[2019] JMSC Civ 67

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 01543

BETWEEN	**JAMAICA POLICE CO-OPERATIVE CREDIT UNION SOCIETY**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**DEFENDANT**

IN CHAMBERS

Mr Gavin Goffee and Mr Jahmar Clarke instructed by Myers, Fletcher & Gordon, Attorneys-At-Law for the Claimant

Ms. Carla Thomas and Ms. Deidre' Pinnock instructed by the Director of State Proceedings for the Defendant

Lord Anthony Gifford QC, Mrs. Emily Shields and Ms. Jutina Wilson instructed by Gifford Thompson & Shields for the Interested Parties

Heard: 10th of July, 1st and 5th of October 2018

Delivered: 29th of March 2019

Judicial Review - Whether industrial dispute existed at the time of referral by the Minister - Waiver - Estoppel by conduct - Labour Relations and Industrial Disputes Act

CRESENCIA BROWN- BECKFORD J,

INTRODUCTION

[1] The Claimant Jamaica Police Co-operative Credit Union Limited is challenging the decision of the Defendant, The Minister of Labour and Social Security to refer the termination by way of redundancy of former employees to the Industrial Disputes Tribunal on the basis that an industrial dispute existed at the time of referral between the Claimant and the former employees.

BACKGROUND

[2] By way of Fixed Date Claim Form the Claimant seeks:

(i) *A Declaration that there was no industrial dispute existing in the Claimant's undertaking between the Claimant and Kadene McPherson or Antoinette Hamilton (the Interested Parties) at the time the matter was referred to the Industrial Disputes Tribunal by the Defendant*

(ii) *Certiorari to quash the Defendant's referral to the Industrial Disputes Tribunal of the alleged industrial disputes between the Claimant and its former employees, Kadene McPherson and Antoinette Hamilton and*

(iii) *Costs to the Claimant*

[3] Albert Fiadjoe, Commonwealth Caribbean Public Law, 3rd edition, in examining the issue of judicial review, states as follows pg. 15:

> *"The power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers. Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality."*

[4] The submissions of the Defendant with respect to the role of the Judicial Review Court are well founded and I adopt them as a correct statement of the law. The

Court's power is thus limited to examining whether a foundation of fact existed upon which the Minister could lawfully exercise her discretion.

[5] It is accepted by all parties that it is a condition precedent to the exercise of the discretion given to the Minister to make a referral to the Industrial Disputes Tribunal that an industrial dispute must exist within the undertaking.

[6] The underlying facts which are not in dispute are that:

a) The Interested Parties Ms. Kadene McPherson and Ms. Antoinette Hamilton are former employees of the Jamaica Police Co-operative Credit Union Limited, the Claimant herein.

b) Ms. McPherson's and Ms. Hamilton's contracts of employment were terminated by reason of redundancy on January 29, 2016.

c) Both were paid their redundancy entitlements, which were accepted.

d) Both were subsequently employed elsewhere.

[7] By letter dated January 16, 2017, through their Attorneys- at- Law, Ms. McPherson and Ms. Hamilton disputed their termination on the basis that there was no genuine redundancy and that they were unjustifiably dismissed. They also raised the issue of their employer's failure to comply with the Labour Relations Code (LRC).

[8] A complaint was subsequently lodged with the Ministry of Labour and Social Security and attempts made at conciliation. Those attempts being unsuccessful, the Minister referred the matter to the Industrial Disputes Tribunal in accordance with section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act (LRIDA).

LAW

[9] Section 11A(1)(a)(i) of the LRIDA provides that:

> ***11A**.-(1) ".................... 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.*

[10] An industrial dispute is defined in the Labour Relations and Industrial Dispute Act (LRIDA) as '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 members of any trade union having bargaining rights, being a dispute relating wholly or partly to' one or more of the following:

1) the termination or suspension of employment of any such worker

[11] A worker includes any individual whose employment had ceased.

