[2023] JMSC Civ. 148

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2023CV00440

BETWEEN	**JAMAICAN REDEVELOPMENT FOUNDATION INC.**	**APPLICANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**RESPONDENT**
AND	**MARGARET CURTIS**	**INTERESTED PARTY**

IN CHAMBERS

Mr. Matthew Royal & Mr. Jovan Bowes instructed by Myers Fletcher & Gordon for the Applicant

Mr. Louis Jean Hacker & Ms. Jenoure Simpson instructed by the Director of State Proceedings for the Respondent

Mr. Emile Leiba & Ms. Chantal Bennett instructed by DunnCox for the Interested Party

May 31, 2023 & July 25, 2023

JUDICIAL REVIEW – Reasonable prospect of success-Illegality-Irrationality, Procedural Impropriety.

SIMONE WOLFE- REECE, J

INTRODUCTION

[1] The Jamaican Redevelopment Foundation Incorporated (JRFI) is a company incorporated in the United States of America, filed a Notice of Application seeking

the leave of the Court to file a Claim for Judicial Review of a decision of the Industrial Disputes Tribunal (IDT). The applicant is seeking permission to specifically challenge the IDT's award made in favour of Margaret Curtis, (the Interested Party).

[2] The Notice of Application for leave to apply for Judicial review was filed February 14, 2023, seeks the following orders;

(1) Permission is granted to the Applicant to apply for an order of certiorari to quash the award of the Industrial Disputes Tribunal (IDT) dated November 14th 2022

(2) The grant of permission shall operate as stay of the award of the IDT dated November 14, 2022

[3] The Applicant outlined eight main grounds on which they hinge their application;

(1) The Respondent violated the Applicants Constitutional right to due process and therefore the award is illegal null and void.

(2) The award is illegal as the IDT failed to specify the date of dismissal and the date from which the award would take effect as required by ss12(4)(b) and 12(4B) (b) of the Labour Relations Industrial Disputes Act (LRIDA)

(3) Ms. Curtis having declared that she was not seeking reinstatement s12(5)(c)(ii) of the LRIDA prohibited the IDT from reinstating her.

(4) The Respondent committed procedural impropriety and breached the Applicants right to natural justice when it allowed Ms. Curtis to change her position and seek reinstatement after the Applicant had been prohibited from calling evidence as to why reinstatement would not be appropriate or making submissions on the point.

(5) Ms. Curtis having been belatedly allowed to seek reinstatement s.12(5)(C)(i) of the LRIDA required that any monetary award be expressed in terms of retroactive wages and this was not done

(6) For the IDT to have found that the reason for dismissal was because Ms. Curtis confronting management on behalf of the staff on more than one occasion over non-payment of a discretionary bonus which is a disciplinary reason, Ms. Curtis would have needed to have lodged a complaint against

such disciplinary action within 12 months of the date on which the disciplinary action became effective (LRIDA s. 11B) and no such complaint was lodged by her representative during that period.

(7) The award of US$203,280 is irrational, as no explanation was given as to how the sum awarded was arrived at, in circumstances where Ms Curtis would have earned significantly less than the sum had she remained employed from the date of dismissal until the date of the award.

(8) The Applicant has no alternative form of redress

(9) The Applicant is directly affected by the Respondent's decision.

[4] All the parties have submitted full written submissions and authorities. I acknowledge from the outset that whilst I may not set out each parties' submissions in full. I have considered them and I will refer to them where necessary in my determination of the issues.

[5] The Civil Procedure Rules (CPR) specifically Part 56 outlines the guidelines to be followed when making an application for leave to apply judicial review. There is no dispute before this Court that the Applicant has an interest in the decision made by the IDT, as they are the employer of the interested party Miss Curtis and was a party to the hearing before the IDT. The Applicant has set out the grounds in its application on which they submit that there is a basis for leave to be granted to include that they have no other form of redress.

