

NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 2281 OF 2005

BETWEEN	HOLIDAY INN SUNSPREE RESORT	CLAIMANT
AND	THE INDUSTRIAL DISPUTES TRIBUNAL	1 ST RESPONDENT
AND	THE MINISTER OF LABOUR AND SOCIAL SECURITY	2 ND RESPONDENT
AND	NATIONAL WORKERS UNION	3 RD RESPONDENT

Lynden Smith, Gregory C. Reid and Gregory O. Reid instructed by Zadie and Reid for the Claimant.

Miss Julie Thompson and Miss Tasha Manley instructed by the Director of State Proceedings for the 1st and 2nd Respondents.

Miss Candice Craig instructed by Hamilton and Craig representing the National Workers Union, 3rd Respondent.

Miss Tanya Ralph observing on behalf of the Industrial Disputes Tribunal.

Heard on: 31st October, 1st November 2006 and the 9th February 2007.

M. MCINTOSH, J.

A dispute arose between the Claimant and the National Workers Union regarding the categories of workers in the Claimant's employee and the Ministry of Labour and Social Security referred the dispute to the Industrial Disputes Tribunal for settlement.

The terms of reference to the Tribunal were:

To determine and settle the dispute between Holiday Inn Sunspree Resort on the one hand, and the National Workers Union on the other hand, as respects the categories of workers of whom the ballot should be

taken or the persons who should be eligible to vote in the ballot to determine the union's claim for bargaining rights.

On the 30th May, 2005 the Industrial Disputes Tribunal made an award that:

"The list of names given in the document marked exhibit 18 are the persons eligible to vote in the ballot to determine the Union's claim for bargaining rights"

The document marked Exhibit 18 was a list of workers who were members of the National Workers Union and who were also employed to the Claimant.

A date the (9th August, 2005) was set by the 2nd Respondent for the taking of a ballot however no ballot was taken because of the Claimants application to this Court and the subsequent order of the Court on 5th September, 2005 that the taking of the poll should be stayed until further order.

The Claimant contends that the award was wrong in law and that if a ballot was taken on the basis of the Tribunal's award it would effectively deny numerous former employees of the Claimant of the right to vote on this ballot mentioned above.

The Claimant, by way of a Fixed Date Claim Form for judicial review and affidavit in support dated 15th September, 2005, seeks the following remedies:

1. An Order of certiorari to quash the award made by the 1st Respondent on the 30th May, 2005 that the list of names given in the document marked Exhibit 18 are the persons eligible to vote in the ballot to determine the Union's claim for bargaining rights.
2. A declaration that the list of names given in the document marked Exhibit 18 is not the list of voters for the purpose of taking a ballot to determine the claim for bargaining rights.

3. A declaration that the proper list of voters is the certified list furnished to the 2nd Respondent in accordance with Regulation 5 of the Labour Relations and Industrial Dispute Regulations 1975.
4. An order of prohibition to restrain the taking of a ballot by the 2nd Respondent to determine the claim of the National Workers Union for bargaining rights.
5. An order of Mandamus directed to the 2nd Respondent requiring him in taking the ballot to use as the list of voters a certified list furnished to the 2nd Respondent by the employer, in accordance with Regulation 5 of the Labour Relations and Industrial Disputes Regulations 1975.

The Claimant is seeking an order on the following grounds:

1. The 1st Respondent erred in deciding that the workers in the document marked Exhibit 18 were the workers entitled to vote.
2. The 1st Respondent acted erroneously and/or in excess of its jurisdiction in making the award in that it acted on a list of employees drawn up by or on behalf of the union instead of having regard to a certified list submitted by the employer.
3. The list of voters is defined and provided for in the Labour Relations and Industrial Disputes Regulations, 1975 which does not provide for a list of voters to be prepared by a trade union.
4. The taking of a ballot on the 9th August, 2005 or on any other date based on the said award by the 1st Respondent would be in excess of the jurisdiction of the 2nd Respondent and/or contrary to the Labour Relations

and Industrial Disputes Regulations and Labour Relations and Industrial Disputes Act.

