In the Supreme Court of Judicature of Jamaica

Suit No. M. 21 of 1976

Before : The Full Court

Parnell, Melville and Carey, JJ.

Regina v. Industrial Disputes Tribunal

Ex parte Jamaica Playboy Club Inc.

Application for an order of certiorari

R. N. A. Henriques for the applicant

K. Knight for the National Workers Union

L. B. Ellis for the Tribunal

July 7, 8, 9, 1976

Parnell, J. :

The Court being unanimous in its conclusion, we do not think it necessary to reserve our reasons.

We are grateful to the learned gentlemen for the assistance they have ably given to the Court in this interesting and difficult matter. It is believed that this is one of the early cases in which the impact of the Labour Relations and Industrial Disputes Act of 1975, on the rights of workers and trade unions in relation to those of employers has now come under judicial review.

On June 10, Rowe, J. granted leave to the applicant to apply for an order of certiorari to bring into this Court, with a view to its being quashed, an Award of the Industrial Disputes Tribunal made on the 6th May. On July 10, 1975, and made under the Labour Relations and Industrial Disputes Act, the National Workers Union put forward a claim for bargaining rights in respect of the applicant's supervisory and clerical staff. The Minister was later brought into the picture.

He directed that a ballot of such workers should be taken for the purpose of determining the matter. But a dispute arose between the applicant and the Union as respects the category of workers of whom the ballot should be taken and the persons who should be eligible to vote in the ballot. Conciliatory meetings between the parties

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having failed to settle the dispute, the Minister named a Tribunal pursuant to sec. 5(3) of the Act with the following terms of reference:

> " to settle the dispute as respects the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot to determine the representational rights claim by the National Workers Union for certain categories of workers employed to the Playboy Club Hotel. "

The Tribunal met on three days, namely, February 3, 25 and 26, 1976. On the second and third days of the hearing, evidence was adduced to indicate the duties and responsibilities of about thirty-two positions held by employees whom the applicant has claimed fall under the level of "managerial, confidential, supervisory and administrative" and should not be represented by the Union which already held bargaining rights for the rank and file workers employed by the applicant.

The award of the Tribunal is as follows:

(1) That the attached categories of workers (Appendix I) have the indisputed right to join the trade union of their choice.

(2) That the National Workers Union or any other union is eligible to represent such workers.

(3) That the said categories of workers referred to above form a bargaining unit separate and apart from the bargaining unit of the rank and file workers.

(4) That a poll should be taken by the Ministry of Labour and Employment to determine the representational rights of such workers.

The applicant has sought to quash the Award in the form above stated on several grounds. And put shortly, the grounds are as follows:

(1) The Tribunal exceeded the terms of reference when it made the Award.

(2) The Tribunal acted ultra vires when it made the said Award, in that it was not requested to determine whether the categories of workers set out in Appendix I "have

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the indisputed right to join a trade union of their choice" or whether the N.W.U. or any other trade union is eligible to represent the said workers.

(3) The Award failed to settle the dispute 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 representational rights claim.

(4) The Tribunal erred in law in making the said Award having regard to the proper interpretation of "bargaining unit" as defined by sec. 2 of the Act and of sec. 5(3) of the said Act and Regulation 4 of the Regulations.

(5) The Tribunal erred in law when it made an Award to the effect that the N.W.U. was eligible to represent the categories of workers set out in Appendix I to the said Award.

It seems to me that the grounds of attack are put in this way owing to the clear provision of sec. 12 (4)(c) of the Act which states that an award in respect of any industrial disputes referred to the Tribunal for settlement:

> " shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law. "

Mr. Knight has argued that the Tribunal was comprised of laymen, and that the form of the award should be examined on the background of how the issues were debated before them. We have had an opportunity to read the transcript of the notes of the proceedings on the second and third days.

Mr. Peter Mais, an attorney-at-law, represented the applicant before the Tribunal. The N.W.U. was represented by Mr. Clive Dobson, an officer of the Union. It has struct me that the level of representation was very high. The interest of each party to the dispute was so ably demonstrated that it earned the applause of the Tribunal.

