In The Supreme Court of Bermuda

CIVIL JURISDICTION

2008: No. 171

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN ARBITRATION AWARD BY THE PERMANENT POLICE TRIBUNAL

BETWEEN:

THE MINISTER OF LABOUR, HOME AFFAIRS AND HOUSING

Applicant

-v-

THE PERMANENT POLICE TRIBUNAL

Respondent

-and-

THE BERMUDA POLICE ASSOCIATION

Party Affected

RULING

Date of hearing: November 21, 2008

Date of Ruling: November 28th, 2008

Mr. Huw Shepheard, Attorney-General's Chambers,
for the Applicant

Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates,
for the Respondent

Mr. Alan Dunch, Mello Jones & Martin,
for the Party Affected.

Introductory

1. The Applicant seeks orders of certiorari and mandamus in respect of a June 11, 2008 decision of the Permanent Police Tribunal to the effect that what is known as the "Combined Allowance" should be regarded as part of the salary of police officers.

2. Leave was initially granted in respect of a wider range of complaints on July 9, 2008. However, as a result of a Memorandum of Agreement dated October 7, 2008, at a directions hearing before me on October 9, 2008, leave was sought and granted to amend the Notice of Application filed on July 3, 2008. The effect of this amendment was to limit the scope of the application to item 1 of the decision and grounds 1 and 2 of the original grounds. The first of these grounds alleges that the Tribunal erred in law in dealing with Combined Allowance at all, even though that issue was the first item in the terms of reference set by the Applicant himself. The second complains, in the alternative, that the Tribunal erred in law by failing to have regard to the impact of its decision on the financing of the Public Service Superannuation Fund.

3. At the October 9, 2008 directions hearing, I ordered on the Court's own motion that Applicant's standing to seek judicial review ought to be determined as a preliminary issue because an application by a Minister on behalf of the Crown appeared to me to be unprecedented. At the hearing of the preliminary issue, Mr. Dunch and Mr. Harshaw both made it plain that since a substantive hearing was now fixed for February 9-11, 2008, and if the present proceedings were struck-out fresh proceedings could still be commenced by a more appropriate applicant, they would not oppose any application made on behalf of the Government to substitute an alternative party.

4. Accordingly, contrary to my provisional view at the directions hearing, the submissions of counsel made it plain that there is no question whatsoever of the entire proceedings being resolved by the determination of the preliminary issue. These submissions also explained why the Respondent and the Party Affected had not made any attempt to summarily strike-out the present application. Moreover, the various grounds on which relief was sought at the initial leave application,

looked at as a whole, raised no obvious questions about the standing of the Minister.

5. Nevertheless, in what appears to be the first case in Bermuda of judicial review being sought by a Government Minister against a public body, it is important to clarify who the proper applicant is for both practical and theoretical reasons which only became clearly apparent once the scope of the present application was narrowed, focusing attention on the Combined Allowance issue. Hopefully, rather than serving as a bridge to nowhere, the preliminary issue hearing will serve to avoid the possibility of points being raised at trial resulting in avoidable delays and wasted costs in this matter.

The Bermuda statutory position

6. Section 10 of the Administration of Justice (Prerogative Writs) Act 1978 provides as follows:

> ***"Orders of mandamus, prohibition and certiorari***
> *10 (1) In any case where the High Court in England would issue an order for mandamus requiring an act to be done, or an order of prohibition prohibiting any proceedings or matter, or an order of certiorari removing any proceedings or matter into the High Court for any purpose, the Supreme Court may make an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be.*
>
> *(2)Such orders shall be called respectively orders of mandamus, of prohibition and of certiorari.*
> *(3)An application for an order referred to in subsection (1) shall by way of originating summons:*
> *Provided that unless the Supreme Court for special reasons otherwise orders the hearing shall be in open court.*
> *(4)An application for an order of mandamus shall be made within two months of the day on which the refusal to act took place; an application for an order of certiorari shall be made within six months of the proceedings the subject of the complaint:*
> *Provided that the Supreme Court may for special reason extend either of such periods.*"

