

Privy Council Appeal No. 15 of 1963

The Shipping Association of Jamaica - - - - - *Appellants*

v.

The Bustamante Industrial Trade Union and others - - - *Respondents*

FROM

THE SUPREME COURT OF JUDICATURE OF JAMAICA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 9TH DECEMBER 1964**

Present at the Hearing:

LORD REID.

LORD EVERSHERD.

LORD PEARCE.

LORD UPJOHN.

LORD WILBERFORCE.

[Delivered by LORD WILBERFORCE]

This appeal is from the Court of Appeal of Jamaica which by a majority allowed an appeal from a judgment of the Supreme Court of Jamaica in favour of the present appellants.

The proceedings in Jamaica arose out of a claim for an increase in wage rates made by the respondents, who for convenience may be referred to as "the Unions", on behalf of certain categories of port workers employed in the Port of Kingston, against the appellant Association, representing the employers. This claim was put forward on 14th April 1960; it included, as well as the claim for increased rates, a request that the suggested increases should date from 4th April 1960. The Association refused to agree to the claim, and it was referred by the Governor in Council to a statutory tribunal, established under the provisions of the Public Utility Undertakings and Public Services Arbitration Law, Cap. 329 of the Laws of Jamaica (Revised Edition) 1953 (which it will be convenient to describe as the Essential Services Law). This tribunal consisted of an employers' representative, a workers' representative and an independent Chairman: the terms of reference were to determine and settle the dispute. An official of the Ministry of Labour was appointed Secretary. The tribunal sat to hear the contentions of the parties on 4th and 7th April 1961 and a transcript of the proceedings is available in evidence. From this it is clear that the question as to the date from which any increase in wage rates should take effect was much debated, the Unions contending that any award should be retroactive to the 4th or at least the 14th April 1960, the Association opposing any retroactivity.

The tribunal made its award on 19th April 1961. After a number of formal and introductory paragraphs, which included a reference to the Unions' claim for an increase retroactive to 4th April 1960, the decision of the tribunal was stated in four sub-paragraphs (i)-(iv) in which specified increases applicable to four categories of workmen were awarded. No mention was made in the award of the date from which these increases were to take effect, and it is accepted that, if the award stood in this form, they would, by virtue of an express provision in section 10(5) of the Essential Services Law, take effect from the date of the award i.e. from 19th April 1961. The award was, as is required, transmitted to the Ministry of Labour which on 28th April 1961 forwarded it to the parties.

On the same day, 28th April 1961, a letter was sent to the Ministry of Labour on behalf of the 2nd respondent pointing out that the award contained no operative date and requesting the Ministry to ascertain from the tribunal the effective date and its approval for this "clarification". On 1st May 1961 a letter was sent to the Ministry on behalf of the 1st respondent stating that the award had omitted reference to the claim for retroactivity, and requesting the tribunal to "interpret" the award in accordance with section 13 of the Essential Services Law.

Section 13 is in the following terms:—

"If any question arises as to the interpretation of any award of the Tribunal the minister or any party to the award may apply to the Tribunal for a decision on such question and the Tribunal shall decide the matter after hearing the parties, or without such hearing provided the consent of the parties has first been obtained. The decision of the Tribunal shall be notified to the parties and shall be binding in the same manner as the decision in an original award."

The request of the 2nd respondent for "clarification" was accepted as being one for action under this section.

On 2nd May 1961 the Secretary to the tribunal enquired by telephone from the Association's solicitors whether they would agree to an interpretation being given without a hearing but this the Association was not willing to do. The Secretary thereupon on 2nd May 1961 wrote to the Association a letter in which he said that the tribunal was "prepared to clarify the point in issue" and fixed 9th May 1961 for the hearing of submissions.

On 9th May 1961 the tribunal sat again in the presence of representatives of the Association and of the Unions. A transcript of the proceedings is available. After Counsel for the Association had objected to the jurisdiction of the tribunal, on the ground that it was *functus officio*, attention was called on behalf of the Unions to sections 8(c) and 24 of the Arbitration Law (Laws of Jamaica Cap.19.). Section 8 provides as follows:—

"8. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power

(c) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

Section 24, it is common ground, makes this section applicable to all arbitrations including those under the Essential Services Law. After Counsel for the Association had objected to the tribunal proceeding under Section 8(c), the Chairman adjourned the sitting of the tribunal until the next day when, he said, a ruling would be given.

