JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 99/91

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	WESLEY SAMPSON	PLAINTIFF/APPELLANT
A N D	AIR JAMAICA LIMITED	DEFENDANT/RESPONDENT

Berthan Macaulay, Q.C. & Miss Portia Nicholson for Appellant

Dr. L.G. Barnett & Miss Leila Parker for Respondents

18th, 19th, 20th May, & 15th June, 1992

CAREY, J.A.

This is an appeal against an order of Theobalds, J., dated 5th November, 1991 refusing to set aside an ex parte order dated 6th May, 1991 made by K.S. Harrison, J. (Ag.) who granted the respondent leave to apply for certiorari to quash an award by the Industrial Disputes Tribunal in favour of the appellant. The tribunal found that the appellant was unjustifiably dismissed by his employers, Air Jamaica Limited, and awarded as follows:

> "(i) Mr. Sampson be reinstated without loss of pay, i.e. from 4.5.85
>
> (ii) that he be paid his salary and such allowances as may be due to him as from the 1st October, 1990."

The appellant submitted one ground of appeal, which was in the following form:

> "The learned trial judge completely missed the point in ground C of the motion dated 5th November, 1991 which was
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> 'that no error of law is alleged on the face of the award impugned or in the proceedings leading thereto.'"

This ground is startling in its simplicity if the manner in which Mr. Macaulay, Q.C. initially put his argument is any way to judge. He contended that the judge was entitled to look only on the terms of the award as recited above, to discover the error on the face of the award. Those two sentences disclosed no error on its face, he said. In the result there could be no basis for the grant of leave for certiorari. He also argued that no error of law was alleged in the grounds of the application for certiorari, on the footing that no particulars of the basis of error were provided.

It might not be amiss at this juncture to detail the grounds of that application, which are as under:

> "(1) the decision of the Tribunal is arbitrary and capricious, and no reasonable Tribunal could possibly have arrived at such a decision in the circumstances of the case;
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> (ii) the tribunal failed to take into account relevant considerations and/or gave undue weight to irrelevant considerations;
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> (iii) the Tribunal erred in law and/or acted in excess or abuse of its jurisdiction in making an Award which is wholly unsupported by the evidence;
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> (iv) the Tribunal erred in law in holding that the fact that Mr. Sampson was or claimed that he acted as an officer of the Jamaica Pilots' Association and/or that he had not been given an opportunity to explain his position made his dismissal unjustifiable."

As to lack of particularity, I would have thought these grounds are as precise and clear as can be. They are, in my view, unexceptionable because the respondent would have more than adequate notice of the case he must be prepared to meet. They appear in any reputable book of precedents: see Atkins Court Forms [Second Edition] Volume 14 Forms No. 23 and 27. It is difficult to appreciate what further condescensions could be included without setting out the

arguments in support of the respective grounds. The cases of **Taplin v. Taplin** [1883] 13 P.D. 100 and **Murfett v. Smith** [1887] 12 P.D. 116, relied upon by counsel, were unhelpful. Both cases were concerned with grounds of appeal which allege misdirection. In those cases, by order XXXIX r. 3 R.S.C. particulars, where misdirection is alleged, must be given. But for the eminence of counsel, I would have thought this point quite unarguable.

Certiorari lies to quash error of law on the face of the record of inferior courts and statutory tribunals, not quash awards of arbitrators. Error of law on the face of the award is referable rather to arbitration proceedings. In Re Jones and Carter's Arbitration [1922] **127 L.T. 622 Lord Sterndale, M.R. at** p. 625 pointed this out. He said:

> "... But it must always be remembered that an error on the face of an award is a very restricted thing indeed. It must appear on the face of the award that the arbitrator has gone wrong, and it is not legitimate to refer to anything outside the award to show that he has gone wrong. It is a very narrow ground indeed, and has to be administered with great care in order that extraneous considerations not appearing on the face of the award may not be introduced into the matter."

Both Warrington and Younger, L.JJ., expressed themselves to the like effect. It should be observed that the reason for this approach is that the court's power to interfere with arbitration awards is governed by certain technical rules in respect of which see **Kelantan Government v. Duff Development Co. Ltd.** [1923] A.C. 395.

What constitutes the record was considered in **R. v. Nat Bell Liquors Ltd.** [1922] All E.R. Rep. 335. The following is extracted from the headnote:

> " On an application for certiorari a superior court has no right to look at the evidence adduced before the inferior court to ascertain whether or not it is sufficient to sustain the conviction sought to be quashed, and, if it considers the evidence not to be sufficient, to

> "quash the conviction. Want of sufficient evidence does not make the conviction one pronounced without jurisdiction. The superior court can only have regard to what appears on the face of the record of the conviction, and extraneous evidence to prove error, such as the depositions, is not admissible."

