

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

SUIT NO. M 43 OF 1978

Reg. v. The Industrial Disputes Tribunal
Ex parte Portland Parish Council

(Motion for certiorari)

CORAM: PARNELL, MORGAN & CAMPBELL, JJ.

Muirhead, Q.C. & Howard Malcolm for the applicant
(Portland Parish Council)

MacCaulay, Q.C. & F. Brown for Isaac Shackleford
(interested party)

Dennis Edmunds for Industrial Disputes Tribunal

HEARD: November 13, 1978

February 1, 1979

Parnell, J.

This is a motion seeking an order to quash an award of the Industrial Disputes Tribunal dated August 30, 1978.

At the end of the hearing on November 13, we unanimously ordered that certiorari should go to quash the order of the Tribunal reinstating Mr. Shackleford who was retired by the Parish Council of Portland by virtue of a statutory enactment. We promised to put our reasons in writing. This we now do.

Brief history of Mr. Shackleford

Mr. Isaac Shackleford entered the service of the Portland Parish Council in April, 1953. He was attached to the Fire Brigade. In January 1971, he was named Superintendent of the Fire Brigade. Mr. Shackleford was born on July 13, 1922 and attained the age of 55 years at mid-night on the 17th July, 1977. He went on vacation leave for 105 days and resumed duties on September 15, 1977, but there was a surprise awaiting him. Following the usual practice, Mr. Shackleford called on the Secretary of the Portland Parish Council, no doubt to exchange pleasantries and to let the Secretary know that he had resumed duties. This was about 9:30 a.m. At about 11:15 a.m. after Mr. Shackleford had returned to his station, a bearer brought a letter to him.

News that the Superintendent should
go on pre-retirement leave

The letter was to the effect that the Portland Parish Council had resolved, and the Parish Council Services Commission had approved that the Mr. Shackelford should proceed to go on pre-retirement leave with immediate effect. Being distressed at this sudden turn of events, Mr. Shackelford got in touch with the Secretary of the Parish Council. He wanted to know from the Secretary what had prompted his employer (the Parish Council) to act in such an unceremonious manner. The reply of the Secretary was terse, that is to say, the decision was recommended by the Parish Council and the Parish Council Services Commission had sanctioned the move. But he was unable to throw any further light on the matter.

An aggrieved Superintendent fights
the decision

Mr. Shackelford did not take the decision lightly. He resorted to certain moves which were designed towards a revocation of a decision which undoubtedly affected him personally. In the ordinary course of things, he was bound to retire on his attaining the age of sixty. But to be put on compulsory retirement at the age of fifty-five in circumstances which he believed were sudden and outrageous, required testing to any limit which was proper. He got in touch with the Parish Council Services Commission and later engaged the services of Mr. Thossy Kelly, a retired veteran on the trade union front but who now practices as a consultant. Being unable to make any headway with the Commission, Mr. Kelly was able to persuade the Minister responsible for labour relations to refer the complaint of Mr. Shackelford to the Industrial Disputes Tribunal for settlement.

Power relied on by the Parish Council

Section 9 of the Pensions (Parochial Officers) Act, states as follows:

"It shall be lawful for a Parish Council to require an officer in its employ to retire from the parochial service -

- (a) at any time after he attains the age of fifty-five years; or
- (b) in special cases, with the approval of the Governor-General at any time after he attains the age of fifty years; or
- (c)

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- (c) ~~in~~ the case of a female officer, on account of her marriage."

And in order to put the power of the Parish Council beyond the area of contention, section 7(2) of the Act which was introduced in 1958 states as follows:

"For the avoidance of doubt it is declared that without prejudice to the right of a Parish Council to require any officer to retire from parochial service in accordance with the provisions of section 9 or of any officer to elect to retire from parochial service on or after attaining the age of fifty-five years, the normal retiring age of any officer shall be sixty years."