[6] It is accepted that in an application for judicial review it is not an opportunity to appeal the decision of a decision maker. The concept and scope of judicial review is confined to the Court exercising a supervisory power over bodies such as the IDT in relation to the manner in which the decision was arrived at. It is also established that the supervisory nature of the Court in such a matter does not call for the Court to delve into the details or evidential substance of the of the case

before it. As was stated by Simmons J (as she then was) in ***Clayton Powell v. The Industrial Disputes Tribunal and Montego Bay Marine Park trust***[1]

> ***"The jurisdiction of the Court in such matters has been also described as supervisory and as such the question is not whether the Court disagrees with the decision of the particular tribunal but whether there is illegality irrationality or procedural impropriety"***

[7] The LRIDA provides that the decisions of the IDT shall be final and conclusive except on issues of law. In making a determination as to whether to grant leave the Court is mindful that it must be satisfied by the Applicant that the IDT in the instant case made some error in law which falls within the ambit of illegality, irrationality or procedural impropriety. The Court must conclude that the Applicant has a realistic prospect of success, which is not subject to any discretionary bar, as was stated by the Privy Council in the case ***Sharma v. Brown Antoine and Others***[2]**.**

Does the Applicant Realistic Prospect of Success?

The Constitutional Claim

[8] The JRFI must therefore must satisfy this Court that it has realistic prospect of success. They must not only demonstrate that their claim deserves the Court exercising its supervisory powers over the decision but that there is likelihood of success.

[9] In seeking to do this the Claimant submitted that the IDT violated the JRFI constitutional right to due process and the decision made is therefore illegal null and void. Mr. Royal submitted that the Applicant has filed a constitutional claim on 31st May 2021 against the Respondent seeking various declarations that the IDT

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[1] [2014] JMSC Civ 196 para 43
[2] (2006) 69 WIR 379

is not an independent and impartial authority and that it violates the JRFI's constitutional right to due process.

[10] Counsel contends that sections 7(2) and 8(2)(c) of the LRIDA and sections 1,2,3,4, and 7 of the second schedule to the LRIDA are in violation of the doctrine of separation of powers and do not offer sufficient protection for the independence and impartiality of the IDT as a quasi-judicial body. He made specific reference to the way members were appointed, the duration of appointment, the guarantee from external pressure and the perception of independence. It is the applicant's contention that the IDT as presently constituted including the panel that determined this dispute was not in keeping with the Constitution and therefore the JRFI constitutional right to due process was breached and the award was therefore illegal null and void.

[11] Mr. Hacker has confirmed that there is a claim challenging the constitutionality of the legislative scheme which established the IDT. He however urged on this Court that the constitutional claim is a separate issue which has not yet been determined. He submitted that the Applicant has not provided any evidence before the Court to demonstrate how the IDT violated its constitutional right to due process, and therefore has failed to show that there is basis on which the Court should grant leave.

[12] In my assessment of the affidavits of Mr. Carlton Simpson filed on February 14, 2023 and May 10 2023, he opines that the applicants constitutional rights to due process has been violated and he has exhibited the Fixed Date Claim Form of the constitutional challenge[3] however the specific evidence as to how the actions of

[3] Affidavit of Carlton Simpson filed February 14, 2023 paragraph 18 & Exhibit CS1

any member of the panel, or the constitution of the IDT directly affected them or the award made in this case, is non-existent.

[13] On the face of the IDT's award dated November 14, 2022[4] at paragraph 3 it is noted that the JRFI advised the Tribunal that it had filed an action in the Supreme Court challenging the constitutionality independence and impartiality of the Tribunal and sought a stay of the proceedings. There is no evidence of the details or basis of the complaint to the tribunal and if so who specifically the allegation of lack of independence and impartiality was levied against.

[14] Simmons J,[5] quoted the adopted position of Sykes J (as he then was) *in* ***R v IDT ex parte J. Wray & Nephew Limited*** who stated;

> *"There must be in the words of Lord Bingham and Lord Walker, 'arguable ground for judicial review having a realistic prospect of success'… The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges regardless of the litigants are required to make an assessment of whether leave should be granted in light of the now stated approach. An applicant cannot cast about expressions such as ultra vires, null and void, erroneous in law, wrong in law unreasonable* ***without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions."***

[15] In my considered view that on the paucity of evidence in this regard the Applicant has not satisfied the requirement for the Court to find that they have a real prospect of success on this issue. The issue of the constitutionality is a separate claim for the Courts consideration. Further the Applicant would be required to substantiate such an assertion with clear evidence for the Courts determination, which they have failed to do.

