[2022] JMSC Civ. 172

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV03260

BETWEEN	**Island (Jamaica) Limited**	**CLAIMANT**
AND	**Industrial Disputes Tribunal**	**DEFENDANT**

Mr. Gavin Goffe and Mr. Matthew Royal instructed by Myers Fletcher and Gordon for the Claimant

Mrs. Taniesha Rowe-Coke instructed by the Director of State Proceedings for the Defendant.

Heard: June 29, 2022 and September 30, 2022

Judicial Review – Whether the disclosure of a without prejudice letter resulted in a breach of the Claimant's right to a fair hearing – Whether the Industrial Disputes Tribunal acted irrationally in refusing to recuse itself from the hearing after being exposed to the without prejudice letter – Whether the Industrial Disputes Tribunal acted unlawfully in coming to its decision not to recuse itself

Carr, J

Introduction

[1] The Claimant company, Island Jamaica Limited (**IJL**), was a party to a dispute involving an aggrieved employee (**Mr. Eric Evering**) before the Industrial Disputes

Tribunal (**the tribunal**), which commenced on the 18th of November 2020. During the hearing, counsel on behalf of IJL tendered a letter which was admitted into evidence as Exhibit 29. The letter contained privileged settlement discussions between the parties before the tribunal. Following the admission of the letter counsel for IJL asked that the panel recuse themselves and that the matter begin de novo before a new panel.

[2] The application for recusal was heard and counsel on behalf of IJL, along with counsel on behalf of the aggrieved employee, were both permitted to make submissions. Counsel for IJL responded to the submissions and the panel took time to consider their decision. On the next date the panel indicated that the application was refused and they declined to recuse themselves from the hearing of the matter.

The Claim

[3] IJL filed a fixed date claim form on the 11th of October 2021 seeking the following orders:

1) A declaration that the Claimant, as a party to a dispute before the Defendant, is entitled to the protection of without prejudice privilege to restrain the disclosure of settlement discussions between itself and other parties by virtue of section 18 (b) of the Labour Relations and Industrial Disputes Act and right to a fair hearing.
2) A declaration that the deliberate disclosure of settlement discussions to the Defendant by an adverse party to the proceedings breaches the Claimant's rights to a fair hearing.
3) A declaration that the Defendant's decision to permit the panel of its members to whom the privileged and prejudicial material had been exposed to continue to hear and determine the dispute breaches the Claimant's right to a fair hearing.

4) An order of certiorari to quash the decision of the Defendant to refuse the application by the Claimant seeking orders that the members presently constituted to hear IDT 51/2019 – Dispute between Island (Jamaica) Limited and Mr. Eric Evering recuse themselves.
5) An order remitting the dispute to the Defendant to be settled by a differently constituted panel.
6) Costs to the Claimant to be taxed if not agreed.
7) Such further or other relief as the court deems just.

The Law

[4] It is accepted that the role of the court in proceedings of judicial review is limited. The function of the Judge is to review the procedure adopted (in this case, by the tribunal) to determine if there was a breach of any legal principles. In the seminal case of **Council of Civil Service Unions v. Minister for the Civil Service[1],** Lord Diplock categorized 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, thereby rendering the decision to be unlawful.
>
> 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.

[1] [1984] UKHL 9

[5] In summary, an application for judicial review is concerned with the legality of the decision making process. It is not a review of the decision itself but a determination as to whether or not the tribunal, in this case, followed the correct procedure in the hearing of the complaint.

Issues

[6] a) Whether the disclosure of the without prejudice letter resulted in a breach of IJL's right to a fair hearing.

b) Whether the decision of the panel not to recuse itself was unreasonable or in breach of the rules of natural justice.

Submissions on behalf of the Claimant

[7] Mr. Goffe filed written submissions which focused primarily on the issue of privileged communication. Counsel submitted that the letter, although tendered by him at the hearing, had been a part of the documents disclosed to the panel before its admission into evidence. He argued that this disclosure was deliberate and was designed to influence the panel. It was also his submission that there could be no waiver of the privilege since the letter had already been disclosed.

