[2017] JMSC Civ 117

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 03883

BETWEEN	**NORANDA BAUXITE LIMITED**	**CLAIMANT**
AND	**MINISTER OF LABOUR AND SOCIAL SECURITY**	**DEFENDANT**

IN OPEN COURT

Mr David Wong Ken for the Claimant Ms Althea Jarrett instructed by the Director of State Proceedings for the Defendant

Judicial Review – Certiorari - Minister's Referral to Industrial Disputes Tribunal – Whether *ultra vires* – Labour Relations and Industrial Disputes (Amendment) Act

Heard: November 28 and 29, 2016 and September 19, 2017

LINDO J:

The Parties

[1] The Claimant Noranda Bauxite Limited (NBL) or the Claimant is a company incorporated under the Companies Act of Jamaica with its registered office at Port Rhoades, Discovery Bay in the parish of Saint Ann.

[2] The Claimant Noranda Bauxite Limited (NBL) or the Claimant is a

company incorporated under the Companies Act of Jamaica with its registered office at Port Rhoades, Discovery Bay in the parish of Saint Ann.

Background to Claim

[3] By letter dated October 31, 2012, the Claimant terminated the employment of an employee, Mr Nigel Gayle, who had been employed under a contract. The letter stated *inter alia* "... *therefore effective October 31, 2012 your contract of employment will be terminated for cause, that is, 'frustration of contract caused by your inability to report for duties to perform your job responsibility as Surveyors' Assistant in the Mine Technical Department".* The letter offered Mr Gayle his wages up to the date of the letter, pay in lieu of notice and an *ex gratia* payment.

[4] Senator Lambert Brown, President of the University and Allied Workers Union (UAWU) expressed his surprise with the termination package given to Mr

Gayle by way of email sent on October 31, 2012 to NBL to the attention of Nathan Thompson (copied to Alfred Hemmings). In the email, he indicated his availability to "work out an amicable settlement..."

[5] The UAWU, representing Mr Gayle, and NBL embarked on negotiations and after a number of meetings, at which Mr Gayle was either present and represented by the union, or represented by the union, a settlement package was negotiated and a cheque was collected on July 17, 2013 and cashed by him without any objections. This was after he, on June 20, 2013, had visited the offices of NBL where he reviewed his pension options relating to separation from employment, and selected and signed for his preferred option on a document titled "Voluntary Termination Calculations".

[6] By letter dated September 5, 2013, attorney-at-law Nadine Lawson wrote to the Conciliation Unit of the Ministry of Labour and Social Security (The

Ministry) seeking its intervention. She indicated that she had been engaged by

Mr Gayle and that "...The termination of Mr Gayle was both wrong and unjustified...Mr Gayle having been wrongfully and unjustifiably dismissed would like to be reinstated and compensated... ".

[7] Ms Latoya McCatty, Director, Pre-Conciliation in the Industrial Department of the Ministry, by letter dated October 29, 2013 to NBL, to the attention of Mr

Nathan Thompson, informed NBL of Ms Lawson's letter and invited NBL to a conciliatory meeting. On November 6, 2013, Mr Nathan Thompson, Manager of Personnel and Industrial Relations of NBL sent an email to Ms McCatty indicating that Mr Gayle was represented by the UAWU and that the UAWU had dealt with the matter. By a further letter dated December 16, 2013, addressed to the attention of Mr Thompson, Ms McCatty invited him to attend a conciliation meeting and sought an indication of the availability of the claimant to attend the meeting.

[8] Conciliation meetings were held on January 20, 2014, March 11, 2014 and May 2, 2014, between NBL's representatives, Mr Gayle and his attorney-atlaw, and a representative from the Ministry.

[9] The Minister, on June 25, 2014, referred the matter to the Industrial Disputes Tribunal (IDT) in the following terms:

> *"To determine and settle the dispute between Noranda Bauxite Limited on the one hand and Mr Nigel Gayle on the other hand over the termination of his contract of employment".*

[10] NBL objected to the "terms of reference" by letter dated June 27, 2014 to the Ministry, and the Ministry responded by indicating, *inter alia,* that "as the

dispute has been referred to the Tribunal it is no longer a matter before this Ministry".

