J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 47/77

BEFORE: The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Carberry, J.A.

BETWEEN: THE NATIONAL WORKERS UNION - PLAINTIFF/APPELLANT

AND : HALF MOON BAY HOTEL - DEFENDANT/RESPONDENT

Dr. Lloyd Barnett and Mr. Enoch Blake for Plaintiff/Appellant.

Mr. Berthan Macaulay, Q.C., and Miss H. Phillips for Defendant/Respondent.

May 29, 30, 31; June 1, 2, 5;
July 12, 31

CARBERRY, J.A.:

On July 12, 1978, we allowed the appeal in this matter, set aside the judgment of the learned trial judge with respect to the second declaration sought by the plaintiff/appellant and granted that declaration - "That the plaintiff is at liberty before the 28th February, 1976, to enter into labour negotiations with the defendant on behalf of the workers of the Half Moon Hotel". We promised to put our reasons in writing and now do so.

Since 1962 the National Workers Union has represented the workers at the Half Moon Bay Hotel in negotiating a series of collective labour agreements, with the Hotel Management usually for two year periods.

It was a common feature or term of all these agreements:-

(a) that in it the employer recognizes the position of the Union as bargaining agent for the workers, and

(b) that during the time period of the collective labour agreement no fresh claims will be presented by the Union to the employers.

In 1974 - the term or period of the collective labour agreement then in force having expired, the Union and the employers entered upon the negotiation of a new collective labour agreement to cover the period 1974 - 1976.

On the 17th October, 1974, at a meeting at the Montego Bay offices of the Ministry of Labour and Employment the representatives of the Union and those of the employers settled the terms of a proposed further or new collective labour agreement; these terms still left outstanding some further details as to a medical plan to be worked out. The Union claims that this was a "draft" subject to ratification by the workers, and that when presented to the workers at a meeting held shortly after the 17th October, 1974, meeting, the workers rejected or refused to accept it and that they so notified the employers. The notification was apparently oral and not by letter, and the Union sought to continue the bargaining process. There is no evidence before us which shows whether or not in their past dealings with one another, the parties had operated on the basis that ratification by the workers was necessary before the agreement could be regarded as complete, or whether they had negotiated on the basis that the Union representatives could make a concluded contract that was binding on the workers. The employers on the other hand claimed that a concluded agreement had been reached at the meeting of the 17th October, 1974, and that under it no further claims could be made and no new bargaining commenced before 28th February, 1976. The note of agreement contained in the minutes of the meeting of 17th October 1974, in paragraph 4 do indicate that the Union's representatives said

they would have to seek the acceptance of the workers and would notify the employers by 24th October, 1974, if the terms were accepted or not. The employers say they got no such notification either way, and therefore assumed an accepted agreement. They therefore refused to continue the bargaining process in 1974. Further the employers, without the Union's consent, commenced payment of wages on the new scale.

There is no evidence that the workers themselves refused to accept the new wage scales or to accept the new benefits proferred to them, though the Union did not and it continued to assert that there was no collective agreement in force, and that the bargaining process should continue. With surprising and commendable restraint the Union refrained from taking what is now politely called "industrial action" to enforce their claim to continue the bargaining process; perhaps they may have feared that their principals - the actual workers - would not have been willing to support this position.

Instead the Union brought the present action on the 15th January, 1976 - shortly before the two year period of the 1974 agreement (if it was an agreement) would expire, and in it they claimed:-

(i) a Declaration that the 1974 "agreement" was not an agreement and that consequently they sought a second Declaration

(ii) to the effect that they were therefore at liberty before the 28th February, 1976, to enter into labour negotiations with the employers on behalf of the workers of Half Moon Bay Hotel.

It may perhaps be useful to set out the actual wording of the two Declarations claimed:-

" (1) A declaration that there is not a collective labour agreement due to expire on the 28th day of February, 1976 in force between the Plaintiff and the Defendant.

(2) A declaration that the Plaintiff is at liberty before the 28th day of February, 1976 to enter labour negotiations with the Defendant on behalf of the workers of the Half Moon Hotel. "

The employers resisted this claim and on the 18th February, 1976, filed a defence to the effect that "a clear and unequivocal agreement" was reached at the meeting of the 17th October, 1974, (apart from some minor unsettled details) and that there was therefore a collective labour agreement in force, not due to expire until the 28th February, 1976, and they asked the court to so find. Implicit in the defence was that if this was the true position, the Union was bound by the agreement to refrain from presenting any further or fresh claim before the 28th February, 1976, and was therefore entitled to neither Declaration.

