REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2006-00600

BETWEEN

THE AIRPORTS AUTHORITY OF TRINIDAD AND TOBAGO

CLAIMANT/
APPLICANT

AND

THE MINISTER OF LABOUR AND SMALL AND MICRO ENTERPRISE DEVELOPMENT

DEFENDANT/
RESPONDENT

BEFORE: THE HONOURABLE MADAM JUSTICE A. TIWARY-REDDY

APPEARANCES:

Seenath Jairam SC leading Rishi Dass instructed by Nicole Mohammed for the Claimant/Applicant.

Josefina Baptiste instructed by Rehanna Hosein for the Defendant/Respondent

JUDGMENT

BACKGROUND

1. For convenience I shall refer to the parties as Applicant and Respondent respectively. In this action the Applicant is seeking judicial review of the

Respondent's decision to grant an extension of time to a Trade Union, to report a trade dispute between the Applicant and a former employee.

2. By Order of this Court made on 23.10.06 the Applicant was granted leave to amend the Fixed Date Claim Form to seek the following additional relief:

   a. A declaration that the decision of the Respondent notified by letter dated 6.9.04 to extend the time within which a trade dispute arising out of the dismissal of Balliram Ramdial could be reported ("the fourth decision") is illegal and/or ultra vires and/or contrary to the policy of the Act and/or was arrived at in breach of the rules of natural justice and/or is irrational and is null and void and of no effect.

   b. An Order of Certiorari to remove into this Honourable Court and quash the fourth decision.

   c. A declaration that the practice of the Respondent whereby in granting extensions of time for the reporting of trade disputes it receives submissions ex parte and does not disclose same to the other parties, is unlawful and in breach of the rules of natural justice.

3. In support of the application for amendment of the Fixed Date Claim Form the Applicant had annexed an earlier affidavit of Rosalind Chinnia-Ramadeen ("the Chinnia-Ramadeen affidavit") filed on 5.10.06 which had also served as the Applicant's response to three earlier affidavits sworn by the Respondent's employees. The Chinnia-Ramadeen affidavit criticized the practice and procedure employed by the Respondent to determine requests for extensions of time and submitted that the Respondent had entertained submissions ex parte to the detriment of the Applicant's right to be heard.

4. In her affidavit Ms. Chinnia-Ramadeen, the Deputy General Manager of the Applicant deposed that this unfair practice had been adopted when the Union's first request for an extension of time was made on the 3.5.04. She cited the Union's letter dated 10.8.04 to the Respondent wherein the Union had sought to dispel the Applicant's objections to its application dated 3.5.04. Ms. Chinnia-Ramadeen maintained that the Claimant had been deprived of the right to contradict the assertions made by the Union in the said letter.

THE BRAITHWAITE AFFIDAVIT

5. On 23.10.06 the Respondent was granted leave to file an affidavit in response to the Chinnia-Ramadeen affidavit. This is the affidavit of Selby Braithwaite (Braithwaite), filed on 19.1.07 ("the Braithwaite affidavit").

6. Braithwaite, Director of Labour Administration in the Ministry of Labour set out his functions in the Ministry and deposed to the general practice followed by the Ministry after receipt of submissions from two parties where one party objects to an extension of time being granted. Thereafter he explained the approach adopted by the Respondent following the receipt of the Union's application of 3.5.04 and the circumstances under which this 'first request' was granted.

7. In paragraphs 7-15 of his affidavit Braithwaite related certain events which had transpired after the Union's 'first request' for an extension had been granted. The Union had first sought to report the Trade Dispute without all the relevant documents and was unable to do so by the expiration date of 29.11.04 resulting in a 'second request' being issued by the Union on 21.2.05. On 4.10.05 after considering the Applicant's objections contained in its letter of 29.4.05, the Respondent eventually acceded to this 'second request' and asserted that the Respondent had acted in accordance with statutory guidelines.

8. Paragraphs 16-30 of the Braithwaite affidavit addressed the Applicant's concerns over the procedure that had been adopted by the Respondent when it considered the Union's 'first request'.