I shall go into a little of the history of the matter. This may explain why the Tribunal made the award as it is and whether it can be sustained. In 1969, an agreement was made between the applicant and the Bustamante Industrial Trade Union. The agreement is dated

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April 1, 1969. The applicant recognised the B.I.T.U. as the bargaining agent of certain of its workers. But it was specifically declared and agreed that the term "workers" did not include:

> " managerial, supervisory, confidential, clerical and other administrative and executive staff, constables, security staff and 'Bunnies' of the Club Hotel. "

By 1974, the workers had changed their Union. On the 5th July, 1974, the applicant entered into an agreement with the N.W.U. Certain terms and conditions of employment of the workers were settled and it was stated that the agreement:

> " shall remain in force until the 29th February, 1976. "

But the said agreement was made "supplemental to the agreements made on the 1st April, 1969, and 1st April, 1972." It is clear, therefore, that the "exclusion clause" in 1969, whereby certain managerial, supervisory, confidential, clerical and administrative personnel would not be "unionised" was recognised.

What were the main issues before the Tribunal? They are clearly set out at the second day's hearing. The transcript at p. 31 shows that Mr. Joseph Hylton, the financial controller of the applicant, in giving his evidence said this:

> " What we really want to establish is whether these categories listed here are supervisory, managerial, and confidential and I would think that the onus would be on the Union to go through this list and to indicate to the Tribunal which categories they do not agree with as being managerial etc. "

Mr. Mais had this to say at p. 31:

> " ..... the Union's claim is whether or not these employees are managerial, confidential, supervisory, administrative, they must be included in a Union. I understand the claim to be that. The first question that the Tribunal will have to answer, in my respectful submission, is whether these five groups will be included in the rank and file, whom they currently represent. "

But this is not all. Mr. Mais continued and he seems to have been clarifying the point:

> " Substantially, my objection is to the National Workers Union being accorded bargaining rights in respect to those categories of workers in a situation in which the National Workers Union already represent the rank and file employees. "

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The position of the Union is made equally clear. Mr. Dobson said this (see p. 31 of transcript of second day):

> " Mr. Chairman, if I might add, however, as we have described in Form I of the Regulations..... we are seeking to represent the very category of workers listed here. Our position is not to determine whether they are supervisory, clerical or confidential people, that is not our position. "

Mr. Dobson then explained the Union's position:

> " Our position, gentlemen, is the right of these workers under the Law to be represented by a Trade Union as association, whatever you want to call it, of their choice and there I think the exercise, in our opinion, that we are going through now is not too pertinent as far as we are concerned. "

In my opinion, the issues were crystallised on the second day, if not before. Before the Tribunal, Mr. Mais - as I have already indicated - argued with skill and urged every material point he could muster. A report of the Duckenfield Enquiry held in 1965 was heavily relied on by Mr. Mais, and by Mr. Henriques when he opened his submissions before us on Wednesday. Duckenfield Estate in Saint Thomas was the scene of an industrial dispute when the management refused to recognise a trade union which was formed to represent certain members of staff. We were supplied with a copy of the report dated October 12, 1965. The stand of the Duckenfield management is put at p. 3 of the report as follows:

> " ..... after most careful consideration, we have come to the decision that although the right of clerical and supervisory employees to organise and be represented by an organisation is fully recognised, we are not prepared to agree that any clerical, administrative, or supervisory employees on the staff of this company should be represented by any Trade Union. "

The recommendations of the Board which was headed by a former Chief Justice of Jamaica, state inter alia, as follows:

> " We are of opinion that members of staff who come within the terms, managerial, administrative, supervisory and confidential, are all part of management and should not be unionised. "

The report states:

> " It is an accepted principle that management cannot function properly if its employees, who are 'the arms of management' are unionised. "

The Duckenfield Enquiry covered a hearing which lasted for about fourteen days. The disputants were represented by men who were skilled in the practice and custom of trade unionism in Jamaica up to that period.

And the stand of the management of Duckenfield Sugar Estate may be succinctly put as follows: Every member of a Trade Union owes loyalty to his Union. If there is a conflict between Management and a Trade Union, there may be divided loyalty on the part of a member of staff as to which side he should faithfully support. Further, that in the Sugar Industry, there have always been two divisions of labour, that is to say, management and its staff and on the one hand and the rank and file on the other. And it has always been accepted and agreed that "staff" should not be represented by a trade union.