In the light of the clear words of the enactment aforesaid, one would have thought the following consequences flow:

- (1) Where a Parish Council officer attains the age of fifty-five years, his employer (the Parish Council) has the right to retire him on pension;
- (2) Where an officer is retired in the manner outlined above, his employer is under no legal duty to give reasons for its action;
- (3) An officer who is retired by a Parish Council on his attaining fifty-five years, is not a person dismissed from its service.

The easily flowing consequences as above-outlined, did not commend themselves to the Minister, the Tribunal and to an extent, to Mr. MacCaulay who argued the case before us with tenacity although he maintained his usual candour.

Terms of reference outlined

An "industrial dispute" within the meaning of section 2 of the Labour Relations and Industrial Disputes Act, must be in existence or threatened in order to move the Minister to refer the dispute to the Tribunal for settlement.

The terms of reference which the Minister submitted to the Tribunal were as follows:

"To determine and settle the dispute between the Portland Parish Council on the one hand, and Mr. Isaac A. Shackelford, formerly Superintendent, Fire Brigade, employed to the Council on

the other hand, over the termination of Mr. Shackelford's employment on the ground of compulsory retirement due to age."

Section 2 of the Act defines "industrial dispute" as:

"a dispute between one or more employers or organisations representing employers and one or more workers or organisations representing workers, where such dispute relates wholly or partly to -

- (a) terms and conditions of employment, or the physical conditions in which any workers are required to work; or
- (b) engagement or non-engagement, or termination of employment, of one or more workers; or
- (c) allocation of work as between workers or groups of workers; or
- (d) any matter affecting the privileges, rights and duties of any employer or organisation representing employers or of any worker or organisation representing workers."

It seems to us that the Minister and his advisers have taken the view that where a Parish Council or a statutory body exercises a right conferred by statute, then a justiciable industrial dispute within the meaning of the Act could arise if the exercise of the statutory power affects or tends to affect any employee of the Parish Council or the statutory body.

If this view is sound, then it must follow that if the Public Service Commission should recommend to the Governor-General that a civil servant aged 55 years should be retired pursuant to section 8 of the Pensions Act (a section similar to section 9 of the Pensions (Parochial Officers) Act, this could give rise to an "industrial dispute" cognisable by an Industrial Disputes Tribunal if the aggrieved civil servant decides to fight the order of the Public Service Commission. And a re-instatement could be ordered in such a case.

Certain highlights at the hearing

Mr. Kelly at the hearing made an opening replete with passion and eloquence. He referred to the Portland Parish Council as dictators. A copy of the transcript of the proceedings at page 37 of the Judge's Bundle, reports Mr. Kelly as saying this on the first day of the hearing:

"All they contend is that they have the right to take penal action, take away the man's job, which is his property, run him off the work.

The dictators in Portland have satisfied what they regard as a mere interpretation of the law and the man and his family must starve and die, that is my respectful submission."

At page 29, the statute under which the Parish Council acted is referred to by Mr. Kelly as a "decadent law." Indeed from the standpoint of emotion and sympathy, Mr. Kelly made a great impression on the Tribunal. As a result, the Chairman was forced to disclose his feeling. At page 29, the Chairman is reported to have said this:

"Mr. Kelly, I think you have made a tremendous opening. The fact is now, how are you going to proceed from there?"

The gravamen of the complaint of Mr. Kelly - and this seems to have overwhelmed the Tribunal - is to be found at page 20 of the Dundle. Mr. Kelly was still opening his case -

"Now, I come to deal with the situation. Be it noted, Mr. Chairman and gentlemen, that up to now neither Mr. Shackelford, the aggrieved worker, nor his representative have been told why this unprecedented letter has been written and delivered to Shackelford without warning, without notice, without good and sufficient reason."

And at page 20, Mr. Kelly adverted to another ground which was urged with strength:

"Now Sir, this is a rather bizarre situation. Mr. Chairman and gentlemen, you are aware that when an employer acts, the onus is undoubtedly on him to be discharged for justifying his actions. In short, an employer cannot and in this case the employing authority, cannot fire Mr. Shackelford and then hope that the onus will be shunted to Shackelford to show cause why he must not be dismissed."

