



[2023] JMSC Civ.215

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV03825

BETWEEN	KENIEL GAYLE	CLAIMANT
AND	INDUSTRIAL DISPUTES TRIBUNAL	DEFENDANT

IN OPEN COURT

Mr. Lemar Neale instructed by NEA|LEX for the Claimant

Mr. Louis-Jean Hacker instructed by the Director of State Proceedings for the Defendant

Ms. Ayana Thomas instructed by Nunes, Scholefield and Deleon for the interested party

Judicial Review – Apparent Bias – The test of the fair-minded and informed observer

Heard: July 31, 2023, and November 9, 2023

CARR, J

Introduction

[1] The Claimant (**Mr. Gayle**) has sought to challenge by way of Judicial Review the award of the Industrial Disputes Tribunal (**IDT**) handed down on August 13, 2020, which upheld the dismissal of his employment from Devon House Development Limited (**DHDL**), a government owned company. It is his contention that he was not given a fair hearing as the Chairman of the IDT failed to disclose her interest and association with the Jamaica Labour Party (**JLP**). This failure to disclose her association with the ruling political party is in breach of the principles of natural

justice as the decision arrived at by the panel was tainted with actual or apparent bias.

The Claim

[2] Mr. Gayle seeks two substantive orders.

1. An order of Certiorari quashing the Award of the Defendant made on August 13, 2020.
2. An order of Mandamus directing the Defendant to commence de novo the hearing of the dispute between Devon House Development Limited and the Claimant in accordance with the referral from the Minister of Labour and Social Security contained in the letter dated October 10, 2018.

Issues

[3] In his submissions before the Court Mr. Neale indicated that he was not pursuing the claim based on actual bias but that of apparent bias. Given that concession, the sole issue before the Court is whether the Award is tainted by apparent bias.

Analysis and Discussion

[4] A claim for judicial review is essentially an examination of the process that led to a decision of a state owned or operated entity. It is therefore not within the remit of this court to consider the merits of the decision or to substitute its own decision for that of the Tribunal. The principal question for determination is whether the process employed in the making of the decision was within the confines of the law. The principles set out in the case of **Council of Civil Service Unions v. Minister for the Civil Service**¹, are well known and accepted. The grounds for judicial review are categorized as follows:

¹ [1984] UKHL 9

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. It has been known as the test of “Wednesbury unreasonableness”.

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.”

[5] In this case Mr. Neale has argued that the decision of the Tribunal should be quashed as there was a breach of the principles of natural justice owing to the apparent bias on the part of the Chairman. The crux of the submissions was that the Chairman’s political association and conduct prior to the handing down of the award are of such degree as to give rise to a suspicion that the Chairman was not impartial. It was submitted that a fair- minded and informed observer would conclude that there was a real possibility that the Tribunal was biased. He relied on the authorities of **Carrol Ann Lawrence- Austin v The Director of Public Prosecutions**², **Helow v Secretary of state for the Home Department & Another**³, **R v Sussex Justices, Ex Parte McCarthy** , **In Re Medicaments and Related Classes of Goods No 2**⁴, and **Attorney General of the Cayman Island v Tibbetts**⁵ to support this point.

[6] Mr. Hacker in outlining his submissions on behalf of the Defendants also focused on the test of the fair-minded and informed observer. He opined that the hypothetical observer is to be treated as if in possession of all the relevant facts and not only those that are publicly available. The observer is to be seen as

² [2020] JMCA civ 47

³ [2008] 1 WLR 2416

⁴ [2001] 1 WLR 700

⁵ [2010] UKPC 8

someone who understands the concepts and workings of Government and the framework of the Labour Relations and Industrial Disputes Act (**LRIDA**). It was argued that the Claimant had conflated the meaning of 'Government of Jamaica' as although the DHDL is Government owned, it is not owned by the JLP or by any Member of Parliament. In summary he asked the Court to find that no fair-minded and informed observer, having knowledge of the facts, would say there was a possibility of bias on the part of the Chairman.

