

In the Supreme Court of Judicature

In Common Law

Suit No. C. L. 86 of 1972

Between Nathaniel Spence Plaintiff

And The Shipping Association of Jamaica Defendant

McCaulay, Q.C. and Miss J. M. Nosworthy for plaintiff

George, Q.C. and D. Scharsdmidt for defendant

January 19, 20, 21, 22,
May 13, 1976

Parnell, J :

At the end of the hearing on the 22nd January, judgment was entered for the defendant with costs. I promised to put my reasons in writing in due course. This I now do.

The plaintiff, who was a former port-worker at the Kingston Water-front, was retired by the defendant on April 20, 1969, on the ground that he was unfit to perform the duties of a port-worker. Not being satisfied with the decision, the plaintiff filed his writ in January 1972, in which he has claimed:

- (1) a declaration that his retirement was wrongful and unlawful;
- (2) a declaration that he is still a port-worker.

In this action, the defendant has based its defence under Regulation 9 of the Kingston Port-workers (Superannuation Scheme) Regulations 1968, which were gazetted on October 1, 1968. The relevant regulation states as follows:

" Subject to the provisions of regulation 33, the Authority shall retire forthwith any subscriber to this scheme who -

- (a) according to the particulars of his registration as a port-worker, is 65 years of age or over on the date of promulgation of these Regulations or attains that age on or after such date; or
- (b) on or after such date is certified by the medical panel as being unfit to perform the duties of a port-worker. "

The defendant is the "Authority" for the purposes of the Regulations. It is recognised as being the representative of employers of port-workers in Kingston. As a port-worker, the plaintiff was a "subscriber" to the Superannuation Scheme.

The Plaintiff gives evidence

Mr. Spence was born at Bluefields, Westmoreland, on December 4, 1911. The original records of Mr. Spence kept by the Shipping Association show his date of birth as December 14, 1901. He began working at the Kingston Water-front in 1932 as a port-worker, and was among those who were registered in 1939 as port-workers after the upheaval in 1938. Registration in 1939 placed him in the proud category of a "Red Book" holder.

According to the plaintiff, a port-worker is either a "dockman" or a "shipman" and he was and always had been a "dockman." As a dockman, he was required to do manual work in common with other portworkers. But he emphasised that as a dockman he was not required to lift any heavy weight or any weight over the 10 - 25 pounds size. A fork lift is provided to lift cartons, heavy goods and parcels unto trolleys when they are taken from the hold of the ship to the side. These trolleys then convey the goods, cartons and parcels to the stores. He has stressed the point that the dockmen work in groups of four. By this method, the lifting of heavy weight is shared among the men and the strain, if any, on any particular workman is minimised. Occupations like serving water (waterman) and a "sweeper" who keeps the store-room and the gangway clean are described by the plaintiff. These exertions do not call for any great physical demand.

Mr. Spence, who showed remarkable signs of agility and mental alertness for a man of 64 summers, was very frank and impressive in the witness box. He erred at times in some of his testimony but this was more out of his exuberance and a feeling - bona fide entertained but erroneously conceived - that the mighty Shipping Association of Jamaica was hounding an ordinary dockman on account of the stand he had taken in 1966 on behalf of himself and other workers. It seems that the advent of the computer in certain industrial activities, like the introduction of new concepts not familiar with the uninitiated, brought in its train problems and uncertainties.

Payments to port-workers since 1966 have been calculated by the computer. The evidence of Mr. Allister Cooke the Acting General Manager of the Shipping Association should be quoted. He was referring to 1966 when "guaranteed pay" to Kingston port-workers was introduced. Under the system, provided a port-worker reports for work daily, he is guaranteed a

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weekly wage whether or not he does any work during any particular week. To meet the intricate calculations which the system would introduce, the computer was called in aid. Said he :

" The system was messed up thoroughly largely because of the interpretation of the concepts introduced. Time-keepers under the old system did not understand the new system. As a result we used to have over-payment and short-payment. Workers frequently came to me about payments. On a few occasions, Mr. Spence came to me. "

The plaintiff "championed" the case of himself and two workers in 1966, concerning short-payments. Taken to the level of the General Manager, the battle was won by him when it was decided that the correct sum should be paid to him and his fellow workers. The result of his case has been described by the plaintiff as :

" my success with the shortage."

