THE JAMAICA LAW REPORTS

VOLUME 18

THE JAMAICAN BAR ASSOCIATION
in association with
THE CARIBBEAN LAW PUBLISHING COMPANY LIMITED
under the auspices of the USAID/Jamaican Bar Association
Sustainable Justice Reform Project

KINGSTON

1996

Let me then summarise four points relative to this matter, which I think are material.

The first one is: a Resident Magistrate has the power, coupled with a discretion to decide whether or not he should grant an order for the trial of accused on indictment. And an enquiry should be held for this purpose. Two: in considering the facts and circumstances, the Resident Magistrate may take into account the plea or wishes of the virtual complainant in the case. Three: there is no power to review the exercise of a discretion, which, on the face of it, was properly exercised, and mandamus would not be ordered to go in the case of the exercise of discretion where no wrong principle was applied or any irrelevant matter considered. Four: where in a criminal proceeding before the Resident Magistrate Court, the records are endorsed 'No Order made at the request of the complainant', it has the same legal effect as the entering of a nolle prosequi for the purpose of instituting civil proceedings for malicious prosecution or false imprisonment.

In my view, this appeal must fail. The applicant, in my view, has the right to proceed with his civil action without having to come to court to attempt to interfere with the Order which was made by the Resident Magistrate.

ROSS, J.: I agree with the order proposed by Mr. Justice Parnell that the order of mandamus must be dismissed. I agree with what has been set out, quite clearly by my brother Parnell and there is nothing I wish to add.

BINGHAM, J.: I too agree with the judgement delviered by Mr. Justice Parnell. He has set out his reasons so fully that there is very little that I can add. I would just like to make this point, however, that the Applicant had to show before Mr. Justice Malcolm that he had some arguable matter in order to launch these proceedings. The complaint of the applicant was that as a result of these facts, the charge was still hanging over his head and he could not bring civil proceedings.

Well, as Mr. Justice Parnell has quite fully set out and in the authorities referred to, there is a very broad interpretation put upon the satement, "that the proceedings were favourably terminated in favour of the applicant and prospective plaintiff". A very broad interpretation is put upon those words.

All I need to say is that it is not merely a question of showing that the criminal proceedings brought were finally terminated but by showing that he was not convicted.

Apart from that I need not add anything else.

PARNELL, J.: The unanimous order of the Court then, is that the appeal stands as dismissed.

THE NATIONAL WORKERS UNION AND COLLINGTON CAMPBELL *v.* THE JAMAICA BROADCASTING CORPORATION

THE UNION OF CLERICAL, ADMINISTRATIVE AND SUPERVISORY EMPLOYEES AND BEVERLEY NEWELL *v.* THE JAMAICA BROADCASTING CORPORATION

[SUPREME COURT (Smith, C. J.) March 13, 1981]

Labour Relations—Employment—Plaintiffs dismissed without notice—Whether collective labour agreement legally binding—Whether arbitrator having power to re-instate plaintiffs in absence of express power in agreement—Arbitration Act, ss. 2, 3—Labour Relations and Industrial Disputes Act, ss. 6, 11, & 12—Employment (Termination and Redundancy Payments) Act, ss. 3 - 5, 11;—Interlocutory Injunction—Principles on which injunction awarded—serious case to be tried.

The plaintiffs were dismissed by their employer, the defendant company, without notice. The plaintiffs thereupon filed originating summonses claiming: (a) a declaration that they were entitled to have the issue of their dismissals referred to arbitration by virtue of the provisions of a collective labour agreement between the parties; (b) an interlocutory injunction restraining the defendant from appointing persons to fill the vacancies before the issue of the dismissals had been determined on arbitration; and (c) a declaration that the employment of the plaintiffs was still subsisting and had not been effectively terminated. The defendant in its defence contended that the plaintiffs had been validly made redundant and that the collective labour agreement was not legally binding but binding in honour only. Consequently, it was submitted, there was no obligation on the defendant to submit the matter to arbitration. It was further submitted by the defendant that in any event the arbitrator would have no power to award re-instatement because no such power was expressed in the agreement and that the dismissals were genuine redundancy measures.

Held: (i) the basis upon which an interlocutory injunction is granted was no longer that the plaintiff must establish a prima facie case but a court needs only to be satisfied that there was a serious question to be tried, and unless the material available to the court at the hearing of the application failed to disclose that the plaintiff had any real prospect of succeeding in his claim at the trial, the court should go on to consider whether the balance of convenience lay in favour of granting or refusing the interlocutory relief sought.

(ii) there was no rule to the effect that collective labour agreements were binding in honour only and the agreement in the instant case was clearly intended by the parties to be legally binding.

(iii) no power to award re-instatement having been expressed in the collective labour agreement such a power could not be implied so that the first declaration sought would be an empty one and would not be granted.

(iv) in that the plaintiffs' dismissals without notice were ineffective to terminate their contracts of employment and such circumstance constituted an exception to the general rule that the law would not enforce whether by specific performance or by injunction, a contract of employment.

