IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 168 OF 1991

BETWEEN	THE TRADES UNION CONGRESS OF JAMAICA	1ST PLAINTIFF
	ALPHANSO GOODEN	2ND PLAINTIFF
	ALLAN BROWN	3RD PLAINTIFF
	ALBERT HENRY	4TH PLAINTIFF
	HUBERT STEWART	5TH PLAINTIFF
	DONALD JOHNSON	6TH PLAINTIFF
	CANUTE MINOTT	7TH PLAINTIFF
AND	SHIPPING ASSOCIATION OF JAMAICA	DEFENDANT

Lord Gifford, B. Samuels and Miss A. Haughton instructed by Knight, Pickersgill, Dowding & Samuels for the Plaintiffs.

Emile George Q.C., Dr. L. Barnett and J. Vassell instructed by Dunn Cox & Orrett for the Defendant.

Heard: 17th & 18th December, 1991 and 31st January, 1992.

PATTERSON, J.

The plaintiffs are seeking, by way of an amended Originating Summons, the following declaration and remedies:-

"1A. A declaration that the purported termination by the defendant of the contracts of employment of the 2nd, 3rd, 4th, 5th, 6th and 7th Plaintiffs on the 12th December, 1990 was unlawful and in breach of the terms of the Collective Labour Agreement made between the Defendant and the 1st Plaintiff and other parties; and that therefore the said contracts of employment still subsist.

2. An injunction restraining the Defendant from appointing anyone to fill the vacancies on the Kingston Ports of the jobs formerly carried out by the 2nd, 3rd, 4th, 5th, 6th and 7th Plaintiffs known as Red Book men before the issue of the dismissal of the said 2nd, 3rd, 4th, 5th, 6th, and 7th Plaintiffs had been determined.

3. An injunction to restrain the Defendant, its servants and/or agents from entering into contracts or arrangements or employing any other devise designed to deprive the Plaintiffs of their jobs whilst they are still validly employed to the Defendant's

Association.

4. That the Defendant pays the costs of and incidental to this application and order.

5. Such further and/or other relief as may be just."

The summons is supported by evidence contained in affidavits sworn by Hopeton Caven, the General Secretary of The Trades Union Congress of Jamaica. Daniel Lynch, a crane operator employed to the Shipping Association of Jamaica in the category of port workers known as "red book men", and Allan Brown, the 3rd plaintiff. The defendant relies on the affidavit evidence of Russell Keith, the Industrial Relations Manager in its employment.

The Trades Union Congress of Jamaica, (the union) the 1st plaintiff, is a registered trade union, and, along with the Bustamante Industrial Trade Union and the United Portworkers and Seamen Union (in its own right and on behalf of the National Workers Union), it entered into a joint labour agreement (the agreement) with the Shipping Association of Jamaica, the defendant, for the shipping industry at Port Bustamante. The agreement in question covered the period 1st November 1987 to 31st October, 1989, and thereafter from year to year until terminated. The Shipping Association of Jamaica is also a registered trade union, the members of which are companies engaged in the shipping industry as owners of docks and wharves, various stevedoring operators, agents of shipping lines warehousing operators, port trucking operators, and so on, and is the employer of all workers and stevedoring labour engaged at the port in loading and unloading ships' cargoes. These workers are represented jointly by the 1st plaintiff and the other trade unions mentioned above, and it was on their behalf that the agreement was entered into. The workers covered by the agreement are categorized and set out in Clause 2 thereof as:-

"(i) those categories of workers registered as port workers under the Government Labour Department Portworkers Registration Scheme of 1939 and employed by the hour and/or by the day in Port Bustamante on wharves and ships for the purpose of on-and-off loading ships' cargoes for import, export or trans-shipment and stacking and stowing the same as and if required, it being agreed that such portworkers are now

commonly known as "red book men" and including deckmen, gangwaymen, holders, lashers, gantry operators, watchmen, deckmen, truckhead operators and foremen (excluding permanent foremen).

(ii) Workers registered and known as "blue book" men employed on a casual basis when required to supplement the red book men.

(iii) That category of worker in Port Bustamante known as gearsmen."

