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File

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 159/90

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE APPEALS TRIBUNAL OF THE LABOUR BOARD MADE ON THE 2ND DAY APRIL 1990 IN RESPECT OF A CLAIM BROUGHT BY SARAH POWERY AND CONRAD FORBES AGAINST A.L. THOMPSON/CAYMAN ISLAND HOTEL.

For the appellant: Mr. D. Murray
As amicus curiae: Miss Lorna Dilbert.

JUDGMENT

Mrs. Sarah Powery and Mr. Conrad Forbes were both employed at the Cayman Islander Hotel by Mr. A.L. Thompson Sr. Mrs. Powery was first employed in October 1979. In August 1988 she went on sick leave and when she was able to return to work in the following month she was told that the hotel was closing in the first week in October and that she would be called back when it reopened. She was recalled and helped to clean up the hotel for the first two weeks of October 1988. During those two weeks she was told by Mr. Thompson that the hotel would reopen in January 1989 and that she would be called back at that time. She was never recalled, nor was she ever notified by anyone that her job was being permanently terminated. She received no payment in lieu of notice, nor severance pay. She had been employed by Mr. Thompson for more than nine years.

Mr. Forbes was employed by Mr. Thompson at the hotel from July 1986 until October 1988. Like Mrs. Powery, he was laid off in October 1988 and was told that the hotel would be opened in January 1989 and that he would be recalled at that time. He was not recalled and he received no payment in lieu of notice nor severance pay.

In accordance with section 67 of the Labour Law a hearing before the Director of Labour was held. The director concluded that Mrs. Powery was entitled to nine weeks, and Mr. Forbes to two weeks severance pay

plus interest. On this basis Mrs. Powery was entitled to $1296 and Mr. Forbes to $384 plus interest. Mr. Thompson appealed to the Appeals Tribunal, which upheld this award, and is now appealing from the decision on points of law, as he is entitled to do under S. 71 of the Labour Law.

The grounds of appeal were that -

1. The Appeals Tribunal erred in law in holding that the provisions of the Labour Law had retroactive validity and in so doing awarded a greater sum to the said Sarah Powery and Conrad Forbes than that to which they were entitled.

2. The Appeals Tribunal erred in law in holding that it was barred from hearing the appeal made to it against the finding of the Director of Labour in respect of his award to Conrad Forbes.

The right to severance pay generally and the method of its computation are set out in sections 35 (1) and 36 (1) of the Labour Law. They read as follows -

> "35 (1) Every employee whose term of continuous employment with an employer and any predecessor - employer has in aggregate exceeded one year is entitled to receive upon termination of his employment by his employer for any reason other than a dismissal which is within paragraphs (a), (b) or (c) of section 44, severance pay, being payment in money calculated in accordance with the provisions of this Part...
>
> 36 (1) severance pay shall consist of one week's wages, at the employee's latest basic wage, for each completed twelve month period of his employment with his employer and any predecessor - employer, subject to a maximum of twelve week's pay."

The award in favour of Mr. Forbes did not exceed $500 and the Tribunal concluded, rightly in my view, that there was no right of appeal with regard to it in view of section 70 of the Labour Law. That disposes of the second ground of the present appeal. The director did express an opinion with regard to the entitlements of Mrs. Powery and Mr. Forbes to pay in lieu of notice and, in the case of Mrs. Powery, to

sick pay, but it is common ground that this was not an "award" in respect of these matters.

The first ground however, raises another point of law of general importance.

The argument on which it is based is that the proper construction of the words "for each completed twelve month period of his employment" is that they relate only to the period of employment from the date on which the Labour Law came into force. To find otherwise, it was argued, would be to give the statute a retrospective effect, against which there is a presumption.

It seems that the present appellant was not the first to put forward this proposition, for at the time when the case was first heard there was a Bill before the legislature for the amendment of the Labour Law. It included the following new subsection in section 35 -

> "(3) For the avoidance of doubt severance pay shall be payable to an employee for the full period of his employment including any period of employment prior to the coming into effect of this Law if that employment is terminated after the commencement of this Law."