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[4] Exhibited to the Affidavit of Carlton Simpson filed February 14,2023 Exhibit CS2

[5] Supra Footnote 1

Illegality

[16] The Applicant further contends that the award made by the IDT in the favour of the interested party is illegal pursuant to Sections 12(4)(b) and 12(4B) (b) of the LRIDA. Mr Royal expounded and submitted that the use of the word ***"shall"*** in Section 12(4)(b) places an express obligation on the IDT to specify the date from which the Award should have effect. He says that in the instant case, the IDT failed to comply with this statutory requirement. It therefore follows that the IDT's obligation under Section 12(4B) (b) could therefore not have been discharged as there was no indication as to what was the considered the date of dismissal, and by extension when the Award would have taken effect.

[17] In these circumstances, it was further submitted that the IDT's failure to specify the date of dismissal and the date from which the Award would have taken effect as required by Sections 12(4)(b) and 12(4B) (b) clearly indicates that the IDT, as the decision maker, did not give effect to the law which regulates is decision-making power and the Award is therefore illegal.

[18] In response to this submission both the Respondent and the Interested party submitted that there is no illegality in the Award that has been made. The interested party submitted that the provisions of the LRIDA does not require the IDT to specify the date of dismissal. It was their contention that the date of dismissal is easily identified by the termination letter dated August 31, 2018 penned Jason Rudd, the Chief executive officer which states;

> *"Pursuant to the terms of your employment agreement and the terms of the Employment (Termination and Redundancy Payments) Act we are required to give you eight (8) weeks' notice of your termination. This letter will serve as your Notice."*

It was submitted that the reasonable inference and conclusion is that the date of dismissal is easily identified as eight weeks from August31, 2018.

[19] Further, Counsel submitted that the provisions of the LRIDA must be read carefully and taken in the intended context. It was a submitted that Section 12(4)(a) gives the IDT the power to make an award with retrospective effect. Therefore, section 12(4)(b) simply requires that where the IDT makes an award which is retrospective they must state the date from which this award would take effect. They concluded that in the instant case the award was not retrospective in nature and therefore the panel of the IDT did not need to specify a date the award would take effect.

[20] The LRIDA section 12 addresses awards by the Tribunal. Section 12(4) states:

> *"(4) An award in respect of any industrial dispute referred to the Tribunal for settlement-*
>
> *(a) may be made with retrospective effect from such date, not being earlier than the date on which that dispute first arose, as the Tribunal may determine;*
>
> *(b) shall specify the date from which it shall take effect;*
>
> *(c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."*

[21] On my assessment of the provision I am of the view that intention of the legislators could not be to create absurdities. The provision gives the Tribunal the power to make awards that have retrospective effect. It is patently clear and reasonable to conclude that in such instances that the Tribunal is required and ***shall*** **specify the date from which the award is to take effect.** In this case the award had no retrospective effect and therefore this Court concludes that the failure to specify a date of the award is to take effect is unnecessary, nor is it demonstrative of an error in law or a conclusion that the award can be deemed to be illegal. It is a fair conclusion that the award will take effect on the date on the award.

[22] Counsel for Applicant referred to Section 12(4A) & 4(B), however it is my considered view that those sections come into play in circumstances of a retrospective awards, which I have concluded are not applicable.

Procedural Impropriety & Breach of Natural Justice

[23] The Applicant has submitted that the award reinstating Ms. Curtis amounts to procedural impropriety. Mr. Royal submitted that the Panel refusal to allow them to make submissions was a breach of the rules of natural Justice.

[24] Mr. Carlton Simpson in his affidavit at paragraph 13 stated that "Miss Curtis submitted a brief to the IDT in which she stated that she did not want to be reinstated. However, after the Applicant had no further opportunity to present a case, she then changed her position stated in her evidence that she wanted to be reinstated."