5. The Tribunal failed to give any or any sufficient consideration to the evidence concerning the categories of workers of whom the ballot should be taken, and further failed to determine and settle the categories of workers of whom the ballot should be taken.
6. The Tribunal erred in coming to a decision as to the workers entitled to vote without first arriving at a decision as to the categories of workers entitled to vote.
7. The Tribunal misdirected itself on the issue of the workers' entitlement to vote in the ballot in a situation where no workers at all remained in the employment of the Claimant in any category to which the Union's claim could apply.

The Claimant further contends that the list of names of workers referred to by the 1st Defendant as the persons entitled to vote in a ballot has a duplication of some names and is therefore inaccurate.

The procedure provided for a list of voters to be certified and sent to the 2nd Respondent was not observed and in addition the 2nd Respondent failed to have regard to the procedure provided and did not seek the participation of the Union to determine if there was any objection to the inclusion or omission of any name from the list.

The Claimant argues that the effect of the award is to make only workers who were members of the National Workers Union, (NWU) at the time the claim was made, eligible voters and failed to have regard to the provisions of the Labour Relations and

Industrial Disputes Act and the Regulations made under that Act especially where Regulations 5(7) set out what was to be the list of eligible voters.

The Tribunal exceeded its jurisdiction (cited ***R V. MANCHESTER LEGAL AID COMMITTEE EX PARTE BRAND [1952] 2QB 423.***

It is also argued that the Tribunal misconstrued the issues before it for decision as where it was required to make a decision as to the category of workers involved, it failed to do so – the question for determination was what was the category of workers for which a ballot should be taken and not whether dismissed workers were entitled to vote in a ballot. The Tribunal failed to apply the relevant law to the facts and failed also to take into consideration the provisions of Regulation 4 inter alia the community of interest of the workers. The Claimant addressed this as a reason why the court should quash the award (i.e, the Tribunal misdirected itself as to the issues before them) and cited ***ANISMINIC V. FOREIGN COMPENSATION COMMISSION [1969] 2 A.C. 147*** in support.

The voters list is not the list produced by the Union and taking a ballot (as the 2nd Respondents intended to do), would be improper. Further, the Claimants contend a declaration from the Court as to the correct list clarifying the right of the parties would be appropriate.

In addition to all the remedies being sought, the Claimant seeks an order of prohibition to prevent the Tribunal from executing its jurisdiction and continuing to do so and cited ***R V. MINISTER OF HEALTH EX PARTE DAVIS [1929] 1 KB 619*** when an order of prohibition was made to prevent the Minister of Health from confirming an ultra vires housing scheme.

The Tribunal, the Claimant submits, has a public duty to take a ballot in accordance with the Labour Relations and Industrial Disputes Act and the Regulations made under this Act and assert that the correct voters list has been set out in the Regulations and neither the 1st nor 2nd Respondent is at liberty to take a ballot according to different rules or to use a list which does not comply with the Act and the Regulations. In support of this argument the case of ***R V. CALDERWOOD EX PARTE MANCHESTER CORPORATION, THE TIMES, FEBRUARY 27, 1974*** was cited. In this case an order of Mandamus was issued to an electoral registration officer to correct the register of electors.

The Claimant submits that the remedies requested ought to be granted by the Court as it is directly affected by the acts of the Respondents, has a sufficient interest, and there is no alternative remedy available to it.

The 1st Respondent has narrowed the issues to be determined by the court to two. The first of which is whether the 1st Respondent either erred in law in deciding that the persons named in Exhibit 18 were the workers entitled to vote on the ballot to determine the Union's claim for bargaining rights and the second issue as being whether the proper list of voters is the certified list furnished to the 2nd Respondent in accordance with Regulation 5 of the Labour Relations and Industrial Disputes Act.