The other categories covered by the agreement consist of workers that are permanently employed and casually employed by the various companies that operate Port Bustamante, and those workers are known as Uncontested Group workers and UCG workers, workers registered and known as tally clerks, and workers registered and known as hold watchmen and locker/discrepancy clerks. Latterly, the defendant has employed a permanent body of registered workers known as "mmen" who do the same work as red book men, but do so in their own right and not merely to assist the red book men. It is contended by the defendant that under the terms of the agreement between the unions and itself, it has a right to employ such mmen, and that they are recognised and represented by the unions.

The object of the 1939 scheme for the registration of port workers in Kingston (set out in the second schedule to the Kingston Port Workers (Superannuation Scheme) Regulations 1954, made under Sec.6 of the Kingston Port Workers (Superannuation Fund) Law, 1954)is:-

"To regulate the employment of port labour in Kingston by forming a register of port workers entitled to preference for engagement, so that only in circumstances of exceptional pressure of work should any unregistered person be engaged for port work. By these means, a check would be put on the employment of purely casual labour, and the engagement of labour would proceed in accordance with a well understood and properly organised plan."

The regulations define a "port worker" to mean "any worker who -

(a) is registered as a port worker under the Scheme for the Registration of Port Workers in Kingston approved by the Labour Department (a copy of which is set out in the Second Schedule to these Regulations) or under the scheme

to be substituted therefor (a copy of which is set out in the Third Schedule to these Regulations); and

(b) is employed by the hour or by the day in the port of Kingston on wharves and ships for the purpose of on and off loading ships' cargoes and re-stocking the same,

and any such worker shall, for the purposes of Section 2 of the Law, be deemed to be registered in accordance with a system approved by the Minister."

It is plain that "port workers" are comprised of two groups of workers, those that are registered and those that are deemed to be registered, and are quite distinct from those that may be employed to do purely casual labour. Section 2 of The Kingston Port Workers (Superannuation Fund) Law, 1954, (a law which contains special provisions only in relation to the pension of port workers) sets out the meaning ascribed to a port worker for the purposes of the Act as follows:-

> "port worker" means port worker in the port of Kingston registered and recruited for work in accordance with any system approved by the Minister."

The evidence in the instant case clearly establishes that the 2nd, 3rd, 4th, 5th, 6th and 7th plaintiffs (the individual plaintiffs) are duly registered port workers and fall in the category known as red book men. As such, they enjoy preference for employment on the wharf over unregistered workers. However, Clause 3 of the agreement, which sets out the "Rights of Management", specifically reserves the right of the defendant, (inter alia):-

> "(c) to promote, demote, transfer, dismiss, layoff or declare redundant, discipline and discharge for just cause workers covered under this Contract within the framework of this Agreement provided however that the Association or wharf Companies shall not victimize, embarrass or create hardships to any worker covered by this Contract and provided further that in the event of termination of employment for whatever reason, the Employer shall have the right in its sole discretion to make payment in lieu of notice and the Unions hereby agree that the workers will accept such payment in lieu of notice."

It is contended by the plaintiffs that the agreement contains the terms and conditions of employment of the workers represented by the unions

and that it embodies the terms of the contract of employment between employer and employee, and as such, the terms are binding.

Mr. George submits "that no binding contract exists between the defendant and the Trade Union Congress of Jamaica or any other trade union and that the Collective Labour Agreement referred to as Exhibit "H.C. 1," does not constitute a legally binding agreement."

I do not understand Lord Gifford to be saying that the agreement is a binding contract between the unions and the defendant. He submits that it is clear on the evidence that the agreement is part of the contract of employment of the port workers and is contractually binding as between the individual plaintiffs and the defendant. I agree with his submission, and consider the law in this regard to be as it is stated in the unreported case of Jamaica Broadcasting Corporation v. The National Workers Union & ors. (S.C.C.A. 14 & 15 of 1981, delivered on December 18, 1981). In that case Zacca P. (as he then was) had this to say:-

> "We see no reason for departing from the view which has long been held that a collective labour agreement may be legally binding if there are express provisions to that effect in the agreement or it can be ascertained from the surrounding circumstances that the intention of the parties was that it was to be legally binding .....
>
> What we are clear about, however, is that once the employer and the employees accept and in-corporate the terms of the collective agreement into the individual contract of service, to that extent, the employer and the employee are legally bound by the terms of the contract of service."

