[2010] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 25/2007

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

BETWEEN	**HOLIDAY INN SUNSPREE RESORT**	**APPELLANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**2ND RESPONDENT**
AND	**THE NATIONAL WORKERS UNION**	**3RD RESPONDENT**

Wendel Wilkins and Gregory O. Reid, instructed by Ziadie Reid & Company for the Appellant.

Curtis Cochrane, instructed by Director of State Proceedings for the 1st and 2nd respondents.

Lord Anthony Gifford, Q.C., instructed by Candice Craig of Hamilton & Craig for the 3rd respondent.

22nd, 23rd June, 30th July 2009 and 26th March 2010

PANTON, P.

[1] I agree with the reasons expressed by my learned sister, Harris, J.A., and have nothing to add.

HARRIS, J.A.

[2] In this appeal the appellant challenges the decision of Marva McIntosh, J. in which she upheld an award by the Industrial Disputes Tribunal made in favour of the 3rd respondent. On the 30th July 2009, we dismissed the appeal, affirmed the order of the court below and ordered costs to the respondents to be agreed or taxed. We now fulfil our promise to reduce our reasons to writing.

[3] For convenience, the 1st respondent is hereinafter referred to as the 'Tribunal', the 2nd respondent, as the 'Minister' and the 3rd respondent, as the 'Union'. By a letter dated 16th August 2004, the Union wrote to the appellant seeking bargaining rights for certain categories of workers who were then in the employ of the appellant. Shortly thereafter, several workers were laid off. It was customary for the appellant to engage the workers on a contractual cycle for a period of three to six months which would be broken for one or two weeks. They would then be re-employed for a further contractual cycle.

[4] On the 23rd September 2004, the Minister wrote to the appellant requesting that it furnishes him with the names and certain categories of the workers for whom a request for a ballot had been made. No response having been received from the appellant, the Union, by letter of 18th November 2004 renewed the request. The appellant responded by letter of even date stating that it had no contract employees in the categories claimed.

[5] On the 19th November 2004, the Minister wrote to the appellant specifying that the request was with reference to the names of the workers employed in the categories at the time when the claim was served. The appellant's response was that it intended to commence proceedings. This, however, they did not pursue at that time.

[6] The requisite information not having been received from the appellant, the Minister referred the matter to the Tribunal. The terms of reference were couched as follows:

> "To determine and settle the dispute between Holiday Inn Sunspree Resort on the one hand, and the National Workers Union on the other hand, as respects the categories of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot to determine the Union's claim for Bargaining Rights."

At the request of the Minister, the Union, by way of a Form 18, submitted a list of the names of contract workers who were employed to the appellant at the time the initial request was made by the Union for their names.

[7] On the 8th February 2005 a hearing before the Tribunal commenced. The appellant objected to the terms of reference. Permission was granted to the appellant to challenge the terms of reference by way of judicial process. This avenue the appellant failed to pursue. The hearing recommenced on the 16th March 2005 and was completed on the 12th May 2005. At the hearing, the

Tribunal utilized the names of the persons on the list supplied by the Union. The appellant asserted that the contract workers on the list were no longer in its employ and would therefore have been ineligible to participate in a vote. At the conclusion of the hearing, the Tribunal held that the persons for whom the Union sought bargaining rights were eligible to vote on the ballot. Following this ruling, the Minister scheduled the taking of a ballot for the 9th August 2005.

[8] The appellant's dissatisfaction with the Minister's ruling resulted in its institution of proceedings for judicial review against the Tribunal and the Union in respect of the Tribunal's decision. The reliefs sought are stated hereunder:

