JUDGMENT BOOK

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IN THE SUPREME COURT

THE FULL COURT

Before: Smith, C.J., Theobalds and Gordon, JJ.

Suit No. M. 26 of 1984

R. v. The Minister of Labour and Employment,
The Industrial Disputes Tribunal,
Devon Barrett, Lionel Henry and Lloyd Dawkins

Ex parte West Indies Yeast Co. Ltd.

J. Leo-Rhynie, Q.C., and Angela Robertson for Applicant

R.G. Langrin and Wendell Wilkins for first and second Respondents. Other Respondents did not appear and were not represented.

Heard: 5, 6, 7 and 8 November 1984, 26 July, 1985.

Smith, C.J. :

The respondents Barrett, Henry and Dawkins were employees of the applicant company - the first two as production supervisors and the third as an electrician. By letters dated 30 April 1982, in the case of Barrett and Henry, and 3 May 1982, in the case of Dawkins, their employment was terminated for stated cause with one month's pay in lieu of notice. It is not disputed that the termination in each case was in compliance with the provisions of the Employment (Termination and Redundancy Payments) Act.

In a joint letter dated 10 May 1982 to the Permanent Secretary, Ministry of Labour and Employment, the former employees sought the intervention of the Ministry. The first paragraph of the letter is as follows :

> " We are to seek the intervention of the Ministry of Labour in a dispute with our employer West Indies Yeast Company Limited over the unjustifiable dismissal of the undersigned. "

The letter urged "that the matter be expedited." Up to the date of the letter, no representation had been made to the company by them or on their behalf nor had the justification for their dismissal been challenged in any way.

In an affidavit dated 29 March 1984, Luis Miguel Medina, Managing Director of the applicant company, states that the Ministry of Labour advised the Company that a report had been made to the Ministry "on behalf of the employees" and that the company was being invited to attend a meeting at the Ministry to "discuss the matter". Mr. Medina added that "no meetings had taken place at the local level in relation to the termination of

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employment of the said employees".

On 26 July 1982 there was a meeting at the Ministry of Labour, which was attended by Mr. Medina and by Mr. Leo-Rhynie, Q.C., representing the company, and by the three former employees. An officer of the Ministry was chairman. In affidavits by two officers of the Ministry it is stated that the meeting, described as a "conciliation" or "conciliatory" meeting, was held "in order to resolve a dispute" between the former employees and the company "pertaining to (their) dismissal" from the company. The minutes of this meeting, which are exhibited in the record, show that Mr. Leo-Rhynie objected to the dismissed employees being represented at the meeting by Mr. Reg. Ennis, who was present. The chairman stated that Mr. Ennis was there as a consultant to them. A discussion of the objection then took place between the chairman and Messrs. Leo-Rhynie and Ennis, after which the chairman ordered "a break". The minutes show that "unilateral discussions" occurred after the break and that the meeting was not thereafter re-convened. The "unilateral discussions" were referred to in the affidavits of the officers as "unilateral talks" and it is stated in those affidavits that "the unilateral talks did not lead to a resolution of the dispute." Mr. Medina swore in his affidavit of 29 March that "no discussion whatever took place at (this meeting) in relation to the termination of employment" of the former employees. It is stated in one of the affidavits of the officers that between 26 and 30 July 1982 Mr. Medina was "contacted" by a conciliation officer of the Ministry and invited to another conciliation meeting. This is flatly denied by Mr. Medina in a supplemental affidavit dated 7 November 1984.

The evidence shows that no further action was taken in respect of the "dispute" reported to the Ministry until 3 November 1983, when the Minister, through his Permanent Secretary, referred "the dispute" to the Industrial Disputes Tribunal "in accordance with" s. 11A(1)(a) of the Labour Relations and Industrial Disputes Act (the Act). A copy of the letter conveying the reference was sent to the attorneys-at-law for the company. In a letter dated 4 November they were invited by the Tribunal to submit a brief on behalf of the company. In a letter dated 18 November 1983 the attorneys-at-law replied that they were not in a position to submit the brief "as (their) instructions (were) that the conditions precedent to the Minister

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referring the matter were not complied with". They stated that the possibility existed that they would be applying to the Supreme Court to quash the reference.

