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Priv Council Appeal No. 69 Of2003

Jamaica Flour Mills Limited — Appellant

(1) The Industrial Disputes Tribunal and
(2) National Workers Union (Intervenor) — Respondents

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIW COUNCIL,

Delivered the 23rd March 2005

Prænt at the hering:Lord Steyn
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Hey»vood

[Deliæred by Lord Scott ofFoscotel

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l. The Tribunal found against the company on all these issues and, in particular, found that Their Lordships are of the opinion that this appeal should be dismissed and, save in respect of one point taken by the appellant that was not argued in the courts below, cannot usefully add anything to or improve upon the reasons given by Forte P, Harrison JA and Walker JA in the Court of Appeal for coming to the same conclusion. Nonetheless out of respect for the submissions of Mr Scharschmidt QC, counsel for the appellant before the Board, as he had been before the Court of Appeal, and also in order to give coherence to their Lordships' views on the additional point taken before the Board, it

is necessary to say a little about the nature of the litigation and the appellant's case.

The Statutory Framework

2. In 1975 the Parliament of Jamaica enacted the Labour Relations and Indusü•ial Disputes Act ("the Act"). The Act contained provision for the Minister to make regulations "for the better carrying out of the provisions of this Act" (s.27(1)) and required the Minister to lay before Parliament for Parliament's approval_

> "3(1) the draft of a labour relations code, containing such practical guidance as in the opinion of the Minister would be helpful for the purpose of promoting good labour relations in accordance with_
>
> (a) the principle of collective bargaining
>
> (b) the principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes . . .;
>
> (c) the principle of developing and maintaining good personnel management techniques designed to secure effective co-operation between workers and their employers and to protect workers and employers against unfair labour practices. "

3. A draft Code was duly laid before Parliament and was approved by both Houses of Parliament in the course of 1976. Paragraph 2 of the Code records the tension between the emcient use of resources, material and human, and the need to accord respect and dignity to the workers. The Code urges employers to

> "…ensure that adequate and effective procedures for negotiation, communication and consultation are maintained with their workers" (para. 5(iv))
>
> and_
>
> "insofar as is consistent with operational efficiency [to] take all reasonable steps to avoid redundancies" (para. 1 1(ii))
>
> and_

> "[to] inform the worker, frade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies" (para.l I(iii))

4. Section I IA of the Act allows the Minister, on his own initiative, to refer an industrial dispute to the Indust'ial Disputes Tribunal ("the Tribunal") for settlement. Section 12 deals with the awards the Tribunal may make and, of particular relevance to this case, section 12(5)(c) provides that if the dispute relates to the dismissal of a worker, the Tribunal _shall, if it finds that the dismissal was tmjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;

> (ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to gant him such other relief as the Tribunal may determine;
>
> (iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine. "

Sub-section (5) ends by saying that "the employer shall comply with such order".

5. Two points of consåuction regarding section 12(5)(c) have been raised before the Board; first, whether paragraph (i) is, as would appear from the word "shall", mandatory, and, if so, what happens in a redundancy case if the job has disappeared. This is the new point, raised for the first time before the Board. The second point is whether "unjustifiable" simply means unlawful or has the wider meaning of "unfair".

6. Issues have arisen, also, regarding the effect of the Code and the use that can be made of it in a case such as the present. In paragraph 8 of its Award the Tribunal, responding to a submission that the Code was no more than a set of guidelines and was not legally binding, observed that the Code was "as near to law as you can get". This observation was endorsed by Clarke J in the Full Court (p.28) and by Forte P (p.6), Harrison JA (p.20) and Walker JA (p.37) in the Court of Appeal. Both in the Full Court and in the Court of Appeal reliance was placed on Village Resorts Ltd v The Industrial Disputes Tribunal SCCA 66/97 (unreported)

in which Rattray P, in the Court of Appeal, had described "The Act, the Code and the Regulations" as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica" (p. 11) and as a "road map to both employers and workers towards the destination of a co-operative working environment for the maximisation of production and mutually beneficial human relationships" (p. 10, cited by Forte P in the present case at p.3 of the Court of Appeal judgment). Forte P went on to say that the Code

> "…establishes the environment in which it envisages that the relationships and communications between the [employers, the workers and the Unions] should operate for the peaceful solutions of conflicts which are bound to develop." (pp.3 and 4)

7. Their Lordships respectfllly accept as correct the view of the Code and its ftmction as expressed by Rattray P in the Village Resorts case and by Forte P in the present case.

