[2025] JMSC Civ. 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2023 CV 04023

BETWEEN	**SPECTRUM SYSTEMS LIMITED**	**APPLICANT**
A N D	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**RESPONDENT**

IN CHAMBERS

Mr. Gavin Goffe Attorney-at-Law instructed by Messrs Myers Fletcher & Gordon for the Applicant

Ms. Faith Hall, Director of State Proceedings instructed by the Director of State Proceedings for the Respondent.

HEARD: March 13, 2025 and March 20, 2025.

Administrative Law – Application for Leave to Apply for Judicial Review out of time – principles involved

Administrative Law – Application for Leave to Apply for Judicial Review – whether Applicant has a good arguable case with a real prospect of success.

Administrative Law – Application for Leave to Apply for Judicial Review – Whether or not the failure to give reasons for their award is a valid ground for leave to be granted for judicial review of the decision of the IDT.

Administrative Law – Application for Leave to Apply for Judicial Review – Whether or not the IDT gave a clear reason for refusing to admit evidence – whether or not this failure is sufficient ground to grant leave.

DALE STAPLE J

BACKGROUND

[1] The Applicant is a limited liability company that had a dispute with a former employee. The Applicant had a disciplinary complaint against the employee and so embarked upon a disciplinary hearing against her.

[2] Subsequent to this disciplinary hearing, the employee was dismissed on the 17th December 2021. The Respondent sought to challenge her dismissal by the Disciplinary Committee and eventually the dispute was referred by the relevant Minister to the Industrial Disputes Tribunal.

[3] Eventually, the IDT, after a series of hearings, concluded that the employee's dismissal was unjustifiable and awarded her the sum of $875,000.00 in compensation.

[4] The Applicant has now sought permission to challenge the decision on the award on the following grounds:

a) *Their right to a fair hearing before an independent authority as enshrined under the Constitution was breached.*
b) *There was apparent bias on the panel by the Chairman, Mr. Danny Roberts against the Applicant;*
c) *There was procedural impropriety and breach of natural justice involving the unlawful rejection of a critical exhibit on which the company sought to rely; and*
d) *The decision on the award was irrational as there were no reasons provided for the award made.*

ISSUES FOR DETERMINATION

[5] I find that at this stage there is really one issue for determination:

(i) Does the applicant have an arguable case with a real prospect of success against the Respondent?

THE LAW ON APPLICATIONS FOR JUDICIAL REVIEW

[6] Applications for Judicial Review are governed under Part 56 of the Civil Procedure Rules. It is a two stage process[1]: first, one must get the permission of the Court to apply for judicial review[2]. If one passes that stage, then you must file your substantive application for judicial review within 14 days of getting the Court's permission so to do[3].

Applications for Permission to Apply for Judicial Review

[7] The major consideration for a Court in deciding whether to exercise discretion to grant permission to apply for judicial review is whether or not there is an arguable case with a real prospect of success[4]. However, delay in seeking leave and not pursuing alternative remedies are discretionary bars.

ANALYSIS

Does The Applicant have a Good Arguable Case With a Realistic Prospect of Success?

The Constitutional Claim

[8] I find that this claim does not present a good arguable case. The Applicant's effective challenge, as explained by Mr. Goffe during oral argument, is that the

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[1] See *Public Service Commission et al v Deanroy Bernard* [2021] JMCA Civ 2 at para 36 per Simmons JA

[2] See Rule 56.3(1) Civil Procedure Rules 2002

[3] Rule 56.4(12) Civil Procedure Rules 2002

[4] *Sharma v Brown-Antoine* id at paragraph 14(4) and see as well Sykes J (as he then was) in *R v IDT (Ex parte J. Wray and Nephew Limited)* Claim No. 2009 HCV 04798, unreported, judgment delivered on 23 October 2009. Sykes J (as he then was) describes the threshold test as being a new and higher test than that which had previously obtained. At paragraph [58] Sykes J opined that the application for leave to apply for judicial review is no longer a perfunctory exercise that turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. Judges are required to make an assessment of whether leave should be granted in the light of the now stated approach.

effectively mandatory nature of disputes between employers and employees being referred to the Respondent is unconstitutional. It is unconstitutional as:

a) the Respondent is not afforded any protection from interference and influence from the executive as an adjudicatory body; and
b) The mandatory nature of the referral process before this unprotected body would render the hearing itself an unfair hearing.