[11] A hearing took place at the IDT on September 3, 2014 at which time submissions were made by the attorneys representing NBL and Mr Gayle

in relation to the terms of reference and the objection on behalf of NBL that there was no dispute between itself and Mr Gayle to be referred to the IDT. The IDT, on

September 17, 2014, sent a letter to the Ministry, referring to the 'Terms of Reference', indicating that "At the first day's sitting of the Tribunal both parties to the dispute disagreed with the Terms of Reference...". On December 11, 2014 the matter was again referred to the IDT for settlement.

The Relief Sought

[12] On July 27, 2015 leave to apply for judicial review was granted to NBL. Further to the grant of leave, NBL filed a Fixed Date Claim Form (FDCF) on August 7, 2015 by which it sought the following reliefs:

1. An Order of *Certiorari* quashing the decision of the Minister of Labour, Social Security by letter dated June 25, 2014 to refer a dispute to the Industrial Disputes Tribunal (IDT) (IDT 27/2014) with the following terms of reference:

   "To determine and settle the dispute between Noranda Bauxite Limited on the one hand and Mr Nigel Gayle on the other hand over the termination of his contract of employment."

2. An Order of Prohibition preventing the IDT from proceeding on the reference 3.

   Costs

4. Such further and other reliefs as this Honourable Court deems just.

[13] The claim is based on the following grounds:

1. The Honourable Minister of Labour and Social Security acted *ultra vires*, unlawfully or without authority when he made the reference, since the

condition precedent to the exercise of the jurisdiction of the Minister under the LRIDA to refer the matter to the IDT was not satisfied, that is, there was no industrial dispute about which the former worker or anyone purporting to represent him had informed the claimant after the former worker had collected and encashed his cheque without demur.

2. The Honourable Minister of Labour and Social Security erred when he failed or refused to consider the fact that the matter giving rise to the dispute about which the Applicant was notified by the Respondent had been fully and finally settled by the UAWU, the union that represented the former worker at all material times.
3. The decision of the Honourable Minister of Labour and Social Security is unreasonable and irrational. The honourable Minister erred as he failed to consider that the effect of the reference is to allow a former worker having benefitted as a unionized worker to now have recourse to the dispute resolution mechanisms embedded in the LRIDA exclusively for non-unionized workers, a benefit not intended by Parliament
4. The reference is inimical to the national interest and if allowed to stand and the IDT proceeds with the hearing, it would lead to instability and uncertainty in the labour and industrial relations practice and seriously erode and undermine the trade union movement in Jamaica.
5. There is no alternative remedy available to the claimant
6. This application has been made promptly as Leave to apply was granted by this Honourable court on July 27, 2015.

[14] The FDCF is supported by the affidavits of Nathan Thompson and Lambert Brown both sworn and filed on August 7, 2015.

[15] On March 7, 2010 the Defendant filed affidavit of McCatty in response at the second hearing to the claim of the FDCF. The Court made orders during paragraph 13 and part of paragraph 15 of the Affidavit of Mr. McCatty.

[16] On March 8, 2016 the court made an order deleting paragraph 2 of the FDCF which states: "*An Order of Prohibition preventing the IDT proceeding on the reference*".

The Evidence

[17] The background facts relating to the claim, as set out earlier, and as contained in the affidavits filed in the matter, provide the evidential basis of the claim and are not in dispute and will therefore not be rehashed.

[18] Counsel for both parties made submissions to the court and provided a number of authorities in support of their respective contentions. I will not restate the submissions in their entirety nor will I refer to all the cases cited.....

[19] Mr Wong Ken's submission, in essence, is that the Minister acted unlawfully and without authority and that he made an error of law when he made the reference. He indicated that the condition precedent to the exercise of his jurisdiction under the LRIDA was not satisfied and he failed to recognize that any dispute which may have existed between the claimant and its former employee, Mr Gayle, had been the subject of negotiations and was fully settled by the union which represented Mr Gayle at all material times. He noted that this information was communicated to the Director of Pre Conciliation at the MLSS, and this is admitted. Counsel expressed the view that the Minister ignored or did not pay due regard to the documentary evidence before him that supported the settlement between the Claimant and Mr Gayle, and in the circumstances at the time of the referral, the condition precedent to the exercise of the jurisdiction by the Minister under the LRIDA was not satisfied.

