Privy Council Appeal No. 25 of 1999

(1) Bryan Sykes *Appellant*

v.

(1) The Minister of National Security and Justice and
(2) The Attorney General *Respondents*

and

Privy Council Appeal No. 26 of 1999

(2) Legal Officers Staff Association *Appellant*

v.

(1) The Minister of National Security and Justice and
(2) The Attorney General *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 25th October 2000, Delivered orally on the 26th October 2000

Present at the hearing:-

Lord Steyn
Lord Hoffmann
Lord Cooke of Thorndon
Lord Hutton
Lord Scott of Foscote

*[Delivered by **Lord Scott of Foscote**]*

The litigation that has led to this appeal to the Board has its origin in industrial action taken in May 1992 by Legal Officers in several Government departments. The Legal Officers were members of the Legal Officers Staff Association. The grievances that led to the industrial action are irrelevant for

present purposes but, briefly, the Legal Officers were dissatisfied with the progress of salary negotiations that were taking place. They had, in protest, absented themselves from work on a number of days. Their protest did not last long. A Press Release dated 20th May 1992 stated that the Association's members had "voted today to resume normal duties tomorrow, May 21, 1992".

The Government's response to this industrial action was to decide that deductions should be made from salary corresponding to the number of days the individuals in question had absented themselves from work.

A letter dated 12th May 1992 from the Ministry of National Security and Justice ("the Ministry") addressed to "All Heads of Department" asked for details of the members of staff who had participated in the industrial action and said:-

> "It has been decided that steps should be taken to ensure that deductions are reflected in the forthcoming pay day on May 21, 1992."

The letter of 12th May referred to Staff Order 3.25 as justifying these deductions.

Staff Order 3.25 provides that:-

> "Salaries and wages of officers who participate in industrial action may not be paid for any day or portion of the day during which they are engaged in industrial action."

The appellant, Mr. Bryan Sykes, was at the time the President of the Association. In a letter dated 17th June 1992 the Ministry informed him that the Cabinet had decided that Staff Order 3.25 was to be enforced against the Legal Officers who had taken industrial action and that "... this Ministry is proceeding to make the necessary deductions from the salaries of the officers concerned for the month of June".

The letter of 17th June led to an application by the Association for orders of certiorari and prohibition to quash the Cabinet's decision and to prohibit its implementation. The grounds of the application included the contention that the threatened salary deductions would constitute a penalty that

could only be imposed after disciplinary proceedings for misconduct had been taken. There had been no such proceedings. The grounds included also the contention that the officers in question, in absenting themselves from work, had been taking sick leave that, under Staff Order 5.29, had been approved by the appropriate authorities. This ground was withdrawn at the hearing of the application. It has not thereafter been contended that the absence from work of any of the officers was attributable to ill health. But the sick leave point has been revived before their Lordships, as will later appear.

The application came before the Full Court presided over by Zacca C.J., which, on 13th July 1992, dismissed it.

The respondents to the application, the Minister of National Security and Justice and the Attorney General, had taken a preliminary point, namely, that the Association, being an unincorporated body, was not a competent party. The Full Court agreed. But the defect was cured by allowing the application to be brought by Mr. Bryan Sykes, suing on his own behalf and on behalf of the members of the Association. The correctness of the court's ruling on this procedural point is one of the issues before their Lordships. On the substantive issues, Zacca C.J., with whose judgment the other two members of the Full Court agreed, described it as "well settled law that where an employee takes industrial action, his employer is entitled to refuse to pay him for the period during which he was on industrial action" (see p. 44 of the Record). Reference was made to and support was derived from *Miles v. Wakefield Metropolitan District Council* [1987] 1 A.C. 539. Zacca C.J. said that:-

> "... the Ministry would be entitled to deduct from their salaries an amount which represented the period for which no work was done due to industrial action."

and went on:-

> "In any event, the applicants have conceded that, for the purposes of the arguments, the legal officers had taken industrial action. This can only mean that having so acted they were not entitled to be paid for the period during which they had not worked."

