IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 2710

BETWEEN	**JAMAICA MEDICAL DOCTORS ASSOCIATION**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**RESPONDENT**

Application for Certiorari and Mandamus to issue against the Industrial Disputes Tribunal at the instance of the Jamaica Medical Doctors Association

Dr. Lloyd Barnett and Mr. Keith Bishop instructed by Bishop and Fullerton for the Applicant; Mr. Curtis Cochrane instructed by the Director of State Proceeding for the Respondent.

CORAM: ANDERSON J.

REASONS FOR RULING

On Friday August 14, 2009 I gave my ruling in which I denied the applications filed by the Applicant, for orders of Certiorari and Mandamus. At that time, I promised to put my reasons in writing. In fulfillment of the promise, I now do so.

The Applicant, The Jamaica Medical Doctors Association, (hereinafter "the Association") formerly known as the Jamaica Junior Doctors Association, have applied for the following reliefs:

1) An Order of Certiorari to quash the decision and award of the Industrial Disputes Tribunal dated May 4 2006 which –

   a) Held that the Government had the right to schedule the hours of work of the doctors concerned; and

   b) Awarded that consistent with Section 3.1 of the Staff Orders, the Minister responsible for the Public Service shall determine and schedule the hours of work that are considered appropriate.

2) An Order of Mandamus requiring the Industrial Disputes Tribunal to determine and settle the dispute as to whether in the present circumstances the Minister

may introduce a shift system in the Classes A and B hospitals of the Government Service and/or the University Hospital of the West Indies.

The Grounds on which the reliefs are sought are as follows:

1. The Industrial Disputes Tribunal failed to determine the real issue in dispute which is whether in the present conditions or known circumstances, the Minister or the Government authorities may introduce the shift system in the Classes A and B Hospitals or the University Hospital of the West Indies;

2. The Industrial Disputes Tribunal failed to perform its statutory duty to settle the dispute or to carry out the mandate defined in the terms of reference; and

3. The decision of the Industrial Disputes Tribunal is arbitrary, inconclusive and irrational.

The Background

The application arises out of a long-standing dispute stretching back to 1999, between these parties, the employers of members of the Association, being the Government of Jamaica and the University Hospital of the West Indies, on the one hand, and the Association which is comprised of medical doctors other than consultants in the employ of the employers. This sortie is but the latest battle in this saga.

By a letter of August 5, 1999 from Mrs. Jean Smith, then the Permanent Secretary in the Ministry of Labour, to the Chairman of the Industrial Tribunal ("IDT"), the dispute between the parties was referred to the IDT for settlement. A letter in the same terms with respect to the junior doctors at the UHWI was also sent on the same day. The terms of reference to the Tribunal were as follows:

> To determine and settle the dispute between the University Hospital of the West Indies, (the Government of Jamaica as represented by the Ministry of Finance and Planning and the Ministry of Health) on the one hand, and the Junior Doctors employed by the Hospital and represented by the Junior Doctors Association, on the other, over the Association's claims as stated in their letter dated July 27 1999, (copy attached)

The letter from the doctors to which reference was made in the terms of reference directed to the IDT stated that

> "As further evidence of lack of regards for the doctors and their posts, your Ministry has offered contracts, the terms of which the JDA find unacceptable....
>
> The membership demands that:
>
> The contracts presently being offered to the "supernumerary doctors" be revoked and replaced with contracts conforming with the last heads of Agreement especially with regards to leave entitlement, duty concession and working hours. Furthermore any change with regards to terms and conditions to be addressed during negotiations which is currently on the way."

By letter dated July 9, 2003, the Tribunal advised the parties that it had decided "to hear and settle the dispute with the only outstanding matter being the Hours of Work for Junior Doctors". The Government challenged the IDT's decision in an application for judicial review on the basis that, in its view, the issue was *res judicata*, it having already been determined by this court in the case of **Junior Doctors Association et al v Ministry of Health et al** (1990) 27 J.L.R. 149,.