When the time came for the attorney of the Parish Council to reply, it was made very clear, as we see it, that the members of the Tribunal had been led astray by their conception of the moral aspect of the complaint and by their erroneous assumption that they were dealing with a case of "unjustifiable dismissal" of a worker within the meaning of section 11(5) (c) of the Act to which we shall return in due course.

Page 18 of the notes of the proceedings of the first day (and this is at page 30 of the Dundle) shows an interesting dialogue. Mr. Chin See, Attorney for the Parish Council, was on his feet. He was dealing with the argument of Mr. Kelly that the statute under which the Parish Council acted is "decadent."

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Mr. Chin See: ".....He must certainly prove that we have done things contrary to the law and he must prove that this is so, before we begin to meet his case."

Mr. Allman: "We are not here only to look at the legal aspect of the case, we are here to look also at the justification."

Mr. Chin See: "With due respect, in other words, what you are saying to a Parish Council is that if they act according to law, they can still be wrong?"

Chairman: "It amounts to that. Under the Industrial Disputes Law, we are empowered to decide whether the action was justified, not illegal.....".

And at page 22 of the notes (p.34 of the Dundle), the exchanges continue:

Mr. Allman: "In other words, Mr. Chin See, do I understand that all you are concerned with is the legal aspect of this matter?"

Mr. Chin See: "With the legal aspect of this matter, that is the sole concern here of any lawyer who is worth his salt."

Mr. Allman: "You are not concerned with the moral part of it?"

Mr. Chin See: "No sir, not at all; that is a part to be taken elsewhere."

Mr. Kelly's reaction to the stand taken by Mr. Chin See was vehement and free from restraint. At pages 31 and 33 the argument of Mr. Chin See is branded as being "legal nonsense", "legal rubbish" and "arrant nonsense."

On the second day of the hearing, Mr. Kelly again referred to the argument of Mr. Chin See (see page 45 of Dundle). This time, it is called:

"a puerile nonsensical submission"

which the Tribunal should reject. At the hearing on the second day, Mr. Chin See was replaced by Mr. P. Dovell. The posture taken by the Parish Council did not change. He put the point concisely (see p.59):

..../7.

"We just make a legal argument on the facts. What Mr. Shackelford is giving is the facts. I am not going to call any evidence."

Tribunal makes an award

The Tribunal heard arguments on May 5 and June 21. On the latter date, Mr. Shackelford gave evidence and was cross-examined. He was the only witness called. On the 30th August, 1978, the award of the Tribunal was as follows:

" The Tribunal awards that Mr. Isaac A. Shackelford be reinstated in the position of Superintendent of the Portland Parish Council Fire Brigade from the date immediately following the expiration of his pre-retirement leave and that from that date be paid all outstanding wages and allowances attached to the office of Superintendent Fire Brigade."

In its decision, the Tribunal made eight findings. Findings 4-8 make such interesting reading that we think that we should record them. They are as follows (see page 74 of the Dundle):

- (4) "That no general policy had been laid down by the Parish Council to retire officers before the normal retiring age."
- (5) "That his record of service was satisfactory."
- (6) "That his retirement was abrupt and carried out on the day he returned from vacation."
- (7) "That his health was not in question and he was an experienced officer."
- (8) "That he had never been charged and found guilty of any breaches."

Parish Council makes move to quash
the award

On the 22nd September, the Parish Council took steps with a view to having the award quashed. Two main grounds are relied on in the statement
Procedure
filed pursuant to section 564D of the Judicature (Civil/Code) Act. When reduced to simplicity, the two grounds may be stated as follows:

- (1) By its award, the Tribunal has purported to deprive the Parish Council of its statutory right to require an officer to be retired on pension as soon as the officer attains the age of fifty-five.