The agreement between the unions and the defendant provides (in Clause 3) that the employer "shall be entitled specifically:-

> (a) to recruit new port workers, gearsmen, U.C.G. workers, tally clerks including hold watchmen and locker/discrepancy clerks as necessary without interference and to decide the number, classification and qualifications of the portworkers, gearsmen, U.C.G. workers, tally clerks, hold watchmen and locker/discrepancy clerks required provided however, that blue book workers who were on the Blue Book roster on or before 1st January, 1966 shall be given preference within the categories of registered port workers only."

This provision seems to recognise the right of the employer to decide when and how the number of registered workers can be increased and reduced. The turn of events seem to have made that provision quite necessary. Since the early seventies, the mode of shipping cargo has been vastly modernized and mechanized, and container shipping has taken over from break-bulk as the primary method, thus reducing the need for a great number of physical workers. The work force was reduced to predominantly permanent workers (red book men) during the years leading up to 1985. But by then, those workers had aged, and with the agreement of the unions, young men were employed and absorbed into the red book men category of port workers. Again, in 1987, because of the ageing of the permanent workers, a body of casual workers, described as m-men, were employed with the consent and agreement of the unions. These casual workers operate in the same areas as red book men, but it is the contention of the defendant that they "do not supplement the red book men as such".

On the 4th October, 1990 forty-four workers were laid off because of the decline for physical labour at the port. These included the individual plaintiffs and also included "some m-men". In December, 1990, eighteen of those laid off were recalled, and the remaining twenty-six were made redundant by letters dated December 12, 1990. The individual plaintiffs were among those made redundant.

The defendant admits that in deciding who would be laid off, it acted on the basis that it would keep the best members of the workforce, based on productivity and work attitude. The individual plaintiffs were said to be "either unproductive or uncooperative or both". The defendant contends that it is not obliged in a redundancy situation to first make all m-men and blue book men redundant, however productive and able they were, and only afterwards to make any red book worker redundant, however unproductive some of them were. After the redundancy exercise, the work force was reduced to 235 red book men, 37 m-men and 2 blue book men. A number of those laid off accepted the redundancy notice and collected the amounts offered for redundancy and pay in lieu of notice. The six individual plaintiffs did not accept the redundancy notice and pay offered and now contend that their contracts of

employment were not legally terminated and still subsist.

It is against this background that the 1st plaintiff and the individual plaintiffs seek the declaration and the remedies mentioned above.

The first issue that the plaintiffs submit that the court should resolve is this:-

"Were the terms of the Collective Labour Agreement incorporated into the contract of employment of the individual plaintiffs?"

Although the agreement is made between the defendant(as employer of all port workers including the individual plaintiffs) and the 1st plaintiff and other trade unions (representing the individual plaintiffs and other workers), it appears to me that it spells out the contractual terms of employment between the defendant and each individual worker represented by the unions, and that it is generally accepted by all the parties that both the defendant and the individual plaintiffs considered themselves legally bound by its terms. The agreement is not a contract that is legally binding between the 1st plaintiff and the defendant but is binding in honour only. A close examination of the agreement makes it clear that it was never the intention of the defendant and the unions to enter into a legally binding contract. The very point was considered by the Full Court of the Supreme Court in Suit M15/1979 Regina v. The Industrial Disputes Tribunal, ex parte The Shipping Association of Jamaica - Applicant. (unreported) The Shipping Association applied to the full court for an order of certiorari to bring up and quash an award made by the Industrial Disputes Tribunal in favour of the workers represented by their unions. The court considered the terms of the agreement between the unions and the Shipping Association, (the main clauses of which are identical to the agreement in the instant case) and Wilkie J., in his judgment, had this to say:-

> "I would support the contention of both Mr. Edwards and Mr. Phipps that it cannot be gathered from this agreement that it is enforceable at law. I can find nothing in an overall view of the document of any mutual intention in the parties to be legally bound. I would therefore hold that the Agreement could not be enforced in a Court of law and can be enforced only by industrial sanctions".

The other members of the court, Chambers J. and Carey J. (as he then was) expressed similar views, and respectfully, I too am of the same opinion. But the position as between the defendant and the workers is not dependent on the legality of the agreement between the defendant and the unions. I hold that the contractual relationship between the defendant and the individual workers is evidenced in the terms of the collective labour agreement, and that the obligations of the defendant and the workers evidenced and covered by the agreement are binding in law on the defendant and the six individual plaintiffs.