9. By Notice of Application filed on 9.3.07 the Applicant sought to strike out paragraphs 7 to 15 inclusive of the Braithwaite affidavit pursuant to Rules 26.1 (w) and 31.3 (3) of the Civil Proceedings Rules 1998 (CPR) and under the inherent jurisdiction of the Court.

SUBMISSIONS

10. The Claimant objected to paragraphs 7-15 on the grounds that the matters contained in those paragraphs are:

a. Outside the scope of the leave granted by the Court. The Respondent was only entitled to comment on the Applicant's challenge to the 2004 decision wherein the Union's 'first request' for an extension of time was approved. Instead paragraphs 7-15 contain additional commentary on the 2005 decision.

b. (i) In contravention of the Applicant's right of final reply. Proceedings are generally commenced by a claim issued against a defendant, who in turn issues a defence, after which with leave of the Court, the Applicant may be allowed to reply, which closes the pleadings. In this case the Applicant first issued a claim supported by six affidavits against the Respondent with respect to the Respondent's "2005 decision" to extend the Union's time to report a trade dispute. The Respondent filed three affidavits in response and the affidavit of Ms. Chinnia-Ramadeen was filed on 5.10.06 in reply.

(ii) Thereafter an amended claim which added the Applicant's new challenge to the "2004 decision", was issued against the Respondent. In response to the amended claim the Respondent filed the Braithwaite affidavit on the 19.1.07 and in reply the Chinnia-Ramadeen affidavit was filed on the 9.3.07.

(iii) However, since the Braithwaite affidavit filed on 19.1.07 addressed both the 2004 and 2005 decisions of the Respondent, this meant that further comment was made on the 2005 decision that had been prohibited by the pleadings.

c. (i) Not allowed without proof of a change in circumstances pursuant to Part 20.1 (3) of the CPR, which provides that:

> *"The court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference."*

(ii) This rule is applicable here because a Statement of Case under Rule 2.3 is deemed to include a Defence, which is made on affidavit in claims for Administrative Orders under Part 56.11 of the CPR.

(iii) In the absence of an application made by the Respondent pursuant to Part 20.1 the Respondent is prohibited from further comment on the 2005 decision.

d. (i) Inadmissible as speculative and opinion evidence. This ground refers to paragraphs 8 and 9 of the Braithwaite affidavit. The deponent does not qualify as an expert, which is an exception to the above rule, since he commenced employment in his present post on the 7.10.01.

(ii) Alternatively, if the deponent is deemed to be an expert the evidence deposed to lies outside of his expertise. Here the deponent offered opinion evidence of the state of mind of members of the Union, to which opinion he would not normally be privy. Paragraph 8 of the Braithwaite affidavit reads:

> *" It is not unusual for parties, in this case the Union, to assume that because the information regarding the steps taken for settlement of the dispute was supplied at the stage of the request for an extension of time in accordance with the provisions of Section 51(3) of the Act that it was not necessary to supply that information when the report of the dispute is made subsequent to the granting of an Extension of Time."*

(iii) Further, where an expert is relied on the Court of Appeal in CA No. 55 of 2003 Ramsaran & Ors v Sandy & Anor per Nelson J.A at paragraph 33 held that "…*before a court can assess the value of an opinion it must know the facts upon which it is based: See R v Turner [1975] 1 QB 834, 840E per Lawton L.J. If expert opinion is based on hearsay it must be verified by admissible evidence*." In the present case no evidence was adduced by the deponent to establish the basis for his opinion of the Union member's state of mind.

11. The Defendant's objections to the Claimant's submissions are as follows-

a. Paragraphs 7-15 are not outside the scope of leave given in the Order. In particular paragraphs 8-9 principally explain the relevant considerations and mechanisms that are generally adopted by the Respondent when determining an application for an extension of time to report a matter as a trade dispute.

b. On the issue of the Claimant's right of reply the Defendant argued that the Braithwaite affidavit '*reinforced*' the Respondent's previously filed affidavits.

c. (i) Braithwaite's experience as the Director of Labour Administration qualifies him as an expert to produce admissible opinion evidence in paragraphs 8-9. Further he is able to base his opinion on his observations and from a review of the files in the Unit.