On 10th May 1961 the tribunal met in the presence of the parties. The Chairman then read a prepared statement, which, after referring to the requests for interpretation and the submissions which had been made, stated as follows:

"The Tribunal at this stage would like to state that there is in the award an error arising from an accidental omission. The Tribunal is of the view that this error once corrected will answer the question of [the Unions' representatives]. In the light of the foregoing the Tribunal has not addressed its mind to the submissions of yesterday, but having regard to section 24 and section 8(c) of the Arbitration Law, Cap. 19, it will endeavour to correct this error. The correction will be forwarded to the proper authority in due course and the interested parties will, we are sure, be informed of the nature and import of this correction."

On 24th May 1961 the Acting Permanent Secretary of the Ministry of Labour, Mr. Goodin, (who was also the Secretary to the Tribunal) wrote a letter to the Association which contained the following passage:

"In a letter dated 17th May 1961, the Tribunal appointed under the Public Utility Undertakings and Public Services Arbitration Law, Cap. 329, to determine the dispute referred to above, informed the Ministry of Labour that the Award of 19th April 1961, did not entirely

reflect the decision of the Tribunal as the operative date of the Award was omitted, and that this constituted an error arising out of an accidental omission.

2. The Tribunal in the aforesaid letter requested that the Award be corrected to read—”

The letter then set out the four sub-paragraphs from the original award which stated the increases in wage rates and added a fifth sub-paragraph as follows:—

“(v) that these wage rates should be retroactive to 15th May 1960.”

Subsequently, the Association through its solicitors requested the Ministry of Labour to supply a copy of the letter of 17th May 1961 above referred to, but the Ministry refused to do so, and the letter in question has not been available to the Courts in Jamaica or to the Board.

The proceedings in Jamaica were started on 30th June 1961 by means of a notice of motion on the part of the Association for an order that any amendments of or additions to the award of the tribunal dated 19th April 1961 might be set aside on the ground (inter alia) that the tribunal had no jurisdiction to make them. The respondents to the motion were the Unions. In support of the motion there was filed an affidavit by John Cecil Wilman, who was the solicitor for the Association. In this affidavit there was set out the history of the dispute and the setting up of the tribunal. The transcript of the proceedings in April 1961 was exhibited, as was a copy of the award of 19th April 1961. The affidavit then referred to the requests for clarification and interpretation, leading up to the meetings on 9th and 10th May 1961: the transcript of those proceedings was exhibited. In paragraph 17 of the affidavit reference was made to the letter of 24th May 1961 and a copy was exhibited.

On 19th September 1961 Mr. Wilman swore a further affidavit in which he referred to the request for and refusal of production of the letter of 17th May 1961.

The motion came on for hearing on 25th September 1961 before the Chief Justice Sir Colin MacGregor, and was opened by Counsel for the Association. After he had stated that the only evidence before the Court consisted of Mr. Wilman's two affidavits, Counsel for the 1st respondent said that his client would be filing affidavits later that day. Shortly before 2.00 p.m. two affidavits were filed on behalf of the Unions, one by Mr. N. P. Silvera the Chairman of the tribunal, the other by Mr. R. Johnstone, the workers' representative on the tribunal. As these affidavits are of critical importance, their Lordships think it right to set out the relevant paragraphs in full.

Those in Mr. Silvera's affidavit are as follows:—

“4. That on a date subsequent to the 7th of April 1961 and prior to the 19th of April 1961 the Tribunal met at the Ministry of Labour, Kingston, and gave considerations to the submissions of the parties.

5. That it was unanimously decided by myself and the other members of the Tribunal that the increases should be made as stated in our Award dated the 19th April 1961 and also that these increases should be retroactive as of the 15th of May 1960.

6. That after our decision as stated above, I personally on the said date of the Award, informed Mr. E. G. Goodin and Secretary of the Tribunal of the Terms of the Award.”

and in Mr. Johnstone's affidavit

“5. That on the date between the 11th and 19th of April 1961 the Tribunal met at the Ministry of Labour, Kingston, and gave considerations to the submissions of the parties.

6. It was unanimously decided by the Chairman of the Tribunal, Mr. Paul Geddes the Employers' Representative and myself that the increases should be made as stated in the Award dated the 19th of April 1961 and also that these increases should be retroactive as of the 15th of May 1960.”

No cross-examination took place on these affidavits, although, as their Lordships understand, the deponents were present in Court, nor was any application made on behalf of the Association for an adjournment in order to consider the affidavits and, if thought fit, to file evidence in answer to them. The case then proceeded to a hearing.

The learned Chief Justice gave judgment on 6th October 1961 in favour of the Association. After considering upon whom lay the onus of proof and holding that even if initially it lay upon the Association it was shifted to the Unions, he criticised severely, and in their Lordships' view understandably, the delay in filing evidence by the Unions and then proceeded to criticise the terms of the affidavits themselves. These he found to be "thoroughly unsatisfactory", and after considering their language and their omission to deal with certain matters, he stated that he was satisfied that whilst consideration might have been given to the making of a retroactive order, it was not decided to make one until after 9th May 1961. The award of 19th April 1961 therefore exactly expressed the decision of the arbitrators and there was no ground on which it could be corrected. He granted the Association an order in the terms of the notice of motion.

