

Commonwealth Electrical Workers Union v. The Minister of Labour and Immigration and another

FP/PUB/jrv/00001/2006

Bahamas Supreme Court, Public Law Division

Maynard, J.

Heard: May 31, August 8 and 28, 2007.

Judgment: September 27, 2007.

Mr Obie Ferguson for Applicant

Mr David Higgins with Melissa Wright-Knowles for Respondents

- Trade dispute – Acts done in contemplation or furtherance of trade dispute – Ballot before industrial action – Plaintiff trade union requesting respondent minister to conduct strike poll at office of union – Minister failing to comply with request to designate officer to supervise poll and referring trade dispute to tribunal – Whether referral of trade dispute to tribunal operating as stay of obligations under relevant act.

JUDGMENT

1 Maynard, J. (Ag): In an originating notice of motion filed on the 15th of March 2006, the Commonwealth Electrical Workers Union asked for two (2) substantive reliefs under Order 53 (Judicial Review) of the Rules of the Supreme Court:

1. (i)

a declaration that the referral of a trade dispute to the Bahamas Industrial Tribunal by the Minister of Labour does not operate as a stay of strike vote application under Section 20(3) of the Industrial Relations Act;

2. (ii)

an order of mandamus directed to the Honourable Minister of Labour and Immigration directing him to conduct a secret ballot poll to determine the strike action;

3. (iii)

and also all necessary and consequential directions.

2 The first paragraph of the originating notice of motion referred to a decision of

the Minister of Labour and Immigration dated 30th of September, 2005, refusing to supervise or designate an officer to supervise a secret ballot poll for the purposes of a strike action which was requested on September 21, 2005".

3 The grounds relied on by the applicant were as follows:-

1. (i)

In refusing to conduct a secret ballot poll the Honourable Minister exceeded his jurisdiction and acted ultra virus section 20(3) of the Industrial Relations Act.

2. (ii)

By refusing to conduct the secret ballot poll as requested by the Applicant, the Minister of Labour and Immigration failed to give proper effect to the provisions of Section 20(3) of the Industrial Relations Act;

3. (iii)

In refusing to conduct the secret ballot poll, the Honourable Minister exceeded his jurisdiction by arrogating to himself powers, which the Act does not give him."

4 In support of the application, two affidavits of Keith Knowles, the president of the Commonwealth Electrical Workers Union were filed on behalf of the applicant. The affidavit of Tyrone Gibson, the Assistant Director of Labour, the Ministry of Labour and Immigration, was filed on behalf of the respondents.

5 The correspondence included a letter from Mr. Knowles to the Minister of Labour and Immigration, dated the 21st of September, 2005, in which he requested the Minister, through his office, to conduct a strike poll at the office of the union. The letter refers to disputes No. 96 of 2005, No. 60 of 2005 and No. 93 of 2005, which involved employees of the Grand Bahama Power Co., Ltd.

6 In the response dated the 30th of September, 2005, to Mr. Knowles, the Minister stated:-

"Please be advised that after thorough review of our files, our records indicate that dispute 60/2005 and 93/2005 were referred to the Industrial Tribunal. As far as dispute no. 96 is concerned, our records indicate that you requested that this matter be deferred until further notice."

7 It is not disputed that the union requested that dispute No. 96 of 2005 be deferred.

8 However, in the final paragraph of his letter, the Minister stated as follows:

"Consequently, and according to our records there is no outstanding dispute(s) that warrants a strike poll at this time. However, should

you be able to prove otherwise, I shall be happy to assist you within the confines of the Industrial Relations Act."

9 In other words, the Minister did not comply with the request to designate an officer to supervise the poll.

10 Section 20 (3) of the Industrial Relations Act, Chapter 321 ("the Act") states as follows:

"Whenever a trade union proposes to take any ballot for the purpose of determining on strike action, not less than two days notice in writing and (sic) shall be given to the Minister of the intention to take the ballot, and of the time and place at which it will be taken, and the ballot shall be taken under the supervision of an officer of the Ministry, who shall attend at that time and place; and, unless the ballot is so taken and is certified by that officer to have been properly taken, the union concerned shall not be deemed to have determined upon strike action in accordance with the provisions of this section."

