R.S.B.D. 4/96

OILFIELDS WORKERS' TRADE UNION AND SCHLUMBERGER TRINIDAD INC.

Coram: His Honour Mr. C. Bernard, Chairman
His Honour Mr. G. Ramsubeik, Member

R.S.B. Act – Severance benefits – Entitlement – Aggrieved signed series of fixed term contracts disclaiming entitlements – Whether aggrieved entitled to severance benefits – Aggrieved employed as a casual worker during interim periods – Whether aggrieved a "worker" according to R.S.B. Act and I.R.A. – Worker cannot contract out of Act – Company's attempt to circumvent Act a fraud on Act – Social legislation an instrument of social engineering – R.S.B. Act : purpose – Role of Court – Contract work – Continuous employment

Appearances: *A. Alexander, S.C. for Union*
W. Thompson, Attorney, for Company

February 24, 1997

Statutes referred to:
Factories Act (Guyana)
I.R.A. s. 2(1)
Merchant Shipping (Safety and Load Line Conventions) Act 1932 (U.K.)
Retrenchment and Severance Benefits Act, 1985, ss. 3(1); 4(1); 18(5)

Cases referred to:
Browning v. Morris [1778] 2 Cowp. 790
Curragh Investments Ltd. v. Cook [1974] 3 All E.R. 658
Enmore Estates Ltd. v. D.R. Singh [1976] 22 W.I.R 206
Gray and Others v. Southouse and Another [1949] 2 All E.R. 1019
Kiriri Cotton Co. Ltd. v. Dewani [1960] 1 All E.R. 177
Lau v. Percy [1960] 3 W.I.R. 47
Shipping Association of Georgetown v. Arthur Hayden [1975] 22 W.I.R. 135
Shipping Association of Georgetown and Others v. Ivan Bentinck [1969] 14 W.I.R 243
Snell v. Unity Finance Ltd. [1963] 3 All E.R. 50
St. John Shipping Corporation v. J. Rank Ltd. [1956] 3 All E.R. 683
Wetherell v. Jones [1882] 3 B. & Ad. 221

JUDGMENT

Delivered by His Honour Mr. Cecil O. Bernard

The Oilfields Workers' Trade Union (the Union) applied to the Court on behalf of Mr. Trevor Dewsbury (the aggrieved) alleging that the aggrieved had been retrenched by Schlumberger Trinidad Inc. (the Company) without payment to him of severance benefits.

There was no dispute as to the relevant facts and we can restate them as they appeared in Union's evidence and arguments as follows:

The aggrieved was employed by the Company on or about 7th February 1985 as a casual wireline helper, a position in which he worked continuously until August 1987 when the Company requested him to sign a "temporary worker agreement" for employment in the position of "wireline testing assistant." That agreement was for a period of six months. On expiry of the agreement the aggrieved was required by the Company to sign a series of similar six-monthly contracts. Where there was a gap between the expiry of one contract and the commencement of the succeeding one (usually not more than a week or two) the aggrieved was employed by the Company as a casual worker. There was, therefore, no break in his services with the Company over a period of more than ten years when the last of these "temporary worker agreements" expired on or about 26th April 1995. The Company then employed the aggrieved as a casual worker until 4th May 1995 when, by letter, it informed him that due to a downturn in its activities it was not possible for the Company to renew his contract. At that time the aggrieved had been in receipt of a salary of $4,918 per month. The Company did not then pay and has not up to now, paid the aggrieved any severance benefits. The Union contends that the aggrieved is entitled to such benefits under the *Retrenchment and Severance Benefits Act, 1985 (the Act).*

These are the facts. The Court is called upon to decide whether the aggrieved, in the circumstances of his employment with and termination of his employment by the Company, was entitled to be paid severance benefits in accordance with *the Act.*

Mr. Alexander, for the Union, submitted that the simple question for the Court is whether the aggrieved was a casual worker within the meaning of *s. 2 of the Act* or whether he was a worker who had been continuously employed by the Company and if he was such a worker, whether he was entitled to severance benefits despite the contracts which he had signed and which contained clauses in which he had disclaimed entitlement to such benefits.

In the contracts which the aggrieved had signed there always appeared a clause in the following or substantially similar terms:

> "That...notice can be given by either party of termination of employment and that I will not be entitled to annual bonus, vacation leave or termination benefits during or at the expiration of my contract with the Company."