(ii) Alternatively if the deponent is a *non-expert witness* reference was made to the judgment of Jones J in Seereeram Brothers Limited v The Central Tenders Board & Anor {1992} 2 TTLR 465 in which an application was made to strike out certain paragraphs on the ground of hearsay or inadmissible opinion evidence. The court held at page 475 that non-expert evidence is receivable as evidence of the facts intended to be conveyed by that expression of opinion but only if founded on facts within the actual knowledge of the witness. Jones J further surmised that *"…though given in the form of an expression of opinion [the witness will] not be departing from the rule that he must express facts which he is able of his own knowledge to prove.*

(iii) Applying the above statement to the instant facts, the deponent's

comments are based on his own knowledge of the files, records and documents within his control. Also he is deemed to possess collective knowledge of the Unit. Hence the paragraphs are admissible.

d. (i) The Court has no discretion to exclude admissible evidence. In Civil Procedure 2005 paragraph 32.1.4 the author stated that while "*…the extent to which a judge in civil proceedings …has a discretion to exclude evidence which is relevant and inadmissible has not been entirely clear… Certainly a court has no general power to exclude relevant and admissible evidence*."

(ii) Under the CPR 1998 there exists no obligation on the Court to direct the issues to be addressed in the affidavit evidence, thereby excluding admissible evidence. In Civil Procedure 2005 paragraph 32.1.4 the author stated that: "*Where a court exercises its power under r. 32.1 (1)(a) and directs that evidence should be given on particular issues only and not on others …the effect of the direction will be (almost invariably) to exclude admissible evidence.*" According to the said author the exclusion of such admissible evidence must be exercised in accordance with the overriding objective to deal with cases justly.

(iii) Although the court's confinement of issues constitutes part of the court's case management powers, questions as to whether otherwise admissible evidence should be excluded would raise issues properly characterised as questions of law.

e. The Court shall only strike out material that is scandalous, irrelevant or oppressive. In Rossage v Rossage [1960] 1 W.L.R 249 Hodson L.J held at page 252 that matters cannot be struck out solely on the ground that they

were scandalous. Since *"…scandalous matter (sic) may be relevant"*. The evidence must be both scandalous and irrelevant in order to be struck out.

ANALYSIS

12. The Claimant seeks an order to strike out the offending paragraphs pursuant to Rules 26.1 (1) (w) and 31.3(3) of the CPR

a. Rule 26.1 (1) (w) provides that:

The court (including where appropriate the Court of Appeal) may-

…

(w) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

b. Rule 31.3 (3) provides that:

The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.

Admissibility Of Opinion Evidence

13. Opinion evidence of persons other than experts in a particular field is generally inadmissible on the general principle that witnesses must speak only to that which was directly observed by them: see Seereeram Brothers Limited v The Central Tenders Board & Anor {1992} 2 TTLR 465 at page 475 H.

14. However, an expert witness may only provide evidence with the leave of the court. In The Matter of an Application by Digicel (Trinidad & Tobago) Limited CV 2006-03320 Justice Jones noted at pages 12-13 that, "*Part 33.5 provides that no party may call an expert witness without the court's*

permission. In my opinion with regard to judicial review proceedings this must mean that no evidence of an expert is admissible except with the permission of the court."

15. The court then held at page 14 that for parties to comply with Part 33 of the CPR the following factors are relevant: *"(a) how cogent the proposed expert evidence will be; (b) how helpful it will be in resolving any of the issues in the case; and (c) how much it will cost and the relationship of that cost to the sums at stake."*

Who Is An Expert

16. It was held in *Ramsaran & Ors v Sandy & Anor* (supra) at paragraph 29 that an expert must have a field of expertise, which is an organised branch of knowledge. Additionally the expert must show the facts upon which his opinion is based.