> "1. An order of certiorari to remove into this Honourable Court for the purpose of its being quashed the award made by the 1st Respondent on the 30th day of May, 2005 that "the list of names given in the document exhibit 18 are the persons eligible to vote in the ballot to determine the Union's claim for bargaining rights.
>
> 2. A declaration that the list of names given in the document marked Exhibit 18 is not the list of voters for the purpose of taking a ballot to determine the claim for bargaining rights.
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> 3. A declaration that the proper list of voters is the certified list furnished to the 2nd Respondent in accordance with Regulation 5 of the Labour Relations and Industrial Disputes Regulations, 1975.
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> 4. An order of prohibition to restrain the taking of a ballot by the 2nd Respondent on the 9th day of August, 2005 to determine the claim of the National Workers Union for bargaining rights.
>
> 5. An order of Mandamus directed to the 2nd Respondent requiring him in taking a ballot for the aforesaid purpose, to use as the list of voters a certified list

furnished to the 2nd Respondent by the employer, in accordance with Regulation 5 of the Labour Regulations and Industrial Disputes Regulations, 1975."

[9] The following grounds of appeal were filed:

"(a) That the learned judge erred when she held that the decision of the Tribunal was based on the evidence presented to it and was reasonable in the circumstances.

(b) That the learned judge erred in upholding the award of the Tribunal.

(c) That the learned judge failed to give any or any sufficient consideration to the evidence before the Tribunal concerning the categories of workers of whom the ballot should be taken.

(d) That the learned judge misdirected herself on the issue before the Tribunal, of the workers' entitlement to vote in the ballot in a situation where no workers at all remained in the employment of the Claimant in any category to which the Union's claim could apply.

(e) That the learned judge misdirected herself when she considered whether there had been any breach of the principles of natural justice by the Tribunal as this was not an issue before the court and was never argued at the review.

(f) That the learned judge misdirected herself when she found that the unions' list of members could de used in place of the employers' certified list of employees as the certified voters' list and a poll conducted on that basis and that the Tribunal acted lawfully and within its jurisdiction in so doing.

(g) That the learned judge erred when she did not direct the 2nd Respondent in taking the ballot to use as the list of voters, a certified list furnished to the 2nd Respondent by the employer, as this was required of the 2nd Respondent in accordance with Regulation 5

of the Labour Relations and Industrial Dispute Regulations 1975.

(h) That the learned judge misdirected herself when she considered whether the Tribunal had the jurisdiction in the narrow sense i.e. it had the power to adjudicate upon the question pursuant to Section 5(3) of the Labour Relations and Industrial Disputes Act as this was not an issue before the court and was never argued at the review."

Grounds (a) to (f) and (h) were argued by Mr. Wilkins. He submitted that the learned judge erred in not finding that the Tribunal acted ultra vires or illegally or irrationally, in that it misconstrued the law and misdirected itself on the issues before it as to the category of workers for whom a ballot should be taken. Having regard to the evidence before the Tribunal, the powers bestowed upon it by the Labour Relations and Industrial Disputes Act and the Regulations made thereunder pertaining to the holding of a ballot or the eligibility of workers to vote in the ballot, the Tribunal, in making its decision, acted unreasonably, he argued.

[10] He further argued that the Tribunal acted outside the regulatory framework in arriving at a decision by the use of the Union's list in lieu of a certified list of employees, in breach of Regulation 5, which requires the use of a certified list, originating from the employer. It was also contended by him that the Tribunal was not empowered to use Form 18, the list supplied by the Union, as that list did not represent persons in the employ of the appellant to which the Union's claim was applicable, in that the law does not permit the use of the list

provided by the Union to settle the eligibility issue. The question, he argued, was whether the Union had a 40% membership in the category of persons claiming bargaining rights.

[11] Mr. Cochrane submitted that the Tribunal made findings of facts based on the evidence before it, and that it acted reasonably and within the constraints of the Act and Regulations. The central issue before it, he argued, was the voting entitlement of the workers for whom bargaining rights were claimed and whether workers whose services were terminated were eligible to vote. This, he argued, the appellant accepted at the hearing as being the main issue and cannot now seek to argue that the Tribunal misdirected itself as to the issues before it. He further argued that the Tribunal was under no obligation to determine the categories of workers for whom a ballot should be taken prior to deciding on the question as to the workers' entitlement to vote. It was also submitted by him that there was no dispute as to the categories of workers and the Tribunal correctly made a decision as to the persons who were entitled to vote in the ballot.

