IN THE SUPREME COURT OF JUDICATURE, JAMAICA

SUIT NO. M. 43 OF 1981

IN THE FULL COURT DIVISION

REGINA V. INDUSTRIAL DISPUTES TRIBUNAL

Ex parte PALACE AMUSEMENT COMPANY LIMITED

CORAM: Parnell, Vanderpump & Theobalds, JJ.

Heard: February 16 and 17, 1982.

J. Leo-Rhynie, Q.C., for the applicant;

Dennis Edmunds for the Tribunal;

Alton Rose (holding watching brief) for the B.I.T.U.

October 21, 1982

Parnell, J.

On the 18th February last we were unanimous that certiorari should go to quash the award of the Tribunal dated May 29, 1981. We also ordered the Tribunal to pay half the taxed or agreed costs of the applicant. Counsel did not appear for the Union which represented the workers. The formula for escaping certain consequences was achieved by the Union when Mr. Rose intimated that he was only "watching" the interest of his client. He did not appear with instructions to support the Tribunal's award.

We gave general reasons for quashing the award and promised to give detailed reasons in writing at a later date. This we now attempt to do.

Brief outline

At all material times, the applicant carried on as its main business activity, the operation of certain cinemas as owner or managing agent. One of the cinemas, is the Carib Theatre at Cross Roads in St. Andrew. Another cinema operated by the applicant is the Majestic which is along the Spanish Town Road. And at all material times, the Bustamante Industrial Trade Union (hereinafter called "the Union"), represented certain categories of the applicant's workers.

A dispute arose between the applicant and the union concerning the rates of pay to which it was claimed that the workers were entitled for certain work done in the cinemas. When the parties were unable to come to an agreement, the dispute was in due course referred to the Industrial Disputes Tribunal. The terms of reference were as follows :

> "To determine and settle the dispute between the Palace Amusement Company (1921) Limited on the one hand, and certain workers employed by the Company and represented by the Bustamante Industrial Trade Union on the other hand, over -
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> (1) the union's claim relating to the rate of overtime pay for work done on week days; and
>
> (2) the union's claim for pay to the workers employed by the Company at the Carib Theatre during the period of cessation of operation from 3rd November, 1979 to 22nd November, 1979."

Sittings and award

A division of the Tribunal (Mr. George Phillips, Mr. Pat Martin and Mr. Edward Dixon), heard evidence and oral submissions at nine sittings over a period extending for nearly one year, to wit.

1980: May 14, June 5,6,12 and 13, July 10

1981: April 6, 8 and 9.

The award dated May 29, 1981 is as follows:

> "The Tribunal's award in respect of each item of claim shall be deemed to be effective from the date of this award unless otherwise specifically stated.
>
> The Tribunal awards -
>
> (1) that the workers be paid at the rate of 1/6th of the basic weekly wage rate as over-time pay for hours worked during extra shows on week days with effect from 1st July, 1980:
>
> (2) that the workers at the Carib Theatre be paid their regular wages for the period 3rd November to 22nd November, 1979."

Concession made

During the opening submissions of Mr. Leo-Rhynie, Mr. Edmunds sought leave to make a concession on behalf of the Tribunal. Mr. Edmunds conceded that part one of the award was wrongly made and cannot be supported. He adopted the grounds set out by the applicant in the statement for relief

with regard to part one of the award. The frankness and timely move of Mr. Edmunds earned the plaudits of Mr. Leo-Rhynie. We also joined in the compliment. With this concession, there was no need to examine that portion of the evidence and the submissions relating thereto which concerned the unsupportable portion of the impugned award.

Part two under attack

At the hearing before the Tribunal, the applicant called three relevant witnesses to support the contention of the management of the cinemas, that the action of the workers forced it to close the operation of the Carib Theatre between the 3rd and 22nd November, 1979 inclusive. The witnesses called were :

(1) Mr. Douglas Graham, the Managing Director of the Company;

(2) Mr. Lincoln Forbes, Film Booker and Theatre Supervisor;

(3) Mr. Mervin Dodd, Relief Manager.