Before us, Mr. Henriques argued:

(1) That whilst a trade union could represent certain workers, it is not permissible for the same trade union which represents the rank and file to represent managerial and supervisory staff;

(2) That before the coming into operation of the Labour Relations and Industrial Disputes Act 1975, the practice in Jamaica was that there were certain levels of management which were not capable of being unionised; that it was management which decided the "level of management" which was not subject to Union representation and that the Act has "codified" the prior practice;

(3) That Regulation 4 of the Labour Relations and Industrial Disputes Regulations has prescribed the factors to be considered where a dispute exists touching the category of workers of whom a ballot should be taken or the persons who should be eligible to vote, and that the Tribunal ignored these factors and was pre-occupied with the right of every worker to belong to a Trade Union which the Act has created.

In support of his arguments, he referred to the definitions of certain terms under the Act; he mentioned an episode during the proceedings and cited two cases decided by the Industrial Court of Trinidad in 1965 and 1969.

The term "bargaining unit" is given a restricted definition by the Act, namely:

" those workers or categories of workers of an employer in relation to whom collective bargaining is, or could appropriately be carried on. "

It has been contended by Mr. Henriques that the Act, by its definition, recognises a situation where certain workers of an employer could not appropriately be a part of a bargaining unit for union representation. He argues that the previous practice which existed in Jamaica to exclude a certain level of managerial and supervisory staff from being represented by union or by the same union which represents the rank and file has been preserved and that the right to join a trade union is not to be confused with the right to be a part of a particular bargaining unit which is not appropriate in respect of a particular employer.

Section 4(1) of the Act states:

" Every worker shall, as between himself and his employer, have the right -

(a) to be a member of such trade union as he may choose;

(b) to take part, at any appropriate time in the activities of any trade union of which he is a member. "

While I am prepared to admit that the argument of Mr. Henriques, on this aspect of the case, is not devoid of substance, I do not think it necessary to express any considered opinion thereon. And how much, if any at all, remains of the right of management to restrict certain of its employees from union representation which the Duckenfield Inquiry adumbrated, is not necessary to decide. The Act has undoubtedly brought about certain substantial changes in the rights of workers and in Union representation. One day, perhaps, certain of these changes, as they affect certain rights, may call for judicial adjudication.

The episode to which reference has already been made must be examined on the basis of the provision of sec. 5(3) of the Act which provides as follows:

" Where the Minister decides to cause a ballot to be taken and there is a dispute, which he has failed to settle, as respects the category of workers of whom the ballot should be taken or the persons who 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 dispute referred to it under this subsection, have regard to the provisions of any regulations made under this Act and for the time being in force in relation to ballots. "

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The wrangle which the Tribunal must settle, may have to be scrutinised by the evidence and the submissions which each party may offer. The Tribunal cannot act on anything else. Regulation 4 of the Regulations requires the Tribunal to consider certain factors in a dispute of the kind referred for settlement. They are as follows:

(a) the community of interest of the workers in that category, and in particular, whether the duties and responsibilities and work place are identical for all of those workers:

(b) the history of collective bargaining in relation to the workers in the employment of the employers in the trade or business in which that employer is engaged;

(c) the interchangeability of the workers in respect of whom the dispute arises;

(d) the wishes of the workers in respect of whom the dispute arises.

On the third day, Mr. Joseph Hylton, the applicant's financial controller, was being examined by Mr. Mais concerning the duties and functions of the category of workers of whom union representation was being claimed. The dialogue, insofar as it is material, ran as follows:

" Q: Do you provide accommodations to these categories of employees in respect of this dispute?

A: Most of them, not all, but you are talking about the people that are now being claimed.

Q: Would you regard this as being reasonable, highclass accommodation?

A: Yes, I would say so. "

An objection was then raised by Mr. Dobson on the ground that the evidence was "irrelevant." It is not clear whether what prompted the objection was the reference to "accommodation" generally or to "highclass accommodation."

Mr. Mais explained that he was trying to establish "community of interest" as is mentioned under Regulation 4 and that it was the duty of the Tribunal to admit the evidence and consider it. One of the members of the Tribunal was in sympathy with Mr. Mais.