Mr. Thompson took the position that the Court could not entertain the claim because the matter did not fall within the procedural provisions of *the Act, s. 4(1)* of which provides as follows

> "Where an employer proposes to terminate the services of five or more workers for the reason of redundancy he shall give formal notice of termination in writing to each involved worker, to the recognised majority union and to the Minister."

Mr. Thompson contended that a worker does not automatically become entitled to severance benefits by reason of working for an employer for any particular length of time. He submitted that entitlement to such benefits had its basis in contract. Unless a worker could bring himself within the provisions of *s. 4(1) of the Act,* (that is to say he is one of at least five employees whom the employer proposes to retrench), Mr. Thompson's argument went,

in order to claim an entitlement to severance benefits he must show either (i) that he was party to a contract of service in which that entitlement was spelt out or (ii) that he was in a bargaining unit for which there was a registered collective agreement which made provision for severance benefits. It was Mr. Thompson's contention that since there was no evidence that the aggrieved belonged to such a bargaining unit and since by contract he had expressly disclaimed any entitlement to severance benefits no case had been made for any such payment to him.

Mr. Thompson's insistence that a worker's entitlement to severance benefits rests in some way on the procedural requirement in *s. 4(1)* is shown to be misplaced on an examination of *s. 18(5) of the Act* which provides as follows:

> "Every worker to whom this Act applies, retrenched on or after 1st January, 1985, is entitled to the severance benefits contemplated by this section regardless of the number of workers in his employer's work force."

The effect of the above provision would be that where an employer's workforce is fewer than five workers he would not be required to give formal notice of his intention to retrench any of them. However, this does not mean that the employer would escape the obligation to pay severance to such workers in accordance with *s. 18 of the Act*. The stated purpose of *the Act* is

> "to provide the procedure to be followed in the event of redundancy and to provide for severance payments to retrenched workers."

Although the long title of the legislation does not form part of the statute it does serve to point the Court in the proper direction when interpreting its provisions. It sets the context in which the provisions of *the Act* must be read. Mr. Thompson's argument would be valid if *the Act's* only purpose was to provide a procedure for bringing about redundancy. However, as Mr. Alexander pointed out, *the Act* also makes provision for the payment of severance benefits to retrenched workers. These are, in our view, two separate purposes, the second not dependent on the first; so that a failure in the procedural requirements of *s. 4(1)* would not affect the *s. 18* entitlement of a worker to whom *the Act* applies. In its effect, Mr. Thompson's proposition would result in the deprivation of all workers of the benefits provided in *s. 18 of the Act* once they were employed in an enterprise whose workforce is fewer than five workers. We must, to quote Devlin, J. in *St. John Shipping Corporation v. J. Rank Limited* [1956] 3 All E.R. 683 "approach the investigation of a legal proposition which has results of this character with a prejudice in favour of the idea that there may be a flaw in the argument somewhere."

Mr. Thompson did not take the point that the aggrieved was not a worker to whom *the Act* applies. The gist of Mr. Alexander's contention was that he was such a worker. Out of respect to Mr. Alexander's argument and in the hope that we could bring some clarity to this area of the law we turn now to an examination of that issue. *Section 3(1) of the Act* makes *the Act* applicable to persons falling within the definition of "workers" under *the Industrial Relations Act* with the following exceptions:

"(a) Subject to paragraph (d), workers who have not had more than one completed year of service;

(b) workers serving a known pre-determined probationary or qualifying period of employment;

(c) casual worker;

(d) seasonal workers, unless such workers are employed as part of the regular work force for at least three consecutive seasons with the same employer and for at least one hundred days each season;

(e) workers employed on a specified fixed term basis or workers engaged to perform a specific task over an estimated period of time where these conditions are made known to the worker at the time of engagement and does not apply to independent contractors."

From the evidence it is clear that the aggrieved did not fall within the exceptions in paragraphs (a) to (d). He was not a casual worker for the reason that he was not "a person who is employed on a temporary or on an irregular or intermittent basis" - the definition of casual worker in *s. 2 of the Act*. If he fell within the exception in paragraph (e) that would be the end of the matter; he would not be a worker for the purposes of *the Act* and would not be entitled to its benefits. The question is whether the aggrieved was "a worker employed on a specified fixed term basis," such as would bring him within the exception of *s. 3 (1)(e) of the Act*. The point was not argued before us but we feel it is a hurdle which the aggrieved must overcome, for, as Shakespeare would say, in his way it lies. We turn to that issue now.

