COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
PUBLIC LAW DIVISION
2021/PUB/jrv/00016

IN THE MATTER of the Industrial Relations Act
AND IN THE MATTER of an Application for Judicial Review

BETWEEN:

DWAYNE WOODS
JEREMIAH STORR
ANISHKA FERGUSON-BOWE
NEKO ALBURY
CHRISTINE ROLLE
MICHAEL HANNA
DWIGHT MOSS
ADVADO MALCOLM
KOSYGEN FORBES

Applicants

AND

DION FOULKES
(in his capacity as the Minister of Labour)

First Respondent

AND

ATTORNEY GENERAL OF THE BAHAMAS

Second Respondent

AND

JOHN PINDER
(in his capacity as the Registrar of Trade Unions**)**

Third Respondent

Before: The Honourable Mr. Justice Loren Klein
Appearances: Ms. Krystian Butler for the Applicants
Ms. Kayla Green-Smith with Ms. Yolantha Yallop for the Respondents

Hearing Date: 05 July 2021

RULING

Judicial Review—Election of Union Executives—Decision of Minister confirming decision of Registrar to refuse to certify poll as properly taken—Breach of natural justice—Denial of right to be heard by Minister on statutory appeal—Section 13 of the Industrial Relations Act—Allegation that Minister conflicted from hearing appeal involving public

union—Nemo judex in causa sua rule—Claim for declaration that s. 13 of Industrial Relations Act incompatible with art. 20(8) of Constitution—Availability of constitutional relief in judicial review proceedings—Multiple proceedings—Abuse of process of court—Discretionary nature of judicial review remedies—Stay of proceedings.

INTRODUCTION AND BACKGROUND

Introduction

[1] By letter dated 1 June 2021, the Minister Responsible for Labour ("the Minister") confirmed the 13 July 2020 decision of the Registrar of Trade Unions ("the Registrar") refusing to certify the poll conducted on 30 June 2020 for the election of officers of the Bahamas Utilities Services and Allied Workers Union ("BUSAWU") as having been properly taken.

[2] The applicants filed a Notice of Motion on 29 July 2021 for judicial review of the Minister's decision, and these proceedings are the latest round in a series of legal challenges they have mounted to the non-certification of the 2020 election results, in which they were the presumptive winners.

[3] In a contested leave hearing on 21 June 2021, I was satisfied that the one or more of the grounds met the threshold for the grant of leave under O. 53, r. 3(1) of the Rules of the Supreme Court ("RSC") as disclosing "*an arguable ground for judicial review having a reasonable realistic prospect of success and not subject to any discretionary bar such as delay or alternative remedy*" (*Sharma v Brown Antoine* [2007] 1 W.L.R. 780). I also directed an expedited hearing of the judicial review proceedings, which I heard on the 5 July 2021.

[4] At the leave hearing, the applicants also applied for a stay of the Minister's decision pending hearing of the judicial review, or in the alternative an interim injunction to prevent the implementation of the decision of the Registrar by letter dated 2 June 2021 directing that a new poll be held on the 24 June 2021. This followed on the heels of the Minister's decision confirming the Registrar's refusal to certify the poll. I refused the stay but granted the order restraining the conduct of new elections (which is the decision the stay was really directed at) pending the hearing of the matter and ordered the Registrar joined to these proceedings. In doing so, I had in mind the principles expressed by the Privy Council in *Vehicles and Supplies v. Ministry of Foreign Affairs* [1991] 1 W.L.R. 550, that a stay is not effective in respect of an executive decision already taken and is more appropriately directed to a judicial or legal process, although it is appreciated that the UK Court of Appeal has taken a much wider view of a stay in administrative law (see, for example, *R v Secretary of State for Education and Science, Ex parte Avon CC* [1991] 1 Q.B. 558, where the CA held that in principle a court can stay a decision taken by an officer or Minister of the Crown pending a challenge to the decision-making process by way of judicial review).

[5] The Application for Leave and the Statement were filed 16 June 2021, along with the affidavit of Dwayne Woods, which was supplemented by the affidavit of Jeremiah Storr filed 29 June 2021. The Respondents filed the affidavits of the Minister of Labour and the Registrar of Trade Unions on 2 July 2021.

[6] The applicants set out four main grounds in their application. These may be summarized as follows:

(i) that the Minister lacked the jurisdiction to "adjudicate" (exercise his statutory appeal functions) with regard to an election decision where the employer is the Bahamas Government or a public corporation;
(ii) that the decision was procedurally improper, in that the applicants were denied the right to be heard before the decision was made;
(iii) that the decision was irrational, or *Wednesbury* unreasonable, in that no reasonable person who applied their mind to the matter could have come to such a decision; and
(iv) the Minister in coming to his decision relied on facts not found or relied on by the Registrar.

[7] The main relief sought is an order of *certiorari* quashing the decision of the Minister and a declaration that "*s. 13 of the Industrial Relations Act insofar as the Minister of Labour is named an adjudicating authority is inconsistent with Article 20(8) of the Constitution insofar as [the] employer is the Bahamas Government or a public corporation*".