7. Prior to the 1978 Act's enactment, Bermuda's judicial review jurisdiction derived from the Court's general jurisdiction as Mr. Shepheard's diligent researches helpfully pointed out. Section 12 of the Supreme Court Act 1905 provides that this Court shall possess and enjoy the jurisdiction previously (prior to June 6, 1905) enjoyed by, *inter alia*, the Court of General Assize. The Court of General Assize was first established in Bermuda in the first half of the seventeenth century, although the first substantive statute regulating the local courts was not

apparently enacted until 1691. This and subsequent legislation was repealed by the Courts Act 1814, section II of which conferred on the Court of General Assize the same jurisdiction as was enjoyed by the English Court of Kings Bench (and related courts). However, in seemingly the first Bermudian statutory reference to judicial review, section 1 of the Court Act 1874 provided in salient part as follows:

> "*Within the meaning of this Act the Criminal Sessions of the Court of General Assize shall be construed to mean the sessions of the said Court when taking cognizance ad holding jurisdiction in like manner as the Court of Queen's Bench at Westminster or as the Queen's bench Division of the High Court of Judicature of England, of Pleas of the Crown,* **and other business now or heretofore pertaining or relating to the business on the Crown said of the said Court**..." [emphasis added]

8. So although Mr. Shepheard is correct that historically what was known as Crown Office matters were quasi criminal in character, once the Administration of Justice (Prerogative Writs) Act 1978 came into force, the general jurisdiction of this Court under section 12 of the Supreme Court Act 1905 and the common law was supplanted by the particular jurisdiction conferred under the 1978 Act. The Bermudian jurisdiction today is the same as that in England, not just because of the adoption of Order 53 with effect from January 1, 2006, but more fundamentally because of section 10 of the 1978 Act. Since all section 10 does is, in effect, to say that English law on orders of certiorari, prohibition and mandamus applies as a matter of Bermuda law, the modern Bermudian jurisdiction can only be ascertained in substantive terms by reference to English statute law and relevant case law in this regard.

9. Two English statutory provisions are of direct relevance. Firstly, section 29(1) of the Supreme Court Act 1981 provides: "*The High Court shall have jurisdiction to make orders of mandamus, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of this Act.*" This retrospective provision effectively requires reference to case law to determine the qualifying classes of case in which the relevant orders may be granted. And section 31(1) (a) of the same statute simply provides that an application for an order of mandamus, prohibition or certiorari "*shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.*" Bermuda's rules of court since January 1, 2006 have embodied an Order 53 modelled on the equivalent English rules.

Can the Crown and/or Government Ministers properly apply for judicial review?

10. Although there appears to be no direct local precedent for the Crown or a Government Minister seeking judicial review, and few prominent English precedents, it is in fact clear that such applicants do possess the standing to do so. The most succinct and direct academic support that I have found for this proposition is the following[1]:

> "*The prerogative remedies, being of a 'public' character as emphasised earlier, have always had more liberal rules about standing than the remedies of private law. Prerogative remedies are granted at the suit of the Crown, as the titles of the cases show; and the Crown always has standing to take action against public authorities, including its own ministers, who act or threaten to act unlawfully.*"

11. The absence of recent local precedents for Crown judicial review applications may be due in part to the comparatively liberal appeal rights conferred on the Crown in criminal cases. Most of the Crown judicial review applications in England appear to relate to summary criminal proceedings where Crown rights of appeal would exist in Bermuda[2]. There are perhaps not many public tribunals in Bermuda required to finally adjudicate disputes between citizens and the Government without any right of appeal to this Court. And to the extent that the Government may be perceived as "controlling" such tribunals, it will perhaps be rare that the public interest will require any decisions in favour of the citizen and against the Government to be challenged. This is because the dominant focus of judicial review is the impact of public action on the individual citizen[3]:

