[2023] JMSC Civ 190

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV04103

BETWEEN	**THE BOARD OF DIRECTORS OF THE MICO UNIVERSITY COLLEGE**	**CLAIMANT**
AND	**MINISTER OF LABOUR AND SOCIAL SECURITY**	**DEFENDANT**
AND	**ALEXANDER OKUONGHAE**	**INTERESTED PARTY**

IN OPEN COURT

Mr. Matthew Royal instructed by Myers, Fletcher & Gordon for the Claimant

Ms. Lisa White instructed by the Director of State Proceedings for the Defendant

Mr. Alexander Okuonghae

Heard: July 17, 2023, and October 6, 2023

Judicial Review – Section 2 of the Labour Relations and Industrial Disputes Act – What is an Industrial Dispute under the Labour Relations and Industrial Disputes Act – Whether the Minister acted Ultra Vires in referring the matter to the Industrial Disputes Tribunal

CARR, J

INTRODUCTION

[1] The Claimant (**the Board**) has sought to challenge by way of Judicial Review the decision of the Defendant (**the Minister**) to refer a "dispute" between Mr. Alexander Okuonghae and the Mico University College to the Industrial

Disputes Tribunal (**IDT**). It is their contention that the Minister acted ultra vires the Labour Relations and Industrial Disputes Act (**LRIDA**) as there was in fact no industrial dispute between the parties.

THE CLAIM

[2] The Board filed a fixed date claim form dated December 11, 2023, seeking the following orders and declarations:

1. *An order of certoriari to quash the decision of the defendant to proceed to hear the alleged industrial dispute between the claimant and its former employee Mr. Alexander Okuonghae.*

2. *A declaration that the expiration of a fixed term contract of employment by effluxion of time is not an industrial dispute within the meaning of Section 2 of the Labour Relations and Industrial Disputes Act.*

3. *A declaration that any alleged legitimate expectation to the renewal of a fixed term contract of employment is not an Industrial Dispute within the meaning of Section 2 of the Labour Relations and Industrial Disputes Act as such is not justiciable before the Industrial Dispute Tribunal.*

4. *Costs to the claimant to be taxed if not agreed.*

5. *Such further or other relief as the court deems just.*

BACKGROUND

[3] Mr Okuonghae was employed as a Laboratory Assistant at the Mico University College under a fixed term one-year consecutive contract beginning from February 1, 2011, that expired on January 31, 2015. The contract was renewed throughout February 1, 2015, to January 31, 2018. On February 6, 2018, Mr. Okuonghae was issued a letter from the Board indicating that his contract would not be renewed. The letter read as follows:

"We advise that your contract will not be renewed. In keeping with this decision, your last day of work will be 2018, February 6.

Attached is cheque #0105107 in the sum of $74,560.93 after all deductions, representing:

Outstanding Vacation leave - $74,617.20

Salary for February 1-6 - $23,095.80

It is the University College's policy that items such as keys, identification, health cards and uniform pieces that bear "The Mico" logo be returned to your supervisor or the Human Resource Department.

We wish you all the best in your future endeavours".

[4] Mr. Okuonghae took issue with his dismissal and filed an application with the Permanent Secretary at the Ministry of Labour and Social Security, (**the Ministry**) dated February 7, 2018, seeking redress for what he cited to be unlawful dismissal by the Board. Following the application, he was invited to, and attended, four conciliatory meetings at the Ministry to resolve the matter. During these meetings the Board, through its representatives, insisted that there was no termination, as Mr. Okuonghae was employed on a fixed term contract and the contract had simply expired due to effluxion of time. Mr. Okuonghae maintained that he was unlawfully dismissed.

[5] There being no resolution of the matter at the conciliatory meetings the Ministry referred the matter to the IDT for adjudication pursuant to Section 11 A (1) (a) (i) of the LRIDA.

Issues

[6] There are two main issues for resolution in this case.

(a) Whether the decision of the Minister to refer the matter to the IDT was ultra vires the LRIDA.

(b) Whether the Board is entitled to the declaratory relief sought.

Submissions on Behalf of the Claimant

[7] The main grounds set out by the Board are listed below:

1. *The decision to refer the alleged industrial dispute over Mr Okuonghae's dismissal is ultra vires as Mr. Alexander Okuonghae was not dismissed by the applicant but rather his contract of employment came to an end by effluxion of time.*

2. *Section 2 of the Labour Relations and Industrial Disputes Act does not contemplate allegations of breaches of legitimate expectation.*

3. *In any event, a legitimate expectation cannot arise in private contractual arrangements, particularly employment contracts; it arises exclusively, between public bodies and those who are impacted by their decisions.*

4. *The decision of the Defendant to refer the dispute to the Industrial Disputes Tribunal in terms of a termination of employment is tainted with the bias of Mr. Michael Kennedy, the Defendants Chief Director of Industrial Relations.*

5. *The Defendants referral of this dispute to the Industrial Disputes Tribunal in terms of termination of employment was made in bad faith and motivated by an improper purpose of circumventing the jurisdictional challenge that would otherwise arise in respect of this dispute.*

