JUDGEMENT BOOK

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. M. 14 of 1980

Regina v. The Industrial Disputes Tribunal

Ex parte Seprod Group of Companies

(Full Court Division)

CORAM: Parnell, Malcolm & Gordon, JJ.

Heard: May 4, 1981.

Emile George Q.C. and Edward Ashenheim for the applicant
Eugene Harris, Crown Counsel as amicus curiae
(No representation for either the Tribunal or the Union).

December 17, 1981

PARNELL, J:

On the 4th May, we unanimously ordered that certiorari should go to quash the award of the Tribunal dated January 10, 1980 and clarified on March 4, 1980.

General grounds were stated why we concluded that the award ought to be quashed. We promised to put our reasons in writing at a later date. This we now do.

At the hearing, no counsel appeared for the Bustamante Industrial Trade Union (hereinafter called the Union). Learned Counsel from the Attorney General's Department and who appeared as amicus curiae conceded that there was nothing he could usefully add to the contention of Mr. George that the Award as clarified is bad in Law and in particular that the decision is contrary to Sec. 12(7) of the Labour Relations and Industrial Disputes Act as amended by Act 13 of 1978. When put concisely, the section bars the Tribunal from making an award:

"which is inconsistent with the national interest."

The award was attacked on several grounds but the burden of the submissions of Mr. George touched the question of what covers or does not cover "the national interest" within the meaning of Section 12(7) of the Act. This is the first time that the question has been directly raised when an award of the Tribunal is under review.

Claim made by Union

On the 10th November, 1978, the Union made a claim consisting of 24 items on behalf of the Clerical and Technical employees of the applicant. On February 7, 1979, three additional items of claim were added.

On the 14th November, 1978, the applicant prepared what I may call a "counter-claim" consisting of six simple items to be considered along with the main claim put forward by the Union.

The parties were unable to agree among themselves in relation to the claim and counter-claim.

I shall outline three of the items included in the Union's claim in order to show its range and implication.

Item	Demand
2	Wage increase of seventy-five percent (75%) on all existing rates.
5	Establishment of a system for the payment of a bonus on an annual basis.
16	An increase in the time allowed for workers to be deemed late from seven to fifteen minutes.

Counter-claim

Three items of the applicant's counter-claim are shown hereunder:

Item	Demand
3	The introduction of a fourth shift in certain areas to be specified.
5	That employees punch in and punch out their time cards for meal time as well as break time.
6	The entitlement to pay for a Public Holiday to be on the basis of employees being present at work both on the normal working days immediately preceeding and immediately following the Public Holiday.

Reference to the Tribunal

By letter dated May 10, 1979, the dispute was referred to the Tribunal for settlement. The Minister's letter outlined the terms of reference. This need not be detailed.

There were eleven (11) sittings between July 9, 1979 and December 5, 1979.

Award made

In its decision, the Tribunal referred to the 27 items of claim. An award was made in respect of 19 of those items. With regard to the applicant's counter-claim, each of the six items was dismissed. No award was made.

The applicant in its grounds, has not formulated any complaint which would open for review the dismissal of the counter-claim. That the decision in that regard is unreasonable and cannot be supported having regard to the material before the Tribunal would in my view, bring the "non-award" of the applicant's items under review. I will not spend much time on this point but I will make some general observations for future guidance.

(1) If the Union is asking for an increase in the time when a worker is deemed to be late for work, it must be relevant for the employer to demand that a system be devised to check on the time when the worker leaves his station and when he returns. This is a matter which is peculiarily within the power, authority or prerogative of management. It is not an arbitrable item. The Tribunal made no award in respect of item 16 of the Union's claim but in my view it did not preclude it from pronouncing (giving reasons) on the merits of the applicant's contention.

(2) Where a move traceable to the power, authority or function of management is introduced or notice is served that it will be introduced at a workshop, the simple exercise of

Management's right is not capable in law of being classified as a "dispute". A dispute could only arise if the exercise of the power or authority causes a worker to be subject to the discharge of some load, function or liability inconsistent with his usual commitment and without reasonable compensation for the extra load or function undertaken.

If the proposition above is incontestable - and it is difficult to see where any rational argument to the contrary may be entertained - then item 3 above of the counter-claim is not arbitrable and it is regretted that the Tribunal adopted a silent posture on this very important element in the proceedings.

Clarification of the Award

The contention of the applicant is that the award in respect of certain items of claim is vague and void for uncertainty. And where a "clarification" was made, no improvement was made towards an understanding of what was being awarded. What is not to be forgotten is this: if an award of the Tribunal is not complied with, then the offender is guilty of an offence. However, if the particular award which is said to have been breached, is vague, uncertain or incapable of being implemented, then the offender cannot be proceeded against. In such a case, the purported award would be purposeless and empty.