(v) that the interlocutory injunction sought would therefore be granted as the plaintiffs had established that there was a serious question to be tried and that the balance of convenience lay in favour of its grant as the plaintiffs could not be adequately compensated in damages if the question were determined in their favour at the trial.

Interlocutory injunction granted.

Cases referred to:

(1) *American Cyanamid Co. v Ethicon Ltd.* [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504.

(2) *Fellowes and Son v Fisher* [1976] Q.B. 122; [1975] 3 W.L.R. 184; [1975] 2 All E.R. 829.

(3) *R. v Industrial Disputes Tribunal, Ex parte The Half Moon Hotel Ltd. (unrep'd) (1st February 1979).*

(4) *R. v Industrial Disputes Tribunal, Ex parte The Shipping Association of Jamaica (unrep'd) (9th July 1979).*

(5) *R. v The National Arbitration Tribunal, Ex parte Horatio Crowther & Co. Ltd.* [1948] 1 K.B. 424.

(6) *Chandris v Isbrandtsen Motor Co. Inc.* [1959] 2 All E.R. 618.

(7) *Hill v C.A. Parsons and Co. Ltd.* [1972] Ch. 305; [1971] 3 W.L.R. 995; [1971] 3 All E.R. 1345.

(8) *Vine v National Dock Labour Board* [1957] A.C. 488; [1957] 2 W.L.R. 106; [1956] 3 All E.R. 204.

(9) *Francis v Kuala Lumpur Councillors* [1962] 1 W.L.R. 1411; [1962] 3 All E.R. 633.

(10) *Lloyd v Brassey* [1969] Q.B. 832; [1969] 2 W.L.R. 310; [1969] 1 All E.R. 382.

(11) *Gunton v London Borough Richmond-Upon-Thames Council* [1980] 3 W.L.R. 714; [1980] 3 All E.R. 577.

(12) *Brindle v H. W. Smith (Cabinets) Ltd.* [1973] 1 All E.R. 230.

(13) *Chappell et al v Times Newspapers Ltd. et al* [1975] 1 W.L.R. 482; [1975] 2 All E.R. 233.

(14) *Sanders v Ernest A. Neale Ltd.* [1974] 3 All E.R. 327; [1974] 1 C.R. 565.

R. Carl Rattray, Q.C. and *P.J. Patterson* for the plaintiffs.

Emil George, Q.C. and *Dennis Goffe* for the defendant.

SMITH, C.J.: These proceedings were commenced by the filing of originating summonses on the 17th of February, 1981. The claims in each case are identical. As filed, the originating summons in the first case claimed, first of all, a declaration that the plaintiffs be entitled to have the issue of the dismissal of the employees of the news room department of the Jamaica Broadcasting Corporation referred to arbitration "by virtue of a true interpretation of the terms of a collective labour agreement" entered into between the first-named plaintiff, the union representing the employees, of whom the second-named plaintiff is one, and the Jamaica Broadcasting Corporation, which agreement is dated the 20th day of August, 1980 and is in full force and effect. The summons claimed, secondly, an injunction restraining the defendant from appointing persons to fill the vacancies in the news room department of the Corporation before the issue of the dismissal of the employees in that department had been determined on arbitration as provided for in the said "collective labour agreement". The claims in the second case identical, as I have said, except that the Union of Clerical Administrative and Supervisory Employees and Beverly Newell are substituted for the National Workers Union and Collington Campbell, as plaintiffs.

On the same day that the originating summonses were filed, ex-parte summonses were taken out for injunctions restraining the defendant from filling the vacancies until a hearing and determination of the originating summonses. On that same day the summonses were placed before me and I granted the applications for eight days to allow the defendant to be served. Subsequently, on the 19th of February, summonses were taken out by the

plaintiffs—that is, the plaintiffs in each case—and served on the defendant for orders that the injunctions previously granted be continued until the trial. Since then, the interim injunctions have been extended from time to time and they are still in existence today.

On the 2nd of March notices of applications to amend the originating summonses were filed by the plaintiffs and the applications were to claim an additional relief in the summonses. The relief which it was sought to add in each case was as follows:

> "Further and/or in the alternative, the plaintiffs claim a declaration that the employment of the employees of the news room department (i) is still subsisting and (ii) has not been effectively terminated since the redundancy claimed by the JBC does not in fact exist and is a mere colourable device by the defendant to deprive the workers of their rights under the Collective Labour Agreement, Industrial Relations practices, the Laws and the Constitution of Jamaica."

The applications were granted without objection on the 6th of March, the day that the hearing of these applications commenced.

The applications were fully argued over the period the 6th to the 11th of March, and I am grateful to learned counsel in the case for their exhaustive arguments and for the maximum assistance which I obtained from them. The hearing of the applications was adjourned into court today for my decision to be given in view of the obvious public interest in the applications.

There are two distinct reliefs claimed in each case. The first is based on the existing collective agreements and seeks to have the court declare the right of the employees to have the question of their dismissal referred to arbitration. Though this is not stated in the summonses, it is common ground, and it is made clear in the affidavits, that the sole purpose of going to arbitration is to seek an award for the reinstatement of each of the dismissed employees. The second relief is independent of the collective agreements and simply seeks a declaration from the court that the contract of employment of each employee had not been effectively terminated and is, thus, still subsisting.