On the face of it paragraph (e) of *s. 3 (1)* would seem to exclude from the definition of "worker" a person like the aggrieved because he was employed on a specified fixed term basis. But was he, for the purpose of *the Act*, so employed? Is to be employed on a series of successive fixed term contracts the same as to be employed "on a specified fixed term basis" for the purposes of *s. 3 (1)(e)?* Each of the first four paragraphs of the *sub-section* applies to workers in short term employment. Does the final paragraph introduce a different requirement, or should that paragraph be interpreted *ejusdem generis* with the earlier paragraphs to produce internal harmony within the *subsection*. Can *s. 3 (1)(e)* apply to a worker who is employed on a specified fixed term basis for a period of twenty years? We do not think so. We interpret that paragraph as applying to fixed term arrangements of short duration. In our view the entire *subsection* applies to workers who have been employed for brief periods of less than one year of continuous service. In this case if it is contended that the aggrieved fell within the second limb of paragraph (e), that is to say, that he was engaged to perform a specific task over an estimated period of time and that such condition was made known to him at the time of engagement we wish to say that the aggrieved was not engaged to perform a specific task and that the time for performance was not estimated.

One of the stated purposes of *the Act* is to provide for severance payments to retrenched workers. In interpreting *the Act* we must seek to give effect, so far as possible, to that purpose. Therefore, faced with an interpretation which would include a person within the benefits of *the Act* and another which would exclude him from those benefits, the Court is under a duty to so interpret *the Act* that its stated purpose is not defeated. In keeping with that duty we hold that a worker who is employed by the same employer (or a successor) on a series of successive fixed term contracts does not fall within the exception in *s. 3 (1)(e) of the Act*. Any other interpretation would be subversive of the intent and purpose of the

legislation. It would render the legislation absurd if its purpose could be subverted by a device as transparent as that employed by the Company in relation to the aggrieved.

But that is not the final hurdle for the aggrieved. It is not enough to show that he did not fall within the exceptions in *s. 3(1)*. It must be shown that he was a "worker" within the definition of the term in *s. 2(1) of the Industrial Relations Act, Chap 88:01*. Only then would he be entitled to the benefits of *s. 18 of the Act.*

"Worker" is defined in *s. 2(1) of the Industrial Relations Act* to mean (subject to *subsection (3)* which does not apply to the aggrieved):

> "(a) any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, technical, clerical or other work for hire or reward, whether the contract is expressed or implied, oral or in writing, or partly oral and partly in writing, and whether it is a contract of service or apprenticeship or a contract personally to execute any work or labour;
>
> (b) any person who by any trade usage or custom or as a result of any established pattern of employment or recruitment of labour in any business or industry is usually employed or usually offers himself for and accepts employment accordingly; or
>
> (c) any person who provides services or performs duties for an employer under a labour only contract, within the meaning of subsection (4) (b); and includes
>
> (d) any such person who -
>
> (i) has been dismissed, discharged, retrenched, refused employment, or not employed, whether or not in connection with, or in consequence of, a dispute; or
>
> (ii) whose dismissal, discharge, retrenchment or refusal of employment has led to a dispute; or
>
> (e) any such person who has ceased to work as a result of a lockout or of a strike, whether or not in contravention of Part 5, as the case may be...
>
> (3) For the purposes of this Act, no person shall be regarded as a worker if he is -
> (a) a public officer...
> (b) a member of the Defence Force...
> (c) a member of the Teaching Service...
> (d) an employee of the Central Bank...
> (e) a person who...
> (i) is responsible for the formulation of policy...
> (ii) has an effective voice in the formulation of policy...
> (g) an apprentice..."

The aggrieved was a person who worked under a series of contracts with the Company to do technical or other work for hire or reward. He was therefore a worker within the definition in *s. 2 (1) of the Industrial Relations Act, Chap 88:01*, since he did not come within any of the categories excluded from the definition by reason of *s. 2(3) of the Act. The Act* consequently applied to him.