Having regard to the fact that the 28th February, 1976, was at the time of the filing of the claim and the defence only a matter of a few weeks off, and that presumably in the fresh (or continued) labour negotiations then due to commence (or to be continued) depending on whether one takes the employer's (or the Union's) view, and that those negotiations could presumably have settled all outstanding differences between the Union and the employers, it is not easy to see what either side hoped to gain by an expensive court action at that stage. Perhaps however they were "jockeying" for what they thought would be a favourable position in the negotiations due to commence in March 1976.

It appears however that these fresh (or continued) negotiations did not take place; both sides apparently were content to wait upon the decision of the court in this litigation. Perhaps

a factor in their decision to use the court rather than the bargaining table was the passage of the Labour Dispute and Industrial Relations Act, 1975, Act 14/1975.

The matter came on for trial on these pleadings before Wright, J. on 24th October, 1977. The parties led their evidence and 'had their day in court'.

Wright, J., found for the Union, i.e. on declaration (i) that the parties had not reached a concluded agreement at their meeting on 17th October, 1974, and he made the first Declaration sought by the Union.

Though one would have thought that the second Declaration that the Union was at liberty to negotiate before 28th February, 1976, would flow naturally from the first Declaration, Wright, J., refused to make that Declaration. His reason apparently was that he regarded it not as a "liberty to negotiate" but as a claim of a "right to negotiate" and he was of the view that such a "right" - "bargaining rights" could only arise as the result of a poll under the 1975 Act or an agreement to that effect between the Union and the Management. If there was, as he found, no concluded collective agreement made in 1974, then in his view there was no "agreement" out of which a claim to bargaining rights could spring, or on which it could be based.

This decision and view took the Union by surprise. It is, with respect, "legalistic"; it was not raised in the pleadings, it doesn't appear to have been clearly argued, and in any event it ignores the fact that there was a poll and an "agreement" dating back to 1962 when the Union first obtained "bargaining rights" apparently as the result of a poll then taken. Those "bargaining rights" were expressly recognized in the 1962 agreement which itself has been renewed or extended with modification ever since.

That was the basis of the Union's claim to "bargaining rights" assuming that there are "rights" and that they must be founded on some "agreement" or poll. The Hotel had not in the pleadings, nor, as far as we can see, in the argument challenged the fact that the Union had "bargaining rights" wherever these derived from; what they had

challenged was that they could be exercised before the 28th February 1976 and they had challenged this on the basis that there was a concluded agreement of 17th October, 1974, that prevented the Union from making new demands during the currency of the alleged agreement and before its time period expired. Had there been on the pleading a challenge to the origin or basis of the Union's "bargaining rights" the Union contends it might have been met by evidence showing how it originated, or at any rate by argument on the basis that the bargaining rights recognized in the 1962 contract still continued.

Before us, Dr. Barnett, for the Union argued that on the pleadings and the way in which the case was conducted, the second Declaration was the logical result of the first. The issue below was not whether the Union had "bargaining rights" (something assumed by both sides) but whether those rights had been restricted, that is by the alleged contract of 1974; was it in fact a concluded agreement or not? The defence had in fact expressly conceded that the Union was representing the interests of the workers at the Hotel. Further the series of collective agreements since 1962 have all, to judge from the agreement of 17th September, 1971, contained an initial clause extending for a further period "the agreement made between the Union and the Hotel on the 26th October, 1962, (hereinafter referred to as the principal agreement)".

That agreement (of 26th October, 1962) contains an express clause: "The Hotel recognizes the National Workers Union as the bargaining agent on behalf of its employees covered by this contract", and "bargaining rights" once granted continue until terminated by the successful challenge of a rival Union at a poll.

Dr. Barnett therefore argued that there was:-

(i) an express agreement by the Hotel conceding bargaining rights to the Union; alternatively

(ii) that there was an implied agreement conceding such rights, and in either event the rights were agreed to continue until terminated in accordance with current industrial practice.

Dr. Barnett further argued that the Labour Relations and Industrial Disputes Act, 1975, did not alter or affect such existing bargaining rights but recognized them as continuing.

In any event, what the second Declaration sought was a Declaration that the plaintiffs were "at liberty" to negotiate with the defendants and it followed logically from the Declaration made in (i).