The reference of 3 November 1983 to the Tribunal was withdrawn by a letter from the Ministry to the Chairman dated 22 November 1983, signed by Mr. L. Anthony O'Gilvie, a conciliation officer of the Ministry. The letter stated that the Ministry considered that further attempts should be made "to settle (the) matter" at the conciliatory level and that it was in those circumstances that the reference was withdrawn. Mr. O'Gilvie, one of the officers to whose affidavit references have been made above, stated in his affidavit, dated 6 November 1984, that the Minister withdrew the reference because, subsequent to the referral, Mr. Medina "disclosed" to the Chief Director of Industrial Relations, Mr. Tony Irons, "that the company was prepared to continue conciliation talks with the employees at the Ministry." In his supplemental affidavit Mr. Medina denied that the withdrawal of the reference was as a result of the company's promise to have a meeting. He admitted repeating the willingness of the company to have discussions with the dismissed employees to an officer of the Ministry subsequent to the attorneys-at-law's letter of 18 November but said that Mr. Irons admitted the "prematureness" of the reference to him "and advised that the Ministry would be withdrawing it."

On 16 February 1984 another meeting was held at the Ministry. Mr. O'Gilvie was the Chairman. The merits of the "dispute" were discussed with the representatives of the company and Messrs. Henry and Dawkins. Devon Barrett was absent. This was followed by unilateral discussions; but the matter was not resolved, after some two hours of discussion. The meeting was adjourned with the Chairman stating that the Ministry 'will be in touch with both sides as soon as possible". The next event was the reference of "the dispute" by the Minister to the Tribunal in a letter dated 29 February 1984, which was signed by Mr. O'Gilvie. The terms of reference were as follows :

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" To determine and settle the dispute between West Indies Yeast Company Limited on the one hand, and Messrs. Devon Barrett, Lionel Henry and Lloyd Dawkins, formerly employed by the Company on the other hand, over the termination of their employment. "

The reference was made under the provisions of s. 11A(1)(a) of the Act.

By leave of Vanderpump, J., granted on 7 May 1984, application was made to the Court for orders of certiorari and prohibition to quash the reference of the Minister and to prohibit the Tribunal from proceeding upon it. The grounds upon which the application was made are set out in full in the amended statement on application for leave. They amount to two main grounds, which may be summarized as follows : (1) the Minister acted ultra vires, unlawfully or without authority in making the reference in that the conditions precedent to an exercise of his powers of reference under s. 11A of the Act were not satisfied; (2) that by the payments in lieu of notice, and their acceptance, the applicant company lawfully and effectually terminated the employment of the employees; so the terminations did not constitute dismissals in respect of which the Tribunal has jurisdiction.

Dealing first with the second ground, s. 12(5)(c) of the Act empowers the Tribunal to grant certain relief, there stated, where an industrial dispute relates to the dismissal of a worker. It was submitted that all this section does is to create an additional remedy and that no new right, additional to the common law rights of an employee wrongfully dismissed, has been established. It was said that where an employee is dismissed for insufficient cause he has an action for wrongful dismissal but that no cause of action is available to him when his employment is terminated by adequate notice or by payment in lieu thereof. It was submitted, therefore, that the reference by the Minister was invalid as it referred to the Tribunal a matter on which it could not adjudicate. It was submitted, contra, that s. 12(5)(c) expressly gives a right to a worker to complain of an unjustifiable dismissal which is otherwise lawful.