[8] The argument for judicial review turned on the grounds of irrationality and procedural impropriety. It was his submission that the decision of the panel to continue to hear the matter in light of the privileged letter being in evidence was irrational. It was his contention that they took into account the wrong considerations. They focused on the issue of bias as opposed to considering the privilege attached to the letter. They ought to have focused on the right to a fair hearing. They should have considered the potential prejudice to both parties and that the complainant Mr. Evering was not opposed to a recusal.

[9] On the ground of procedural impropriety, Mr. Goffe argued that the principle that the tribunal is the master of its own proceedings does not defeat or override the without prejudice letter. It was his contention that the panel ought to have recused

itself in the circumstances. He made reference to the Civil Procedure Rules and pointed out that the rules make provisions for the recusal of the Judge who conducts the Case Management Conference from trying the case. It was suggested that in like manner the tribunal, having had sight of the material in respect of negotiations for settlement between the parties, ought not to have continued with the hearing.

Submissions on behalf of the Defendant

[10] Mrs. Rowe Coke commenced her submissions by reminding the court of its duty in matters of judicial review. She submitted that the role of the court was to determine whether the decision of the tribunal not to recuse itself was wrong in law. It was her contention that the decision of the tribunal was well within its remit and that there was no unfairness.

[11] Counsel from the outset conceded that the letter was without prejudice and so was privileged. She referred to the affidavit of Ms. Royette Creary and indicated that the tribunal met on twelve previous occasions and that at no time did counsel Mr. Goffe raise the issue of disclosure. The letter was not presented to the panel through Mr. Evering but was in fact tendered through Mr. Goffe, who, by the records provided, insisted that the letter was to be admitted. How then can he ask for the panel to recuse itself? The actions of counsel it was submitted was tantamount to a waiver of the privilege as the letter was tendered at his instance.

[12] On the ground of irrationality, it was submitted that the IDT is not a court of law, and the authorities suggest that the tribunal is not bound by the rules of evidence. It was accepted however, that the tribunal was bound by the rules of natural justice. Counsel insisted that those rules were never breached during the hearing. Once the letter was tendered, the role of the tribunal was to determine whether or not it had any evidential value.

[13] It was further submitted that the court should consider whether the tribunal gave both sides an opportunity to be heard in the application for recusal. Since there

was no evidence of bias outside of the exposure of the panel to the without prejudice letter the claimant had failed to substantiate their claim. In the round counsel asked that the claim be dismissed.

Analysis and Discussion

Whether the disclosure of the without prejudice letter resulted in a breach of the claimant's right to a fair hearing

[14] It is undisputed that the letter, which was exhibited, was in fact privileged communication and therefore on the face of it was inadmissible. In the recent Court of Appeal judgment of **Michael Lorne v. R**[2], V. Harris, JA in delivering the judgment summarized the effect of a without prejudice document in law as follows:

> ***The 'without prejudice' rule governs the admissibility of evidence. In essence, based on public policy reasons, where parties to a dispute engage in negotiations to settle the dispute, the rule makes communication between them during those negotiations privileged and inadmissible in court proceedings unless the parties consent (see Rush & Tompkins Ltd v Greater London Council and another [1988] 3 All ER 737 (Rush & Tompkins), applied in Leeroy Clarke, Caulton Gordon et al v Life of Jamaica Limited (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 59/2008, judgment delivered 12 August 2008 ('Leeroy Clarke v LOJ') at paras. 8 – 11; Winston Finzi and Anor v JMMB Merchant Bank Limited [2016] JMCA Civ 34 at para. [25]). In short, 'without prejudice' documents are generally subject to privilege and are immune from disclosure and admission in evidence unless the privilege is waived'***[3]***.***

[2] [2022] JMCA Crim. 45
[3] Supra. Paragraph 57

[15] In applying the law as set out in the judgment of the Court of Appeal to the facts in this case the question to be grappled with is twofold. The first is in relation to the effect of the disclosure of the letter with regard to the right of IJL to a fair hearing? The second is whether the tendering of the document by counsel was tantamount to a waiver? The latter will be dealt with further on in the judgment.