The first issue, i.e. whether the Tribunal erred in law, the 1st Respondent referred to ***HALSBURY'S LAWS OF ENGLAND VOLUME 1(1) at paragraph 77*** which states that a public decision making body will err in law where it:

- (i) wrongly construed or applied a statutory provision;

or

- (ii) misinterprets a rule of common law or any other legal document; or
- (iii) it acts in breach of fundamental human right; or
- (iv) takes legally irrelevant considerations into account, or it fails to take legally relevant considerations into account; or
- (v) admits inadmissible evidence; or
- (vi) rejects admissible and relevant evidence; or
- (vii) takes a decision on no evidence; or
- (viii) misdirects itself as to the burden of proof; or
- (ix) fails to follow the proper procedure required by law; or
- (x) fails to fulfill an express or implied duty to give reasons or otherwise abuses its powers; or
- (xi) make a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires (emphasis added).

The 1st Respondent submits that the general presumption is that a public decision-making body does not have the power to commit an error of law. This presumption will be rebutted where Parliament has provided that the decision of an inferior court of law, are final and conclusive. ***R V. LORD, PRESIDENT OF THE PRIVY COUNCIL EX PARTE PAGE*** – Where the presumption is rebutted, the court will not quash for an error of law made within jurisdiction in the narrow sense. Jurisdiction within the narrow sense means that the body has the power to adjudicate upon the dispute or make the kind of decision or order in question.

Further, the court may quash a decision or order where a body erred in law in reaching a decision or making an order. The error of law must be an error in the actual making of the decision which affects the decision itself and even if the error of law is

relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed.

Based on the terms of reference, the Tribunal had the jurisdiction to determine either the categories of workers of whom the ballot should be taken or the persons entitled to vote in the ballot. The issue between the parties to the industrial dispute was with the status of the workers, that is, whether they were temporary, short term, part time, casual workers, probationers or all or some of them and not with the categories of workers of whom the ballot should be taken. 1st Respondent refers to page 4 of the verbatim notes at the first sitting, page 8 of the verbatim notes taken at the second sitting and pages 41, 56-57 of the notes of the 3rd sitting as also paragraphs 7-8 of the affidavit of Donovan Hunter and submits that in view of these, that the Tribunal made its decision on the persons eligible to vote. It was therefore within the jurisdiction of the Tribunal to have decided on the persons eligible to vote without first deciding on the categories of workers of whom a ballot should be taken or on the categories of workers at all.

The evidence presented before the Tribunal showed that the persons named in Exhibit 18 were employees of the Claimants as at the date when the claim for bargaining rights was served on the Claimant, and the service of these employees were subsequently terminated. The 1st Respondent submits that the workers' right to vote on a ballot to determine bargaining rights is preserved even when the worker is dismissed, or is no longer employed to the company subsequent to the service of the claim – ***R V. I.D.T. EX PARTE GAYLE (1987) 24 JLR 330.*** The Tribunal acted on the list of workers in Exhibit 18 as that list was the only list of workers accepted in evidence before it.

The submissions of the 1st Respondent continued and emphasized that it was the duty of the parties to marshal all relevant evidence before the Tribunal – ***ABERDEEB STEAR HOUSES GROUP V. IBRAHIM 919880 1 CR 550***. In addition, the Procedure and Pleadings of the Tribunal stipulates at Clause 5(e) that parties to an industrial dispute must provide to the Tribunal a brief containing copies of all documents which will be exhibited during oral submissions. Briefs prepared by both parties are exchanged, pursuant to Clause 6.

In view of this, the 1st Respondent argued that only evidence upon which the Tribunal acted and made a decision was that which was marshaled by the Union and that being the case, it cannot be said that the Tribunal committed an error of law. It is an error of law to make a finding unsupported by any evidence.

The issue as to whether the proper list of voters is the certified list furnished to the 2nd Respondent in accordance with Regulation 5 of the Labour Relation and Industrial Disputes Act was dealt with by the 2nd Respondent who submitted that Section 5(3) of the Labour Relations and Industrial Disputes Act provide that the Tribunal must have regard to the provisions of the Regulations.

“(3) Where the Tribunal decides to cause a ballot to be taken and there is a dispute, which he has failed to settle, as respects the categories of workers of whom the ballot should be eligible to vote in the ballot, the Minister shall refer the dispute to the Tribunal for determination. The Tribunal, shall, in determining any disputes referred to it under this sub-section, have regard to the provisions of any regulations made under this Act and for the time being in force in relation to ballots.”