I will now make reference to the principles relating to the grant of interlocutory injunctions. It is said that the object is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action. The uncertainty which existed at the time of the application regarding the existence of his right were resolved in his favour at the trial. On the 5th February, 1975, the decision was given by the House of Lords in *American Cyanamid Co. V. Ethicon, Ltd.*, [1975] A.C. 396. Before this case was decided the established rule was that before a plaintiff could ask a court to exercise its discretion to grant an interlocutory injunction he must establish a *prima facie* case. This is to say, he must satisfy the court that if the case went to trial upon no other evidence than is before it at the hearing of the application, the plaintiff would be entitled to judgment on his claim. In the American Cyanamid case the House of Lords, in a speech by Lord Diplock which was concurred in by all the other members of the House, declared that there was no such rule as was thought to exist. Instead, it was held that a court need only be satisfied that there is a serious question to be tried and that, unless the material available to the court at the hearing of the application fails to disclose that the plaintiff has any real prospects of succeeding in his claim at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. As to that, Lord Diplock had this to say in his speech (at p. 408):

> ". . . the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be

enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both that the question of balance of convenience arises."

Within three months of the decision in the *American Cyanamid* case it was criticized in the Court of Appeal and justification found for applying the accustomed principles in the particular circumstances of individual cases (see *Fellowes and Son v. Fisher*, [1975] 3 W.L.R. 184).

Counsel on both sides in these proceedings adverted during the argument to the *American Cyanamid* principle, that there is a serious question to be tried, so that is the principle which I shall apply in coming to a conclusion on the arguments.

I deal first with the reliefs which are based on the collective agreements. The first issue raised is the question of validity of the agreements, it being contended for the plaintiffs that they are legally binding and enforceable, and for the defendant that the are not—that they are binding, if at all, in honour only. Counsel for the defendant were able to cite authority in favour of their contention, while counsel for the plaintiffs were not. Mr. George relied on statements in The Worker and the Law, a work by Prof. K.W. Wedderburn, and to two unreported decisions of the Full Court of our own Supreme Court, namely, *R.v. The Industrial Disputes Tribunal, Exparte The Half Moon Hotel and R. v. The Industrial Disputes Tribunal, Exparte The Shipping Association of Jamaica*. On their part, Messrs. Rattray and Patterson for the plaintiffs submitted that there was no legal authority which went as far as saying that collective agreements as a class are legally unenforceable, and this submission was not contradicted. The submission appears to be supported by the statement of Professor Wedderburn (at p. 107 of his work) that -

"the question of the enforceability of collective agreements is not yet finally closed in Britain."

Collective agreements are not binding and it is not necessary to set them out here, but it seems clear from those authorities that a decision as to the legal enforceability of such agreements can only be made on an examination of the terms of each agreement. Thus Carey, J. Said in the *Shipping Association* case (at p. 38 of the judgment):

"Such agreement will have to be considered on its own facts. Where the terms are precisely stated and are certain, there is no reason in law why the intention to be bound by the terms cannot be imputed to the parties."

As a matter if interest, and perhaps ironically in the context of these proceedings, it appears from what Prof. Wedderburn says (at p. 107 of his work), that the trade unions in Britain are the main contenders that collective agreements are not legal contracts, and so they say that no legal action can be brought if a union fails to observe agreed procedure. Prof. Wedderburn goes on (at p. 108) to say:

"... no legal action between union and employers for the direct enforcement of such an agreement has ever been reported in this country; and this is so because neither side wishes this sanction to apply to their agreements. There is no final judicial decision because the parties have always 'intended' that there shall not be one."

Those actively involved in industrial relations disputes in this country will be able to say whether unions and employers in this country have blown hot and cold in this respect from time to time.

Counsel for the plaintiffs point to the terms of the collective agreements in these proceedings and submit that it is manifest that the parties intended and did create legally enforceable contracts. Looking at the agreements and examining their terms, I see nothing in form or content, and my attention has not been directed to anything in them, which is inconsistent with their being legal contracts, enforceable as such. To the contrary, they comply in all respects with the requirements of written legal contracts. I point particularly to Part III headed "Permanent Provisions", the introductory paragraph of which reads as follows (reading from the agreement in the National Workers Union case):

"The following clauses of this agreement numbered 7-37, shall form part of the permanent terms of the employment of the employees and shall remain in force until varied by agreement between J.B.C. and the representative of the employees for the time being, and the expression 'the union' used therein shall mean the recognized bargaining representatives of the employees from time to time and shall be deemed to have come into force on the date of this agreement."

Clause 37 of this agreement sets out the grievance procedure. No reason was suggested during the argument, apart from the general statement that collective agreements are binding in honour only, why an employee should not be able to enforce any of these clauses against the defendant. It may be said, as Mr. George said, when I asked him about the remuneration in Part II of the agreements, that they would be enforceable, not because the collective agreement is itself enforceable but, because the clauses are incorporated into the contracts of employment of the employees. I fail to see any practical difference. I hold that the collective agreements are prima facie legally enforceable.

