SUPREME COURT LIBRARY
KINGSTON
JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. M38/80

REGINA V. INDUSTRIAL DISPUTES TRIBUNAL
EXPARTE KAISER BAUXITE COMPANY

BEFORE: The Hon. Mr. Justice Parnell
The Hon. Mr. Justice Ross
The Hon. Mr. Justice Bingham

Dr. Barnett and Dr. Edwards for the applicant, Kaiser Bauxite Co.
Mr. Langrin and Miss C. McDonald for the Tribunal.
Interested party Herbert Kerr in person.

~~HEARD~~ February 16, 1981

17.2.81 (~~Oral judgments delivered~~)

PARNELL, J.

This is a motion seeking an order of prohibition to inhibit the Industrial Disputes Tribunal from further acting on a reference which was made to it on the 9th of November, 1979 by the Honourable Minister of Labour. An alleged dispute between the applicant, Kaiser Bauxite and one Herbert Kerr is said to have arisen.

The facts giving rise to this motion are not in dispute. Mr. Herbert Kerr was employed to the Kaiser Bauxite Company from the 9th of November, 1971 until the 2nd of June, 1978 when he was dismissed. There is a document which shows that he was first employed as a Male Clerk Typist at the salary stated. When his services were terminated on the 2nd of June, 1978, he was a Systems Clerk. The note shows that he was dismissed for cause. What was the actual cause, we do not know. I shall refer briefly later to what Mr. Kerr, the interested party who appeared in person and made a submission himself had to say about it.

Now, an affidavit was filed by Mr. George Alfred Brown a Senior Executive of the applicant and Attorney-at-Law, and it would be better if I quote fully certain paragraphs of the affidavit, dated 24th of July last year. Paragraph 3 states:

"Mr. Herbert Kerr was employed by the applicant from the 29th of November, 1971 to June 1978 when he was dismissed for cause.

Paragraph 4: The said dismissal took place after performance reviews, counselling and normal disciplinary measures.

Paragraph 5: Between July, 1979 and November, 1979, Messrs. Thossy Kelly and Associates made representations on behalf of Mr. Herbert Kerr in respect of the dismissal.

Paragraph 6: At all material times the applicant made it clear that its position was that Mr. Kerr had been justifiably dismissed and the applicant would adhere to its decision."

Paragraph 9 of the affidavit shows that a letter was written to the Permanent Secretary, Ministry of Labour and Employment submitting that the reference that was made to the Tribunal was illegal and that the Tribunal had no jurisdiction to hear the matter.

Paragraph 10 shows the state of affiars.

"By letter dated June, 1980, the Secretary to the relevant Division of the Industrial Disputes Tribunal replied that on the advice of the Attorney General's Office the Tribunal had decided to hear the matter."

So on the 9th of November, 1979, the Secretary wrote to the General Manager of Kaiser Bauxite Company in these terms.

"Dear Sir,

Re: Dispute - Kaiser Bauxite Company and Mr. Herbert Kerr

I am to advise that the Honourable Minister of Labour has referred to the Industrial Disputes Tribunal for settlement, the dispute between Kaiser Bauxite Company and Mr. Herbert Kerr represented by Thossy Kelly and Associates in accordance with Section 11A(1)(a) of the Labour Relations and Industrial Disputes Act.

The terms of reference are as follows:

To determine and settle the dispute between Kaiser Bauxite Company on the one hand, and Mr. Herbert Kerr, formally employed by the Company, on the other hand, over the dismissal of the said Mr. Kerr."

When the applicant received this letter and having taken advice, the Company sought to take proceedings with a view to prohibit the Tribunal from entering into any investigation of this alleged dismissal, or alleged complaint which is put under the head of a dispute. And so, a statement on the application for leave to apply for order of prohibition was filed and the grounds relied on are as follows:

1. The Minister had no power or jurisdiction at the material time to refer the issue relating to dismissal of an employee which has taken event on June 2, 1979 to the Industrial Disputes Tribunal for settlement.
2. The said dismissal took effect before the statutory provision before the Minister had come into effect.
3. There was and is no dispute at the material time between the applicant and any relevant person relating to a worker within the meaning of the Act.

The point that the applicant relied on is one of law, and as I have already indicated, it is shown by the correspondence which passed between the Industrial Disputes Tribunal's Secretary and the applicant. The Minister is acting under the section of the Act which we know came into force on the 6th of June, 1978.

When the matter came before us yesterday, Dr. Barnett made a brief submission, and putting it in a nutshell, his argument is that there are only three methods wherein a reference may be made by the Minister to the Industrial Disputes Tribunal. The first one is under Section 9 of the Labour Relations and Industrial Disputes Act of 1975. Section 9 deals with an Industrial Dispute existing in an essential service. The first one is what you may call an essential and industrial dispute.