The application was heard by Anderson, J. on July 7 and 8, 2004 and in a judgment that I handed down on July 8, 2004, I agreed that the IDT did, in fact, have jurisdiction to hear the matter. I accordingly denied the government's application for prohibition and certiorari.

It is common ground that the main issue outstanding at the time of the hearing by the IDT had to do with hours of work. Indeed, in elaborating on its position in the brief filed with the IDT for the hearing, with respect to the issue of the work hours, the Association stated:

> "HOURS OF WORK
>
> Clause 1 of the Form Agreement is not acceptable. The current system provides for doctors to work from 8:00a.m. to 4:00 p.m. Monday to Friday except in the case of casualty officers and other particular cases where different hours have been agreed. The Junior Doctors Association contends that the current system best maintain (sic) continuity of patient care, which would be jeopardized under the shift system. The Employment Policies and Procedures, page 5, also provides for fixed hours of work Monday to Friday.

As a consequence of my ruling, the IDT completed its hearing and it was concluded on April 18, 2006. It handed down its rulings on May 4, 2006. In relation to the UHWI, (Award 20/1999) the award is in the following terms.

> "The University Hospital of the West Indies shall determine and schedule the hours of work that it considers appropriate"

In relation to the government, the award (19/1999) stated:

> Consistent with Section 3.1 of the Staff Orders, the Minister responsible for the Public Service shall determine and schedule the hours of work that is considered appropriate."

It is the contention of the Applicant that by the time the IDT resumed its hearing after the refusal of the Government's application for the issue of the Orders of Prohibition and Certiorari, the issue which was at stake was properly articulated by the very IDT itself, in the following terms:

> "The University Hospital of the West Indies, the Ministry of Finance and the Ministry of Health maintains that it has the right to schedule work in any forty (40) hours during each seven (7) days period.
>
> The Junior Doctors' Association (now the Jamaica Medical Doctors' Association) disagrees and holds that the present system, which has the Doctors working from 8:00 a.m. to 4:00 p.m. Monday-Friday except in the case of Casualty Officers and other cases where different hours have been agreed, provides continuity in patients' care which would be jeopardized under a shift system." (Emphasis supplied)

In handing down its awards, the IDT purported to justify them in the following terms. Firstly, in relation to the Government:

> "It is a generally accepted principle in industrial relations that the scheduling of the hours of work is a prerogative of management. It is instructive to note that the term "worker" as defined under the Labour Relations and Industrial Disputes Act, 1975 and amended in 2002 states as follows:
>
> > "'worker' means an individual who has entered into or works or normally works (or where the employment has ceased, worked) under a contract, however described, in any circumstances where that individual

works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee".

The right of the employer to control the hours of work of the employee is one of the dominant features that determine the employer/employee relationship. This right of the employer is not shared with the employee unless there is agreement between the parties. In the case of the dispute at hand, there is no such agreement between the Government and the doctors".

With respect to the UHWI the IDT stated:

"(a) The Tribunal accepts the evidence of Mrs. Shernette Williams Powell with respect to the hours of work, that is, the doctors are required to work, as scheduled, any forty (40) hours during any seven (7) days work period. The Tribunal notes that this is the present arrangement as it affects the Junior Doctors.

(b) The right of the employer to control the hours of work of the employee is one of the dominant features that determine the employer/employee relationship. This right of the employer is not shared with the employee unless there is agreement between the parties. In the case of the dispute at hand, there is no such agreement between the Government and the Doctors."

For the record, it should be noted that the Applicant challenges the conclusion of the IDT that Mrs. Williams-Powell gave such evidence as it is claimed she did, and it sets out the verbatim evidence in relevant part. The gravamen of the Applicant's challenge to the awards by the IDT may be summarized from two paragraphs taken from the skeleton submissions made by the Applicant's counsel. These are:

1. The Tribunal erred in law in failing to understand that their jurisdiction permitted and required them to state the relevant conditions of employment required to settle the dispute, whether they related to wages, place of work, hours of work or any other conditions of the employment.