- [7] Ms. Thomas on behalf of the interested party, concurred with the submission of the Defendant and reiterated that the Chairman's entrance into representational politics with the JLP did not provide her with a personal interest in the outcome of the dispute between the Claimant and the Defendant. Further a fair-minded observer would not conclude that there was a real possibility that the Chairman was biased simply because of her association with the JLP.

The principles of natural justice and the rule against bias

- [8] The concept of natural justice is guided by fairness. It is well established that natural justice is concerned with the protection of the right to a fair hearing and the rule against bias. Essentially a person should not be a judge in his own cause, and a litigant/complainant should be afforded an unbiased fair hearing.
- [9] The evidence contained in the Affidavit of Mr. Gayle (filed on December 24, 2020) is that he was employed to DHDL until October 26, 2017. His employment was terminated and being aggrieved he asked the Ministry of Labour to intervene in the dispute. The matter was eventually referred to the IDT and the Chairman of the panel was Ms. Marsha Smith. The hearing commenced on December 11, 2018, and prior to its completion he became aware of a Gleaner article which was headlined "*Ernie Smith's daughter Marsha tipped to replace Shahine Robinson*". The article was dated July 19, 2020.
- [10] He states that at no time prior to the Award being handed down did the Chairman indicate or disclose that she had an association with or an interest in the JLP nor

did she disclose her intention to run as a candidate for the JLP. It is his evidence that had this disclosure been made at the commencement of the hearing or during the hearing he would have objected to her presence on the panel as it gives rise to a conflict of interest and he was not of the view that she could be impartial.

- [11] The parties all referred to the same cases in their submissions and the test for the determination of apparent bias is accepted as outlined in the case of **Carrol Ann Lawrence-Austin v The Director of Public Prosecutions**⁶. At paragraph 36 of the judgment Morrison, P stated.

“The law is well settled with regard to the test for apparent bias. It has moved away somewhat from the approach laid down in R v Gough [1993] AC 646 in the speech of Lord Goff of Chieveley, where the test was formulated in the headnote as “whether, in all the circumstances of the case, there appeared to be a real danger of bias”. The current test is found in the well-known statement of Lord Hope of Craighead in Porter and v Magill [2002] 1 All ER 465, where he stated that the reference to “real danger” should be deleted as it no longer served any useful purpose, and that the question should now be “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.

- [12] Who is this fair-minded and informed observer? Morrison, P went on at paragraph 37 of the judgment to examine the case of **Helow v Secretary of State for the Home Department and another**⁷ where he stated that,

“Lord Hope of Craighead gave clarity to the concept of the fair-minded and informed observer, in paragraphs 1-3 of his judgment. He stated.

[1] *... a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a*

⁶ [2020] JMCA Civ 47

⁷ [2008] 1 WLR 2416

creature of fiction. Gender-neutral (as this is a case where the complainant and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.

- [2] *The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainant makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.*
- [3] *Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."*

[13] Morrison, P also referred to the case of **In re Medicaments and Related Classes of Goods (No 2)**⁸ . In that case the principles to be applied in determining bias were outlined as follows:

“(1) If a judge is shown to have been influenced by actual bias, his decision must be set aside.

(2) Where actual bias has not been established the personal impartiality of the judge is to be presumed.

(3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside.

(4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court.

(5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.”

[14] The authority has set out the guidelines to be followed when examining an allegation of apparent bias. I must first be satisfied as to the facts on a balance of probabilities and then I must examine the facts through the lens of the fair-minded and informed observer to determine whether she would conclude that there is an appearance of bias using the same standard.