[9] The problem with this ground as a basis for judicial review is that it is not a challenge to the decision itself. It is trite law that judicial review is concerned with the correctness of the procedure applied by an inferior tribunal in arriving at a decision made by them. Judicial Review does not concern itself with whether or not Parliament could set up a body as the IDT in the manner in the manner it did. Such a challenge could be a separate action brought at the same time and in the same proceedings as judicial review proceedings, but it is not itself a ground for judicial review.

[10] In those circumstances, this is not an arguable ground for judicial review.

Was there Prima Facie Evidence of Apparent Bias Sufficient to allow the Applicant to Seek Judicial Review on this Basis?

[11] The evidence of this apparent bias comes from Mr. Stanigar (one of the directors of the Applicant). He asserts that he saw Mr. Roberts, the chairman of the IDT Panel, “fist bumping” with Mr. Garfield Harvey, the representative of the employee at the hearing before the IDT, before the hearing.

[12] In an Affidavit in Response, Mr. Roberts denied that such a thing ever happened and asserted, essentially, that he hardly knew Mr. Harvey. He said he only saw Mr. Harvey once before at a prior disciplinary hearing for another aggrieved employee and that he first spoke to him outside of the IDT at a funeral of a colleague and fellow member of the IDT.

[13] Mr. Roberts further asserted that he does not greet persons by fist bumping when entering a hearing room or even on the IDT compound.

[14] Mr. Stanigar responded in an affidavit sworn on the 30th July 2024 that he saw the fist bumping on 2 occasions whilst entering the IDT Hearing room and throughout the proceedings. I am unclear if he meant that during the course of the hearing he saw fist bumping or if the two occasions were once at pre hearing and the other during the hearing.

[15] So this raises the question of apparent bias. Mr. Goffe combined this fist bumping with the rejection by the panel of the evidence from the disciplinary hearing which, they argue, shows that Mr. Stanigar did not play any major role in the disciplinary proceedings. So Mr. Goffe was using the two things as a basis for saying that there was apparent bias in at least one member of the panel which taints and condemns the entire panel and the proceedings.

[16] The authorities submitted by the parties on apparent bias are well known. ***Porter v Magill***[5] provides the test for apparent bias. The House of Lords (as it then was) stated that the test was to ask, "whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

[17] The Court of Appeal of Jamaica, in the decision of ***Roald Henriques v Hon. Shirly Tyndall OJ et al***[6]*,* said, "There can be no dispute as to the fundamental rule as to bias. Nor can the logical basis for the rule be a subject for any serious contest, as a man cannot be a judge if he has a **substantial or personal interest** in the outcome of an issue or proceedings over which he presides."

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[5] [2002] 1 All Er 465
[6] [2012] JMCA Civ 18

[18] The Court of Appeal, at paragraph 53, adopted the ***Porter v Magill*** two stage test. The first stage is to examine the evidence upon which the allegation is made. Thereafter, the court should determine whether, on the balance of probabilities, a fair-minded observer would conclude that there is a real possibility of bias on the part of any member of the tribunal whose right to sit on the tribunal has been challenged.

[19] The Court of Appeal said that the test is an objective one[7]. As observed in ***Panday v Virgil***[8] by the Court of Appeal of Trinidad and Tobago,

> *"An allegation of apparent bias does not involve a finding of judicial impropriety or misconduct, or breach of the judicial oath. It involves a finding that circumstances exist from which a reasonable and informed observer may conclude that there was bias in the conduct of the proceedings. Except where actual bias is alleged, it is not useful to investigate the individual's state of mind. The courts have recognised that bias operates in such an insidious manner that the person alleged to be biased may be unconscious of the effect. It is trite law that if a reasonable apprehension of bias arises, the whole proceeding becomes infected. Credibility issues no longer arise; the reasonable apprehension of bias remains and the proceedings cannot be saved".*

[20] A point to note though on the Respondent's submissions is that the proprietary interest test is only applicable in cases where *actual bias* is being imputed in the adjudicator. This was stated at paragraph 63 of the judgment in ***Henriques*****.**

[21] The evidence as presented is sufficient to raise an arguable case that Mr. Roberts was apparently biased and so the panel tainted. There has to be a trial to firstly determine whether or not there were fist bumps; if so, to what amount and what the effect of this would be on the mind of the reasonable and informed observer.

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[7] N7 supra at para 54.
[8] TT 2007 CA 13 at para 26

[22] The cultural meaning of a fist bump in Jamaica, to the ordinary Jamaican, is what would have to be considered. How does the ordinary Jamaican view a fist bump between two people? Would a reasonable and informed Jamaican observer, in our culture, conclude that there was bias in the proceedings having seen the Chairman of the panel and one of the advocates for a party in the proceedings fist bump?

