JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 18/81

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

BETWEEN: DERRICK WALTERS - PLAINTIFF/APPELLANT

A N D : SHELL CO. (W.I.) LTD. - DEFENDANTS/RESPONDENTS

Mr. H.G. Edwards, Q.C. with Mr. E. Alcott
for the Appellant.

Mr. R.N.A. Henriques, Q.C. for the Respondents.

July 30, 1982. January 27 & 28, 1983.

CARBERRY, J.A.:

This is an appeal by the plaintiff from the judgment of Bingham, J. dated the 3rd of March, 1981 in an action brought by the plaintiff, Derrick Walters, against his employers Shell Company (W.I.) Limited.

Briefly put, the plaintiff was an employee of the defendant company for upwards of thirty years, and his claim against them was based on an allegation that while working in their employment, and in particular in a section of their plant called the blending plant, he became ill and, in effect, he claimed that his illness was due to fumes from the oil processed there and the defendants' failure to provide him with a safe place in which to work, or in the alternative, that they were negligent with regard to his safety.

The defence, in essence, was a denial of these claims, and while the plaintiff's illness was admitted, the defendants denied that they were responsible for it.

The evidence was to the effect that the plaintiff went to work with the defendants in 1944. The plaintiff said that he enjoyed excellent health until 1965 when the company built a blending plant where oil was processed and tinned for distribution to consumers. The plaintiff worked in that plant from 1965 to 1969 when he says that he was moved and employed elsewhere. He claims that when he was moved, it was as a result of a complaint that he made to the plant Manager, Mr. Deering, in 1967 in which he asked that he be moved from the blending plant to some other department as he found that the fumes from the oil were affecting his health.

The plaintiff's case was that after he was moved in 1969 he enjoyed very good health - recovered and enjoyed very good health, and he was as normal as before. He complains that he was sent back, however, to the blending plant on the 15th of March, 1972, worked there for a little over a month when he collapsed on the 4th of May, 1972. It appears that since that date he has never resumed working with the company.

Now the main thrust of the plaintiff's case was that he had a duodenal ulcer and that for some reason which is not entirely clear, the fumes that arose when he was filling the oil drums in the blending plant affected his health and either caused or aggravated his ulcer. The main burden of his case is that with knowledge of this idiosyncracy, the company continued to employ him in the plant, and they are therefore responsible for the deterioration in his health which has led to him not working since May of 1972.

It should be noted that the plaintiff's doctor who gave evidence on his behalf in effect said that the plaintiff had first consulted him in 1964 for peptic ulceration of the stomach, and he said in his evidence that in the period between 1964 up to date, or, rather that during that period he was recommended for leave. He said, "I know

the complainant. He was first examined by me in 1964. He had been suffering from epigastric pains since 1965. He came to see me every four to six weeks. During that period he was recommended for leave, and this would have been addressed to his place of employment. This is during the period 1965 to 1969."

The doctor alleges he had been in communication with the patient's place of employment as well as the company doctor. Unfortunately there is nothing to show that in this case the company was asked for a disclosure of the plaintiff's work record, if any, and what leave he had been granted, and it is to be observed that the medical evidence of the plaintiff's doctor, at best, showed that the plaintiff had been recommended for leave from time to time during that period. The medical evidence did not suggest that the company had been told that he ought to be moved from that particular employment and employed elsewhere. However, when the plaintiff collapsed in May of 1972 he again consulted his doctor and there were discussions between his doctor and Dr. Paul Bell, the company's doctor, as to the plaintiff's condition, and both doctors agreed with the diagnosis of duodenal ulcer, and both doctors agreed, as from 1972, that because the plaintiff felt that it was the fumes of the oil process that affected his ulcer that it would be better, in the plaintiff's interest, if he were moved to some other employment. Neither doctor, either in their certificates or in oral evidence, suggested that in fact the oil fumes caused the plaintiff's condition. What they did agree was that the plaintiff believed that the oil fumes caused his condition and that because of that, whether he were right or wrong, it would be better to move him.

The fact remains that it was not until June of 1972 that there was any written evidence showing that the

plaintiff was not only ill but that his illness was related to his work, and that the nature of his employment should be changed.

Well the plaintiff had the onus of establishing that the company knew of this idiosyncracy and that with knowledge of his condition persisted in employing him in a place which was dangerous to his health. The evidence shows that there was such awareness on the part of the company after June of 1972, but that will not assist the plaintiff because since his collapse in April of 1972 he has never resumed work with them, although he has been treated quite generously by the company. He enjoyed two years full pay without any work and he has enjoyed further consideration secured for him by his trade union in the shape of severance pay, and also he has enjoyed the benefit of contributions to the pension scheme for workers in that company's employment.

No medical certificate or evidence has suggested that his failure to resume work was justified. His own doctor did not recommend that he had become entirely disabled. His doctor observed that many persons with ulcers continued gainful employment, taking their diet and so forth.

Is there any evidence to show that prior to this date the company was aware of the plaintiff's condition and persisted in exposing him to this danger? The only such evidence is the plaintiff's oral evidence to the effect that he said this to the plant Manager, Mr. Deering in 1967, and that as a result of that he was moved from the plant in 1969.