The Unions (in fact the first and second respondents only who are also the only respondents to the present appeal) appealed to the Federal Supreme Court and the appeal came on before the Court of Appeal in Jamaica (which through certain constitutional changes replaced the Federal Supreme Court as regards appeals from the Supreme Court of Jamaica) on 10th December 1962. Prior to the substantive hearing the Unions had applied for leave to adduce further evidence by putting in the letter of 17th May 1961 which is referred to in the Ministry of Labour's letter of 24th May 1961, but this was opposed by the Association and leave was not granted. On 31st December 1962 the Court of Appeal by a majority (Waddington, J. dissenting) allowed the appeal.

Phillips, J. dealt with the question of onus of proof by holding that it was upon the Association. He then examined the affidavits and held that, unless they were dishonest affidavits, the finding of the learned Chief Justice, that the decision as to retroactivity was not reached until 9th May 1961, could not be upheld. He accepted the evidence as showing that this decision was taken before 19th April 1961. He held that a mistake arising from an omission had occurred which the tribunal could correct.

Lewis, J. also found it impossible to accept the conclusion of the learned Chief Justice that the decision as to a retroactive date was not reached before 9th May 1961. He considered that the evidence showed that the decision had been made before 19th April 1961, that there was no evidence of a deliberate omission of this decision from the award, and came to the conclusion that the Chairman (Silvera) omitted to tell the Secretary of the tribunal's decision on this point. He held that the Association had failed to show that the circumstances did not fall within the ambit of section 8(c) of the Arbitration Law and that the appeal should be allowed.

Waddington, J. took an opposite view. On the onus of proof he said that he was prepared to adopt the view that the onus was on the Association to show that the tribunal had not made the decision as to retroactivity before 19th April 1961. After considering all the facts and the history of the matter, he found that the only reasonable and probable inference was that the tribunal had not made any decision as to retroactivity before 19th April 1961. He went on to say that even if such a decision was reached there was no sufficient evidence that a slip or omission had occurred. Neither affidavit showed that any accidental slip or omission arose: the members of the tribunal could have given the necessary evidence but did not do so. The case therefore had not been brought within section 8(c) of the Arbitration Law.

Their Lordships have referred at some length to the facts of the case, and to the evidence available, because they are of the opinion that the issues in this appeal are essentially issues of fact, relating to the weight of evidence and the balance of probabilities upon the evidence.

Before proceeding to those issues, however, it appears to be convenient to dispose of a separate contention which has been raised by the appellant Association. This is to the effect that no document has ever been produced which is formally sufficient to amend the award of 19th April 1961. They point to the fact that the crucial amendment—introducing the operative date of 15th May 1960—is only to be found in a letter from the Ministry of Labour and that although that document refers to the existence of a letter from “the tribunal” there is no evidence that this letter was signed by the members of the tribunal or was formally effective to amend the previous award. They argue (and their Lordships accept) that an award can only be corrected (assuming that a basis for correction exists) by an act in which all the arbitrators participate, and that has never been shown. In their Lordships’ opinion, this point is not at this stage open to the appellants. If it were to be taken, it should, as involving an issue of fact, have been taken unequivocally in the trial Court. But the allegation that the three arbitrators did not concur, or might not have concurred, in the amendment was not made: the point taken was that the document of 17th May 1961 was not produced, not that it was not signed by all the members. The notice of motion itself, which asked that any amendments or additions to the award of 19th April 1961 should be set aside, is upon the basis that some amendment or addition had been made, and the appellants’ position, further is not improved by the fact that when the respondents sought to put the letter in evidence before the Court of Appeal, they objected to its admission. In their Lordships’ view therefore this point disappears from the case, and their Lordships proceed to the main issue of the validity of the amendment.

This depends upon the answer which is to be given to two questions. The first is whether the tribunal decided before making the award of 19th April 1961 that the pay increases in wage rates should be retroactive to 15th May 1960: the second is whether, assuming that to be so, there was in the award an error arising from an accidental slip or omission.

Before assessing the evidence on these issues, their Lordships must consider the question of onus of proof.

