IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. HCV 0205/2003

BETWEEN	MOORES AIR EXPRESS SERVICE LIMITED	PLAINTIFF
A N D	THE POSTMASTER GENERAL	RESPONDENT

Dennis Morrison, Q.C.,Wendell Wilkins and Andrea Moore instructed by Nunes Scholfield Deleon & Co. for the Plaintiffs.

Cheryl Lewis and Annalesia Lindsay instructed by the Director of State Proceedings for the Respondent.

HEARD: 9th, 10th, 12th ,16th December 2003 & 1st March 2004

Campbell, J.

The Postmaster General invited tenders for the provision of transportation services for their staff and the mail. The tenders would be deposited in a box in the lobby of the Central Sorting Office of the PMG. Bids were being accepted from Monday, 13th January 2003 until 3:00 p.m. Monday, 3rd February 2003. The invitations to tender and the tendered documents expressed that late tenders would be rejected. Moores Air Express Service Limited (Moores), who had provided such services for the Postal Services for a period exceeding fifty (50) years, had demonstrated their intention to submit bids in respect of the offer. Moores was also

tendering on behalf of some thirty-five (35) mail contractors islandwide, whom they represented. Moores' attempt to deposit these bid documents failed. They claimed they were prevented from so doing by the actions of an employee of the Postmaster General's Department. The Postmaster claims that Moores was out of time, and that the box in which the tenders were to be deposited had been already sealed at the time Moores representative arrived there. This Moores has denied. It is this decision of the Postmaster General not to allow the Plaintiff to deposit their tenders that the Plaintiff seeks to impugn, by way of Judicial Review.

The parties have agreed that the issues lie within a narrow compass. Was the Plaintiff late? Even if the Plaintiff was late, was the Postmaster General's decision to exclude him from the tendering process an unreasonable exercise of her discretion. Further, was such a sanction out of proportion to the breach that had been committed?

The Plaintiffs' Case

Moores' case is to the effect that they had intended to arrive at the Central Sorting Office at about 2:30 p.m., in order to ensure the integrity of the submitted bids. This decision to arrive as close to the deadline as possible was born out of the experience they had had with prior tendering process at the Postmaster General's Department. Miss Moore testified that

"the later they could put their bid in, the more comfortable we would be." They had complained in 1998 about the confidentiality of the process.

The fact that they did not arrive as they had planned at 2:30 p.m. was a result of difficulties that they had encountered in the preparation of some of the bid documents for mail contractors whom they represented, and the unexpected level of traffic they had encountered on their way to the Central Sorting Office. Miss Andrea Moore, an attorney-at-law, representing the Plaintiff at the deposit of the bids, deponed that she had arrived at the Central Sorting Office "at approximately 2:53 p.m." she was accompanied by Helen Richards and Courtney Whilby and said in cross-examination that the attempt to deposit the bids would have been made no later than 2:55 p.m. She said that Miss Chambers, the Head Postmaster, had her right hand placed over the aperture of the box, and there was no tape on the box.

Mr. Whilby who drove the vehicle in which Miss Moore travelled, testified that they had left the offices of the Plaintiffs at 2:30 p.m. This bit of evidence is in conflict with the evidence of Miss Moore and Miss Richards. They, on their evidence, left at 2:15 p.m. Mr. Whilby stated it took him fifteen (15) minutes to make the trip, however Miss Richards was of the view that it took them a little under thirty (30) minutes. Richards maintained that he arrived at Central Sorting Office at 2:53 p.m. On his

evidence the journey would have taken twenty-three (23) minutes. If the evidence of Miss Moore and Miss Richards is correct that the time of their departure from the Plaintiff's office was 2:15 p.m., then the journey would have actually taken some thirty-eight (38) minutes on their own evidence.

Richards, in her evidence said that, "We had planned to leave at two o'clock. We had planned to arrive there at 2:30 p.m." Moore was in agreement with this proposed departure and arrival times. It is clear that the journey took a longer time than they had anticipated.

In the evidence of Whilby, he had deponed that the tenders were presented no later than 2:55 p.m. In cross-examination he said that when he went to Central Sorting Office he checked his phone and it said 2:57 p.m. Both statements are palpably inconsistent. Although there is no general agreement on the time of departure or on the duration of the journey, the plaintiff's witnesses are unanimous as to the time of arrival.

The Respondent's Case

The Postmaster General adduced the evidence of Percival Griffiths, a Director in the office of the Contractor-General, who was present to execute his office's oversight capacity in the bid process and to specifically deal with the opening of the tenders. He said he observed that it was three o'clock and the tender box ought properly to be closed. He dispatched Mr. King, an

officer of the OUR, to deal with the closing. Griffiths has testified that he asked Miss Moore one question. Why are you late? To which she responded that there was a problem with the traffic among other problems.

