REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2018-01550**

IN THE MATTER OF AN APPLICATION BY DWAYNE IFILL FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES 1998

AND

IN THE MATTER OF SECTION 4 AND 5 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT 4 OF 1976

AND

IN THE MATTER OF THE FAILURE OF THE AIRPORTS AUTHORITY TO ISSUE AND OR RE-ISSUE HIS EMPLOYEE ACCESSS SWIPE-CARD

BETWEEN

DWAYNE IFILL

Claimant

AND

THE AIRPORTS AUTHORITY OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. P. Carter instructed by Mr. D. Mitchell for the Claimant

Mr. S. Fabian for the Defendant

Decision on application to set aside permission for Judicial Review

1. The defendant has applied by application of the 4th June 2018 to set aside the leave to file for judicial review granted by the court and/or alternatively to have the leave application heard inter partes. In a nutshell, the facts alleged by the claimant, an employee of Swissport Ltd at the Piarco International Airport are as follows. On the 7th September 2017 he was stopped by police officers while driving and informed that he was being arrested in relation to inquiries into alleged drug exportation at the said airport. His home was searched and his Airport Identification Pass (issued by the respondent) was confiscated. The claimant was eventually released but the pass was not returned to him. His attorney wrote several letters seeking the return of the pass. By response of the 15th November 2017 under the hand of the ACP North East, the police informed him that his pass was handed over to the Respondent on the 5th October 2017. This claim is one to judicially review the decision of the respondent to revoke and/to refuse to re-issue the pass to the claimant.

2. The application to set aside is based on two broad limbs. Firstly, the Defendant argues that it was not served with the Order granting leave, the application for leave or the affidavit in support of the application for the grant of leave. This is a requirement under **Part 56.10 (3) (a), (b) and (c) CPR**. Secondly, it submits that the claimant has failed to make full and frank disclosure, which amounts to material non-disclosure that has prejudiced the defendant. The item which was not disclosed according to the defendant was its response to the Pre-Action protocol letter of the 5th April 2018 sent to the defendant by the claimant. In that letter of the 24th April 2018, Attorney for the defendant points out that the period of seven (7) days given by the claimant's attorneys for a response is contrary to the Pre-Action protocol practice direction and sought an extension of time to the 11th May 2018 to take instructions.

Material non-disclosure

3. It is convenient to treat with this limb of the submission first. Non-disclosure is material if it treats with relevant matters that the court ought to have considered prior to making its decision on the application and the failure to so consider the matter redounds to the disadvantage of the party making the submission, the failure to disclose being unfair to that party and prejudicial to its case.

4. To determine whether this is the case here, it is necessary to look at the chain of correspondence. The application for leave demonstrates that as early as the 29th September 2017, attorney for the claimant wrote to Superintendent Avril Brassey of the Airport Authority Administration Center copied to Colonel Albert Griffith, Deputy General Manager of Security at the Airport Administration Center. In that letter attorney set out his client's position including the fact that he brought the matter of the seizure of his pass to the respondent on the 15th September 2017 and was advised that he should report the matter to the police which he did on the very day at the CID POS. (see the attached extract). Attorney also sought the re-issue of the pass.

5. By letter of the 15th November 2017, set out above, the police informed attorney for the claimant that the pass was handed over to the respondent since the 5th October 2017.

6. By letter of the 29th December 2017, attorney once again wrote to the defendant. The letter was addressed to the Corporate Secretary Ms. Shannon Rudd. Full details of the claim from both a factual and legal position were set out in the letter and the return of the pass was sought.

7. Finally, after some four months of one-way communication with the respondent with no substantive reply forthcoming (save an except for an acknowledgment of receipt of the 15th January 2018), on the 29th January 2018, the Respondent wrote to the claimant's attorney saying that the matter was at their sole discretion and they refused

to re-issue the pass. That letter is signed by one Kieren Whittington, as Senior Legal Counsel of the respondent.