[12] Lord Gifford, Q.C. adopted Mr. Cochrane's submissions. He further argued that the real issue between the parties was whether the employees who were dismissed subsequent to the date of service of the Union's claim for bargaining rights should be entitled to vote in the ballot. It was also submitted by him that in the securing of bargaining rights, as specified by Regulation 3 (3), a prima

facie case must be established and if there is found to be dispute as to eligibility, it must be referred to the Tribunal by the Minister.

[13] The learned trial judge summarized her findings and conclusions as follows:

> "This court after considering all the evidence is of the view:
>
> (1) That the Tribunal made its decision based on the evidence placed before it.
>
> (2) The Tribunal acted lawfully and had the jurisdiction in the narrow sense i.e. it had the power to adjudicate upon the dispute in question pursuant to Section 5(3) of the Labour Relations and Industrial Dispute Act.
>
> (3) The decision of the Tribunal was based on the evidence presented to it and was reasonable in the circumstances.
>
> (4) There was no breach of the principles of natural justice as all parties were given a fair opportunity to be heard and to adduce evidence in support of their claim to the Tribunal.
>
> (5) There was no error of law and the decision of the Tribunal, a quasi judicial body is final and conclusive pursuant to Section 12(4) of the Labour Relations and Industrial Disputes Act."

[14] Two main issues arise. They are as follows:

(a) Whether the Tribunal could have legitimately made an award as to the voting entitlement of the workers notwithstanding that their services had been terminated; and

(b) Whether the Tribunal wrongly acted on Form 18 in making its award as to the eligibility of workers and their voting entitlement and as a consequence the Tribunal acted outside its jurisdiction in making the award based upon the list provided by the Union.

[15] The settlement of industrial disputes is governed by the Labour Relations and Industrial Disputes Act and the Regulations made thereunder, namely, the Labour Relations and Industrial Disputes Act (Regulations). The power conferred on the Tribunal by the Act and its Regulations gives to it a right to hear and settle industrial disputes and make awards. Rattray P., in **Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Green** SCCA No. 66/97 delivered on the 30th June 1998, described the function of the Tribunal as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica".

[16] The powers of the Tribunal are unfettered. Section 12 (4) (c) of the Act speaks to the unassailability of the Tribunal's decisions, save and except on a point of law. It reads:

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

It is a general presumption of law that an administrative tribunal does not commit an error of law. However, such body does not enjoy absolute immunity from a review of its decision by a court of law. It follows therefore that its decision is rebuttable notwithstanding the presumption of finality and conclusiveness thereof. See **R v. President of the Privy Council**, **ex parte Page** [1993] AC 682.

[17] A tribunal's powers only remain unfettered so far as they are exercised in accordance with and in obedience to the statutory framework within which it operates. An error of law must be such that there can be found in the award some legal proposition which makes the award bad and consequently, where a public body, in arriving at its decision, fails to observe the rules or procedure prescribed or mandated by statute or the common law, such decision may be quashed.

[18] The authorities have often repeatedly demonstrated that a duty is imposed on an administrative body to act judicially. This demands that it acts within the scope of the jurisdiction conferred upon it. In **Anisminic Ltd. v Foreign Compensation Commission** [1969] 2 A.C. 147 Lord Reid gives an indication of the circumstances under which a public body's transgressions may warrant the court's intervention. At page 171 he said:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is nullity. But in such cases the word "jurisdiction" has

> been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the Tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account."

[19] It is clear that although the court may upset the decision of a tribunal, it will only be impelled to interfere where the error of law is one which affects the making of the decision. In dealing with matters of this nature, the primary question for the court is whether the decision maker acted in accordance with the law and not whether the court, if faced with the facts which were before the tribunal, it would have reached the same conclusion as the tribunal. See **Associated Provincial Picture Houses, Limited v Wednesbury Corporation** [1948] 1 K.B. 223.

