

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M.32/96

BEFORE: THE HON. MR. JUSTICE ELLIS  
THE HON. MR. JUSTICE LANGRIN  
THE HON. MR. JUSTICE PITTER

REGINA

VS.

INDUSTRIAL DISPUTES TRIBUNAL

EXPARTE CARIBBEAN STEEL COMPANY LTD.

Mr. G. McBean for Applicant instructed by Dunn, Cox, & Ashenheim.

Mr. Lennox Campbell Snr. Asst. Attorney General for Director of State Proceedings.

Mr. Robert Baugh for Union.

Heard: November 5 & 6, 1996.

LANGRIN, J.

On the 6th November, 1996, we were unanimous in dismissing the Applicant's Motion to quash the award of the Tribunal dated 28th March, 1996. We also ordered the Company to pay the costs of the respondents. We gave general reasons for quashing the award and promised to give detailed reasons in writing at a later date. This we now attempt to do.

BRIEF OUTLINE

Prior to January 1993 the applicant Company was primarily engaged in the manufacture of reinforcing steel bars at its factory in St. Catherine. Owing to several factors operating in the market place the applicant could no longer compete profitably with the importers of steel bars and the decision was taken to change the Company's business to become an import and distribution Service Company.

As a consequence of this decision the applicant ceased production in its factory around January 1993 rendering it inevitable that workers employed to the applicant would be made redundant. The

contract year for the workers would have expired on the 30th April, 1993 and a new contract year with higher wages would have commenced on the 1st May 1993. At that time the question of the wage rates for the contract year ending on 30th April 1993 and the one commencing on the 1st May 1993 was before the Industrial Disputes Tribunal for its ruling.

On the 23rd April, 1993 the workers were advised that they were being made redundant effective 28th April 1993 and that payment of sums due to them, including payment in lieu of notice and redundancy payments at the current rates of pay would be made to them on the 28th April 1993, the date of the termination of their employment.

Subsequently, a dispute arose between the Company and the Union concerning this payment and the dispute was referred to the Industrial Disputes Tribunal by the Minister on July 20, 1995.

Pursuant to Section 11(1) of the Act, the Minister referred to the Industrial Dispute Tribunal for settlement in accordance with the following terms of reference the dispute described therein:

"To determine and settle the dispute between Caribbean Steel Company Limited on the one hand, and the Bustamante Industrial Trade Union on the other hand over the following:

- (1) Whether or not certain workers represented by the Bustamante Industrial Trade Union waived their right to notice of termination and had accepted termination benefits calculated in the manner proposed by or on behalf of the Company in respect of the workers to be made redundant by that Company on or about April 28, 1993; and
- (2) Arising from the above, what is the relevant date of termination pursuant to the Employment (Termination and Redundancy Payments) Act and the appropriate method of computing redundancy benefits in respect of the said workers".

The Division of the Tribunal which dealt with the matter comprised of Mr. Clinton Davis, Chairman and Messrs C.J. Burgess and Fred Clarke. Both sides were represented by experienced Counsel and detailed analysis of the relevant laws were applied to this unusual dispute.

The following letters are of considerable significance in determining the dispute.

By letter dated April 23, 1993 the Company informed the workers as follows:

"Further to the decision of the Company to restructure its operations as discussed with Your Union Representatives and yourself, we regret to advise you that you will be made redundant effective Wednesday April 28, 1993.

Payment of sums owed to you as a result of this decision will be made on the same date.

These payments will include payment in lieu of notice and redundancy payments at current rates of pay. Additional payments will be made at a later date based on any award made by the Industrial Disputes Tribunal, and those provisions in the award to which you are legitimately entitled.

You can be assured that all other payments and benefits to which you are legitimately entitled, up to the date of your termination will be honoured by the Company."

By letter dated 29th April, 1993 the Company confirmed further discussions with the Union stating inter alia:

"The point raised on the question of the rates to be used in determining notice pay and redundancy payments has been placed before the Company's lawyers, the Union's lawyers and the Ministry of Labour. Both the Company and the Union undertake to honour the mutually accepted outcome of these deliberations."