The facts

8. The facts of the present case have been frilly set out in the courts below- The essentials can be briefly expressed. The appellant, Jamaica Flour Mills Ltd ("JAR') operates a flour mill located at Windward Road, Kingston. JFM's main raw material is wheat which is imported from the USA. The wheat is unloaded at the ShellRockfort pier and stored in silos at the mill. The unloading at the pier was carried out by means of equipment operated by JFM employees. The three employees, Mr Suckie, Mr Campbell and Mr Gordon, whose dismissals gave rise to this litigation, were employed at the pier. They were members of the National Workers Union. .JFM and the Union were party to a Collective Labour Agreement under which JFM had the right to dismiss employees whose jobs had become redundant (see clause 21 of the Agreement).

9. In 1997 ADM Milling Co purchased shares in JFM and became the majority shareholder. Under its new management JFM re-assessed the effciency of the unloading operation at the pier and, in 1999, concluded that it would be more cost-effective to contract-out that part of its business operations. JFM's decision to do so meant that the three employees became redundant. JFM did not inform the Union or the employees of the impending redundancy.

10. A letter of 13 August 1999 was issued to each of the three employees at about 2.15pm on that date. Each was dismissed with immediate effect. Each letter was accompanied by a cheque for a sum calculated to cover (i) payment in lieu of notice (ii) separation payment (iii) payment for unused and prorated vacation leave and (iv) payment

for accumulated sick leave. Each letter requested the employee to return "all keys, identification card, health cards and any other property of the company in your possession by 4.30pm today". By the date of these peremptory dismissals JFM had employed Nfr Campbell and Mr Suckie for over thirteen years. They had employed Mr Gordon for twenty-eight years. The dismissals had not been preceded by any communication or consultation either with the Union or with the employees relating to their impending dismissals.

I l. The three employees protested at once about their dismissals, their Union took up the cudgels on their behalf and JFM's whole workforce went on strike. The Minister, exercising his power under section I IA of the Act referred the dispute to the Tribunal. The terms of reference, set out in a letter of 23 August 1999 from the Tribunal to JFM and to the Union, required the Tribunal

> "To determine and settle the dispute between [JFM] on the one hand and [the Union] on the other hand over the termination of employment on grounds of redundancy of Messrs. Simon Suckie, Michael Campbell and Ferron Gordon."

12. On 20 August 1999, the Tribunal, pursuant to its power under section 12(5)(a) of the Act, ordered the strike to cease. The workmen, other than the three who had been dismissed, returned to work the next day. Arrangements were then made for the hearing of the dispute referred to in the Tribunal's terms of reference.

13. As to the cheques that each of the dismissed employees had been sent, Mr Campbell cashed his cheque, a cheque for $541,068-51, on 26 August 1999. Mr Gordon cashed his cheque, a cheque for $1,188,06601, on I September 1999. Mr Suckie's cheque, a cheque for $635,717-66, has not been cashed.

The proceedings

14. JFM's case before the Tribunal was that the dismissals were on account of redundancy and were in accordance with the employees' respective confracts of employment. The dismissals could not, therefore, be said to be "unjustifiable" for the purposes of section 12(5)(c) of the Act. Moreover, Mr Campbell and Mr Gordon, by cashing their respective cheques, must, it was submitted, be taken to have waived their statutory rights under the Act. The Union, on behalf of the three dismissed employees disputed the genuineness of the alleged redundancy, contended that in any event the manner of the dismissals rendered them "unjustifiable" and denied that waiver could be established from the cashing of the cheques.