Had that amendment been in force at the material time I would not be dealing with this case today. However, the question of whether the amendment itself has retrospective effect is not one which, in the light of what I am about to say, I need pursue further.

There is at common law the prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. The principle was thus expressed by Lord Brightman in Yew Bon Tew v. Kenderaan Bas Mara (1983) AC at p558. He also said this -

"Whether a statute is to be construed in

> a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute."

Unless the draftsman includes specific provisions in a statute, a problem of construction may arise concerning retrospectivity in enactments that deal with events occurring over a period. If the enactment comes into force during the period is it retrospective or not? I have found the following cases of particular assistance in seeking to determine that question in the present matter. The first is R v. St. Mary, Whitechapel (1848) 12 QB 120. It was concerned with the interpretation of section of 2 of the Poor Removal Act 1846 which provided that -

> "no woman residing in any parish with her husband at the time of his death shall be removed ... from such parish, for twelve calendar months after his death, if she so long continue a widow".

The parish authority had previously had the right to remove the widow immediately after the death, and the relevant period had began but not ended when section 2 came into force. The authority argued that at commencement they had a vested right to remove the widow which should not be removed by the subsequent statute, but it was held that the removal itself was the substance of the matter and since it had not been carried out before commencement of the Act section 2 applied and was not to be treated as retrospective. In the words of Lord Denman CJ -

> "That the statute is in its direct operation prospective, as it relates to future removals only and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

On the other side of the line is Alexander v. Mercouris (1979) 3 ALL ER 305 in which section 1 (1) of the Defective Premises Act 1972 fell for consideration. It provides that a person "taking on work for or

in connection with the provision of a dwelling" has a duty to see that the work is done properly. The English Court of Appeal held that the substance of the matter was the initial act of "taking on" the work and the duty did not therefore arise unless the taking on occurred after the commencement of the Act.

Nearer in its facts to the present case is Master Ladies Tailors Organisation v. Minister of Labour (1950) 2 ALL ER 525. Paragraph 9 of the schedule to the Wholesale Mantle and Costume Wages Council (Great Britain) Wages Regulation (Holidays) Order 1949 made provision for Holiday Remuneration calculated on the basis of the normal wage to accrue from 1st May 1948. The schedule came into force on 15th August 1949 and the holiday remuneration was payable when a worker ceased to be employed after that date. It was argued that a provision for accrual of remuneration before the order came into force made the order retrospective and hence ultra vires the statute under which it was made. However, Somervell LJ held that the fact that a prospective benefit is to be measured by antecedent facts does not necessarily make the provision for that benefit retrospective. He said this -

> "I have come to the conclusion that the effect of these provisions as to remuneration accruing, being, as I hold, to determine and limit the quantum of prospective payments, do not make this order retrospective in the sense which has to be given to the word in this issue. The claim therefore fails. Most of the cases dealing with retrospective legislation, some of which were cited to me by counsel for the plaintiff are concerned with a different issue. It has, of course, been laid down in the clearest possible terms that no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act. That most salutary principle does not assist in solving the problem which I have so far being considering."

I respectfully adopt these observations which seem to me to be directly applicable in the present matter. In order for a statute to be genuinely retrospective in its operation it is not enough that the circumstances on which its operation depends should have existed before it came into force. It must take away some vested right or impose a penalty for past acts which were not penalised when they were

committed. For example, the statute would, in the present case clearly be retrospective if it sought to impose an obligation to pay severance pay in respect of contracts of employment which had already been terminated when it comes into force. Moreover, I am able, on the view, which I am taking, to attach to the words " for each completed twelve month period of his employment with his employer" in section 36 (1) of the Labour Law their ordinary meaning in the English Language, without any implied limitation. The amendment to Section 35 of that Law made by Section 11 of the Labour (Amendment) Law 1989 merely expressed in more explicit terms what the law already was.

The appeal accordingly fails and the decision of the Appeal Tribunal is affirmed.

G.E Harre

15th February 1991