The result of this decision is that the employees are entitled to enforce the grievance procedure in the agreements and with the aid of the Arbitration Act insist that the dispute be referred to an arbitrator. Even if I am wrong and the collective agreements are not legally enforceable, I am of the opinion that, with the aid of the Arbitration Act (more accurately, the definition of "submission" in s.2 of the Act) refers to arbitration clauses in legally binding agreements. This may well have been so when the Act was passed but I can see no reason in principle why the relevant provisions in the Act, which are not limited in terms, should not apply to agreements with a legal status such as is given to written collective agreements by the Labour Relations and Industrial Disputes Act. One need only look at s. 6 (1) of that Act:

"Every collective agreement which is made in writing after the commencement of this Act shall, if it does not contain express procedure for the settlement, without stoppage of work, of industrial disputes between the parties, be deemed to contain the procedure specified in sub-section (2) (in this section referred to as the implied procedure)."

The effect of these provisions is that grievance procedures in collective agreements are recognized by the statute and where no such procedure is provided in such agreements the implied procedure in sub-s. (2) of the section is incorporated in the agreements. There is no reason in principle why the grievance procedure should not include a reference to an arbitrator as a final step in the procedure; and if it does, why should not the Arbitration Act be used to enable the parties, in the interest of industrial peace, to have their disputes

settled in a way which is final and legally binding; which, after all, is the sole purpose of the implied procedure.

Mr. George contended that even if s.3 of the Arbitration Act gives legally binding force to the clauses, the arbitrator could not enforce any clause in the hitherto unenforceable agreement. I have said enough to indicate that I disagree with this contention. In any event, it is not, *ex hypothesi*, the unenforceable clause that would become enforceable. It would be the award made by the arbitrator in respect of that clause that could be enforced.

It was submitted for the defendant that even if the arbitration clause in the collective agreements can be enforced, under the agreements the powers of the arbitrator would be limited to complaints arising out of "the application and interpretation" of the agreements. It was said that the agreements make no mention of dismissal on the ground of redundancy, so if the arbitrator is to apply and interpret the agreements it cannot fall within his jurisdiction as to whether or not the employees have been properly dismissed on the ground of redundancy since such determination would not be either the application or interpretation of the agreements. I think Mr. Rattray's reply effectively answered this submission. He submitted that it is clearly implicit in clause 29 of the National Workers Union agreement (and similarly in the arbitration clause in the other agreement) that employees are entitled to have disputes relating to their dismissal or the terms and conditions of their employment submitted to the grievance procedure and these would be disputes arising out of the application of the agreement. It seems that the arbitrator would, clearly, have power to deal with disputes regarding the termination of employment, and that is the dispute here.

As I have said, the employees wish to enforce their right to go to arbitration for the sole purpose of obtaining an award for their reinstatement. It was submitted for the defendant that the arbitrator would have no power to award reinstatement because (a) the power to reinstate cannot be implied, it has to be expressly given, and (b) the power is not a common law remedy and equity follows the law. It is to be observed that no power to award reinstatement is expressed in the agreements.

The submission that the power to reinstate cannot be implied is supported by the case, cited by Mr. George, of *R. v. The National Arbitration Tribunal Ex-parte Horatio Crowther & Co. Ltd.*, (1948) 1 K.B. 424. In spite of this authority, Mr. Rattray contended that the power may be implied and relied on the later case of *Chandris v. Isbrantsen Motor Co. Inc.*, [1959] 2 All E.R. 618. This was a case where it was held that on a submission to an arbitrator of a dispute in a commercial contract the arbitrator had an implied power to award interest on the award that he made for damages. The court was able to come to this conclusion because at the time a court, albeit by statute, could award interest on damages awarded by the court.

Basing himself on this principle, Mr. Rattray submitted that although the Labour Relations and Industrial Disputes Act does not apply in terms to arbitrations, yet in industrial relations references of the kind in question, it is an implied term of the collective agreement that the arbitrator must decide the dispute according to the existing law of industrial relations and that every right and discretionary remedy given to a tribunal can be exercised by him. In answer to the submission Mr. George said that in the *Chandris* case the court could say that the arbitrator had the implied power to award interest only because the court itself had the power and that a court has no power to award reinstatement.

Attractive as is Mr. Rattray's argument, I do not think it is sound. If he is right, would the arbitrator have the identical power given to the Industrial Disputes Tribunal in s. 12 (5) (c) (I) of the Act or some less power of reinstatement? Would he be compelled to reinstate, as the tribunal would be compelled if the worker wishes to be reinstated, or would he have a discretion? This provision in the Act was a revolutionary departure from the common law powers which existed in respect of disputes for wrongful dismissal and, in

my opinion, cannot be imposed on any employer against his will in any other circumstances without express statutory authority. Moreover, the presence in a collective agreement of a grievance procedure ending in arbitration does not preclude advantage being taken of the wider powers of the Industrial Disputes Tribunal under the Act where at the level of the arbitrator the dispute is unresolved (see s.11 (2) of the Act).