[25] The LRIDA Section 12(5)(c)(i);

> *"(5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal-……*
>
> *(c) if the dispute relates to the dismissal of a worker the Tribunal, in making the decision or award-*
>
> *(i) may if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv). Order the employer to reinstate him, with payment of so much wages if any as the Tribunal may determine.*
>
> *(ii)shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine*
>
> *(iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall at the end of that period pay the worker such compensation or relief as the Tribunal may determine."*

[26] The record of proceedings reflects that at the 11th sitting the Applicant was invited to make its opening and call its first witness. However, the Applicant declined to do so. The response to this invitation by Counsel for the Applicant was ***…" as it stands now we have no instructions to present any opening statement, or prepare a brief or submit a Brief. We have no instructions to call any witnesses at this time."*** [6] The contents of the brief presented to the IDT by the interested party was not placed before this Court. The record of proceedings and the Award was exhibited to the affidavit of Mr Simpson[7] reflects that Miss Curtis in her testimony before them stated that she loved her job and did not mind going back if she was fully compensated for the period she was out. After Ms. Curtis gave this evidence she was cross examined by the Applicants attorneys at law.

[27] The Applicant contends that the interested parties' Brief is equivalent to pleadings in a civil claim and that there is no procedure to amend ones Brief, before the Tribunal, and therefore allowing evidence of her desire to be reinstated amounts to procedural impropriety.

[28] It is clear to this Court that the Tribunal, a decision making body has a responsibility to be fair to all the parties who appear before them with a dispute to be resolved. The principles of natural justice require that the tribunal allow each litigant to know the case against them, to allow them to present their case, to cross examine if they chose and for the tribunal to come to a decision without bias. In the instant case the Tribunal gave the Applicant an opportunity to present a brief to call witnesses which they declined to do. The Panel then deliberated on the position and ruled as follows;

> *"We note that the Company is not prepared for an opening or to invite any witnesses, in that regard we are going to be inviting the aggrieved party to*

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[6] IDT award dated 14 November 2022 pages 3-4
[7] Affidavit of Carlton Simpson filed February 14, 2023 Exhibit 2

> *start the case. We will allow the Company to cross examine any witnesses that appear for the aggrieved but will not allow the Company to make submissions, give any evidence thereafter, given that you have decided not to open your submissions this morning."*

[29] I am of the view that the Applicant was given an opportunity to present a case which they chose not to do, however they were given the opportunity to cross examine the witnesses for the aggrieved and seek to challenge and test the evidence put forward by the aggrieved party before the Panel. In the case of ***Council of Civil Service Unions v Minister of Civil Service***[8] Lord Diplock stated;

> *"I have described the third head as procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument, by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."*

[30] I accept that the Panel would have erred in preventing the Applicant from making submissions. I can see no reason why the Applicant should not be allowed to make submissions before the tribunal, as every litigant/party has a right to be heard. In the circumstances that they have not presented a brief or called witnesses should not operate as a bar to submit on the law and the evidence that is before the Tribunal. I find that this is an error on their part. However, I am of the view that the issue of reinstatement was relevant and the Tribunal was open to accept or reject that evidence. In light of the un-contradicted evidence of the Interested party with respect to reinstatement I am of the view that the finding was open to the tribunal to make, and that error in not hearing from the Applicant would not have tainted the finding or have resulted in a different outcome.

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[8] [1984] AC 374 at page 411 A-B

[31] I am not of the view that the Applicant has placed any evidence before the Court to substantiate an allegation of procedural impropriety or a denial of natural justice.

Reason for Dismissal

[32] The Applicant contends that the Panels' finding on the evidence *'that the likely reason for termination was that Ms. Curtis was confrontational with management on several occasions over the non- payment of a discretionary bonus'*, amounted to a disciplinary action as contemplated by Section 11B LRIDA. They submitted that the IDT could not have found there was a dispute in this regard because Ms. Curtis had not lodged a complaint against such action to the Minister within 12 months and therefore was not a part of the dispute as at 19th September 2018, nor was it part of the complaint sent to the Ministry on Ms. Curtis' behalf.