The second question posed by the plaintiffs is this:-

> "on the true construction of the Collective Labour Agreement, was the defendant obliged to give preference to red book men i.e., by only employing or continuing to employ casual workers when no red book men were available to perform the relevant category of work".

Lord Gifford argues that Clause 2 of the agreement makes reference to The Government Labour Department Port workers Registration Scheme of 1939, and therefore, in construing the provisions of the agreement, the court is entitled to look at the scheme and in particular, the object of the scheme. I have alluded to the provisions of the 1939 scheme. He relies on the definition or description of the 2nd category of workers - blue book men in Clause 2(ii) of the agreement. He argues that blue book men are casual workers employed "when required". If there are red book men, then they have preference from the mere fact that they are red book men. Blue book men can only supplement red book men, and supplement means that they make up numbers when there are insufficient red book men available to do the work. He submits that "on the plain meaning of the words, these clauses, 2(i) & (ii), must be construed to mean that the employer is obliged to give preference to red book men when there is any question of reducing numbers because of a shortage of work."
Lord Gifford argues that the right of the defendant, defined in Clause 3(c) of the agreement, to lay off or declare redundant workers covered by the agreement, must be exercised subject to the defendant's obligations under the agreement and "within the frame work" of the agreement. He submits that "the defendant's action in giving the notices of the 12th December, 1990 constituted an unlawful repudiation of the contract of employment. If the construction of the agreement contended for is correct, then it was not lawful

under the contract for the defendant to make no distinction between red book men and casual workers in making its selection for redundancy. In fact, on the evidence, the defendant considered that it was entitled to choose the best men irrespective of whether they were red book men or casual, and that is why they unlawfully repudiated the contract".

He submits further that since, on the evidence, the individual plaintiffs have never accepted the repudiation of their contracts, the legal consequence is that those contracts still subsist and the plaintiffs are still registered port workers in the employ of the defendant. In support of his submission, he relies to a large extent on the judgment of Jenkins LJ. in Vine v. National Dock Labour Board [1956] All ER 1 (at page 8 et seq.) I do not think it necessary to recite the facts in that case. Suffice it to say that the dismissal of Mr. Vine was a nullity because the disciplinary committee which purported to terminate his employment had no statutory power to do so.

The instant case is easily distinguishable from Vine's case. The defendant is not a statutory body, and the plaintiffs were not employed by a statutory body. They were not employed and controlled under the provisions of any statutory scheme. The Kingston Port Workers (Superannuation Fund) Law, 1954 simply establishes a scheme for providing superannuation benefits for registered port workers, but it does not control in any way the contractual relationship between the defendant and the individual workers. I hold that the contractual relationship between the defendant and the individual plaintiffs is that of master and servant, and that such relationship is not governed by any statutory enactment, but strictly by the agreement between the parties and such common law principles that are applicable in the circumstances. The provisions of the Employment (Termination and Redundancy Payments) Act for notice of termination has been expressly waived by the agreement, which states "that in the event of termination of employment for whatever reason, the Employer shall have the right in its sole discretion to make payment in lieu of notice and the Unions hereby agree that the workers will accept such payment in lieu of notice". (Clause 3(c)). The letters of the 12th December, 1990 which made the individual plaintiffs redundant provided for payment in lieu of notice.

I am of the view that Clause 2 was not intended to and does not fetter the rights of the defendant to reduce the workforce at the port. Both red book men and blue book men are registered port workers, but the difference between them is that red book men are preferred workers, and they are on the permanent staff of the defendant, while blue book men are casual workers who work if and when the permanent workers are short in numbers to perform the work at the port. They supplement the red book men when the necessity arises. But surely an employer must have the right to decide the number of preferred permanent staff required in its ordinary operations, and in my opinion, the defendant is at liberty to reduce the number of its employees in the red book men category, provided always that it adheres to the principle that blue book men do not displace but only supplement red book men. The evidence in this case does not support a finding that this principle was not adhered to.