Mr. Macaulay for the respondents sought to draw a distinction between "representational rights" and "bargaining rights". The former depended on the workers appointing the Union their agent to negotiate, the latter depended on the employer recognizing the Union as the workers' bargaining agent. He argued that an employer could not be compelled to give such recognition or afford such "bargaining rights". He suggested that such recognition was not "eternal" - it lasted only for the period of the particular collective labour agreement. In this case, the grant of "bargaining rights" by the employer had been extened by the series of labour agreements made between 1962 - 1974. When the agreement expired in 1974, "bargaining rights" previously given also expired.

This argument, attractive as it is, appears to us to be self-defeating. "Bargaining rights" are by definition rights to bargain; if they are, as in this labour agreement or contract, proscribed or taken away for the period or term of the collective agreement, then, if they are dependent upon and can arise only from the contract itself,

then it follows logically that they can never exist or be exercised under this and similar types of contract. Bargaining rights can only be exercised in the 'inter-regnum' between the expiry of one labour contract and the creation of the new one. If they are limited, as Mr. Macaulay says, to the terms of the contract they come to an end with it, and until a new contract is made reviving or re-establishing them - they have ceased to exist, and at the only time when they can in fact be exercised! We do not think that the parties can ever have agreed to such an extraordinary result, which would make one of their express terms granting "bargaining rights" completely illusory, unless perhaps they had been careful to write into their agreement a complicated time schedule which would provide for the embargo on wage claims by the Union to fall short by a set period the ending of the labour agreement.

When the term of a labour agreement expires in the normal context of Jamaican Labour Relations, it does not mean that the employer-employee relationship has ended: that all workers then employed lose their jobs and cease to be employed, nor that the employer ceases to be under an obligation to pay them. Both sides envisage that the relationship will continue, and it does continue, on the terms of the expired contract, until such time as new wage rates and other conditions of employment are agreed, usually on a retroactive basis, relating back to the date on which the previously negotiated contract expired. This countinuance may be rested on implied agreement. Perhaps another way of arriving at the same conclusion is to regard the term or period of the contract as relating to the 'embargo' or 'barring' of wage claims only, rather than to the period of employment and the term of the employer-employee relationship.

However regarded, and whatever may be the apt characterization of the relationship between employer and employee in the "inter-regnum period", their relationship continues, and so does the relationship between the Union and the employer, and between the Union and the worker

until one or other party deliberately takes steps to terminate it, unless of course the parties originally agreed that the employment should be for a fixed term as in the case of the employment of say an expatriate teacher on contract.

Mr. Macaulay himself virtually conceded the point in argument when he said that perhaps "bargaining rights" did not cease on the expiry day of the contract, but ceased when the subsequent negotiations were broken off.

Strictly speaking the term "bargaining rights" though part of the language of modern industrial relations does not seem a happy or apt term, especially when it is sought to base it on contract. There is no such thing in law as an "agreement to agree" - or a "contract to make a contract".

Parties may agree to meet and discuss and see if they can conclude an agreement or contract; but the agreement or arrangement to meet is not itself a contract or an agreement enforceable at law.

It is perhaps for that reason that the appellants were content to seek a declaration that they were "at liberty to enter into labour negotiations" and it is on that basis that we propose to grant the Declaration sought. It is not therefore necessary to state whether the respondents are under a duty to negotiate, or to enquire whether under the Constitution or otherwise they are "compelled to negotiate". We do not think that it is practicable to compel anyone to negotiate; but the Legislature may of course pass a law, subject to possible arguments as to its constitutionality, which may provide in the case of an employer refusing to negotiate that some third party is to fix the terms and conditions of the employment. This happens, by agreement, when the parties agree to arbitration and agree to accept whatever award may be made. It could also no doubt be provided for by <u>statute</u> as apparently now obtains under the United Kingdom Legislation: The Industrial Relations Act of 1971. Such intervention in employer-employee relations is not novel - e.g. the Minimum Wage Acts.

Mr. Macaulay's second line of defence was to refer us to a number of cases establishing technical limits on the power and practice of the court in granting Declarations.

The jurisdiction of the court to grant a declaration is contained in Section 239 of the Civil Procedure Code. It reads:-

> " No action or proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not. "

This section corresponds to and is idential in wording with the old U.K. R.S.C. O 25 R 5 - now to be found, without any significant change, in the present U.K. R.S.C. Order 15 R. 16.