[33] The Panel in their award at paragraph 41 stated;

> *The argument of the Aggrieved is that her leadership role in confronting management on behalf of the staff on more than one occasion over the non-payment of the "discretionary bonus" was the reason for the termination of her services. The Tribunal accepted this as a **likely reason** for termination given that the Company has not availed itself of the opportunity to present evidence to the contrary." (emphasis mine)*

[34] The dispute which was referred to the IDT and the terms of reference stated in letter dated November 30, 2021 is;

> *"To determine and settle the dispute between the Jamaican Redevelopment Foundation, Inc., on one hand and Margaret Curtis on the other hand over the termination of her contract of employment."*

[35] The Court concludes that the finding of the Panel is that this is a 'likely reason' based on the evidence of Ms. Curtis, in circumstances where the company has failed to place any evidence to contradict same is reasonable. This finding does not offend the terms of reference nor is there any evidence of a "disciplinary action"

but rather based on the evidence a determination of the likely reason or motivation for her termination. I disagree with the Applicant on this point.

Irrationality of the Award

[36] The question to be answered is whether the award made by the Panel is irrational? The Applicant contends that the award of USD$203,280 is irrational as the panel failed to state how it arrived at that figure. Lord Diplock stated in the Council of Civil Service case[9]; defined Irrationality in this way. He stated:

> *"By "irrationality" I mean what can by now be referred to as "Wednesbury unreasonableness", It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person would have applied his mind to the question to be decided could have arrived at it."*

[37] The complaint of irrationality is that the amount awarded bore no apparent connection to retroactive wages. Section 12(5)(c) of the LRIDA. This section lists remedies that the Tribunal ought to award in cases where it finds that the dismissal of a worker was unjustified, I find it useful to quote this section for completeness:

> *"If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award-*
>
> *(i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv), order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;*
>
> *(ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;*
>
> *(iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within*

[9] Supra Footnote 8 page 410 G-H

such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine;

(iv) shall, if in the case of a worker employed under a contract for personal service, whether oral or in writing, it finds that a dismissal was unjustifiable, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine, other than reinstatement…."

[38] The Applicant submitted that having accepted Ms. Curtis' desire to be reinstated, they were now constrained to calculate the Award in terms of retroactive wages. The failure to show how they arrived at the figure is in itself irrational as they have not provided a basis that any sensible person can conclude that it was reasonable. In analysing the evidence before the Tribunal made the Award pursuant to Section 12(5) (c) (iii) as cited above. The Interested party gave evidence that when she was terminated at the end of October 2018 her salary was USD 42,000 per annum with a gratuity of 10 per cent.

[39] The legislative frame work gives the Tribunal the latitude and discretion to award compensation or grant such other relief as the Tribunal may determine. There is no requirement that the award must be specific or limited to retroactive wages. The Applicant would need to show how the sum was unreasonable in all the circumstances which they have not done and therefore this submission cannot succeed. See: ***Garrett Francis v Industrial Disputes Tribunal and The Private Power Operators Ltd.*** [10]

[10] [2012] JMSC Civ 55

Delay & Alternative Remedy

[40] The issue of delay which is a discretionary bar, was raised by the Respondent and the Interested party. I accept that a litigant who seeks to engage the supervisory jurisdiction must act with alacrity. The Decision was handed down on November 14, 2022. The Applicants unchallenged evidence is they received same on November 22, 2022. The Applicant filed its Notice of Application on February 14, 2023. The Civil Procedure Rules (CPR) 56.6 (1) provides that;

> *"An application for leave to apply for judicial review must be made promptly and in any event within three (3) months from the date when the grounds of the application first arose."*

[41] The Interested party has given evidence that the delay in filing the application has been prejudicial to her and has caused serious financial burden on her. I am aware that even where an application has been filed within the three months of the decision that delay can still be a live issue. The Court however having considered all the issues and in this particular case the issue of delay will not be used as a bar to the application.

[42] The LRIDA provides that the IDT decision is final and therefore is not subject to appeal. I accept that there is no other remedy to challenge errors of law but by way of judicial review.

[43] In a total consideration of the case presented and issues raised I find that there is no evidence that there is basis for the Court to exercise its supervisory power in this matter. The application is therefore refused.

DISPOSAL

1. **The application for permission to apply for an order of certiorari to quash the award of the Industrial Dispute Tribunal dated November 14, 2022 is refused.**

2. **Leave to appeal refused.**

3. No Order as to costs.

4. Applicants attorney to prepare file and serve the orders made herein.