

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M-36 OF 2001

***IN THE MATTER of an Award of the
INDUSTRIAL DISPUTES TRIBUNAL
DATED 14TH day of February, 2001.***

A N D

***IN THE MATTER OF THE LABOUR
AND INDUSTRIAL DISPUTES ACT.***

***R v. INDUSTRIAL DISPUTES TRIBUNAL EXPARTE
JAMAICA CIVIL SERVICE ASSOCIATION.***

Mr. Bert Samuels instructed by Knight, Pickersgill, Dowding & Samuels for the Applicant.

Ms. Ingrid Mangatal and Mr. Peter Wilson instructed by the Director of State Proceedings for the Respondent.

Heard: 19th December 2001, 14th January & 12th April, 2002

Pitter, J.

This is an application by way of Judicial Review in which the Applicant the Jamaica Civil Service Association seeks to quash by certiorari an award made by the Industrial Disputes Tribunal on the 14th February, 2001 concerning the rate at which travelling officers in the Jamaica Civil Service

should be paid for using their motor cars in the performance of their official duties.

The ground is as follows:-

“That the ground upon which the Applicant will rely inter alia is that the Tribunal failed to act on the evidence put before it by the Applicant and the 1st respondent and based its finding on a sum not representing a true re-imbusement of expenses incurred by Civil Servants for travelling and motor car up-keep and in fact is a sum which will have to be subsidised by Travelling officers”.

This ground was further expanded in the Affidavit of Edward Bailey in support of Judicial Review, thus:-

“That at the hearing before the Tribunal the Association presented through their experts the sum of \$16,886.67 per month as the real cost incurred by travelling officers for upkeep and travelling of their motor cars and the Government in their presentation and with the advice from their experts led evidence that the cost incurred would be \$18,500 per month. That the Tribunal in its findings awarded \$15,000 per month contrary to the evidence placed before it and therefore the award is bad in Law and unsupported by the evidence”.

Negotiations between the Jamaica Civil Service Association and the Government of Jamaica regarding a revision of the rate of travelling and upkeep for travelling officers employed by the Government took place over a protracted period in excess of one year ending in September, 2000. There was no agreement on a proposal by the Association that the rates should be \$16,886.67 per month for upkeep and \$10.70 per km for travelling nor on the

Government's offer of \$15,000 per month for upkeep and \$10.35 per kilometer for travelling. A dispute arose as a result and the matter referred to the Industrial Disputes Tribunal, the terms of reference being:-

“To determine and settle the dispute between the Government of Jamaica on the one hand and certain workers employed by the Government of Jamaica and represented by the Jamaica Civil Service Association on the other hand, over the Association's claim for a revision of the travelling rates”.

The Tribunal heard evidence from both parties with sittings lasting from November 2000, to February 2001 and at the end thereof submissions were made by the respective representatives. Mr. Edward Bailey represented the Jamaica Civil Service Association and Mr. Peter Wilson represented the Government. On the 14th February the Tribunal made the following award:-

“AWARD

The Tribunal awards

- (a) with effect from October 1, 2000 full upkeep at the rate of \$180,000 per annum.
- (b) with effect from September 1, 2000 a kilometer rate of \$10.35”

The challenge to the award is in respect of the rate of upkeep; the kilometer rate being accepted.

The Association contends that the Government's offer and the award of the Tribunal are unfair, unjust, unlawful and unconstitutional and conflict with the full import of clause 9.1 of the Staff Order for the Public Service. These Orders do not constitute a contract between the Government and Civil Servants but regulate the welfare, conduct and conditions of service breaches of which attract sanctions.

- S.O. 1.3 (ii) "The provision of the Orders do not constitute a contract between the Crown and its servants".
- S.O. 1.6 "Public Officers may be liable to disciplinary action under the regulations of the appropriate Service Commission in respect of breach of any of these Orders".

Under the heading "**TRANSPORT AND SUBSISTENCE**" sub-head "**GENERAL**" is the following provision which reads:-

"9.1 Travelling allowances are divided into two categories viz; Transport and Subsistence, and are granted to cover the expenses actually incurred in the performance of official duties. No officer should be out of pocket as a result of having to travel on duty, but, on the other hand, he should not derive pecuniary advantage therefrom".

