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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 56/02

BEFORE:	**THE HON. MR. JUSTICE HARRISON, J.A.** **THE HON. MR. JUSTICE PANTON, J.A.** **THE HON. MR. JUSTICE SMITH, J.A.**	
BETWEEN	**THE ATTORNEY-GENERAL FOR JAMAICA**	**APPELLANT**
AND	**THE JAMAICA CIVIL SERVICE ASSOCIATION (Ex parte)**	**RESPONDENT**

Miss Ingrid Mangatal, Snr. Asst. Attorney-General and Peter Wilson instructed by the Director of State Proceedings for appellant

Bert Samuels for respondent

27th, 28th, 29th, 30th January & December 19th 2003

HARRISON, J.A.

This is an appeal from the order of Pitter, J on 12th April 2002, in the review court, granting an order for certiorari to issue to quash the award of the Industrial Disputes Tribunal made on 14th January 2001 in respect of the amount payable to public officers as upkeep when travelling on official duties. We heard the arguments herein, allowed the appeal, set aside the judgment of the court below and restored the award of the Industrial Disputes Tribunal (the IDT"), with no order as to costs. As promised these are our reasons in writing.

Negotiations had been ongoing for over one year between the Government of Jamaica and the Jamaica Civil Service Association (the "JCSA") from August 1999 in respect of its claim for a revision of travelling rates to public officers. These negotiations broke down and as a result the Minister of Labour and Social Security referred the matter to the IDT on 27th October 2000.

The terms of reference were as follows:

> "To determine and settle the dispute between the Government of Jamaica on the one hand and certain workers employed by the Government and represented by the Jamaica Civil Service Association on the other hand over the Association's claim for a revision of the Travelling rates."

After several days of hearing of evidence and submissions, the IDT made the following award:

> "(a) with effect from October 1, 2000
> Full Upkeep at the rate of $180,000 per annum;
>
> (b) With effect from September 1, 2000 a Kilometre rate of $10.35."

By virtue of Motion dated 11th October 2001 the JCSA sought judicial review in challenge to the said award for the issue of an order of certiorari to quash the said order of the IDT. At the conclusion of the hearing before Pitter, J. he ordered that:

> "... an Order of Certiorari is granted to quash the award made by the Industrial Disputes Tribunal on the 14th February, 2001.
> Costs to the Applicants to be agreed or taxed."

The grounds of appeal are as follows:

"1. That the learned judge erred in law in granting an Order of Certiorari to quash the award made by the Industrial Disputes Tribunal.

2. That the learned judge erred in law in finding that the Tribunal is obliged to follow the guidelines of Clause 9.1 of the Staff Orders of the Public Service, having regard to the nature of the dispute between the Government of Jamaica and the workers represented by the Respondent, which dispute was referred to the Tribunal.

3. The learned judge erred in law in finding that the Award of the Tribunal breached the terms of the Staff Order.

4. The learned judge erred in law in finding that the Tribunal erred when it allowed the use of evidence regarding the Suzuki Baleno motor car as the average car or at all.

5. The learned judge erred in law in finding that the Tribunal ought not to have taken the national interest into account, having regard to the nature of the dispute referred to the Tribunal, and the clear terms of subsection 12(7) of the Labour Relations and Industrial Disputes Act.

6. The learned judge erred in law in deciding that the Tribunal should not have allowed or taken into consideration the Government of Jamaica's budgetary constraints, having regard to the dispute which was referred to the Tribunal.

7. The learned judge erred in law in finding that the Tribunal erred in disregarding the recommendation of the Government's own expert, since the Government's own expert Mr. Anderson had on the evidence simply provided information and figures and had not made what could be described as a

"recommendation" on the issues the subject of the dispute.

8. The learned judge applied the wrong principles in reviewing the award of the Industrial Disputes Tribunal. He misconceived the nature of the dispute before the Tribunal and wrongly failed to accept, or alternatively to accord the proper weight, to the factual findings of the Tribunal, the competent body that Parliament has commissioned to deal with Industrial Disputes."