[12] Black's Law Dictionary, 9th edition, defines a dispute as a conflict or controversy. Webster Roget's Thesaurus gives among its synonyms the following words – argument, quarrel, debate, misunderstanding, verbal contention, disagreement, controversy, conflict, dissenting, variance, difference of opinion. The meaning of dispute in the context of industrial dispute has attracted judicial consideration in **R v. Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins Ex Parte West Indies Yeast Co, Ltd.** (1985) 22 J.L.R. 407. Smith CJ said he *"would have expected the word "dispute" to be defined in the Act if it was intended that the word should have a meaning other than its ordinary meaning."*

[13] In **R v Industrial Disputes Tribunal, Alcan Jamaica Company, Alumina Partners of Jamaica, Alcoa Minerals of Jamaica Incorporated, Kaiser Bauxite Company, Reynolds Jamaica Mines Ltd. ex parte The National Workers Union Ltd** [1981] 18 J.L.R. 293, the judgment of Smith CJ makes it clear that if there was no industrial dispute, the Minister's reference to the Tribunal was ultra

vires. This position was recently accepted by Brown J in **Jamaica Infrastructure Operators Limited v The Honourable Pearnel Charles, Minister of Labour and Social Security** HCV 5486 of 2010, where he found that no industrial dispute existed where a redundancy exercise undertaken by the employer had ended without any attempts by the Minister to refer the matter to the Industrial Disputes Tribunal. This was so even though the Minister was aware of a dispute between the employer and the union representing the employees. As such, he found that the Minister erred in his decision to refer the alleged dispute to the Industrial Disputes Tribunal.

WAS THERE A DISPUTE AT THE TIME OF THE REDUNDANCY EXERCISE

[14] In **R v Industrial Disputes Tribunal & Honourable Minister of Labour ex parte Wonards Radio Engineering** (1985) 22 JLR 64 it was held that the relevant date to determine whether there was an industrial dispute was at the date of dismissal and not the date of referral to the Tribunal.

[15] The Claimant submitted that a dispute only exists when one party joins issue with another. Once a worker accepts payment without protest or complaint of any kind, then the worker is accepting the terms on which the payment is made or offered. The Interested Parties each accepted their redundancy payments and evinced no issues. There was therefore no dispute at the time of the redundancy exercise.

[16] The Interested Parties agree that the relevant date is at the date of dismissal and repeat their contention that each made an objection at that time giving rise to an industrial dispute which remained unresolved at the date of referral**.** The submissions of the Interested Parties would suggest that a dispute arose at the time the redundancy exercise was carried out as Ms. McPherson challenged her dismissal by making a note on the cheque leaf given to her while Ms. Hamilton met and spoke with a Director at the Claimant company.

[17] The reason for the dispute posited to the Minister from the Affidavits of Alrick Brown (paragraph 10) and Michael W. Kennedy (paragraphs 8-12) indicate that a challenge was being made to:

(1) the fact that the redundancy was not genuine; and

(2) failure to comply with the obligations set out in LRC.

[18] The letters of Counsel on behalf of the Interested Parties make the same point. (See letter dated June 16, 2017 and letter dated August 4, 2017 under headings 'Dismissal with Immediate Effect on the grounds of Redundancy' and 'Breach of Labour Relation Code'. There is therefore no support for the Interested Parties contention.

[19] From the material placed before the Minister therefore, there was no indication of a dispute arising at the time the redundancy exercise took place.

[20] A "dispute" only arose after the Interested Parties became aware of what they believed to be an advertisement for similar/same positions. This was in October 2016. The Claimant was made aware of their contention by letter dated January 16, 2017. Therefore, the earliest it could be said that a dispute arose was January 16, 2017.

WAS THERE AN INDUSTRIAL DISPUTE AT THE TIME OF REFERRAL BY THE MINISTER

[21] The Interested Parties contend an industrial dispute existed at the time of referral as they wrote to the Claimant indicating their areas of concern before the intervention of the Ministry of Labour was sought. This dispute continues as it was not resolved through the process of conciliation.

[22] The Claimant maintained that no dispute having arisen at the time of the redundancy exercise and the time elapsed between the redundancy exercise and the date of referral, no dispute existed at the time of referral by the Minister.

[23] The question of whether there was an extant industrial dispute at the time of the Minister's referral was considered in **Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security** [2018] JMSC Civ 103. In this case, the employees were summarily dismissed. Termination letters were withdrawn and the workers reinstated and paid all emoluments due to them during the period. These sums were accepted. A disciplinary hearing was scheduled which the workers refused to participate in. The matter of the termination was referred to the Minister. Disciplinary hearings were held and the employees were subsequently dismissed. The matter of the initial termination of employment was referred to the Industrial Disputes Tribunal.