Procedural History

[8] A full history of the earlier proceedings is set out in the ruling of Winder J. dated 16 September 2020 (*Woods et. al. v Pinder et. al.* [2020/pub/jrv/21) and the ruling of the Court of Appeal of 31 May 2021 (SSCiv. App. No. 126 of 2020, *Dwayne Woods et. al. v. John Pinder et. al.*) Only a brief outline of the salient facts need be set out here.

[9] The challenges have their origin in the dismissal by Winder J. of the applicants' claim for judicial review of the decision of the Registrar to refuse to certify the polls for the election of officers conducted on 30 June 2020. The unsuccessful candidates in the elections protested the results on several grounds, namely that the person who purported to supervise the poll conducted in Exuma was not a person designated by the Minister for that purpose (as required by s. 20 of the Industrial Relations Act ("IRA")) and that there was unfairness in the process in that the symbol of the applicants was printed on the back of the ballots. The Registrar, by a decision letter dated 13 July 2020, agreed that these irregularities amounted to non-compliance with the statutory requirements and refused to certify the poll as having been properly taken.

[10] Winder J. dismissed the application for judicial review on the discretionary ground that the applicants had adequate means of redress available through the statutory process created at s. 13 of the IRA, which was not followed. Notwithstanding the determination of the judicial review claim on procedural grounds, the learned Judge went on to consider the merits (which is not an unusual occurrence in judicial review proceedings where leave has been granted, so as to avoid multiple appeals). He concluded that even considering the merits, he would refuse mandamus to compel the Registrar to certify the results of the poll,

and affirmed that the Registrar had a statutory power to call fresh elections in the circumstances.

[11] The applicants contended on appeal that they had in fact appealed via a "WhatsApp" message to the Minister, but as will be seen presently, they were mistaken in this regard. The Court of Appeal dismissed the applicant's appeal and made several findings that are of some significance to these proceedings. The substance of the appeal Court's ruling, delivered by Sir Michael Barnett P., is contained in the paragraphs set out below:

> "11. In a nutshell, this Court held that the decision of the Registrar could not be the subject of judicial review. The decision of the Minister on appeal may be the subject of judicial review, but that is not the subject of these judicial review proceedings. Indeed, as far as we are aware, the Minister has not made a decision on any appeal which may have been made to him.
> 12. For these reasons ground one must fail because the WhatsApp message could not constitute an appeal to the Minister in accordance with section 13 of the Act; and even if I am wrong and the message was in fact an appeal to the Minister, judicial review must be refused because the statute gave a right of appeal to the Minister. That right must be exercised and it if has been exercised, the applicant must await the decision of the Minister on that appeal, which decision may be the subject of judicial review. […]
> 14. As there may be an extant appeal to the Minister, we are loathe to say anything which may be said to be calculated to influence the Minister's decision on the reasonableness or otherwise of the Registrar's decision. …
> 16. The issue whether the Registrar was right to determine for the two reasons stated by him the poll was not properly taken is a matter for the Minister on appeal. It is not for this court to comment upon it and it is a matter of regret that the trial judge expressed his views, which in any event do not bind the Minister."

[12] Immediately after the Court of Appeal delivered its decision, the Minister, by letter dated 1 June 2021, responded to the applicants' statutory appeal, which he accepted was properly triggered by a letter dated 30 July 2020. A response to that letter had been held in abeyance because, as explained by the Minister in his affidavit, the matter was before both the Supreme Court and the Court of Appeal, and he felt unable to respond prior to the conclusion of the legal proceedings.

[13] I pause at this point to observe that I entertain some doubt as to whether the Minister's apprehension of the legal position was correct. An injunction had been granted to prevent the Registrar calling elections pending the substantive hearing of the judicial review, but there was nothing to prevent the Minister forging on with the statutory appeal. As pointed out by both courts, the IRA ordained him the first port of call for any appeal of the Registrar's decision. In this regard, there was a two-week window between the submission of the appeal letter of 30 July 2020, apparently tendered after the respondents took the alternative remedy point at the leave hearing, and the hearing set for 17 August 2020, during which the Minister was free consider the appeal, and in fact the applicants were urging his intervention. The appeal letter contained the specific entreaty that: "…*it is prudent for both parties to assess the matter at hand to avoid further costs as the matter is set for Trial on 17 August 2020*". Further, Winder J's decision was issued on 16 September 2020, clearing the way for the statutory appeal to proceed, and there was an interregnum of some 6 weeks before the appeal was filed to the Court of Appeal on 28

October 2020. So, there were two missed opportunities for the Minister to have dispatched the appeal.

[14] Had the Minister availed himself of the first opportunity, the JR proceedings before Winder J. might have been averted, or at the very least recast as a review of the Minister's s. 13 decision—which was the proper decision suitable for judicial review in the first place—and the matter might have been put to bed by now. The court would observe at this point that very many applications for judicial review do not proceed to their legal terminus precisely because administrative decisions are taken in the interim or alternative remedies pursued which make the JR claims academic, or otherwise resolve the issue. And this is precisely the reason that any statutory remedies provided by Parliament for challenging an administrative decision must be expeditiously pursued and heard. But this is water under the bridge.