In Hanson v. Radcliffe U.D.C. (1922) 2 Ch 490 Lord Sterndale M.R. said of this Rule at p. 507:

> " In my opinion, under Order xxv., r 5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide. "

However, earlier as counsel for the respondent reminds us, the courts have approached the exercise of this discretion with some caution - e.g. see dictum of Swinfen Eady J. in Faber v. Gosworth Urban Council (1903) 38 L.T. 549 at p. 550:

> " The plaintiffs now claim only a declaration, and it may well be that under the new practice a declaratory order might be made, having regard to Order XXV r. 5. It has been pointed out that this jurisdiction ought to be exercised with extreme caution. "

This was, however, in 1903, and by 1922 as can be seen from Lord Sterndale's dictum above the attitude of the Courts had changed.

That this is the attitude nowadays of the Courts can be seen from the remarks of Greer LJ. in Cooper v. Wilson (1937) 2 A.E.R. 726, at p. 734:

> "The power of the court to grant declarations has been greatly extended in recent years, and, according to the judgment of Bailhache, J., in Guaranty Trust Co. of New York v. Hannay & Co. (1915) 2 K.B. 536, declarations may be granted in all cases where there is a dispute between a plaintiff and a defendant, and the claim for a declaration is a convenient method of dealing with such dispute. I think the view as to declaratory judgments that finally prevailed is that which is stated by Lord Sterndale, M.R., in Hanson v. Radcliffe Urban District Council ....."

Greer, L.J. then cites the passage already referred to above.

However, even in Guaranty Trust Co. of New York v. Hannay & Co. (1915) 2 K.B. 537, Bankes, L.J., after reviewing the history of the declaratory action and the changes introduced by Order 25 R. 5, said at page 572:

> "There is however one limitation which must always be attached to it, that is to say the relief claimed must be something which it is not unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the court exercises its jurisdiction. "

The position, therefore, is that despite the wide scope of the power given to the courts to make declarations, the courts have laid down a number of limitations on the exercise of his power. For example, the court will not make a declaration where the point is merely academic - see Howard v. Pickford Tool Co. (1951) 1 K.B. 417; or where the applicant requests intervention in a situation where there is no "right" to be declared - see Nixon v. A.G. (1930) 1 Ch. 574 (Civil Service Pensions); or where no useful purpose would be served - see Mellstrom v. Garner (1970) 1 W.L.R. 603 (1970) 2 A.E.R. 9 (no real dispute between partners - so no need to interpret nonsensical clauses in the partnership agreement). In this regard itdoes from time to time happen that the court is asked to make a declaration in respect of a matter on which the need for a declaration existed at the time of the filing of the original writ, but in which by the time the matter comes to trial, subsequent events - or on occasion even the mere passage of time - have resulted in reducing the value or effectiveness of the declaration. The court then has to consider whether any useful purpose would still be served by granting the declaration.

Three examples of this situation were cited by the appellant's counsel: Gibson v. Union of Shop Distributive and allied workers (1968) 1 W.L.R. 1187 (where the plaintiff sought a declaration that his two year suspension by his trade union was wrongful and by the time the case came to trial in the Court of Appeal, that period had nearly ended); Marion White Ltd. v. Francis (1972) 3 A.E.R. 857 (where the court was asked to declare whether a covenant restraining competition from ex employees of a hairdressing salon was lawful or wider than necessary and in which the time limit of the restraint had at the time of hearing in the Court of Appeal only two or three weeks left to run); and the point also arose in Eastham v. Newcastle United Football Club (1964) 1 Ch. 413 (where a professional footballer challenged the validity of the transfer and retention system as it affected him, but by the time the case came on for trial his particular ground of complaint had disappeared as he had in fact been able to effect his transfer to a new club of his choice.

In these three cases the court decided nevertheless to entertain and grant the declarations prayed for because it thought that this should be done in view of the wider interests involved even though the declarations came so late in time that their effect in the actual individual cases was minimal. Counsel for the appellants naturally relies on these cases, while counsel for the respondents relies on those in which the court, in its discretion, refused the declarations sought.

In the instant case, as we have seen, the respondents - (employers) had refused to negotiate with the appellant (Union) claiming that until the 28th February, 1976 the embargo against the presentation of fresh claims contained in the alleged contract of 17th October, 1974, still subsisted.