The question as argued in the Courts below and before the Board is whether it is for the appellant Association, challenging the amendment, to prove that the conditions necessary for its validity did not exist, or whether it is for the respondent Unions, justifying the correction of a completed award, to prove that they did. So far as the point is material, their Lordships take the view that the onus initially lay upon the appellants. Assuming, as their Lordships have already indicated that they must assume, that an amendment of the award was made, which was formally valid and purportedly made under a statutory authority to make it, it was for the appellants, if they wished to invoke the jurisdiction of the Court to set it aside, to establish at least such sufficient facts as, if not answered, would deny validity to the amendment. The notice of motion was in fact, and necessarily so, framed in this way; it asks the Court to set aside the amendments upon certain stated grounds—grounds which the appellants would have and would expect to prove. Their Lordships do not however consider that this question of the initial onus is determinative of the appeal since the matter did not rest without evidence, or even without evidence on one or other of the two sides. Evidence on both sides was ultimately placed before the Court and thereafter and at the trial it became the task of the Court to decide on the evidence before it and the balance of probabilities, whether the conditions necessary for a valid amendment had or had not been met. Their Lordships now examine the evidence in this light.

On the first point, whether the tribunal had, before 19th April 1961, reached a decision to antedate the increases to 15th May 1960, their Lordships, agreeing with the majority in the Court of Appeal, cannot avoid the conclusion on the evidence that such a decision was made. While they agree with the criticism of the learned Chief Justice as to the manner in which the Unions’ affidavits were produced, and also with much of his observations regarding the terms in which the affidavits were expressed, their Lordships

feel themselves obliged to accept that, given the veracity and good faith of the deponents, the purport of both affidavits is that at some date, prior to the making of the award on 19th April 1961, the tribunal unanimously decided both on the pay increases and on the retroactive date. The veracity of the deponents was not challenged: equally in their Lordships' view, any suggestion that the affidavits were veiling the truth, or couched in deceptive language, was not open to the appellants once they decided not to cross-examine the deponents. Equally, although, as is forcibly pointed out by the learned Chief Justice and by Waddington J., there were a number of features of the conduct of the tribunal, after the request for interpretation had been made, which on the face of them and in the absence of explanation invited criticism, yet, since the members of the tribunal were not questioned upon them, these matters cannot properly be relied upon to attack their credit. This being so their Lordships cannot follow the learned Chief Justice and Waddington J. in the finding that the critical decision was not taken until after 9th May 1961. The affidavits fairly read do not admit of this being the case, and fair reading is the only process open to the Court in the circumstances of the case.

There being then, in their Lordships' view, sufficient evidence as to the making of the decision, it becomes necessary to consider the second question—whether there was an error arising from an accidental slip or omission. This, as Waddington J. pointed out, is a separate point on which proof is required. With regard to it, their Lordships are in agreement with many of the observations and criticisms expressed by both the learned Chief Justice and by Waddington J. as to the quality of the evidence available. There is indeed scarcely any explanation or account of what went wrong. There is no evidence at all from one of the arbitrators, Mr. Geddes, the employers' representative, or, which might have been of the greatest use, from their Secretary. Mr. Johnstone in his affidavit makes no reference to any error: Mr. Silvera confines himself, in his obscure paragraph (6), to saying that he told the Secretary of the terms of the award on the date of the award. It may be (as Lewis J. was prepared to hold) that he is saying here that he omitted to tell Mr. Goodin of the operative date, but that is uncertain and in his affidavit there is nothing more.

But this is not the whole of the evidence. The Court had before it, put in evidence by the appellants, the record of the proceedings of the tribunal and, in their Lordships' view, was entitled and bound to take into account both what was stated by the Chairman on behalf of the tribunal on 10th May 1961, and also the terms of the letter from the Ministry of Labour of 24th May 1961 (the relevant passages in each case are cited above). These together amounted to a clear statement that a decision as to retroactivity had been made which was not reflected in the award. There is a complete absence of any evidence that the omission of this part of the decision from the award was deliberate. Their Lordships on this point agree with the analysis of these documents and of their evidentiary value by Lewis J. in the Court of Appeal and with his opinion that the right conclusion was that the omission was accidental. Admittedly—and this remains an unsatisfactory feature of the case—the exact nature and cause of the error or omission has never been made known to the Court, unless, and even then the explanation would not be complete, the conclusion be reached that Mr. Silvera omitted to tell the Secretary of the decision as to retroactivity. But nevertheless, in their Lordships' opinion, once the bona fides of the members of the tribunal is accepted, there is sufficient evidence to support the resort of the arbitrators to section 8(c) of the Arbitration Law and their consequent correction of the award.

For these reasons, which are based upon an assessment of the evidence substantially the same as that made by the majority of the Court of Appeal, their Lordships are of opinion that the appeal must fail and they will humbly advise Her Majesty accordingly. The appellants must pay the respondents' costs of the appeal but since the interests of the two respondents are identical only one set of costs will be allowed.

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