> "*In recent years, it is increasingly being realised that in a constitutional democracy the role of judicial review is to guard the rights of the individual against the abuse of official power.*"

12. Mr. Shepheard supported his submission that the Applicant Minister possessed the *locus standi* to apply for judicial review by reference to an extradition case, *R-v-Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department* [1989] 1 All ER 151. This submission in general terms was not challenged by Mr. Harshaw or Mr. Dunch and is fundamentally sound. After the hearing the following local precedent came to my attention. In *Giles –v- Cooper* [1988] Bda LR 76, Sir James Astwood CJ (as he then was) granted declaratory relief on the prosecutor's application for an order of certiorari to quash an order of

[1] Wade & Forsyth, 'Administrative Law', 9th edition (Oxford University Press: Oxford, 2004) at page 684.
[2] It is true that public bodies established to protect citizens' rights have also sought judicial review. See e.g.: *R-v-Chief Constable of Thames Valley, Ex p. Police Complaints Authority*.
[3] Woolf, Jowell and Le Sueur, '*De Smith's Judicial Review*', 6th edition (Sweet & Maxwell: London, 2007) paragraph 1-010.

the Magistrates' Court binding over a defendant without convicting. The jurisdiction to entertain a Crown application for judicial review was not doubted.

Is the Applicant a person with sufficient interest to pursue the present application for the purposes of Order 53 rule 3(7) of the Rules of the Supreme Court?

13. This question falls to be determined on both a technical basis and a practical basis, bearing in mind that this question ought ordinarily to be determined at the substantive hearing when all the facts are clear. From Mr. Harshaw's helpful written submissions, it is clear that this issue should only be dealt with as a preliminary issue where it is properly open to the Court to deal with it as a discrete issue. I accept the submission that this is an appropriate case for such a preliminary determination. The crucial question is whether the Minister for Home Affairs is the appropriate legal person to be named as Applicant in respect of the matters complained of herein, it being accepted that if he is not, the appropriate legal person may be substituted in his place.

14. After an elaborate analysis of the legal distinction between "*the Government*" and a "*Minister*", under both the Bermuda Constitution and the Police Act 1974 ("the Act"), Mr. Harshaw concluded that the Minister was not a person for the purposes of Order 53 rule 3(7). I am unable to accept that submission as a general proposition divorced from an analysis of the specific relief which the Minister now seeks from this Court. It is correct that the Constitution distinguishes between "*the Government*" (a term defined in section 102 of the Constitution and section 3 of the Interpretation Act 1951) and individual Ministers. It is true that section 44 of the Interpretation Act declares that the Government is a "*corporation sole*". But it does not follow that Government Ministers are merely office holders with no legal right to sue. The 1989 revision of the Crown Causes Act 1951 states as follows: "'*the Crown' includes a Minister, Government Department and a Government Board*" (section 1(1)). In providing permissively for the style of Crown causes, this Act assumes that a Minister may have a claim on behalf the Crown. Section 14 of the Crown Proceedings Act 1966 also expressly provides that Ministers may be sued on behalf of the Crown. Although these Acts do not apply to judicial review proceedings, the underlying principle should be one of general application. The Government collectively and Ministers individually are as much officers of the Crown under Bermuda's Constitution as they are under the British Constitution. Section 56 of the Constitution provides in salient part as follows:

> *"56 (1) The executive authority of Bermuda is vested in Her Majesty.*
>
> *(2) Subject to the provisions of this Constitution, the executive authority of Bermuda may be exercised on behalf*

of Her Majesty by the Governor, either directly or through officers subordinate to him."

