JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 27/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	UNION OF TECHNICAL ADMINISTRATIVE AND SUPERVISORY PERSONNEL	APPELLANT
A N D	MINISTER OF LABOUR	1ST RESPONDENT
A N D	DESNOES & GEDDES LTD.	2ND RESPONDENT

Enos Grant for Appellant

Wendell Wilkins for 1st Respondent

Emile George, Q.C., & Edward Ashenheim instructed by Milholland, Ashenheim & Stone for 2nd Respondent

January 16, 17 and February 27, 1989

ROWE P.:

For upwards of seventeen years the National Workers Union represented certain workers employed by Desnoes and Geddes Limited as a single bargaining unit. On December 31, 1986, this bargaining unit totalled six hundred and forty-seven persons including electricians, servicemen, mechanics, welders, machinists and instrument technicians which sub-group together numbered ninety-three persons. The terms and conditions of the bargaining unit were contained in a collective agreement made on the 1st day of January, 1985 between Desnoes and Geddes Limited and the National Workers Union. It contained a duration clause:

> " Duration of Wage Agreement
>
> 1. (i) This Agreement shall be effective until the 31st day of December, 1986 and shall continue in force thereafter from year to year subject to the right of either party to give to

" the other not less than thirty nor more than ninety days notice in writing prior to the termination thereof to amend the Agreement.

.....

(iii) This Agreement shall remain in force until all proposed amendments are settled, after which, it shall continue in force as so amended, and all employees will be provided with a copy of this Agreement."

On January 23, 1987 the appellant served upon the 2nd respondent a Claim for bargaining rights for servicemen, mechanics, welders, machinists and instrument technicians on the prescribed form. Then on February 11, 1987 the appellant wrote to the Permanent Secretary in the Ministry of Labour forwarding a prescribed form signed by an Auditor in verification of its claim to membership of certain categories of employees of the 2nd respondent and another prescribed form which was held by the Full Court to be a request to the Minister to cause a ballot of the workers to be held. From this finding, there has been no appeal.

Prior to the receipt on January 23, 1987 of the claim by the appellant for bargaining rights, the 2nd respondent had commenced negotiations with the National Workers Union for an amendment to the Collective Agreement of January 1, 1985, and these negotiations continued and were concluded on April 2, 1987. Notice of the pending negotiations was given to the appellant by letter of February 17, 1987 from the 2nd respondent in which the suggestion was made that the question at issue was fit for discussion at the level of the Ministry of Labour.

The Minister, on March 11, 1987, took action on the request dated February 11, 1987 from the appellant. The 2nd respondent was required within seven days, that is to say, by March 18, 1987, to submit to the Ministry a list of particulars prescribed in Regulation 3(3) of the Labour Relations and Industrial Disputes Regulations 1975. As there was no response to this demand on March 30, a reminder was sent from the 1st respondent to the 2nd respondent which ended with the Caution:

> "The Labour Relations and Industrial Disputes Regulations (Reg. 3(6)) makes failure to supply such information an offence and if the information is not received within five (5) days of the date of this letter, consideration will be given to the initiation of appropriate legal action."

Before the five days ultimatum could expire, the 2nd respondent advised the 1st respondent on April 2, 1987 that it had concluded an amended Collective Agreement with the National Workers Union covering all the categories in the bargaining unit effective January 1, 1987 and to expire December 31, 1988. This advice led the Ministry to write to the appellant on April 8, 1987 stating that in those circumstances, the appellant's "claim for Bargaining Rights cannot be pursued any further."

A more definitive statement of the Ministry's position was contained in its letter to the appellant's attorney-at-law on June 2, 1987.

> "The position is that, while processing the above-mentioned claim and before reaching the stage where the Minister decides whether or not to cause a ballot to be taken, this Ministry was furnished by the Company with a copy of a new collective agreement which was reached on the 2nd April, 1987 with the National Workers Union for a two-year period, from 1st January, 1987 to 31st December, 1988 for a bargaining unit which includes the workers in the aforesaid claim. In the circumstances, this claim could not be pursued any further.
>
> Any attempt to vary representational rights by any category of workers in the bargaining unit now represented by the National Workers Union, must be pursued towards the end of the existing collective agreement, that is to say, any claim for bargaining rights should be served in 1988 bearing in mind that a ballot cannot be held earlier than ninety (90) days before the collective agreement is due to expire."

The appellant was indignant. Its retort to the Minister was that members of the category of workers it sought to represent had revoked their membership in the National Workers Union on February 16, 1987 and it was not understood by the appellant how an agreement in April 1987 with their former Union could be said to affect them. The months went by without any further action by the Minister and in March 1988 the appellant sought an order of

mandamus "directed to the Minister of Labour to cause a ballot to be taken for the purpose of determining whether the applicant should have bargaining rights for the category of Servicemen, Mechanics, Welders, Machinists, Instrument Technicians and Electricians employed to Desnoes and Geddes Limited of 214 Spanish Town Road, Kingston 11, Jamaica."