[20] Ms Jarrett on behalf of the defendant indicated that the only issue to be resolved was whether when the matter was referred to the IDT, by letter dated June 25, 2014, there was a dispute. She indicated that the court has to look and determine whether any evidence before him would make him satisfied that there is a dispute to be referred to the IDT and questioned whether the minister could have been properly satisfied that there was no dispute.

[21] Counsel noted that the email did not say the matter was settled, therefore the question was what "union dealt with matter" means. She also noted that NBL's representatives attended three conciliation meetings and that there was no challenge to Ms McCatty's statement that at the meeting held on January 20, 2014, its representatives did not seek to refute the contention of Ms Lawson that she had made attempts to discuss the matter of the termination of the employment of Mr Gayle and had not been successful.

[22] She contended that the precursor to the Minister's referral was the fact that the matter remained unresolved after three conciliation meetings and also submitted that contrary to the arguments of the claimant's attorney that the Minister acted irrationally and was sidetracked, he had regard to the relevant law and applied it, and he had all the relevant issues considered so his conduct was reasonable and *intra vires.*

The Issues

[23] The contention before the court is whether the Minister acted *ultra vires*, or without authority when he made the reference and essentially turns on whether in the circumstances there was an industrial dispute when the Minister, by letter dated June 25, 2014, made the reference to the IDT.

The Court's Role

[24] Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Services** [1985] AC 374 at page 408 10 F-H, discussed the scope of judicial review in relation to decision making powers and noted that it was the means by which the court exercise control over administrative action. He referred to three recognised heads under which decisions are reviewable -- illegality, irrationality and procedural impropriety. He stated as follows:

> *"By 'illegality' as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. -* 24 *- By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (see* ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** *[1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it... I have described the third head as —procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involves any denial of natural justice.*

[25] Grounds for judicial review were also explained by Roskill LJ in the CCSU case. He said:

> *"...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 actions, 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 review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1947] 2All ER 680,[1948] 1 KB 223). The third is where it has acted contrary to what are often called "principles of natural justice".*

[26] It is by way of judicial review that courts exercise supervisory jurisdiction over inferior bodies or tribunals which exercise judicial or quasi judicial functions or make administrative decisions which affect the public. Judicial review is concerned with the process by which the decision is arrived at and not the substance or merit of the decision made. A court will therefore seek to correct a decision where it is

unreasonable or where the decision-maker acts outside of that which he is authorised to do.

[27] The court's duty is therefore to review the relevant statutory provisions and authorities and consider the submissions of Counsel in assessing whether on the evidence, the Minister in exercising his discretion in making the referral, acted unreasonably or outside the scope of his powers under the enabling statute and thereby erred in law or if he failed to observe or to take into account relevant information and whether his decision to make the referral was one which no reasonable tribunal, properly directed, could have arrived at.

The Law and Analysis

[28] In **Brind v. Secretary of State for the Home Department** [1991] 1 All ER 720 at 731, Lord Ackner said as follows:

> *"Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its view, the judicial view, on the merits and on that basis 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 supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a 'perverse' decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which 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".*

[29] In **Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation** [1948] 1 KB 223 at 229 Lord Greene MR in stating the principle said *inter alia*:

> *"There have been in the cases expressions used relating to the sort of things that authorities must not do... - unreasonableness, attention given to extraneous circumstances... For instance, we have heard in this case a great deal about the meaning of the word "unreasonable." It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority..."*

[30] Sykes J, in **Kristi Charles v Maria Jones &/o**r **The Minister of Education** [2008]JMSC Civ. 48 at paragraph [5] suggested another ground for reviewing a Minister's administrative decision as "the error of precedent fact principle". This, he said, was where certain facts must be found to exist before a power can be exercised by the decision maker, in which case the courts can look to see if those facts are present and if they are not, the decision will be vulnerable to challenge.