[8] At the commencement of the hearing Counsel Mr. Royal abandoned the grounds in respect of bias. The gist of his submission therefore was that Mr Okuonghae's contract was terminated by effluxion of time and as such there was no termination in the sense of the word as contemplated by the LRIDA. Counsel relied on the authority **ME Taylor v Ministry of Defence**[1] and **Harding v Attorney General of Anguilla**[2] to advance his argument that once a fixed term contract expires,

[1] [1977] IRLR 2
[2] [2018] UKPC 22

an employer's failure to renew it did not constitute a termination of the contract, as such the employee could not prove that they had been dismissed. Counsel also argued that the reasonable expectation of renewal is not considered as an industrial dispute within the meaning of the LRIDA, additionally he submitted that the doctrine of legitimate expectation was inapplicable, but within the court's jurisdiction for final determination as in the case of **Legal Officers' Staff Association and Tasha Manley et al v The Attorney General et al**[3].

Submissions on behalf of the Defendant

[9] Ms. White on behalf of the Defendant argued that the custom adopted by the Board in renewing Mr. Okuonghae's contracts from 2015 to 2018 without a written agreement, and the conduct of the Board in terminating the contract six days into a new contract period while compensating Mr. Okuounghae accordingly, takes the contract outside of the category of a fixed term contract which is terminated by way of effluxion of time. Counsel also submitted that Mr. Okuonghae did not receive the requisite one month's notice and compensation as was required, as such it was contended that the dispute fell within the ambit of section 2 of the LRIDA, and the Minister did not fall into error in referring the matter to the IDT.

Submissions of Mr. Alexander Okuonghae

[10] Mr. Okuonghae submitted that his dismissal was unlawful, and the Minister had rightfully sent the matter to the IDT for settlement as they have the authority to determine and settle the issues.

Analysis and Discussion

Whether the decision of the Minister to refer the matter to the IDT was ultra vires the LRIDA

[11] In matters of Judicial Review, I am guided by the overarching principles as set out in the leading case of **Council of Civil Service Unions v. Minister for the**

[3] [2015] JMFC FC 3

Civil Service[4]. Lord Diplock outlined the grounds for Judicial Review as follows: *a) Illegality – where the decision is made which is ultra vires the law that regulates the decision-making power, b) Irrationality – where the decision made defies logic, and c) Procedural Impropriety – the failure to follow the rules of natural justice and procedural fairness as well as the failure of the decision maker to follow all the procedural steps required by the legislation which enables him to make the decision*.

[12] The Claimant's case rested entirely on the ground of illegality, that the decision of the Minister was ultra vires the LRIDA.

[13] **Section 2 (a) of the LRIDA** provides as follows:

> *"Industrial dispute" means* ***a dispute*** *between one or more employers or organizations representing employers and one or more workers or organizations representing workers and –*
>
> *(a) In the case of workers who are not members of any trade union having bargaining rights, being* ***a dispute relating wholly to one or more of the following****:*
>
> *i. The physical conditions in which any such worker is required to work.*
>
> *ii.* ***The termination*** *or suspension of employment of any such worker; or*
>
> *iii. Any matter affecting the rights and duties of any employer or organization representing employers or of any worker or organization representing workers;*

[14] Section 11 A (1) (a) (i) of the LRIDA states:

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[4] [1984] UKHL 9 at page 8

"Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative.

(a) Refer the dispute to the Tribunal for settlement-

(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."

[15] In referring the matter to the IDT, the Minister outlined the terms of reference as:

"*To determine and settle the dispute between Mico University College on the one hand and Mr. Alexander Okuonghae on the other hand, over the termination of his employment".*

[16] Upon attending the hearing before the IDT, the Board objected to the hearing indicating that the IDT had no jurisdiction to deal with the non-renewal of employment contracts. They disagreed with the label "termination of employment". The IDT sought directions from the Minister and the Minister responded utilizing the same terms of reference.

[17] It is pellucid that the Minister by virtue of Section 11 A (1) (a) (i) has the authority to refer an industrial dispute to the IDT. Mr. Royal has argued that a termination by effluxion of time is not a "termination" in accordance with the LRIDA. I cannot agree. The LRIDA has not defined the word "termination". Instead, it defined an "industrial dispute". By its basic definition a dispute is a disagreement or argument between two or more parties as to an issue. The Minister's role under the Section as stated is twofold. She must first be satisfied that there is an industrial dispute, then she must also consider whether all efforts were made to resolve the matter without success.

[18] Did the Minister exercise her power within the confines of the Act? Mr. Okuonghae indicated that his contracts of employment started out as fixed term contracts, however, after the initial agreement expired in 2015, there was an

informal renewal of the agreement, and nothing was put in writing. By way of letter dated May 26, 2017; the Board wrote to Mr. Okuonghae as follows:

> *"We have acknowledged that your last contract expired on 2015 January 31, In light of this your temporary employment as Laboratory Assistant in the Department of Medical Sciences has been extended for the periods:*
>
> 1. *2015 February 1 to 2016 January 31*
> 2. *2016 February 1 to 2017 January 31*
> 3. *2017 February 1 to 2018 January 21*
>
> *All other terms and conditions of your employment will remain the same.*

[19] Mr. Okuonghae never signed this letter. It was a term of his initial agreement of employment that he was to be provided one month's notice if the Board wished to terminate his employment. This was not done. It was his argument that he had a legitimate expectation that his contract of employment would be renewed.