Mr. Noel Holness, the member in question, is reported to have expressed his views as follows:

> " I would think that Mr. Mais has the right of way to present his case as he sees fit, and it must be for the Tribunal to decide whether this evidence will be of use to us. "

But the majority had its way. The Chairman and the other member, Mr. D. White, were of the view that the objection should be upheld, In making the ruling the Chairman savoured it with a little bewailing. Said he:

> " We here are not lawyers, we are for equity and justice, and of course, legal basis, and we can always get legal advice quickly, but we like to be as you know very well equity and custom sometimes quite over-rule the actual law. "

It is clear that the Chairman's ruling was not only wrong but his reasoning is faulty. However, he gave Mr. Mais the assurance that:

> " in our discussion, we will take due notice of what you said, believe that, so don't worry too much Mr. Mais. "

Certainly, it must be relevant whether any of the workers on the disputed list was given reasonable accommodation by the applicant to indicate either the nature and responsibility of the duties to be discharged at the work place or the community of interest as between the workers themselves. The terms of reference have everything to do with this matter since the relevant Regulation demands that it be considered where the evidence points to this element. I do not agree with Mr. Henriques that this erroneous ruling - put it at its highest - is an indication that what the Tribunal considered relevant was only whether as between himself and his employer, the worker had the enjoyment of his newly acquired statutory right.

An erroneous ruling committed within jurisdiction may be the subject of an appeal but of itself is not, in my view, a ground to quash by way of certiorari.

We were told,- and this has not been controverted - that during the hearing about four to five positions were either deleted from the original list by the Tribunal or by consent were removed on the ground that those workers constituted part of the "upper arm of management" of the applicant's business. The remainder was in dispute and having considered the evidence as to duty and responsibility of each of the posts mentioned in the Appendix, the Tribunal came to the conclusion - and an award was made - that the categories listed have the right to

join the trade union of their choice and therefore were capable of being formed into a bargaining unit separate and apart from the rank and file. The Tribunal rejected the contention of the applicant that the list contained supervisory, managerial and confidential personnel which could not be appropriately the subject of collective bargaining.

Mr. Knight has asked us to use our common sense and to remember that the Tribunal was composed of laymen. He has pointed out that the award is not framed in the precise language of the trained lawyer and that a domestic tribunal is generally not capable of handing down an award with exactness. He contends that the applicant and the Union were aware of the category of workers in dispute and that the list was prepared by the applicant.

Mr. Knight has conceded that if in any given unit, certain supervisory staff can be identified with policy making, then those who comprise that staff should not be represented by the said union which represents the rank and file. He has contended that what should concern the Court is whether the Tribunal did have before them sufficient facts to come to the conclusion as mentioned in the award. When his turn came, Mr. Ellis for the Tribunal adopted the arguments of Mr. Knight with a show of gratitude.

Is it open to us to say that there was no evidence to ground the award? Can the award be attacked in the way it is worded having regard to the manner in which the battle was fought before the Tribunal? Did the Tribunal commit any error so as to move us to quash the whole or part of what they have awarded? As far as I am concerned, I would answer each of the above questions in the negative. The true standing and efficacy of each of the positions on the list cannot be determined by reference to the label given to it. The duties and responsibilities which are attached to the office and actually performed must be the measuring rod. The result is a question of fact which was submitted to the Tribunal for settlement.

The list shows, for example, that the front-desk manager, the receptionist, the telephone operator and the dining room captain

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are claimed by the applicant as being unsuitable to form a bargaining unit having regard to the duties and responsibilities of each of them. Alternatively, if these workers could be the subject of collective bargaining, the Union to represent them should not be the one which already represents the rank and file.

Relying on common sense and doing their best in a difficult situation, the Tribunal have given their answer. I am unable to detect anything in the several grounds relied on which could be a possible basis to disturb the award. I would dismiss the application with the usual consequences.

Melville, J. :

I agree with the order proposed. I think it is common ground between the parties before us in so far as paragraphs 1 and 2 of the Award are concerned that those matters are superfluous and do not indeed add anything at all to what the Tribunal was actually required to find. Insofar as paragraph 4 is concerned, Mr. Knight conceded that that also was unnecessary but later retracted, and seemed to argue that it should be tied up with the finding in paragraph 3 of the Tribunal's award.

I regret that I am unable to accept his reasoning there. What is clearly stated there is really a matter entirely for the Minister. The Act sets out clearly that it is the Minister who can order a poll to be taken. That, again, in paragraph 4 seems to be merely superfluous.

I at one time had some doubt as to whether paragraph 3 of the Award really sets out what the Tribunal was required to find. It is simply that they are required to find, having heard the evidence, whether a particular worker, or group of workers listed in Appendix I in the bundle, could properly be a collective - be the bargaining unit. But as far as this is concerned it seems to me that what the Tribunal has said can only reasonably be understood to be that the persons listed in Appendix I are the persons who should form the ballot in this matter.

For those reasons I agree with the order proposed that the application be refused.