[31] From the above it can be seen that there is a plethora of authorities which show that in determining whether a tribunal or body is amenable to judicial review, the source and nature of the power being exercised by the tribunal or body has to be examined. A determination of the legality and reasonableness of the decision of the Minister to make the referral therefore requires a contextual appreciation of the nature of the power to be exercised by him under the **LRIDA.**

[32] **The LRIDA**, vests authority for the referral of industrial disputes in the Minister.. He exercises this authority pursuant to Section 11A (1)(a)(i) which states:

"Notwithstanding the provisions of Section 9,10 and 11, where the minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative-
(a)refer the dispute to the Tribunal for settlement-
(1) if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties"

[33] The LRIDA also gives to the Minister directions in relation to matters which do not need to be established in referring a matter to the IDT in disputes which involve an individual who is not a unionized worker. **Subsection 3** (b) reads as follows:

"(3) *Nothing in this section shall be construed as requiring that it be shown, in relation to any industrial dispute in question, that-*

(a) Any worker who is party to the dispute is a member of a trade union having bargaining rights.

Section 2 of the LRIDA defines the term 'Industrial Dispute' thus:

"industrial dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, and-
(a) in the case of workers who are members of any trade union having bargaining rights, being a dispute relating wholly or partly to-
(i) terms and conditions of employment, or the physical conditions in which any workers are required to work;
(ii) engagement or non-engagement, or termination or suspension of employment, of one or more workers;
(iii) allocation of work as between workers or groups of workers; . .

(iv) any matter affecting the privileges, rights and duties of any employer or organization representing employers or of any worker or organization representing workers; or

(v) any matter relating to bargaining rights on behalf of any worker;

(b) in the case of workers who are not members of any trade union having bargaining rights, being a dispute relating wholly to one or more of the following:

(i) the physical conditions in which any such worker is required to work;

(ii) the termination or suspension of employment of any such worker; or (iii) any matter affecting the rights and duties of any employer or organization representing employers or of any worker or organization representing workers;

[34] The **LRIDA** therefore sets up the framework for the resolution of industrial disputes starting with the powers exercised by the Minister and it sets out a process by which the Minister's discretion is to be exercised. The question is therefore whether there was at the material time an industrial dispute which would give rise to the Minister's referral.

[35] I note that the statute does not permit the Minister to make a referral in every instance where there is a dispute between an employer and an employee even if such dispute occurs in relation to the termination of the employment. The power given to the Minister by Section 11 of the LRIDA can only be properly invoked in circumstances which conform with the overall scheme of the LRIDA and after the conditions precedent are satisfied.

[36] It is clear that the Minister's referral in this case was prompted by the letter from attorney at law, Nadine Lawson. Mr Gayle, by this time was no longer an employee of NBL having been separated as at October 31, 2012 and having accepted his separation package as negotiated on his

behalf by the UAWU, a Trade Union having bargaining rights, and of which he was a member.

[37] The evidence, which has not been contradicted, discloses that up to the time of the negotiations giving rise to the package which Mr Gayle accepted, he was a unionised worker, being a member of the UAWU. The evidence also shows that approximately nine months after receiving the letter terminating his employment, and after the negotiations between NBL and the UAWU on his behalf, he collected a cheque which he cashed without any objections.

[38] There is no evidence to show that Mr Gayle was not satisfied with the outcome of the negotiations which took place between the union which represented him and NBL. The evidence which is uncontroverted, is that he returned to the claimant's office in relation to his pension benefits after which he signed for and subsequently encashed the cheque given to him, and it was some two months later that attorney-at-law, Nadine Lawson contacted NBL indicating that Mr Gayle had been unjustifiably dismissed.

[39] The evidence also discloses that when the matter came on for the first sitting before the IDT, at the point where the parties were to indicate if they were in agreement with the "Terms of Reference", Counsel for the claimant indicated that there was a preliminary issue to be determined as to whether or not there is a dispute capable of being referred to the Tribunal.