The 1939 scheme discriminates against unregistered workers, who may only be engaged in circumstances of exceptional pressure of work, that is, when all available registered workers have been engaged and the necessity for additional labour still exists. It does not categorise registered port workers, nor does it regulate the preferential treatment of the various categories of registered port workers. It states specifically that the act of registration does not entitle any port worker to employment (Para. 2(ix). Their employment and dismissal falls within the realms of the contractual relationship between employer and employee, and it should be noted that under the scheme of registration, dismissal from employment of a registered port worker does not automatically revoke his registration as a port worker. But nevertheless, the individual plaintiffs are contending that their contracts of employment have not been effectively or legally terminated and still subsist. Lord Gifford argues that the contract is not terminated until the repudiation is accepted, and in the instant case, acceptance cannot be inferred from the conduct of the individual plaintiffs. They have maintained themselves ready to assume work, they accepted no money and they have not sued for damages.

The evidence discloses that firstly, the individual plaintiffs were laid off, and then, without being recalled, they were served with letters of redundancy on the 12th December 1990. It is plain that the defendant considered the contracts of employment to be at an end in accordance with Clause 3 of the

agreement, and therefore, in the ordinary case, that puts an end to the contract. The question still remains, however, must the individual plaintiffs accept the repudiation to put the contract at an end? In Hill v. Parsons [1971] 3 ALL ER 1395, it was held that although an employee has been wrongfully dismissed, exceptional cases can arise which will leave the contract in existence. However, such cases are rare and can only arise if the relationship of mutual confidence between employer and employee remains intact. Mr. George argues that even if the Court should find that the individual plaintiffs were wrongfully dismissed, there is no evidence of any exceptional circumstances to bring the instant case within the principles enunciated in Hill v. Parsons (supra), and consequently, that case is not applicable to the facts of the instant case. I find myself in full agreement with Mr. George on this score. I hold that the individual plaintiffs were not wrongfully dismissed, and that under the terms of the agreement the letters of the 12th December, 1990 were sufficient to put an end to the contracts, quite independent of whether or not the employees accepted the repudiation.

Even in cases where the dismissal was wrongful, it has been held that such a wrongful dismissal terminates a contract of personal service without the necessity for acceptance by the employee (see Saunders & ors. v. Ernest A. Neale Limited [1974] 3 ALL ER 327.) This however, is a much debated point, and there are opinions to the contrary. In Gunton v. London Borough of Richmond upon Thames [1980] 3 ALL E.R. 577, Buckley & Brightman L.J.J. held (Shaw L.J. dissenting):-

> "The wrongful dismissal of an employee did not put an immediate end to the contract of service because, applying the ordinary principles of the doctrine of repudiation, it was merely a repudiation of the contract by the employer which only resulted in termination of the contract when it was accepted by the employee."

Shaw L.J. on the other hand, expressed the view that:-

> "Having regard to the fact that specific performance would not be ordered to enforce a contract of service, the wrongful dismissal of an employee was to be regarded as a total repudiation of the contract which automatically destroyed the contractual

> relationship, leaving the employee to be compensated in damages according to ordinary principles."

This case did not settle the matter and there are later cases in which the debate continued unresolved. London Transport Executive v. Clarke [1981] 1CR 355, and Cort & Son Limited v. Charman [1981] 1 CR 816 are two such cases, to which counsel did not refer. But as was pointed out by May LJ. in R.v. East Berkshire Health Authority, exparte Walsh [1984] 3 ALL ER 425 (p.434)

> "this difficult question of an unaccepted wrongful dismissal is still unresolved".

He respectfully agreed with the dissenting opinion of Shaw LJ., in Gunton's case (supra).

It is true that in Gunton's case, (supra) Buckley L.J. reviewed the principal authorities in this unsettled area of contractual relationship before arriving at his opinion, but nevertheless, having regard to the later decisions, I too must respectfully say that the matter is still unresolved, and so I am at liberty to express my humble opinion. I agree that as a general rule, the wrongful repudiation of a contract by one party, does not determine the contract; the innocent party has the option of accepting the repudiation or regarding it as still subsisting and insist on its performance. But I can do no better than to respectfully adopt as my own the words of Shaw LJ. when he said, in Gunton's case (supra at p.583):-

> "While it is true that arbitrary repudiation by one contracting party cannot of itself terminate a contract so as to relieve that party of the obligation to perform his contractual obligation, the application of this principle cannot, in real terms, go beyond those situations in which the law can compel performance. The preservation of the contractual relationship is necessarily coterminous with the ability of the law to compel performance. Where it cannot, it is the scope of damages that must afford appropriate redress to the injured party."