- (2) The Industrial Disputes Tribunal is prohibited by section 12(7) of the Act from making an award which is inconsistent with the provision of an enactment which regulates the terms and conditions of employment of a worker.

Before us, Mr. Muirhead in his submissions added a third simple ground. With promptness accompanied with a show of pleasure, he adopted an observation from a member of the Bench. So that the third ground may be stated as follows:

- (3) A Tribunal has power to order the reinstatement of a worker where it finds that the dismissal of that worker was not justified. Where, however, a Parish Council officer is required to retire on his attaining the age of fifty-five, such a move is not a dismissal within the meaning of section 12(5)(c) of the Act and therefore the Tribunal exceeded its powers by ordering a reinstatement of Mr. Shackelford as Superintendent of Portland Fire Brigade.

One is able to appreciate the reality of the situation in ground three above. The Parish Council took steps to appoint a new Superintendent after the retirement of Mr. Shackelford. If the award of the Tribunal is to be upheld, it would mean that the Council would have to put up with two Superintendents where the establishment only calls for one. The firemen would be unable to know who is really in charge; divided loyalty would be encouraged; discipline would be put in serious jeopardy and in the end, the parish of Portland would be prejudiced by this confusion and embarrassment. Nothing was said or done by the Tribunal to resolve the dilemma its award would cause by ordering that compensation be made to Mr. Shackelford, if reinstatement could not have been carried out in the circumstances. And such a power is given to the Tribunal under Section 12(5)(c)(iii) of the Act.

Arguments before us

When the hearing began before us, Counsel representing the Tribunal informed the Court that he was not opposing the application. He did not spell out his reasons but we assumed that he could not possibly

support an award which is patently bad in law and one which shows the error on the face of the record. We commend Mr. Edmunds for his frankness and for the wisdom he displayed.

As a result of this concession Mr. Muirhead did not take much time in putting forward his submissions. He argued in accordance with the three grounds above mentioned. In developing the third ground, Mr. MacCaulay interrupted him in order to concede that no issue will be joined on the proposition that Mr. Shackelford was not dismissed by his compulsory retirement. With this concession, we thought that that was an end to the debate and that it was tantamount to an admission that the award of the Tribunal could not be upheld.

When the turn of Mr. MacCaulay came, he relied on an argument based on the definition of an "industrial dispute." We found the argument more ingenious than sound and were surprised that he could have mustered sufficient courage to put forward any argument which he in his judgment, could be called tenable. It is not out of disrespect, therefore, if we refrain from putting in this judgment his submissions concerning what he was pleased to call the "amplitude and plentitude" of the powers of the Tribunal as a result of the definition of the term "industrial dispute."

Limitations placed on the Tribunal

The Industrial Disputes Tribunal is doing a commendable job in Jamaica. Created under the Act of 1975, the Tribunal assists the Minister in the settling of industrial disputes, in the soothing of the belligerence which sometimes arises on the industrial front and in general, it helps in keeping a balanced adjustment between management and workers in a rapidly changing society.

The Tribunal is comprised mostly of laymen but who nevertheless are experienced in their calling and are knowledgeable in the history of our country and in the aspirations of the people. The problems ^{with} which the Tribunal has to deal are various and some of these problems at times are bristled with difficult points of law. It is evident, therefore, that there are occasions when the Tribunal may go astray in their well intentioned desire to do what is believed to be right. That is why Parliament has directed that an award is only impeachable on a point of law.

Points of law in this case

- (1) Under section 12(5)(c) of the Act, the Tribunal is only empowered to order reinstatement, where a worker has been dismissed and the Tribunal finds that the dismissal was unjustified. Was Mr. Shackelford's compulsory retirement a dismissal?
- (2) Under section 12(7) of the Act as amended by Act 13/1978, the Tribunal is prohibited from making an award which conflicts with an enactment which regulates the terms and conditions of the employment of a worker. Mr. Shackelford at all material times knew or ought to have known from 1953 when he entered the service that as soon as he attained the age of 55, the Parish Council of Portland or such other Parish Council to which he was then employed had or has the power to retire him. Is this a condition of employment regulated by an enactment within the meaning of section 12(7) of the Act?
- (3) Suppose an employer does nothing more in relation to his worker than to rely on a power given to him by statute? If the employer resorts to his statutory right and the employee feels that he is aggrieved, does this "grievance" give rise to an "industrial dispute" so as to make the Tribunal competent to hear and settle it?