[16] Counsel Mr. Goffe, argued that the disclosure of the letter in the bundle provided to the tribunal breached his client's right to a fair hearing. He referenced the Civil Procedure Rules, specifically the requirement that the Judge who has conduct of the case management conference ought not to conduct the trial. It was his argument that a similar principle should apply in this case. I cannot agree, the IDT is governed by the **Labour Relations Industrial Disputes Act**. At section 20 of that Act it states:

> **"Subject to the provisions of this Act the Tribunal and a Board [of Inquiry] may regulate their procedure and proceedings as they think fit."**

In light of that provision it is clear that the IDT has the absolute power to determine the procedure to be adopted in the hearing of matters. The Civil Procedure Rules would therefore not apply to the tribunal.

[17] Further, counsel took no objection to the fact that the letter was included in the bundle. There was no submission made during the proceedings that the letter should be removed. Instead the letter was tendered at the instance of counsel on behalf of IJL.

[18] The privilege attached to a without prejudice letter is not absolute. As such, the mere inclusion of the letter in and of itself is insufficient to charge that there is a breach of a fair hearing. It was open to the panel to determine after hearing submissions on the issue (if any such submissions were made) whether the letter was relevant to the proceedings and thereafter determine what weight to attach to it. It was also open to the panel to disregard it completely in coming to their

decision. I do not agree with Counsel Mr. Goffe that the members of the panel were incapable of excluding from their minds the contents of the letter, if necessary, in their deliberations.

[19] I cannot find therefore that the disclosure of the letter by itself resulted in a breach of the right to a fair hearing.

Whether the decision of the panel not to recuse itself was unreasonable or in breach of the rules of natural justice.

[20] The plank on which Mr. Goffe rested his submissions on this issue, is that the tribunal acted unreasonably in failing to recuse themselves as they had now been fully exposed to a privileged letter which was legally inadmissible before them. Mrs. Rowe – Coke argued that the tendering of the letter waived the privilege and as such there was no reason for the tribunal to recuse themselves.

[21] The second question as previously alluded to now becomes important. Did the tendering of the letter and the consent of the other side to its admission amount to a waiver of the privilege? It is clear from the transcript of the proceedings which forms a part of the Affidavit of Ms. Royette Creary exhibited at **"RC2"**[4] that the document was tendered and admitted into evidence at the instance of counsel Mr. Goffe with the consent of Counsel Mr. Duncan.

[22] I wish to highlight the exchange below:

> **"Q. Would you agree with me, sir, that this is purportedly the settlement offer being made between representatives of the parties, correct?**
> **A. Yes and I'm aware of…**

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[4] Notes of Proceedings of the 12th Sitting of the Industrial Disputes Tribunal, to determine and settle the dispute between Island Jamaica Limited and Mr. Eric Evering, Held Tuesday, April 6, 2021, at Western Division, 51 Blue Diamond Mall, Montego Bay, St. James commencing at 2:00pm, at pages 23 - 24

Chairman: Mr. Goffe …
Mr. Duncan: Is he tendering this document?
Chairman: That's what I was going to ask…are you planning to tender this document into evidence?
Mr. Goffe: I am doing it now.
Chairman: Could you repeat what you've said?
Mr. Duncan: he said he's doing it now.
Chairman: Okay, would you like to tender it?
Mr. Goffe: Yes, through him.
Chairman: Okay, any objection, Mr. Duncan.
Mr. Duncan: No, no

[23] In the case of **Michael Lorne**[5] the issue of a waiver was also considered. The evidence at the first instance trial was similar, the document, although not titled 'without prejudice', was tendered into evidence with the consent of both parties. At paragraph 61 of the judgment V. Harris, JA stated,

> ***"Assuming without deciding that the Agreement is a 'without prejudice' document, in the light of the parties' agreement to its admissibility, we concur with the submissions made by the Crown that any privilege would have been waived."***

[24] Mr. Goffe's submissions on this point are without merit. The letter was admitted with the consent of both parties and as such the privilege was waived. There was therefore no basis on this ground for the tribunal to recuse itself.