[24] The issue as formulated by Fraser J was that there is in law, an existing industrial dispute in relation to the first dismissal thereby justifying the Minister's referral of the matter to the Industrial Disputes Tribunal. He found that at the time of the referral the workers had been reinstated and had received all emoluments due to them and that the dispute which had been initiated at the time of the dismissal no longer existed at the time of the referral to the Industrial Disputes Tribunal by the Minister

[25] The dispute must be subsisting at time of referral. Fraser J found a dispute existed between first dismissal and reinstatement. At time of referral, by the Minister to the Industrial Disputes, that dispute no longer existed.

[26] It is apposite to note that in the cases of **Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security** and the **Jamaica Infrastructure v The Honourable Pearnel Charles, Minister of Labour and Social Security** there was a dispute in existence but which had ended by the time of referral by the Minister.

[27] A review of the cases relied on by the parties and my own research did not yield a situation where the dispute commenced at a time, so far removed from the act, giving rise to the dispute. I would be inclined to the view taken from the principle

of finality in litigation, that it is questionable that the Interested Parties could initiate an industrial dispute in this manner. It is not necessary to take a final position on this issue in view of the discussion to follow.

WAIVER/ESTOPPEL

[28] It is pertinent in these circumstances to consider the Claimant's submission that the Interested Parties are estopped from claiming that a dispute was in existence at the time of the referral by the Minister.

Claimant's Submissions

[29] The Claimant's submission is that by acceptance of payment without protest or demur and moving on to other employment, there is indication of either no dispute or waiver of dispute. The Claimant by advertising for the position altered its position at which time, there was no dispute or complaint. The Claimant believed that there was no complaint about the redundancy exercise.

Defendant's Submissions

[30] The Defendant submitted that the fact of delay could not affect the fact that an industrial dispute existed. They contended it was for the Industrial Disputes Tribunal to determine the effect of delay. The Minister could have no such regard and to do so would be ultra vires. Counsel relied on **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal & Anor** (Jamaica) [2005] UKPC 16 for the proposition that encashing cheques did not amount to a waiver.

Interested Parties Submissions

[31] For the Interested Parties, it was contended that the inquires of the Interested Parties were based on new facts. There is nothing in the law which indicates that a dispute must be initiated on the day of dismissal. Waiver goes to the state of mind of the parties which is properly explored before the Industrial Disputes Tribunal. The Minister is obligated to make a decision only on the facts before her.

[32] In the matter **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal & Anor** (Jamaica) (supra), three (3) employees were dismissed by reason of redundancy with immediate effect. Each was given a letter accompanied with a cheque to cover their entitlements. They protested at once and their union 'took up the cudgels' on their behalf and the whole workforce went on strike. The matter was referred to the Industrial Disputes Tribunal by the Minister. Two of the three employees subsequently cashed their cheques.

[33] Lord Scott of Foscote for delivering the judgment of the Lords of the Judicial Committee of the Privy Council said at paragraph 20:

> *"Waiver as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the alleged waiver. If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present. An objectively ascertained intention to waive is the first requirement. …the waiver would only become established if JFM had believed that that was their intention and altered its position accordingly."*

This principle was applied in **Spur Tree Spices** (supra) at para. 58 by Fraser J. He said;

> *"The question therefore becomes whether in all the circumstances, objectively viewed, the former employees' conduct following their dismissals indicated an intention to waive their right to pursue a statutory remedy and the claimant believed this and altered its position accordingly. The former employees sought via the IRC and accepted from the claimant reinstatement. They also accepted the retroactive payments for the period they had been dismissed, less the termination benefits they had previously received. They were however still in consultation with the IRC and he referred the issue of the company requiring them to attend disciplinary hearings prior to resumption of duties, to the Ministry. [59] Based on the Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and National Workers Union case, in light of the ongoing challenges to the actions of the company, the acceptance of these payments could not by itself, have amounted to a waiver of the workers' rights to pursue statutory action."*

[34] The Interested Parties at bar acted differently. The facts before the Minister were:

(1) The cheques were accepted without demur.