In paragraph 13(E) of the Affidavit of Mr. Graham in support of the application for relief, the wailing of the applicant is put in this way:

> "That the Tribunal failed to appreciate that the industrial action of the workers prior to the 3rd November, 1979, resulted in the closure of the Carib Theatre over the period 3rd November to 22nd November, 1979 inclusive and this industrial action by the workers constituted a breach by them of their individual contracts of employment with the applicant and therefore disentitled them to be paid for that period of closure."

Nature of the evidence

At the hearing, Mr. Lascelles Beckford appeared for the Union and Mr. Leo-Rhynie for the applicant. No evidence was led by the Union to challenge the clear evidence of the witnesses for the applicant that industrial action was resorted to by the workers when the claim on their behalf was not accepted. We were supplied with copies of the transcript of evidence.

A brief summary of the evidence may be outlined as shown below:

Witness	Substance of the evidence
1. Mr. Douglas Graham (Fifth Day's Sitting)	(a) The workers resorted to a "go-slow" at the Cinema Theatre. The Regulation Rules dealing with opening were ignored. On the instructions of the Chief Delegate, the theatre was opened and closed at the caprice of the workers. Patrons seeking to enter the theatre were locked out although they were in the queue in time and there was space inside to accommodate them. The Chief Delegate was warned that the "go-slow" could not be tolerated. (b) A "work-to-rule" was instituted which gained momentum. Under this "move" about 12 shows per week were exhibited. The normal "work-to-rule" would have been suffered by management while discussions were in progress. The "work-to-rule" began on September 6. According to Mr. Graham "it escalated, de-escalated escalated and continued in that fashion and the Theatre was closed on November 3." (c) There was a substantial loss of goodwill and revenue during the industrial action. (d) Workers refused to screen advertisements. This involved a breach of contract between management and the advertisers. (e) Workers refused to display synopses of future shows.
2. Mr. Lincoln Forbes	As a result of complaints made to him by patrons between August and September, 1979 he went to the Carib Theatre to investigate. He arrived at 5:10 p.m. (evening show) to find that the gates were closed. People were outside trying to get in. The normal hours of opening and closing for the evening show were 4 p.m.-5:30p.m.
3. Mr. Marvin Dodd	was manager of Majestic Theatre between 1979 to July, 1980. Industrial action took place at the Majestic in early September, 1979. The workers resorted to a"work-to-rule." The opening and closing of gates lasted for only half an hour. As a result patrons who went to the theatre late could not get in. The workers were warned that if they continued with their action the theatre would be closed until further notice. At this theatre, advertisements and trailers were not shown. The workers refused to do so.

Effect of the evidence

The cummulative effect of the evidence is that on account of the

conduct of the workers, management was put in an intolerable position. It was losing revenue at a rapid rate; patrons were forced to leave the entrance gates of the theatre when they were unable to enter. This caused irritation and disappointment to the prospective patrons to the prejudice of goodwill and good business management. Advertisers who had contractual arrangements with the applicant for the screening of their goods and services, discovered to their annoyance that the Carib and Majestic Theatres, were in breach of their contractual obligations. It would have been unwise - if not suicidal - for the management to have attempted to function at the theatres above-mentioned in the face of what Mr. Graham called "escalation, de-escalation and escalation." The workers by their combined action forced the applicant into a corner which had only one possible exit route and that was the exit marked "closed until normality is restored or guaranteed." And that was what management resorted to.

Notice to Union

Mr. Beckford in his closing address on the 9th day, had this to say: (See page 19 of the transcript of that day)

> "now, sir, the other issue is also a simple one. It relates to the closure. We want to submit, sir, at no time did the company advise the union of the closure. At no time did they advise the workers officially. What the company did and it must be remembered, sir, was to write letters to their managers about the closure. No notice was given to us of their intention to close the theatre. No notice was given to the delegate officially. .....In the case of Carib there was no information conveyed to the delegates in respect to the closure of the theatre."

We venture to make two simple comments about this portion of Mr. Beckford's peroration.

