IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

Claim No. 2024/PUB/con/FP/0001

B E T W E E N:

(1) ALBURYS FREEPORT LIMITED

(2) STEPHEN ALBURY

Claimants

and

(1) THE MINISTER OF LABOR

(2) THE VICE PRESIDENT OF THE INDUSTRIAL TRIBUNAL

(3) THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Defendants

BEFORE: The Honourable Mr. Justice Andrew Forbes

APPERANCES: Jacey Wittaker for the Claimants

Sophia P. Thompson – Williams for the Defendant

HEARING DATE: 14th November 2024

RULING ON LEAVE APPLICATION

FORBES J

INTRODUCTION

[1.] This application before the Court is for leave to appeal this Court's decision made on 25 October, 2024. In which the Court dismissed the application for constitutional relief due to *inter alia* the Applicant's claim not meeting the Article 28 proviso.

[2.] This application for Leave to appeal the Judgement was filed on 30 October, 2024 as well as its Affidavit in Support.

[3.] The grounds for appeal, in part, are as follows:

a. The ruling raises significant constitutional questions with concern to the application of Article 28 of the Constitution;
b. The Tribunal in relying on section 57(3) of the Industrial Relations Act permits procedural overreach;
c. The alleged use of unwritten rules and inconsistent practices are contrary to the to the rules of natural justice and denies them predictability;
d. Alleged ongoing procedural violations require immediate constitutional intervention to prevent further rights infringement;
e. Allowing the Tribunal to proceed while questions concerning the constitutionality of their procedure remain unresolved will create a risk of conflicting judgements and repetitive legal processes;
f. The appeal holds a reasonable chance of success;
g. An order;

BACKGROUND

[4.] The brief background to this matter is that on 30 May 2024 the Claimants filed an Originating Notice of Motion. The Claimants sought reliefs in the form of a declaration that the Tribunal's procedural conduct violated the constitutional protections of the claimant, specific court orders mandating the Tribunal to comply with the procedural norms and Costs. The Claimants rely only on the Affidavit of Stephen Albury filed on the 14 July, 2024.

[5.] The Claimants filed an Affidavit of Service on the 6 June, 2024. A Notice of Application along with a Certificate of Urgency was filed on the 12 June, 2022. The application sought to

stay the proceedings in the Industrial Tribunal against the First Defendant until determination in the Originating Notice. The Affidavit of Stephen Albury in support of the application was filed on the 14 June, 2024. An Acknowledgement of Service was filed on the 20 June, 2024. On the 24 June, 2024, an Order dated the 21 June, 2024 was filed. The Order made by this Court granted the stay of pending proceedings in the Industrial Tribunal.

[6.] The Defendant filed an Acknowledgement of Service on the 20 June, 2024, in which laid out its Defence to the application for stay as well as the substantive application before the Court. Further, in Support of the Defendant's Claim, an Affidavit in Opposition to the Notice of Motion for Constitutional Relief was filed on the 26 July, 2024.

[7.] In a written decision the Court granted judgment as described in paragraph 1 above.

THE APPLICATION

[8.] The current grounds for the leave to appeal, in brief, are as follows:

a. The ruling raises significant constitutional questions, including the interpretation of Article 28 and the right to immediate constitutional relief for ongoing procedural breaches. The Applicants argue that the learned Judge erred in concluding that an appeal following the final decision of the Industrial Tribunal provides an adequate remedy, despite the continuing impact of these breaches on the Applicants" rights.

b. The Applicants contend that the Tribunal's reliance on Section 57(3) of the Industrial Relations Act has permitted procedural overreach, including arbitrary ex parte decisions and improper summonses, compromising procedural fairness, which merit appellate review.

c. That the Tribunal's use of unwritten rules and inconsistent practices denies them procedural predictability and transparency, contrary to the principles of due process.

d. The learned Judge's failure to address these procedural irregularities impacts the Applicants" right to a fair hearing and warrants appellate examination;

e. The Applicants submit that ongoing procedural violations require immediate constitutional intervention, as recognized in Minister of Home Affairs. Fisher and Maharaj. Attorney-General of Trinidad and Tobago (No. 2), where timely redress was provided to prevent further rights infringement. This appeal seeks to clarify the availability of real-time constitutional remedies when procedural rights are at risk during ongoing proceedings.

f. Permitting the Tribunal to proceed while the constitutional questions remain unresolved creates a substantial risk of conflicting judgments and duplicative legal processes. An appeal would ensure that the constitutional issues are resolved in that promotes judicial economy, fairness, and a manner consistency.

g. The appeal holds a reasonable prospect of success and raises issues of public.

EVIDENCE

[9.] The evidence in support of this application is the Affidavit of Sheila Taylor, which reads more as submissions rather than evidence as required by Part 30(3) of the Civil Procedure Rules (CPR), states, in part:

a. That she is a Paralegal employed at the law firm of Messrs. Parris Whittaker, and she is authorized to make the Affidavit on behalf of the Claimants.

b. That the Article 28 is designed to prevent ongoing rights violations;

c. That the ruling of the Court allows the Tribunal to exercise powers beyond the intended scope of Section 57(3);

d. That the Tribunal's employment of inconsistent practices denies the Claimants transparency and predictability in proceedings.

e. That an appeal following the Tribunal's final decision would be insufficient to address ongoing breaches impacting procedural fairness; and

f. The appeal raises issues of public importance concerning the procedural safeguards within administrative tribunals and enforcement of constitutional rights.

