[2022] JMSC Civ. 44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2021 CV 00631

IN THE MATTER OF AN APPLICATION BY SUTHERLAND GLOBAL SERVICES JAMAICA PLC LIMITED

A N D

IN THE MATTER OF THE LABOUR RELATIONS INDUSTRIAL DISPUTES ACT

BETWEEN	**SUTHERLAND GLOBAL SERVICES JAMAICA PLC LIMITED**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**DEFENDANT**

Mr. Kwame Gordon instructed by Samuda and Johnson for the Claimant

Mr. Louis Jean Hacker instructed by the Director of State Proceedings for the Defendant

HEARD: 8th April, 2022

ON PAPER

WILTSHIRE J,

Background

[1] The sole issue to be determined in the Fixed Date Claim Form is whether to grant the declarations as requested by the Claimant. The Fixed Date Claim form filed on June 2, 2021 sought, in addition to the order of Certiorari, the following:

a. A Declaration that the Defendant's referral to the Industrial Disputes Tribunal (the "IDT") of the dispute between the Applicant on the one hand and Miss Suan Smith (the "aggrieved worker") on the other hand, pursuant to the terms of reference detailed in the Defendant's letter of the 4th of December, 2020 is *ultra vires* in that the said referral was done in contravention of the Labour Relations and Industrial Disputes Act (the "LRIDA"), in particular Section 11A.
b. A Declaration that the aggrieved worker's refusal to engage the Applicant's local level appeal process prior to lodging a complaint with the Defendant meant that there was no industrial dispute before the Defendant which was capable of being referred pursuant to Section 11A(1)(a)(i) of the LRIDA.
c. Further, or alternatively, a Declaration that the Defendant's referral of the dispute was *ultra vires* as the Defendant prior to making the said referral did not utilize the mechanism detailed in Section 11A(1)(b) which empowers the Minister to direct the parties in writing to pursue a settlement of the dispute pursuant to the Applicant's local level appeal process.
d. Further, or alternatively, a Declaration that the Defendant's referral of the said dispute to the IDT is *ultra vires* in that the referral offends the provisions of the Labour Relations Code (the "Code") in particular, Section 22(1)(d).
e. Further, or alternatively, a Declaration that the engagement of the Applicant's local level appeal process by the aggrieved worker subsequent to the referral of the dispute by the Defendant to the IDT, meant that the referral was *ultra vires* and ought properly to have been withdrawn.

Law

[2] "Declaratory judgements play a large part in private law and are a particularly valuable remedy for settling disputes before they reach the point where a right is infringed. The essence of a declaratory judgement is that it states the rights or "legal position of the parties and they stand without changing them in any way……" "In administrative law the great merit of a declaration is that it is an efficient remedy against ultra vires action by governmental authorities of all kinds…..". "There are additional advantages, as in cases where it is difficult to choose the right remedy or where the ordinary remedy is for some reason unsatisfactory." (Wade and Forsythe, Administrative Law, 10th ed., pgs 480 and 481).

[3] **Dyson v Attorney General** [1912] 1 Ch. 158 is a landmark case for the use of declarations. In that case the Commissioners of Inland Revenue, empowered to demand from landowners under threat of penalty, required a valuation of the land which was not something which was authorized in the Act. A landowner brought proceedings against the Attorney General and the Court of Appeal granted a declaration that the demands were ineffective in law. In Wade and Forsythe, Administrative Law, 10th edition, page 482, it was stated that, "by seeking a declaration the owner was able to take the initiative, and the court rejected the Crown's argument that his right course was to take no action and then dispute the demand when he was sued for the penalty. Fletcher Moulton LJ said,

> *So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty"*

The case showed that there was merit to an action for a declaration as a defensive remedy against the executive power.

[2] In **Forbes v The Attorney General of Jamaica** SCCA 29/2005 the court noted that, the declaration, though utilized in public law, was

essentially a private law remedy. Harrison P stated that *Part 8, rule 8.6 of the CPR read:*

> *"A party may seek a declaratory judgement and the court may make a binding declaration of right whether or not any consequential relief is or could be claimed."*

Harrison P continued:

> *"Judicial review is defined in rule 56.1(3) to include the remedies of:*
>
> *(a) Certiorari, for quashing unlawful acts;*
>
> *(b) Prohibition, for prohibiting unlawful acts; and*
>
> *(c) Mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case*
>
> *…*
>
> *Rule 56.9(1) states that an application for administrative order must be made by Fixed Date Claim Form, specifically whether the application is for:*
>
> *(a) Judicial review*
>
> *(b) Relief under the constitution*
>
> *(c) Declaration or*
>
> *(d) Some other administrative order*
>
> *Under our rules, the declaration is not subject to the procedure that governs judicial review and should not have been joined as a claim. Note however, that rule 56.7 empowers a court to direct how such a claim may proceed.*
>
> *The Supreme Court Act (1981), section 31 (UK) permits an application to be made for mandamus, prohibition, certiorari or for a declaration or injunction in respect of public law rights by way of an application to the High Court for judicial review sparing the applicant of two distinct set of proceedings. There is no such corresponding statutory provision in Jamaica"'*

