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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: HCV 1840 OF 2003

BETWEEN	**THE MINISTRY OF HEALTH**	**APPLICANT**
	THE MINISTRY OF FINANCE AND PLANNING	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL}**	**RESPONDENT**
	THE JUNIOR DOCTORS' ASSOCIATION}	**RESPONDENT**
	DR. COLLIN GRAHAM }	**RESPONDENT**
	DR. AYE THWYN }	**RESPONDENT**
	DR. PATRICK TOPPIN }	**RESPONDENT**

Mr. Patrick Foster and Ms. Katherine Denbow instructed by the Director of State Proceedings for the Applicants:
Dr. Lloyd Barnett instructed by Mr. Keith Bishop for the 2nd, 4th and 5th Respondents;
(Ms. Grizzle representing the Ministry of Finance and Ms. Gabbidon representing the Ministry of Health)

Heard on July 7 and 8, 2004

ANDERSON J.

This is an application by certain ministries of Government, ("The Government") for a declaration and prerogative orders. It originated in a threat of industrial action by the members of the Junior Doctors' Association, at least in partial response to certain proposals by the Government, (as well as by the Association itself), as to the conditions of service of members of the Association.

There is no dispute as to the factual history of this matter and how it got here from there. I will accordingly start with the order made by Daye J. on the 8th October 2003. On that day the learned judge granted leave to the Ministry of Health and the Ministry of Finance & Planning to apply to the Judicial Review court for the following:

(a) A Declaration that the Industrial Disputes Tribunal ("IDT") does not have the jurisdiction to hear and determine the claim by the Junior Doctors' Association (hereinafter "JDA") pertaining to their hours of work, that is to say, that their hours of work are from 8:00 a.m. to 4:00 p.m.

(b) An Order of Prohibition to prevent the Industrial Disputes Tribunal from hearing the claim made by the Junior Doctors' Association for and on behalf of the Junior Doctors that their hours of work are from 8:00 a.m. to 4:00 p.m.

(c) An Order of Certiorari to quash the decision of the Industrial Dispute Tribunal to hear and settle the claim made by the Junior Doctors' Association for and on behalf of the Junior Doctors that their hours of work are from 8:00 a.m. to 4:00 p.m.

Mr. Foster, instructed by the Director of State Proceedings on behalf of the applicants, contended that the IDT had erred in law and/or exceeded its jurisdiction when it determined that it could hear and settle the claim in question. He submitted further that the issue before this court had already been determined in the case of ***The Junior Doctors' Association et al v The Ministry of Health, Ministry of the Public Service, University Hospital of the West Indies and the Attorney General of Jamaica*** reported at [1990] 27 J.L.R. 148. In that case the JDA sought a declaration that "the normal working hours of all doctors represented by the Association were 40 hours exclusive of meal-time subject to a working day of 8 hours exclusive of meal times and that they were entitled to overtime outside of those hours". The late Clarke J, who heard the matter, held that they were not entitled to such a declaration. He based his decision upon an examination of the relevant agreements, Public Service Regulations, Staff Orders and other orders issued by the Minister of Finance and other documents. Mr. Foster submitted that this was the identical issue over which the IDT now sought to exercise jurisdiction and in his submission, it was not competent for an inferior tribunal to reopen an issue that had already been determined by a superior court.

He further submitted that the IDT's remit under the provisions of the Labour Relations and Industrial Disputes Act ("LRIDA") was "to deal with industrial disputes which relate to terms and conditions of employment". Further that this remit is limited to circumstances "where there are existing terms and conditions which have given rise to a dispute as to future terms and conditions. The IDT has no power to impose terms and conditions on contracting parties in relation to matters which do not form part of the

contract and for which a superior court has adjudicated on, to that effect." According to this view an administrative decision to put in place a new regime of working hours, albeit opposed by the JDA, could not elevate the "differences" to a dispute as to "terms and conditions".

Mr. Foster also said that the Respondents relied upon the definition of "industrial dispute" in the LRIDA which states that:

> "industrial disputes" mean a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, where such disputes relate wholly or partly to
>
> (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;

This was in the context of a Respondents' submission that hours of work are clearly within the meaning of "terms and conditions of employment". However, he was of the view that the Junior Doctors' case had decided that they were not such. On his reading of the Junior Doctors' case, the judgment of Clarke J was to the effect that hours of work were not "terms and conditions" within the meaning of the contractual relationship between the JDA and the Government. It therefore precluded the IDT from hearing or settling or pronouncing upon something which was not within the contemplation of the provisions of the LRIDA.