By letter to the Ministry of Labour dated 11th April, 1994 the Union reasserted its claim that payment to the workers:

"Must be calculated on wages and other monetary payments which would be received had they worked during the notice period."

The Ministry of Labour by letter dated April 11, 1995 wrote to the Union as follows:-

"You will recall that a conciliatory meeting held on March 7, 1994 failed to resolve the captioned dispute and you were advised subsequently that the Ministry would be seeking the Attorney General's advice on the matter.

The Attorney General has advised that Section 3(1) and (2) of the Employment (Termination and Redundancy Payments) Act imposes an obligation on the employer to give certain minimum periods of notice to the employee before terminating a contract of employment. However, Section 3(3) of the Act stipulates that payment in lieu of notice must be effected only if the employee accepts such payment. In the absence of a clear intent on the part of the employee to waive his rights to notice, the statutory period will apply. Termination would therefore take effect on the date on which the

notice expires and the applicable rates would be those current on that date.

The Attorney General further advises that the onus is on the employer to establish that there was a waiver and that if it were to be found that there was unconditional acceptance, the applicable rates would be those in effect on the date of termination."

Mr. Garth McBean contended before us that as a matter of law where the Employer gives the employee a termination letter which contains no notice as required by the Employment, Termination and Redundancy Payment Act, but instead contains an offer of payment in lieu of notice then upon the acceptance of this offer by the worker or a waiver of his right to notice the termination takes effect immediately. During the period to which the 'payment in lieu' relates the employee is not employed.

On the contrary Mr. Lennox Campbell submitted that the acceptance by the Union was conditional since it was clear from the evidence that there was no waiver of their right to notice.

Based on the evidence as disclosed in the record and the affidavits we are of the view that the Company thought that it had a unilateral right to make a payment in lieu of notice and denied any right of the workers to reject the same. At the same time the Union maintained the right to insist on the required statutory notice and to reject payment in lieu of notice.

We agree with the finding of the Tribunal that the Union and the workers accepted the amounts paid by the Company on the agreement of both parties that the right to reject the amount payable 'in lieu of notice' and redundancy were in dispute and that the necessary adjustments would be made when the legal position was properly determined. In the light of the Attorney General's opinion of which we are in agreement we find it unacceptable that the workers would accept less than their legal entitlement.

The Company cannot by its failure to give the workers a choice to work during the notice period or accept payment in lieu of notice benefit by depriving the workers of a legal entitlement which would accrue to them had they worked during the notice period.

In all the circumstances it cannot be said that the Union 'accepted termination benefits calculated in the manner proposed

by or on behalf of the Company'. In our judgment there was only a conditional acceptance on the part of the workers. The money was not accepted as full compensation 'in lieu of notice' since the Union maintained that the statutory notice was mandatory and termination would only be effective when such notice would be due to expire in each case. The rates and total sum to be paid would therefore be based on emoluments existing at the latter dates.

We are therefore in agreement with the Tribunal's finding that there was no acceptance by the Union of the moneys paid to the workers such as would effect dismissal and termination on the 28th April, 1993 or prevent them claiming what they consider to be their entitlements under law. Further we accept the finding on the part of the Tribunal that there was no waiver by the workers of their right to notice.

The Employment (Termination and Redundancy Payments) Act 1974, particularly at Section 8(1) and (2) clearly indicates that the rates to be used in calculating redundancy payments are those on which the workers's remuneration is based for the week immediately preceding the relevant date. Since all the relevant dates pertaining to the dispute in the statutory notice expiry dates are more than one week later in time than the 1st May, 1993 we agree with the findings of the Tribunal that the respective redundancy payments should reflect and be calculated on the basis of the increases awarded by the Industrial Disputes Tribunal with effect from the 1st May, 1993.

For these reasons we unanimously dismissed the motion.