[4] The Defendant in this matter relies on the case of **Gouriet v Union Post Office Workers** [1977] 3 All ER 70 which was cited in the case of **The Honourable Dorothy Lightbourne v Christopher Coke and Others** unreported Supreme Court decision, delivered May 11, 2010 where Jones J stated at para 12 and 13:

> "[12] …a person will not be a proper defendant if the declaration of the court will not affect their legal interests either actual or contingent…
> [13] Lord Diplock put it best … when he said:
> "…the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else"

[5] Counsel for the Defence also relied on **St George et al v Joel Betty and the Attorney General** unreported Supreme Court decision delivered August 4, 2010 where Anderson J guides the court on what is required to grant declaratory relief as sought. That case speaks to the issue of utility of the declaration and therefore this court must consider whether making the declaration would be of any utility to the Claimant. Utility should be accorded a broad meaning extending to more than mere legal correctness. The 'utility' of the orders was one of the reasons given by counsel for the Claimant for granting the declaration.

Conclusion

[6] "A declaration is a discretionary judgement which must be granted with care and caution having regard to all the circumstances of the case and ought not to be granted where the relief claimed would be unlawful or inequitable or where an adequate alternative remedy disposes of all the issues available". per Anderson J, **St. George Jackson** (supra) paragraph 48,

[7] The court will not make a declaratory judgment where the question raised is purely academic, the declaration would be useless or embarrassing or where an alternative remedy is available. The authorities have stated that it is of importance

that when exercising this discretion to grant relief there should be some utility, if not, it is difficult to see why the declaration is being granted. Utility in this case would be the court's need to address some difficulty with which the Claimant is faced as a result of the Defendant's actions.

[8] In light of the Defendant's conceding and the order for certiorari having been granted the Claimant is no longer faced with any issues which require the court's intervention. It would be now superfluous for the Claimant to want these declarations, that serve no real purpose to prove a point of law, or to establish an authority. It can only be inferred that the declarations being sought were being done on the basis that if the Claimant was not granted a Certiorari, the declarations would be there to clarify any peripheral issues which may have arisen.

[9] The Claimant has submitted that the declaratory reliefs being sought serve a useful purpose and provide guidance should a similar dispute arise in the future. To that end they have also relied on the case of **St. George Jackson (supra).** The court however maintains that the order of certiorari has adequately dealt with the issue between the parties and no other remedy is necessary. The court finds support and guidance for its position in **Gouriet (supra)** that it is not to give advisory opinions and "it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

[10] Notwithstanding the foregoing, in accordance with **Forbes (supra)** the court is also concerned that it has no jurisdiction to hear these proceedings. In a judicial review hearing the only available remedies are a certiorari, prohibition and mandamus. A declaration was not included in the remedies in rule 56.1of the CPR and therefore is not recognized by the court as available. Whilst it may be allowed if the court applies rule 1 of the CPR, it cannot be used as an alternative to a substantive claim or pleading where the law is clear and specific. In the circumstances, where the certiorari is granted, there is no need to look to the declarations.

WITHDRAWAL OF A REFERRAL

[11] The court is of the opinion that the Minister was not so empowered as the relevant section of the legislation provides nothing for withdrawal. The withdrawal of a reference is provided for in section 11(3) of the LRIDA, solely for references made under said section. It states as follows:

> "11(3) If all the parties which have requested the Minister to refer a dispute to the Tribunal under this section inform the Minister in writing, before the Tribunal begins to deal with the dispute, that they no longer wish such dispute to be settled by the Tribunal, the Minister shall not refer the dispute to the Tribunal or, if he has already done so, he shall withdraw the reference."

This matter was referred to the Minister under 11A(1)(a)(i), which has no such provision, therefore, it would not be open to be withdrawn by the Minister as under the provisions in 11(3). Counsel for the Claimant has submitted that the authorities relied on by the Defendant are supportive of the view that if a tribunal's decision was "validly made" or was "within jurisdiction" then it was intra vires and said decision could not be recalled or revisited. Further that since in the case at bar, the Defendant had conceded that there should not have been a referral, then in the absence of legal authority, the Minister could have withdrawn the referral. In other words, reverse his own decision.

[12] Counsel also cites the dicta of Sopinka J in **Chandler v Alberta Association of Architects** 62 D.L.R. (4th) 577 which dealt with the issue of whether a statutory board was functus officio having acted in a manner which was ultra vires. The court there reaffirmed the general rule that once a decision maker had reached a final decision, that decision could not be revisited "because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances." Sopinka J also stated that in the context of administrative law, the application of this general rule should be more flexible where the decisions are

subject to appeal only on a point of law. It is of note however that Sopinka J went on to say that the strict application of the rule should not obtain "where there are indicators in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by the enabling legislation….." There are no indicators in section 11a(1)(a)(i) of the LRIDA that the Minister could withdraw the referral.

[13] The court is also mindful of and finds merit in the Defendant's submission that the dispute surrounding Suan Smith's termination of employment, is a dispute affecting her legal rights and therefore not one which the Minister could withdraw in the absence of statutory authority.

[14] In light of the reasons stated above the declarations sought are refused.