[25] Mr. Goffe also argued that the panel's decision was unreasonable because they took into account factors that they should not have, such as the issue of bias. The

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[5] Ibid. 2

rule against bias is that a judge or tribunal should disqualify themselves from any case in which they may be or may fairly be suspected to be biased.

[26] Although Mr. Goffe did not mention the word “bias” in his arguments before the panel, that is essentially what his submissions were about. It was submitted that the sole intention of the interested party in including the document was to taint the proceedings by showing that IJL had a weak case. As such the panel would rule in favour of the interested party. The tribunal cannot be faulted for referring to bias given the arguments posited by counsel at the hearing.

[27] I do not find that there was anything unreasonable about the decision that rises to the standard of Wednesbury unreasonableness. The fact is that in all matters whether before a tribunal or a court, negotiations between the parties with a view to settlement as opposed to continued litigation is encouraged. The inclusion of a concession that IGL may have had a weak case in and of itself does not preclude the tribunal from finding otherwise after hearing all of the evidence. In fact, they might have disagreed with such a statement. There was no other evidence of bias before this court and as such, I do not find that the decision to continue to hear the matter was unreasonable in all the circumstances.

[28] On the ground of procedural impropriety or a breach of natural justice, it is well established that the role of the tribunal is to ensure fairness. The fundamental pinnacle of a right to a fair hearing is that all sides must be heard. The transcript of the proceedings shows that both sides were heard on the application for recusal. Mr. Goffe made submissions to the tribunal[6] outlining his arguments that the letter was deliberately added to the brief because it was the intention of opposing counsel to taint the view of the tribunal with the settlement discussions between

[6] Supra. pages 36 - 49.

the parties. It was further argued that the interested party had admitted that he deliberately attached the letter to the brief.

[29] Mr. Duncan was given an opportunity to respond[7]. It was his submission that there was no intention to influence the tribunal as if that was so they would have tendered the document through their own witness. He indicated that the negotiations between the parties was already a part of the evidence before the tribunal, the only issue which was not included was the amount of the offer. He also submitted that from the outset of the hearing they were asked about local level discussions with a view to resolving the matter and that both attorneys present agreed that they would make those attempts. The information as to the figures therefore was the only thing new presented to the tribunal. The parties presented further arguments following their submissions and the panel retired to consider their decision.

[30] The panel gave their decision at the next sitting and the Chairman stated:

> **"On the last occasion, Mr. Goffe had made an application for the recusal of this Panel and for the matter to be reheard by another constituted Panel. We have heard Mr. Goffe's position and also the response from Mr. Duncan. So the Tribunal has to consider all the necessary factors and principles when considering such application regarding the recusal. And the Tribunal has made the decision not to recuse itself and for the matter to continue."[8]**

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[7] Ibid. pages 49-58

[8] Notes of Proceedings of the 13th sitting of the Industrial Disputes Tribunal, to determine and settle the dispute between Island Jamaica Limited and Mr. Eric Evering, held Tuesday, April 13, 2021, at the offices of the Industrial Disputes Tribunal, Western Division, 51 Blue Diamond Mall, Montego Bay, St. James commencing at 11:05am, at page 1.

[31] The tribunal gave their reasons as follows:

> **"With regard to the reason behind the Tribunal's decision, the Tribunal – the fact – well, I'm sure both parties would have known the factors that the Tribunal would have to take into consideration in making such a decision. So based on the submissions of Mr. Goffe, the Tribunal did not see any possibility of bias being breached and as such we have decided to continue the matter."[9]**

[32] The argument as to procedural impropriety rests on the inclusion of the without prejudice letter which has already been discussed. I agree with Counsel Mrs. Rowe Coke that there is no basis upon which it can be said that the tribunal did not follow procedure in coming to their decision. The without prejudice letter was tendered as an exhibit by the very counsel who sought to challenge it. The tribunal considered the arguments put forward by both sides and they determined that there was no possibility of bias being breached. The proper procedure was followed and they abided by the principles of natural justice.

Disposition

[33] For the reasons outlined above, the orders sought in the fixed date claim form are refused.

Order

1. Judgment for the Defendant.

2. Costs to the Defendant to be agreed or taxed.

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[9] Ibid. pages 6-7