



[2017] JMSC Civ.19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV03110

BETWEEN	CASSAVA PIECE DEVELOPMENT AND EDUCATION CENTRE	CLAIMANT
AND	THE MINISTRY OF LABOUR AND SOCIAL SECURITY	1ST DEFENDANT
AND	THE INDUSTRIAL DISPUTES TRIBINAL	2ND DEFENDANT

IN CHAMBERS

Dr. Lloyd Barnett QC and Ms. Justine Collins instructed by Hart, Muirhead & Fatta for the affected party Ms. Virginia Chin

Mr. Jerome Spencer and Ms. Vanessa Young instructed by Patterson, Mair, Hamilton for the applicant

Ms. Carla Thomas and Ms. Tanya Ralph instructed by the Director of State Proceedings for the 1st and 2nd respondents

Heard: November 6 and 17, 2017

Application to be heard by affected third party on an application for leave to commence judicial review proceedings - Whether overriding objective applies to part 56 of the Civil Procedure Rules - Whether judge has discretion to allow affected third party to be heard at the leave stage - Whether judge has power to invite submissions from a third party to assist in the just disposal of the application – Part 56 Civil procedure rules

Wint-Blair, J (Ag.)

- [1] On November 6, 2017 this court granted the application of Ms. Virginia Chin to be heard in the application for leave to commence judicial review proceedings and made the orders set out at paragraph 17. These are the reasons for so doing.
- [2] It is agreed by both sides that Ms. Chin is the party who will be the most directly affected by any order of the court. It was her written application to the Ministry of Labour and Social Security regarding her dispute with the Cassava Piece Development and Education Centre pursuant to the Labour Relations and Industrial Disputes Act (“LRIDA”) which set in train a series of events which eventually led to this application. The Minister upon the written application of Ms. Chin referred the dispute to the Industrial Dispute Tribunal (“IDT”) as provided by LRIDA. The applicant for leave now seeks to oppose the order of the Minister which referred the matter to the IDT and by extension the jurisdiction of the IDT to conduct the hearing as referred to it. The applicant for leave also opposed the separate application for Ms. Chin to be heard at the leave stage.
- [3] Dr. Barnett, QC argued that Ms. Chin had had a desire to engage the conciliatory process facilitated by the Ministry of Labour and Social Security with a view to settlement. The LRIDA provides that disputes referred to the Ministry of Labour and Social Security may be handled in this way. The parties to that hearing would be Ms. Chin and her former employer. Dr. Barnett submitted that any order which barred the IDT from hearing the dispute between the parties would deny Ms. Chin access to the tribunal as the party most directly affected. The argument that the Minister had no authority to refer the matter to the IDT is the issue to be argued at the full hearing. The submissions of Ms. Chin as a directly affected party would therefore be important in a hearing on the application for leave based upon the principles of fairness. Additionally, any order which barred Ms. Chin from appearing at the leave stage would be in conflict with the overriding objective of the Civil Procedure Rules.

- [4] Mr. Spencer opposed the application on the grounds that the rules implicitly provided for only parties to the dispute to be heard. The bounds of the Minister's jurisdiction to have referred the matter to the IDT and by extension the statutory jurisdiction of that tribunal to hear the dispute are to be determined by the court if leave is granted. The parties to the judicial review proceedings are only the Minister and the Cassava Piece Education and Development Centre. He argued that there is no power given to a judge in Rule 56.4(4) to direct that notice be given to an interested party. Further, Rule 56.13(2)(c) and (d) contemplate that an individual can be heard and may be permitted to make submissions at the first hearing after leave is granted. The affected party therefore has no right to be heard at the leave stage.
- [5] Ms. Thomas for the Director of State Proceedings who was not opposed to the grant of the application very persuasively argued that Part 56 of the rules neither contained any express provision for the grant of the application sought, nor contained any provision which precluded it. She relied on the case of **R v Industrial Disputes Tribunal ex parte J. Wray and Nephew Limited** 2009HCV04798 delivered October 23, 2009 which was of great assistance.
- [6] In that case, J. Wray and Nephew Limited had applied for leave to apply for judicial review seeking a review of the decision of the Industrial Disputes Tribunal ("IDT"). The IDT had, after a hearing, ordered workers represented by the Union of Clerical Administrative and Supervisory Employees ("the union") be reinstated. At the leave stage, Mr. Robinson who appeared for the Attorney General argued that the union had no right of audience. It could only participate after leave had been granted. The union was not a person aggrieved and therefore there was no basis on which it could be present having received an award in its favour. The upshot was, the union had no locus standi at the leave stage and additionally it was not challenging the decision of the IDT.
- [7] In that decision, my learned brother, Sykes, J sets out the background to Part 56 and examines Rules 56.4 (3), (4). At paragraph 25 to 29 he sets out the most

instructive part of the decision with regard to the application before me. I will not reproduce all of those paragraphs here, but paragraph 25 bears repeating. It is clear that Rule 56.4(4) does not limit who can be at the hearing. "Hearing" as used in paragraph 25 refers to the hearing of the application for leave. Sykes, J said:

"Significantly, the rule does not limit who can be at the hearing. The reason is obvious. It is possible, as is the case before me, that there may be instances where the judge may wish to hear from other persons such as directly affected third parties. In this case, the company is seeking immediate interim relief for a stay of the reinstatement order, that is to say, the workers should not immediately reap the benefit of an award in their favour by a properly constituted tribunal. The framers of the rule did not hamstring the judge by putting in any restriction on who may be present. The reason has to be that because once interim relief is involved, there may be issues that affect the third party in ways that even the most Solomonic of judges, the wisest of applicants and the most perspicuous of respondents simply cannot foresee. The judge therefore has the leeway to invite the third party in order to hear his views on the matter. After hearing from the third party the judge may decide to grant leave with conditions or on such terms as appears just (rule 56.4(8))"

[8] It would seem to me that there is a discretion reposed in a judge hearing an application for leave to decide who the parties at the hearing ought to be. The rules do not speak to the criteria for an inter parties hearing. There being no express prohibition, the discretion is to be exercised in accordance with the overriding objective. I find support for this view in paragraph 26 of the decision of Sykes, J. The judge therefore has the power to *"give directly affected parties an opportunity to say how a particular order of a court may affect him if the court considers it necessary to do justice to the parties."*

[9] I agree with and adopt the conclusion of my brother that there is no rational reason, nor anything in the rules, which prevents the application of the overriding objective to applications pursuant to part 56. There is similarly no rule or precedent which has been raised in argument before me which precludes an inter parties hearing at the leave stage of an application for judicial review if the judge forms the view that this is necessary for the just disposal of the application.

“In other words, the sheer common sense of the matter makes it plain, that dealing with a case justly must mean that court, should it think necessary, hear from persons who may be directly affected by a decision the court may make.”

- [10] Mr Spencer argued that the case of **J. Wray & Nephew** turned on its particular facts as the union had won a thing of value in the award of the IDT. The company therefore sought interim relief, and a stay until the application for leave was determined. The application then had not been opposed by the Attorney General. It would appear that counsel did not view the lost opportunity for continued employment a thing of value such as the affected party may perceive it.
- [11] Mr Spencer further relied on the case of **Orrett Bruce Golding v The Attorney General of Jamaica and Portia Simpson Miller** SCCA 3/08 delivered April 11, 2008. He submitted that the Court of Appeal decided that Part 56 of the Rules is a discrete and exhaustive section containing all the relevant procedural requirements. Part 56 proceedings cannot be extended to allow the affected party to be involved as the respondents had been served and were prepared to respond to the application.
- [12] I do not agree with this submission for four reasons. The issues decided by the court in the **Golding v Simpson Miller** case concern an application to extend time which is different than the application to be determined. The decision of the Court of Appeal in **Golding** did not lay down any specific pronouncement of law with respect to nor did it derogate from the powers of a judge to decide issues which fall within the inherent jurisdiction of the court. The issue of an application for the extension of time is one which is provided for in the Rules, the application to be heard is not. Lastly, Rule 1.2 provides: *“the court must give effect to the overriding objective when interpreting these rules or exercising any powers under these rules.”* Rule 1.2 needs no elaboration.
- [13] There was no submission made by counsel Mr. Spencer, nor any evidence before me to suggest that there would be any prejudice to his client at any stage

or that the decision to allow for an inter parties hearing would bring about some adverse effect. Mr Spencer made submissions which were similar in nature to those made without success by Mr Robinson in the **J. Wray & Nephew** case.

[14] I will adopt the reasoning of my brother Sykes, J at paragraph 33 of his judgment which showed why as a practical necessity the judge has the power to determine the right to order the presence of any affected party at the leave stage. If the application were heard without the participation of the affected party, Ms. Virginia Chin could be told that the court had made a decision which would affect her expectation as regards the position she had held with the applicant without hearing from her. This could not be fair in the absence of any evidence as to how the grant of the order would affect her. Sykes, J went on to state the correct issue on an application of this nature:

“in any event, the real issue to my mind is not so much whether there is a right to be heard as it is whether it is within the power of the judge to invite persons to make submissions that can assist in the just disposal of the application.”

[15] The affected party, Ms. Virginia Chin is a party directly affected as defined by the House of Lords in **R v Rent Officer Service and another ex parte Muldoon** [1996] 1 W.L.R. 1103. Lord Keith said at page 1105 that:

“directly affected by something connotes that he is affected without the intervention of any intermediate agency.”

[16] Sykes, J in **J. Wray & Nephew** distinguished between interested parties and parties directly affected at paragraph 39 of his decision. The distinction does not need to be elaborated upon in this case. I adopt his reasoning and conclusion in that regard.

[17] That Ms. Chin is a party directly affected is not in dispute. The court therefore ordered as follows:

1. The Applicant is permitted to be heard in on the application for leave to commence judicial review proceedings.

2. The Applicant is permitted to make oral submissions herein or make submissions by way of a written brief.
3. Due notice of all proceedings and applications in the proceedings herein is to be given to the Applicant.
4. The hearing of the notice of application filed on the 28th day of September, 2017 for leave to commence judicial review proceedings is set down for hearing on November 13, 2017 at 10:00am for four (4) hours.