11 The terms of that paragraph are mandatory; "not less than two days notice in writing and (sic) shall be given to the Minister of the intention to take a ballot, and of the time and place." Also that paragraph is mandatory in that, "the ballot shall be taken under the supervision of an officer of the Ministry, who shall attend at that time and place; and, unless the ballot is so taken and is certified by that officer to have been properly taken, the union concerned shall not be deemed to have determined upon strike action in accordance with the provisions of this section."

12 This matter raises the question of how a poll is to be taken and whether the Minister can refuse to designate an officer to supervise the poll once the other requirements of the Act have been satisfied.

13 My understanding of the procedure required under the Industrial Relations Act for a strike to be lawful is as follows:-

1. **(a)**

An employee or trade union registered in the Bahamas makes a report of a trade dispute to the minister s. 68;

2. **(b)**

Where there is a suitable dispute settlement machinery binding on the parties:

1. **(i)**

The minister may refer the trade dispute to that machinery;

2. **(ii)**

If the parties fail to settle within seven (7) days, they notify the minister s. 69 (1);

3. **(iii)**

The minister may refer the matter to conciliation;

4. **(iv)**

If they fail to settle within a further seven (7) days, they notify the minister s. 69(2);

3. **(c)**

Where there is no suitable machinery or the minister does not choose to refer the matter or the minister is notified of a forementioned failure to settle, the minister shall endeavour to secure a settlement by conciliation with sixteen (16) days or longer agreed period s. 69(3) last part

4. **(d)**

Regarding an essential service, the minister may forthwith refer the matter after the latter 16 days or longer agreed period, to the Industrial Tribunal "if in his opinion the public interest so requires" s. 72(1);

5. **(e)**

Regarding a non-essential service, if conciliation fails, the minister may refer the matter back to the parties for further consideration "if in his opinion the public interest so requires"; after "such reasonable period" as determined by the minister, the reporting party notifies the minister of failure; and the minister shall refer the dispute to the Tribunal s. 73;

6. **(f)**

If the above steps fails, a trade union is to give two (2) days notice in writing to the minister of its intention to take a ballot on strike action and of the time and place s. 20 (3);

7. **(g)**

The secret ballot is to be taken under the supervision of a designated officer of the Ministry of Labour;

8. **(h)**

The designated officer is to certify that the ballot was properly taken;

9. **(i)**

If he does not so certify the ballot, the union is not deemed to have decided on strike action in accordance with section 20 of the IRA s. 20(3).

14 The following provisions are also noteworthy:-

1. **(1)**

A settlement binding (until varied by a subsequent agreement). s. 71(2);

2. **(2)**

A copy of the settlement is to be transmitted to the minister and filed with the Industrial Tribunal. s. 71(1)

3. **(3)**

It is unlawful for any person or trade union to declare, instigate or incite others to take part in, a strike, when all the above conditions have not been satisfied. s. 74(2). An individual guilty of an offence on summary conviction faces a fine of \$150.00 or 3 months or both. s. 74(3).

4. **(4)**

A report of a trade dispute is to be made to the Minister within 12 months after the dispute first arose. Any dispute not reported within that period shall be deemed to have been settled, although the Minister may extend such period. s. 68(2);

5. **(5)**

When a strike is in progress and the minister considers that the public interest is affected, he may refer the dispute to the Industrial Tribunal for settlement. s. 76(1).

6. **(6)**

At that time, every participant in the strike shall have to discontinue participation. If within twenty-four hours of notification of the reference to the Industrial Tribunal, any employee fails to cease participation, he shall be guilty of an offence. On summary conviction, \$200 or 3 months or both may be imposed. s. 76(2)(b).

7. **(7)**

No employee shall go on strike, and no union or executive committee member shall call a strike, while such proceedings are pending before the Tribunal or the Court of Appeal. s. 77(1).