But it seems that the plaintiff entertained the view that his "success" marked him as an "agitator" or an "activist" on the water-front. He claimed that the management tried him :

" about six weeks after my success with the shortage, " and suspended him for six months. His trade union took up the matter of his suspension; an appeal was lodged. The result was that the sentence of six months suspension was reduced to five months.

The plaintiff's "trial" followed so closely to his agitation for a more careful calculation of wages due, that he believed he was being punished for his action when he was suspended. But the real reason for the taking of disciplinary action against him is plain. It seems that the plaintiff exhibited rudeness and defiance to a foreman named Pratt while in the execution of his duty.

On the 30th October, 1968, the defendant, through its General Manager, wrote the plaintiff informing him that in accordance with Regulation 9 of the Kingston Port Workers (Superannuation Scheme) Regulations, hereinafter referred to as "the Regulations," he would be retired on 31st December, 1968, he having attained the age of 65 years. The plaintiff then produced his birth certificate or a certified copy thereof showing his birth as December 4, 1911. Having accepted the birth certificate, the defendant amended their records accordingly.

The plaintiff said that on March 12, 1969, he got a letter from the defendant and he took it to Dr. Swaby, now deceased. Dr. Swaby was on the
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medical panel approved by the defendant. He was examined by Dr. Swaby and received a medical certificate which he took to the defendant's office.

This letter and medical certificate have not been traced by the defendant; there is no record on their files.

On the 28th March, 1969, the secretary of the Pensions Committee by letter (Exh. 3A), informed the plaintiff that consideration had been given to a request by the Shipping Association that he be examined by the medical panel. The plaintiff has denied receiving it. However, I find that he did receive the letter. As a result, on the 16th April, 1969, the plaintiff was medically examined by Dr. Swaby and Dr. R. Shoucair, as to his fitness to perform the duties of portworker. The conclusion of both doctors was that the plaintiff was unfit. Dr. Shoucair found the following on April 16, 1969:

- (1) severe hypertension;
- (2) cardiac murmur;
- (3) indication that there could have been an early "Parkinsonism" (a disease of the nervous system) - the blood pressure reading was 220/110.

Dr. Swaby, who died in May, 1975, found:

- (1) high blood pressure i.e. P.B. 210/100;
- (2) tremor of both hands.

In a joint certification, the defendant was informed that the plaintiff was unfit to perform his duties as a portworker.

Being aggrieved with the certification, the plaintiff consulted Dr. Dawson who prescribed medication for hypertension. Dr. Dawson referred the plaintiff to a medical specialist, Dr. R. Suite of Medical Associates Hospital. After a thorough examination, Dr. Suite found evidence to support the substance of the findings of the medical panel. However, he recommended that the plaintiff be employed "in a job which does not require manual labour."

After a consideration of all the relevant factors, the defendant retired the plaintiff. The decision to retire is the sole prerogative of the defendant.

It is clear that the defendant did not seek to draw out the plaintiff from the water front. On the 19th May, 1969, the plaintiff was again examined by Dr. Shoucair. On this date, Dr. Dawson was treating him for

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blood pressure. Dr. Shoucair, on the 16th May, 1969, found that the plaintiff's blood pressure was still high and that the "cardiac murmur" was still present. On the 1st August, 1969, Dr. Shoucair had a meeting with Dr. Dawson (the plaintiff's private doctor), and representatives of the B.I.T.U. and the Shipping Association. The object of the meeting was to discuss the description of the various jobs which the plaintiff would have been required to perform if he continued as a portworker. A copy of the description was sent to Dr. Suite, the medical specialist.