[10.] Both Counsel laid over submissions to the Court to which the Court considers in its judgement.

LAW

[11.] Firstly, the requirement for leave to appeal only applies to interlocutory orders. Section 11(f) states:

> "11. No appeal shall lie ...,
> (f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court except;
>
> (i) where the liberty of the subject or the custody of infants is in question;
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> (ii) where an injunction or the appointment of a receiver is granted or refused;
>
> (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;
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> (iv) in the case of an order in a special case stated under the Arbitration Act;

(v) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise; or

(vi) such other cases to be prescribed as are in the opinion of the authority having power to make rules of court, of the nature of final decisions."

Therefore a final order does not require leave to appeal.

[12.] When determining what is a final order the decision of **Peace Holdings v First Caribbean Bank** [2014] 2 BHS J No. 73 is helpful, as it applied the Privy Council ruling of **Salaman v Warner and Others** [1891] 1 QB 734 at 735, the Court of Appeal determined that:

> 'The **question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final.** On the other hand, **if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final but interlocutory**'."

[13.] The Court dismissed the substantial constitutional claim and therefore disposed of the matter in dispute. Had the Court ruled for the Plaintiff, the matter too would be disposed of and, therefore, the Court is of the view that the order is final and does not require leave.

[14.] Nonetheless, in the instance the Court of Appeal is of the view that the matter is interlocutory the relevant law is discussed below.

[15.] The law in relation to leave to appeal is well established. Section 11(f) (ii) states that no appeal of an interlocutory Order shall lie without leave to appeal.

[16.] The test to be applied for the consideration for grant of leave to appeal is stated in **Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments)** [1999] 1 WLR 2 at para 10-11:

> "The general test for leave
> 10. **The general rule applied by Court of Appeal, and this is the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success.** A fanciful prospect is insufficient. **Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for consideration.**
> 11. The approach will differ depending on the category and subject matter of the decision and the reason for seeking leave to appeal, as will be indicated below. However, **if the issue to be raised on the appeal is of general importance that will be a factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave."**
>
> [Emphasis added.]

[17.] Further, when examining what is considered an 'exceptional circumstance' **Smith v Cosworth Casting Process Limited** (1997) 4 All ER 840 as the principles established are as follows:

> (1) The **court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal.** This test is not meant to be any different from that which is sometimes used, **which is that the applicant has no arguable case.** Why however this court has decided to adopt the former phrase is because **the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**
> (2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. **For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying."**
>
> [Emphasis added]

[18.] The test is further summarized in the case of **Keod Smith v Coalition to Protect Clifton Bay** SCCivApp. No. 20 of 2017 at paragraph [23] where it is stated the considerations before the Court are:

> "whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying".

[19.] Therefore, in order for leave to be granted, the Court must be satisfied that there is a reasonable chance of success or more plainly an arguable case. Moreover, where there is no reasonable prospect of success the Court can grant leave in exceptional circumstances as a concern of public interest or interpretation of law.

ISSUES TO BE DETERMINED

[20.] The issues to be determined are as follows:

a. Whether there is a reasonable prospect of success; and/or
b. Whether the issue before the Court is one of exceptional circumstances.

APPLICATION

Whether there is a reasonable prospect of success?

[21.] The Court in paragraph 37 and 38 of its ruling delivered on 25 October, 2024 stated:

[37.] However, at its very core the question is whether an "adequate means of redress" is or was afforded to the Applicants at the time of making this motion before the Supreme Court.

There are two requirements that the Applicant are to meet and it is evident to this Court that they have failed to meet either.

[38.] The Court notes Article 28 (3) which provides:

> (3) If, in any proceedings in any court established for The Bahamas other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the provisions of the said Articles 16 to 27 (inclusive), the court in which the question has arisen shall refer the question to the Supreme Court.

It is the Court's view that the basis of this issue is a procedural disagreement based on the rules/law provided for in the Industrial Relations Rules, Chapter 321. This is an issue of law based on a decision would ordinarily fall at the feet of the Supreme Court if there was no adequate means of redress. However, it is the view of the Court that there is.

[22.] There have been countless decisions of law that have considered the section 28 proviso or its equivalent in other jurisdictions. Namely the cases of **The Attorney General v Siewchand Ramanoop** [2005] UKPC 15 at para 24 *Lord Nicholls of Birkenhead*, when discussing whether to invoke "the section 14" procedure (the equivalent to our Article 28) stated:

> 24. In **Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant.** Speaking in the context of judicial review as a parallel remedy, Lord Diplock **warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action.** Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. **Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268**
>
> [Emphasis added]

[23.] Therefore, it is settled law, in statute and common law, that where there is an adequate "parallel remedy" the Court is not permitted to exercise its power permitted by section 28 (1). This was the basis for the Court's ruling.