Dr. Barnett said the second method comes under Section 10, where the Minister is given the power to make an order which he has to submit to the House of Representatives and subject to a negative resolution, where he is giving information that an industrial action is contemplated in an undertaking other than an essential service, but there is a likelihood that grave injury will be done to the national interest. In such a case, if the parties cannot come to an agreement or settlement, under Section 10(v) of the Act, he has the power to refer it to the Tribunal.

According to Dr. Barnett, the third method is under Section 11 of the Act, but that is where there is an industrial dispute in some under-

taking and the parties themselves agree that the matter should be referred to the Industrial Disputes Tribunal for settlement.

The fourth method is the one which is relevant before us, and according to Dr. Barnett, was brought about by Act 13 of 1978, an Act to amend the Labour Relations and Industrial Disputes Act. The amending Act came into force, as I have already pointed out, on the 6th of June, 1978. It states:

> "Notwithstanding the provisions of Sections 9, 10 and 11 where the Minister is satisfied that there is an industrial dispute in any undertaking and should be settled expeditiously, he may on his own initiative refer it to the Industrial Disputes Tribunal for settlement if he is satisfied that attempts were made without success to settle the dispute by such other means that were available to the parties."

I think it was during the argument that my brother Bingham pointed out that this particular method, which I call 'the sweeping-up method' - you have three main ones that I have already put, and this is the fourth one, to sweep up anything that may be lacking, and which will not be covered under any of these sections, that 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 to the public interest.

So, these are the main submissions of Dr. Barnett. What Dr. Barnett is saying is that the reference under Section 11(1)(a) of the Act, must be in respect of a dispute which came into existence on or after the Act came into force. And the "dispute" must satisfy the statutory definition of that term.

When Mr. Langrin who appeared for the Tribunal came to make his submission, he put three broad points. According to Mr. Langrin, the question to be decided in this case is whether the Industrial Disputes Tribunal has jurisdiction to hear a dispute which has its origin before the provision of the amended Act. Then Mr. Langrin contends that at the time when the reference was made is the operative period and not when the alleged dispute did arise. And he has submitted that at the time when the reference was made to the Tribunal by the Minister, Mr. Kerr was a worker who was not

satisfied with the decision that had been made to dismiss him and he complained to the Minister. This would give rise to a dispute, notwithstanding the fact that he was dismissed on a date prior to the coming into force of the amending Act.

When Mr. Langrin ended his brief points and spirited submission, on a question asked by my brother Bingham, he conceded that before the Act was passed, that is, Act 13 of 1978, the Minister would have had no power to have referred a matter of this kind to the Tribunal. Well, having made that concession, one would have thought that that would have been the end of the argument. If he has conceded that, how then can the Minister refer the matter to the Tribunal when the cause or origin of it was before he was given the power by Parliament to do what he did?

When Mr. Kerr - an interested party in the case - took his turn, we allowed him to make his submission. What he did really was - first of all, he asked the court a question, and this was the question that he asked. This was how it started.

> Q: Before this amended Act was passed, was there any power given to the Minister to refer a dispute like mine to the Industrial Disputes Tribunal?

Answer by the Court: No, there was no such power.

Then he submitted that the old Act would carry his dispute, or rather would carry it to the point where the Minister could at the relevant time - that is what I understand him to be saying - refer to the Tribunal his dispute, because there is a dispute.

After that, he told us a brief history of what had taken place. He had been working as an Assistant Clerk in the Engineering Department and he was not a member of any trade union. As a matter of fact, when he was employed first, he was told that as a salaried worker he would not be permitted to join a trade union.

I think that what he was really hinting at was that because of the policy which existed in 1971, when he joined Kaiser Bauxite, he didn't have what you call "trade union support" in his alleged grievance following his dismissal.

He told us that his pastime was to play football on behalf of the Company and in a football game he dislocated his shoulder, his right shoulder. As a result of that he had to get sick leave. He sought medical advice and an operation was to be performed on the 27th of July, 1978, but the doctor who was to perform it, Dr. McNeil-Smith, advised him that he would have to go on three months leave after the operation.

According to Mr. Kerr, what happened was that the company then employed a man in the office as a kind of trainee. He trained the man. The man would carry out the work for him while he was on sick leave. So having trained the man now, and while he was on sick leave, he got to his surprise a note dismissing him. The understanding was that as soon as he recuperated and completed his sick leave, he would have resumed his duties.