Ms. Mangatal is opposing the motion, submits that the terms of reference to the Tribunal do not specifically refer to Staff Order S. 9.1 and in any event that Order is not law but in the nature of an Executive Order which has no contractual basis and may only create legitimate expectations. She further

submits that the Tribunal is not dealing with actual costs and re-imburement, that its task is to come up with a figure which is reasonable and therefore Staff Order 9.1 is not violated by the award made since they are not applying the Order literally and therefore there is no basis for review.

Mr. Samuels in replying contends that Clause 9.1 of the Staff Order is binding on the Tribunal as a guide in determining the issue of travel allowance. This provision he says accords with:-

- (1) Section 18 of the Constitution of Jamaica as it protects its citizens from the arbitrary deprivation of property by anyone, including the State;
- (2) Logic in its application, in that the Officer is merely being re-imbursed the actual cost of travelling on behalf of his employer, namely the Government of Jamaica;
- (3) The need to do equity and guarantee fair play to both parties as it envisages correctly, under-payment being unfair to the employee and over-payment an unjust enrichment of the said employee.

The intendment of this provision is to ensure that officers travelling on official duties should be reimbursed the actual cost incurred. It follows therefore that

any award made by the Tribunal must be in accordance with these provisions. I hold that the correct interpretation to be placed on the above provision accords with the submission made by Mr. Samuels as opposed to that of Ms. Mangatal. The Tribunal is therefore obliged to follow faithfully the guidelines of S.9.1 of the Staff order, to do otherwise is to fall into error.

It is useful at this point therefore to look at some of the provisions guiding the functions of the Tribunal and the effect of awards made by it. These are to be found in the Labour Relations and Industrial Disputes Tribunal Act. Section 12(4) (c) reads:-

“An award in respect of any industrial dispute referred to the Tribunal for settlement shall be final and conclusive and no proceeding shall be brought in any Court to impeach the validity thereof, except on a point of law”.

Section 12 (7)

“where any industrial dispute referred to the Tribunal involves questions as to wages, or as to hours of work, or as to any other terms and conditions of employment, the Tribunal –

- (a) shall not if these wages, or hours of work, or conditions of employment, make an award which is inconsistent with that enactment;
- (b) shall not make any award which is inconsistent with the national interest”.

It is recognised from the wording of Section 12(4) (c) of the Labour Relations and Industrial Disputes Act that on the hearing of an application for certiorari the Judicial Review Court acts as a Court of review and not as a Court

of appeal. In the case of **Hotel Four Seasons Ltd. V. The National Workers Union** (1985) 22 JLR 201, Carey, J. A after citing Section 12 (4) of the LRIDA which makes the award of the Tribunal final and conclusive and its validity unimpeachable except on a point of law continued-

“The procedure is not by way of appeal but by certiorari, for that is the process invoked to bring up before the Supreme Court orders of inferior Tribunals so that they maybe quashed. Questions of fact are thus for the Tribunal and the Full Court is constrained to accept these findings of fact unless there is no basis for them. It is right then to emphasise the limited functions of the Full Court and to observe parenthetically that the Full Court exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the Industrial Disputes Tribunal....”

In the case of **Racal Communications Ltd. (1980) 2 AER 634** at page 638 Lord Diplock in considering the case of **Anisimic Limited Foreign Compensation Commission (1969) 1 AER 208**, said:-

“The breakthrough made by Anisimic was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision in matters of fact or administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity”.

It is also useful to look at **DeSmiths Judicial Review of Administrative Action** 4th edition where at page 156 the learned authors said:-

- (5) The concept of error of law includes the giving of reasons that are bad in law or (if there is a duty to give reasons) inconsistent, unintelligible or it would seem inadequate. It also includes the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into accountand wrongful admission of or exclusion of evidence.

Discussing Judicial Review, the learned authors in their book **The Cambridge Law Journal 1974** said thus:-

“...The growing tendency to give Acts of Parliament a purposive construction has led to the extension of the concept of error of law to include discretionary administrative power, however wide the authorizing words themselves may be, to achieve some different or broader purpose than that for which the Court on the construction it puts upon the statute, infers that parliament intended it to be used. From this is but a short step to the presumption that parliament intended the discretion to be exercised rationally and responsibly; and rationality and responsibility involve that due consideration should be given to all matters relevant to the

achievement of the intended purpose and that matters irrelevant to that purpose should not have influenced the decision. To fail to do this is to err in law and it is for the Court to determine upon a true construction of the statute what matters are capable of being relevant and what are not”.