[24.] Further, it was brought to the Court's attention that the Claimants brought three civil actions concerning the persons mentioned in this action for a cause of action stemming from the employment and benefits of the persons mentioned, further proving that there was an adequate remedy which could've been applied and thus, no need for a jump to the constitutional motion before this Court.

[25.] Further, obiter, at paragraph 35, the Court mentioned section 70 of the Fourth Schedule which outrightly prevents the Court's interference with the Tribunal's power. Specifically the Court stated:

> [35.] Further, section 70 of the Fourth Schedule of the Industrial Relations Act states:
> 70. (1) Subject to subsection, (2) a decision of the Board in any matter before it under this Act - **(a) shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever;** and
> (b) **shall not be subject to prohibition, mandamus or injunction in any court on any account whatever, and as respects any trade dispute referred to it under this Act shall be binding on the employers and employees to whom the award relates.**
> (2) **Any party to a matter brought before the Board shall be entitled, as of right, to appeal to the Court of Appeal on a point of law from any decision, order or award of the Board, and the decision of the Court of Appeal on any such appeal shall be final.**
> [Emphasis added]

[26.] At no point did the Court assert that the Tribunal possesses an unlimited power. Simply, the Court ruled that the Supreme Court is not the appropriate forum.

[27.] Moreover, orally Counsel submitted that the section 70 of the Forth Schedule is only applicable to "the Board" and thus ought not be considered when concerning "the Tribunal", its powers, and its alleged Statutory protection.

[28.] However, the Court notes *Hall JA's* judgement in the case of **The Hotel Corporation of The Bahamas v Bahamas Hotel Managerial Association** Civil Appeal No 12 of 1999 in which he stated:

> "Substantial amendments were made to the Act in 1996 (Act No. 9) and 1997 (Act No. 1). Section 6 of Act 9 of 1996 inserted Part IVA (sections 53A through 53N) into the principal Act which created the urrent regime of the Industrial Tribunal", Other provisions of Act 9 of 1996 abolished the system of arbitration tribunals.
> Act 1 of 1997 repealed Part V of the Act, abolishing the Board and conferring on the Tribunal functions hitherto performed by the Board."

[29.] Therefore, it is the Court's understanding that the new regime caused by the amendments gave the Tribunal the protection as mentioned pursuant to section 70 of the Fourth Schedule by abolishing the Board.

[30.] With consideration to the above-mentioned I see no reasonable prospect of success as there is no arguable case of merit that is likely to have a different outcome on appeal.

Whether issue before the Court is one of exceptional circumstances?

[31.] The Court not being satisfied that there is a reasonable prospect of success on appeal moves to determine whether this appeal/issue meets the threshold of being an exceptional circumstance.

Public interest.

[32.] In Clamant Counsel's pleadings and on his feet he alleged that the Tribunal's use of "inconsistent" practices has been a hindrance to natural justice for not only him but to other counsel/laypeople operating in the Tribunal as well. However, at the time of the hearing, there was only the word of Counsel Whittaker. There is no Affidavit evidence nor Witness Statement to support this claim of alleged breaches for the Court's consideration.

[33.] There is nothing of evidential value besides Counsel's anecdotal evidence that can assist the Court in determining whether there was an actual public policy issue.

Interpretation/ Clarification of Applicable law.

[34.] The Court reiterates that the basis of the ruling was that the conditions of the Article 28 proviso were not met. Therefore, in reliance on the previous Privy Counsel decisions the Court is not allowed to exercise its power given by Article 28.

[35.] Moreover, with reliance on the fact that after the various amendments, "the Board" was abolished and its powers and protections were conferred to The Tribunal. (see **The Hotel Corporation of The Bahamas, *supra***) the Court cannot state that the law was misinterpreted nor ambiguous and requires the consideration of the learned Appellate justices.

[36.] Therefore, the Court is not satisfied that the current matter is an exceptional circumstance, as it does not meet the criteria of proving that an issue to be determined is of great public importance nor that there is a law that needs clarification.

DISPOSITION

[37.] The Court notes that Counsel for the Defendants filed an Application to quash the Stay ordered on the 21 June, 2024 and filed on the 24 June, 2024. However, the Court notes that;

> All proceedings currently pending before the Industrial Tribunal in the matters of:
>
> (a) Siyyid Campbell v AFL – IT/NR/NES/008/2024
>
> (b) Garanique Williams v AFL - IT/NR/NES/027/2024
>
> (c) Patrick Adderley v AFL -IT/NR/NES/030/2024

Are hereby stayed **pending the final determination of the constitutional motion before this Honourable Court**.

The Industrial Tribunal is hereby prohibited from taking any further action or making any orders in the aforementioned cases **until the resolution of the constitutional motion by this Honourable Court.**

[38.] The Court above is of the view that the Judgement delivered on the 25 October, 2024 is final and resolves the constitutional motion before this Honourable Court. Therefore, the Stay of Proceedings ordered on the 21 June, 2024 is quashed.

[39.] Application for leave to appeal is denied. Moreover, the application to quash the stay order is granted. No order is made as to cost.

Dated the 28 November, 2024

Andrew Forbes
Justice of the Supreme Court