2. The Tribunal did not determine and settle the dispute between the doctors and UHWI or the Government but merely made a suggestion for consultation. In the case of the University Hospital of the West Indies the

Award merely stated that they should determine and schedule the hours of work that they considered appropriate.

Summary of legal propositions advanced by Applicant

The Applicant submitted that the award breached section 12(4)

The dispute had been referred to the IDT "for settlement" and pursuant to section 9(3)(a) of the Labour Relations and Industrial Disputes Act (LRIDA).and by virtue of section 12(4)(c) of that Act, the award "shall be final and conclusive".

Section 12(4) is in the following terms:

(4) An award in respect of any industrial dispute referred to the tribunal for settlement:

a. May be made with retrospective effect.....

b. Shall specify the date from which it will have effect;

c. Shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof except on point of law.

It was accordingly submitted that:

> "Finality, certainty and consistency are essential requirements of any Award handed down by a body to which disputes are referred for settlement. This is a well-known principle in the law of arbitration".

In support of this proposition the Applicant's attorneys-at-law cite **Baille v. Edinburgh Oil Gas Light Co. (1835) 6 E.R. 1577.**

In that case, an arbitrator's award was held to be bad when he made an award which seemed to have provided alternative remedies which made the determination uncertain. It was accordingly submitted that the IDT had failed to determine the issue which was referred to it and had failed to provide finality. It was argued that to the extent that it lacked finality, it was also bad in law. In support of that proposition the Applicant's attorneys-at-law cite the cases ***Re Becker et al*** [1921] 1 K.B. 59; ***Arcos Ltd. v. London & Hawkins Trading Co. Ltd.*** 45 Ll.L.Rep. 297 and ***River Plate Products etc. v. Establissement Coargrain*** (1982) 1 Lloyd's Rep. 628. In the result, it was submitted that the decision is bad on account of ambiguity and lack of finality and the Applicant

cites ***Re O'Connor and Whitlaw*** (1919) 88 L.J.K.B. 1242; ***Cogstad v. Newman*** [1921] A.C. 528

Irrationality and No Supporting Evidence

The Applicant also submitted that the award is irrational and is not supported by the evidence.

It was the submission of the Applicant that the IDT had arrived at certain findings without any supporting evidence or that flew in the face of the evidence. In particular the Applicant's attorneys-at-law deny that the evidence of Mrs. Williams-Powell of the UHWI was in the terms quoted by the Tribunal. It was also suggested that the IDT had accepted inadmissible evidence. To the extent that the IDT had arrived at conclusions of fact which were unsupported by the evidence, this amounted to irrationality and represented an error of law which was reviewable in judicial review proceedings as permitted by the LRIDA.

The Respondent's Submissions,

The point of departure for Respondent's counsel is also consideration of the terms of the award. He reminded the court that pursuant to the terms of the LRIDA, the award of the IDT was final and only reviewable on a point of law. In that regard, Mr. Cochrane in his written submissions cited the judgment of Carey J.A. in **Jamaica Public Service Company Ltd v Smikle (1985) 22 JLR 244.**

In that case his lordship re-iterated the proposition that the role of the judicial review court is not to act as a court of appeal but only to review and its role is limited to challenges on law appearing on the face of the record. It is not, accordingly, the role of the Judicial Review Court to reverse an award of the IDT merely because it might have come to a different view on the evidence presented.