At the outset, it must be observed that the IDT gave no reasons for its decision. Although there is no statutory requirement that it does so, it is desirable and of great assistance if the reasons for its award are disclosed. The necessity for reasons is more so evident in the instant case, in that the respondent's argument in the court below, accepted by Pitter, J was based on the wrongful finding of facts on the evidence by the IDT, resulting in its award. The desirability for reasons for an award was forcibly stated by Rowe, P in the case of ***Jamaica Public Service Co Ltd vs. Bancroft Smikle*** [1985] 22 JLR 244. At page 246 he said:

> "In the instant case the Court of Appeal was provided with hundreds of pages of verbatim notes taken by the Tribunal. It had no reasons from the Tribunal for its award. The judges in the Full Court were not all agreed as to what facts were found by the Tribunal. In the judgment which follow, Carey and Campbell, JJ.A., make reference to what we considered to be the true basis of the award. In doing this we have taken a different view from that of the Full Court. Had the Tribunal set out its findings of fact, the attack upon the award, if any, would of necessity have been on quite different bases. I wish to recommend to the

> Tribunal that in every case it ground its award either by reasons therefor or with its findings of fact."

The application for judicial review in the Court below and the respondent's argument before us are both based on "a point of law," consequent on the absence of particular evidence before the IDT to support its award, hence the need for reasons.

The IDT may well be advised to give serious thought to disclosing its findings and giving its reasons in every case, resorting to its power under section 20 of the Act, to –

> "... regulate their procedure and proceedings as they think fit."

Because of the nature of the appeal from Pitter, J it is necessary to examine the evidence that was led at the hearing before the IDT. Witnesses Wayne Jones and Henry Anglin were called on behalf of the JCSA and Maria Thompson and Wainsworth Anderson on behalf of the Government of Jamaica.

Wayne Jones, vice president and leader of the team negotiating travel rates on behalf of the JCSA and involved in such negotiations since 1986, said that there had always been an "... understanding and agreement between the two parties (the JCSA and the Ministry responsible for public officers) as to the formula, the method we are to use to arrive at the rates for reimbursement of travelling expenses incurred by Government travelling officers in the execution of their duties". Advice would be given to the said Ministry by the Ministry of

Transport and Works and agreement would be reached as to the components to be used to determine the rates.

> "We would agree on what has come to be known as formula, as to what are the things to go into that formula for calculating upkeep and ... mileage rates ..."

The choice of motor vehicle used for calculating rates in 1986 was "a brand new Toyota Corolla 1600 cc motor car." Each negotiating side would then collect information on the cost of operating the motor vehicle, namely, the cost of insurance, taxes, tyres, petrol, lubricants, repairs to front end, upholstery and the cost of washing and cleaning, compare their figures and negotiations would take place. At times the calculations of each side are not far different, and so each side would compromise.

With reference to the Toyota Corolla used as the "model car", the witness Jones at page 127 of the Record said:

> "... traditionally it has been Toyota Corolla. In the last round of negotiation attempts were made by the government to change that model and in fact sought and received advice from their technical officer – which was shared with us in writing – indicating that they could use an average cost. In other words, they would look at the Corolla, Mitsubishi Lancer, and some other cars and use the average cost of two or three vehicles as the price of the vehicle to be plugged into the formula. We rejected that out of negotiation and say we would stick to the traditional model, that is the Toyota Corolla 1600cc."

but he went on at page 128 to admit that:

> "... because of the change in the exchange rate there was likely to be a change in the value of the motor

> car being used and the recalculation done by us did in fact push up the value of the Toyota Corolla 1600cc subsequent to the start of the negotiation."

The witness Jones identified a letter dated 2nd October 2000 from the Honourable Minister of Labour to the President of the JCSA, Eddie Bailey, stating, inter alia:

> "... we are stating that there is no agreed formula for the calculation of travelling rates."

and at page 133 stated:

> "... I don't know of any documentary formula. I have already indicated that the agreement has been born out of tradition and convention over the years."

Because of the change in the exchange rate of the Jamaican dollar, the price of the new Toyota Corolla was "... close to 1,000,000. ..."

A second witness Henry Anglin, trained in statistics and research, and associated with the negotiating team on behalf of the JSCA since 1991 stated in evidence that a formula was provided "from the Government side". The JCSA would collect data, such as the purchase price of the selected car and the duty, to arrive at the market value.

Other details would be taken into consideration, such as depreciation, insurance, interest on investment, washing, cleaning and a percentage for personal use, and running expenses, such as petrol, oil, batteries and miscellaneous repairs. These would be applied to the formula and a result would be arrived at by the JSCA, doing its independent calculations. The selected reference car was the 1600cc Toyota Corolla. A monthly charge of

$16,886 for upkeep was arrived at. Discussions and negotiations were held at the Ministry of Finance with the Deputy Financial Secretary and other officers.

The Ministry of Transport and Works by letter dated 23rd August 1999 to the Ministry of Finance confirmed that the selected reference car was the Toyota Corolla 1600cc motor car. It reads:

> "Re: Review of Civil Servant's Motor Vehicle Rates
>
> Please see revised rates as per request on the captioned subject. Calculations are based on a 1600cc Toyota Corolla using current data."