Mr. Sykes, on behalf of the Association, appealed to the Court of Appeal. The appeal was dismissed on 25th February 1993. Downer J.A. and Patterson J.A. each gave a reasoned judgment Rowe P. agreed with both.

It appears from the judgment of Downer J.A. (p. 82 of the Record) that the Court of Appeal was under the impression that the Ministry had in fact gone ahead and made the deductions from salary that had been threatened and that the substance of the claim was for payment of the deducted sums. This, as Mr. Berthan Macaulay Q.C., counsel for the appellants in the Jamaican Courts and before their Lordships, made clear was a misapprehension.
The threatened deductions of salary were never made.

On the issue whether the officers were entitled to claim salary for the days on which they had absented themselves from work, the Court of Appeal agreed with the conclusions of the Full Court. The common law principle "no work, no pay", exemplified by *Miles v. Wakefield Metropolitan District Council,* was accepted. So the appeal was dismissed. On the procedural point, also, the Court of Appeal agreed with the Full Court. Patterson J.A. described Mr. Macaulay's submission that under the Civil Procedure Code an unincorporated association such as the Legal Officers Staff Association could institute legal proceedings as "untenable."

In the course of his judgment, Zacca C.J. referred to a number of concessions that had been made by Mr. Macaulay (see p. 39 of the Record). These concessions were referred to by Downer J.A. in his judgment (see p. 90 of the Record), so they were plainly maintained in the Court of Appeal. The first four of the concessions were as follows:

"(1) It was conceded that for the purposes of the case, the Legal Officers were on industrial action;

(2) The present case related to one of contract of employment;

(3) There were no statutory limitations which prevented the operation of the common law rule that an employee was only entitled to wages where they have been earned;

(4) There are no statutory limitations to take the case out of the normal master and servant situation."

These concessions are of relevance to the manner in which Mr. Macaulay has argued the appeal before their Lordships.

He has submitted that the common law principle "no work, no pay" does not apply to the legal officers who absented themselves from work in 1992. This submission appears to their Lordships to be inconsistent with the concessions made before the Full Court and maintained before the Court of Appeal. In any event, the grounds on which Mr. Macaulay sought to support his submission are unacceptable.

His first point was based on the sick leave provision in Staff Order 5.29. This Staff Order, which has the side heading "Leave on the ground of ill health" provides, in sub-paragraph (1), that:-

> "Sick leave to cover absence from duty owing to illness may be granted by Heads of Department up to the limit set out in Schedule A ... This leave may be taken in short periods or all at any one time, provided that absence for more than three days on any one occasion should be supported by a medical certificate. ..."

Mr. Macaulay tried to persuade their Lordships that this provision entitled an officer to take leave of up to three days notwithstanding that he or she was not suffering from any ill health. Such a proposition needs only to be stated to be seen as absurd. There was no suggestion made either in the Full Court or in the Court of Appeal that ill health had been the reason why the officers had absented themselves from work. It had originally been contended that their taking of sick leave for the duration of their industrial action absences had been approved by the appropriate authorities. The contention of approval was abandoned before the Full Court and the sick leave defence was abandoned with it. The officers' absences from work were not attributable to ill health; they were attributable to industrial action (see concession (1)).

Mr. Macaulay next drew their Lordships attention to Staff Order 1.6:-

"Public Officers may be liable to disciplinary action under the regulations of the appropriate Service Commission in respect of breach of any of these Orders."

and to Staff Order 3.3:-

"An officer who absents himself from duty without permission except in the case of illness or other unavoidable circumstances shall render himself liable to disciplinary action."

Their Lordships would draw attention in each of these Orders to the words "liable to". Disciplinary action is not an inevitable consequence. It is something that may follow but is not bound to follow. There is a thoroughly sensible flexibility inherent in the language of these two Orders.