15. The Respondent's counsel was entirely correct in pointing out that the Applicant was not the other party to the proceedings before the Permanent Police Tribunal; the other party was clearly the Government under the scheme of the Act. But this fact alone would not in my judgment lead to the inevitable conclusion that the Minister lacked sufficient interest to apply in the public interest for judicial review in respect of proceedings in which he was not directly involved. His role in setting the terms of reference for the Tribunal, and circulating the decision to the parties after the hearing, are consistent with the obvious fact that the Minister is politically responsible for overseeing Police matters generally. In general terms the Minister does have sufficient interest in Tribunal decisions under the Act to qualify as an applicant with sufficient interest, even if he may not invariably be the most interested potential applicant on behalf of the Crown. What is crucial in the present application is to determine whether the nature of the complaints raised impact to any material extent on the general position just described.

Does the Minister have standing to pursue the present application?

16. As a result of a post-Tribunal agreement between the Government and the Party Affected, only the following two grounds of seeking judicial review are now being pursued:

> "*1. In reaching its decision on whether the Combined Allowance paid to police officers of or below the rank of Chief Inspector for the years 2005-2006, 2006-2007 and 2007-2009 should be included in the officers' salaries and be made pensionable, the Permanent Police Tribunal erred in law and acted beyond its powers in that section 29A(5) of the Police Act 1974 specifically excludes questions of pensions from the ambit of an agreement under Part VA of the Act and the Tribunal is appointed under section 29C(1) of the Act to settle matters referred to it for the purposes of Part VA of the Act.*
>
> *2. Further or in the alternative, in reaching its decision on the pensionability of Combined Allowance, the Tribunal erred in law in that it failed to take into account a relevant consideration, namely the effect of its award on the Public Service Superannuation Fund.*"

17. In my judgment the Minister lacks standing to pursue the ground 1 but, at least arguably, may pursue ground 2. Mr. Shepheard was clearly astute enough to appreciate the difficulties with the Minister complaining that the Tribunal had no jurisdiction to consider the Combined Allowance issue. It is common ground that the first item of the terms of reference drawn up by the Minister for the purposes of the proceedings before the Tribunal stated as follows:

"*Whether the Combined Allowance should be added to their pay, which would make it pensionable.*"

18. It is also common ground that Mr. Shepheard appeared as counsel for the Government before the Tribunal, dealt with this issue on its merits and did not raise any jurisdictional objections to the point being considered. This is hardly surprising, because when the Minister set out the terms of the reference for the Tribunal in his letter of November 23, 2007, he had formally requested the Tribunal to consider this very issue. It is certainly arguable that the Act does not empower the Tribunal to adjudicate disputes relating to pensions. This flows from section 29A(1), which empowers the Police Association to give notice of its "*wish to enter into negotiations with the Government for the making of ...an agreement.*" Agreement is defined in section 29A(5)as an agreement dealing with various matters, "*but not any question of retirement or pension*…" Where there is a failure to agree, the matter shall in the first instance be referred to conciliation under section 29B.

19. Section 29F then provides in salient part as follows:

> "*(1) Subject to subsection (2), where the conciliator has reported under subsection (4) of section 29N that a matter referred to him under that section has not been settled by conciliation, the Minister shall within fourteen days refer the matter to the Tribunal for arbitration in strict accordance with terms of reference provided by him.*
>
> *(2) The Minister shall provide the Minister of Finance with a copy of he terms of reference in draft, and shall consult the Minister generally about the terms of reference provided by him.*"

20. The Court is asked to accede to the complaint that the Tribunal had no jurisdiction to deal with the Combined Allowance issue, despite the fact that it may be assumed that (a) the issue formed the subject of negotiations, (b) the issue was referred to conciliation, and (c) the issue was approved as a draft term of reference by the Minister of Finance before being finalised as the first item in the Minister's terms of reference. Acceding to this part of the Application will clearly require the Court to find that (1) the Government acted unlawfully in negotiating about a pension issue in contravention of section 29A(5), (2) that the Minister of Finance acted unlawfully in failing to object to the issue being included in the draft terms of reference prepared by the Minister (alternatively the Minister contravened section 29F(2) by failing to obtain the Minister of Finance's approval), and/or (3) that the Minister acted unlawfully in referring a prohibited issue to the Tribunal. Bearing in mind the presumption of regularity in relation to official acts, these are

conclusions this Court should not lightly reach. In any event, the Crown has filed no evidence to date which appears designed to rebut the presumption that the Minister validly referred the Combined Allowance issue to the Tribunal for its determination[4].