The decision letter

[15] The material parts of the Minister's findings and reasons in his decision letter of 1 June 2021 are set out below:

> "Firstly, I have seen a sample of the ballot used on the day of the election, and your election team symbol was stamped to the back of the same. This action compromised the fairness of the poll and the ballot was also considered to be influential.
>
> Secondly, in my capacity as Minister of Labour, I executed a Designation Certificate, giving Mr. Leslie Curtis, a public officer with the Department of Labour's Exuma Office, the power to supervise the Election of Officers poll. The ballots for the poll were sent to the Exuma Island Administrator's Office and members of the union also voted at that location. The Exuma Island Administrator was not designated with supervision powers and the purported exercise of such powers was not valid and the ballot could not be certified as being properly taken. It is also my understanding that it was your decision to change the polling station without following the proper Statutory procedure.
>
> In light of the above irregularities surrounding the poll, I confirm the decision of the Registrar of Trade Unions not to certify the poll as being taken."

Judicial review principles

[16] Central to the function of judicial review is that the court is not concerned with the merits of the decision (i.e., whether it is right or wrong) or even with underlying determination of facts. In the exercise of its supervisory powers, the court scrutinizes the decision-making process to determine its lawfulness or overall fairness (*Kemper Reinsurance Co. v Minister of Finance* [1998] 3 WLR 630 at 638). Thus, the grounds for judicial review are normally expressed in terms of a decision being: (i) *illegal* (e.g., exceeding statutory powers); (ii) *irrational* or '*Wednesbury'* unreasonable (e.g., an outrageous decision that no sensible person considering all the material would have arrived at); (iii) *procedurally improper* (e.g., a decision arrived at by an unfair process), or (iv) in breach of a *legitimate expectation* (e.g., a decision that unfairly reneges on a practice or previous promise of a decision maker).

DISCUSSION AND ANALYSIS

Abuse of process

[17] I can dispose of the abuse of process point as a preliminary consideration. In addition to their response to the applicants' grounds, the respondents opposed the claim on the ground that it is an abuse of the process of the court. As put in their written submissions, it is a "*repacking of fundamental facts already pleaded and adjudicated in both the Supreme Court and in the Court of Appeal*". In this regard they relied on the well-known speech of Lord Bingham in *Johnson v Gore-Wood and Co*. [2002] 1 A.C. 1, deploring re-litigation of issues that could have been raised in earlier proceedings. However, the doctrine of *res judicata* and issue estoppel do not apply with the same rigour in public law proceedings as they do in private proceedings, mainly because statutory bodies cannot fetter their freedom to perform their duties or exercise statutory powers (see *Thrasyvoulous v Secretary of State for the Environment* [1990] 2 AC 273).

[18] So, while it is true that the applicants have not shied away from a full-throated challenge to the outcome of the 2020 elections, I think reliance on abuse of process is misplaced in the context of these proceeding. The Minister's determination of the appeal is a fresh decision and a judicial review challenge to it could only now be mounted. The previous actions concerned the decision of the Registrar to refuse to certify the poll and the appeal therefrom. As made plain by the Court of Appeal, the decision in the first judicial review cannot bind the Minister in the exercise of his statutory functions pursuant to s. 13 of the IRA.

Ground 1: Lack of jurisdiction to adjudicate (*Nemo judex in causa sua rule);* breach of Constitution

[19] To the extent that the first ground alleges a lack of jurisdiction, it is clearly misconceived, although I am inclined to believe the challenge to 'jurisdiction' is a result of imprecise drafting of the grounds more than anything else. Firstly, the statute clearly provides for the Minister to function as an appeal tribunal in several different circumstances:

> "13. Any person aggrieved—
>
> (a) by any decision of the Registrar—
> (i) not to register a trade union under this Act; or
> (ii) to cancel the registration of a union;
> (iii) not to register an amendment of the constitution, or a change of name, of a trade union; or
> (b) by the refusal of an officer of the Ministry to certify any ballot as having been properly taken,
>
> may appeal in respect thereof to the Minister, who may, with effect from the date of the determination of the appeal, reverse the decision of the Registrar or officer or confirm it."

[20] There are no limitations imposed on the Minister's power to hear appeals depending on the nature of the union involved. In fact, the only limitation in the application of the Act is

that it does not apply to the "disciplined forces" as defined in the Constitution (s. 3(1) of IRA). But the definition of a "trade union" or "union" at s. 2 is "*any combination or association of employers or employees, whether temporary or permanent, the principal objects of which are statutory objects*". There is nothing in this definition to exclude public unions.