The Respondent also cited the Privy Council decision in **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal** (Privy Council Appeal No: 69 of 2003, unreported, decision handed down March 23, 2005). In that case, counsel for the Appellant Flour Mills had urged upon the Board the view that the award was bad because the Tribunal had not determined a particular issue which he felt was necessary to arrive at the award. In the words of their lordships, the submission was that the award was bad because the IDT had not sufficiently addressed their terms of reference. In particular, the IDT had not addressed the issue, live in that case, of whether a true redundancy had arisen. Their Lordships accepted that the IDT did not specifically address the redundancy issue but nonetheless held that the Tribunal had complied with its mandate under its terms of reference.

Lord Scott of Foscote, in delivering the opinion of the Board said:

> Mr Scharschmidt submitted, also, that the Tribunal's decision in the present case was impeachable because the Tribunal had not decided one way or the other whether there truly was a redundancy that had necessitated the dismissal of the three employees and, consequently, had not sufficiently addressed their terms of reference. Mr Scharschmidt is correct in observing that the Tribunal did not definitively decide the redundancy issue. Instead the Tribunal addressed themselves to the question whether the dismissals, having regard to the manner in which they were effected, were in any event "unjustifiable". But, in agreement with the Court of Appeal, their Lordships do not accept the submission that the Tribunal consequently did not properly address their terms of reference. The terms of reference required the Tribunal "to determine and settle the dispute ...". The Tribunal did so. They were able to do so without definitively deciding the redundancy issue. In effect, as the Court of Appeal judgments pointed out, the Tribunal assumed in favour of JFM that its redundancy case was well-founded. The absence of a definitive finding can give JFM no ground for complaint.

The Respondent's counsel submitted that the IDT had in fact done what it was required to do: that is, to settle the dispute as to whether hours of work were to be determined by the employer. It had made the determination. Nor, it was added, could the IDT have gone further to determine specific hours of work as is implicit in the submissions of the Applicant. To have done so would have been to determine and impose terms and conditions of work and so fetter the ability of an employer to ascertain, if necessary in consultation with its employees, appropriate working hours.

It was further submitted that the Tribunal in making the award that the GOJ and the UHWI may determine and schedule the hours of work of the Junior Doctors that is deemed appropriate, determined the issue as to whether a shift system could be introduced in the hospitals.

Respondent's counsel also makes the point that, contrary to the Applicant's assertion, the award is not impeachable for finality or conclusiveness. There is nothing in the terms which required the IDT to specifically endorse or reject "the shift system". It was not a part of the terms of reference. That the IDT failed to specifically rule on that issue cannot make the award less final than that in the Flour Mills case. This is reinforced by the fact that there was no evidence that the Government intended to introduce the shift system at any Type A or Type B

Hospital. It is also clear from the evidence that, at least in the Accident and Emergency Unit at the University Hospital, the doctors did work according to a shift system, while this also operated at some Type C hospitals. The fact that no finding was made in relation to the shift system cannot be a ground to impugn the award in law, on the basis that the IDT had failed to fulfill its terms of reference. There was no evidence that there was any intention on the part of the Government so to do. According to the evidence of Mrs. Williams- Powell, it is also clear that there was no attempt to do so at the University Hospital, although I understood the section of her evidence before the tribunal referred to, as saying that that was presently a part of the terms on which the doctors were employed at that institution.

Reasons

I have already in my ruling determined that the applications for Certiorari and Mandamus must fail and I set out hereunder the reasons.

The starting point of the reasoning for this ruling is to ask what the terms of reference of the Tribunal had been. It will be recalled that the terms of reference were

> *To determine and settle the dispute between the University Hospital of the West Indies, (the Government of Jamaica as represented by the Ministry of Finance and Planning and the Ministry of Health) on the one hand, and the Junior Doctors employed by the Hospital and represented by the Junior Doctors Association, on the other, over the Association's claims as stated in their letter dated July 27 1999, (copy attached)*

The section of the letter to which reference was made was in the following terms:

> The contracts presently being offered to the "supernumerary doctors" be revoked and replaced with contracts conforming with the last heads of Agreement especially with regards to leave entitlement, duty concession and working hours. Furthermore any change regards to terms and conditions to be addressed during negotiations which is currently on the way."