Now the plaintiff had the onus of persuading the judge that what he said was true. What has been argued before us at great length, for two days, is that Mr. Deering was not called to deny this and that no evidence was offered on the other side to show that the plaintiff's story was not true.

It is perfectly true that in this case the defendant company did not call evidence, they elected to rely on the weakness of the plaintiff's case and were content to address the Court merely on such evidence as has been offered by the plaintiff. This is a course that is sometimes a risky one to adopt, but in this case the judge agreed with the submissions that were made to him and he delivered a full and careful judgment dealing with the various issues that had been canvassed before Him.

In short, what the judge decided was that he did not accept the plaintiff's evidence that there had been any such report to the company or its officers prior to the plaintiff's collapse at the workplace in May 1972.

Now it is not the law that merely because a plaintiff alleges something and no counter evidence is called a judge is obliged to accept what the plaintiff says. It may be that not calling evidence to contradict the plaintiff may be risky, but the plaintiff still has the onus of persuading the judge that what he says is true. It must be remembered that in this case the whole of this claim, if any, turned or depended on this allegation, and all that was offered in support of it was his allegation that he had had a conversation with the plant Manager, Mr. Deering, then again in 1970 with Mr. Deering's successor.

We can find no fault with the judge's findings. He saw and heard the witnesses, and he came to the conclusion that on many aspects of the matter the plaintiff's evidence was not only unsatisfactory but that it was deliberately intended to mislead. There are a great many cases in which courts of appeal have had to consider the circumstances in which they should review the findings of fact of a trial judge, and upset them, and it is clear that when those findings are based on the judge's considered opinion and his assessment

of the credibility of witnesses whom he saw and heard give evidence, the Court of Appeal will not lightly upset a judgment based on those advantages which the trial judge had merely on a consideration of the written record, unless it can be established that the trial judge failed to make proper use of his advantages in seeing and hearing the witnesses, or that it is a case in which the ultimate conclusion is an inference, and one which the Court of Appeal is able to draw with the same facility as the trial judge.

I need only refer to Powell v. The Streatham Nursing Home, [1935] A.C. 243, and to Watt v. Thomas, [1947] 1 All E.R. 582, and indeed Mr. Edwards himself has added to this collection by the case which he cited, Whitehouse v. Jordan, [1981] 1 W.L.R. 246; [1981] 1 All E.R. 267. All the cases that I have mentioned are House of Lords cases, and I think it is only fair to cite a passage in Whitehouse v. Jordan at page 252, from the opinion of Lord Wilberforce. It says this:

> "My Lords, at this point it is vital to recall that we are not here entitled to re-try the case. We have indeed read almost the whole of the transcripted evidence. But it is not for us to say how we would have decided the case at trial. What we can properly do is to examine the Judge's findings and to reach a conclusion, difficult though this may be, whether they can reasonably be supported on the evidence-recognising his advantages and, as fairly as we can, his difficulties-and whether the Court of Appeal was justified in reversing them."

There are other passages in the other opinions in Whitehouse's case which advert to the case that I cited, Powell v. Streatham Nursing Home, and it is clear that there is a heavy onus lying on those who challenge the trial judge's findings of facts based on his assessment of the witnesses' credibility.

Perhaps, as this is a Caribbean Court, I should mention at least one Caribbean case, that is Bookers Stores Limited v. Mustapha Ali, [1972] 19 W.I.R. 230. Interestingly enough this is a Privy Council case in which the Privy Council reviewed the issues, and Lord Morris of Borth-Y-Gest had this to say at page 231:

> "There were issues which had to be resolved by the learned Judge which involved questions of credibility. If a learned Judge has reached conclusions on such questions after seeing and hearing witnesses and forming his opinion in regard to them it is accepted and in well known authorities it has been laid down that only by reason of some very telling factors or compelling circumstances will an appellate court differ from such conclusions."

It is not easy to upset a judgment of that sort unless one can point outside of the judgment to errors that may have been made.

Mr. Edwards has struggled valiantly for two days, and I think that he can rest assured that there is nothing that could properly be urged upon us that he has failed to urge, and indeed, he has in fact gone further and urged many things upon us, which do not seem to be to the point, but he has certainly spared no effort on behalf of his client, and while we sympathise with a worker who has worked with a company for the best part of thirty years, and has become ill, I do not think it could be said, in fairness to the company, that they were ungrateful for his services. So far as we can see, without any medical recommendation to that effect, he has been allowed to enjoy two years full pay sick leave, and he has further been able to gain compensation, which no doubt he is entitled to at law now, in the shape of severance pay, and also his contributions to the Provident Fund of the Company. In these circumstances we see no reason for disturbing the judgment in this case.

There may be one or two minor imperfections here and there; there usually are in such judgments, as there may be undoubtedly in this one I am now delivering, but all that can be said has undoubtedly been said, and in the result then, the appeal will be dismissed with the usual order for costs in favour of the respondent. The judgment of the Court below is affirmed.