That view had not changed three decades later. Denning, L.J. in **R. v. Northumberland Compensation Appeal Tribunal.** Ex parte Shaw [1952] 1 All E.R. 122 at p. 130 observed:

> "... What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings: see Blackstone's Commentaries, vol. III, p. 24. But it must be noted that, whenever there was any question as to what should, or should not, be included in the record of any tribunal, the Court of King's Bench used to determine it. It did it in this way. When the tribunal sent their record to the King's Bench in answer to the writ of certiorari, this return was examined, and, if it was defective or incomplete, it was quashed: see **Apsley's Case** [1671] Sty. 85; 82 E.R. 549, **R. v. Levermore** [1700], 1 Salk. 146; 91 E.R. 135; 16 Digest 571, 3511 and **Ashley's Case** [1697], 2 Salk. 479; 91 E.R. 412; 16 Digest 470, 494. Alternatively, the tribunal might be ordered to complete it: **Williams v. Lord Bagot** [1824] 4 Dow. & Ry. K.B. 315; 2 L.J.O.S.K.B. 152; 16 Digest 436 2999 and **R. v. Warnford** [1825] 5 Dow. & Ry. K.B. 489. It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction and also the document which contained their adjudication. Thus in the old days the record sent up by the justices had, in the case of a conviction, to recite the information in its precise terms, and in the case of an order which had been decided by quarter sessions by way of appeal, the record had to set out the order appealed from: see **Anon** [1697] 2 Salk. 479; 91 E.R. 412; 33 Digest 390 1011. The record had also to set out the adjudication, but it was never necessary to set out the reasons: see

> "**South Cadbury (Inhabitants) v. Braddon, Somerset (Inhabitants)** [1710] 2 Salk. 607; 91 E.R. 515; 33 Digest 403, 1131, nor the evidence, save in the case of conviction. Following these cases, I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision."

Four decades on, things are not quite the same. The concept of jurisdiction is much wider in scope than it was hitherto. In **Anisminic, Ltd. v. Foreign Compensation Commission** [1969] 2 A.C. 147 the House of Lords had reformulated the concept of jurisdictional error to embrace almost any error of law. Lord Pearce at p. 233 expressed himself in these terms:

> " Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error."

It should be noted that an award of the Industrial Disputes Tribunal is challengeable as is ordained by section 12 (4) (c) of the Labour Relations and Industrial Disputes Act - "on a point of law." The phrase "on a point of law" is that used where a right of appeal is being conferred. I would suggest that the scope of the enquiry which the court undertakes in testing the validity of awards under this Act is much wider than that undertaken in certiorari proceedings, simpliciter. That perhaps explains the practice in this country of including in the record the evidence taken at these tribunals, at all events, when the matter reaches the level of the Full Court. At the stage of leave, an affidavit verifying facts is filed for the use of the judge.

In support of their application for leave, the respondents exhibited to their affidavit a number of documents viz:

> "(a) the letter of dismissal of Mr. Wesley Sampson issued by the Applicant and dated April 5, 1988, marked O.S.1;
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> (b) the letter from the Tribunal dated April 13, 1988 advising the Applicant of the reference of the dispute to it, marked O.S.2;
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> (c) the brief filed with the Tribunal by the Jamaica Air-line Pilots' Association on behalf of Mr. Wesley Sampson marked O.S.3;
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> (d) the brief filed with the Tribunal by the Applicant, marked O.S.4."

Mr. Oswald Simpson, the Director of Administration with responsibility for personnel and industrial relations of the respondents' company, deposed so far as material, as follows:

> "3. At the hearing by the Industrial (sic, Tribunal Mr. Wesley Sampson admitted making the allegations in question on a public radio broadcast programme.
>
> 4. ...
>
> 5. ...
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> 6. In the subsequent hearings before the Tribunal there was no evidence to support the said allegations and it was manifestly demonstrated that the said

> "allegations were false misleading and/or exaggerated.
>
> 7. The evidence showed clearly that Mr. Sampson intended to disparage the company and his superior officers."

Mr. Macaulay argued that these facts provided no material on which the judge could have exercised his discretion to grant leave. As he put it, this was not the record on the face of which, error of law could be sought.

In my opinion, the material with which the judge was provided, is helpful as to what was advanced and argued before the tribunal. This material includes the terms of reference, the briefs of the respective parties which are in the nature of pleadings and the adjudication. The affidavit also gave a summary or review of the facts before the tribunal. It was necessary to give these facts seeing that one of the grounds advanced was that the tribunal acted in excess of jurisdiction. Where this is the ground, affidavit evidence is admissible. See per Denning, L.J. in **R. v. Northumberland Compensation Appeal Tribunal** supra) at p. 131. The judge was at liberty therefore and acted quite properly in examining the documents to which I have referred in determining whether a point of law arose for the adjudication of the Full Court.

In my judgment the grounds filed constitute points of law or to use the traditional language of certiorari, errors of law. In Judicial Review of Administrative Action by S.A. de Smith (3rd edition) at p. 117 the learned writer pointed out:

> "The concept of error of law includes the giving of reasons that are bad in law or (if there is a duty to give reasons) inconsistent, unintelligible or, it would seem, substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account."

I conclude therefore, that Theobalds, J., came to a correct determination in declining to set aside the ex parte order and I, for my part, would not interfere with the exercise of his discretion. I would dismiss the appeal with costs to the respondents.

WRIGHT, J.A.

I agree.

WOLFE, J.A. (AG.)

I agree.