21. Mr. Dunch submitted that this ground was misconceived, properly construed in its context, because the Combined Allowance issue was not a pension issue at all. It was a characterisation of salary issue, which merely consequentially impacted upon pensions. This point is certainly arguable[5] but has no direct bearing on the question of who has the standing to assert ground 1 of the present judicial review application. It is also too fact sensitive to be determined at this stage.

22. What does seem obvious in legal terms assessed with reference to agreed facts is that the jurisdictional complaint requires the Court to conclude not simply that the Tribunal erred in law, but did so against a background in which the letter and/or spirit of the Act was contravened by both the Government and the Minister. It does not lie in their mouths, in this specific statutory context, to complain that the Tribunal (under an express statutory duty to strictly follow the terms of reference set by the Minister) acted unlawfully in doing just that.

23. Accordingly, I find that as regards Ground 1, the Minister lacks sufficient interest to make the application. The Crown is at liberty to apply to amend to substitute another Applicant, should this difficult ground be pursued. Without deciding this matter, an appropriate substitute applicant would appear to be either "the Attorney-General" or "Regina".

24. None of these concerns apply to Ground 2, which presupposes that the Combined Allowance issue was properly before the Tribunal which erred in law by failing to have regard to a relevant consideration. While it could be argued that the Government or, perhaps, the Minister of Finance, had stronger interests, no substantial objection to the right of the Minister to pursue this complaint truly arises.

25. No doubt careful consideration will be given by the Applicant's counsel to the viability of this ground, as presently formulated, as well. The complaint that the Tribunal "*failed to take into account a relevant consideration, namely the effect of its award on the Public Service Superannuation Fund"*, on its face is not obviously strong. The undisputed evidence[6] now before the Court suggests that the Tribunal could not have decided that the Combined Allowance should be treated as salary without considering and rejecting the opposing argument that to

[4] The assertion that the Tribunal in December 2007 indicated that it would not deal with this issue is contradicted by the fact that the parties both made submissions on this issue to the Tribunal before its decision.

[5] It would also provide a simple explanation as to why all parties concerned were content to deal with the Combined Allowance issue in the first place.

[6] I ignore for present purposes the Tribunal Chairman's un-contradicted evidence that the representations made by Government on this issue were actually considered.

do so would be (a) too costly directly in and of itself, and (b) be too costly, indirectly, if the award was used as a precedent by other workers[7]. It is true that the decision explicitly dealt only with the latter issue, but it does not necessarily follow that this means the Tribunal failed to consider the affordability issue.

26. Any application for leave to clarify the basis of the application, be it by way of amendment of the pleadings or further evidence, should obviously be undertaken as soon as possible to avoid any delay in the presently scheduled substantive hearing.

Summary

27. As far as Ground 1 of the application is concerned, the Minister lacks standing to seek relief on grounds which imply that he facilitated the error of law complained of. Should this ground be pursued, leave to amend to substitute the Attorney-General or the Queen as Applicant is granted. No standing problems arise in respect of Ground 2.

28. The present hearing was directed by the Court and was in effect a case management hearing. Unless any party applies by letter to the Registrar within 14 days to be heard as to costs, I would order that the costs of the preliminary issue hearing shall be costs in the cause.

Dated this 28th day of November, 2008

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KAWALEY J

[7] 'Government's Outline Position', written submissions of Huw Shepheard dated February 6, 2008: page 16 of Exhibit "ADOH-1" to the Affidavit sworn by Tribunal Chairman Arthur Hodgson on August 19, 2008.