In my judgment, the contention on behalf of the applicant company is misconceived. Mr. Leo-Rhynie contrasted the provisions of s. 12(5)(c) with the provisions of the corresponding United Kingdom legislation where "unfair" is used instead of "unjustifiable". I understood him to concede

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that if s. 12(5)(c) had used the word "unfair" a worker could complain to the Tribunal in spite of a dismissal which was lawful. This concession is consistent with the views of the learned author of Harvey on Industrial Relations and Employment Law, cited by Mr. Leo-Rhynie. Dealing with the topic "Dismissal at common law - lawful and wrongful", the view is expressed in para. 11(28.01) that even if a dismissal "is justifiable at common law, it is not necessarily justified under the statute: it is possible for the employee to succeed in a complaint of unfair dismissal even if he would lose in an action for wrongful dismissal". The statute to which reference is made in the quotation is the Employment Protection (Consolidation) Act 1978 (U.K.). Then, dealing with the topic "The Impact of Unfair Dismissal", the learned author says at para. 11(29.20)(op. cit) :

> " The provision of unfair dismissal protection was designed to achieve a number of objectives. Together with the contracts of Employment Act 1963 and the RPA .... it marked a trend towards recognising that the employee has an interest in his job which is akin to a property right. A person's job can no longer be treated purely as a contractual right which the employer can terminate by giving the appropriate contractual notice. "

Finally, it is stated at para. 11(29.22) that "in essence, (unfair dismissal) differs from the common law in that it permits tribunals to review the reason for the dismissal. It is not enough that the employer abides by the contract. If he terminates it in breach of the Act, even if it is a lawful termination at common law, the dismissal will be unfair. So the Act questions the exercise of managerial prerogative in a far more fundamental way than the common law could do."

Reference to the Oxford English Dictionary shows that, in respect of actions, conduct etc., the word "unfair" means: "Not fair or equitable; unjust." While, in respect of actions etc., "unjust" means: "Not in accordance with justice or fairness." In Re Kempthorne Prosser & Co.'s New Zeal. Drug Co., Ltd., (1964) N.Z.L.R. 49 (cited in Words and Phrases Legally Defined (2nd. edn.) Vol. 5 at p. 250) Dalghish, J. said, at p. 52:

> " In my view a person is 'unjust' when he does not observe the principles of justice or fair dealing and an act can be said to be 'unjust' when it is not in accordance with justice or fairness. That is the ordinary dictionary meaning of the word 'unjust', and the word 'unjustifiable' ..... has a related meaning. "

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In my opinion, in the senses in which they are used in s. 12(5)(c) of the Act and in the corresponding U.K. legislation, the words "unjustifiable" and "unfair" are synonymous and the use of one rather than the other merely shows a preference of the respective draftsmen. In my judgment, "unjustifiable" in the section refers to the reason for dismissal and not the dismissal itself. The Tribunal, therefore, had jurisdiction to hear the complaint of the dismissed workers in this case if the Minister was otherwise authorised to make the reference.

Turning now to the first ground, it seems doubtful whether the prime condition precedent to the making of a reference, namely, the existence of an industrial dispute, was satisfied. The Act does not provide for the intervention of the Ministry, as distinct from the Minister, and the Minister's intervention may only be sought when an industrial dispute already exists. The dismissed workers, in their joint letter of 10 May 1982, sought the intervention of the Ministry "in a dispute" with their employer; but the uncontradicted evidence shows that there had been no complaint to their employer about their dismissal. Where then is the dispute ? It was "the dispute" referred to in their letter that the Ministry officials sought to conciliate and it is that dispute which the Minister purported to refer to the Tribunal for settlement when the efforts of his officials failed. The submissions of Mr. Leo-Rhynie on this ground were made, however, on the assumption that an industrial dispute existed. So, as this issue was not argued I shall not base my decision on it.

In support of the application, reference was made by counsel to the provisions of the Act, which was passed in 1975, in order to demonstrate the history and policy of the statute. Reference was made to s. 6, dealing with collective agreements and the implied procedure (set out in subsection (2)) for the settlement of disputes, a reference to the Tribunal being the final step in the procedure. It seems to me that the legislature is here stating the general scheme which should govern the settlement of industrial disputes, the ultimate aim being, as expressly stated in the section, the settlement of such disputes <u>without stoppage of work</u> (emphasis added).