I shall make reference to two items of claim, the award, if any, thereon and the clarification.

/....

No.	Item of Claim	Award	Clarification
5	Establishment of a system for the payment of a bonus on an annual basis.	The Tribunal awards that a formula be implemented whereby a worker will not receive less than two weeks pay as an annual bonus. This claim takes effect from the date of the award.	The Tribunal awards that a formula be implemented whereby a worker will not receive less than two weeks pay as an annual bonus after a full year of service.
18	Study Leave with pay	The Tribunal awards that Study Leave be granted to workers with full pay during the duration of such leave - effective 1st October, 1979.	None requested and none given.

Where an award is divisible, the valid portion may be sustained while the ineffective portion may be quashed.

The awards touching items 5 and 18 aforementioned appear on the face to be vague and uncertain. An attempt to "clarify" one of the items, left more of nebulosity and bewildering maze in its trail than what was there before.

The Tribunal was being asked to deal with tricky problems which posed heavy financial burden on the applicant. A few questions could be asked in respect of claim 18.

Q: What worker would qualify for study leave and what would be the minimum qualification required?

Q: What course of study would be allowed? Must the study be relevant to the operation of the applicant's business or could a clerk in the accounting department be allowed to pursue a course in theology or in electronics?

Q: How many workers would be allowed to proceed at any one time and from how many departments of the applicant's plant?

Q: Where is the course of study to be pursued? Should all be local or some local and others foreign?

Q: Would a grant be subject to a condition that the grantee be required to return to the Company for a minimum period of service after completion and a further condition that the

grant may be terminated during the period of study if satisfactory progress is not made?

Dozens of questions may be properly asked in respect of this widespread award. I agree with the substance of the argument of Mr. George that these two particular awards (5 and 18) are vague, uncertain and void.

National interest breach

The award was attacked in its entirety as being in breach of the statute under which the Tribunal operates. Mr. Victor Harris, the Industrial Relations Manager of the applicant, swore to an affidavit dated March 18, 1980. Paragraph 6 (1) states as follows:

> "The said award or decision was wrong in law in that it is inconsistent with the national interest as required by statute."

The statute referred to is the 1975 Labour Relations and Industrial Disputes Act. Three years and two months after the Act came into force and in the heat of serious economic difficulties facing the nation, an amending Act came into force. As a result of the amendment, section 12(7) of the Act to which I have already referred, states as follows:

> "Where any industrial dispute referred to the Tribunal involves question as to wages, 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.

Public policy statement

The Constitution is the supreme law in Jamaica. Section 69(2) of the Constitution states as follows:

> "The Cabinet shall be the principal instrument of policy

and shall be charged with the general direction and control of the Government of Jamaica and shall be collectively responsible therefor to Parliament."

I understand the use of the word "policy" in the section to cover the line of conduct which the government of the day adopts in particular questions especially in the management of public, private or foreign affairs. The display of prudence in any given situation; the handling of a sudden and difficult problem; and the course of conduct to be followed for the public benefit, are all matters which fall under the rubric to wit "policy".

The founding fathers, in their wisdom, ordained that it is the Cabinet of the day which formulates and directs the policy of the period.

Ministry Paper 22

On the 9th May, 1979, the Minister of Labour laid on the Table of the House a document referred to as "Ministry Paper No. 22". The Paper dealt with pay guidelines and certain areas of collective bargaining agreements between management and trade unions. Two particular areas of the Paper should be noted.

(1) The maximum increase in total pay within any given enterprise as a result of a demand for increases in wage and fringe benefits on the part of workers, should not exceed 15% above the total pay for the last preceding twelve month period.

This permissible increase was later reduced to 10% by Ministry Paper 23, dated May 4, 1979.

(2) Contracts and Pay periods were required to run a two year period.

In order to secure compliance with the policy of Government as outlined in the paper, certain measures were to be taken. One of these measures is clearly spelt out in paragraph 17 of the Paper as follows:

"The law will provide that in dealing with disputes relating to matters of Pay or other forms of compensation, the Tribunal, or any Arbitrator will be required to ensure that awards are consistent with the national interest."

National interest element enacted

Act 13 of 1978, amended the principal Act so as to bar the Tribunal from making any award:

"which is inconsistent with the national interest."

And this amendment was brought into force approximately one month after the Ministry Paper was promulgated. When the Court is called upon to construe an enactment, it is permissible not only to consider the state of the law at the time of the enactment but to review the history of the legislation upon the subject.