Prior to that, the selected car was the "Suzuki Gemini" (sic) motor car. After discussions and negotiations between the JCSA and the Ministry of Finance up to September 2000, the latter made an offer to the JSCA of $15,000 per month as upkeep. The JCSA by letter dated 26th September 2000 rejected the offer. As a consequence meetings were held at the Conciliation Division of the Ministry of Labour and Social Security on 9th October 2000 and 18th October 2000. No conclusion was arrived at. As a consequence the matter was referred to the IDT on 27th October 2000.

Witness Maria Thompson, pay planning officer in the Ministry of Finance on instructions, did a survey based on the applications by the public officers for motor vehicle loans, and ascertained that the most popular used car preferred by such officers was the 1996 Toyota Corolla 1600cc. Of the approved motor vehicle loans the most popular motor car was the Suzuki Baleno, second was the Mitsubishi Lancer followed by the Suzuki Grand Vitara. She said at page 200:

> "... we had only found one incidence of a new Toyota Corolla being applied for and approved."

Her findings are contained in Exhibit 2. The Ministry of Transport and Works has a formula for the calculation of the cost of maintaining a motor vehicle to conform with paragraph 9.1 of the Staff Orders using an international standard. The said Ministry feeds the information into its computer to effect the calculation. It has a copyright on the programme. She said that the JSCA has and uses the formula to make their claim. All the motor vehicles in the travelling fleet then, were used motor vehicles, including the Toyota Corolla.

Wainsworth Anderson, an electrical engineer with a diploma in Management Studies and Technical Director in the Ministry of Transport and Works, confirmed that his office provided the calculation based on the average cost of operating a motor vehicle, using the formula and the information available. He had been involved in such negotiations since 1992. His Ministry is responsible to advise the Ministry of Finance on the travelling rates of public officers. The average price motor car that would have been considered suitable and would be purchased by the public officer would be arrived at and used in the calculations. These calculations involved the use of input data, such as the purchase price of the preferred motor vehicle, the operating expense, including a cost for repairs and deducting a percentage for which the public officer would use the vehicle for personal use. The percentage used in the negotiations was 20% for personal use.

He said at page 238 of the record:

> "It can be appreciated that it is very difficult in a very exact and scientific manner to determine the cost to the government for the utilisating (sic) of officers' vehicles. Therefore, it is purely a matter of, you would think, negotiating or, you would say sitting with officers with the figures that was used for traveling etc. and coming to a final figure that would be acceptable to both parties, because it is going to be very difficult to really pin it down in that exact manner as to what percentage is used on a general basis. It can be done on an individual basis whereby the actual miles used by a vehicle for the entire year by an officer and looking at the actual travel done by the officer on behalf of the government and that would take care of an individual situation."

Computerizations were done by the witness Anderson and recommendations made in respect of the monthly upkeep of the Suzuki Baleno, the Mitsubishi Lancer, and the Toyota Corolla, 1600cc – all new cars and the used Toyota Corolla 1600cc. The purchase prices of the Suzuki Baleno and the Toyota Corolla, both new were $977,462 and $1,242,360, respectively in the year 2000. The recommendations in respect of the monthly upkeep allowance for new motor cars were:

(1) Toyota Corolla 1600cc (August 1999)
Upkeep $14,600 (Exhibit 3a)
(Market value $1,097,437.00)

(2) Toyota Corolla 1600cc (October 2000)
revised calculations
Upkeep $18,500 (Exhibit 4a)
(Market value - $1,242,360.00)

(3) Mitsubishi Lancer 1500cc (October 2000)
Upkeep $15,877.64 (Exhibit 5a)
(Market value $1,050.000.00)

(4) Suzuki Baleno 1600cc (October 2000)
Upkeep $14,750.25 (Exhibit 6a)
(Market value ($977,462)

This witness also did his computation and made recommendations as to the upkeep allowance in respect of the undermentioned used car:

(5) Toyota Corolla 1500cc - 3 year old deportee
(October 2000)
Upkeep $14,099.63 (Exhibit 7a)
(Market value $680,000)

Each recommendation contemplated that the public officer would be using the said motor vehicle for his personal use. This was agreed at 20%.

On the basis of this evidence placed before it, the IDT made the award of $15,000 per month upkeep payable to public officers. Pitter, J ordered that certiorari should go to quash the award, resulting in this appeal.