In my opinion, in deciding whether to exercise its discretion in granting the first declaration sought, a court would be bound to consider whether the grant would be effective to enable the plaintiffs to obtain the relief sought. In my judgment, a declaration in the terms sought would not be effective to secure the reinstatement of the employees. It would be an empty declaration. This cannot, therefore, form the basis for the grant of an interlocutory injunction.

I turn now to the second, or alternative, declaration claimed. As I have said, this is a declaration that the employment of the employees of the news room department (a) is still subsisting and (b) has not been effectively terminated. Contrary to the general rule that a court will not grant specific performance of a contract for personal services or indirectly enforce such a contract by the grant of an injunction, there is a line of cases which establish that in special circumstances, though rarely, a court will enforce a contract of employment by declaring that it still subsists in spite of its purported termination by an employer. The foundation of the principle is a finding that the purported termination is invalid. The case in which this principle is most clearly established is *Hill v. C.A. Parsons & Co. Ltd.* And the report to which I shall refer is that in (1972) Ch. 305. Reference to extracts from the judgment of Lord Denning, M.R. will illustrate the principle. In stating the facts Lord Denning said (at p.313):

> "In the letter of July 30, 1971, the company purported to terminate Mr. Hill's employment by giving one month's notice. They had no power to do any such thing. In order to terminate his employment, they would have to give reasonable notice."

The Master of the Rolls made reference to other aspects of the case relating to the length of notice and then continued (ibid):

> "Then comes the important question: What is the effect of an invalid notice to terminate? Suppose the master gives the servant only one month's notice when he is entitled to six? What is the consequence in law? It seems to me that if a master serves on his servant a notice to terminate his service, and that notice is too short because it is not in accordance with the contract, then it is not in law effective to terminate the contract—unless, of course, the servant accepts it. It is no more effective than an invalid notice to quit. Just as a notice to quit which is too short does not terminate a tenancy, so a notice which is too short does not terminate a contract of employment."

The Master of the Rolls goes on (at p. 314) to discuss the consequences in law if the master insists on termination on the named day and said (ibid):

> "*In the ordinary course of things*, the relationship of master and servant thereupon comes to an end: for it is inconsistent with the confidential nature of the relationship that it should continue contrary to the will of one of the parties thereto."

He referred to a statement of Viscount Kilmuir, L.C. in *Vine v. National Dock Labour Board* [1957] A.C. 488 and continued:

> "Accordingly, the servant cannot claim specific performance of the contract of employment. Nor can he claim wages as such after the relationship has been determined. He is left to his remedy in damages against the master for breach of the contract to continue the relationship for the contractual period. He gets damages for the time he would have served if he had been given proper notice, less, of course, anything he has,

or ought to have earned, in alternative employment. He does not get damages for the loss of expected benefits to which he had no contractual right . . ."

Lord Denning continued (ibid):

"I would emphasise, however, that this is the consequence in the *ordinary* course of things. The rule is not inflexible. It permits of exceptions. The court can in a proper case grant a declaration that the relationship still subsists and an injunction to stop the master treating it as at an end."

He then referred to a statement in the opinion of Lord Morris of Borth-y-Gest, in *Francis v. Kuala Lumpur Councillors* [1962] 1 W.L.R. 1411 where Lord Morris said (at pp. 1417 and 1418):

"when there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsists will *rarely* be made . . . Special circumstances will be required before such a declaration is made . . .

Lord Denning came to his conclusion in spite of the fact that it would indirectly enforce a contract for personal services.

The decision in the *Hill v Parsons* case was a majority decision by two common law judges, as Mr. George pointed out—Lord Denning, M.R. and Sachs, L.J.; the dissenting judge was Stamp, L.J., the only equity judge in the case, as Mr. George said. But Stamp, L.J. did not dissent from the majority decision that the contract could be held to be still subsisting. He gave his decision on the assumption that the contract still subsisted.

All the employees, the subject of these proceedings were dismissed with immediate effect on the 11th of February, 1981—that is, without notice. On the face of it, this is in breach of the provisions of s. 3 (1) of the Employment (Termination and Redundancy Payments) Act, an Act which was passed in 1974. Section 3 (1) provides for the giving by an employer of a minimum period of notice to terminate the employment of an employee who had been continuously employed for four weeks or more. It is not suggested that any of the employees in these proceedings were employed for less than four weeks. Section 3 (3) provides as follows in paragraph (a):

"The provisions of subsections (1) and (2) shall not be taken:

(a) to prevent either party to a contract of employment from waiving his right to notice at the time of the termination, or from accepting a payment in lieu of notice, or from giving or accepting notice of longer duration than that of the relevant notice specified in those sub-sections."

Mr. George pointed to clause 28(a) and (b) of the collective agreement in the National Workers Union case and submitted that this is an *attempt* by the parties to waive their right to notice at the time of termination and to accept a payment in lieu of notice.

I agree that if the provisions of the clause amount to any such thing it can only be an attempt. Clause 28(a) provides a period of notice which, in the case of employees with ten or more years of service, is shorter than the statutory period and is therefore illegal. Such a provision, which was intended to apply to all permanent employees without distinction, can have no legal effect. The reference in the clause to pay in lieu of notice is an alternative to the legally ineffective period of notice set out in the clause. In any event, the reference in s. 3 (3) (a) of the Act to accepting a payment in lieu of notice seems to refer to an acceptance of payment at the time of termination.