Mr. Samuels in his submission contends that the award of \$15,000 per month for upkeep does not represent a re-imbursement of the costs incurred by travelling officers in carrying out their official duties, and to accept this award would leave them out of pocket which would be unfair and in breach of Staff Orders 9.1. He said further that had the Tribunal not included in its deliberations the evidence of the Suzuki Baleno as the “average car” instead of the Toyota Corolla, then an equitable and just solution would have emerged.

The evidence discloses that the mix of cars used in the formula for calculating travelling and upkeep, were the Toyota Corolla 1600 cc, the Mitsubishi Lancer and the Isuzu Gemini. These were the basic cars used up to the time of the negotiations between the parties. A part of the equation was to use one of the cars as the starting point, that is the car which would best represent the average car used by the members of the Association. The evidence further discloses that the average car used over the past recent years in determining travelling and upkeep rates is the Toyota Corolla 1600 cc. Evidence was led on behalf of the Government which includes the Suzuki Baleno motor as

an addition to the mix of cars, and on which much reliance was placed. The Association objected to the use of this car as it did not represent the average car. This car proved to be the least expensive to purchase and the least costly to operate.

Evidence given by Ms. Maria Thompson on behalf of the Government is that she is employed to the Ministry of Finance and Planning as the "Pay Planning Officer" and as such her functions include the costing of claims for increases in salaries and allowances made by various unions and associations and that she played a part in the negotiations with the Jamaica Civil Service Association. She said she was asked to carry out a survey to determine the most popular car used by Civil Servants based on applications for motor car loans as well as the cost of Government's offer to the Association. She said further that based on her survey, the most popular car that was being purchased by the Civil Servants was the Suzuki Baleno. She said her findings were based on loan applications which had not yet been approved. She also admitted in cross-examination that the survey was of new cars to be purchased and that the Suzuki Baleno would not be in the current fleet of cars used by travelling offices. She admitted further that the most popular car used by civil servants is the Toyota Corolla.

It is clear from the evidence of Ms. Thompson that the Suzuki Baleno did not represent the “average car” as this car is not a car in the fleet of cars used by traveling officers. It raises the question therefore whether evidence should have been led regarding the Suzuki Baleno and whether any consideration should be made regarding the recommended upkeep of such car. To include this car in the mix impacts on the outcome of the final figures, it being the least costly to operate. There is no basis therefore upon which it should have been used in the determination of the rates to be awarded. If the Tribunal took this into account, they would fall into error as having taken irrelevant evidence and irrelevant considerations into account.

The thrust of submissions made on behalf of the Government to the Tribunal centered around budgetary constraints of the Government. In the brief submitted to the Tribunal by the Ministry of Finance and Planning on behalf of the Government it ended by saying and I quote:-

“CONCLUSION

“The Government has made every effort to offer and maintain reasonable travelling rates consistent with the cost of maintaining an average motor car. Government offers have to be made within its budgetary allocations.

The Government is therefore requesting that the Tribunal in making its award, consider Government's budgetary constraints and not make awards that may be inimical to the national interest"

"COSTING

"The Ministry's offer to the Jamaica Civil Service Association is estimated to cost \$75M for the five month period November 1, 2000 to March 31, 2001. Annualised the Government's offer works out to be \$182M whilst, on the other hand the Jamaica Civil Service Association's claim costs \$432M annualised. Hence for the five-month period, whilst Government's offer is \$75M, the Jamaica Civil Service Association's claim is \$180 M.

The Budget and Fiscal Management Division s of the Ministry of Finance and Planning have advised that the budget cannot accommodate anything over the Ministry of Finance and Planning's offer for the current fiscal year"

It is here convenient to note Mr. Wilson's address in his submissions to the Tribunal. He said inter alia:-

"The offer as I said Mr. Chairman and members of the Tribunal is a reasonable offer. Why is it a reasonable offer? The offer is based on the Government's ability to pay and the impact thereon on economic

performance. The difference between the offer put on the table by the Ministry of Finance and Planning on behalf of the Government and that put forward by the Jamaica Civil Service Association on behalf of travelling officers would adversely impact on this year's budget. To make up for this shortfall in the budget, the Government would be forced to borrow money to pay for the travelling differential”.