That is how he puts it. He didn't put it in an affidavit form. If that is so, it seems that he would have had a strong moral case to argue that the Company was harsh and that it had gone behind its promise. But, morality is not law. We have to see what the law is.

The Labour Relations and Industrial Disputes Act of 1975 was brought into operation after a long debate. There was a lot of dialogue between trade unions, government and employers. Following the decision of the full court in Banton V. Alcoa Minerals of Jamaica, /1971/ 12 J.L.R. 417 - a case that I took part in - an attempt to put under one cover all the possible or reasonable steps that could be taken to settle a dispute, which may arise in any undertaking in the country and which would likely affect the State if it is not satisfactorily determined was made.

It is an Act to provide for the relation between employers and workers; to establish an Industrial Disputes Tribunal for the settlement of industrial disputes; to provide for those industrial disputes and for purposes incidental to or consequential to matters foregoing.

When one looks at Section 29 of the Act, one sees that two Acts which were in force up to that time were repealed, but those were Acts dealing with the Public Utility undertakings and Public Services Arbitration Law and the Trade Disputes Arbitration Law. The position was that whenever

there was a dispute in an essential service which the parties could not settle, the matter had to go to arbitration and not to a permanent Industrial Disputes Tribunal.

The Industrial Disputes Tribunal has been created as a consequence and it has no more power than what the statute has conferred on it specifically or where it may be gathered by necesary implication.

The definition of "industrial dispute" is put in Section 2 of the Act. I will not repeat it, it is there and it was read to us by Dr. Barnett and Mr. Langrin. Who a worker is, is also mentioned in the Act, Section 2 - "An individual who has entered into or normally works under a contract of employment".

So really, the question in this case is in the circumstances that I have outlined. Was there an industrial dispute within the meaning of the Act? If it was an industrial dispute, was there power on the part of the Minister to refer it to the Tribunal as he did by letter in November 1979? When the matter was referred to the Tribunal in November of 1979, Mr. Kerr having been dismissed from June, 1978, a matter of one year and five months had elapsed. Was that an expeditious attention to an industrial dispute within the meaning of Section 11A(1) of the Act?

This brings me now to the point that was urged by Dr. Barnett, and which was also referred to by Mr. Langrin, the retrospective effect of a statute. It is put very neatly in Craies on Statute Law, 7th Edition, page 387. Under the heading 'Retrospective' it says:

> "A statute is deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transaction or considerations already past."

And then the Author quotes Lord Justice Lindley in Lauri v. Renad [1892] 3 C.H. 402 at page 421, where the learned Lord Justice said:

> "It is a fundamental rule of the English Law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such ~~conclusions."~~ a construction".

And the same rule involves a subordinate rule that a statute cannot be construed so as to have a greater retrospective operation than its language renders necessary. And on page 391 of the Text Book, reference is made to the presumption against retrospectivity, but it may be rebutted. It says:

> "It being then the general rule of law that statutes are not to operate retrospectively, we have now to consider under what circumstances this general rule has been departed from, and ~~has~~ to examine the grounds, so far as they can be ascertained for such departure."

Well, the author referred to those cases in which the presumption can be rebutted; that is by expressed words of the statute, or whereby from necessary implication by the language employed, it can be ascertained that Parliament did intend that the statute should act retrospectively.

In this case, the applicant is saying that by the existing practice, with the aid of - to use the words of Mr. Brown, and let me refer to it again, "a review of his performance, counselling and normal disciplinary measures" - having gone through that procedure, the applicant exercised its right and dismissed this worker. A Tribunal which is appointed under the Act and to which a reference of this nature is made has the power to settle a dispute, if it is a dispute. And one way of settling it is to order the worker to be reinstated if it thinks that it was a wrongful dismissal. A statutory power is given to the Tribunal to interfere with the vested right of an individual which existed before Act 13 of 1978 came into force.

Is there a section under which the Minister could make a reference so as to allow the Tribunal to act retrospectively? My answer to that is a resounding no. Why? Because the statute has not stated so in plain language. Secondly, there is nothing in the statute to show that by necessary implication it intends that state of affairs. It was speaking as to the future, that is, on and after the 6th of June, 1978, where one can trace what is generally regarded as a dispute arising, and which does not fall under Sections 9, 10 or 11. The Minister is then given the power on his own initiative to refer the matter to the Tribunal. He cannot, in my judgment, go behind the Act and pick up a dispute which originated long before the amending Act came into

force and refer it to the Tribunal, leaving it to the Tribunal to make an order to interfere with a vested right.