[20] I will now outline the provisions of the Act and the Regulations under which the Tribunal acted and determine whether the manner in which it arrived at its decision would warrant its decision being set aside.

Section 2 of the Act defines a worker in the following terms:

> " 'worker' means an individual who has entered into or works or normally works (or where the employment has ceased, worked) under a contract, however described, in circumstances where that individual works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee."

[21] Under section 5 (1) (a), where a dispute arises and it is the desire of workers or a particular category of workers that a trade union should have bargaining rights for them, the Minister is obliged to cause a ballot to be taken in order to determine the issue. The section reads:

> "5 (1) If there is any doubt or dispute-
>
> (a) as to whether the workers, or a particular category of the workers, in the employment of an employer wish any, and if so which trade union to have bargaining rights in relation to them; or
>
> (b) as to which of two or more trade unions claiming bargaining rights in relation to such workers or category of workers should be recognized as having such bargaining rights,
>
> the Minister shall cause a ballot of such workers or category of workers to be taken for the purpose of determining the matter."

[22] Where the Minister causes a ballot to be taken and a dispute arises, he is empowered to refer the matter to the Tribunal in accordance with the mandate of section 5 (3) of the Act. The section provides:

> "(3) Where the Minister decides to cause a ballot to be taken and there is a dispute, which he has failed to settle, as respects the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot, the Minister shall refer the dispute to the Tribunal for determination. The Tribunal shall, in determining any dispute referred to it under this subsection, have regard to the provisions of any regulations made under this Act and for the time being in force in relation to ballots."

[23] Section 12 (1) empowers the Tribunal to make an award in respect of disputes referred to it. The section states:

> "12 (1) Subject to the provisions of subsection (2) the Tribunal shall, in respect of any industrial dispute referred to it, make its award within twenty-one days after that dispute was so referred, or if it is impracticable to make the award within that period it shall do so as soon as may be practicable, and shall cause a copy of the award to be given forthwith to each of the parties and to the Minister."

Regulation 3 sets out a detailed procedural scheme to be followed where the Minister seeks to have a ballot taken under section 5 of the Act. For the purpose of this appeal, it will only be necessary to specifically outline regulations 3 (1) (a) (b) (c) (d); 3 (3) and 3 (5); 4 and 5 (1).

[24] Regulation 3 (1) reads:

> "The Minister may cause a ballot to be taken under section 5 of the Act if-
>
> (a) a request in writing so to do is made to him by a trade union (hereinafter referred to as the applicant) and a certificate in the form set out as Form No. 1 in the Schedule is supplied to him; and

(b) he is satisfied that a claim in the form set out as Form No. 2 in the Schedule was served on the employer of the workers in relation to whom that request has been made; and

(c) a ballot of the workers or category of workers in relation to whom that request has been made was not taken during the period of one year immediately preceding the date of that request, or, where such a ballot was taken during that period, if he is satisfied that new or unforeseen circumstances have arisen which, in his opinion, justify the taking of the ballot for which that request has been made;

(d) he is satisfied, after taking the steps referred to in paragraph (2), that not less than forty *per centum* of the workers in relation to whom that request has been made are members of the applicant."

[25] Where a request for a ballot has been made in respect of workers, regulation 3 (3) grants the Minister discretionary powers to seek such information from an employer in respect of the workers as he deems necessary. The section reads:

"3. The Minister may, pursuant to paragraph (2) require the employer to supply him, within such period as the Minister may specify, with such information as the Minister thinks necessary in respect of the workers in relation to whom the request for the ballot has been made, and in particular may require the employer to state -

(a) the names of those workers and the categories in which they are employed;

(b) the names of any other workers in his employment and the categories in which they are employed;

(c) whether he objects to the inclusion, in a voters' list, of the names of any of the workers in relation to whom the request for the ballot has been made, and if so, what are the names of those workers and what are the reasons for his objections;

(d) the general nature of his business;

(e) the name of any trade union which he recognizes as having bargaining rights in relation to the workers referred to in subparagraph (a);

(f) the name of any trade union, other than the applicant, which has claimed bargaining rights in relation to the workers referred to in sub-paragraph (a), and the date of the claim of that other trade union;

(g) whether any collective agreement relating to any workers in his employment is in force and if so, to which categories it relates, the date of commencement and the date of expiry."