Mr. George next referred to s. 5 (5) of the Act in Part III, which deals with redundancy payments, and it reads as follows:

"For the purposes of this section an employee shall be taken to be dismissed by his employer -

(a) if the contract under which he is employed by the employer is terminated by the employer, either by notice or without notice."

It was submitted that for the purposes of redundancy, whether or not notice is given, the contract is terminated and notice is not required to effectively terminate the contract for redundancy.

If emphasis is placed on the words "for the purposes of redundancy", I agree with the submission; though it must be borne in mind that the plaintiffs contend that the dismissals of which they complain were not genuine redundancy dismissals. If Mr. George's contention is that the provisions of s. 5 (5) (a) justify dismissals without notice in breach of s. 3, I do not agree. As Lord Denning, M.R. said in respect of similar provisions in a United Kingdom statute: "It is all because of some 'deeming' provisions in the Act where a thing is 'deemed' to be that which it is not." (See *Lloyd v. Brassey* [1969] 2 W.L.R. 310 at 313). A redundancy payment is made on the basis of dismissal by an employer (s.5 (1) and all s. 5 (5) is doing is stating that the several ways of ending a contract of employment set out in paragraphs (a), (b) and (c) of the sub-section must be deemed to be dismissals, making employees entitled to redundancy payments. The reference by Mr. George to s. 11 (1) (a) of the Act did not assist his argument.

It seems clear that the manner in which the defendant sought to terminate the contracts of employment of the employees was not in law effective to terminate the contracts, thus laying the foundation for consideration of their cases within the principle in the *Hill v Parsons* case. The employees concerned have not accepted the repudiation of their contracts.

It was submitted by Mr. George that there are no special circumstances which could bring the cases of the employees within the *Hill v. Parsons* principle. He pointed out that one of the special circumstances in that case was the fact that there was no loss of confidence between Mr. Hill and his employers. He pointed to the affidavit of Mr. Patrick Rousseau, the Chairman of the defendant Corporation, filed in these proceedings and said that the affidavit indicates that the Board had lost confidence, generally, in the people in the news room, where the employees concerned in these proceedings were employed. Reliance was also placed on the latest reported case dealing with these questions, viz, *Gunton v. London Borough of Richmond upon Thames* [1980], 3 All E.R. 577, in which the majority of the members of the court, though following the *Hill v. Parsons* line of cases that the wrongful dismissal of the employee did not put an immediate end to the contract of service, nevertheless held that the plaintiff's remedy was in damages only. Mr. George also relied on the overriding principle in the *American Cyanamid* case that if damages would be adequate remedy an interlocutory injunction will not be granted.

The line taken by Mr. Rattray was that the intervention of the Acts of 1974 and 1975, that is to say, the Employment (Termination and Redundancy Payments) Act and the Labour Relations and Industrial Disputes Act, respectively, gives a worker a right in his job analogous to a property right and so the position now differs from the common law position on which Mr. George relied. Mr. Rattray found support for his submission in two cases: first, *Lloyd v. Brassey,* to which reference has already been made, where the Master of the Rolls, Lord Denning (at p. 313) said:

"As this is one of our first cases on the Redundancy Payments Act, 1965, it is well to remind ourselves of the policy of this legislation. As I read the Act, a worker of long standing is now recognised as having accrued right in his job; and his right gains in value with the years. So much so that if the job is shut down he is entitled to compensation for loss of the job—just as a director gets compensation for loss of office. The director gets a golden handshake. The worker gets a redundancy payment. It is not unemployment pay. I repeat 'not'. Even if he gets another job straightaway, he nevertheless is

entitled to full redundancy payment. It is, in a real sense, compensation for long service."

The other case is *Brindle v. H.W. Smith (Cabinets)Ltd.* [1973] 1 All E.R. 230 where Lord Denning said (at p. 231):

"At common law Miss Brindle could have been dismissed on reasonable notice. I should have thought she would have been entitled to three month's notice. She would not have been entitled to any compensation for her long service, or for loss of office. Just three months' notice No more. Now the 1971 Act makes a great difference. An employer is not allowed to dismiss a servant unfairly without compensation. The Act gives an employee a right in his job which is akin to a right of property. The employer can no longer give the legal notice and say: 'Out you go, without compensation!' The tribunal can enquire into the reasons for the dismissal. If the reasons are not sufficient to warrant it, the tribunal will hold it to be an unfair dismissal. The employer will have to pay compensation."