8. It is in this context that the pre-action protocol letter of the 5th April 2018 was dispatched. Whether something amounts to material non-disclosure cannot be view in isolation. History of the correspondence and context are equally important. In that regard the court has considered the following;

    a. The application for permission for JR does not disclose the response of the respondent
    b. The response of the respondent simply set out that investigations were proceeding and more time was required in keeping with the pre-action protocol requirements.
    c. Attorneys for both sides have deposed to a conversation which took place on the 25th April 2018 in relation to the holding of the hand of the claimant in filing his application. There are variations in the versions given but in the round it can be clearly gleaned from the evidence that the claimant was saying that because of the impending deadline to file, should the defendant not be willing to forego the point on delay, he would have no choice but to not grant an extension for reply and to file the application for permission. There was no agreement on the issue and so the claimant filed.
    d. In the court's view, the period set out in the protocol is in fact subject to the context, history and other matters relevant to the claim. In this case, the claimant had been writing detailed letters to the respondent through his attorneys since the 29th September 2017 without any responses so that certainly by the pre-action protocol stage it could be reasonably inferred that the respondent was well aware of the issues.
    e. To that end, the disclosure of the request for more time to respond, as disingenuous as it may appear (which is a finding the court does not make, for the avoidance of doubt) would have in no way changed the substance of the

application save and except for the issue of costs of the claim upon determination of the case.

f. The letter of the respondent seeking more time, is therefore relevant in the context of costs but was not material for the purposes of the determination of the application for permission and its absence could in no way have been prejudicial to the respondent and the court so finds. Tried as it may, the court could find no unfairness to the respondent as a consequence of the non-disclosure.

9. But for a court to set aside the permission, the applicant must also demonstrate that the grant of leave was plainly unjustified. See the well-known and accepted dicta of Kangaloo JA in ***Sanatan Dharma Maha Sabha v Partick Manning*** C.A 174 of 2004. To that end it would be an exercise in futility should a court decide that permission should be set aside and that a new permission hearing should be conducted *inter partes* giving the parties the opportunity to file further affidavits and submission. The purpose of the test set out above is designed to treat with just that, in an effort not to waste judicial time and resources. This is why at the application to set aside permission stage, the respondent must demonstrate additionally that the grant of leave was plainly unjustified. To the extent that the respondent seeks to have the court set aside and rehear the permission application, such a process is unnecessary. Both parties have had a full opportunity to set out their arguments in relation to whether leave should have been granted, in other words whether the grant was plainly unjustified and they have so done. So that the process is akin at this stage to a hearing of the permission application inter partes.

Was the grant of leave unjustified

The ultra vires ground

10. The test for the grant of leave for JR is well known. It is set out in the ***Sharma v Browne*** case as being one in which the applicant must demonstrate an arguable case with a

realistic prospect of success not subject to a discretionary bar. The permission threshold is a low one which does not admit of wholly unmeritorious claims.

11. The challenge of the claimant is that of denial of the principles of natural justice by the decision maker. The claimant claims that he was denied the opportunity to be heard prior to the making of the decision, despite the fact that the respondent had advance notice of his interest by way of several letters prior to the decision being communicated to him. He also seeks a declaration that the decision to revoke or refuse to re-issue the pass was itself an act which was ultra vires the Civil Aviation [No.1] General Application and Personnel Licensing Regulations and was unlawful.

12. The respondent submits that the pass is not issued under the Regulations set out by the claimant, namely 11(2) but is in fact issued in accordance with a policy of the respondent which policy was developed partly on the basis of the National Civil Aviation Security Programme and the Trinidad and Tobago Aviation Regulations. None of these documents have been placed before the court by either party. The respondent also submits that the regulation relied on by the claimant treats with the issue of "aviation documents" which according to the Civil Aviation Act is defined inter alia as documents issued by the Civil Aviation Authority and the pass at issue in this case is not issued by that Authority. It therefore does not qualify as an aviation document. It submits that the issuance of the pass in fact falls under section 34(1)(ii) of the Civil Aviation Regulations, in that it imposes a duty on the aerodrome operator to ensure that access to restricted or sterile areas of his aerodrome is controlled by the use of an identification media system to facilitate access by such persons and vehicles where authorized.