Dr. Barnett appearing on behalf of the Second, Fourth and Fifth Respondents submitted that the decision in the Junior Doctors' case upon which the Applicants relied heavily was not determinative, and if I understand him correctly, perhaps not even relevant, to the matter presently before me. His point of departure is that the earlier case was one in which a declaration as to the state of affairs was sought. In the instant case what was being canvassed was how to resolve a dispute. That dispute had arisen in 1999 when the Government sought to put in place the new hours of work regime for Junior Doctors. In support of this contention, he cited the affidavit of Dr. Patrick Toppin, in particular

paragraphs 4 and 5 of that affidavit sworn to on the 9th March 2004. Those paragraphs are in the following terms:

> That the basic hours of work of the Junior doctors have been from 8a.m. to 4:00 p.m. Monday to Friday, that is 40 hours per week. That where Junior Doctors are rostered to work beyond the basic hours of 8 a.m. to 4 p.m. they are usually paid an overtime/duty allowance. This practice was affirmed in the last concluded Heads of Agreement signed by the parties for the period April 1, 2000 to March 31, 2002 which is marked PT1 and is now produced and shown me.
>
> The Applicants wish to introduce a shift system, which would require Junior Doctors to be roistered to work for any forty hours in any seven days at the discretion of the Administration. That the Junior Doctors have objected to the proposed change as it would affect the terms and conditions of their employment.

He referred to the letter from the Ministry of Health to the Chairman of the IDT dated August 5th 1999 in which the Minister purported to refer to the IDT "the dispute between the Government of Jamaica represented by the Ministry of Finance & Planning and the Ministry of Health on the one hand and the Junior Doctors employed by the Ministry of Health and represented by the Junior Doctors' Association on the other hand in accordance with Section 9 (3)(a) of the Labour Relations and Industrial Disputes Act". The letter stated that the terms of reference of the Tribunal are as follows: "To determine and settle the dispute between the Government of Jamaica represented by the Ministry of Finance & Planning and the Ministry of Health on the one hand and the Junior Doctors employed by the Ministry of Health and represented by the Junior Doctors' Association on the other hand, over the Association's claims as stated in their letter dated July 27, 1999 (copy attached).

Dr. Barnett felt that the brief provided to the IDT by the JDA and especially paragraph 33 thereof was instructive. This was in the following term:

> "Clause 4 of the formal agreement is not acceptable. The current system provides for Doctors to work from 8 a.m. to 4 p.m. Monday to Friday except in he case of casualty officers and other particular cases where different hours have been agreed. The Junior Doctors' Association contends that the current system best maintains continuity of patient care which would be jeopardized under a shift system. The Employment Policy and Procedure, page 5 also provides for fixed hours of work Monday to Friday."

It will be recalled that the dispute which had been referred to the IDT under section 9(3) of the LRIDA was referred back for discussion at the local level and the only outstanding issue which was not resolved there was that of the hours of work, and this was the issue which was again return to the IDT and it is this issue jurisdiction over which the government is now claiming that the IDT does not have. He also referred to the Heads of Agreement concluded between the various parties for the contract period April 1, 2000 to March 31, 2002 and signed on September 26, 2002 and which left the hours of work as an issue yet to be determined.

It should be noted that in a letter dated July 12, 2000 from the government and the University Hospital to the IDT headed "Dispute between the government of Jamaica and the Junior Doctors Association University Hospital and the Junior Doctors' Association", the different positions of the parties were set out. Dr. Barnett accordingly formulates the dispute which arose at this time in the following terms:

> "Whether the normal working hours should remain in practice as they were under prevailing practice or should be altered by the government.

He said that that issue did not arise and could not have arisen in the Junior Doctors' case of 1990. The LRIDA provided for reference of disputes under section 9 and section 12. The reference of the "dispute" had been made by the government to the IDT. He further submitted that when a Minister refers a dispute in which it is a party, to the IDT, as occurred in this case, it is subject to the general law and jurisdiction of the Tribunal and it

cannot by government policy directives oust the Tribunal's statutory jurisdiction. In support of this proposition he cited **Jamaica Association of Local Government Officers and the National Workers Union v The Attorney General S.C. No: M38 and 56 of 1994**, a decision of the Full Court. As Cooke J. said in that case:

> "The Ministry Paper endeavoured to facilitate the solution to what it regarded as "persistent problems in public personnel administration". It was never intended nor could it have sought to exclude the Tribunal from its function and authority given it by law".