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Then there is s. 9, which provides for the intervention of the Minister where an industrial dispute exists in an undertaking which provides an essential service, and s. 10, which empowers the Minister to act in the public interest where an industrial dispute exists in an undertaking which does not provide an essential service and "industrial action in contemplation or furtherance of that dispute has begun or is likely to begin." Section 11 allows the Minister to refer an industrial dispute to the Tribunal for settlement at the written request of all the parties to the dispute. Consistent with the provisions of s. 6, these three sections (9, 10 and 11) emphasize the importance which is placed on parties to a dispute being encouraged and allowed to settle their disputes themselves before the Tribunal is called upon to do so. Section 9 authorises the Minister to make a reference only "if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties." Section 10 contains similar provisions. Section 11 appears to be the Minister's authority for making the reference referred to in s. 6(2)(c); but, in any event, the Minister may not make a reference unless unsuccessful attempts were made by the parties to settle the dispute by the procedure in their collective agreement, where there was one.

Section 11A was added to the Act by amendment in 1978. It provides as follows :

> " 11A-(1) Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking and should be settled expeditiously, he may on his own initiative -
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> (a) refer the dispute to the Tribunal for settlement if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties ; or
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> (b) give directions in writing to the parties to pursue such means as he shall specify to settle the dispute within such period as he may specify if he is not satisfied that all attempts were made to settle the dispute by all such means as were available to the parties.

> (2) If any of the parties to whom the Minister gave directions under paragraph (b) of subsection (1) to pursue a means of settlement reports to him in writing that such means has been pursued without success, the Minister may, upon the receipt of the report, or if he has not received any report at the end of any period specified in those directions, he may then, refer the dispute to the Tribunal for settlement. "

It was submitted by counsel for the applicant company that unless s. 11A(1)(a) is construed so that the power conferred is only exercisable where industrial peace, the national economy or the public interest is threatened, the section would be repugnant to, and inconsistent with, ss. 9 and 10 of the Act and with the objects and policy of the statute as a whole. It was argued that it is inconceivable that Parliament intended to confer on the Minister a more restrictive power to refer disputes affecting industrial peace etc. than where the only interest affected was that of an individual.

It was submitted, further, that there was no foundation of fact on which the Minister could have concluded that the matter should be expeditiously settled or that attempts to settle by other means were unsuccessful. It was said that the words of the section imply that the Minister must satisfy himself that there existed a dispute which had resulted in the creation of circumstances warranting urgent and speedy resolution; that the circumstances should be such as to threaten industrial peace, the economy or the public interest.

In support of these submissions reference was made to passages in R. v. Industrial Disputes Tribunal, Ex parte Kaiser Bauxite Co. (unreported - 17 Feb. 1981). In his judgment in that case, Parnell, J. said (at p. 4) in reference to s. 11A :

> " the Minister now may refer the matter to the Tribunal because he sees the likelihood that it may interfere with the national interest, but it is something which is existing, something which is current and where there is the likelihood that unless something is done, great harm would be caused to the economy or the public interest. "

Ross, J. said (at p. 13) :

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> " It seems clear to me that the conditions contemplated by the section do not exist in the present case: at the time when the Minister made the reference ..... it was almost eighteen months after Mr. Kerr had been dismissed, there was a dispute between an employer and an ex-worker but no dispute between an employer and a worker or between any organisations representing one or both, there was no dispute existing in the mining operations of the company and there were no circumstances which required that the dispute should be settled expeditiously. "

For the Minister and the Tribunal, in this case, it was submitted that the language of s. 11A is clear, so the Court must give effect to it; that the Court has no right to put an unnatural interpretation upon the words merely to avoid harsh and inconsistent consequences. It was said that the section harmonizes with the other sections and there is no inconsistency. It was submitted, further, that the evidence from the affidavit of Mr. O'Gilvie clearly indicates a foundation of fact on which the Minister could have been satisfied that attempts were made without success to settle the dispute and that the exercise of his discretion ought not to be interfered with.