It will also be recalled that by letter dated July 9, 2003, the Tribunal advised the parties that it had decided *"to hear and settle the dispute with the only outstanding matter being the Hours of Work for Junior Doctors"*. It is clear that the doctors were saying that the government could not, and did not have the legal right to introduce a shift system. The government was clearly of a different

view. There was no evidence before the IDT that there was any plan to introduce, willy nilly, a shift system either in Type A or B hospitals or at the UHWI.

As I understand it, the IDT interpreted the terms of reference to mean simply: 'Who has the right to determine hours of work?" It answered that in its awards, as a matter of law, in favour of the employer. But it went further by advocating that the suggestion advanced by Dr. Barnett in his submissions should be considered in determining the hours which the affected doctors would work. The IDT was not asked and could not properly been expected to determine, whether and to what extent a shift system could have compromised patient care. Indeed, there was evidence of Dr. Bachelor that it is not that a shift system could not work. Rather, the question is what is an appropriate regime which will be not only in the interest of the particular patient, but the medical system as a whole?

The Applicant's counsel seem to have proceeded on the basis, unwarranted in my view, that the issue for the IDT was whether the government and the University Hospital could arbitrarily, and without reference to what is appropriate for proper patient care and in defiance of any reason, impose a "shift system". The IDT, not having addressed the issue in those terms, has made the award impeachable as being "not final or conclusive" within the meaning of section 12(4) of the LRIDA. As is implicit in my ruling, I do not agree.

I do not accept that the ruling of the IDT is either arbitrary, inconclusive or irrational. The Tribunal considered its terms of reference and made an award which came down in favour of the view that employers have the right to determine hours of work. In the case of the doctors in the government service, there was no evidence or suggestion that they were other than civil servants and accordingly, subject to the Staff Orders, section 3.1. There can be no doubt that under the Staff Orders the Minister may set the hours for those civil servant/doctors.

With respect to the University Hospital, the Applicant's counsel has characterized as "the basis of the award" the statement contained in a section of the Report captioned, Tribunal's Response". There it was stated that

> "(a) The Tribunal accepts the evidence of Mrs. Shernette Williams Powell with respect to the hours of work, that is, the doctors are required to work, as scheduled, any forty (40) hours during any seven (7) days work period. The Tribunal notes that this is the present arrangement as it affects the Junior Doctors.

view, to say that the tribunal did not even consider the views of the doctors and their evidence before the enquiry. It is instructive, therefore, that the IDT said:

> "Evidence submitted by the doctors emphasized the disadvantages of a shift system that would compromise patient's care. The evidence was not directly challenged by the government, being confident that under section 3.1 of the Staff orders, it had the right to schedule the hours to which the Tribunal so agrees".

The concern at this line of approach is heightened when the submission above is followed by the proposition that "Where findings of fact are made without any supporting evidence they amount to errors of law"; a perfectly understandable legal proposition in and of itself, but there is nothing here to indicate what the submission is related to, since there was no award indicating that there was evidence upon which the IDT had made any award "precluding " it from making the determination referred to above.

It may be that the matter could have been simply decided on the basis set out in part of the Reply of the Applicant to the submissions of the Respondent. That section of the reply is set out below:

> "It is undisputed that one of the conditions of employment that an employer may determine is hours of work, but when it comes to the Tribunal as a dispute then the Tribunal must determine that dispute as to the appropriate hours of work".

There was nothing before me in the affidavits which suggested that alternative formulations of shift systems had been canvassed before the IDT. Nor is there any evidence that every shift system was un-workable. Indeed, the evidence of Dr. Bachelor is instructive. There was nothing which contradicted that evidence. Indeed, another part of the Applicants reply is equally instructive.