[23] In the circumstances, I accept this as a ground that shows a good arguable case for judicial review.

Was there Procedural Impropriety in Rejecting the Evidence of the Zoom Recording of the Disciplinary Proceedings?

[24] In the celebrated case of ***R v Sang***[9] Lord Diplock said as follows,

> 1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
>
> (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an *agent provocateur*.

[25] The justifications for the refusal to have the evidence presented by the tribunal are objectively varied. There are at least 4 explanations which I have come across:

(i) The first from the transcript exhibited to Mr. Roberts' Affidavit was that Mr. Gammon (counsel for the Applicant at the IDT Hearing) failed to introduce it during evidence in chief.
(ii) The second came from his affidavit filed on the 21st March 2024 where he said, at paragraph 13, that the panel determined that the recording was not relevant to the proceedings.
(iii) The third was a modification of the 2nd in that in a subsequent affidavit, filed on the 28th June 2024, at another paragraph 13, this reason as to relevance was excluded.

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[9] [1980] AC 402

(iv) Another reason advanced was contained in paragraph 34 of the Affidavit of Mr. Richard Peters who asserted that the reason for the exclusion was that the recording was not in the company's brief before the IDT.

[26] So as a question of fact, there is uncertainty as to why the evidence was refused. From a perusal of the transcript, there is clear evidence of the Panel accepting evidence from the company outside of any evidence in chief being taken, so the question can be legitimately asked, why accept these bits of evidence, but not this bit of evidence.

[27] The presence of Mr. Stanigar at the disciplinary hearing and his role at the hearing was a major part of the litigation before the IDT. There was extensive cross-examination of Mr. Stanigar by Mr. Harvey as can be seen from the transcript. So there is evidence, which, if accepted, would tend to show that the conduct and presence of Mr. Harvey at the hearing could have been an important part of the evidence.

[28] Therefore, it would be important to the case of the Applicant, that this bit of evidence go in and be considered by the tribunal. So if it would be refused, then there is a good arguable case that this should be plainly explained and a good arguable case can be made that the failure so to do is procedurally improper. Likewise the failure to admit the recording into evidence.

[29] What is more, the IDT had considered the role of Mr. Stanigar at the disciplinary hearing as a key issue for their decision[10]. They devoted an extensive section of their findings to that very issue. A part of this was what role he played, not just in his actions prior to the hearing, but during the hearing. So this raises a good

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[10] See paragraphs 75 et seq of the Reasons for Award exhibited at exhibit RP-5 of the Affidavit of Mr. Richard Peters filed on the 11th December 2023.

arguable case that the exclusion of the evidence of the recording of the hearing was improper as the evidence was arguably quite relevant.

The Failure to Give Reasons for the Award.

[30] Our Court of Appeal has recently affirmed the principle that the Industrial Disputes Tribunal is under no duty to give reasons for any decision it makes on awards.

[31] The authority relied on by the Respondent of ***Kingston Wharves Limited v Industrial Disputes Tribunal and Interested Parties***[11] is appropriate as a starting point. Fraser J (as she then was), opined, after reviewing the relevant authorities, that the authorities are not insisting or compelling that reasons must be given explaining how an award from the IDT is computed. She further stated that the failure to give reasons is not fatal in the sense that it amounts to irrationality.

[32] The decision in ***Kingston Wharves Limited*** was the subject of an appeal[12]. The Court of Appeal agreed with Fraser J (as she then was), that there was no need for the IDT Panel to provide reasons for their decision as the ***Labour Relations and Industrial Disputes Act*** **(LRIDA)** provides that the Panel need not give any reasons for any award of compensation at which they have arrived. I am bound by this decision and so it must be followed.

[33] Accordingly, I find that no good arguable case has been made out that the method by which the amount of the award was arrived at was unreasonable and/or irrational and therefore improper.

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[11] [2017] JMSC Civ 199
[12] [2020] JMCA Civ 66 at 131

CONCLUSION

[34] In the circumstances, I am satisfied that the applicant has a good arguable case with a reasonable prospect of success against the Respondent.

ORDERS

(1) The Applicant is granted permission to Apply for Judicial Review in terms of paragraphs 1 and 2 of the Notice of Application for Court Orders filed December 11, 2023.

(2) The Permission in (1) above is conditional on the Applicant filing a claim for judicial review within 14 days of the 20th March 2025.

(3) Costs to be in the Claim.

(4) Applicant's Attorneys-at-Law to prepare, file and serve this order.

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Dale Staple
Puisne Judge