It is safe to follow a simple rule. And I shall state it in this way: Where Parliament has attempted to deal with a social or economic problem, and very shortly thereafter the Act is amended in a material particular, an inference may be drawn, that defects or problems have come into notice since the enactment and that it is in the public interest that the principal Act should be amended in order to deal with the new development.

Breach of Ministry Paper 22

When the total cost of the applicant's pay bill, as a result of the award, was examined, it was found as follows:

(1) There was an increase of 30% during the first year of the adjustment;

(2) There was an increase of 31% during the second year.

A vast amount of money was involved.

The affidavits of the Financial Secretary and of the then Trade Administrator and Adviser to Government on economic matters, to this effect were not challenged. The case before us, therefore, has proceeded on the basis that the financial burden thrown on the applicant as a

result of the award contravened the permissible limit outlined by government.

National interest not defined

The Act has not defined the term "national interest." Parliament had deliberately left it open for the Tribunal and the Courts to deal with it if in any given case the question as to what is covered by the term comes up for determination. There may be a good reason for this step. And perhaps at this juncture, I should attempt to summarise the position.

(1) Under section 39(2) of the Constitution, the government is the only authority recognised to declare the policy relevant to a given subject which affects the country;

(2) On May 9, 1973, government's policy with regard to pay and fringe benefits was made known to the nation. And on that very day, notice was served that legislation would be enacted to enforce the policy; a limit of 15% increase in wages and fringe benefits was permitted;

(3) On June 6, 1973, the promised legislation was brought into effect.

(4) On November 10, 1973, the Union served notice on the applicant asking for five times the permissible increase in wages alone. The Ministry Paper was ignored.

(5) On the 10th January, 1980, the Tribunal made an award which was double the permissible increase in the first year. For the second year, the increase was more than double the stipulated increase. The Ministry Paper was again ignored.

Parliament assumed - and quite rightly - that the Tribunal in the first instance and the Court in the last resort, would not forget the history of the legislation.

Approach to construction of amending section

It is a good rule of construction that words and phrases in an Act of Parliament are to be understood with reference to the subject matter in the mind of the Legislature at the time it was passed. What

a judge is required to do when the provision of an Act comes up for interpretation, was laid down nearly 370 years ago. And the rule still holds good today.

> "The office of the Judge is, to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief."
>
> Magdalen College Case (1616), 11 Rep. 71a.
>
> Cited in Maxwell on Interpretation of Statutes, 9th Ed. p.113.

The Mischief Rule allows the Court to trace the history of the Act or provision of the Act which is under review. Lord Halsbury puts the point neatly:

> "To construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy."
>
> Eastman Photographic Co. v. Comptroller - General of Patents, /1899/ A.C. 571, 576.

In a recent case before the High Court of Australia, one of the seven Judges (Stephen, J.) discussed the question as to the limits to the permissible use of material which is extrinsic to the legislation itself in aid of interpretation. After referring to certain authorities, the learned judge, summed up the matter in this way:

> "English and Australian authorities establish that it may not be resorted to, to determine what it is which Parliament has in fact enacted in legislating for a particular situation, but only so as to cast light upon what has been variously described as the mischief to be remedied, the subject matter which the legislation intended to deal with or the

legislation's general background."

Dugan v. Mirror Newspapers Ltd.

(1979-1980), 142, C.L.R. 583 at 600.

Mischief identified

Prior to June 1978, attempts were made by Government to issue wage guidelines for the private sector and commercially operated enterprises. But trade unions argued that the "guidelines" were not binding and in their discussions with several management concerns preparatory to the execution of a collective agreement, Ministry Paper 55 (then in existence), was ignored both by the Union and by the Industrial Disputes Tribunal. The case of Reg. v. The Industrial Disputes Tribunal Ex.p. Esso West Indies Ltd. (M.24 of 1977), which is mentioned elsewhere in this judgment, paints the picture of what was taking place in 1976-1977.

By early 1978, when the economy of the country was in a parlous state, the Government took positive action to arrest a trend which was not in unison with the general welfare of the nation.

Government's strategy for the economic recovery of the country; the move to improve the balance of payment position; the introduction of measures designed to make Jamaica's exports reasonably competitive in order to raise foreign exchange, are in my view touched by the restraint imposed in limiting the increase of workers' pay and benefits to 15% in any given year.

All this was for the national interest.

Element of "national interest" mentioned

I have adverted to the Labour Relations Code in the Bata Shoe Company case. And I shall return to it in this case.

When the Labour Relations Code was being considered, the questions of the general welfare of the society and of the national needs were uppermost in the minds of those who composed the contents therein contained.

Brief reference will be made to two of the twenty-two paragraphs in the Code.