This application for an order of mandamus was heard by the Full Court in May 1988 and was refused. Langrin J. with whom the other judges concurred, in delivering the reasons for the Court's refusal, said at page 9:

> "However, what is critical for the determination of this case is whether the Minister is under a duty to cause a ballot to be taken and if so whether the duty is affected by the Collective Labour Agreement in force.
>
> What is significant is not when the request to the Minister to cause a ballot to be taken was made, but more importantly, whether a Collective Agreement was in force at the time when the Minister comes to make his decision.
>
> Once the Minister is requested under the Act to cause a ballot to be taken, he is required to act in accordance with the statute and cannot, in my view, ignore the existence of the new agreement which became effective from January 1, 1987 to December 31, 1988. Before the Minister had taken a decision whether he should cause a ballot to be taken, Desnoes and Geddes Limited and National Workers Union had concluded their negotiations on the 2nd April, 1987. ..... It follows therefore that the operative Agreement which the provisions of Regulation 3(4) fall to be applied would be the Agreement which became effective on the 1st January, 1987 and will come to an end on December 31, 1988."

Original and Supplemental Grounds of Appeal were filed herein. They may be divided into three grounds:

(a) the Full Court was in error when it held that it was not necessary to determine whether the word "may" in section 5 of the Labour Relations and Industrial Disputes Act (LRIDA) was permissible or obligatory;

(b) the Full Court incorrectly fixed the relevant time at which the Minister was required to carry out his duty to direct a ballot and in so doing took into consideration an irrelevant factor, the new contract;

(c) the Full Court placed an interpretation on section 5 of the LRIDA and the Regulations made thereunder which would contravene the constitutional rights of the appellant and its members.

Section 5 of the LRIDA delineates the circumstances in which a ballot may be ordered for the purpose of determining bargaining rights for workers or particular categories of workers in the employment of an employer and the ancillary steps to ensure the fairness and secrecy of the ballot. Section 5(1) provides:

> "If there is any doubt or dispute -
>
> (a) as to whether the workers, or a particular category of the workers, in the employment of an employer wish any, and if so which, trade union to have bargaining rights in relation to them; or
>
> (b) as to which of two or more trade unions claiming bargaining rights in relation to such workers or category of workers should be recognized as having such bargaining rights,
>
> the Minister may cause a ballot of such workers or category of workers to be taken for the purpose of determining the matter."

Section 27 (1)(b) of the LRIDA empowers the Minister to make Regulations "as to the furnishing of information to the Minister in relation to collective agreements."

The LRIDA Regulations 1975 provide, in Regulation 3(1), for the manner in which applications to the Minister for a ballot ought to be made; and in Regulation 3(3) for the manner in which the Minister ought to carry out his investigations to determine whether 40% of the workers in respect of whom the claim is made are members of the applicant's Union. Regulation 3(3) opens with this paragraph:

> "The Minister may, pursuant to paragraph (2) require the employer to supply him, within such period as the Minister may specify, with such information as the Minister thinks necessary in respect of the workers in relation to whom the request for the ballot has been made, and in particular may require the employer to state - "

Then follows a listing (a) - (g) of the material information which the Minister may require. Item (g) is relevant:

> "whether any collective agreement relating to any workers in his employment is in force and if so, to which categories it relates, the date of commencement and the date of expiry."
> [Emphasis added]

The letter of request from the 1st respondent to the 2nd respondent dated March 11, 1987 contained a request in the terms of Regulation 3(3)(g)

Mr. Grant submitted that although the LRIDA in Section 5 provides that the Minister "may" cause a ballot to be taken, having regard to the fact that the whole intendment and purpose of the Act is for the protection of Trade Unions and their members, once the conditions in Regulation 3 are satisfied, the Minister is obliged to exercise his discretion in favour of the applicant and to order that a ballot be taken. He relied upon the decision of the House of Lords in Julius v. Lord Bishop of Oxford and Another [1874-80] All E.R. Rep. 43. Mr. George although critical of Mr. Grant's formulations of principle, submitted that however Mr. Grant couched the mandatory or obligatory nature of the Minister's duty, Mr. Grant had to concede that the conditions in Regulation 3 must first be fulfilled before the Minister is called upon to make his determination. Mr. Grant at some point of his submission sought to say that the provisions of Section 5 of the LRIDA lays down the primary duty of the Minister. This does not seem to be a relevant consideration unless he was saying that there is something in Regulation 3 which is ultra vires and void. As that was certainly not Mr. Grant's submission, the primacy of the Act over the Regulations is not an issue in question.