[15] The Defendant filed an affidavit of Royette Creary in answer to the claim. In her affidavit Ms. Creary outlined that she was the secretary at the IDT. She indicated the dates of the hearing and exhibited the copy of the notes of proceedings, exhibits and the Award. The evidence as to the political affiliation of the Chairman was never challenged. The undisputed facts therefore are:

⁸ [2001] 1 WLR 700

1. DHDL is a company wholly owned and operated by the Government of Jamaica.
2. The Chairman of the panel that heard the dispute between DHDL and Mr. Gayle, was Ms. Marsha Smith.
3. It was reported in the media that Ms. Smith intended to enter representational politics to replace Ms. Shahine Robinson the previous JLP member of parliament for North East St. Ann.
4. The members of the JLP formed the Government of Jamaica.

[16] The Chairman of the IDT is accepted as a person who exercises a quasi-judicial function. There being no allegation of actual bias, in accordance with the principles enunciated in **Re Medicaments** the presumption is in favour of the personal impartiality of the Chairman.

[17] Do the facts as outlined give rise to a legitimate fear that the Chairman was not impartial? Mr. Hacker in his submissions on the evidence asked the Court to disregard the newspaper articles and the television reports as hearsay. There was no objection taken as to its admissibility before and there is no evidence before this court to contradict the statements contained therein. The evidence of the intention of the Chairman to enter representational politics is therefore a fact which this Court must accept in the determination as to the issue.

[18] The approach of the observer must not be confused with that of the person who brought the complaint. The fact that Mr. Gayle has viewed the Chairman's intention as akin to bias in favour of the DHDL, or that he referred to the opinions of the Opposition Minister as to the potential for a conflict of interest is not to be used to gauge the views of the observer. What is clear however is that the Court must not substitute its own view of the matter for that of the fair-minded and informed observer.

- [19]** The fair-minded and informed observer must reserve judgment until she has seen and fully understands both sides of the argument. On one side is Mr. Gayle indicating that the Chairman's affiliation to the ruling political party is enough to give the appearance of bias in the making of the decision between a government owned entity and himself. The point raised by Mr. Hacker however is a valid one. The fair-minded and informed observer knows the government is separate and apart from any political party. The observer is also aware that the Chairman would have no stake in the dispute as she was not connected to DHDL, that the DHDL is owned by the Government and not the JLP and that the JLP as an organization had no interest in the results of a labour dispute between DHDL and Mr. Gayle.
- [20]** As an informed observer who is well read and has taken the trouble to inform herself of all the facts, she would be aware that at the commencement of the hearing there was no information that the Chairman was affiliated with the ruling JLP. It would also be evident that the dates of the hearing occurred prior to the announcement by the Chairman of her intention to enter representational politics. This was confirmed by the evidence of Ms. Creary who stated that the hearings were completed in September 2019, Mr. Gayle says it was November 2019. It was only the Award which was left to be handed down in August. At that time although the Chairman had signalled her intention to enter representational politics, she was still not a member of parliament and therefore not a member of the Government. It therefore could not be said that the Chairman had an interest in the Government owned DHDL at the time of the hearings.
- [21]** The observer is not unduly sensitive or suspicious. The evidence before this Court is that the Chairman is one of three persons who make up the panel at the IDT. The decision maker in this case is not the Chairman but the panel. There is no evidence that there is any political affiliation or connection of the other members. It would be highly suspicious of the observer to find that the remaining two members of the panel were led to accept the decision of the Chairman on the matter without any independent thought or voice.

[22] The observer in this case would after considering all the facts, in the absence of –
a) any evidence that the other two panellists were unduly influenced by the affiliation of the Chairman,

b) any evidence to suggest that this affiliation took place during the hearing of the matter, and

c) any evidence to suggest that the JLP had any interest in the dispute between an employee and one of the many companies owned by the Government,

find that the Award was not tainted with the bias of the Chairman. Accordingly, I am not of the view that Mr. Gayle is entitled to the orders sought on the fixed date claim form.

Orders:

1. The orders sought on the fixed date claim form are refused.
2. Each party is to bear their own costs.