13. A distinction is to be made between the Civil Aviation Authority and the Airports Authority, the latter being a statutory authority established for the purpose of ensuring the compliance of security and other matters at the nation's airports. But the AA has the power in its own right to grant permission in writing for individuals to enter restricted areas;

Regulation 7 of the **Airports Regulations** made under the **Airports Authority of Trinidad and Tobago Act** Chap 49:02 reads

No person shall enter—

(a) a Customs area except with the general or specific written permission of the Authority or Comptroller of Customs; or

(b) a restricted area except with the general or specific written permission of the Authority,

and subject to such conditions as may be attached to the grant of such permission.

14. *Section 31 of the Act reads;*

> ***31.*** *The Minister responsible for National Security may for the purpose of ensuring security at any airport declare by Order—*
>
> *(a) on the advice of the Security Committee, any part of an airport or air navigation installation to be a restricted area; or*
>
> *(b) an airport to be a restricted area.*

15. So that the issue of whether the identification pass is in fact issued by the respondent or the CAA is one of both fact and of law. No evidence has been put before the court as to a copy of the relevant pass or letters of issuance. However, whichever side of the fence the arguments falls on is not necessarily determinative of the issue which remains that of whether the failure of the respondent to hear the claimant prior to the revocation of the pass was ultra vires the relevant legislation. The evidence of the claimant is that the pass is issued by the respondent. In the respondent's reply to attorney for the claimant by letter of the 29th January 2018, the respondent admits that it issues the passes and that it is done at its sole discretion. It further avers that it has exercised its discretion and has refused to re-issue the pass. These are the words of the respondent

who has not denied that the letter is theirs and has in fact admitted that the letter is theirs. In its written submissions the respondent has also accepted that the CAA is not the authority that issues the passes. So that the parties are ad idem on which authority issues the pass.

16. However, the duty law with the claimant to demonstrate on his application for permission that he has an arguable case, one that is sound in law and logic and that the case has a realistic prospect of success in respect of all the limbs of his claim. In this regard, the claimant appears to have relied on legislation that does not apply to this case.

17. It means therefore that in relation to the test for leave to file judicial review the claimant did not have an arguable case with a realistic prospect of success in relation to his claim under the principle of ultra vires. The claimant relied on legislation which appears to be irrelevant to his claim. The grant of leave in relation to the relief for a declaration that the decision was *ultra vires* Regulation 11(2) Civil Aviation [No.1] General Application and Personnel Regulations was therefore plainly unjustified and leave for this relief shall be set aside.

The natural justice ground

18. Quite simply, the resolution of this point is linked to the submission of the respondent that there is an insufficient public law element in the decision and the claimant has not demonstrated any infringement of rights to which he is entitled as a matter of public law.

19. Judicial Review proceedings deal exclusively with the violation of public law rights. In the case of ***O'Reilly -v- Mackman*** [1982] 3 All ER 1124 Lord Diplock put it thus:

"A person seeking to establish that a decision of a public authority infringes rights which he is entitled to have protected under public law must as a general rule proceed by way of an application for judicial review....."

See also the case of ***Cocks -v- Thanet District Council*** **[1982] 3 All ER 1135.**

20. There is no issue in this case that the respondent is a public authority established under the relevant act to perform public duties. See the definition set out by Bernard J as he then was in ***L J Williams -v- Smith and The AG*** (1980) 32 WIR 395.

21. The issue is whether at the time of the issuance of the pass, the respondent was performing a public function which is amenable to judicial review. The respondent submits that in so deciding it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision and unless the allegation involves suggested breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable. The claimant must demonstrate the infringement of rights to which they were entitled as a matter of public law. The right must flow from the statute if the public law element emanates from a statute. Those are in fact the words of Kangaloo JA in ***NH International (Caribbean) Limited v UDC Trinidad and Tobago Limited and Hafeez Karamath Limited*** Civ App No. 95 of 2005 and the court accepts the approach set out by His Lordship as being the correct one.