8. **(8)**

Any person who contravenes this provision is guilty of an offence. On summary conviction, in the case of an employee, \$200 or 3 months or both, and in the case of a union or a member of the executive committee, \$10,000 or 2 years or both may be imposed. s.77(2) (a) and (b).

9. **(9)**

A strike is illegal if it has any object other than the furtherance of a trade dispute within the trade or industry, or furthermore, if it is designed to coerce the Government (where such coercion ought reasonably to be expected as a consequence of the strike). s. 75(1) and (6).

10. **(10)**

It is an offence to declare, instigate and incite others to take part in an illegal strike under s. 79. On summary conviction, the penalty is \$150 or 3 months, and on information, 2 years. s. 75(3).

11. **(11)**

Prosecutions can only be taken by or with the consent of the Attorney General.

12. **(12)**

The same provisions apply to lock-outs by employers

15 The above abbreviated treatment includes not only Section 20 (3), but also notably section 77 (1), which states as follows:

"No employee shall go on strike, and no employer shall declare a lock-out, and no union or member of the executive committee or other governing body of a union shall call a strike or declare a lock-out in consequence of a trade dispute while proceedings taken in relation to that dispute are pending before the Tribunal or the Court of Appeal."

16 Counsel for the applicant referred to the case of *Hotel Corporation of the Bahamas and Bahamas Hotel Managerial Association*, civil appeal no. 12 of 1999, in support of the view that the Industrial Tribunal is a creature of statute. In my opinion, that view is unassailable. In particular, in that judgment, Hall, Justice of Appeal (as he then was), wrote as follows:

"The Industrial Tribunal is a creature of statute and, therefore, has only such coercive power as its parent statute allows it. Accordingly, when the Tribunal is faced with a dance of delay between a union and employer, such as was patently the case here, eminently sensible and logical though the decision of the President was in seeking to sever the Gordian knot, the Tribunal can do no more than "request" execution of the agreement."

17 The applicant also referred to paragraph 628 of Hallsbury, 3rd Edition, page 414, the second sentence of which is as follows:

"Statutory provisions giving jurisdiction to inferior courts, to government departments, or to bodies created ad hoc, must be strictly construed, and the procedure prescribed must be exactly followed."

18 The respondents, argued that under Order 53 rule 6(2) of the Rules of the Supreme Court the notice of motion cannot be amended unless the applicant gave notice of his intention and of any proposed amendment of his statement to every other party, and he must supply on demand and on payment of the proper charges copies of such further affidavits. I accept that view. This part of Order 53, which used to be Rule 4(2), was referred to by Strachan J. in *Rolle v. Attorney Général* No. 1094 of 1995. No application has been made to amend the notice of motion and no amendment has been granted of the notice of motion. That is significant because in my view, the originating notice of motion presupposes in paragraph 2(1) that there has been a referral of the trade dispute to the Tribunal. That subparagraph assumes there was a valid referral to the Industrial Tribunal and paragraph 1 recalls the decision set out the letter of the Minister of the 30th of September, 2005. Not having applied to amend the notice of motion, the applicant cannot now open the question of the validity of the referral.

19 Therefore, the following remarks on the validity of the referral, offered for clarity since the matter was extensively canvassed by counsel, are strictly speaking *abiter dicta*. The respondents claimed that the referral constituted proceeding before the Industrial Tribunal under Section 77, which precludes any employee from going on strike and any union or member of executive committee or other governing body calling a strike while the proceedings are pending.

20 The penalty is set out in paragraph 2 of Section 77, which states that:-

"Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable, on summary conviction - (a) in the case of an employee, to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding three months or to both such fine and imprisonment; (b) in the case of a union or a member of the executive committee or other governing body of a union, or an employer, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment."

21 The applicant also referred to section 83, which deals with relief by way of injunction against contravention of the Act.