The provisions of Regulations 4 and 5(1) address the issue of ballots. Regulation 4 addresses considerations which the Tribunal must take into account if there is a dispute in relation to the categories of workers of whom a ballot should be taken or the persons who should be eligible to vote:

Regulation 5 (1) provides:

"If there is no dispute as respects categories of workers of whom a ballot should be taken or the workers who should be eligible to vote in the ballot, or after settlement of any dispute which arises in connection with that matter, the Minister may require the employers to prepare and certify a list of those workers from his pay bills and to furnish the Minister, within such period as he may specify, with such number of copies of that certified list as he may require."

Regulation 5(5) states:

"The certified list furnished to the Minister under this regulation, with any alteration or amendment made in accordance with paragraph (3) or (4), shall be the list of the workers who are eligible to vote in the ballot."

The request of the Minister for the provision of a certified list of workers is only applicable where there is no dispute as to the category of workers of whom a ballot should be taken or the workers who should be eligible to vote in the ballot or after settlement of such a dispute. The request of such a list is at the discretion of the Minister.

The 1st Respondent submitted that Regulation 5(1) is not applicable to these circumstances as a dispute exists. Based on paragraphs 5-7 of Faylene Foster's affidavit, no request was made by the Minister pursuant to Regulation 5(1) as the

procedure referred to in that regulation is only applicable where the dispute was settled at the conciliation level. The Minister assists in settling disputes by conciliation prior to reference to the Tribunal.

It is further submitted that at the time at which the Tribunal heard and determined the dispute there was no evidence before it in relation to a certified list of employees and in fact, the Tribunal would have committed an error of law if it took a decision having no evidence in that regard.

NATIONAL WORKERS UNION

Attorney Mrs. Candis Craig presented the arguments on behalf of the National Workers Union. The NWU regarded the actions of the Claimant (i.e. changing the condition of employment of the categories of workers who were employed by the Claimant and fell within the definition of workers as "an individual who has entered into or works or normally works (or where employment has ceased,)" would as a direct result of the Union's claim for their bargaining rights. This action, the Union views as a violation of the constitutional right of the worker to belong to a trade union and there was no legitimate basis to terminate the employment of these categories of workers.

As a result of the dispute which arose between the Claimant and the NWU which the Minister was unable to settle, the Minister referred the matter the Industrial Disputes Tribunal in accordance with the provisions of the law. The Industrial Disputes Tribunal in such circumstances is obliged to make an award.

The general submissions made by the 1st and 2nd Respondents on the two points argued, was adopted by the NWU.

Reference was made to the fact that no submission was made before the Tribunal that it did not have jurisdiction to consider the reference and it is submitted that there was no error of law on the face of the award at all.

The NWU concluded its submissions by urging the Court not to grant the relief sought by the Claimant in its Fixed Date Claim Form.

CONCLUSION

The Court has considered the evidence placed before it and the very thorough and detailed submissions made by each of the parties in this matter and concludes that the Tribunal did not commit an error of law in determining the dispute between the Claimant and the Union in the manner in which it did and will therefore not quash the Tribunal's award made in May 30, 2005.

This Court after considering all the evidence is of the view:

- (1) that the Tribunal made its decision based on the evidence placed before it.
- (2) The Tribunal acted lawfully and had the jurisdiction in the narrow sense i.e. it had the power to adjudicate upon the dispute in question pursuant to Section 5(3) of the Labour Relations and Industrial Dispute Act.
- (3) The decision of the Tribunal was based on the evidence presented to it and was reasonable in the circumstances.
- (4) There was no breach of the principles of natural justice as all parties were given a fair opportunity to be heard and to adduce evidence in support of their claim to the Tribunal.

- (5) There was no error of law and the decision of the Tribunal, a quasi judicial body is final and conclusive pursuant to Section 12(4) of the Labour Relations and Industrial Disputes Act.

The orders sought by the Claimant are therefore not granted and the Claimant's application is dismissed.