[26] Under regulation 3 (5) the Minister may request the production of relevant books and documents as well as other information for the verification of information supplied under Regulation 3(1) or 3 (3).

Regulation 4 provides:

"4. If there is a dispute as respects the category of workers of whom a ballot should be taken or the persons who should be eligible to vote, the matters which shall be taken into consideration for the purpose of settling the dispute include —

(a) the community of interest of the workers in that category, and in particular, whether the duties and responsibilities and work place are identical for all of those workers;

(b) the history of collective bargaining in relation to the workers in the employment of the employer concerned, or in relation to workers employed by other employers in the trade or business in which that employer is engaged;

(c) the interchangeability of the workers in respect of whom the dispute arises;

(d) the wishes of the workers in respect of whom the dispute arises."

[27] Regulation 5 (1) specifies that if there is no dispute as to the eligibility of workers to vote on the ballot, the Minister may require the employer to furnish him with a certified list of workers. The regulation reads:

"5(1) If there is no dispute as respects the category of workers of whom a ballot should be taken or the workers who should be eligible to vote in the ballot, or after the settlement of any dispute which arises in connection with that matter, the Minister may require the employer to prepare and certify a list of those workers from his pay bills, and to furnish the Minister, within such period as he may specify, with such number of copies of that certified list as he may require."

Regulation 5 (5) prescribes that the furnished certified list shall be the list of workers who are eligible to vote in the ballot.

[28] I will now turn to the question as to whether the Tribunal could have lawfully made the award in view of the fact that the services of the workers had

been terminated when the request for their names was made. The responsibility of the Tribunal, as directed by the terms of reference, is in keeping with section 5 (1) (a) of the Act. The terms of reference provided the Tribunal with an option. Its mandate was:

> (a) either to make a decision as to whether there were any workers in the appellant's employ eligible to vote in the ballot to determine the Union's claim for bargaining rights; or
>
> (b) to decide whether there were any particular category of workers from whom a ballot should be taken who would be eligible to vote on the ballot to determine the bargaining rights.

[29] In its reasons for its award the Tribunal stated:

> "In settling this dispute the Tribunal has to determine who are the persons eligible to vote in the ballot to determine the Union's claim for bargaining rights. To determine this, there are two (2) questions that have to be addressed:
>
> (a) When does the right of a worker to vote on a ballot to determine bargaining rights accrue? and
>
> (b) Whether "worker" as defined in the Labour Relations and Industrial Disputes (Amendment) Act, 2002 includes an individual whose employment has ceased."

[30] It is clear that the Tribunal was not limited to making a decision on both limbs of the terms of reference and it is without doubt that it pursued the first option, namely, whether there were workers employed by the appellant who were eligible to vote. The Tribunal explored the meaning of the word "worker."

It found that the word as defined by section 2 of the Act, included a person who had ceased employment with an employer at the time at which a worker's right to vote on a ballot would have accrued. That section makes it undoubtedly clear that a worker does not only include an individual who is currently employed but also an individual who was no longer an employee. The Tribunal found that the word "worker" extended to a person whose employment had ceased. It cannot be said that the Tribunal was wrong in so construing the word.

[31] Further, the Tribunal took into account and relied upon the case of **R v Industrial Disputes Tribunal, exparte Gayle** (1987) 24 JLR 330. In that case it was held by the Full Court of the Supreme Court that employees who had been dismissed subsequent to the date of a claim by a union for bargaining rights were eligible to vote on a ballot for those rights. This decision clearly supports the Tribunal's finding in the instant case. It follows that the Tribunal was correct in ruling that the persons from whom ballots could be taken were workers, notwithstanding they were no longer in the employ of the appellant.