It cannot be doubted that the Acts of 1974 and 1975, to which I have referred, made revolutionary changes in the common law as it applied to contracts of employment. In the case of the Act of 1974, apart from providing minimum periods of notice for termination of employment, it provided for the payment of compensation to employees who are dismissed on the ground of redundancy in circumstances where at common law they would be entitled only to be given reasonable notice of termination of employment or payment in lieu thereof. That is all a court would award. The Act of 1975 was even more revolutionary. It gave an employee a right to remain in his job so long as he is not dismissed for misconduct or on genuine ground of redundancy. Reference has already been made to the provisions of s. 12 (5) (c), where the Industrial Disputes Tribunal is obliged to order the reinstatement of a worker who wishes to be reinstated if it finds that his dismissal was unjustifiable. More than that, the Tribunal may order the employer to pay wages to the employee for the period when he was away from work because of the dismissal—a payment he could never receive at common law no matter how unjustifiable was his dismissal. And it is right to point out that the question of loss of confidence between employer and employee is irrelevant. A tribunal is compelled to order reinstatement in spite of the fact that there may be loss of confidence between employer and employee. It is not a matter of discretion. Whether this is wise or not is not for me to say.

In the face of these changes in the common law in-so-far as redress of wrongs is concerned, it seems natural that the courts should have regard to them when disputes under contracts of employment reach the courts. There is authority that account should be taken of them. In the judgment of Sachs, L.J. in the *Hill v Parsons* case, the Lord Justice had this to say (at p. 321):

"Finally it was urged that any order made would run contrary to the policy or trend of previous practice. At the risk of reiterating views expressed in my judgments on other subject-matters, it seems appropriate to repeat that in matters of practice and discretion it is essential for the courts to take account of any important change in that climate of general opinion which is so hard to define but yet so plainly manifests itself from generation to generation. In that behalf account must, inter alia, be taken of the trend of the views of the legislature expressed on behalf of the community in its enactments and also of the trend of judicial decisions."

He continued (ibid):

"Over the last two dedades there has been a marked trend towards shielding the employee, where practicable, from undue hardships he may suffer at the hands of those who may have power over his livelihood—employers and trade unions. So far has this

now progressed and such is the security granted to an employee under the Industrial Relations Act 1971 that some have suggested that he may now be said to acquire something akin to a property in his employment. It surely is then for the courts to review and where appropriate to modify, if that becomes necessary, their rules of practice in relation to the exercise of a discretion such as we have today to consider—so that its practice conforms to the realities of the day."

In *Chappell and others v The Times Newspapers Ltd. and others*, [1975] 2 All E.R. 233, Stephenson, L.J. said (at p. 241):

"Relations between employer and employed have indeed developed and are still developing; and their development invites continuous reconsideration by the court of rules worked out in different conditions. The workman now has statutory rights including a right of compensation for dismissal which though lawful is unfair."

And later (at pp. 241, 242):

"In this developing situation there may arise cases in which it is proper for the court to exercise its discretion in favour of a workman and grant an injunction which will hold an employer against his will to the continued performance of hs contract of employment. Such a case was *Hill v C.A. Parsons & Co. Ltd.*, but it was 'highly exceptional', as

"Sachs, L.J. said, and was in my judgment rightly described by Sir John Donaldson, P. When presiding in the National Industrial Relations Court in *Sanders v Ernest A. Neale Ltd.*, as 'unusual if not unique'. Like Stamp, L.J. dissenting in *Hill v Parsons:* 'I would be far from holding that in a changed and changing world there can be no new exception from the general rule' that a court will not grant an injunction in aid of specific performance of a contract of personal service, so that if the servant has been wrongfully dismissed, it will consider his contract unilaterally termianted by the master and leave the servant to his remedy in damages. I would not, however, look for new categories in which to pigeonhole new exceptions to this rule as it works either for the employer or the employee, but I would make exceptions in accordance with the general principle on which discretionary remedies are granted, namely, where, and only where, an injunction is required by justice and equity in a particular case, and, at the interim stage, by the balance of convenience."

In the *Hill v Parsons* case the learned judges who were in the majority referred to the fact that the Industrial Relations Act of 1971, which had been passed by Parliament but had not yet been brought into force, would benefit the plaintiff in that case when it came into force, and in arriving at their decision they made reference to the fact that when the Act came into force it would reinforce the position of Mr. Hill in his job. Stamp, L.J. in his dissenting judgment made reference to the submission founded upon the Act of 1971 and said (at p. 324):

"It would be contrary to the principle upon which the court acts in granting interlocutory injunctions to do so in order to secure to a party some advantage not accorded to him by the contract which he seeks to enforce. Interlocutory injunctions are granted to protect rights sought to be asserted at the trial."

The learned Lord Justice stuck to his equitable principles, though he conceded that damages as a practical matter would not be an adequate remedy in the case. Later he said (at p. 325):

"It is also perhaps worth mentioning that despite any change of climate affecting the legal relations between employer and employee the Act contains no provisions under which an order on an employer to continue the employment of an employee is contemplated."

I interpose here to repeat that our Act has those provisions.

Stamp, L.J. continued (ibid):

> "Of course, one deplores a situation in which a loyal and good servant may be summarily dismissed at the instance of and under pressure exerted by a third party. That situation may perhaps—I express no opinion—be less likely to arise in the future than is at present the case; but it is not for this court to give him the protection that he would have if the Industrial Relations Act 1971 had come into operation or to grant him interlocutory relief with a veiw to preserving his position so that he or his employers may in the future have the advantages which that Act will it is hoped accord."