Clause 5(f) of the Joint Labour Agreement which regulates the general working conditions of portworkers states, in substance :

" The Shipping Association shall be the sole judge as to whether the medical report justifies such action as the association decides to take thereon. "

But this clause is subject to a second examination by the medical panel in the presence of the portworker's doctor if the portworker so demands. And if the medical panel's conclusion is in disagreement with that of the portworker's doctor, the dispute should be settled by arbitration before the Government Chief Medical Officer or his nominee. Mr. Spence did not avail himself of his right to seek a second medical examination nor does it appear that he was advised by his Union so to do.

In an answer to Mr. George, in cross-examination, Mr. Spence said this :

Q. " I am putting it to you that Dr. Shoucair is an honest doctor.

Ans. Yes, he is an honest doctor but the workers do not like him. It is true that Dr. Shoucair would send sick people back to work and he would only say a person is sick if the Company wants a man to retire. I have told Dr. Shoucair that myself. "

This could be a hint that conspiracy was afoot between the Shipping Association of Jamaica and their medical panel to retire the plaintiff improperly on medical grounds which had no basis in fact. Any such suggestion was properly repudiated by Mr. McCaulay in his closing address. Such a "conspiracy" would have been wide enough to envelop the plaintiff's own medical advisers.

Mr. McCaulay in his final address raised an interesting and novel point. He argued in effect that the final conclusion of the medical panel must be based with reference to the duty or all the duties of a portworker and if all the duties of a portworker were not known to the medical panel,

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a medical certificate by the panel would be issued on a mistaken basis or alternatively there would not have been a compliance with the Regulation in a matter affecting status.

Certain authorities were cited to support the contention that in a matter affecting status, the Act which gives power to do so should be strictly construed. Mr. McCaulay referred to Hall v. Hall [1940] 1 A.E.R. 192 and Head (1957), 41 C.A.R. 295. In the first case, the question was whether a medical certificate complied with the Lunacy Act of 1890 so as to justify the detention of an alleged lunatic. In the second case, the question was whether a woman who was the complainant in a sexual offence case was "legally certified as a mental defective" within the meaning of the Mental Deficiency Act, 1913.

On the face of it the argument of Mr. McCaulay was attractive but in my view, it is unsound. The authorities he cited cannot help me in this matter. Arguing by analogy has its dangers. The Regulations and the Joint Agreement make the Shipping Association the sole judge as to what is to be fate of a portworker who is examined by a medical panel with a view to determining his fitness to continue as a portworker. Even if the medical panel does not know what are the precise duties and obligations of a portworker, the Shipping Association is deemed to know. And the Court of the Jamaica can take judicial notice that all portworkers whether at ^{the} Kingston Waterfront or at any other port in the Island are required to do manual work. It does not require medical evidence to prove that once a working man is found to be suffering from severe hypertension and an affected heart, the time has come for him either to cease certain exertions or to be cautious in his exercises.

The Regulations were framed on the hypothesis that only fit and able men should work or continue to work as portworkers. When age, lassitude, infirmity or a bad heart indicate that a portworker should give way to one not so affected, the Shipping Association is required by the Regulations to act.

I find that the plaintiff was retired by the defendant on the basis of a valid medical certification that he was unfit to perform the duties of a portworker and that the defendant accepted the finding in view of what the plaintiff was required to do in that capacity.

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I reject entirely the suggestion that the Shipping Association had an ulterior motive in retiring the plaintiff.

In dismissing the claim on the 22nd January, I said that the plaintiff had taken on a "giant" in a fight. The odds against him were tremendous. But he continued to spar and counter-punch from the Waterfront to the Supreme Court. In all this exhibition he felt that he was fighting a genuine grievance both for himself and the other portworkers who may be called upon to face a medical panel. No man, however, can fight age or persistent ill health for long. He will be counted out in due course; he must make his exit from the stage when the time comes. Mr. Spence faced the perils and toils of the Kingston Waterfront from before the upheaval of 1938. The men of those days were trained to fight back. Everyone, therefore, must sympathise with those stalwarts who still show glimpses of their former self.

I recommend that in the question of costs the defendant be good enough to show some compassion to this portworker who took on an encounter which was doomed to end in failure from the sound of the bell.