[32] I will now address the question as to whether the Tribunal could have lawfully acted on Form 18, in determining the workers who were eligible to vote. The gravamen of Mr. Wilkins' complaint on this issue is that the Tribunal acted unreasonably and ultra vires by its use of the list of persons named in Form 18 which was supplied to the Tribunal by the Union.

[33] It cannot be denied that a court will interfere to correct the decision of a public body where it acts unreasonably or acts outside of that which it is authorized to do. What is unreasonableness within the context of the exercise of discretionary powers? The test of unreasonableness was eminently enunciated by Lord Greene in the well known case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** (supra) when at page 229 he said:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

He went on to say:

> "In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

[34] Can it be said that the Tribunal acted unreasonably in using Form 18? As earlier stated, the Act and Regulations confer on the Tribunal a discretion which may only be successfully challenged if it can be proved that it had acted

unreasonably or it had acted outside the scope of that which is lawfully prescribed. I must at the outset state that it had not acted in breach of its mandate by its use of the list.

[35] The list, Form 18, containing the names of persons who were employed to the appellant, furnished by the Union, was admitted into evidence by the Tribunal. No objection was taken by the appellant to the admission of the list into evidence. There was a dispute between the parties and in circumstances where a dispute exists, neither the statute nor the regulations, expressly or implicitly, make provision for a certified list to be used by the Tribunal in its making of an award. I will further address this point at a later stage.

[36] In order to proceed with its deliberations, it would have been necessary for the Tribunal to have had a list before it. One was supplied by the Union which had been properly used. Armed with the information supplied by the list, the necessity would not have arisen for the Tribunal to have taken any steps to obtain a certified list. There is nothing which would have precluded the Tribunal from taking into account that list which had been presented by the Union.

[37] Its attention was rightly directed to the question as to whether the persons named in the list were the employees of the appellant at the date on which the claim for bargaining rights was served. The use of Form 18 does not fall within the test of unreasonableness, in that, the reliance on the uncertified list could not have caused the decision of the Tribunal to be viewed as so illogical

or unacceptable that no reasonable individual, in giving consideration to the issues which the Tribunal had before it, would not have arrived at the same decision as that of the Tribunal.

[38] In contending that the appellant exceeded its jurisdiction, Mr. Wilkins cited a number of cases, including **R v Minister of Health ex parte Davis** [1929] 1 K.B. 619; **R v Manchester Legal Aid Committee ex parte Brand** [1952] 1 QBD 480; **R v Industrial Disputes Tribunal ex parte Linton Gayle** (1987) 24 J.L.R. 330, none of which, I must unreservedly state, offers him any assistance. It is of significance that the principles upon which the cases of **R v IDT ex parte Gayle** (supra) was decided is clearly in support of the present case.

[39] A distinction must be drawn between the case of **R v Minister of Health ex parte Davis** (supra) and the case under review. In that case the Minister was not clothed with jurisdiction to confirm a scheme for the clearing of an area to construct houses, purporting to be made under the provisions of the Housing Act, as the law did not confer on a local authority unrestricted power to sell or lease the cleared area. In the present case, the Tribunal was clothed with jurisdiction to hear and determine the issues before it and acted within its powers in so doing.

[40] The case of **R v Manchester Legal Committee ex parte Brand** (supra) is clearly distinguishable from the instant case. In that case, the Tribunal

failed to make a determination in accordance with important provisions of certain regulations. It imposed conditions which it had not been empowered to make and had thereby clearly exceeded its jurisdiction. Those circumstances do not arise in the present case. The Tribunal, without doubt, in arriving at its decision, had properly proceeded in compliance with relevant statutory and regulatory provisions.

[41] Mr. Wilkins, in his further effort to persuade this court that the Tribunal acted ultra vires and in breach of the principles of natural justice, stated that it failed to take into account regulation 5 (1). In support of this submission, he cited the well known case of **Associated Provincial Picture Houses v Wednesbury** (supra). In that case, although the principles of reasonableness and natural justice were extensively explored and addressed, it was shown that a local authority had acted within the constraints of certain regulations and accordingly, had not acted unreasonably nor ultra vires, in imposing a condition that a corporation to which it granted permission to hold performances on Sundays, may do so provided that children under fifteen were not admitted to the performances.