Miss Chambers testified that when she went to the tender box, three o'clock had already passed; the box was fully closed with tape. The opening through which the tenders are deposited was taped over. Prior to the arrival of Miss Moore, Miss Chambers said a gentleman had come to the area, looked at his watch and left. Miss Moore arrived with several envelopes which were not sealed. The Court had the benefit of reading the affidavit of one Mr. McCatty who deponed that he entered the hall and observed the box taped and left with his bid. McCatty's evidence was unchallenged.

Barry Davis said he was instructed to close the tender box at three o'clock. When he arrived at 2:56 p.m. he was satisfied that the time was correct. He checked the time with a security guard. At 3:03 p.m., he sealed the box. He observed a man came and he advised that the tender was closed. The man left without complaint. He observed a lady complaining that it was not yet 3 o'clock. By his watch the time was then 3:06 p.m.

The Law

The ground on which a reviewing Court may impugn an administrative decision were identified in the judgment of Lord Roskill in **The Council of the Civil Service Unions v. Minister for Civil Service (1984) 3 All E.R. 935** at page 954, where he said:

> "Thus far, this evolution has established that executive action will be the subject of Judicial Review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action – as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to Judicial Review on what are called lawyers shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation 1947) 2 All ER 680. The third is where it has acted contrary to what are often called 'principles of natural justice'."

Lord Diplock at page.....summarizes these grounds as follows:

> "The first ground I would call 'illegality' the second 'irrationality' and the third 'procedural impropriety'."

Having identified those three grounds Lord Diplock intimated that further development was likely on a case by case basis and highlighted the

European administrative law principle of "proportionality" as being a likely addition to the grounds enumerated.

These grounds are not mutually exclusive, there is overlapping of the boundaries in many cases (as in the case before this Court). This point was well illustrated by the learned authors of **De Smith, Woolf & Jowell – Judicial Review of Administrative Action**, at page 294, where it is noted; 'Adopting this classification does not mechanically assign any particular administrative offence to any one of the categories. Nor does it claim there is no overlap between them.....the failure to give reasons, or the failure to base a decision upon any evidence could fall equally comfortably into the category of procedural impropriety or irrationality.'

The first declaration sought was sufficiently wide to encompass all three grounds, but the substantial thrust of the Plaintiff's case was an attack upon the 'rationality' of the Postmaster General's decision. The Plaintiff submitted that the Respondent and her representatives were arbitrary and unreasonable. They claimed an arbitrary abortion of the tender process, and the failure of the Respondent to provide an official time piece to determine the time of the closing of the tender, the 90% weighing on price rather than efficiency and performance in the tender documents, the subjective determination by Barry Davis of the time for closing tender and failure to

appreciate that the tender period may be extended for good reasons. Moores' challenge is essentially to the reasonableness of the decision and may well be considered under the head of "irrationality".

Mr. Wilkins submitted that if the reviewing Court found that the applicant arrived in time, then that would be the end of the matter, as the Respondent would have breached its obligation to the Applicant to conform to the conditions of the tender process. With this submission, I cannot agree.

The function of the Court is an exercise of its supervisory function, it is not meant to supplant the decision of the administrative authority with that of its own views of the matter. The reviewing Court is not empowered to find facts, but to review such facts as found to ascertain whether the decision constitutes a lawful exercise of the administrative decision.

This fundamental principle is well illustrated in **Brind and others vs The Secretary of State for the Home Department 1991 1 All E.R. 720**, where a directive of the Home Secretary to the Independent Broadcasting Authority and the BBC prohibited the broadcasting of direct statements by proscribed organizations. The Home Secretary directives were challenged on the ground that they were ultra vires the statute and inconsistent with the terms of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court, after noting the failure of the Applicants

to suggest that relevant matters were not considered or that the Home Secretary considerations included extraneous or irrelevant matters said;

> "Where Parliament has given to a minister or other person or body a discretion, the Courts jurisdiction is limited in the absence of a statutory right of appeal to the supervision of the exercise of that discretionary power by the judiciary to substitute its views, the judicial view, on the merits and on that to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the Court, in the exercise of its supervisor role, will quash that decision.....**To seek the Courts intervention on the basis that the correct or objectively reasonable decision is other than the decision that the minister has made, is to invite the Court to adjudicate as if Parliament had provided a right of appeal against the decision that is to invite an abuse of power by the judiciary** (emphasis mine)."

Langrin J. was mindful of these strictures placed on a Court in its exercise of its supervisory function in reviewing administrative decisions. In the unreported case of **Re; Tropical Airlines; Suit No. M1996/042, delivered October 2, 1996; he said:**

> "Needless to say that this Court in exercising its power of review will not arrogate unto itself the special jurisdiction of a Court of Appeal or attempt to try or retry the issue. However, since the critical conclusion of fact is one reached by the administrative body as opposed to a judicial body the Court regard it proper to review that decision in order to see whether the decision was properly reached within the stated legal framework."