[20] It is agreed that the initial agreement was one of a fixed term contract. The documentary evidence before the Minister is that Mr Okuonghae's contract expired and was replaced with something akin to an informal arrangement. Further, in breach of this informal arrangement he was told that with immediate effect his contract would not be renewed.

[21] This is the industrial dispute which the Minister had to deal with. This was the dispute as to termination. On the one hand was the Board standing firm in its position that there was no termination, and, on the other was Mr. Okuonghae who was steadfast in his claim that he was unlawfully dismissed.

[22] It is not the Minister's role to determine the nature or correctness of the submissions of the representatives for either side. Her role was simple she had to determine whether an industrial dispute existed. I make bold to say that it is for the IDT to determine whether this was in fact a fixed term contract which had expired by effluxion of time or if it was a new contract which was informally arranged and would carry over month to month. Given the evidence, I am satisfied that this was a dispute as to termination in keeping with the definition

of an industrial dispute in accordance with the LRIDA. The Minister therefore acted within the confines of the law.

[23] Although Mr. Royal did not make any submissions on the ground of irrationality, I am also of the view that there is sufficient evidence before this court to support a finding that the Minister did not act unreasonably in referring the matter to the IDT. There were several conciliatory meetings between the parties with no settlement. All efforts had been made by the team at the Ministry to resolve the issues without success. In the circumstances there was nothing further that could be done at that level and the referral was reasonable.

Whether The Board is entitled to the Declaratory relief sought

[24] The court has the power to make declaratory orders in matters involving the state, the court, a tribunal, or any other public body. A declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs.[5] It is a discretionary remedy, and a Court must be satisfied that it is appropriate to do so.

[25] The Board seeks two declarations. *a) that the expiration of a fixed term contract of employment by effluxion of time is not an industrial dispute within the meaning of Section 2 of the Labour Relations and Industrial Disputes Act. b) A declaration that any alleged legitimate expectation to the renewal of a fixed term contract of employment is not an Industrial Dispute within the meaning of Section 2 of the Labour Relations and Industrial Disputes Act as such is not justiciable before the Industrial Dispute Tribunal.*

[26] Anderson J in **George Jackson, Andrew Jackson, Joel Betty v Attorney General[6],** relied on an excerpt from the text **Perspectives on Declaratory Relief[7]**, the case of **Aussie Airlines Australia v. Australian Airlines[8]** was quoted, outlining the circumstances under which the court ought to exercise its power to grant declaratory relief as follows:

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[5] de Smith, Woolf & Jowell, Judicial Review of Administrative Action, fifth edition, page 735
[6] 2009 HCV 02775
[7] Perspectives on Declaratory Relief by Anthony Papamatheos and Peter W. Young, page 148.
[8] [1996] 139 ALR 663 at 670-671

"For a party to have sufficient standing to see and obtain declaratory relief it must satisfy a number of tests which have been formulated by the courts, some in the alternative and some cumulative. I shall formulate them in summary points as follows:

i. *The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved and the declaratory relief must be directed to the determination of legal consequences: In Re Judiciary and Navigation Acts* (1921) 29 CLR 257. *The answer to the question must produce some real consequences for the parties.*

ii. *The applicant for declaratory relief will not have sufficient status if relief is 'claimed in relation to circumstances that (have) not occurred and might never happen'. University of New South Wales v Moorhouse (1975) 133 CLR 1, per Gibbs J at 10; or if the Courts declaration will produce no foreseeable consequences for the parties; Gardner v Dairy Industry Authority (NSW) (1977) 52 ALJR per Mason J at 180 and per Aickin J at 189.*

iii. *The party seeking declaratory relief must have a real interest to raise it; Forster v Jododex Australia Limited (1972) 127 CLR 421 per Gibbs at 437 and Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited 1921 AC 438 per Lord Dunedin at 448,*

iv. *Generally, there must be a proper contradictor Russians Commercial and Industrial Bank v British Bank for Foreign Trade Limited at 448 and Ainsworth per Brennan J at 596'.*

[27] In adopting these principles I find that in this case there is a contradictor in the Director of State Proceedings. I also find that the Board has a real interest in raising the matter before the court. I do not find that a declaration as set out by the Board will have any foreseeable consequences for the parties. It is my considered opinion that the proceedings in this case would not result in such a finding as I have already determined that the Minister acted within the ambit of

the LRIDA. Further, it is noted that the declarations sought by Counsel are essentially asking the Court to impute definitions to terms that have already been established. The LRIDA has defined an ‘industrial dispute”. It is not for this Court to expound upon that definition. The declarations sought given the circumstances would be inappropriate.

Disposition

1. The orders sought in the Fixed Date Claim Form are refused.

2. Each party is to bear their own costs.