(1) The management was under no duty to give "official notice" - whatever this may mean - to any delegate about the intention to bring down the shutters of the theatre. The unchallenged and uncontradicted evidence is that in respect of the Carib and Majestic theatres, the

respective delegates were warned of the consequences that may flow if the industrial action in the form it was being pursued, continued. That was enough. And if notice to the Union was required by practice or otherwise, then in our judgment, notice express or implied to a known and recognised delegate by management, is notice to the Union which appointed him. Where a man is being squeezed, he is under no duty to inform the offender who puts on the pressure that a consequence of his continuing conduct is that he may have to squeal. A natural consequence of an act need not be explained to a sane person who is committing the act.

(2) The Union did not call any witness at the hearing. A hearing before the Tribunal is a serious business. Under pain of criminal punishment, an award must be satisfied unless it is set aside by the Supreme Court. In order to satisfy the award, management may have to go very deeply into its financial reserves, if it has any. It is only fair and it is good practice that in order to influence the Tribunal concerning a factual situation, no advocate appearing before that body should be allowed to give "evidence" or state "facts" under the heading of a closing speech. The objections raised to this procedure by the advocate of the applicant before the Tribunal were well founded and it is regretted that no notice was taken to the objection raised. If in a closing address - and in this case, Mr. Beckford addressed last - an advocate is allowed to rely on facts in support of his case which were not proved and which the applicant had no opportunity to challenge then a breach of natural

justice may flow. And this is not permissible before any Tribunal which has the power in law to settle the rights of the parties.

Submissions on behalf of Tribunal

Out of respect to the ingenious arguments of Mr. Edmunds who is always helpful to the Court, I shall mention, as we understand him, at least three of his planks on which he relied:

(a) Where an employee commits a breach of his contract of employment which entitles the employer to treat the breach as going to the root of the contract, the employer's remedy for the breach is either to dismiss the worker or make a claim for damages for breach of contract. There is no option to suspend the employment of the worker.

(b) There was no evidence before the Tribunal as to the custom, or practice in the trade of operating a theatre or other circumstances peculiar to the relationship between employer and employee giving rise to the employer to suspend employment.

(c) The Tribunal could have based its decision on the ground that the contract of service was continuing and certain consequences must follow, one of which is to sue for damages.

The argument is attractive on its face, but with respect, there is an inherent fallacy. If it is conceded in a given state of affairs that a power to dismiss arises, then this wide power must include the merciful power or right to suspend the worker pending his repentance. The greater includes the less. However, it has been argued that before the Tribunal, the question of the suspension of the employment of the workers was not raised, debated or remotely canvassed. Where an employer is forced by circumstances beyond his control to suspend operation of his business, he is doing an act which the law does not compel him to answer. If he is not compellable to answer or respond to a given situation, he is not compellable to pay for the interval during which the force of the circumstances continued. As far as our researches go, we are unable to find any case where an employer has brought an action in any Court in Jamaica seeking damages against a worker or a group of workers as a result of industrial action. Even if the action which the workers have taken amounts to fundamental breaches of their express or implied terms of their

contract of service and which would justify dismissal, it would be a waste of time for any legal proceedings to be launched against the workers. The closure of a plant for two or three days may bring out a loss to the employer of thousands of dollars. A struggling business may collapse under the pressure of industrial action for a few days. Where would the workers or the union-backed supporters get a quarter million dollars to satisfy a judgment? There is immunity against loss sustained as a result of action taken by workers:

> "in contemplation or furtherance of an industrial dispute."

But even where it is clear that the industrial action was not "in contemplation or furtherance of an industrial dispute," it would be unwise for any action seeking "damages" for breach of contract to be launched. The employer, in a proper case is, therefore, entitled to help himself and to mitigate his loss by closing down the plant until he is assured that full production will resume as heretofore.

In closing this area of the submission, we must advert to what Mr. Leo-Rhynie has strongly contended that, before the Tribunal, there was no issue to the effect that the contract of service was suspended. We agree with him. We have examined the evidence, the briefs of the parties and the addresses. There was nothing placed before the Tribunal to support the plank of Mr. Edmunds concerning the point "suspension of the contractual service of the worker" as a result of the closure of the Carib Theatre for a period of nineteen (19) days. And we are not impressed with a submission based on an alleged factual or fanciful situation which was not aired during the hearing.