22. The main function of the respondent is set out at section 12 of the **Airports Authority of Trinidad and Tobago Act** ('the Act") as follows;

> *12. (1) The main function of the Authority is to develop and manage the business of the airports, including the development, maintenance or improvement of their facilities in a cost effective manner, so as to ensure the availability of efficient, secure and safe aviation services to the public at all times as well as to ensure commercial viability.*

23. Further, the Act is entitled "An Act to provide for the establishment, incorporation and management of an Airports Authority of Trinidad and Tobago, so as to ensure the provision of efficient, secure and safe aviation services." So that the purpose is clear.

24. **Regulation 7** of the **Airports Regulations** (set out above) made under section 43 of the Act provides for entry to restricted areas (so designated under the Act) with the permission of the respondent in writing. It follows that the security pass amounts to such permission in writing, such pass also being a method of identification of the pass holder. The respondent submits that the passes are issued to the companies who conduct services at the airport and not the employees. This has not been refuted. However there is a clear inference that the pass relates to the specific employee of the company with which he works but that the claimant would have only obtained the pass because of his employment with Swissport.

25. Further, by letter dated the 5th October 2017 from Swissport (the employer of the claimant), attached to the evidence in support of the application for leave Swissport indicated that the claimant must be cleared by the respondent and his pass returned to him in order for him to resume his duties. It follows that the absence of the pass effectively prohibits the claimant from performing the duties associated with his employment. When viewed from that perspective, it becomes clear that the exercise of the discretion either to refuse or re-issue a pass to persons who are employed at the airport and who must traverse the restricted areas for the purpose of employment and performance of their duties is the exercise of a public function that affects the rights of members of the public at large to engage in employment at the airport and the ability of the service providers to provide such service.

26. Of course, in the exercise of the discretion there may be valid reasons for the denial of passes such as concern for the welfare and safety of all members of the public who use the facilities but equally the exercise of the discretion impinges on the availability and entitlement of the workers chosen by the various service providers to provide services to the public at the airport. There is therefore vested in the decision maker in this case

a duty to those who are employed by the service providers (and by extension to the service providers themselves) to ensure that a pass is revoked only when there is a proper and justifiable basis for revocation and after consideration of all of the circumstances. It is the case for the claimant that part of that process involves affording him an opportunity to make representations on the facts which may be in the possession of the authority before it makes its decision on whether to revoke.

27. Additionally, while there may be no right vested in the claimant or any similar circumstanced employee to have a pass returned to him or re-issued, the claimant may be adversely affected by the decision made by the authority in the exercise of its public function by the exercise of its discretion to revoke without first affording to him the opportunity to be heard. Indeed that is his claim. He does not claim a right to a pass. In the court's view therefore, the claimant is entitled to pursue his claim in relation to the breach of natural justice as someone whose interests are adversely affected by the decision of the body in the performance of a public function. See section **5(2) (a)** of the **Judicial Review Act** Chap 7:08.

28. The court is satisfied therefore that at this stage, the claimant has an arguable with a realistic prospect of success on this issue.

Alternative Remedy

29. The respondent submits that there is in fact an alternative remedy for breach of Regulation **11(2)** of regulations made pursuant to the **Civil Aviation Act** (CAA) set out above. Having regard to the court's ruling on the non-applicability of the **CAA**, and its setting aside of permission for such relief, the issue of breach of the CAA and a complaint for such breach is no longer a live one.

Service of the proceedings

30. The respondent argues that it was not served with the Application for permission, the affidavit in support and the order for leave made by this court on the 2nd May 2018 which is a requirement under **Part 56.10 (3) (a), (b), (c)** and **11.14(1) CPR**. They have not denied service of the Fixed Date Claim Form and affidavit in support. The evidence of the respondent demonstrates however, that on the 1st May 2018, the day before permission was granted, there was according to the respondent "an attempt" to serve the Notice of Application for permission and the affidavit in support on attorneys for the claimant. These documents were in fact handed over to the office of attorneys for the respondent and signed as having been received by one Nakoya Wilson at 3:07 p.m. (see paragraph 4 of the affidavit in response of Instructing Attorney at law for the claimant filed on the 13th June 2018). The next day however, the documents were promptly returned to attorneys for the claimant on the basis that attorneys for the respondent had no authority to accept service.