The Labour Relations and Industrial Disputes Act governs the powers and functions of the IDT. Section 12 (4)(c) reads:

> "(4) An award in respect of any industrial dispute referred to the Tribunal for settlement –
>
> ...
>
> (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."

"A point of law" is not restricted to a point of law simpliciter, but extends to a situation where the Tribunal made a finding on a matter, in the absence of any evidence led to support it.

This "no evidence" rule permits a challenge to the award based on the findings of fact by a tribunal, which award in that respect would otherwise be

"final and conclusive." The authors of Administrative Law by Wade & Forsythe, 7th edition, at page 312, in respect of the "no evidence" rule said:

> "Findings of fact are traditionally the domain where a deciding authority or tribunal is master in its own house. Provided only that it stays within its jurisdiction, its findings are in general exempt from review by the courts, which will in any case respect the decision of the body that saw and heard the witnesses or took evidence directly. Just as the courts look jealously on decisions by other bodies on matters of law, so they look indulgently on their decisions on matters of fact.
> But the limit of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.
> 'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding ***Allison v. General Medical Council*** [1894] 1 Q.B. 750 at 760,763: or where, in other words, no tribunal could reasonably reach that conclusion on that evidence ***R. v. Roberts*** [1908] 1 KB 407 at 423."

A reviewing body may not therefore allow a challenge to the findings of fact of a tribunal where there was some relevant evidence on which the tribunal could and did act. The fact that the reviewing body would have come to a different conclusion is irrelevant and constitutes the wrong test. It is only if the findings of fact are of such a nature that they could be labelled irrational, that is, a finding that no reasonable tribunal could have come to, that the challenge may succeed, as a point of law: (***Associated Provincial Picture Houses Ltd vs.***

Wednesbury Corporation [1948] 1 KB 223). A tribunal would have erred if in coming to its decision it took into consideration matters which it should not have, or ignored matters that it ought to have considered.

Proceedings before a review court are supervisory and not by way of an appeal. Such proceedings are concerned with the propriety of the method by which the decision is arrived at, as distinct from the substance of the decision itself. Carey, J.A. commenting on the functions of the Full Court under the said section 12(4)(c) of the Act, in ***Hotel Four Seasons vs. N.W.U.*** [1985] 22 JLR 201, at page 204, said:

> "The procedure is not by way of appeal but by certiorari, for that is the process invoked to bring up before the Supreme Court orders of inferior tribunals so that they may be quashed. Questions of fact are thus for the Tribunal and the Full Court is constrained to accept those findings of fact unless there is no basis for them. It is right then to emphasize the limited functions of the Full Court and to observe parenthetically that the Full Court exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the Industrial Disputes Tribunal."

Consequently, provided there was evidence led at the hearing before the IDT, based on which it made its award, its decision cannot be the subject of a successful challenge by way of certiorari in those circumstances.

In addition, in making its award, the IDT is required to have regard to the provisions of the Staff Orders which govern the benefits, terms of service and conduct of public officers. Order 9.1 reads:

> "9.1 Travelling allowances are divided into two categories viz: Transport and Subsistence, and are granted to cover the expenses actually incurred in the performance of official duties. No officer should be out of pocket as a result of having to travel on duty, but, on the other hand, he should not derive pecuniary advantage therefrom."

The necessity for the said officer to possess a means of transport, in some instances is also provided for. Order 9.2 (i) inter alia reads:

> "9.2(i) When it is considered essential for the proper performance of the duties of an office that the holder thereof should possess his own means of transport an allowance for its upkeep will be granted to him, and he will receive in addition a mileage allowance in respect of actual travelling performed." (emphasis mine)

In order to satisfy this provision, the public officers, through its Association and the Government, enter into negotiations on a periodic basis to arrive at a sum suitable to conform with requirements of the said Order. A balance is expected to be achieved, in that, the public officer travelling on official duties should not suffer the burden of having to pay from his personal funds any expenses so incurred, nor should he profit from such travel.

The IDT is also required to have regard to the provisions of section 12(7) of the Labour Relations and Industrial Disputes Act. It reads:

> "(7) 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."

These statutory provisions serve to circumscribe the limits of the awards of the IDT. However, in respect of the "national interest" restraint, the IDT may not apply it unless there is relevant evidence led in support of such a restraint.

Miss Mangatal for the appellant argued that the Review Court (Pitter, J) was in error to quash the award of the IDT and erred in holding that the IDT was obliged to follow the guidelines laid down in order 9.1 of the Staff Orders.