[42] The failure of the Tribunal to take into consideration regulation 5 (1) does not render the decision of the Tribunal a nullity. In the present case, there was a dispute between the appellant and the Union as to the eligibility of workers who were in the appellant's employ. Regulation 4 prescribes that where a

dispute arises with regard to the workers or category of workers of whom a ballot should be taken, or in respect of their eligibility to vote, certain factors must be taken into consideration for the purpose of settling the dispute. The furnishing of a certified list is not one of those factors.

[43] Mr. Wilkins failed to appreciate that a certified list would only be required in circumstances where a dispute had not arisen. Where there is no dispute, a certified list may be requested by the Minister as specified by regulation 5 (1). However, a dispute was in progress. In settling the dispute, a certified list would not have been necessary for the disposal of the matter before the Tribunal. I can perceive no obstacle which would have prevented the Tribunal from acting on the list which was furnished by the Union.

[44] It is without doubt that the Tribunal took into consideration the evidence before it. It is remarkable that at the hearing the appellant abstained from raising an objection to the use of an uncertified list, yet now seeks to complain about its use. This is certainly enigmatic. The appellant had ample opportunity to complain about the list during the hearing. It failed so to do. If, as is now being contended for, a certified list ought to have been used by the Tribunal, there is nothing which would have barred the appellant from furnishing one.

[45] The appellant had subjected itself to the Tribunal's jurisdiction and had fully participated in the proceedings. Having not objected to the use of the list,

the appellant is taken to have acquiesced in its use and cannot now justifiably complain that the Tribunal acted in breach of the law.

[46] It was also Mr. Wilkins' complaint that the Tribunal did not have sufficient evidence before it and ought to have requested additional information from the parties before proceeding. Section 20 of the Act enables the Tribunal to regulate its procedure and proceedings as it deems fit. Clause 5 of the Tribunal's Procedure and Proceedings prescribes that each party to a dispute must furnish the Tribunal with a brief containing, among other things, statements as to the nature of the claim or complaint and the grounds upon which the parties rely, as well as copies of documents to be exhibited during oral submissions. These the Tribunal had before it. There can be no doubt that the necessary machinery had been put in motion prior to the commencement of the hearing. The Tribunal was seized of all relevant material for the conduct of the proceedings. There would have been no necessity for it to have requested any further information or additional material from the parties, before the commencement of, or during the proceedings.

[47] The Tribunal, in the performance of its role, acted in accordance with the provisions of the Act and the relevant Regulations. It carried out its function in conformity with the law and acted within the scope of the authority given thereby. The Tribunal considered written and oral submissions of the appellant and the Union. It ascertained the facts and identified the issues, was guided by

and applied the relevant statutory provisions to the facts. There is no evidence that it acted outside of the parameters of the relevant statutory and regulatory scheme. It clearly acted fairly and within the scope of its jurisdiction.

[48] The learned judge rightly found that the Tribunal had acted within the constraints of the law. She was correct in concluding that there was no error of law on the face of the Tribunal's decision.

[49] Generally, as stipulated by Rule 56.15 (4) of the Civil Procedure Rules, the court may decline from ordering costs against an applicant for an administrative order. However, if the court considers that an applicant has acted unreasonably in bringing the claim, or in the conduct of the application, it may make an order for costs against the applicant. The appellant knew or ought to have known that initiating and pursuing a claim for judicial review of the Tribunal's decision would have been an exercise in futility. The pursuit of the hopeless claim was unwarranted. The appellant ought to have known that the respondents would have been put to great expense in order to pursue their defence. Consequently, it is fitting that the respondents should be awarded costs.

[50] The foregoing are our reasons for the dismissal of the appeal and the ordering of costs to the respondents.

DUKHARAN, J.A.

I too agree.