We think that the answer in (1) above is in the negative. This Mr. MacCaulay conceded. With regard to the question posed in (2), the answer is a resounding "yes." And in (3), it is a resounding "no". The legal consequence follows that the award of the Tribunal cannot stand. And this result, in our view, would follow from anyone of the three points of law above outlined.

We do not criticise the Tribunal because it entertained the reference which the Minister sent to it. We venture to suggest that prima facie, a Tribunal is entitled to accept the terms of reference of a dispute which the Minister requires to be settled. But it does not follow that because the Minister calls an alleged grievance "an industrial dispute" the Tribunal is competent to make an award. That is why Parliament has gone out of its way to make provision under section 12(7) of the Act as amended which states:

...../11.

" Where any industrial dispute referred to the Tribunal involves questions as to wages, or as to hours of work, or as to any other terms and conditions of employment, the Tribunal -

- (a) shall not, if those wages, or hours of work, or conditions of employment are regulated or controlled by or under any enactment, make any award which is inconsistent with that enactment;
- (b) shall not make any award which is inconsistent with the national interest."

Mr. Chin See had an opportunity on the first day of the hearing to drive home the point that the Tribunal was not competent to entertain the reference since it was being asked to inquire into the exercise of a power and discretion of a body that was acting pursuant to a statute. The dialogue is at page 19 of the transcript of the proceedings and mentioned at page 31 of the Dundle.

Chairman: "Are you saying that the Tribunal hasn't the competence in this matter?"

Mr. Chin See: "I am not saying that. I am saying what the Tribunal must do, is to look at the law and see if the Parish Council has contravened the provision of the law."

Mr. Chin See was cautious. He refused to lower his guard. If he had stood firmly and hinted that action would be taken to seek prohibition to prevent the Tribunal from launching into the unchartered sea, perhaps good judgment would have prevailed resulting in the Tribunal getting legal advice from the Solicitor General's Department. And it is evident that the advice, if sought, would have been consonant with the stand which Mr. Edmunds has taken before us.

The Tribunal was pre-occupied with the moral aspect of the case. Moral law is another name for natural law, that is the principle of natural right or wrong. But it has been clear law for at least three hundred years that an Act of Parliament is not void, nor can its validity be questioned, on the ground that it is repugnant to natural or moral principles.

Whether or not legislation is desirable on a certain matter is to be determined by electors at the polls, by public^{opinion} and even in the lobby of Gordon House. It is not a question to be determined by judges and tribunals in the course of litigation though they are free to criticise the state of

the law even if it is a recent enactment.

We think that we should state another principle and it is this: where a statute confers power on a person or body to do some act or thing, then the power may be resorted to and relied on from time to time as the occasion requires. And in any such case, the motive of the person or body which relies on the statute is irrelevant and may not be inquired into by any Court or Tribunal unless the statute so directs. Once the act is authorised by the law, the motive however reprehensible it may be cannot alter its character though it may provide a fertile ground for public debate with a view to altering the law in question.

Since the Tribunal's counsel did not oppose the application, we did not make any order for costs. The plea of Mr. Muirhead that Mr. Shackleford should be ordered to pay costs was not entertained. After all, he had an award in his favour. The true respondent in the proceedings is the Tribunal with Mr. Shackleford as an interested party. For all practical purposes, Mr. Shackleford was only trying to protect an award made in his favour. The argument in support had little or no merit. However, we think that he should not be called upon to pay costs in the result merely because he urged an untenable argument.