[21] Secondly, as pointed out by the respondents, both courts (Supreme Court and Court of Appeal) found that there was a statutory appeal available to the Minister. Winder J. in refusing the application said [20] "…*there was a viable appeal process under the Act by which the Minister was empowered to reverse or confirm the decision*." The Court of Appeal was more emphatic in stating that judicial review must be refused because "*the statute gave a right of appeal to the Minister*" (see para. 12 of the Ruling, *supra*).

[22] I am also unpersuaded by the argument that the Minister's hearing of the appeal violates the *nemo judex* rule, in that he is required to act as a judge in his own cause when he has to hear an appeal involving a Government department or public corporation (in this case the BUSAWU union). Put another way, the challenge is that the Minister was affected by unconscious bias, arising from his dual position as a minister in Government and as an appellate authority, and should thus be disqualified from hearing the appeal. Regrettably, the way the matter was put in the applicants' written submissions did not elucidate or advance the point. They submitted that:

> "In the present case, the Applicants vied for administrative positions of a bargaining unit of a Government Corporation. The Minister being a representative of the government and Registrar being a policy advisor to government is not impartial or independent and any decision made by the Minister would have an effect on any decision having to be made by the Registrar."

[23] With respect, this argument conflates the issues and fails to deal with the fact that the challenge is to the decision of the Minister, not the functions of the Registrar. Necessarily, the Registrar's next steps with respect to the Union's election will be based on whatever decision the Minister makes on the appeal. If the Minister confirms the decision, then the Registrar's decision stands, and fresh elections are called; if he reverses it, then the election results would be certified in favour of the applicants. But that does not raise any question of impartiality or bias. It is simply the process ordained for the conduct and certification of union elections.

[24] In any event, in relation to decisions made under s. 13, I am not of the view that it is appropriate to import concepts of automatic disqualification based on perceived or apparent bias as applies in the case of a judicial decision (see, for example, *Ex Parte Pinochet Ugarte* (No. 2) [2001] 1 AC 119). To my mind, the mere fact that the statute appoints the Minister the decision maker rules out any consideration of automatic disqualification. His duty is to determine the appeal based on the facts, the statutory criteria, and any other relevant considerations. To the extent that he has any interest in the outcome, it is an interest in the proper conduct of union elections and the good governance of unions, which is a not an interest that can disqualify him from making the decision on an appeal.

[25] In the absence of evidence that the Minister suffered from actual bias or exercised a closed mind or predetermined the issue—and none of these allegations are made—the claim of bias must also fail. In my judgment, a fair-minded informed observer would readily conclude that there was no real possibility that the Minister's decision was vitiated by the appearance of bias (i.e., the leading test in *Porter v Magill* [2002] 2 AC 257) because he is also constituted an appellate authority for various functions under the Act. The informed observer would know that Ministers are frequently empowered to make administrative decisions or hear appeals from administrative decisions under many different pieces of legislation and, if the applicants were correct, such legislation would be unworkable.

The Constitutional claim

[26] There is another dimension to the challenge, in that the applicants also allege that as a result of these conflicting interests the Minister is not constituted an independent or impartial adjudicating authority for the purposes of article 20(8) of the Constitution. Article 20(8) provides:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instated by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

[27] The respondents' primary attack on this ground was procedural, and they contended that it was not open to the applicants to raise constitutional applications on a claim for judicial review. They relied on the case of *Dwight Armbrister v Hon. Hubert Minnis et. al.* (20201/PUB/jrv/00024), where Charles J. held that "*Courts have determined that judicial review applications which are substantially constitutional matters ought to be refused*", after reviewing a trilogy of Trinidadian cases: *Nixie Quashie v Airports Authority of Trinidad & Tobago* HCA 1220 of 1990 (where Jones J. struck out allegations of breach of constitutional rights in an application for judicial review); *Seereeram Brothers Limited* HCA No. 3123 of 1993, where Jones J., concerned that he might have gone too far in *Nixie,* allowed the allegations of constitutional breaches on the basis that they were illustrative of the breaches of natural justice claimed in the JR; and *In the Application of Corporal No. 10089 Christopher Holder* HCA No. 2581 of 1993 (TT), where Bharath J. held that "*comingling of constitutional matters with errors in administrative decisions are inappropriate for Judicial Review proceedings*."

[28] In the Bermudian Supreme Court case of *Centre for Justice v. The Attorney-General and Minister of Legal Affairs et. al.* [2016] SC (Bda) 72 Civ (11 July 2016), after an exhaustive treatment of the issue, Kawaley CJ, took a slightly more nuanced approached. That case involved a judicial review claim seeking various declarations that the Referendum (Same Sex Relationships) Act 2016 and any referendum held in furtherance of it would contravene certain fundamental rights and freedoms guaranteed in the constitution. Kawaley CJ held as follows:

> "30. Accordingly, while I accepted the Respondent's submission that the purely constitutional relief sought (i.e., the challenge to the validity of primary legislation) fell

> beyond the bounds of judicial review, I found instead that this court's general jurisdiction to grant declaratory and injunctive relief was sufficiently broad to entertain complaints grounded in an allegation that constitutional rights have been or are likely to be contravened without the need for separate application under section 15 of the Constitution. I further found that there was no clear or coherent basis upon which it might be argued that the Applicant, as a public interest litigant, lacked standing to seek declaratory relief under Order 15, rule 16 of the Rules and/or the inherent jurisdiction of the Court."