The reply, in considering whether the shift system could work said that "in order for it (to) work, fundamental changes would have to be made and significant sums would have to be expended to properly implement such a system". It seems implicit in that submission that there is a concession that properly structured and funded, a shift system could work. Further, it must follow logically that the IDT's embrace of Dr. Barnett's proposition is more than a mere gratuitous gesture but more of a warning to the employers.

In fact, as it pointed out, it is consistent with paragraph 19 of the Labour Relations Code which is in the following terms:

> "Communications and consultation are necessary ingredients in good industrial relations policy as these promote a climate of mutual understanding and trust which (ultimately) result in increased efficiency and greater job satisfaction. Management and workers or their representatives should therefore co-operate in improving communications and consultation within the organization".

This is important because in the **Flour Mills** case, Lord Scott of Foscote considered what the effect of the Labor Relations Code is: He referred to earlier dicta of our own Court of Appeal in the following manner:

> Issues have arisen, also, regarding the effect of the Code and the use that can be made of it in a case such as the present. In paragraph 8 of its Award the Tribunal, responding to a submission that the Code was no more than a set of guidelines and was not legally binding, observed that the Code was "as near to law as you can get". This observation was endorsed by Clarke J in the Full Court (p.28) and by Forte P (p.6), Harrison JA (p.20) and Walker JA (p.37) in the Court of Appeal. Both in the Full Court and in the Court of Appeal reliance was placed on ***Village Resorts Ltd v The Industrial Disputes Tribunal SCCA 66/97 (unreported)*** in which Rattray P, in the Court of Appeal, had described "The Act, the Code and the Regulations" as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica" (p.11) and as a "road map to both employers and workers towards the destination of a co-operative working environment for the maximisation of production and mutually beneficial human relationships" (p.10, cited by Forte P in the present case at p.3 of the Court of Appeal judgment). Forte P went on to say that the Code
> "... establishes the environment in which it envisages that the relationships and communications between the [employers, the workers and the Unions] should operate for the peaceful solutions of conflicts which are bound to develop."

He then went on to say:

> Their Lordships respectfully accept as correct the view of the Code and its function as expressed by Rattray P in the **Village Resorts** case and by Forte P in the present case.

I have formed the view that in making the award it did, the IDT, in answering the question I posed above, decided the issue of the right to determine hours in favour of the employers. It implicitly and explicitly determined that the right to set

hours is that of the employer. Its concomitant recommendation for incorporating Dr. Barnett's excellent suggestion and which, as outlined above is consistent with the LRIDA Code, is nothing more than it would be expected to do within the context of the scheme of arrangements contemplated by the Act, the Regulations and the Code.

It is noted from the submissions of the Applicant's counsel that there was fear that the shift system was being considered so as to deny those doctors who presently work outside the hours 8:00 a.m. to 4:00 p.m. the additional overtime pay to which they might otherwise be entitled. If that is the fear then it seems to me that that is not a principle upon which this application should be decided. That is an issue as to money.

In **Jamaica Association of Local Government Officers And National Workers Union v The Attorney General Suits Nos: M 36 and 5 of 1994 (unreported)**, Cooke J, as he then was, stated:

> "I have set out these sections of the Act to demonstrate that the purpose of the tribunal is to settle disputes. It does not have to give reasons. Its determination of the respective merits of rival contentions is final and conclusive".

He did however go on later in his judgment to cite a passage from de Smith's Judicial Review of Administrative Action, 4th Edition, page 406:

> Where a tribunal that is not expressly obliged to give reasons for its decisions chooses not to give any reasons for a particular decision, it is not permissible to infer on that ground alone that its reasons for its decision were bad in law. But if the grounds or reasons stated, even in an informal document written after the decision, disclose a clearly erroneous legal approach, the decision will be quashed.

I find nothing in the reasons advanced by the tribunal which makes me call into question the legitimacy of the IDT's approach and for the reasons cited above, I reused the applications.

ROY K. ANDERSON

PUISNE JUDGE

September 25, 2009