At the time the claim was filed in January, 1976, by the appellants seeking the declaration that they were not bound by the embargo and asking for liberty to negotiate, there was still a short period of time left to run under the alleged embargo.

By the time the matter had come on for trial before Wright, J., in October 1977 that time had expired - and there then existed no such contractual embargo as had been alleged, and no reason on that score why the respondents, assuming they were bona fide interested in settling this dispute, should not have entered into negotiations with the Union and so avoided this protracted and expensive litigation. However, they did not and the case went to trial on the basis of these pleadings. Though Wright, J., held that the alleged contract never reached the stage of a concluded agreement, and granted the first declaration sought so that the originally pleaded reason for refusing to negotiate disappeared. Nevertheless Wright J., having refused to grant the second declaration which was implicit in the first, the respondents have since his judgment interpreted his decision as entitling them in law to continue to refuse to negotiate with the appellants.

The respondent's counsel before us, somewhat inconsistently. (seeing that the respondents had themselves originally sought a declaration "that there is a collective labour agreement due to expire on the 28th February, 1976", and had further sought before us at this late stage of the proceedings to amend this defence to ask for a further counter-declaration that the respondents were not obliged to negotiate with the Union), has suggested that the court in the exercise of its discretion should not at this stage and after this length of time make the second declaration that Wright, J. refused to make, on several grounds which may be summarized by saying that to make the declaration now would be of academic interest, that no useful purpose would be served by making the declaration, and that the declaration would not end the dispute between the parties, and is one which would not have any legal consequences. Taking these reasons together, while it may well be true that making the declaration sought will not end the dispute in the sense that if the

respondents are determined not to negotiate with the Union, no power in law can make them do so, the grant of the declaration, for what it is worth, will at least remove from their chosen stand the cover of apparent reliance on legal rights said to flow from the agreement they themselves set up, and their apparent reliance on a court decision that the appellants were not at liberty to negotiate with them. If the respondents have truly been relying on these particular legal reasons for their refusal, then the grant of the declaration will at least have the effect of removing these reasons and thus have the effect of leaving them so to speak "naked" and relying purely on their own arbitrary decision (right or wrong) not to negotiate, a decision which the appellants can if they wish challenge in the usual way by industrial action.

Though the time limit for which the alleged embargo on negotiations was alleged to last has long since expired, this court thinks as did the court in the cases of Gibson, Marion White Ltd., and Eastham, referred to earlier, that it will still serve some useful purpose to grant the declaration prayed for and we do so.

In this case the Union, has preferred to appeal to the court for a declaration that it is at liberty to negotiate rather than to resort to industrial action against an employer who on its side purported to justify its refusal to negotiate by a similar appeal to the court to rule on the legal position arising from the negotiations of 17th October, 1974. We do not think that justice would be done by refusing a declaration merely because one party who hitherto relied on a legal justification for their stance, says in effect when that cloak is removed - "well no matter what this court may decide I have a freedom to refuse to negotiate and I intend to do just that".

The effect of our declaration then is that we can see no reason in law why these two parties should not sit down and negotiate with one another on matters that should be of mutual interest: the terms and conditions of employment of the Hotel workers at Half Moon Bay Hotel. We hope that sanity and commonsence will take over now that the appeal to the courts has been made and determined. If this

is not to happen - then that will be unfortunate, but at least it cannot then be said that any ruling of the courts was responsible for one of the parties refusing to pursue the normal channels available on the industrial scene for the settlement of such disputes.

In the circumstances, we do not see this as a case similar to or falling within the spirit of cases such as Nixon v. Attorney General, or nor do we see this decision as inconsistent in any way with Banton v. ALCOA Minerals Ltd. (1971) 17 W.I.R. 275; though as regards that case it may be that sub-sections (5) and (6) of Section 5 of the Labour Relations and Industrial Disputes Act, may one day be found to have somewhat altered the effect of that decision.

It may also be that an occasion will one day arise in which the courts will have to decide to what extent if at all collective labour agreements such as this create enforceable legal obligations which one side may enforce against the other - (see Ford Motor Co. v. A.E.F. (1969) 2 A.E.R. 481 and compare s.349 of the U.K. Industrial Relations Act, 1971), but this point has not been pursued before us nor could it have been canvassed on these pleadings, and it does not here form any obstacle to the grant of the declaration prayed for in this case.

The question of costs is reserved for further arguments.