He went on to advise the Tribunal of the serious economic effect an award over and above \$180,000 per year or \$15,000 per month would have on the country.

He said the offer was a reasonable one and he ended thus:-

“In closing I would say the Government has made a reasonable offer, it is based on the price of a reasonable priced motor vehicle, the Suzuki Baleno....and an offer should be made which is reasonable and within the budgetary constraints set by the Ministry of Finance and Planning....”

Mr. Wilson's submissions clearly conflict with Section 9.1 of the Staff Order. I find that there is no room for such considerations as budgetary constraints, national interest or reasonable offer – the only consideration should be reimbursement consistent with Section 9.1 of the Staff orders.

Mr. Samuels further contends that the Tribunal failed to take into account the expert evidence of Mr. W.N. Anderson, who testified on behalf of the

Government recommending an upkeep of \$18,500 per month. The letter exhibited reads as follows:

File No. 605-133

Ministry of Transport & Works
15 Hagley Park Road
Kingston 10
JAMAICA

2000 September 19

Financial Secretary
Ministry of Finance & Planning
Industrial Relations Unit
63- 67 Knutsford Boulevard
Kingston 5

Attention: Miss Hazel V.I. Gibbon

In response to your memo Ref. No. 11301 V11 dated 2000 September 18, the attached represents our revised calculations **for Public Servants Travelling Rates** using current data.

On recommendation is as follows:-

- (1) Upkeep (20% Personal Use) \$18,500.00 per month
- (2) Travel Rates \$10.35 per kilometer

Please feel free to contact us for any further assistance.

for W.N. Anderson
Permanent Secretary
Attached”

He says that the Jamaica Civil Service Association's claim for upkeep at \$16,886.67 per month is based on actual costs using the Toyota Corolla as the "average car" whilst the Government's offer is \$15,000 per month using the Suzuki Baleno as "average car". The Tribunal's award of \$15,000 per month coincides with Government's offer. He argues that this clearly demonstrates that rather than relying on the testimony of Mr. Anderson they rejected it and came to their conclusion based on budgetary constraints and national interest and to reject the evidence of Mr. Anderson in this regard was an error in law.

I hold that budgetary constraints and national interest are matters which should not occupy the minds of the Tribunal. These matters cannot be if the objective of the exercise is to arrive at a figure which represents the cost of upkeep and travelling. Bearing in mind the provisions of Section 9.1 of the Staff Orders the only consideration is re-imbursement. The provision is mandatory in its effect and has the force of law since the Staff Orders govern the terms and conditions of employment of Civil Servants with particular reference to travelling expenses.

How then did the Tribunal arrive at its decision?

There being no reason given by the Tribunal in arriving at its decision in making the award of \$15,000 per month upkeep, this Court is constrained to review the evidence presented and the addresses made by the contending parties.

At this stage this Court is concerned only to determine if the Tribunal fell into error. The question to be answered is whether the Tribunal acted on the evidence before it and if so whether it took irrelevant considerations into account, or failed to take relevant considerations into account or the wrongfully excluded evidence.

The irresistible inference drawn results in my findings:-

- (1) That the Tribunal erred in law when it allowed the use of the Suzuki Baleno motor car to be adduced in evidence as the average car, or at all.
- (2) That the Tribunal erred in law when it allowed evidence of budgetary constraints and national interest and acted upon these considerations.
- (3) That the Tribunal erred in law when it took in consideration “**the reasonableness**” of the Government’s offer.
- (4) That the Tribunal erred in law when it disregarded the recommendation of Mr. N. Wilson the Government’s own expert,
- (5) That the Tribunal erred in law when it failed to give effect to the provisions of Section 9.1 of the Staff Order by not making the award one of re-imbursement and acted instead on other considerations.
- (6) These several errors render the award of the Tribunal a nullity.

The motion brought by the Jamaica Civil Service succeeds and an Order of Certiorari is granted to quash the award made by the Tribunal on the 14th February, 2001.

Costs to the Applicants to be agreed or Taxed.