Pitter, J found at page 370 of the record:

> "Bearing in mind the provisions of Section 9.1 of the Staff Orders the only consideration is re-imbursement. The provision is mandatory in its effect and has the force of law since the Staff Orders govern the terms and conditions of employment of Civil Servants with particular reference to travelling expenses."

and at page 371:

> "(5) That the Tribunal erred in law when it failed to give effect to the provisions of Section 9.1 of the Staff Orders by not making the award one of re-imbursement and acted instead on other considerations."

Order 9.1 of the Staff Orders under the heading "General" in relation to "Transport and Subsistence" which reads that "Travelling allowances ... are granted to cover expenses actually incurred in the performance of official duties" is no more than a broad general statement. Order 9.2 under the heading "Transport" deals specifically with the officer who travels on official duties using

his own means of transport. To such officer "an allowance for its upkeep will be granted to him" (emphasis added) He will receive, in addition "a mileage allowance in respect of actual travelling performed." (emphasis added)

The issue before the IDT involved "upkeep". The matter of travelling had already been settled. Whereas in Order 9.2 "travelling" contemplates "actual" mileage, no such distinction is made in relation to "upkeep." Pitter, J was therefore in error to find that the IDT should have regarded Order 9.1 in relation to upkeep in the context of re-imbursement and that its provision is accordingly mandatory. Still less accurate is it to state that the said order "has the force of law." In that regard therefore the IDT's award did not contravene the said Order.

It was further argued that the learned judge was in error to find that the IDT erred when it allowed the use of evidence in respect of the Suzuki Baleno as the "average car". Pitter, J found at page 371:

> "(1) That the tribunal erred in law when it allowed the use of the Suzuki Baleno motor car to be adduced in evidence as the average car, or at all."

The evidence before the IDT revealed that in previous negotiations the Toyota Corolla 1600cc was the preferred car for the public officers (see the evidence of Wayne Jones). This is reflected in the fact that in the year 2000, the most popular used car in the fleet of motor cars owned by travelling public officers was the said Toyota Corolla 1600cc. Added to this fact, the evidence of Maria Thompson from the Ministry of Finance demonstrated that in the year

2000, the used car most preferred by public officers applying for motor vehicle loans was the "1996 Toyota Corolla 1600cc," a used car. She stated further that of the approved loans the most popular motor car was the Suzuki Baleno.

On the basis of that evidence the IDT was not wrong to find that the relevant upkeep allowance payable to public officers was the allowance which was referable to the used Toyota Corolla 1600cc or the Suzuki Baleno motor cars. The recommended monthly upkeep allowance for those said motor cars was $14,600 and $14,750.25 respectively. The evidence before the IDT failed to point to any other motor car as the preferred choice of the majority of travelling public officers. It certainly did not point to the new Toyota Corolla 1600cc which the IDT, on the evidence, could find that its purchase price then was prohibitive to most public officers.

If the IDT had awarded an amount of $16,886.67 per month as upkeep, based on the new Toyota Corolla 1600cc as the average car of the public officer, the IDT would have, in effect, given a "pecuniary advantage" to such officers, in contravention of Staff Order 9.1. The IDT would thereby have made an award not in accordance with the evidence led before it, and it would have ignored what was in fact the preferred motor cars of public officers, namely the used Toyota Corolla 1600cc and the Suzuki Baleno. The IDT acted properly and was not in error.

Although the brief of the Government of Jamaica and the closing submissions of counsel for the appellant, before the IDT, both referred to

"budgetary restraints" and "national interest", there was no evidence in support of such issues. One cannot therefore conclude as the learned judge did, that the IDT took such matters into consideration in making its award. This is more so in the absence of reasons and the nature of the evidence.

The IDT committed no error of law. It acted properly on the evidence before it, and made its award of $15,000 per month from the 1st September 2000. The review court was in error to find to the contrary.

In all the circumstances the appeal was allowed and the award of the IDT was restored, as stated earlier.

PANTON, J.A.

I agree with the reasons that have been expressed by Harrison, J.A. In its brief to the IDT, the Jamaica Civil Service Association over the hand of its President, Eddie Bailey said:

> "While we are in one sense apologetic, we cannot pretend to be unaware of the comfort which our members derive from the involvement of a body so manifestly reputed to be the foremost epitomization of justice and fairplay in our land." (Page 12 of the record)

Notwithstanding those sweet words, the Association found it necessary to challenge the award of the IDT and, in doing so, maintained a stance that was devoid of merit.

SMITH, J.A.

I too agree with the reasons and with the conclusion of Harrison, J.A.