In my judgment, it seems to me that first of all, the Minister stepped outside the power given to him by the Act. He had no power whatever to refer this matter to the Tribunal, and it follows as a necessary corollary that the Tribunal would had no power to entertain it. It appears that the Minister, having got the letter from the applicant, sought advice from the Chief Law Officer of the Crown and he followed the advice. The advice was to the effect that he would have the power to refer the "dispute" to the Tribunal. It is said that 'Law is a matter of opinion'. The advice given may be an example of that adage.

In my judgment, the opinion of the Law Officers was wrong, and the applicant is entitled to the relief which it seeks; namely, that this court should order that prohibition should go. I am prepared to make such an order.

ROSS J:

This is an application by Kaiser Bauxite Company by way of motion for an order of prohibition prohibiting the Industrial Disputes Tribunal from further acting on the reference to it made on or about 9th November, 1979, by the Honourable the Minister of Labour in respect of an alleged dispute between the applicant and one Herbert Kerr and from proceeding with any hearing pursuant to the said reference.

The facts here are not in dispute and maybe set out briefly. The applicant company is engaged, inter alia, in the mining of bauxite and employs large numbers of workers. Mr. Herbert Kerr was employed by the applicant from 29th November, 1971, to 2nd June, 1978, when he was dismissed for cause. Representations were subsequently made by Mr. Thossy Kelly and Associates on behalf of Mr. Herbert Kerr in respect of his dismissal and in November, 1979, the Industrial Disputes Tribunal informed the applicant that the matter had been referred by the Minister to the Tribunal for determination and settlement.

In reply the applicant submitted that the reference was illegal and that the Tribunal had no jurisdiction to hear the matter.

Dr. Barnett who appeared with Dr. Edwards for the applicant submitted that up to the time when Mr. Kerr was dismissed there were three methods by which a matter could be referred to the Tribunal under the provisions of the Labour Relations and Industrial Disputes Act; although there were these three methods, Mr. Kerr's dismissal could not have been referred under any of them as they dealt with other clearly defined cases and there was no provision by which the dismissal of Mr. Kerr could properly be referred by the Minister to the Tribunal.

That was the situation up to 6th June, 1978, when there came into force Act 13 of 1978 by which an amendment was made to the Labour Relations and Industrial Disputes Act, incorporated in the Act as section 11A.
This section provided that:

> " 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 -
>
> a) refer the dispute to the Tribunal for settlement.........
>
> b) give directions in writing to the parties .... "

Each of sections 9, 10 and 11 provided one of the methods by which a reference could be made by the Minister to the Industrial Disputes Tribunal, and section 11A provided a fourth method; it was conceded by Mr. Langrin (who appeared for the tribunal) that none of the methods referred to in sections 9, 10 and 11 permitted the Minister to refer Mr. Kerr's dispute to the Tribunal. So if it could be referred at all it would have had to be done under the provisions of section 11A.

The Act creating this new section came into effect on 6th June, 1978 - this was four days after Mr. Kerr had been dismissed by the applicant. Dr. Barnett observed that there is nothing in the Act to suggest that the Act has retrospective effect, and so the power to the Minister to act on his own initiative did not exist on 2nd June, 1978, when Mr. Kerr was dismissed.

It was the submission of Mr. Langrin (who appeared for the tribunal) that the amendment to the Act providing for the addition of section 11A had retrospective effect - but I incline to the view that in the absence of some specific provision in the Act that it is to operate retrospectively, it cannot be given that effect. I am fortified in this view by the reference in Craies on Statute Law... (7th edition) at p. 387, where it

is stated that "In Louri v. Renad Lindley L.J. said:

> " It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction ";

there is nothing in the language of section 11A to suggest this.

I would say that at the time that Mr. Kerr was dismissed i.e., on 2nd June, 1978, there was no provision in the Act giving the Minister the power to refer his dispute with the applicant to the Tribunal, For the purpose of this application it would seem that without more the court could find that the Minister had no authority to refer the matter and consequently the Tribunal would have had no jurisdiction to deal with the case.

But I think I should add a few more words. "Industrial dispute" and"worker" are defined and it may be instructive to look at the definitions in the Act:

"Industrial dispute" means "a dispute between one or more employers or organisations representing employers and one or more workers or organisations representing workers, where such dispute relates wholly or partly to .....!' various things. "Worker" means "an individual who has entered into or works or normally works under a contract of employment."

Having regard to the definition of "industrial dispute" and "worker", it seems that after 2nd June, 1978, there was here a dispute between the Kaiser Bauxite Company and Herbert Kerr, an ex-worker of the company; if this is correct then there would not have been an industrial dispute within the meaning of the law, since such a dispute must be between an employer and a worker or the organisation representing one or both of them. If, of course, there was no "industrial dispute" (as defined by the Act) then there would have been nothing to refer to the Industrial Disputes Tribunal.