[40] NBL is maintaining that the Minister had knowledge that the issues giving rise to the dispute had been settled by the UAWU, the union representing Mr Gayle, and that the Minister acted *ultra vires* his powers in making the referral to the IDT for settlement and that the effect of the

referral is to allow Mr Gayle to now claim, as a worker for whom no trade union has bargaining rights, that an industrial dispute exists.

[41] There is correspondence from which it is seen that the issue relating to Mr Gayle's separation from the claimant company was addressed to the point where he accepted a negotiated package. It was therefore appropriate for the Minister to consider the fact that Mr Gayle had received a negotiated package in his capacity as a former employee

for whom the union had negotiated in determining whether there was a dispute capable of being referred to the IDT. The Minister therefore erred in failing to consider that the matter which gave rise to the dispute had been addressed by the union on behalf of Mr Gayle and the employer, or former employer NBL, and that in referring the matter to the IDT it would allow him to now benefit as a non-unionized employee.

[42] It is an undeniable principle of law that a discretionary power conferred by statute must be exercised for proper purposes. Where a decision maker, such as the Minister, acting by virtue of his statutory powers, has failed to take into account relevant considerations or has taken account of irrelevant considerations his decision may be quashed as he will be deemed to have failed to exercise his jurisdiction or to have exceeded his jurisdiction.

[43] Additionally, if a tribunal makes a finding of fact which is not supported by the evidence before it, it will be held to have erred in law because it would have acted unlawfully in finding facts without there being any basis for so doing and would be regarded as unreasonable or irrational.

[44] Lord Reid in the case of **Padfield and Others v Minister of Agriculture, Fisheries & Food and Others** [1968] 1 All ER 694 indicated that the discretion of the Minister should be exercised to

promote the intention of parliament and objects of the Act must be determined by construing the Act as a whole and that the courts do not accept that this administrative discretion is unfettered.

[45] There was no satisfactory evidence on which the Minister could possibly find that at the time he made the referral there was an industrial dispute. The Defendant had not taken into consideration the fact that at the time the matter was brought to the attention of the Ministry, Mr. Gayle had already exercised his bargaining rights as an employee who had been a member of a trade union, and that he had encashed the cheque with the amount that was agreed between NBL and the trade union on his behalf, without any objections. In that regard, I find that there was no dispute capable of being referred to the IDT.

[46] I agree with Counsel for the claimant that there were several sources from which the Minister was aware that Mr Gayle had been represented by the UAWU and had he properly informed himself of things he was bound to consider he would have recognised that the matter had already been dealt with. The Minister's decision was therefore a misinterpretation of the law by which his actions were guided. It was unreasonable and irrational and lacked due consideration of all relevant factors.

[47] I do not find that the Minister was concerned with an industrial dispute as defined in the LRIDA. This was a dispute between the company and an employee, or former employee, for that matter. The Minister therefore disregarded a relevant consideration that there had been negotiations between the union and the claimant and a package arrived at. His power to refer the matter can only be invoked in circumstances which conform with the LRIDA and where the conditions precedent are

met and at the time of the referral, even if there was a dispute, it did not amount to an industrial dispute as defined by the LRIDA.

[48] When all the circumstances of this case are examined, this court finds that the referral to the IDT by the Minister was unreasonable and irrational. It is clear that the Minister was acting outside the parameters of the LRIDA which gives him the discretion to make the referral. Having regard to the facts there was therefore an error of law on the record to invoke the supervisory jurisdiction of the court as the Minister failed to act in accordance with the law by which he was bound.

[49] It is settled that an order for *certiorari* may be granted to quash a decision which is *ultra vires*. The claimant has established that the defendant has acted outside of his powers and was acting under an error of law in making the referral to the IDT and was therefore not authorised to do so. In the exercise of its supervisory powers the court is therefore minded to quash the decision of the Minister.

[50] The court therefore grants an order of *Certiorari* quashing the decision of the Minister of Labour and Social Security.

Costs to the claimant to be agreed or taxed.

This one