In reviewing the decision of the Postmaster General (PMG) to determine whether it may be deemed to be irrational or unreasonable, the Court is to investigate whether the PMG took into account matters that she ought not to have considered or disregarded matters that she should have taken into account. In either case the decision may be impugned. However, the decision having satisfied these primary considerations may yet be impugned if it can be assailed on the ground of perversity or irrationality. The test for such a course being; if no reasonable PMG acting on the circumstances presented before this PMG could come to a decision that the advertised time for the tendering of bids had passed and that she was justified in refusing the Plaintiff's bid.

On the production of such evidence, the reviewing Court acting in its supervisory capacity will quash the decision. It takes evidence of a very high standard to satisfy this test. The applicant would be required to demonstrate by way of evidence that the decision of the PMG to use language of Lord Green is so "absurd that no sensible person could ever dream that it lay within the power of the authority", see **Associated Provincial Picture Houses Ltd. v Wednesbury Corp. (1947) 2 ALL. E.R. 680 at page 683**, or that of Diplock's in **The Council of Civil Service Unions (supra) at 410**, "It applies to a decision which is so outrageous in its

defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Did the PMG disregard matters she should have taken into account? The Plaintiff did not specifically point to any relevant matter that was omitted from the PMG's consideration. However, issue was taken that there was no provision made to have an official clock by which the closing of the tender would have been guided. It appears to me the issue of an objective assessment of the time was duly considered as demonstrated by the presence of the Contractor General's agent. Additionally, the requesting of time from the security guard and consequent adjustments made to the time. The advertised guidelines published by the PMG's department were in conformity with the guidelines issued by the National Contracts Committee as it pertains to the Deadline for submission of tenders. Mr. Griffiths testifies that there is no stipulation in the procurement guidelines that there must be a clock present. Further, the tender process was preceded by a study done by Price Waterhouse to determine the efficiencies in the contracting of the transport services.

Did the PMG take into account irrelevant matters? There was no complaint of irrelevant considerations.

Bias

Moores has also complained that the PMG has shown bias in past, and also during the present tender process. The allegation of bias hinges on the fact of certain policy direction that were undertaken by the PMG, e.g. splintering of routes, the non-inclusion of a form contract in the tender documents and the rationalisation process undertaken by the department. These actions are undertaken by the PMG for its own pecuniary advantage. In **De Smith, Judicial Review of Administrative Action**, it is stated at page 584: -

> "In some situations it will be perfectly proper for a public body to make a particular decision for its own pecuniary advantage (as distinct from the pecuniary advantage of individual members or officers)."

On the question of bias, the test to be followed by the Court was propounded by Lord Goff in the case of **R v Gough** (1993). "Accordingly, having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him." Does such a danger exist?

What are the circumstances before us? The PMG had recently acquired a new executive officer. New management personnel was co-opted to the team. In 2001, the department decided to explore the feasibility of executing a joint venture arrangement for the transportation of mail and other services. Those ventures failed. In keeping with broad governmental policy of enabling transparency in the use of public funds, the department advertised an invitation of tender process. The department must have a right subject to its legal framework to set policy and implement the policy as it sees fit, even if the implementation is inimical to the interest of other entities. The decision taken by the PMG is clearly in its own self-interest and permissible. In light of these circumstances, I ask myself whether there was a real danger of bias on the part of the PMG department staff that they might have dealt with the Plaintiff's attempt to submit their tender without the necessary impartiality. I see no evidence of such lack of impartiality on the part of the PMG.

No evidence has been adduced before me to prove that the PMG had taken irrelevant matters into her consideration or disregarded relevant matters in coming to her decision not to accept the Plaintiff's bid. Similarly, the Plaintiff has failed to satisfy this Court that the PMG action decision not to allow the deposit of the Plaintiff's bid is so outrageous and in defiance of

logic or accepted moral standards that no reasonable PMG faced with a similar set of circumstances and properly applying her mind to it could have come to the same conclusion.

The Plaintiffs, very bravely in my estimation, sought to impress upon the Court that should their substantial applications fail, this was a fitting case for the application of the principle of proportionality. In the Council of Civil Service Unions Case, Lord Diplock intimated that proportionality as a principle may at some time in the future be introduced into the common law.

In 1991, Lord Lowry, in the House of Lords was emphatic that the concept of proportionality was still not a part of the common law. He said;

> "The first observation I would make is that there is no authority for saying in the sense that the appellants have used it (proportionality) is part of the English common law and a great deal of authority the other way (see Brind and others, supra) at page 739."

The Applications are dismissed. Costs to the Respondent to be agreed or taxed.