This case of some interest, because s. 15 of the Bermuda constitution is substantially identical to art. 28 of the Bahamian constitution.

[29] In *Responsible Development for Abaco (RDA) Ltd. et. al. v Rt. Hon Hubert A. Ingraham et. al.* (SCCivApp. No. 139 of 2010), the Court of Appeal affirmed the decision of Longley J., in which the learned judge had found that constitutional claims which were grounded on the same facts as the judicial review claim, constituted an abuse of process. As that Court said:

> "62. Clearly the constitutional relief claim and that of the judicial review application were based on essentially the same facts, and I agree with the learned judge that there was duplicity [duplication] in launching both claims and consequently, the constitutional claim was an abuse of process of the court."

[30] The case law reviewed above clearly shows that as a matter of principle, judicial review is not the appropriate vehicle for seeking substantive redress of fundamental rights, or to challenge the validity of primary legislation. Indeed, there are powerful procedural and substantive reasons why this is so. Firstly, there is a leave hurdle in judicial review, which (though admittedly not high) does not apply to constitutional applications, which can be brought as of right. Secondly, remedies in judicial review are discretionary and may be refused in the interest of good public administration, even when a claim is properly made out. By contrast, constitutional relief is granted as a matter of right where proper grounds are shown. Thirdly, as constitutional remedies are intended to be matters of last resort, mixing them in a judicial review claim is likely to constitute an abuse of process, since common law and other remedies are to be pursued prior to commencing constitutional proceedings. Fourthly, judicial review proceedings are subject to rather strict procedural time limits, which do not attach to constitutional claims.

[31] The upshot of these cases is that an applicant for judicial review, while not necessarily precluded from alleging constitutional breaches as part of his judicial review grounds, or as an incidence or example of the breach, cannot use judicial review to deploy a direct constitutional claim. For example, in the *Armbrister* case, Charles J. refused leave because she found that the "*substance of the application is constitutional*", in that it required a determination of whether a specific article of the constitution (29(2)) had been breached according to constitutional criteria. This was to be distinguished from *Seereeram Bros,* where the constitutional allegations merely amplified the judicial review claim. In other words, using the example of the current application, it would be within the bounds of judicial review to claim that the applicants' right to natural justice was breached in that they were denied the right to a fair hearing, also in breach of the constitutional right as set out at art. 20(8) of the Constitution. But it would be seeking substantive constitutional

relief to claim that s. 13 of the IRA is *pro tanto* void, as being incompatible with art. 20(8), to the extent that it provides for Minister to adjudicate where public unions are involved.

[32] On this basis, I hold that the declaration sought is outside the remit of the application for judicial review.

[33] While the procedural point disposes of the constitutional claim, it should be noted for completeness that it has been decided by apex courts that the ability of a political person or minister to act as decision maker in relation to matters in which he may have also have a policy interest does not *ipso facto* amount to a breach of the right to a fair hearing (see, for example, *R v. Secretary of State for the Environment, Transport and the Regions, ex parte Holdings & Barnes Plc, and Alconbury Developments Ltd.,* [2001] UKHL 23 ("the *Alconbury* case")). In that case, the House of Lords, following jurisprudence from the European Court of Human Rights ("ECHR"), held that the power of the Secretary of State to determine planning applications (including appeals in that regard), did not breach the right to a fair hearing under Article 6 of the European Convention for the Protection of Human Rights (which is the forerunner and in substance the same as article 20(8) of the Constitution), even if it might be said that the Secretary of State did not constitute an independent and impartial tribunal according to the strict meaning of the term. Underpinning this decision and the jurisprudence of the ECHR, was the consideration that the courts were able to exercise sufficient supervisory control over the decisions of the Secretary of State made pursuant to any statute by means of judicial review, and thereby correct any unfairness, making the overall process fair.

Ground 2: Procedural impropriety (right to be heard)

[34] The applicants argue that the process adopted by the Minister in hearing the appeal denied them the right to be heard. This was an important consideration in my granting leave, as it seemed to be the ground potentially with the most merit. In particular, the complaint is that the Minister's letter of 1 June 2021 failed to give them a chance to be heard before rendering his decision. In support, they referred to the leading case of *Ridge v. Baldwin* [1964] AC 40, for the general proposition that the Minister had a duty to comply with the rules of natural justice and to act fairly before exercising a "legal power" which affected the interest of the Applicants.

[35] It may be recalled that *Ridge v Baldwin* was a case involving disciplinary action, and while it remains a leading case in laying down general principles of natural justice and fairness, it is not apposite the facts of this case. There was also a reference to *Council for Civil Servants Union v. Minister for the Civil Service* [1985] 5 AC 374, in particular the speech of Lord Diplock that laid down foundational principles for legitimate expectation, in which His Lordship referred to the principle that a person should be afforded an opportunity to comment before some benefit or privilege which he had enjoyed is revoked. But as no claim was being made to a legitimate expectation (and none is apparent on the facts of this case), this reference does not help the applicants.