17. The question therefore is whether Mr. Selby Braithwaite was an expert and entitled to give evidence pursuant to Part 33 CPR. It is submitted that he does not qualify as an expert based on the above authorities. At paragraph 1 of his affidavit he cites his qualifications as being " *I have been in the Public Service continuously since 7th February, 1983 and have held the office of Director of Labour Administration from the 7th October, 2001 to the present*…" His position at the Ministry does not equate to a field of expertise.

Admissibility Of Non Expert Evidence

18. Non-expert opinion evidence is admissible if the opinion is founded on the facts within the actual knowledge of the witness: Seereeram Brothers Limited v The Central Tenders Board & Anor {1992} 2 TTLR 465 at page 475 I.

Justice Myers affirmed this recently in Chaitlal v A.G H.C.A No. 2472 of 2004 at paragraph 60.

19. At paragraph 29 of Chaitlal (supra) the learned Judge referred to three categories of witnesses who may give evidence in support of a Ministry, or Government Department in public law proceedings. These are (1) any person who has direct personal knowledge of relevant events; (2) the Minister or Head of the Department; (3) the Permanent Secretary in a Ministry.

20. And at paragraph 30 the learned Judge stated:

> "The Head of a Ministry or Government Department, may give evidence on behalf of that Ministry or Government Department as though the matters deposed to are within his or her own personal knowledge, the collective knowledge of the Department, technical and factual being his or her knowledge on the grounds of practicality and close association with the matters in question, *provided that* the necessary background information on which his or her evidence was based is supplied."

It is not disputed that Braithwaite as the Director of Labour Administration was the Head of that Department.

21. The issue then is whether Mr. Braithwaite's comments on the assumptions generally made by the Union constitute part of the collective knowledge of the Department. At paragraph 8 he begins his analysis by referring to the possible state of mind of members of the Union "*It is not unusual for parties, in this case the Union, to assume…*" There is no background information supplied to support this inference.

22. This Court therefore finds that Braithwaite's reference to the Union members' state of mind lies outside his collective knowledge and amounts to hearsay. The offending paragraph 8 should be struck out.

Relevance

23. The Court is entitled to exclude evidence, which is irrelevant pursuant to the Part 31 CPR. What constitutes *'relevance'* was considered by Justice Judith Jones In The Matter of an Application by Digicel (Trinidad & Tobago) Limited CV 2006-03320, where an application was made for orders disallowing the use of the Hausman affidavit and paragraphs 47-60 inclusive of the Barrins affidavit. At page 7 the learned Judge held that *"In order to be admissible the disputed evidence must pass the relevance test. The evidence must be relevant to the issues to be determined."* In the instant case the relevance is to be determined by reference to the grounds upon which the relief is sought.

24. Irrelevant evidence, which is likely to cause real prejudice should be struck out. See The Secretary for Trade and Industry v Swan & Ors [2003] EWHC 1780 (Ch) at paragraph 94. This case involved a director's disqualification proceedings in which the Defendants made an application to strike out an affidavit given in support of the Claimant. The likelihood of possible prejudice is not the determining factor in allowing irrelevant evidence as suggested by the Respondent. Part 31.3 of the CPR is unambiguous in relation to the court's powers to strike out affidavit evidence on the ground that it is irrelevant. At paragraph 97 of the *Swan* case the court stated the general rule "*If evidence contains matter which is irrelevant you strike out that matter.*

25. The additional relief sought by the Claimant via its *amended claim form* is a declaration that the decision of the Respondent notified by letter dated the 6 September 2004 is null and void. Consequently, only evidence relevant to this 2004 decision is admissible. Since paragraphs 7-15 of the Braithwaite

affidavit adduce evidence of events after "the 2004 decision" namely the events leading up to "the 2005 decision" they should be struck out.

DECISION

26. This Court makes the following Orders:

a. Paragraphs 7 to 15 inclusive of the affidavit of Selby Braithwaite filed herein on 19.1.07 be and are struck out; and

b. The costs of this application be paid by the Respondent to the Applicant fit for two counsel.

Dated this 15th day of February, 2008

AMRIKA TIWARY-REDDY
JUDGE

Aisha Peters-Francis (JRA)