The first portion of paragraph 2 states as follows:

"The code recognises the dynamic nature of industrial relations and interprets it in its widest sense. It is not confined to procedural matters but includes in its scope human relations and the greater responsibilities of all the parties to the society in general."

And the first part of paragraph 7 states:

"The main objective of a trade union is to promote the interest of its members, due regard being paid to the interest of the total labour force and to the greater national interest.

See Jamaica Gazette Supplement, No. 105 dated September 30, 1976.

Strong stress on society's needs

The Code was established in accordance with Sec. 3 of the Act. In both paragraphs quoted above, it is plainly indicated that the national interest is of greater concern than that of workers at any given work place. And the reason for this is plain. The workers form only a small portion of society. An axiom in mathmatics may be cited.

"The whole is greater than a part of it.

The term "national interest" has appeared since September 1976 but in June 1978, it was enacted as a factor to be considered in the settlement of an industrial dispute.

Interpretation clause

An interpretation clause in an Act has its part to play. Sometimes a term used in the statute is given a restrictive meaning. And in some cases, an extensive meaning. Where an interpretation clause is found in a statute, it should be approached on the background of a valuable rule, namely, that it is unwise to enact under the guise of definition.

See Craies on Statute Law, 4th Ed., p. 193.

Another valuable rule is that even where an interpretation clause has been provided, the definition given does not necessarily apply on every occasion when the word as interpreted in the Act is used in a particular provision. Ibid 195.

In 1927, a case involving the application of the term 'national interest', came up for consideration before the Railway and Canal Commission. Under the Mining Industry Act of 1926, the English Parliament permitted an amalgamation of colliery companies under a scheme which showed that the national interest was served.

The Act did not define "national interest". The Commission was required to consider and determine this element when it arose for advisement. This is what Sankey, C. had to say:

> "We do not think that it would be desirable, even if it were possible, to lay down an exhaustive definition of what is in the national interest. As has been said in another set of circumstances, the fact that opinion grounded on experience, has moved one way does not preclude the possibility of its moving, on fresh experience, in the other - nor does it bind succeeding generations when conditions have changed. After all, the question whether a particular thing is in the national interest is a question of the times, and it is a question of fact".
>
> See Re application of Amalgamated Anthracite Collieries Ltd. (1927), Times Law Report, 672 at 673.

In my view, it would be unwise to attempt an exhaustive definition of the term 'national interest'. No Court ~~shall~~ should deliberately hobble itself.

The categories of what is deemed to be in the national interest, are not closed. What was relevant in the horse and buggy period may not be suitable in the Jamaica of today. The national interest varies with the period. The requirements of a rapidly changing society may

influence a shift in a course of action once thought to be suitable. Public opinion may play a great part in shaping or refurbishing "national interest" but it is the government of the day which is competent to declare it. And where this has been done, it is left to a Tribunal or a Court to say whether in a given set of circumstances the national interest is involved.

I shall ~~request~~ suggest a working formula. The national interest encompasses any move, strategy or course of conduct designed, formulated or designated for the purpose of handling or settling any question which affects or tends to affect Jamaica as a nation.

The question may cover a matter which touches social, economic or foreign interest and in particular, it may involve the consideration of governmental policy as determined and declared pursuant to section 69(2) of the Constitution to which reference has already been made.

Summary

I shall run the risk of being criticised as repititious in order to give a summary of certain issues raised in these proceedings. This case has shown that the Industrial Disputes Tribunal has to deal with difficult and momentous problems in an attempt to settle an industrial dispute. And from the number of matters coming before us in recent times, it appears that the Tribunal is set to be overwhelmed with disputes in which complex and important issues will be involved.

I am satisfied that the Tribunal is in great need of some guidance. If I offer a few general principles for consideration, no harm can be done.

(1) A hearing of an industrial dispute begins on the irrefutable proposition that each of the parties to wit, management and the union (representing the workers) has certain rights. This fact should not be forgotten.

(2) A collective agreement, although it is not enforceable as a contract in a Court of law is

deemed to have been voluntarily executed and the provisions contained in it are expected to be "binding" for the purpose of maintaining harmony, fostering production and of supporting the national interest.

(3) Where what is in issue, is found to be nothing more than the mere exercise of a right within the province of management, then it means that under the pretence of the existence of "an industrial dispute", a matter has been referred for settlement. In such a case, the award should not be difficult to formulate.

(4) Where what is in controversy involves the rights of both management and the worker, then there should be a careful balancing of the issues with a leaning towards the national interest if that factor presents itself. An award made should show, when examined that a balancing exercise was resorted to and that the national interest was underlined.