[36] The respondents accept that the right to be heard is a "*fundamental principle and every person has the right to have a hearing and present his case*". However, the thrust of their argument on this point is contained in their written submissions as follows:

> "51. Whether or not a person was given a fair hearing of his case will depend on the circumstances and type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. By letter dated July 30th 2020, the Applicants submitted an appeal to the Minister of Labour. Their position and views on the elections of officer's polls was clearly laid out within the contents of the letter. Therefore, it is most disingenuous to approach this court with the view that the process was not fair or that the union was not heard. The appeal letter asked that the matter be reviewed, it did not request a meeting with the Minister to further discuss the appeal, nor is there any requirement to do so. The Minister responded to the appeal letter with his findings."

[37] They referred to *Bahamas Utilities Service and Allied Workers Union v. Water and Sewerage Corp.* [2003] BHS J. No. 389, where the Court of Appeal dismissed a claim by the appellant union from a decision of the Industrial Tribunal in which they alleged they had not been heard (after they absented themselves from the hearing). There, Sawyer P. said:

> "20. It is beyond peradventure that a failure to hear both sides to a dispute is a breach of the rule of natural justice that a tribunal must hear both sides to any dispute which it is called upon to adjudicate. However, a hearing need not be an oral hearing and there is no requirement for any tribunal to postpone the determination of a dispute before it, if one side or the other makes itself unavailable for the timely hearing of evidence and, where necessary, submissions by representatives of the parties, the parties themselves or their counsel and attorneys."

[38] The respondents are clearly right to point out that the duty to act fairly is a protean concept, which will vary depending on the circumstances of the case. This principle was highlighted by the Privy Council in the very recent decision of *Public Service Commission v. Ceron Richards (Trinidad and Tobago)* [2022] UKPC 1, on appeal from Trinidad and Tobago, and only handed down on 31 January 2022. Their Lordships referred to the well-known statements in *R v Secretary of State for the Home Department, ex parte Doody*, [1993] UKHL 8, and *Lloyd v. McMahon* [1987] AC 625, and it is only necessary to reference the latter, in which Lord Bridge of Harwich said [702-703]:

> "…the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, had to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguard as will ensure the attainment of fairness."

[39] In this regard, it is to be noted that the statute does not set out any specific procedure for how the appeal process ought to be conducted. As to process, the respondents indicated that the appeal letter did not request a meeting with the Minister and only asked for the matter to be reviewed. The Minister's approach to the appeal letter may be derived from several passages of his affidavit as follows:

> "18. Nevertheless, within the body of the letter [letter of 30 July 2020], the first Applicant triggered his appeal by asking that I review the matter of the Registrar's non-certification of the BUSAWU Electoral Poll dated June 30th, 2020. However, I did not respond to the first Applicant as the matter was before the courts.
>
> […]
>
> 20. On September 16th, 2020, the Honourable Justice Ian Winder dismissed the application for judicial review against the decision of the Registrar of Trade Unions and directed that the appeal of July 30th, 2020 to me in my capacity continue.
>
> 21. I was informed of the above ruling on September 16th, 2020, and in light of Justice Winder's ruling to allow the appeal to the Minister based on the July 30th 2020 letter from the first Applicant, I continued with my inquiries into the decision of the Registrar of Trade Unions not to certify the poll to respond to that appeal letter.
>
> 22. After the ruling, the first Applicant did not make any further requests of me and/or sent any further letters enhancing their original appeal letter of July 30th, 2020. Hence, it can only be concluded that the Applicants were standing on the contents of the original appeal letter of July 30th, 2020."

[40] I seriously doubt that the Minister's decision to spring into action the very day after the Court of Appeal's decision and determine the appeal based on a letter that had been extant from 30 July 2020, without putting the applicants on notice, was a commendable way of proceeding in all the circumstances of this case. In this regard, it is significant that it does not appear that the Minister ever formally acknowledged the appeal letter (he says he did not respond as the matter was before the court), and consequently it was not indicated to the applicants how the hearing of the appeal would proceed. It is right, as the respondents contend, that the applicants only requested that the Minister "review" the decision, but I do not think the Minister's statutory duty under the IRA can be discharged by simply adhering to what is asked of him.

[41] No submissions were led by the parties as to what should be the proper approach to hearing an appeal pursuant to s. 13, and the applicants do not take any points in this regard—other than to complain that they were not heard. It is obvious from the terms of s. 13 that when acting as an administrative adjudicator to review the primary decision of the Registrar, the Minister is conducting a merits review and entitled to make a new decision based on the material before him, and/or have regard to additional matters not considered by the Registrar. Such is the nature of an appeals process. His affidavit indicates, however, that in addition to reviewing the letter sent by the applicants, he "*made inquiries, reviewed the decision of the Registrar and his reasoning, reviewed relevant Statutes…and case law*" and after "*reviewing the circumstances surrounding the June 30th, 2020 election of officers*" , he decided to confirm the decision. In other words, it appears reasonably clear that the Minister appreciated his appellate function.