It will be seen that the provisions of s. 11A are consistent with the scheme and policy of the Act in that a reference may not be made to the Tribunal unless the Minister is satisfied that the parties have tried themselves to settle the dispute without success. What the section does in addition is to give the Minister power to act "on his own initiative". The reason for this is not difficult to find. Under s. 9, essential services, the Minister may act only on a written report made to him by or on behalf of a party to the dispute. Under s. 10, where he may act in the public interest, the Minister has to follow the rather lengthy procedure of making an order (which may be countermanded by the House of Representatives), publishing it and serving it on the parties and giving them thirty days to settle the dispute themselves; the parties must then be given time to nominate the members of a special Tribunal to hear the dispute and settle it. Under s. 11, the Minister may act only on the written request of all parties to the dispute.

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What s. 11A clearly does is to give the Minister freedom to intervene and take action in respect of any industrial dispute in spite of the restrictive procedures which the other sections require. However, in my opinion, he is not authorised to act with complete freedom. His powers are governed by the scheme and policy of the Act and by the express provisions of the section.

I agree with the contention of counsel for the applicant company that the Minister is authorised to act only in the public or national interest or in the interest of industrial peace. In my view, he has no authority to act in the interest of a dismissed ex-employee where his dismissal has not given rise to a dispute which threatens industrial peace, as would occur if, for example, he is represented in his dispute by a trade union which also represents workers currently employed to his former employer who may take industrial action if the dispute is not settled. Views similar to my own were expressed by Bingham, J. in the Kaiser Bauxite Co. case (supra) when he said (at p. 15) that "even with this added power which the Minister had (s. 11A), the entire scheme of the Act does not contemplate such a dispute as related between an employer, on the one hand, and the non-unionised worker on the other hand which does not in any way threaten industrial peace."

I agree with Mr. Langrin that whether or not a dispute should be settled expeditiously is a matter for the Minister's judgment and is not normally subject to review by the Court; but the expedition should be for the public interest and not purely for the interest of individuals, as in the case under consideration. No steps to settle the dispute in this case, if it can be called an industrial dispute, were taken prior to the report to the Ministry, which must be taken to be a report to the Minister. The pre-requisite that the Minister must be satisfied, before reference to the Tribunal, that attempts were made, without success, to settle the dispute "by such other means as were available to the parties" seems to be lacking. I do not think that this requirement can be satisfied only by what occurred at the Ministry.

It is a fundamental requirement, expressly stated in s. 11A, as in ss. 9 and 10, that the industrial dispute should exist in an undertaking before it can be referred for settlement to the Tribunal. It, therefore, seems obvious that the Minister's power to make a reference must be exercised so as to endeavour to ensure industrial peace in the undertaking in which the dispute exists and not merely to satisfy some narrow personal interest. In this case, the applicant company's managing director has stated that there has been no cessation of work or any disruption of, or interference with, the production of the applicant's plant as a result of the termination of the employment of the three ex-employees. He said that at all material times industrial peace and stability have existed and still existed between the company and its workers up to the date he swore his affidavit on 29 March 1984. The Minister's reference was made almost two years after the dismissal of the employees.

Assuming it can be said that an industrial dispute existed between the dismissed employees and their former employers, that dispute did not exist in the applicant company's "undertaking". In my judgment, for this reason and others previously stated, the conditions precedent to the exercise of the Minister's powers under s. 11A were not satisfied. He was, therefore, not authorised to make the reference. I would grant the application with costs.

May 28, 1985.

THEOBALDS, J:

The Learned Chief Justice (as he then was) has written his judgment with his usual vigour and thoroughness and having had the opportunity to read it my dilemma now is that whatever I may add as my contribution could properly be classified as being either merely repetitive or superflous. Apart from agreeing with his reasoning and the final decision arrived at there is just one point which I would wish to underscore. It was part of the applicant's case that "by payment in lieu of notice to the said employees and the acceptance by them of the said payments the applicants lawfully and effectually terminated their employment as recognized by Section 3 of the Employment (Termination and Redundancy Payments) Act and the said termination of employment by the applicant of the said employees did not constitute a dismissal in respect of which an Industrial Disputes Tribunal has jurisdiction".