It is clear from these passages and from his statement (relied on by Stephenson, L.J. in the passages above) that "he would be far from holding that in a changed and changing world there can be no exception to the general rule" that even this conservative equity judge recognized taht the equitable principles so well known and applied by him sere capable of being altered by changes in relationship created by statute.

To return to these proceedings, the employees here allege that theirs were cases of wrongful dismissals masqueraded as dismissals for redundancy. On the other hand, the defendant corporation will contend that they were genuine cases of dismissals for redundancy. The issue raised by these opposing contentions will be decided at the trial. If the defendant is right they, that is, the defendants, are liable to make redundancy payments and the employees have no recourse but to join the ranks of the unemployed until they find other jobs. If the employees are right, then they have a right given to them by the Labour Relations and Industrial Disputes Act to seek to obtain an order of the Industrial Disputes Tribunal compelling their employers to reinstate them in their jobs and an order for the payment of wages they have lost. There can, therefore, be no doubt that there are serious issues to be tried at the hearing of the originating summonses.

If the posts formerly occupied by the employees, which they claim still exist, are filled by their employer before the court pronounces upon the disputed issues, then they will lose the right under the Act to which I have referred, if they succeed. This could set a precedent which could result in other workers being deprived of the security of their jobs to which the Act entitles them. In the *Hill v Parsons* case Lord Denning said (at p. 316):

> "The Judge said that he felt constrained by the law to refuse an injunction. But that is too narrow a view of the principles of law. He has overlooked the fundamental principle that, whenever a man has a right, the law should give a remedy. The latin maxim is ubi jus ibi remedium. This principle enables us to step over the trip-wires of previous cases and to bring the law into accord with the needs of today."

I have no hesitation in holding that in the circumstances of these cases damages would not adequately compensate the employees, that there are here special circumstances which bring them squarely within the principles of the *Hill v Parsons* case and that the balance of convenience is heavily in favour of the grant of the injucntions asked for in order to preserve the status quo until the issues raised have been determined by the court.

I make orders accordingly with the usual undertaking in damages and the costs of these proceedings will be costs in the cause.

R. *v.* OLASSIO BAILEY

[COURT OF APPEAL (Robinson, P., Kerr and Rowe, JJ.A.) 28th January & 24th March 1981]

Jury—application to discharge on the basis of manifest bias—high degree of necessity must exist before application is granted.

Two teenaged sisters, testified in Court during the trial of their father for murder that on March 1, 1975, they witnessed a domestic dispute, where the father had beaten their mother, Ermenia Bailey, unconscious by several blows to the head with a pick-axe.

The applicant had placed his wife on a bed, and ordered the children to change her clothes as he was taking her to the hospital.

Mrs. Bailey was not seen or heard of since March 1, 1975. Four months later parts of a dismembered body was found in a plastic bag; with one item of the deceased's clothing, and a shirt of the applicant.The applicant was convicted of the murder of his wife. He appealed on the ground that (1) the verdict was unreasonable and could not be supported having regard to the evidence as there was no reliable evidence from which the jury could find death of his wife. Ground (2) there was no proof that the alleged beating of the wife by the applicant had caused her death, and that her death was an accident.

He also complained of (a) bias against the applicant on the basis of conduct of one or two members of the jury and that a fair trial was not likely to result, and that (b) the trial judge wrongly exercised his discretion in not discharging the jury.

Held:(i) the judge had a duty to ascertain the facts on which the allegations of bias or unfitness occurred and there must be a high degree of necessity for the discharge of the jury;

(ii) the act of hand clapping on the part of the juror in this case was an ambiguous act and was not a sufficient ground to impute any improper motive to that juror.

Appeal dismissed.

Cases referred to:

(1) *Windsor v. R.* (1866) L.R. Q.B. 390
(2) *R. v. Hamberg* [1977] Q.B. 924; [1977] 2 W.L.R. 999; [1977] 3 All E.R. 561; 65 Cr. App. R. 233.
(3) *O'Connor v. Malone* (1839) E.R. 814
(4) *Hughes v. Budd* (1840) 8 D. &L. s. 55
(5) *Stanwicke v. Hopkins* (1844) 2 D. &. L. 502
(6) *Corrish Dowling 30 English and Empire Digest,* para 398

Eric Frater and *Miss A. Tapper* for the applicant.

Glen Andrade, Dep. D.P.P. for the Crown.

ROWE, J.A. : Velma a 17 year old girl and her sister Pamela aged 15 years of age testified before Carey J. and a jury in the Port Maria Circuit court during the trial of the applicant, their father, for murder that on the night of March 1, 1975, they saw the applicant thump their mother, Ermenia Bailey with his fists, hold on to her, wrestle with her so that she fell to the ground at the foot of the stairs, then he stepped on her, sat across her as she lay on the floor and used the stick of a pick-axe to beat her in the process delivering several blows to her head; he beat her all over the body in so much so that Velma Bailey said, "Her face mash up and her hand did batter bruise and her nose dig out." The girls said that after the beating Ermenia Bailey was not able to talk, or to move. They shook her and called her name but got no response. Her clothes were saturated with blood. It was the applicant, said these witnesses, who lifted Ermenia Bailey and placed her on a bed in a