By reason of his status as a worker the aggrieved would be entitled to be paid severance benefits in the circumstances of the termination of his employment unless he could

and did contract out of the provisions of *the Act*. Although submission on both sides were very brief we crave the indulgence of attorneys if we delay a little to examine some of the authorities on that aspect of the case. In *St. John Shipping Corporation v. Joseph Rank Ltd.* [1956] 3 All E.R. 683 it was held that the loading of a ship so as to submerge the load line was an infringement of law that was not contemplated by a contract of carriage of cargo and, on the true construction of the *Merchant Shipping (Safety and Load Line Conventions) Act* 1932 (U.K.), the contract for the carriage of goods in the ship was not within the ambit of the prohibition against overloading enacted by the statute, which accordingly, did not render the contract unenforceable for illegality. Devlin J. put the test to be applied thus:

> "is the contract as made or as performed, a contract that is prohibited by the statute?"

The learned judge then quotes Lord Tenterden, C.J. in *Wetherell v. Jones* [1882] 3 B. & Ad. 221 as stating the law decisively as follows:

> "Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part."

In *Enmore Estates Ltd v. D.R. Singh* [1976] 22 W.I.R. 206 there was an appeal from a judgment in which the trial judge had made an award to the plaintiff, a monthly paid employee, who had claimed against his former employer, arrears of pay for work he had done on Sundays and public holidays for which he had been entitled to be paid overtime under *s. 24 of the Factories Act* of Guyana, but for which he had not been paid. He had agreed with his employer to accept "time off" in lieu of overtime payment during his period of employment.

A powerful Court of Appeal (Haynes C., Persaud and Crane JJ.A.), by a majority, dismissed the appeal and affirmed the decision of the trial judge, Crane J. A., finding support in the earlier English case of *St. John Shipping Corporation v. Joseph Rank Ltd.* quotes a passage from the judgment of Devlin J. and continues (page 240).

> "I respectfully beg to adopt the identical reasoning of Devlin J., in reaching the conclusion that there was a clear implication by the legislature to prohibit any contracting out of section 24. It could hardly be supposed that the Factories Act would penalize an employer for contravening a statute or failing to follow the provisions of it and yet permit him to make a contract that is detrimental to the rights of his workers. I must say it is this point more than any other which convinces me that the clause in the later agreement restricting the right or obligation under the Act, as aforesaid, belongs to the class which the statute intends to prohibit. While I respectfully agree with Devlin, J., that courts should be slow to imply the statutory prohibition of contracts, I am more than ever convinced in this case that such an implication is quite clear. Under the Labour Act there is an express prohibition against contracting out of paying wages other than in money; whereas, under the Factories Act, there is an implied prohibition against waiving or contracting out of rights to pay overtime rates to factory workers by giving them time-off in lieu of such rates.

> It cannot be legal to give an employee in any occupation in a factory time-off in lieu of work done on Sundays and public holidays when the law clearly says he must be given overtime pay,...not even if the employee consents to have time-off in lieu. Not so long ago, in the case of *Shipping Association of Georgetown v. Arthur Hayden* (1975) 22 W.I.R. 135 a case under the *Labour Act, Chap 98:01* (Guyana), we had occasion to consider a similar kind of collective labour agreement and to deem it null and void because it suffered from the vice of initial illegality. In that case, I held that "our Labour Act is one of a class of statutes that curtails freedom to contract if so to do will operate to the detriment of the labouring class." I take the view that the same approach is equally applicable to our Factories Act which is a remedial statute, the object of which is to improve the health, comfort, well-being and generally the conditions of service of working-class people in factories ... the Factories Act, like the Labour Act, must not be narrowly construed. It is my considered opinion that everybody working "in ... a factory" ought to benefit under *s. 24 (4)* if he works overtime ... and no agreement to the contrary will avail the employer; not even if, as in this case, the employee consents to take time-off in lieu, for he cannot contract out of the Act which is made for his benefit..."

In *Lau v. Percy* [1960] 3 W.I.R. 47 it was held by the Court of Appeal that where a statutory provision is absolute it must be strictly complied with and the result of non-compliance is that the thing which is done is invalid and void.