English Industrial case cited

We are grateful to Mr. Leo-Rhynie for bringing to our attention the English case of Employment Secretary v. Associated Society of Locomotive Engineers etc., /1972/ 2 W.L.R. 1370 (C.A.). That case deals with a serious situation which was brewing in May 1972 as a result of a dispute between the Railways Board and three trade unions representing the workers. Offers of increases in wages by the Railways Board were rejected. The unions flexed their muscles and prepared for a fight. Under the Industrial Relations Act

1971, an application was made to the National Industrial Relations Court at the instance of the Secretary of State for Employment. A cooling off period of 14 days was obtained but as soon as that period expired, the unions' leaders directed their members to work "strictly to rule" and to ban all overtime and rest day working. The railway services of England were going to be hard hit. Disruption, chaos, public inconvenience and grave injury to the national economy, were in the balance.

The English Act to which I have referred has no counter part in Jamaica. Perhaps one day a careful study of the Act could be made with a view to introducing certain sections in Jamaica. Matters like "a cooling off period"; irregular industrial action short of a strike, and a temporary restraint on "irregular industrial action", could be considered here.

Observations in the Court of Appeal

When the case reached the Court of Appeal, a strong court (Lord Denning M.R., Buckley & Roskill, L. JJ) heard at short notice the appeal of the Unions against the order of the Industrial Court. In the course of his judgment, the learned Master of the Rolls, has this to say -

> "Now I quite agree that a man is not bound positively to do more for his employer than his contract requires. He can withdraw his goodwill if he pleases. But what he must not do is wilfully to obstruct the employer as he goes about his business. That is plainly the case where a man is employed singly by a single employer. Take a homely instance, which I put in the course of the argument. Suppose I employ a man to drive me to the station. I know there is sufficient time so that I do not tell him to hurry. He drives me at a slower speed than he need, with the deliberate object of making me lose the train, and I do lose it. He may say that he has performed the letter of the contract; he has driven me to the station; but he has wilfully made me lose the train, and that is a breach of contract beyond all doubt. And what is more, he is not entitled to be paid for the journey." See /1972/ 2 W.L.R. 1370 at p. 1389C.

And at page 1395, G. Buckley L.J. has this to say :

> "Assuming in the appellant's favour that the direction to work to rule avoided any specific direction to commit a breach of any express term of the contract, the instruction was, nevertheless directed and is acknowledged to have been directed to rendering it impossible,

> or contributing to the impossibility, to carry on the board's commercial activity upon a sound commercial basis, if at all."

Before the Tribunal, Mr. Leo-Rhynie quoted passages from the case under review. In particular, he quoted the words of Lord Denning to which I have referred. And he tried hard to explain the practical common sense which the learned Judges were trying to underline. But no impression - it would seem - was made on the minds of the members who heard him.

The effect of the award in the second portion is to applaud the workers who deliberately did everything to frustrate the purpose of the operation of a cinema; their efforts in bringing about disruption, irritation to patrons, loss of goodwill and loss of revenue, were rewarded by an order which would "compensate" those who took part in the irregular action. The Tribunal gave no reasons for its decision. It was under no duty to do so. But the reasoning which induced the Tribunal to make the award, must be taken to have flowed from an erroneous consideration of the proved and uncontradicted facts or in the alternative, the Tribunal misdirected itself.

Certain principles cited

On the 18th February last, we enumerated about six general principles which we thought then and still think could be of help to the Tribunal. We think that no harm will be done if we incorporate in this judgment and restate them, the principles which we outlined. They are as follows :

(1) Under Section 20 of the Act, the Tribunal is permitted to regulate its procedure and proceedings as it thinks fit. But this permission is subject to the provisions of the Act. However, this power does not permit the Tribunal to allow a trade union official who appears before it to give an eloquent and lengthy address which is laced with facts which have not been proved and in which the employer was given no opportunity to challenge by way of cross-examination or otherwise.