(5) The viability of an undertaking should be maintained. That is a requirement under paragraph 7 of the Code. No investor is going to put his money in an area which is doubtful or is manifestly precarious. This means that an award should show the result of vision and careful thinking. If I am permitted, I would suggest that an award should be tested by the mnemonic "car", that is to say, clear, acceptable and reasonable. (the initial letter in each epithet when formed, produces the word "car").

Acceptability protects the national interest, reasonableness looks after the rights of the parties with a leaning towards acceptability. Clarity removes any doubt as to what is awarded.

(6) Where the dispute involved a demand or a request which if granted is dangerous to trade unionism or to the rights of workers, the Tribunal should play the part of a Solomon. The demand should be rejected. A helping hand would then be offered to save the union and the workers from themselves.

I shall repeat what I said in a previous case.

> "If trade unions and workers demonstrate too much zeal in the wisdom and good judgment which they claim they have, members of the Tribunal should counter with a display of the agility of an acrobat and the foresight of a seer."
>
> Sec. M. 22 of 1977 - p. 17.
>
> Reg. v. The Industrial Disputes Tribunal
>
> Ex.p. Esso West Indies Ltd.
>
> (Judgment of Full Court delivered on Nov. 30, 1977).

(7) Where a difficult point of law arises during a hearing, the Tribunal should seek advice if necessary. An independent attorney should be summoned at a hearing and he should beallowed to tender his advice orally or in writing in the presence of the parties. If the Law Officers of the Crown are unable to send a member of their team, a member of the private bar (agreed on by the parties), could be summoned.

In this case, the Union on behalf of the workers, put forward a claim which showed on its face, items of demand which were contrary to the then operating Ministry Paper 22.

An increase of rates of pay was requested but this was far outside the range of the guidelines. It was also requested that the Collective Agreement to be executed should run for twelve months instead of the two year period which Government policy outlined.

The Tribunal should be alerted when it finds that the brief of one or both of the parties contains material which looks outlandish. Equally, it should be alerted if the germ of "Peter's Law of Substitution" is detected namely:

> "look after the molehills and the mountains will look after themselves."

Clarification of an award

As the opportunity has presented itself, I shall make a brief comment on a complaint argued before us. It was contended that in relation to claims 6 and 7 - which I do not find necessary to outline - the union was asking for one thing but the Tribunal generously awarded more than what was asked for. And when an interpretation was requested by the applicant pursuant to Sec. 12(10) of the Act, the error was compounded in that the Tribunal:

(1) Vacated the original order in respect of one of the items;

(2) Varied the order in a material particular in respect of the other item.

Parliament granted the right to ask for an interpretation because it was clear at the time the Act came into force, that generally, laymen would be called upon to constitute a panel for adjudication. This is no reflection on the competence and expertise of those selected. There is an art in formulating in legal language or with precision the award of some relief prayed for. Where ambiguity or uncertainty is detected in any area of an award, the Tribunal may be requested to "interpret" or "clarify" what is intended.

Under the heading of interpretation, the Tribunal is not allowed to vary or amend in a substantial particular what was originally awarded. Similarly, the Tribunal, before it makes an award, is not permitted to go outside an item of claim without giving an opportunity to the party concerned to amend this claim. An opportunity must, in such a case, be given to the other party to meet the amendment or the new development which may arise.

In M.24 of 1977 (Reg. v. The Industrial Disputes Tribunal, Ex. p. Esso West Indies Ltd.), we gave certain guidelines concerning the question of interpretation of an award. A perusal of our views in that case as well as in the one under review, could be of assistance to the Tribunal in future cases.

It could be that in order to save expense and to obtain expedition in the final settlement of an industrial dispute, this Court ought to be given specific power to amend an award as the justice of the case requires.

In the alternative, power ought to be given whereby this Court may remit the award to the Tribunal for such amendment or alteration which may be specified.

Parliament has allowed an impeachment of an award on a point of law. This is wide enough to cover a multitude of sins. But Parliament has not said specifically - and it ought to say so - what is to happen where the sin is small and does not substantially affect the award. It may be suggested that the Full Court ought to be regarded as a little more than a reviewer of the Tribunal's action.

The nature and the amount of cases coming before us in recent times suggest that more power should be granted to this Court in order to arrest an unsatisfactory situation. There are too many awards which are compelled to quash.

A general power of review with the specific power to amend an award or to remit with directions as the justice of the case demands, is a question which ought to be considered by those parties who are concerned with industrial relation matters. The national interest may very well be involved in such a move.

MALCOLM, J:

I have had the opportunity of perusing the reasons of Parnell, J., in this matter. I agree with them and have nothing to add.

GORDON, J:

I agree.