of salary referred to in paragraph (2) shall be related to the nature and circumstances of the charge against the officer, so, however, that ---

- (a) Subject to sub-paragraphs (b) and (c), the proportion shall not be less than one-half;
- (b) Subject to sub-paragraphs (c), where the charge involves an allegation of defalcation, fraud or misappropriation of public funds or public property, the proportion shall not be less than one-quarter; and
- (c) Where special circumstances exist which in the opinion of the Public Service Commission justify such action, the Commission may recommend to the Governor General that salary be paid at a proportion less than one-quarter or entirely withheld."

Under Section 36 of the Act, on conviction, the officer is not entitled to receive emoluments pending determination of his case by the Public Service Commission.

Section 36 provides:

"An officer convicted of a criminal charge involving dishonesty, fraud or moral turpitude or convicted of a criminal charge and sentenced to imprisonment shall not receive any of his emoluments after the date of such conviction pending consideration of his case by the Commission."

There is obviously a marked distinction between vacation leave and interdiction. The appellants were mandatorily required to be absent from duty

by virtue of being placed on interdiction. They did not enjoy the benefit of full salaries while on interdiction as they would, had they been on vacation leave.

In my judgment, it is erroneous to regard vacation leave as being akin to a period of interdiction. The learned trial judge had clearly erred in concluding that vacation leave is equivalent to a period of interdiction.

It was further argued by Mr. Miller that it was not the intention of Parliament to disqualify the appellants from the right to vacation leave during interdiction. He further submitted that they would have enjoyed all benefits of employment as public officers. It was also argued by him that provision would not have been made for full payment of salaries on their exoneration from interdiction if it was intended to deprive them of the right to vacation leave.

Section 32 (2) of the Public Service Regulations as earlier indicated, provides for the retention of a part of an interdicted officer's salary. Section 32 (4) makes provision for the payment of such portion of the salary retained, on an officer's exculpation from interdiction.

This section states:-

"32 (4) Where disciplinary proceedings against an officer under interdiction from duty result in his exculpation, he shall be entitled to the full amount of the salary which he would have received had he not been interdicted, but where the proceedings result in any punishment other than dismissal the officer shall be allowed such salary as the commission may in the circumstances recommend."

It is manifest that a public officer, exonerated from disciplinary and or criminal charges is entitled to such proportion of his salary which has been withheld. Does the fact that the officer is entitled to the outstanding balance of the salary retained, means that he is also entitled to vacation leave during interdiction? The answer may be found in the construction of Section 32 (4) of the Public Service Regulations and in Chapter V of the Staff Orders so far as it makes reference to vacation leave.

In construing an enactment, the dominant purpose is to discover the intention of the legislature. If words used in a statutory instrument are plain and unambiguous, they must be given their natural meaning. They must be applied as they stand, and must be taken to have been the intention as expressed by Parliament. The foregoing was exquisitely summed up by Lord Simon of Glaisdale in the case of ***Lord Advocate v de Rosa & Anor (4) [1974] 2 All ER 863*** when he said:-

"Justice is more likely to be served, as well as constitutional propriety to be observed, if Parliament is given credit for the meaning of what she said."

As it is the duty of the Court to give effect to the intention of Parliament, words cannot be imported into an enactment to modify or alter the language contained therein. In ***Re Debtor (No. 335 of 1997) ex parte H.M. The King v The Debtor [1948], 2 All ER 536,***

Lord Green said:

"If there is one rule of construction for statutes and other documents, it is that you must not imply

anything in them which is inconsistent with the words expressly used."

I think, however, that in my quest for the true intention of Parliament I am obliged, in examining the Public Service Regulations and Chapter V of the Staff Order, to look for a possible meaning of the words used in these instruments and interpret them so as to obviate any inequity. It is presumed that Parliament does not intend its legislation to be the product of highly unjust results.

The learned trial judge found that an absurdity and an unworkable situation would result if the appellants were permitted to earn vacation leave. She also found that payment of part of the salary on interdiction, is to enable an officer to attend criminal and disciplinary proceedings prior to reinstatement or dismissal while on interdiction. With these findings, I am constrained to disagree.

On being reinstated, following interdiction, an officer is entitled to receive all the salary which had been retained, as ordained by section 32 (4) of the Public Service Regulations. Does 'Salary' include all benefits which an officer ought to receive? Although Mr. Miller contended that it does, Mr. Foster argued that it does not and in citing a dictum of ***Viscount Haldane in Railway Clearing House v Druce TLR at 664***, said, in relation to salary, "it is a contractually secure payment that excludes bonuses."

"Salary" as defined by the dictionary means "fixed payment made by an employer at regular intervals." A bonus, therefore could not be classified as

salary. It is gratuitous by nature, payable at the discretion of the employer. Consequently, no general contractual obligation would arise on the part of the employer, to pay a bonus.