22 The respondents, relying upon the affidavit of the Assistant Director of Labour, said that dispute No. 60 of 2005 was referred on the 22nd of July, 2005; and dispute No. 93 of 2005 was referred on the 15th of July, 2005. It was agreed that the union had requested that dispute No. 96 of 2005 be deferred and the Minister acknowledged the deferral of that dispute. Nevertheless, the affidavit of the Assistant Director of Labor suggested that dispute was still purportedly referred on the 4th of January, 2006.

23 The certificates of referral correspond with the parties in the reports of the trade disputes. Exhibits TDG-1 and 5 correspond regarding dispute 60 of 2005 and TDG-6 and 11 regarding dispute No. 93 of 2005. The point was made by the applicant that there is no evidence that the trade dispute report accompanies a certificate of referral.

24 The respondent promised a future affidavit of Tyrone Gibson to that effect; that is to say that as a matter of practice the certificate of referral is accompanied by the report of the trade dispute and, perhaps, indeed other documents setting out the nature of the dispute.

25 As far as the Act is concerned, Section 72(1) states in respect of essential services, such as electrical supply, the Minister may upon the expiry of the time specified forthwith refer the dispute to the Tribunal if in his opinion the public interest so requires. Section 72(1) states as follows:-

"Where the Minister has endeavoured under subsection (3) of section 69 to secure a settlement of a trade dispute within an essential service and such settlement has not been reached within the period of

sixteen days mentioned in that subsection or, as the case may be, any longer period agreed upon by the parties pursuant to that subsection, then the Minister may forthwith upon the expiry of such period refer the dispute to the Tribunal if in his opinion the public interest so requires."

26 For the purposes of this application, the question is whether the referral of a trade dispute to the Tribunal operates as a stay of the obligations under Section 20(3) of the Industrial Relations Act. It appears to me that the employees may express their view on whether or not they wish to strike and once the other requirements are fulfilled -- and they appear to have been fulfilled in this case - the ballot shall be taken under the supervision of an officer of the Ministry of Labour and Immigration. Unless that ballot is so taken and certified by the officer to be properly taken, a determination upon strike action would not have been made under the section.

27 I therefore find that in these circumstances an officer ought to have been designated to attend for the poll. It is quite a different matter as to whether or not the members of the union or employees or the union executives or committee or governing body shall go on strike or call a strike. I do not accept that a poll is a declaration or call contrary to Section 77(1) of the Act.

28 Therefore, I grant the relief in paragraph 2(1) the declaration requested, namely, the declaration and referral of trade dispute to the Tribunal by the Minister of Labour does not operate as a stay of a poll under Section 20(3) of the Industrial Relations Act.

29 As for subparagraph 2 of paragraph 2 of the Notice of Motion, I order that the terms of Section 20 (3) be followed, namely, that the ballot shall be taken under the supervision of an officer of the Ministry, who shall attend at the time and place.

30 On the question of whether there are proceedings pending by the Industrial Tribunal under Section 77, I am satisfied that regarding dispute 23 No. 60 of 2005 and No. 93 of 2005 that the reports of the trade disputes correspond with the certificates of referral contained in the affidavit of the Assistant Director of Labour. Dispute No. 96 of 2005 has been deferred and I, therefore, do not address it.

31 A further affidavit of Mr. Tyrone Gibson has been promised by the respondents confirming that the trade dispute report accompanies the certificates of referral and other documents setting out the nature of the dispute. I do not doubt that was the case. These remarks are only obiter and therefore I accept the undertaking to provide the affidavit. If it is, then it appears to me that under Section 77, a trade dispute proceedings are pending before the Industrial Tribunal and in these circumstances it would be an offence for any employee to go on strike or for any union or member of the executive committee or governing body of the union to call a strike.

32 The order of mandamus is granted in terms of section 20 (3) of the Act, namely that pursuant to section 20 (3) of the Act, an officer of the Ministry of Labour shall attend at the time and place indicated by the applicant to supervise the ballot for the purpose of determining on strike action.

33 Costs will follow the event. Costs to the applicant to be taxed if not agreed. I thank counsel for their submissions, skeleton arguments and authorities.

[Back to Top](#)

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- [Legal Terms](#)
- 
- [Footnotes](#)



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