[42] But even assuming that the appeal could have been approached in a more inclusive manner, does this necessarily mean that there has been procedural impropriety or a breach of natural justice that would warrant quashing the Minister's decision?

[43] In *R v Chief Constable of Thames Valley Ex p. Cotton* [1990] WL 753309, the UK Court of Appeal was faced with the difficult question of whether, having found that there had been unfairness in the decision-making process, it should decline to interfere merely because the applicant was not able to demonstrate substantial prejudice. In that case, a police constable was dismissed on the grounds of obesity, pursuant to regulations which provided for dismissal where an officer was physically or mentally unfit to perform his duties. In fact, he was allowed the option to resign, which he did, as there was no dispute that he was grossly overweight. But the judicial review was brought on the basis that he was denied natural justice and the decision-making process was therefore vitiated by procedural impropriety. He had been dismissed by the Deputy Chief Constable, who indicated that he was provided with "*a complete file of papers relating to the officer's probationary period*". However, the Chief Constable later recorded in writing a concession that the decision to dismiss the constable had been in breach of the rules of natural justice, as he was not shown one of the reports and had not been allowed an opportunity to comment before the decision was taken to dismiss him.

[44] Simon Brown, J. dismissed the application for judicial review, and the Court of Appeal dismissed the applicant's appeal on the grounds that no unfairness was shown by him. The court conducted a meticulous review of the authorities on the issue and in his speech Bingham LJ said:

> "I would readily accept the views expressed by Lord Denning MR and Cumming-Bruce LJ in *George v. Secretary of State for the Environment* (1979) 77 LGR at 695 and 699 that there can be no such thing as a technical breach of natural justice. That is because, to my mind, a procedure must in all the circumstances of a given case be either fair or unfair. Since (always assuming the absence of a prescribed statutory procedure) the court is concerned with matters of substance and not mere form, a procedure cannot be unfair in a technical sense. There is no third category embracing procedure which are unfair to the subject of the decision as a matter of technicality but not of substance.
>
> Judges of high authority have held that the subject of a decision who has been denied a right to be heard cannot complain of a breach of natural justice (or unfairness) unless he can show that the decision might have been different if he had been heard. In *Malloch v Aberdeen Corporation* [1971] 1 WLR 1579 Lord Wilberforce said:
>
> > "The particular principle of administrative law to which he appeals is that, before his dismissal became effective, he ought to have been given an opportunity of making written representations to or being heard by the education authority. He had asked for this opportunity, and it is admitted that it was refused by the respondents.
> >
> > "The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether

> called a failure of natural justice, or an essential administrative fault, cannot given him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

[45] In fairness to Lord Justice Bingham, however, he did acknowledge that there were authoritative statements to the opposite effect and pointed to a statement by Sir William Wade (Administrative Law, 6th ed., at 573) in which the learned writer referred to "*the dubious doctrine that a hearing would make no difference*". He ended his ruling with the caveat that:

> "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity."

[46] The Board's ruling in *Richards*, however, provides further assurance at the highest judicial level that not every breach of natural justice will result in the decision being vitiated. In *Richards*, the Privy Council affirmed the ruling of the Court of Appeal of Trinidad and Tobago that the failure of the PSC to hear a prison officer before he was placed on administrative leave with full pay, pursuant to the reg. 88 of the Commission's regulations, pending an investigation into the loss of his firearm without giving him a hearing or inviting him to make representation was not unfair. One of the issues in that case was that the Commission failed to review a letter which had been written by the officer explaining the situation, because it was misfiled within the Commission and not brought to their attention. The Board found that the failure of the Commission to consider the appellant's letter did in fact constitute a breach of its duty under public law, as the misfiling was attributable to it.

[47] Obviously, the facts of this case are distinguishable from *Richards*, as in that case an investigation was pending and the suspension was only done at a preliminary stage. But their Lordships made general comments which are worthy of reproducing. Writing for the Board, Lord Sales said as follows:

> "38. However, the Board is also satisfied that if the Commission had considered the 19 July letter it could not have made any difference to the decision to suspend the appellant pursuant to reg. 88. The letter would have told the Commission nothing of relevance more than it knew already: the appellant disputes the allegation of misconduct and he had offered an explanation which required investigation and was being investigated in the appropriate way. Those were the circumstances known to the Commission which had led to it taking the decision to suspend the appellant in exercise of its powers under reg. 88.
>
> "39. Since this is not a case in which there was a right to be heard before the decision was taken and it is clear that the element of unlawfulness present had no impact on the decision, it is appropriate that relief should be refused and that the decision should not be quashed. The case law is consistent on this point: on breach of duty of fairness which clearly has no impact at all on a decision…[citations omitted]."