15.

> "It was unfair, unreasonable and unconscionable for [JFM] to effect the dismissals in the way that it did. It showed little if any concern for the dignity and human feelings of the workers …" (para. IO(iii) of the Award)

The Full Court and the Court of Appeal came to the same conclusions and for much the same reasons. The correct meaning to be attributed to the word "unjustifiable" in its section 12(5)(c) context was, of course, an issue of law. Mr Scharschmidt submitted that "unjustifiable" should be given the restricted meaning of "conformable to law" and that unless it could be shown that the dismissals were in breach of some duty, whether contractual or imposed by statute, the dismissals could not be held to be "unjustifiable". Their Lordships, for the reasons in the courts below, which their Lordships will not attempt to improve on, reject this limited construction. The dismissals were "unjustifiable" for the purposes of section 12(5)(c).

16. Mr Scharschmidt drew their Lordships' attention to The Institute of Jamaica v The Industrial Disputes Tribunal and Beecher (the Beecher case) an unreported case in which the Court of Appeal gave its judgment on 2 April 2004, some nine months after the Court of Appeal had given judgment in the present case. The case was one in which Mrs Beecher had been summarily dismissed. Following a reference to the Tribunal of the dispute over the dismissal, the Tribunal found, apparently, that Mrs Beecher had committed various serious breaches of her contractual duties (see p.20 of the judgment of Downer JA) but nonetheless held that she had been entitled to a hearing before being dismissed and that her dismissal was therefore "unjustifiable" for section 12(5)(c) purposes. The Court of Appeal disagreed and held that in the circumstances her dismissal without a prior hearing was justifiable. The question whether an employee who has committed serious misconduct justifying dismissal is entitled to a hearing before being dismissed is not one that arises in the present case and their Lordships express no view on it. The case does not, in their Lordships' opinion, assist Mr Scharschmidt's submission on the restricted meaning to be given to "unjustifiable".

17. Mr Scharschmidt submitted, also, that the Tribunal's decision in the present case was impeachable because the Tribunal had not decided one way or the other whether there fruly was a redundancy that had necessitated the dismissal of the three employees and, consequently, had not suffciently addressed their terms of reference. Mr Scharschmidt is correct in observing that the Tribunal did not definitively decide the redundancy issue. Instead the Tribunal addressed themselves to the

question whether the dismissals, having regard to the manner in which they were effected, were in any event 'tmnjustifiable". But, in agreement with the Court of Appeal, their Lordships do not accept the submission that the Tribunal consequently did not properly address their terms of reference. The terms of reference required the Tribunal "to determine and settle the dispute …".The Tribunal did so. They were able to do so without definitively deciding the redundancy issue. In effect, as the Court of Appeal judgments pointed out, the Tribunal assumed in favour of JFM that its redundancy case was well-founded. The absence of a definitive finding can give JFM no ground for complaint.

18. Mr Scharschmidt made a number of other submissions critical of the manner in which the Tribunal had dealt with the dispute and the weight the Tribunal had attached or had not attached to various factors. None of these complaints in their Lordships' opinion, raised any point of law. They amounted to criticisms of the factual findings of the Tribunal expressed in paragraph 10 of the Award. Those findings, measured against the correct meaning to be attributed to the word "unjustifiable" in section 12(5)(c), make the Tribunal's conclusion that the three employees were 'tmjustifiably" dismissed a conclusion that in their Lordships' opinion, is unchallengeable.

19. The Tribunal's Award ordered the company to reinstate the three dismissed employees with effect from 13 August 1999 and gave directions as to the wages they should receive from then until their actual reinstatement and as to the sums to be brought into account by Mr Campbell and Mr Gordon (each of whom had cashed his dismissal cheque). These orders have been stayed pending each successive appeal. No point has been raised before their Lordships in criticism of these directions. The only point raised regarding the terms of the Award relates to the re-instatement order.