Mr. Grant submitted, however, that the time-table within which the Minister ought to seek information from the employer is rigidly fixed by the Regulations and cannot exceed fifteen days. He submitted further that in such a case any extension of time by the Minister would be in excess of powers conferred on him by the Regulations and would have the consequence of infringing the provisions of Section 23 of the Constitution in respect of the Trade Union and its members.

In my view to ensure or at least to encourage industrial peace, one would expect the Minister of Labour to process requests for a representational ballot without undue delay. Regulation 3(1)(e) contains a provision, which although not free from doubt, could fairly be interpreted to mean that an employer upon whom the prescribed form is served by the Union seeking bargaining rights, can within fifteen days object or otherwise respond to the request, and that response is a matter which the Minister can take into account in determining whether or not to hold a ballot. Significantly, however, Regulation 3(2) uses the phrase "as soon as practicable" to set the time within which the Minister is to ascertain whether the applicant Union enjoys a 40% membership of the workers for which it makes claim.

Specific language is employed in Regulation 3(3) to set the time within which the Minister ought to seek information from the employer. The Minister is given the discretion, "within such time as the Minister may specify" to require the information. One can easily envisage that with a small concern the information might be easily ascertainable, whereas with a large and complex enterprise, situate away from the centre of normal communications, the exercise might prove more onerous. It is for the Minister, given the facts as known to him, to fix the period of time relevant to each case.

If the Minister has fixed a specified time, can he enlarge that time? Mr. Grant says he has no such power as an enlargement of time could undermine the rights of the workers. Section 9 of the Interpretation Act provides that "where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the occasion arises."

Section 34(1) of the Interpretation Act provides further that:

> "Where any Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises."

Based upon these statutory provisions, it is my opinion that the power given to the Minister to specify a time in Regulation 3(3) may be exercised by him from time to time in relation to a single matter. In the instant case, the employer was given seven days within which to respond. When nineteen days after request, it had still not responded, a strong final demand, giving five days within which to respond, was issued. It is my view, that on a proper construction of Regulation 3(3) the Minister was so empowered to act.

It seems to me that the whole purpose of Regulation 3(3) is to put the Minister into a position where he can make an informed decision whether or not to hold a poll and in one instance, the time at which a poll can be held. The Minister is to make his determination in relation to the claim made by the Union and in reference to the situation as it exists when that claim for representation is made. It would make nonsense of the law, if after a claim has been made for representational rights an employer could add a score or two new employees to his work force or even a hundred or two persons for that matter and then tell the Minister that his work force is now at the inflated number. This stratagem could defeat a genuine claim and could be repeated ad nauseam. This leads me to think that the Minister is concerned with a historical situation. He is concerned with a state of affairs which existed at the time when the claim for representational rights is made and certainly he is concerned with the situation which exists at the time when his request to the employer is made. The purpose of giving adequate time for the employer to reply is not to give the employer an advantage to change the circumstances at the work place or to enable another Union to entrench itself or otherwise improve its position upon what existed when the claim for representational rights was made. The time allowed by the Minister is for data gathering and data preparation and report to the Minister.

I think that the inclusion in Regulation 3(3) of item (g) makes it clear beyond a per-adventure that a historical situation is envisaged and not a prospective one. This sub-regulation as I said earlier sets the question thus:

> "Whether any collective agreement relating to any workers in his employment is in force and if so, to which categories it relates, the date of commencement and the date of expiry." [Underlining mine]

The use of the present tense "is in force" in Regulation 3(3)(g) can only have reference to the time at which the Minister's enquiry is received. Test it this way. Suppose the Minister had telephoned the employer and asked for the information, and the employer had said I will not give you any information over the telephone, please send me a letter and the Minister sent down the letter by hand on the same day. Could the employer put the letter aside and then one week later after it had either concluded an agreement for the first time with another Union or extended the life of a current contract, reply and give the new dates of the Collective Agreement? The Minister would be furious. He would say, I will have none of it. I wanted information as of the date of my request and I will not be put off in this manner.

Provision is made in the LRIDA Regulations for the method of procedure when the Minister, upon enquiry, is informed that a Collective Agreement containing the terms and conditions of employment of the workers in relation to whom the request for the ballot has been made is in force. In the event that all the other conditions for holding a ballot are met, the Minister cannot exercise a discretion to hold a ballot immediately or postpone the holding of a ballot to a time which in his discretion, he considers to be most opportune. Regulation 3 (4) and (7) constrain him to act within a specific time-table. But shortly the earliest date on which a ballot can be taken is ninety days from the expiration of the subsisting specified period of that collective agreement. "Specified period" is defined but for the purposes of the instant case the "specified period" which was relevant prior to April 2, 1987, was December 31, 1987.

In the event that the Minister determines that a representational ballot is to be taken, two statutory conditions are attached. Firstly, the decision to hold a ballot has no effect upon any Collective Agreement then in force and secondly, "no negotiations for the making of a new Collective Agreement in respect of those workers shall be concluded before the ballot is taken" - Regulation 3(4)(b).

Negotiations for a new Collective Contract are not frozen until the Minister determines that a representational ballot ought to be taken and thereafter no new Collective Agreement involving those workers can be concluded.

The clear intention of Regulation 3(4)(b) is to bring some order into Industrial relations and to ensure that the Minister's directives are not rendered nugatory by subsequent action between employers and Unions other than the claimants for ballots. Rank confusion could ensue if parties were free to act as if the Minister had not intervened. Regulation 3(4)(b) however, is dealing with a situation after the Minister has decided that a ballot should be held. Regulation 3(3) on the other hand is concerned with the data collecting process. Then the Minister wishes to know what is the state of affairs at the work place at the time of the Union's request for a ballot. The existence or not of a Collective Agreement is one of the factors which he will take into consideration to determine whether or not a ballot ought to be held.

When one applies this line of reasoning to the admitted facts in the instant case, one finds that the Minister's request was made on March 10, 1987 and that there was a Collective Agreement in force on that day between the N.W.U. and the 2nd respondent. That is the Collective Agreement contemplated by Regulation 3(3)(g) and the expiry date of that Agreement would determine the earliest date on which a ballot could be held, if all the other conditions for a ballot had been satisfied. I think that the Full Court applied the wrong test where it held that:

> "What is significant is not when the request to the Minister to cause a ballot to be taken was made, but more importantly, whether a Collective Agreement was in force at the time when the Minister comes to make his decision."

The correct test, in my opinion, is to determine whether or not a Collective Agreement was in force on the date when the Minister's enqury was served upon the employer.

The appeal should be allowed and an Order for Mandamus should issue in terms of the Motion of the appellant filed on 21st April, 1988. The appellant should have the costs both here and in the Court below to be agreed or taxed.

WRIGHT, J.A.:

I have had the benefit of reading the judgments in draft of the President and Downer J.A. and with all due deference to the learned President I find myself in agreement with Downer, J.A.'s reasoning and conclusion. Nevertheless, I wish to make a few brief comments.

Inasmuch as Mandamus is a discretionary remedy it is my opinion that, even if on the evidence Mandamus could issue yet because of the delay of roughly a whole year before seeking redress Mandamus should not issue. Furthermore, having regard to the provisions of Regulation 3(1)(4)(a) of the Regulations delimiting the time within which a ballot may be taken the practicability of now ordering the taking of a ballot in terms of the Motion dated 21st April, 1988 is called into question. Regulation 3(1)(4)(a) provides:-

> "If any collective agreement containing the terms - and conditions of employment of the workers in relation to whom the request for ballot has been made is in force:-
>
> (a) the Minister shall not cause the ballot to be taken earlier than ninety days before the date on which any subsisting specified period of that collective agreement is due to expire....."

On the evidence the date of expiry of the relevant Collective Agreement was either December 31, 1987 or December 31, 1988 - both of which dates have already passed. The present state of affairs is not known. Against what date would the ninety-day restriction now be considered? Then, too, is there now the required 40% of the workers with respect to whom there is a doubt or dispute? According to the letter dated February 17, 1987 from Desnoes and Geddes Limited to The Union of Technical Administration and Supervisory Personnel there was no doubt or dispute as to the union representation of the workers concerned. Such a doubt or dispute is a pre-condition to the setting in Motion of the machinery provided by the Labour Relations and Industrial Disputes Act and the Regulations made thereunder. So where there is no issue to be resolved the remedy sought

would be misconceived.

The other question to which I will direct my attention is the date with reference to which the Minister must act in deciding whether or not to order the holding of a ballot. Mr. Grant's submission is that the effective date is the date of the request for the ballot. Mr. George contends it is the date when the Minister comes to make his decision. The effect of Mr. Grant's submission would be to freeze the status quo at the time the request for the ballot is received. If this is correct then anything which the workers concerned may properly do within the time given the employer to submit the required information to the Minister would be irrelevant. These are not workers who had no union representation. They had representation by the National Workers Union for 17 years. It is therefore obvious that the new union, Union of Technical Administration and Supervisory Personnel was seeking a foothold at the expense of the National Workers Union. But the workers may well have had second thoughts about the benefits which a new union might be able to secure them and so become reconciled with the National Workers Union. In that case there is no one on whose behalf a ballot could now be ordered or held. And it is unthinkable that these workers could then be told that even if you do not want a ballot, Union of Technical Administration and Supervisory Personnel requires one and your reconciliation with the National Workers Union is of no avail. A union cannot be foisted upon the workers and the union has no rights superior to the workers' rights. It is merely their agent. The workers can make or break a union.

Of crucial importance are the powers granted the Minister under Regulation 3(3) which reads:-

> "The Minister may, pursuant to paragraph (2) require the employer to supply him within such period as the Minister may specify with such information as the Minister thinks necessary in respect of the workers in relation to whom the request for the ballot has been made, and in particular may require the employer to state:-

"(g) Whether any collective agreement relating to any workers in his employment is in force and, if so, to which categories it relates, the date of commencement and the date of expiry."

These provisions obviously postpone the Minister's decision to a point in time when, in compliance with the relevant provisions, he has advised himself so that he is able to make a decision which will uphold the intendment of the Act, that is, the interest of the workers and their unions against the background of industrial peace. If it was intended that events intervening between the making of the request and the Minister's decision should be ignored then what is the purpose of requiring the information? To my mind these provisions implicitly contemplate the possibility of changes, as happened here, between the making of the request for the ballot and the Minister's decision on the request. I do not think there is anything wrong in either the union representing the workers or the employer advising the workers that their interests will be better served by the current union than by a minority union. I would think that on the employers' part the fewer the unions they have to deal with the better. So if the workers effect a rapprochement with their former union there would in effect be a de facto withdrawal of the request for a ballot. They cannot be denied that right and the Minister cannot, in my opinion ignore that fact once he is advised of it any more than he could choose to ignore the fact that in keeping with a planned increase in production the employer had increased his work force in the disputed area so that at the time when he comes to decide on whether a ballot should be held the new union does not have the required 40% of the workers. Could the employer be told that although he had gone to great expense in acquiring the necessary machinery having done his feasibility study and established the market for his increased production he would have to forego such plans so as to facilitate the new union's challenge? Such a construction would be patently repugnant to the obvious intent of the Act.

I am, for these reasons, persuaded that the relevant date must be the date when the Minister, having obtained the necessary information, comes to decide to grant or refuse the request and in so doing he is obliged to have regard to the status quo at that date. That would make his date of reference 31st December, 1988.

I would, accordingly, dismiss the appeal with costs to the respondents to be taxed or agreed.

DOWNER, J.A.:

The issue to be decided in this appeal was whether the Supreme Court (Bingham, Ellis, Langrin, JJ.) was correct in refusing to issue an order of mandamus which would direct the Minister of Labour to cause a ballot to be taken to determine whether the appellant, the Union of Technical Administration and Supervisory Personnel would have had bargaining rights in relation to certain category of workers employed to Desnoes and Geddes Limited. In order to determine this appeal, it will be necessary to examine the circumstances surrounding the request for a ballot to be held and the reasons given by the Minister for refusing to hold it. Also the relevant provisions of the Constitution, the Labour Relations and Industrial Disputes Act (the Act) and the regulations made pursuant thereto as well as the collective agreement must be interpreted to ascertain whether the Minister's decision not to hold a ballot was in accordance with law. If it was, then the order of the Supreme Court upholding the Minister's decision must be affirmed.

The facts

The initial move was made by the Union through their General Secretary, Reginald Ennis who served the prescribed forms on the Minister and the employers; claiming bargaining rights for a category of workers, namely, servicemen, welders, mechanics, machinists, instrument technicians and electricians. The number of workers who indicated that they would support the appellant Union was seventy-two. The number of workers in the bargaining unit at Desnoes and Geddes represented by the National Workers Union was six hundred and forty-seven (647) while the number in the category claimed by the appellant Union was ninety-three (93). The claim was served by letter dated 11th February, 1987 and acknowledged on 9th March. In order to make his decision, the Minister, on March 11, sought information in writing from the employers in compliance with paragraph 3 (1)(3) of The Labour Relations & Industrial Regulations (1975). Paragraph 3 sets out the steps which the Unions, employers and the Minister must take to ensure order in this sensitive area of industrial relations. Thus in paragraph 3 (1)(d) the Minister must be

satisfied that at least forty percent of the workers support the claimant union and paragraph 3 (1)(e)(II) permits the employer to state that he is not satisfied that the workers claimed wished the appellant union to have bargaining rights in relation to them. Also, the employer is entitled to state that he has already recognised a trade union other than the appellant as having bargaining rights in relation to the workers claimed and the employer exercised its rights in this case. But the decisive issue in this case turns on paragraph 3 (3)(g) as it was in reliance on this provision that the Minister refused to accede to the appellant's request to cause a ballot to be taken. It is therefore necessary to cite the relevant paragraphs of this provision. It reads:

> "Paragraph 3(3)
>
> The Minister may, pursuant to paragraph (2) require the employer to supply him, within such period as the Minister may specify, with such information as the Minister thinks necessary in respect of the workers in relation to whom the request for the ballot has been made, and in particular may require the employer to state-"
>
> "(g) whether any collective agreement relating to any workers in his employment is in force and if so, to which categories it relates, the date of commencement and the date of expiry."
>
> [emphasis supplied]

When on March 11, the Minister sought information from the employers he specified that the information should be supplied by March 18. As there was no response, on March 30, he gave the employers a further five (5) days and pointed out that a prosecution would be considered in pursuance of paragraph 3(6) of the Regulations if there was any further delay. The employer replied on 3rd April and it was the information in that reply which enabled the Minister to decide whether to call a poll as the appellant union requested. During the period from February 11 when the claim was served to the period 3rd April when the Minister arrived at a decision the workers were free to return to the National Workers Union which would mean that there would no longer be a basis for the claim put forward by the appellant union. Such are the hazards of democracy at the workplace for a claimant

union, and these are facts which the Minister must acknowledge before coming to a decision. It is clear, therefore, that if the workers claimed by the appellant union were covered by a collective agreement in force, it would be superfluous to take a ballot just because one was requested. Such a course apart from being expensive would cause strife instead of order in industrial relations. It would mean the request determined the Minister's decision, when on the true construction of the Act and the Regulations, while the Minister must respond with promptitude to the request to call a poll, it is the information which he received subsequent to the request which must determine whether he would be obliged to take a poll. Also to be noted is that if the appellant were correct it would mean that a claimant union by a mere request supported by 40% of a category of workers could determine expenditure from the consolidated funds even though the workers had a change of heart. Such a contention ignores the constitutional position of the Minister of Labour who would be answerable to Parliament for such wasteful public spending. As for the legality, the regulations by virtue of paragraphs 3(4) as amended and 3 (5)(6) and (7) provide that the Minister shall not cause a ballot to be taken, if there is a collective agreement in force, earlier than ninety days before the subsisting specified period of the collective agreement is due to expire. This paragraph was construed by the Privy Council in Attorney General & Another v. Cordell Stewart & University & Allied Workers' Union (Unreported) Privy Council Appeal No. 21/88.

It is against this background that the critical letter of the Minister dated April 8 must be considered. The Minister's decision not to cause a ballot to be taken is stated specifically and it is pertinent to quote it:

> "Attention: Mr. Reg Ennis
>
> Dear Sir:
>
> Re: Claim for Bargaining Rights dated 23rd January, 1987, by the Union of Technical, Administrative and Supervisory Personnel on Desnoes and Geddes Limited.

"Please refer to your letter dated 11th February, 1987, regarding the above-mentioned matter.

By letter dated 3rd April, 1987, this Ministry was furnished by the Company with the copy of a New Collective Agreement which was reached on the 2nd April, 1987, with the National Workers' Union for a two (2) year period, effective from 1st January, 1987 to 31st December, 1988, which includes the workers in your claim.

In the circumstances, your claim for Bargaining Rights cannot be pursued any further.

Yours faithfully

Chelsie Shellie-Vernon (Mrs.)
for Permanent Secretary"

It is evident that the Minister regarded the response elicited in pursuance of the regulations from the employers as precluding him from causing a ballot to be taken and it was this decision which has been challenged as not being in accordance with law. Be it noted that this letter forms part of the affidavit evidence of Mr. Ennis, the General Secretary of the appellant union and he has not challenged its accuracy. Also pertinent was the fact that when the request for a poll was made it was common knowledge that the National Workers Union was bargaining with the employers for an amendment to the existing collective agreement. The agreement of April 2 was the result.

Mandamus being a discretionary remedy it would have been appropriate to challenge the Minister's decision as at April 8, 1987 or shortly thereafter since promptitude in attending to so serious an allegation is an essential feature of good labour relations. Instead, correspondence initiated by the union and its attorney on the one hand with the Ministry on the other, continued. So it was not until the 11th of April, 1988, that leave to apply for an order of Mandamus was sought. This was a year after the Minister's decision was made and such a delay in the

circumstances of this case would have been sufficient ground for refusing to issue the order of mandamus.

After the Minister's decision a significant letter dated 22nd June, 1987 from the Acting Permanent Secretary of the Ministry of Labour to the Attorney for the Union reinforced the Ministry's position and it is apposite to quote two paragraphs of that letter. They read as follows:

> "The position is that, while processing the abovementioned claim and before reaching the stage where the Minister decides whether or not to cause a ballot to be taken, this Ministry was furnished by the Company with a copy of a new collective agreement which was reached on the 2nd April, 1987 with the National Workers Union for a two-year period, from 1st January, 1987 to 31st December, 1988 for a bargaining unit which includes the workers in the aforesaid claim. In the circumstances, this claim could not be pursued any further.
>
> Any attempt to vary representational rights by any category of workers in the bargaining unit now represented by the National Workers Union, must be pursued towards the end of the existing collective agreement, that is, any claim for bargaining rights should be served in 1988 bearing in mind that a ballot cannot be held earlier than ninety (90) days before the collective agreement is due to expire.
>
> Yours faithfully,
>
> (A.B. Irons)
> Acting Permanent Secretary"

It is manifest that the Ministry in this case reckoned that the workers who had indicated that they would have wished the appellant Union to represent them had a change of heart and had returned to the fold of the National Workers Union. It is in the light of these facts that the appellant's claim that the Minister's action was not in accordance with law must now be examined.

The Application of the Act, the Regulations and The Constitution

It was contended by the appellant that on the true construction of Section 5 of the Act, the Minister was obliged to cause a ballot to be taken once the request of 11th February had been made by the Union. In support of

this he relied on Julius v. Lord Bishop of Oxford and Another (1880)5 App. Cas. 214 and (1874) All E.R. Rep. 43 at p. 49 and Lord Cairns, L.C., sets out the rule of construction relied on by the appellant. It reads:

> "The cases to which I have referred appear to decide nothing more than that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."

Lord Penzance also stated the rule, at page 52 thus:

> "In all these instances the courts decided that the power conferred was one which was intended by the legislature to be exercised and that, although the statute in terms had only conferred a power, the circumstances were such as to create a duty."

Lord Selborne was of the same mind. At page 54 he said :

> "The question whether a judge or a public officer to whom a power is given by such words is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and in general it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power."

Lord Blackburn was equally emphatic in stating the rule. At p. 57 he stated:

> "I do not think the words 'it shall be lawful' are in themselves ambiguous at all. They are apt words to express that a power is given; and as prima facie the donee of a power may either exercise it, or leave it unused, it is not inaccurate to say that prima facie they are equivalent to saying that the donee may do it; but if the object for which the power is conferred be for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Where there is such a duty it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. It by no means follows that, because there is a duty cast on the donee of a power to exercise it, a mandamus lies to enforce it; that depends on the nature of the duty and the position of the donee."

It is to be noticed that despite that unanimity of views of the House of Lords as to when it could become a duty to exercise a power, it was held

that in the circumstances of that case there was no duty cast on the Lord Bishop of Oxford to issue a commission as required. This must be borne in mind when the provisions of the Act, the Regulations, the Constitution and the circumstances of the instant case are examined. The principles adumbrated in Julius v. Lord Bishop of Oxford and Another were considered and applied in the case of Padfield v. Minister of Agriculture [1968] A.C. 997 where the Court ordered the Minister to consider the complaint according to law which in effect meant that the Minister was directed to refer the complaint to the independent Investigating Committee pursuant to the Agricultural Marketing Act, 1958. The gist of the decision was that Parliament had conferred a discretion on the Minister so that it could be used to promote the policy and object of the Act which was to be determined by the construction of the statute. That is why we must now construe the Act and its regulations as well as the Constitution to determine if the Minister in this instance erred in law as the appellant union contended.

Section 5 of the Act insofar as material, reads:

> "5(1) If there is any doubt or dispute -
>
> (a) as to whether the workers, or a particular category of the workers, in the employment of an employer wish any, and if so which, trade union to have bargaining rights in relation to them; or
>
> (b) as to which of two or more trade unions claiming bargaining rights in relation to such workers or category of workers should be recognized as having such bargaining rights,
>
> the Minister may cause a ballot of such workers or category of workers to be taken for the purpose of determining the matter."

The primary aim of the Act is to promote good labour relations and the Minister has an important statutory role. In order to minimise inter-union conflicts, and provide a conclusive determination to representation claims the Minister was empowered by Section 5 to cause a ballot to be taken when there was any doubt or dispute as to whether the workers wished to be represented by a Union or rival Unions were making claims to represent the workers. There was also a need to discard frivolous claims and discourage

those where it could not be demonstrated that at least 40% of the workers claimed wished a particular Union to represent them. The status of existing Unions was also recognized and generally speaking a ballot was not to be taken within a year of a previous ballot unless new and unforeseen circumstances arose. Then in paragraph 3 (3)(g) of the regulations the Minister may require the employer to state whether there is a collective agreement in force. As all these provisions are contained in the regulations, it is useful to advert to Section 27 of the Act which entrusts the Minister with rule-making powers. Section 27 reads:

> "(1) The Minister may make regulations for the better carrying out of the provisions of this Act and in particular but without prejudice to the generality of the foregoing, may make regulations -
>
> (a) as to the formation and composition of bargaining units;
>
> (b) as to the furnishing of information to the Minister in relation to collective agreements;
>
> (c) prescribing any matter or anything which may be, or is required by this Act to be, prescribed."