[48] I am likewise of the view that the failure of the Minister to alert the applicants to the fact that he was considering (or about to complete his consideration of) their statutory appeal, following the Court of Appeal's decision on the 31 May 2021, and to invite them to either appear or make any further written submissions, did constitute a breach of his public law

duty to maintain fairness in the process. But I am also of the view that even if the applicants were given a further opportunity to be heard, that could not have made any difference to the decision.

[49] There was an embarrassment of riches before the Minister with respect to the applicants' claims, and I cannot conceive of anything else they could have brought to his attention. Not only did the Minister have the benefit of the reasons of the Registrar and the information put before him by the applicants, in particular the appeal letter, he also had the views of the Supreme Court on the question (although as the Court of Appeal rightly pointed out he was not bound by those views). In the circumstances, I see no utility in quashing the Minister's decision because of a failure which, while regrettable, does not undermine the decision that was taken.

Ground 3: *Wednesbury* unreasonable

[50] This ground may be disposed of shortly. The applicants in particular say that the irrationality arises from the fact that the Department of Labour is the body which is responsible for supervising the elections, and therefore it is unreasonable for the applicants to be saddled with the consequences of any procedural irregularities arising from its conduct.

[51] The respondents contend that the irrationality claim is fully answered by the finding of Winder J. that the decision by the Registrar to refuse to certify the poll was a far cry from the *Wednesbury* standard, and therefore by parity of reasoning, a decision of the Minister confirming it cannot be unreasonable. They set out the learned Judge's finding on the point as follows:

> "33. In determining reasonableness, the test for the Court is not whether the Court would have made such a decision but the wider one of whether the decision is so unreasonable that no decision maker in similar circumstances, property directing himself, would make such a decision (See: *Council for Civil Service Unions v Minister for the Civil Service* (GCHQ case) [1984] 3 All ER 935). In all the circumstances I am not so satisfied that it can be said that the decision taken by the Registrar is one which no Reasonable Registrar would take in similar circumstances. Whilst the 5 votes in Exuma would not have affected the overall outcome of the elections, it cannot be said that issue, having regard to the authorities, is a trite one. When considered in conjunction with the issue of the Applicants marking of the ballots with their team's stamp, the overall fairness of the election is called into question."

[52] I agree, and find no basis on which the Minister's decision might be impugned on grounds of unreasonableness. As I had occasion to point out in *Alexander Burrows Jr. et. al. v. John Pinder et. al.* [2020/PUB/jrv/00031], judicial review might admittedly not be the best way of reviewing union election results, as procedural and other irregularities which do not affect the numerical outcome of the election might nevertheless vitiate the entire process. But a court or other body or tribunal that concludes that a poll is invalid for non-compliance with statutory requirements cannot be said to have made an unreasonable decision simply

because the consequences of such findings might lead to a draconian or what might be thought an absurd result. This is a problem that has to be fixed by Parliament.

Ground 4: Reliance on facts not found by the Registrar

[53] In respect of this ground, the respondents contend that there is no evidence before the court to suggest that the Minister relied on facts not found by the Registrar. I agree that the affidavits filed by the applicants in support do not indicate what the additional facts were, nor is there any clear reference in the submissions. The contention seems to be predicated on the allegation that the Registrar expressed equivocal views as to whether the symbol printed on the ballots had any prejudicial effect during a meeting with the applicants to discuss their concerns, while the Minister accepted that the symbols were influential in his reasons. The point is misconceived in any event, as in fact the decision letter of the Registrar of 13 July 2020 refusing to certify the poll lists the symbol on the ballots as one of the issues. In any event, as indicated, the Minister in his appellate capacity was not strictly bound by the facts found by the Registrar. I reject this ground as unsubstantiated.

General

[54] The applicants take a further point that the Registrar's decision to direct a new ballot by the letter dated 2 June 2021 (which the court enjoined pending the hearing of the substantive claim) was *ultra vires* his powers under s. 21(1) and (2), on the basis that the sections do not apply to the situation in which the challenged elections were conducted. I only mention this point for completeness, and I reiterate that the JR challenge is to the Minister's decision, not any decision taken by the Registrar. In any event, the point was discussed in *Woods et. al.* and *Alexander Burrows Jr. et. al.*, and the Court of Appeal stated very clearly in the appeal that the combined effect of ss. 20 and 21 was to empower the Registrar to order a new poll if he was not satisfied that a poll was "properly taken". Nothing more needs to be said of this.

CONCLUSION AND DISPOSITION

[55] In all the circumstances of this case, I dismiss the application for judicial review on all the grounds advanced by the applicants and I refuse to quash the decision of the Minister. The injunction staying the Registrar's hand to direct new elections pending the hearing of this claim is hereby discharged, and the Registrar is free to conduct his statutory functions according to law, as may be deemed appropriate in the circumstances.

[56] I order costs to be those of the respondents, to be taxed if not agreed, and thank counsel for their assistance.

15 February 2022

Loren Klein,
Justice