20. As to JFM's waiver point, which affects only Mr Campbell and Mr Gordon, their Lordships would reject the point for the same reasons as those given in the courts below. Waiver, as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the alleged waiver. If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present. An objectively ascertained intention to waive is the first requirement. JFM's case falls at this hurdle. The cashing of the cheques took place after the Union had taken up the cudgels on the employees' behalf, after the dispute had been referred to the Tribunal and after arrangements for the eventual hearing had been put in train. In these circumstances the cashing of the cheques could not be taken to be any

clear indication that the employees were intending to abandon their statutory rights under section 12(5)(c). Nor is there any indication, or at least no indication to which their Lordships have been referred, that JFM or any representative of JFM thought that the two employees were intending to relinquish their statutory rights. Even assuming that the cashing of the cheques could be regarded as a suffciently unequivocal indication of the employees' intention to waive their statutory rights, the waiver would, in their Lordships' opinion, only become established if JFM had believed that that was their intention and altered its position accordingly. There is no evidence that JFM did so believe, or that it altered its position as a consequence. The ingredients of a waiver are absent. Their Lordships would add that they do not see this as a case where the employees were put to an election between inconsistent remedies, i.e. cashing the cheques or pursuing their statutory remedy (see Scarf v Jardine [1882] 7App. Cas. 345 at 351). Mr Scharschmidt did not advance any argument to the contrary but based his waiver contention on estoppel by conduct.

21. Finally, their Lordships must deal with the reinstatement point. The point is based on remarks made by Downer JA in the Beecher case. These remarks were to the effect that the apparently mandatory requirement imposed on the Tribunal by the word "shall" in paragraph (i) of section 12(5)(c) involved a misreading of the statutory provision and that the provision should be construed as conferring a discretion, not as imposing a mandatory duty. Downer JA said this_

> "Implicit in the wording of this sub-section is that there is an offce to which the worker can be reinstated, so regard has to be paid to the contact of employment, the establishment, and finances of the institution " (p.25)

and

> "Also the decision to reinstate Mrs Beecher when there was no offce in the establishment was absurd and an error of law" (p.27)

Downer JA was plainly influenced by paragraph (iii) of section 12(5)(c), which he said "provides the discretion to be exercised by the IDT". Hewenton-

> "In effect it states what is to be done if the offcer or worker is unjustifiably dismissed and wishes to be reinstated but there is no offce or position existing to which she can be reinstated." (p.26)

22. Downer JA's remarks cited in the last preceding paragraph were, as Mrs Foster-Pusey and Lord Gifford QC, counsel for the respondents,

correctly submitted, obiter. Downer JA had held that the dismissal of Mrs Beecher was not "unjustifiable". Questions about how section 12(5)(c) should be applied if the dismissal had been unjustifiable did not form part of the ratio for allowing the Institute's appeal.

23. Moreover the question whether paragaph (i) of section 12(5)(c) means what it says has been overtaken by an amendment made by the Labour Relations and Industrial Disputes (Amendment) Act, 2002. Section IO(b) of the 2002 Act amended section 12(5)(c)(i) of the principal Act by deleting the word "shall" and substituting the word "may". This amendment would not affect causes of action which arose before the amending Act was passed but does indicate that the Jamaican Parliament believed the unamended section 12(5)(c)(i) to impose a mandatory duty rather than the discretionary power that Downer JA had preferred.

24. Their Lordships are not inclined to accept that the obiter view expressed by Downer JA is correct. The word "shall" in paragraph (i), and also in paragraph (ii), confrasts with the word "may" in paragraph (iii). The unamended section 12(5)(c)(i) should, in their Lordships' opinion, be given its ordinary meaning i.e. as imposing a mandatory duty to order reinstatement if the conditions of the statutory provision are met. Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code. Their Lordships, therefore, are not convinced that the practical diffculties referred to by Downer JA are as real as supposed and do not accept that they justi$' a judicial re"Titing of the statutory provision.

25. For these reasons their Lordships will humble advise Her Majesty that this appeal should be dismissed. JFM must pay the costs of the appeal.