Mr. Macaulay's point was that the officers in question, by absenting themselves from work, had made themselves liable to disciplinary action for misconduct. Their Lordships agree that they may well have made themselves so liable.

Mr. Macaulay then directed their Lordships' attention to the relevant regulations under which any disciplinary action against the officers would have had to be taken. They are the Public Service Regulations 1961.

Regulation 29(1) provides that:-

"Any report of misconduct shall be made to the Chief Personnel Officer and dealt with under this Part of these Regulations as soon as possible after the time of its occurrence."

And Regulation 37(1) provides that:-

"The penalties which may be imposed on an officer against whom a disciplinary charge has been established are –

(a) dismissal;

(b) reduction in rank;

(c) suspension without pay for a period not exceeding 3 months;

(d) deferment or withholding of increment;

(e) a fine;

(f) reprimand."

As Zacca C.J. observed in his judgment (p. 44 of the Record), none of these penalties would allow the deduction of salary that had been earned. Mr. Macaulay submitted that a decision to deduct from the monthly salary otherwise payable the amount attributable to the days on which the officer had absented himself from work was a decision to impose a penalty for misconduct. This, he submitted, was beyond the power of the Minister. It was for the Public Service Commission to institute and prosecute disciplinary proceedings for misconduct, not the executive. Mr. Macaulay endeavoured to clothe his submission with constitutional significance and importance. The Cabinet decision regarding the deductions was an unconstitutional attempt by the executive to usurp the function of the Commission. He submitted, also, that the regulations regarding misconduct, disciplinary proceedings and penalties had displaced the common law, and in particular the "no work, no pay" principle, so far as the consequences of unauthorised absences from work are concerned.

Their Lordships are unimpressed by these submissions. The with-holding of a part of salary attributable to a period in which, in breach of contract, no work has been done is in accordance with common law (*Miles v. Wakefield Metropolitan District Council*) and in accordance with the contract of employment between the parties. Their Lordships agree with the Full Court and the Court of Appeal that Staff Order 3.25 expresses the common law. As to the displacing of the common law "no work, no pay" principle, Mr. Macaulay's submission is inconsistent with concessions (3) and (4) made in the Full Court and maintained in the Court of Appeal. The concessions were, in their Lordships' view, rightly made.

Disciplinary proceedings may or may not be a sensible response to misconduct. If misconduct is found established, penalties as set out in Regulation 37(1) may be imposed but these do not include an order for the whole or a part of salary

that has been earned to be forfeited. A deduction to take account of salary that, by reason of unauthorised absences from work has not been earned, is not a penalty at all. It is a deduction necessary to be made in order to calculate the officer's contractual entitlement to salary. This is a process unaffected by disciplinary proceeding or penalties.

Accordingly, on the main point argued before the Full Court and the Court of Appeal, their Lordships' are in full agreement with the conclusions reached in those courts.

There is, however, a further point that, in their Lordships' view, is fatal to this appeal. It is accepted that the threatened salary deductions were never made. The Legal Officers who engaged in the industrial action were paid in full. It may be that it was the existence of this litigation that was the reason why no deductions were made. But, whatever the reason, the result is that this litigation has now become utterly pointless. Whatever the position may have been in 1992, when the Full Court gave judgment, and in 1993, when the Court of Appeal did so, it is now, over eight years after the industrial action was taken, far too late for the amount of the overpaid salary to be recovered. There is no case for the grant of either of the prerogative orders.

This case does not give rise to any constitutional issue. It involves simply the re-affirmation of the common law principle of "no work, no pay" that has been settled for many years. The Cabinet decision, if that is the right description, that the officers who took the industrial action should be paid no more salary then they had earned, did not raise any constitutional implications that warranted an appeal to the Board.

As to the procedural point regarding the status of the Association, as an applicant, nothing now turns on the point but their Lordships do not doubt that the decision of the Full Court was correct.

In these circumstances their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs.