[2016] JMSC Civ 56

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2012 HCV 04268

BETWEEN	**UNITED MANAGEMENT SERVICES LIMITED**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**2ND RESPONDENT**

IN CHAMBERS

Mrs. Georgia Gibson Henlin, Q.C. instructed by Henlin Gibson Henlin for the Applicant.

Ms. Althea Jarrett instructed by the Director of State Proceedings for the Respondents.

Heard: 5th September 2012, 11th September 2012 and 29th April 2016.

Administrative Law – Judicial Review – Application for Leave to apply for Judicial Review – Orders of Certiorari and Prohibition – Non-Unionised Worker – Apparent Bias - Minister's Power to refer matter to Tribunal – Whether Applicant has an Arguable case with a Real Prospect of Success.

CAMPBELL J;

[1] The Applicant, United Management Services, is a registered company, with contract for services with Jamaica Infrastructure, for toll collectors. The 1st Respondent, the Industrial Disputes Tribunal, (hereinafter called the "Tribunal") is a statutory Tribunal established pursuant to the **Labour Relations and**

Industrial Disputes Act, 1975 (LRIDA). The 2nd Respondent, is the Minister of Labour and Social Security, (Minister) responsible for making referrals under the **Labour Relations and Industrial Disputes Act.**

[2] On the 16th January 2012, the Applicant terminated an employee who was employed under a contract dated 11th July 2011, for a period of one year, on the basis, "*we have lost confidence in you as an employee and as a result we are terminating your services with us effective today* ..."

[3] On the 1st March 2012, the Applicant received from, Mr. Howard Duncan, Industrial Relations Consultant, a letter requesting the reinstatement of the employee, Ms. Natasha Simpson, within five (5) days, failing which the matter would be referred to the Ministry of Labour and Social Security. Mr. Duncan wrote the Minister seeking his intervention in a dispute between the said Ms. Natasha Simpson and her employer relating to the termination of her employment.

[4] On 16th April 2012, the Applicant was advised, by Mr. Alrick Brown of the Ministry, that the matter had been referred to the Ministry by Mr. Howard Duncan. The meeting date was confirmed for the 17th May 2012. After several hours of negotiations, the matter was not resolved. The matter was referred to the Minister, to determine whether or not he would wish to exercise his discretion to refer the dispute to the Tribunal. On 6th July 2012, the dispute was referred to the Tribunal.

[5] In a letter dated 10th July 2012, the Applicant was advised that the Minister had referred to the Tribunal for settlement the dispute between the Applicant and Ms. Natasha Simpson in accordance with Section 11A(1)(a)(i) of the **LRIDA**. On 18th July 2012, the Applicant's counsel wrote to advise they had not been served with the Minister's referral notice. The 1st Respondent responded that they were proceeding with the matter unless by 30th July 2012, the Applicant agreed to the dates or the alternative dates provided.

The Application

[6] On 26th July 2012, the Applicant filed a Notice of Application for Court Orders, seeking the following orders;

(i) Leave to apply for judicial review by way of a Certiorari to quash the decision of the 2nd Respondent to refer the dispute between the Applicant and Natasha Simpson relating to the termination of her employment to the 1st Respondent.

(ii) An Order of Prohibition to prevent the 1st Respondent from exercising jurisdiction to hear the matter relating to the dispute regarding the termination of the employment of Natasha Simpson.

(iii) A stay of Proceedings regarding the dispute relating to the termination of the employment of Natasha Simpson, pending the hearing of the application for judicial review.

The Applicant's Submission

[7] The Applicant states that the application is made to review the decision of the Minister to refer the dispute to the Tribunal. To review the decision of the Tribunal to proceed with the hearing notwithstanding a challenge to its jurisdiction. That the conditions precedent to the exercise of the Minister's jurisdiction has not been made. There was no settlement prior to the referral as required by the Act. There is no dispute in an undertaking as required by the Act. The involvement of the Minister in the process and the decision to refer the matter automatically disqualifies him.

[8] There are three (3) circumstances whereby the Minister may refer disputes to the Tribunal. These are set out in Section 11A of the **Labour Relations and**

Industrial Disputes Act. Two of these are set out in section 11A(1) (a) and the third circumstance is set out in section 11A(1)(b).

[9] By virtue of an amendment on 22nd March 2010, the Act deals with disputes in respect of two (2) categories of workers. Workers who are members of Trade Unions having bargaining rights and workers who are not members of any Trade Unions having bargaining rights. Prior to this amendment, workers who are not members of Trade Unions with bargaining rights had no standing under the Act. The effect of this amendment means that the worker who is not a member of a Trade Union with bargaining rights would not be a party to a collective bargain agreement as contemplated by Section 6 of the Act. It follows that such other means as were available to the parties '*under section 11A(1)(a)(i) would not apply to that category of worker by reference to Section 6 of the Act'*.

[10] It follows that in the absence of a collective bargaining agreement, the Minister must find some other ways under the Act to carry out the statutory scheme. It is submitted that this could only be by reference to section 11A(1)(b).

The Respondents' Submission

[11] Ms. Simpson was not a member of a Trade Union having bargaining rights. Section 2(b) of **LRIDA** (amended March 2010) applies to individual disputes. The section defines industrial disputes as follows, "*a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers and...in the case of workers who are not members of any trade union having bargaining rights, being a dispute relating wholly to one or more of following*." Subsection (ii) deals with the termination or suspension of employment of any such worker.

[12] The dispute between the non-unionised, Ms. Simpson and her employer, concerns the termination of her employment contract and as such the dispute is an individual dispute for purposes of the **LRIDA**. No joint referral was made by

the parties. There was no claim here to this being an essential service, such referrals being dealt with pursuant to Section 9 of the **LRIDA**. Section 10 deals with disputes injurious to the national interest.

[13] The Minister may, pursuant to Section 11A, where he is satisfied that an industrial dispute exists in any undertaking and should be settled expeditiously, on his own initiative refer the dispute to the Tribunal. He may do so in industrial disputes in undertakings providing essential services, and in circumstances where the Act empowers him to act in the public interest to settle dispute.

[14] The Minister may make a referral on his own initiative, if he is satisfied an industrial dispute exists;

a. refer the dispute to the Tribunal for settlement –

i. If he is satisfied that attempts were made without success to settle the dispute by such other means as were available to the parties ; or

ii. if, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do.

[15] In 1985, the Court of Appeal, in **R v Minister of Labour, I.DT. Barrett, Henry & Dawkins, ex parte West Indies Yeast Co. Ltd.** [985] 22 J.L.R 407, at page 411, letter H, noted;

> *" it was submitted by counsel for the applicant that unless s.11A (1) (a) is construed so that the power conferred is only exercisable where industrial peace, the national economy or the public interest is threatened, the section would be repugnant to and inconsistent with ss. 9 and 10 of the Act and with the object and policy of the statute as a whole. It was argued that it is inconceivable that Parliament intended to confer on the Minister a more restrictive*

> *power to refer disputes affecting industrial peace etc. than where the only interest affected was that of an individual."*

Discussion

[16] The contention essentially before the court is whether the Minister ought to have referred the matter to the Tribunal in the circumstances outlined in the case. Section 11A of the **Labour Relations and Industrial Disputes Act** sets out the circumstances where disputes may be referred to the Tribunal.

[17] In **R v Minister of Labour, I.DT. Barrett, Henry & Dawkins, ex parte West Indies Yeast Co. Ltd.,** Smith C.J, held at page 412 of the judgment;

> *'What s.11A clearly does is to give the Minister freedom to intervene and take action in respect of any industrial dispute in spite of the restrictive procedure which the other sections require...."*

I agree with the contention of counsel for the Applicant company that the Minister is authorised only to act in the public or national interest.

[18] Mrs. Gibson Henlin, submitted that the worker who is not a member of a Trade Union with bargaining rights would not be party to a collective bargaining agreement as contemplated by Section 6 of the Act. It follows that such other means as were available to the parties '*under section 11A(1)(a) (i) would not apply to that category of worker by reference to section 6 of the Act'*. Therefore some other statutory scheme would be necessary. This according to Mrs. Gibson Henlin, would be by reference to section 11A(1)(b). The procedures for settlement outlined in Section 6 are relevant for collective bargaining agreements. The Minister is empowered pursuant to the Amended **LRIDA**, and can on his own initiative make a reference. There is no statutory requirement how a non-unionised employee, should be dealt with pursuant to Section 6. The term such other means as are available to the parties contemplates, among others means, the holding of conciliatory meetings.

[19] The affidavit of Alrick Brown, dated 27th August 2012, indicates, at paragraph 6; "*that conciliation meeting are utilized by the 2nd Respondent where negotiations between disputing parties are not fruitful and a Conciliation Officer, employed to the 2nd Respondent is used as an independent third party to assist in amicable peaceful and expeditious settlement of disputes."*

[20] The construction sought to be placed on the term "*such other means as are available to the parties*", by Mrs. Gibson Henlin, would seek to restrict the term to collective agreements. I cannot accept that submission. Mrs. Gibson Henlin, attacked the process leading up to the conciliation meetings, for procedural impropriety and that the meeting itself in which, the Conciliation Officer participated was impugned with bias.

[21] Mrs. Gibson Henlin submitted that the danger of real risk of apparent bias is irresistible, that the Minister's involvement in the conciliation decision making or referral process, taints the process which arrived at a decision to refer the matter to the Tribunal with bias so that the Applicant does not feel that the decision accords with justice. The affidavit of Kerine Brown-Gentles, filed 26th July 2012, in support of the Application for Court Orders, notes that the letter of referral was signed by the same officer who chaired the conciliation meetings. It was further submitted that the section contemplates a different and distinct Conciliation Officer from the Minister's representative. There is no evidentiary support for such a proposition.

[22] The Conciliator, is not a judge who is party to the cause, nor has he a financial interest in a party to the cause or in the outcome of the cause. Neither is he closely connected with a party to the proceedings. There is no evidentiary proof that the Conciliation Officer, is in a "*cause in which he has an interest*." In the Privy Council decision of **George Meerabaux v The Attorney General of Belize** [2005] UKPC 12, it was held that the relevant test, in circumstances, where there was no personal or pecuniary interest alleged as in the instant case, is to apply the **Porter v Magill** test. At paragraph 25, inter alia, the court outlined the test as;

> *"What the fair minded and informed observer would think. The man in the street, or those assembled on Battlefield Park to adopt Blackman J's analogy, must be assumed to possess these qualities."*

[23] Those observers would have to examine the legislative structure under which the industrial disputes are managed. The policy of government, where there has been a failure to settle to provide voluntary conciliation service. That it is the Minister who on his own initiative could refer the matter to the Tribunal. I am inclined to the view that if he had taken these facts into account, the fair-minded and informed observer would not have concluded bias in the Conciliation Officer.

[24] In an application for leave for judicial review, the Judicial Committee of Privy Council in the Matter of **Sharma v Brown-Antoin**e (2006) WIR 379, Lord Bingham of Cornhill, stated at page 397;

> *"The ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to the discretionary bar such as delay or an alternative reedy. R v Legal Aid Board ex parte Hughes (1992) 5 AdminLR 623 at 628 , and Fordham , Judicial Review Handbook (4th Edtion , 2004) p.426 . But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexibility in its application."*

[25] The discretion which the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application. (Per Lord Wilberforce, at page 6, in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Limited** [1981] 12 All E.R 93). Rule 56.4(2) of **the Civil Procedure Rules**, allows the Judge on an application for leave, to grant the application, without hearing the Applicant. This allows the Judge, to consider the application on paper alone. It is only if the judge is minded to refuse the application, or the application includes a claim for immediate interim relief, or

if the hearing is desirable in the interest of justice that the Judge must direct that a hearing be fixed.

[26] There is no issue as to whether, the Applicant has sufficient interest. Neither is there any question raised of any discretionary bar being raised. However, I am of the view that the Application for leave for Judicial Review does not disclose that the Applicant has an arguable case with a realistic prospect of success. Leave is refused and the application denied.