In *Shipping Association of Georgetown and Others v. Ivan Bentinck* [1969] 14 W.I.R. 243 it was held that a reduction in a workman's wages was not permissible under the *Labour Ordinance Chap 108* of Guyana and that any agreement made between an employer and employee for such reduction would be illegal, null and void. In that case Crane J.A. is heard to say at page 253:

> "The principle behind all truck law is the enforcement of payment of wages to workmen in cash and not in kind. It is the recognition by the law of the need for its protection of the weak against the strong. The law justifies the necessity for its intervention in the sphere and in the interest of good industrial relations on account of inequality in the relative bargaining strengths of employer and employee..."

We also considered the following cases which we found to be helpful:

(A) *Snell v. Unity Finance Ltd.* [1963] 3 All E.R. 50 where, in a hire purchase agreement the price of the subject matter of the agreement was wrongly stated in order to avoid the requirements of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1960, the Court of Appeal held that once the facts which made the hire-purchase agreement illegal had become apparent to the court it was the court's duty to refuse to enforce the agreement.

(B) *Kiriri Cotton Co. Ltd. v. Dewani* [1960] 1 All E.R. 177, where the parties to a contract which breached the Uganda Rent Restriction Ordinance were held not to be in *pari delicto* and the Privy Council upheld an order of the Court of Appeal for Eastern Africa in which the court had lent its assistance to the party for whose protection the statute had been enacted.

© *Curragh Investments Ltd. v. Cook* [1974] 3 All E.R. 658 where it was held, *inter alia*, that for a contract allegedly made in breach of a statutory requirement to be struck with illegality it had to be shown that there was a sufficient nexus between the statutory requirement and the contract itself.

(D) *Gray and Others v. Southouse and Another* [1949] 2 All E.R. 1019 where Devlin J. quotes Lord Mansfield C.J. in *Browning v. Morris* [1778], 2 Cowp 790 to this effect:

> "But where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in *pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." p 1020.

While those cases are not completely in *pari materia* with this case we cull from them a constant thread in the reasoning applied to the interpretation of social legislation; that is, that such legislation is to be seen as an instrument of social engineering and that the Court must not lose sight of its function to ensure that the intended beneficiaries of such social engineering are not deprived of their rights by reason of their relatively inferior bargaining strength.

We have come to the conclusion that the same spirit which guided the courts in those cases to which we have referred should guide this Court in interpreting the relevant provisions of *the Retrenchment and Severance Benefits Act.* We must look beyond the veneer of the contract and expose to full view what in reality is a mere attempt at circumvention of *the Act*. Can it be said in this case that the contract which the Company asks this Court to uphold was not, by implication, forbidden by *the Act* - an *Act* made for the benefit of persons in the position of the aggrieved? A contract which seeks to take away from him such benefit must lead to infringement of *the Act*. We so hold.

Section 18 (5) of the Act creates an entitlement for every worker to whom *the Act* applies who is retrenched on or after 1st January 1985. We hold that a worker, for whose benefit the legislation was enacted, cannot contract out of its provisions and that any attempt to do so by agreement with his employer would be null and void and of no effect. Any such provision in a contract of employment of a worker would be severable from that contract on the ground of repugnancy to *the Act* and the Court would treat the term as severed from the contract and would give no effect to it. We venture to say that contracts containing terms such as those found in the successive short term contracts which the aggrieved was required to sign constitute a fraud on *the Retrenchment and Severance Benefits Act* and are contrary to the policy of *the Act* and the common good. It is for the protection of workers such as the aggrieved that the Court must refuse to enforce such a provision in a contract of employment, where to enforce it would result in depriving the worker of benefits which Parliament has conferred on him by statute. In the circumstances we deem the offending provision, in so far as it would have disentitled the aggrieved to be paid severance benefits to be severed from each of the successive six monthly contracts which the worker was required to sign. We therefore find that the aggrieved had been a worker in continuous employment with the Company from 17th February 1985 to 4th May 1995 and order that severance benefits be calculated in accordance with *s. 18 of the Act* for the period 17th February 1985 to 4th May 1995 and paid by the Company, Schlumberger Trinidad Inc. to the aggrieved, Mr. Trevor Dewsbury, within 21 days of the date of this judgment.

We make no order for the payment by the Company of any sum in lieu of notice of retrenchment to the aggrieved. Liberty to apply.

****