In my view, the issue in this case might be shortly determined on a strict interpretation of the definition of "terms and conditions of employment" set out in the statute. The definition states that the term means "the terms and conditions on which one or more workers are, *or are to be, required to work* for their employers". As will be apparent below, I am satisfied that the LRIDA clearly contemplates that hours of work are within the meaning of the expression. Section 12 (7) is instructive.

> Where any industrial dispute referred to the Tribunal involves questions as to wages, or as to hours of work, or as to *any other terms and conditions of employment*, the Tribunal
>
> (a) shall not, if those wages, or hours of work, or conditions of employment are regulated or controlled by or under any enactment, make any award which is inconsistent with that enactment;
>
> (b) shall not make any award which is inconsistent with the national interest.

Further, if I am correct in that view, it also seems clear that a dispute which involves the terms and conditions under which the employee *is to be required to work*, is an "industrial dispute" within the meaning of the Act, and may properly be considered by the Tribunal. If that is correct, then the Applicants application for Prohibition and Certiorari must fail. However, if I am not correct in this view, I would still hold that the

Applicants ought not to succeed in their applications for Prohibition and Certiorari for the reasons which I set out below.

I have formed the view that in referring the matter to the IDT as it did in its August 5, 1999 letter, it appeared to concede that all the matters in that referral were within the purview of the Tribunal. There was, if you will, an approbation of the right of the IDT to consider the issue, *and that* it was a dispute within the meaning of the LRIDA. It seems to me that to now refuse to accept the characterization of "dispute" to the hours-of-work issue on its return to the IDT from the failure to resolve it at the local level, is now a reprobation of its previous position. The Government cannot approbate and reprobate at the same time.

I also accept the submission that the Junior Doctors' case is not determinative of the instant case as the cases were addressing distinctly different questions. In the former case, the JDA sought a declaration as to the existing rights at that time, and that it was entitled to an eight hour 8 a.m. to 4 p.m. working day and a forty hour working week, Monday to Friday. As Clarke J. decided, and I accept quite correctly, there was no such entitlement. As he so eloquently articulated the issue in that case, he said:

> The central issue is whether the junior doctors in the government service or those employed by the hospital, or both groups of doctors, have a legal right to any of the conditions of service in respect of which they sought declarations.

In the instant case, the issue, a bifurcated one may be stated thus:

a) whether an attempt to change what was (on the evidence of Dr. Toppin and not controverted anywhere), the "prevailing practice" with respect to hours of work; and

b) the validity of the claim on the same affidavit, that such a change would militate against "proper patient care and therefore adversely affect their professional standards and responsibility".

Is this an "industrial dispute" over "terms and conditions of employment"? I believe that it is. In other words, the issue is not that "we have a right to the eight hour day and the forty hour week". Rather, it is an assertion that there is a "p*revailing practice* which the Administration is about to change, which change has implications for hours of work but also for professional patient care. There is a dispute about the making of that change. It would seem that if the submission from Mr. Foster is taken to its logical conclusion, the Administration would be entitled to institute any hours of work that it considered fit, and such could never be challenged since, hours of work were not terms and conditions of employment. Could it say that henceforth all members of the junior doctors group will work at their respective posts from 4 p.m. to midnight? Merely stating the issue in this way must cast doubt upon the validity of the proposition.

Moreover, the submission that it is not for the IDT to impose conditions upon contracting parties ignores the realty that it is often in situations where lacunae in contractual arrangements become manifest that the IDT determines what the rights of the parties are. I also agree with Dr. Barnett that the LRIDA does not use the expression "terms and conditions of employment" as a term of art or as the same would be understood in dealing with a contract. There was also a suggestion that it is in any event, too late in the day, and thus inconsistent with current labour relations practices, to say that hours of work are not terms and conditions of employment. Indeed, the LRIDA in section 12(7) which is set out above, seems to support this view.

It seems clear from section 12 (7), that the statute contemplates that hours of work *are part of the terms and conditions of employment* and for the purposes of considering the jurisdictional appropriateness of a referral to the IDT under the LRIDA, I do so hold. The direct implication of this holding is that the IDT does, in my view, have jurisdiction to hear and determine the dispute.

Accordingly, the applications for the Declaration and Orders of Prohibition and Certiorari are denied. No Order as to Costs.

Stay of Execution granted for six (6) weeks from the date hereof.