In my judgment there is merit in this contention. The letters of dismissal which are in almost identical terms speak of payment of salary for the month of April as well as one month's salary in lieu of notice and contributions towards the Company's Pension Scheme. The Managing Director of the Company further deponed that "the said employees accepted payment of the said sums paid in lieu of notice". It has not been contended by or on behalf of any of the employees who saw fit to complain to the Ministry of Labour that they were unjustifiably dismissed that any of these sums were ever refunded. Yet the employees had the services of a Mr. Henry as spokesman, Mr. Reg. Ennis as Consultant representative and a nameless "firm of industrial relations lawyers" according to the minutes of the 26th February 1984. It would seem that if one is sincere in a contention of unjustifiable dismissal the Company's payment of unearned wages should be returned to the Company at the earliest opportunity. Once you accept payment then you are accepting the terms on which such payment is made or offered and the contract of employment is legally brought to an end. This is the position at common-law, this is given statutory recognition by the Employment (Termination and Redundancy Payments) Act and although common-law rights can be nullified by Statute this

can only be by an express provision.. It has not, of course, been suggested that the Labour Relations and Industrial Disputes Act purports to make illegal or render a nullity anything done under and in compliance with the provisions of the Employment (Termination and Redundancy Payments) Act.

To adopt the argument of the Learned Senior Assistant Attorney General "if the dismissals were lawful then there would be no dispute at all". There was no dispute at all. Indeed by the offer and acceptance of the letters of dismissal and the payment that followed same the Company and the employees could only be said to have been ad idem up to that point. What followed was a letter of complaint to the Ministry of Labour and even although this letter did make use of the word "dispute" there was never any evidence of a dispute sufficient to satisfy the requirements of Section 11(a) 1(a) of the Act under which the reference to the Tribunal purports to have been made. Conceivably the employees who made use of the word "dispute" in their complaint may have been referring to the oral warnings and written warnings which the Company had on file but which be it noted, the two employees who appeared emphatically denied receiving. I would hold that there being no dispute in any undertaking and certainly no evidence of attempts at settlement without success and for the other reasons stated in the judgment of the Learned Chief Justice an order of Certiorari should go to quash the reference dated 29th February, 1984, made by the Honourable Minister of Labour. The conditions precedent for such an Order were never met. Costs are to be agreed or taxed.

GORDON, J:

I entirely agree that for the reasons given by the Learned Chief Justice the application should be granted.

Seven to ten days after they accepted letters of termination of their employment and payment of amounts due to them in lieu of notice in accordance with the provisions of the Employment (Termination and Redundancy Payments) Act, the three former employees of the applicant Company wrote to the Ministry of Labour and Employment seeking that Ministry's intervention in matter of a "dispute" that existed between them and their former employer.

In the Labour Relations and Industrial Disputes Act, an "industrial dispute" means:

> " A dispute between one or more employers.....
> and one or more workers.....where such
> dispute relates wholly or partly to -
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> (a) Terms and conditions of employment.....
>
> (d) Any matter affecting the privileges, rights,
> .....of any worker".

The respondents did not challenge their dismissal but accepted the letters and payments without demur. The applicant Company was not informed of the respondent's dissatisfaction with the manner of their dismissal until they received notification from the Ministry of Labour and Employment.

In the Concise Oxford Dictionary the word dispute is defined thus: "quarrel, have altercation, controvert, call in question etc".

We are here concerned with the provisions of two Acts, The Labour Relations and Industrial Disputes Act which provides machinery for the determination of disputes and the Employment (Termination and Redundancy Payments) Act, under which the applicants acted as stated in the letters of dismissal.

The respondents could have brought themselves under the umbrella of the former Act if they had intimated to the applicants on receipt of the letters of dismissal, their dissatisfaction and/or rejection of the letter, thus initiating a dispute while the relationships of employer/employee existed.

After this condition ceased to be by virtue of the respondents acceptance, without protest, of their letters of dismissal, the relationship between the parties became that of employer and former employees.

I find there was no foundation of fact on which the Minister could properly refer the "dispute" to the Industrial Disputes Tribunal.