As I understand Mr. Langrin on behalf of the Tribunal, his first submission was to the effect that a dispute arose between Herbert Kerr and his employer, the applicant, over his dismissal on 2nd June, 1978, and this dispute was still continuing up to November, 1979, when there was a reference to the Industrial Disputes Tribunal.

It is true that there was such a dispute between Mr. Kerr and the applicant, but was that a dispute as contemplated by section 11A? This section, it will be noted, states that:

> " where the Minister is satisfied that an industrial dispute exists in any undertaking and should be settled expeditiously "

he may on his own initiative refer the matter to the Tribunal.

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 in November, 1979, 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 - having regard to the lapse of time between the dismissal and the reference, it could hardly be claimed that the Minister was satisfied the matter should be settled expeditiously. - Submissions made by Mr. Herbert Kerr did not take the matter any further.

For the above reasons I agree with my brother Parnell J. that as the Minister had no legal authority to make the reference and consequently the Tribunal could not properly entertain the reference, the motion for an order of prohibition in the terms set out in the notice of motion should be granted.

BINGHAM J:

In this matter, the facts are not in dispute, and they have been clearly set out by both learned brethren in their respective judgments. I shall not weary you by being repetitive.

The sole question to be determined is whether the Minister in making the reference he sought to make on the 9th of November, 1979 had the power to do so. It is not in dispute that whatever power the Minister had was such as was given to him under Section 11A. At least, it is not in dispute that such power, if any, as was given to him was given to him under Section 11A of the Labour Relations and Industrial Disputes Act, Act 13, of 1978 which came into operation on the 6th of June, 1978.

It may be convenient at this stage to read this particular section. Section 11A reads:

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

Now, it is conceded by Mr. Langrin who appeared for the Tribunal that prior to this section coming into operation, the Minister had no power to make the reference which he sought to make on the 9th of November, 1979. He submits, however, that Section 11A - such powers, if any, which the Minister had under that section, had retrospective effect and as such, could properly affect such existing rights which Kaiser Bauxite Company under whatever disciplinary procedures it had, could seek to attempt to discipline a worker by dispensing with his services.

Now, both my learned brethren have referred to Craies on Statutes Law and to the established canons of construction which apply in interpreting retrospective enactments, and I will, however, refer to a passage from Craies Statute Laws, 7th Edition, Page 389, under the heading, 'Retrospectivity not Presumed'. Here the learned author states:

> " Before giving such a construction to an Act of Parliament, one would require that it should either appear very clearly in the terms of the Act, or arise by necessary and distinct interpretation, and perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only".

Now, this is exactly Dr. Barnett's point. Dr. Barnett submitted, among other things, that Section 11A, that in the reading of that section, there is nothing in the section which would seem to suggest that it is intended to have a retrospective effect. Indeed, I would add that it would be only by doing violence to the very language of Section 11A that one could read any such effect into the words used in seeking to arrive at the intention of the legislature.

But, even for argument sake, one were to apply such a construction, one would have to do so strictly, and if such a construction was applied, Mr. Kerr would have had to be a worker at the time that the Minister sought to act, and it is, at least common ground that on the 9th of November 1979 when the reference was made, Mr. Kerr had long ceased to be a worker.

I will not venture to go further, because that seems to be the disposal of the entire question. As the statute, therefore, on the reading of it, did not operate retrospectively, it cannot affect such rights as Kaiser Bauxite Company had to take disciplinary steps in relation to a worker. I should also add that on a reading of the entire Labour Relations and Industrial Disputes Act, and even with this added power which the Minister had, 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 anyway threaten industrial peace. It seems to be relating to situations which involve

disputes between a group of workers represented by a trade union or association or workers on the one hand, and employers on the other hand.

Indeed, there are other statutes which gives a worker who feels that he is wrongly dismissed rights which he can exercise. So in any case, Mr. Kerr is not without his common law or statutory remedy.

From the affidavit of Mr. Brown, the facts of which are not in dispute, the Company had sought to discipline Mr. Kerr for cause. One can detect here words, similar in substance with the Termination of Employment Act and therefore may be within the terms of the provisions of this Act that Mr. Kerr ought to be seeking his remedy, if any. It follows that from all that I have said, that I also agree that the relief sought in this case should go as I too am of the opinion that there is really no power on the part of the Minister to interfere in the circumstances.

Parnell J:

The order of the court is that prohibition will go to prohibit the Industrial Disputes Tribunal from acting on the reference of 19th November 1979. There shall be no order as to cost.