(2) Where an employer has tendered evidence on an issue and a union wishes the Tribunal to take a certain view of the facts which is inconsistent with what has been proved, there is a duty on the union to tender counter-evidence. If, however, a fair examination of the employer's evidence makes it possible for two interpretations to be deduced, then the one which is consistent

with the Union's stance, may be acted on.

(3) Every employee is expected to behave fairly to his employer and to do a fair day's work for his pay. Conversely, every employer is expected to act fairly to his worker and to demonstrate reasonableness, foster co-operation and encourage productivity.

(4) It is a breach of a term in the contract of service for a worker wilfully to obstruct his employer in the course of his business. And if a worker, with others, takes action to disrupt a business or undertaking so that the resultant effect is to force the employer to cease operation until normality is restored or guaranteed, the workers who participate in the action which forced the cessation, are not entitled to receive any wages during the period of closure. Wages are to be paid for services faithfully rendered and not for services producing disruption, chaos and strife.

(5) A course of conduct on the part of workers which tends to frustrate the object for which the contract of service was expressly or impliedly made, is a blow aimed at the consensual intention of the parties to the contract. And where the conduct brings about a situation which puts a temporary halt of operation of the business it is unreasonable for any Tribunal to order the employer to pay workers for the period during which the operation of the business ceased.

(6) It is a point of law, whether on the facts as established, a reasonable Tribunal properly addressing its mind to the evidence, could have made the award which is under attack.

Question of costs

As we have already indicated, as a result of our conclusion and the posture taken before us by Counsel for the Tribunal, we ordered the Tribunal to pay half of the applicant's costs. Mr. Leo-Rhynie has asked us to include in our detailed judgment our rationale for awarding the applicant half only of its costs.

The general rule is that costs follow the event. Where, however, the order of an inferior tribunal has been successfully challenged in the Supreme Court, the general rule does not necessarily apply. The Court will examine the facts and circumstances leading up to the making of the order which is later challenged and observe the course adopted by the Tribunal and its advisers and any other interested party when the impugned order is being examined. We dealt with the question of costs in an application for one of the prerogative orders, in R. v. Licensing Authority

for the Western Area Ex parte Panton Ltd., see (1970), 15 W.I.R. 380. At page 386, this is what the Full Court had to say :

> "The general rule is that where an application is made for one of the prerogative writs, it is very rare that the Court will make an order for costs unless the other party has appeared and contested the application."

In Reg. v. Hastings Licensing Justices Ex parte Lovibond & Sons Ltd., /1968/ 1 W.L.R. 735, Justices exceeded their jurisdiction in part of the order which they made in a certain application. When the order was challenged before the Queen's Bench Division, the Justices did not appear nor were they represented. The other respondent did not appear but it was proved that about three months before the hearing, the second respondent Jesco Stores Ltd., wrote to the applicants to say that the application for certiorari would not be contested. The bad portion of the order of the Justices was quashed and the question of costs arose for consideration. In the end, the second respondent was ordered to pay the costs of the applicants up to the date the letter was written indicating that there would be no contest.

This is what Lord Parker, C.J. had to say concerning the incidence of costs :

> "As is well known, it is very rare that this court makes any award in regard to costs on an application for one of the prerogative orders unless the other party has appeared and contested the application. Mr. Jupp has, however, pointed out in the present cast that Jesco Stores Ltd., no doubt under a bona fide misconception as to their rights under the Licensing Acts, succeeded in persuading the Justices to adopt the same misconception and have fought this case, as it were, up to December 14 when they wrote saying they were no longer contesting the application. ..... In those circumstances the Court feels that the proper order to make is that the respondents, Jesco Stores Ltd., do pay the applicant's costs up to December 14." ibid. p. 738.

A rare case could be where the Tribunal whose order is impeached was deliberately guilty of a denial of justice in arriving at its decision, or that it committed contumacy in the course of its proceedings or that the conduct of one or more of the members of the Tribunal was so outrageous,

that it ought to be visited with an order that the guilty member or members should personally pay the costs of the successful applicant.

In the matter before us, the impugned award is in two parts and each is severable from the other. The Tribunal must be taken to have admitted its error in making part of the order - in which case there was no contest. With regard to the other part, Mr. Edmunds attempted to support it and failed. In these circumstances, therefore we think that there was a half of a contest for the purposes of cost and that the Tribunal bona fide erred in arriving at the final result.