(2) The Interested Parties were otherwise employed shortly after.

(3) No action was taken by the Interested Parties until eleven (11) months later after seeing an advertisement by the Claimant.

(4) The Claimant did not deny placing the advertisement several months later for substantially the same position.

[35] The Interested Parties conduct, objectively assessed in all the circumstances, could be taken to indicate an intention to waive their right to contest their dismissal. The Claimant's position from the outset was that the Interested Parties had accepted their redundancy by virtue of their acceptance of their redundancy packages. The Claimant by advertising for new employees could be said to have accepted that there were no issues arising from the redundancy exercise.

[36] On these facts, the Minister was required to have considered the question of waiver in the determination of whether an industrial dispute existed. The Minutes signed by the Minister makes it clear there was no such consideration by the Minister. There was a failure by the Minister to consider material relevant to the question as to whether an industrial dispute existed in the Claimant's undertaking at the time of her referral to the Industrial Disputes Tribunal. She therefore erred in her decision to refer the alleged dispute to the Industrial Disputes Tribunal.

[37] The condition precedent to the exercise of the Minister's discretion has not been met that an industrial dispute existed within the Claimant's undertaking at the time of referral to the Industrial Disputes Tribunal. The Claimant is entitled to have the decision of the Minister quashed.

DISPOSITION

[38] The court makes the following order:

i) Certiorari is granted to quash the Defendant's referral to the Industrial Disputes Tribunal of the alleged industrial disputes between the Claimant and its former employees, Kadene McPherson and Antoinette Hamilton.

COSTS

[39] On March 29, 2019, judgment was handed down in favour of the Claimant and the parties were invited to make submissions on costs.

[40] For the Claimant, it was submitted that as it was the successful party, it should be awarded its cost against the Defendant who was the unsuccessful party. Reliance was placed on CPR Rule 56.15 (2) and CPR Rules 64.6 (1) and 64.6 (2). The Claimant also relied on the decision of Managatal J in the **University of Technology Jamaica v Industrial Disputes Tribunal and the University and Allied Workers Union** Claim No. 2009 HCV 1173 applying the case of **Toussaint v Attorney General of Saint Vincent and the Grenadines** [2007] UKPC 48, where costs were awarded to the successful party following the general rule. It was further submitted that to do otherwise would discourage employers from challenging wrong decisions of the Minister for fear of the expenses associated with such a claim. Further the Claimant at all times acted in compliance with the Orders made in this claim.

[41] The Claimant indicated it was not seeking costs against the Interested Parties.

[42] The Defendant did not dispute the general rule that costs should be awarded to the successful party. However, it was argued that the Claimant had only partial success as the Declaration sought by the Claimant that no industrial dispute was in existence at the time of the Minister's referral was not granted. Cost then should be dealt with on an issue by issue basis. There were two orders sought (1) for a Declaration and (2) for Certiorari. As the Claimant was successful on only one issue, cost should be in favour of the Defendant on the other. Alternatively, each party should bear its own costs.

[43] The Interested Party helpfully referred the Court to De Smith's Judicial Review Sixth Edition at paragraph 16-097 for the following principle:

> *"Cost following a full hearing of a claim for judicial review will generally be awarded to the successful party. In some circumstances, however, it may be inappropriate for the unsuccessful claimant to be ordered to meet the defendant's costs, where the claim was brought not with view to personal gain and there was a wider public interest involved. Costs of the successful party may be limited to some of the issues argued. In claims where there is more than one defendant or interested party, an unsuccessful claimant will normally be ordered to pay only one set of costs."*

[44] The Court considered that in granting an order of Certiorari quashing the Minister's decision the Claimant was substantially successful but ultimately the question of whether there was an industrial dispute in existence at the time of the Minister's referral was not determined. Further, the Defendant stoutly resisted the claim though not unreasonably or improperly so.

[45] In the circumstances, the Court exercises its discretion in favour of the Claimant to award it 75% of its costs.

ORDER

[46] It is ordered therefore that:

1. The Claimant is to have 75% of its costs against the Defendant to be taxed if not sooner agreed.

2. No order as to costs against the Interested Parties.