The plain words of the section which state that 'the Minister may cause a ballot' if there is any doubt or disputes gives the Minister a discretion, but as in the Bishop of Oxford case there was nothing in the circumstances of this case or in the provisions of the Act to make the exercise of the discretion obligatory. On the contrary, it was by acting in pursuance of the regulations that the Minister discovered that there was a collective agreement in force and this gave him a basis for his decision. The agreement in force came into effect as a result of an amendment of the collective agreement which existed when the request for a poll was made. It must be emphasised that even in its unamended form, there could have been no compulsion to call a poll on this agreement until October 1987. The intendment of Section 5 was to ensure that there is a ballot at reasonable intervals when a proper request is made and there could be no necessity for a ballot to be taken when a new agreement was in force. This is so because 90 days before the subsisting specified period of the collective agreement is due to expire, the appellant union would be entitled to a declaration that a ballot

could be taken and by parity of reasoning mandamus could be issued. This was the ruling in 'Hampden case', i.e., The Attorney General v. Cordell Stewart and University & Allied Workers' Union (supra). As at April 2, 1987 a new agreement was in force which covered the workers claimed and this information was elicited by the Minister's enquiry of 11th and 30th March, 1987. There is no evidence in the record that there has been any claim for representation in respect of this new agreement. The real complaint of the appellant union was that initially the workers indicated support for them, then subsequently they again permitted the National Workers Union to amend the existing collective agreement and so enter into a new collective agreement on their behalf. Such conduct by the workers is not unknown in other spheres of activity and it must be inferred that the workers thought that they were better off as a result of such conduct. Workers must be allowed to retain the union of their choice, and there is no requirement in law for the Minister to take a ballot, when there was no 'doubt or dispute' as to which union represents the workers. As the unchallenged evidence was that the workers claimed by the appellants were now a party to a collective agreement between the National Workers Union on the one hand and Desnoes & Geddes Limited on the other, there was then no 'doubt or dispute' which indicated that the workers wished the appellant union to represent them.

The other ground argued by Mr. Grant was that by refusing to cause a ballot to be taken, there was a breach of the workers constitutional rights. It was further contended that mandamus should issue to repair that breach. It is necessary to examine the provisions of Section 23 of the Constitution to decide whether this submission was justified.

Section 23 (1), so far as material, reads:

> "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assembly freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests."

In Collymore v. Attorney General [1970] A.C. 539 the Privy Council decided that an Act in Trinidad which curtailed the freedom to strike and to bargain collectively did not infringe freedom of association. If this principle is applied to the instant case, it can be fairly said that the refusal to call for a ballot is derived from statute and therefore the refusal to cause one to be taken does not breach the constitutional right of anyone to form or belong to a trade union. As Mr. George for the 2nd respondent submitted, it was difficult to see in what way the Minister's action hindered the workers from forming or belonging to a trade union which are the rights enshrined in the Constitution. Indeed the existence of a collective agreement in force when he made his enquiry and the amended agreement when there was a response to that enquiry, was manifest evidence that the workers belonged to a trade union, i.e., the National Workers Union and that their interests were protected on both occasions by that union.

The appellant has therefore failed to establish that there was any breach of Section 23 of the Constitution as alleged so as to justify the issue of mandamus to compel the Minister to cause a poll to be taken.

Conclusion

As the appellant has failed to establish that the Minister erred in interpreting the Act or the Regulations made pursuant thereto or that there was any breach of Section 23 of the Constitution, there can be no basis for setting aside the order of the Supreme Court. The application to compel the Minister to call a poll was rightly refused and the order of the Supreme Court was good in law. It also acknowledged the reality that the workers had returned to the National Workers Union and therefore there was no need to cause a poll to be taken. The appeal is therefore dismissed and the appellant must pay the agreed or taxed costs.

Cases referred to

(1) Julius v Lord Bishop of Oxford and another (1880 5 App. Cas. 214) (1874–80) All ER Rep
(2) Attorney General and another / Carell Stewart & UAWU (unreported) Privy Council [illegible] 21/68
(3) Padfield v Minister of Agriculture (1968) AC 997
(4) Collymore v Attorney General (1970) AC 539