We are grateful to Mr. Leo-Rynie and Mr. Edmunds for their industry and clarity displayed in the course of their submissions.

VANDERPUMP, J.

On the 18th February last we ordered that Certiorari should go to quash the Award of the Tribunal herein bearing date the 29th of May, 1981.

This reads :

1. That the workers be paid at the rate of 1/6th of the basic weekly wage rate as overtime pay for hours worked doing extra shows on week days with effect from 1st July, 1980.

2. That the workers at Carib Theatre be paid their regular wages for the period 3rd November, to 22nd November, 1979.

Mr. Edmunds for the Tribunal conceded that item 1 was wrongly made and that it was his submission that it was severable from the rest. He supported the other portion of the award. Mr. Leo-Rhynie agreed that the items were severable.

HISTORY

Because their claim for increased wages and improved working conditions were not met, the workers engaged themselves in a go slow on Thursday the 1st November, 1979 as a result of which the company served notice of ~~it's~~ its intention to close it down unless there was a resumption of work by the Saturday, 3rd November. They not having resumed, the company closed ~~it's~~ its doors thereby locking out the workers for the period 3rd November to 22nd November, 1979.

This go slow was also described as an escalated work to rule. This phrase "work to rule" has been described by the Court of Appeal in England as being "to give the

rules a meaning which no reasonable man could give them and work to that": See Employment Sec. v. ASLEF: (No.2) : [1972] 2 W.L.R. 1370 at p. 1381 B.

Here this took the form of late opening and early closing of the gates to the public, a discontinuing of the screening of trailers and advertisements with a consequent loss of profits to the company. This went on for two months immediately prior to the 3rd November. This continued course of conduct was a breach of their contract of employment as indeed

> "wages are to be paid for services rendered not for producing deliberate chaos".
>
> per Lord Denning, M.R. ibid 1389-1390.

Mr. Edmunds argued that the company had the right to suspend the workers in the circumstances because of an implied term in the contract of employment. He relied on Chitty, Vol. 1 24th Edition pages, 781-783 for this. He further argued that it could not be said that a reasonable inference was that the parties must have intended such a stipulation in the contract 783. So that the Company had the option to terminate and dismiss the workers or keep it alive and sue for damages. Having decided on the latter i.e. to keep it alive, the Company had no right to suspend the workers. Hanley v. Pease 1915 1KB 697, 705. In my judgment what had happened went to the very root of the contract so they, the workers were not entitled to any pay. See p. 1389 D: Aslef's case supra. The company had to close down to escape grave financial loss occasioned by the conduct of the workers. This was reasonable in the circumstances.

Mr. Beckford appearing for the Union and in his submissions sought to deny the go slow but no evidence was led to that effect. It is difficult to accept his ipse dixit!

In my view the Tribunal misinterpreted the legal situation. This is a question of law in which the Tribunal erred. This error enables us to interfere with the result as has been indicated.

THEOBALDS, J.

I have read the judgments of my learned brethren herein and agree with the reasoning and conclusions arrived at. I too hold that certiorari should go to quash the award of the Tribunal dated 29th May, 1981. There is just one point I wish to stress. Since it is hoped that these judgments will provide some guidance and assistance to the Industrial Disputes Tribunal in future, each division thereof should be wary of any attempt by any advocate to introduce evidence by way of final submissions. Experience has shown that particularly after prolonged hearings inferences and conclusions tend to be slipped in, sometimes quite innocently, under the guise of evidence by way of a closing address. It is sometimes a question of believing so much in one's own case that evidence is imported without any licence so to do. This more frequently happens in civil cases and is usually met by vociferous protests from the opposing party. These protests ought not to be ignored. They serve to alert the Tribunal. The situation can then be met by a concerned enquiry from the Board

"Mr. so-and-so can you refer us to the evidence? ....."

If he persists the Board should insist. Unhappily this was not done and the Union representative was permitted to make submissions that there was no go slow without any evidence to support this. That per se was a breach of natural justice and would justify our intervention by quashing of the award.