I have referred to the judgment of Zacca P. (as he then was) in The Jamaica Broadcasting Corporation cases (supra) where the services of workers were terminated in circumstances which are somewhat similar to the instant case, and in which the decision in Hill v. Parsons (supra) to the effect that in exceptional circumstances, a court will enforce a contract of employment by declar-

ing that it still subsists although there has been termination by the employer, was reviewed. The court considered and decided what were the exceptional circumstances that the evidence in that case disclosed. In my view, these considerations could only arise in the instant case if I had decided that the defendant wrongfully terminated the contracts of the individual plaintiffs. But even if I had found the termination to be wrongful, the evidence in the instant case does not disclose any exceptional circumstances that would lead me to grant the declaration sought by the plaintiffs. In my judgment, I hold that had the termination been wrongful, the contract for services would nevertheless be at an end. That being so the ordinary remedies open to the individual plaintiffs would be to seek damages. It would also be open to the individual plaintiffs to invoke the provisions of the "Grievance Procedure" set out as Clause 16 in the agreement, or perhaps, the conciliatory provisions of the Labour Relations and Industrial Disputes Act could be resorted to with a view of re-instatement if the dismissals were found to be unjustified by the Industrial Disputes Tribunal.

I should refer to the argument of Mr. George to the effect that even if the Collective Labour Agreement is legally binding, it is an agreement which has been so amended by agreement, consensus and practice, that it could not be said that the document "H.C.1" was in 1990 the entire agreement between the parties. He cites the fact that m-men are working at the port with the unions' full agreement. He says they are doing work that red book men cannot do. M-men are outside the categories mentioned in the agreement as exhibited. Lord Gifford contends that they are "casual workers" and that they do "the same kind of work" as red book men, and that they displaced red book men who enjoyed a special status. There can be no genuine redundancy of red book men when casual workers are still employed.

I have already intimated that it is my view that the defendant has a right to determine its work force and to decide on its structure. It does not appear to me that the unions at any time objected to the employment of m-men. It is agreed that they were introduced from as far back as June or July, 1987, even before the current agreement was made on 30th August, 1988,

with retrospective effect to November, 1987. In my view, it is much too late in the day to complain that they have replaced red book men. It seems to me that they are in a separate category somewhat analagous to red book men doing the same kind of work, but certainly not displacing the red book men over the years that they have been recognised. But even if I am wrong in this regard, and it can be said that the continued employment of the m men to the exclusion of the individual plaintiffs constitutes a wrongful repudiation of the individual plaintiffs contracts of employment, my decision would not be different, having regard to my earlier opinion.

Mr. Geroge asks the court to consider the question of delay on the part of the individual plaintiffs in seeking the grant of an equitable remedy. He points out that the termination dated back to the 12th December, 1990, and no steps were taken until May, 1991. Further, the individual plaintiffs were unproductive and unco-operative, and so it cannot be said that they have come "with clean hands." Therefore, they would not be entitled to the declaration or any other relief sought on this summons. Lord Gifford submits that it would not have been possible to bring the matter to court directly after the dismissals, because it was necessary to determine by observation whether the dismissed men were properly made redundant, or whether they were being displaced by casual workers. He makes a distinction between "reduncancy" and "dismissal" and finally submits that he is not contending that the defendant is precluded from declaring redundancies, but that the defendant is obliged to give preference to red book men over casual workers and this, on the defendant's own admission, it has failed to do.

The question of delay is indeed relevant, though not necessary for my decision. I will say no more than that there has been inordinate delay in bringing these proceedings. The reasons for the delay advanced by Lord Gifford are not accepted as valid reasons; the evidence does not seem to support his argument in this regard.

In my judgment, the plaintiffs are not entitled to the grant of the declaration sought in para. 1a of the amended originating summons, and consequently, the question of the injunctive and other reliefs sought become otiose. Accordingly, the summons stands dismissed, with costs to the defendant to be agreed or taxed. (certificate for Counsel granted).