What is of importance is whether there are benefits such as salary which accrue to the employee by virtue of his contract of employment. The case of **Railway Clearing House v. Druce** (supra) appears to demonstrate that where the word "salary" is used, the court is authorized to construe it as something to which a person is entitled by virtue of his contract. In **Adams v Liverpool Corporation (1927) 137 Lt 396 at 397 Banks, LJ** said:-

"... I think Druce's case does establish that where the word 'salary' or 'pay' or 'wages' is used you are entitled to interpret that language as meaning something to which a person is contractually entitled."

The appellants were by their contract entitled to be paid salary on reinstatement to their posts. Was vacation leave something to which they also had a right contractually?

A right to vacation leave accrues to a public officer by virtue of his contract of employment. Chapter V of the Staff Orders, in outlining provisions with reference to leave of absence, affords vacation leave to an officer during his tenure of office, prior to resignation and on dismissal. Even upon death, his legal personal representatives would be entitled to such salary which he would have earned by way of vacation leave. The Chapter also specifies certain terms and conditions under which vacation leave may be computed and granted, including the right to accumulate it.

It is of significance, that Order 5.19 specifically refers to certain periods which cannot be factored into the computation of vacation leave. Order 5.19 reads:-

"Officers will not be allowed to earn vacation leave during periods of sick leave and vacation leave exceeding fourteen (14) days respectively. Good Friday, Christmas Day and Public Holidays shall not be reckoned in the granting of vacation leave."

Order 5.19 expressly excludes the periods during which an officer is ineligible to earn vacation leave. If it had been the intention of Parliament that a period of interdiction should be excluded in respect of the grant of vacation leave, it would have so decreed.

Further, section 32 (2) of the Public Service Regulations having provided for the retention of a part of an interdicted officer's salary, if Parliament had intended that the officer ought not to benefit from vacation leave during interdiction, section 5.19 of the Staff Orders would have expressly so stated. Clearly, it would have made express provision depriving an officer of the right to vacation leave, if it was so intended.

Vacation leave being a benefit which enures to the appellants as public officers, by virtue of their contractual right, it would not have been Parliament's intention to deny them the right to such leave during a period of interdiction. It would not have been in the contemplation of the legislators to have conferred on them a general right of enjoyment of vacation leave yet deny them such right during interdiction, they having been absolved from interdictable charges. It is

my view that the appellants were entitled to earn and accumulate vacation leave up to the maximum of their grades during interdiction.

Although the appellants were at liberty to earn and accumulate vacation leave, a further question is whether they are entitled to be paid salary in lieu thereof. Order 5.24 of the Staff Orders provide:-

"5.24 (i) If an officer on the permanent establishment who has accumulated the maximum vacation leave in respect of his grade without having been granted such leave, should apply in writing, for the vacation leave to which he is entitled or some portion thereof, but is not granted such leave owing to the exigencies of the service, such officer shall be allowed, with effect from the date immediately after attaining the prescribed maximum accumulable for his grade. The amount of additional leave which may be so accumulated shall be limited to leave in respect of approval of the Parliament Secretary of the Ministry involved.

Whenever approval is given for the accumulation of vacation leave in accordance with this Staff Order the matter should be reported to the Permanent Secretary of the Ministry responsible of the Public Service.

(ii) Where an officer who has been allowed to accumulate additional vacation leave beyond the maximum accumulable for his grade in accordance with sub-section (1) of this Staff Order applies for vacation leave and is denied any leave whatsoever such officer may be given the option to accept salary in lieu of the additional leave earned beyond the maximum accumulable for his grade subject to the approval of the Permanent Secretary of the Ministry responsible for the Public Service."

It is clear from the foregoing that, on accumulation of vacation leave, an officer is not automatically eligible for the payment of salary instead of leave. The

appellant's eligibility for such payment would require them to have accumulated the maximum of 105 days vacation leave and submit a written application for such leave. If they were denied all or part of the maximum accumulated leave, they would then be permitted to further accumulate leave up to a period, not exceeding two (2) years. They may then be given the option to accept salary in lieu of the additional leave. However, payment of salary in lieu of additional leave is at the discretion of the Permanent Secretary under whose portfolio the Public Service Ministry falls.

The appellants have not demonstrated that they had fully met the requirements of Order 5.24. Consequently, they are not entitled to payment of salary in lieu of vacation leave.

It is of importance to note that effective January 1, 2004 the Staff Orders have been revised and Part 7.3 (111) thereof prescribes that Public Officers are not entitled to earn and accumulate vacation leave.

I would allow the Appeal with costs to the appellant.

PANTON, J.A:

ORDER:

1. The Appeal is allowed.
2. It is hereby declared that the Appellants are to be regarded as having been entitled to earn and accumulate vacation leave during the period that they were on interdiction.
3. Costs are awarded to the Appellants to be agreed or taxed.