Carey, J. :

In this matter counsel moves for an order of certiorari to bring into this court for the purpose of its being quashed an Award of the Industrial Disputes Tribunal which was made on 6th May this year. The learned President, Parnell, J. has already recapitulated with sufficient clarity the background history to this Award, and it would be a needless prolongation of the judgment if I were to repeat what he has already said.

In my view, the question to be determined by this court is, was the Tribunal in error in point of law when it made that Award No. 3. As to Awards Nos. 1, 2, and 4, I will return to them at a later stage in this judgment. It was contended on behalf of the applicant that it was an error in point of law because, in effect, the Tribunal did what it was not required to do having regard to its terms of reference.

The dispute between the Union and the Playboy Club centered around the categories of workers, not being rank and file workers, who had been excluded from agreements made between the parties on 1st May, 1969, on 1st April, 1972, and 5th July, 1974. Those agreements concerned rank and file workers. So that, by these agreements, the N.W.U. did not represent persons who were classified as supervisory, clerical, managerial, confidential and other administrative and executive staff, constables, security staff and bunnies. On 10th July, 1975, the Union sought bargaining rights in respect of these categories of the applicant's staff, in other words, workers not included in the agreements. The applicant was contending that the Union was not entitled to represent these categories because the Union already represented rank and file workers, and it was a well established practice that a Union should not represent rank and file and "arms of management" in the same organisation. The dispute would then seem to be whether the Union was, notwithstanding the agreement, entitled to represent these workers. But the reference by the Minister was not in those precise terms, but following sec. 5(3) of the Act was:

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> " to settle the dispute 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 representational rights claim by the National Workers Union for certain categories of workers employed to the Playboy Club, the applicant. "

The transcript of evidence with which we were provided shows that the Tribunal had before it evidence of the nature and scope of various jobs and degrees of responsibility which attached as a necessary incident to those categories of workers.

Parnell, J. has already referred to Regulation 4 of the Labour Relations and Industrial Disputes Regulations, 1975. It is clear that Regulation 4 was brought forcefully to the attention of the Tribunal. I do not think that because an objection by the N.W.U. to exclude evidence as to quality of accommodation or pay (which was sustained albeit wrongly) could lead to the conclusion that the Tribunal had not applied its mind to the factors which Regulation 4 requires it to do, when recommendation or pay was one of several factors in this Regulation.

As I understand it, the applicant was maintaining before the Tribunal the position that the N.W.U. was not entitled to represent these categories of workers because the N.W.U. already represented the rank and file and could not therefore represent, for brevity, those whom I call "arm of management." The position of the Union was that they were entitled to represent workers not being rank and file except where it was shown that they were not classified as "arms of management." It seems to me that the question which the Tribunal had to determine was whether or not the categories claimed for by the Union were "arms of management" that is, whether the several categories of workers of the applicant were such in relation to whom collective bargaining could appropriately be carried on.

We were told in the course of argument at the Bar that either by concession or on its own motion, some categories of workers were in fact excluded by the Tribunal from the categories in Appendix I of the Award, on the basis that they were "arms of management." As I said, the Tribunal had all these matters before it, namely, evidence as to scope and character of job, the degree of responsibility. It held by its award that the workers in Appendix I together were eligible to vote,

or rather, were the persons whose ballot ought to be taken.

In my judgment, the Tribunal did no more than it was asked to do. I am not, therefore, persuaded that there is any error on the face of the Award 3.

As to Awards 1, 2 and 4, it seems to me that the reason why those awards were framed in the form they now appear, was by virtue of the manner in which the respective cases were presented before the Tribunal and they were mainly rejecting the positions taken. Those Awards 1, 2 and 4, add nothing and do not detract anything at all from Award No. 3. Award No. 3 was somewhat inelegantly expressed, and some degree of sympathy must be shown the Tribunal. For myself, I would respectfully recommend either that the Tribunal should have as one of its members a person with legal training, or training in industrial relations or perhaps, a secretary qualified in law, should be attached to it.

It is not necessary, in my judgment, to determine whether the Act of 1975 alters the practice whereby a Union considers itself as being bound not to represent the rank and file as well as the "arms of management" in the same organisation. Whatever the legal position, as I understand Mr. Knight for the Union, he accepted that the same Union ought not to represent the rank and file and "arms of management" in the same organisation. I prefer not to express a concluded view as the matter has not been fully argued before us.

For these reasons I also agree with the order proposed by my brethren.

Parnell, J. :

The order of the Court is that the application is refused with costs.