31. One matter stands out to the court in this regard. Even if service on the attorneys was not proper service and it was within the purview of attorneys for the respondent to return the documents, the court is left to wonder at the prudence and appropriateness of so doing in all of the circumstances of this case. It is clear that Mr. Fabian was acting on behalf of the respondent as early as when he wrote the letter of the 24th April 2018 to attorney at law for the claimant and from their conversations on the matter between them. So that perhaps the prudent course would have been to consider the service as notice of the making of the application and approach the court to be heard on the application (having notified the client and obtained instruction) as the application was not granted until the next day. In the age of technology, notice can take any form, whether a telephone call or fax or email. This is particularly so in cases where the time for written notice may be too short. In such a case, the respondent would have lost the

opportunity to be heard on the application ab initio thereby avoiding the increased costs of an application to set aside.

32. Additionally, the claimant has admitted that the Notice of Application for leave and the order of the grant of leave was not served on the respondent as an oversight. So that the only documents served would have been the Fixed date Claim Form and the affidavit in support. This is a contravention of the provisions of the CPR set out above.

33. However, the setting aside of leave on the basis of non-service of the order, application and affidavit would in the court's view be wholly disproportionate a sanction to the wrong committed. A court ought to be circumspect when imposing such a consequence for a breach of the relevant rule so as not to permit injustice to one party. The purpose and intent of the rule could only be that of full disclosure off all the matters which were brought before the court in the absence of one party. This full disclosure would permit a respondent to make an informed decision as to whether it should itself apply to discharge the court's order. Such disclosure would also assist the respondent in defending the substantive claim.

34. This court must therefore examine the circumstances and history of the proceedings of this claim to determine whether the failure to comply with the particular aspect of the rule (the Fixed date Claim Form and affidavit in support having been duly served) has operated so as to prejudice of the respondent. The answer to that question is a resounding and pellucid no. Indeed, the present application before the court is one on an application by the respondent to set aside permission. The Notice of Application of the respondent has gone way above and beyond that which is necessary to set out as ground in applications. Comprehensive grounds of argument together with principles of law and authorities have been set out in the Notice of Application so that the respondent availed itself of the process above and beyond that which is required.

35. Further, the respondent was permitted by the court to file full submissions in writing and it took full advantage of the opportunity so to do. Additionally, this has all occurred

prior to the filing of affidavits in opposition to the substantive claim by the respondent. In those circumstances there could be no complaint of prejudice and certainly no real prejudice has been demonstrated as the claim is yet to be heard. In relation to the expense incurred in making the application, the court is well suited to make the appropriate costs order in that regard so that prejudice in that regard is assuaged.

36. The court will therefore not set aside leave on the basis of non-service of the Notice of application for leave, the affidavit in support and the order. In that regard it is also to be noted that the Fixed date Claim Form sets out that it is filed pursuant to an order of this court so that any concern that it was filed without permission could be easily verified.

37. Before passing on, the court must express its disappointment in the fact that attorneys for the claimant appeared not to have had a proper hold on its process servers to ensure that proper service of the documents that were required as a matter of law was effected. The incompetence of process servers or the lack of knowledge of the process by attorneys more often than not leads to the incurring of additional costs on the part of both parties, an increase in the demand on the already limited judicial time and resources and may sometimes result in the dismissal of the claim through no fault of the client. This is something which attorneys should seek to avoid at all costs.

Claims made under the provisions of the constitution

38. The respondent has argued that the doctrine of legitimate expectation does not apply to this case as relates to any infringement of right guaranteed under the constitution. The court agrees with this submission. However permission for such relief was neither sought nor granted and same does not form part of the relief prayed in the Fixed date Claim Form.

Disposition

39. The court therefore sets aside the permission granted to the claimant to file for judicial review in terms of the first relief sought in the application of the 1st May 2018 and the relief sought at paragraph A (i) of the Fixed date claim form is struck out. In all other respects the application of the respondent of the 4th June 2018 is dismissed.

40. The claimant shall pay to the respondent the 50% of the costs of the claim to be assessed in default of agreement upon determination of the claim.

Dated the 19th day of July 2018

Ricky Rahim
Judge