In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 99

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER THE RULES OF THE SUPREME COURT 1985

BETWEEN:

JANICE FLEMING

Applicant

-and-

DIRECTOR OF LABOUR AND TRAINING

Respondent

Date of Hearing: 16th August 2013

Date of Judgment: 18 December 2013

H. J. Tucker of Appleby for the Applicant
S. J. Dill Crown Counsel for the Defendant

RULING

The Application

1. This matter commenced by Notice of Application for leave to apply for Judicial Review dated the 1st of April 2013 as amended under order of the court of the 16th of May 2013.

2. The Applicant seeks (1) An Order of Certiorari to quash the decision of the Respondent for refusing to refer the Applicant's complaint to the Employment Tribunal; (2) A Declaration that the Respondent wrongfully refused to refer the Applicant's complaint to the Employment Tribunal and (3) An Order of Mandamus to oblige the Respondent to reconsider its decision as to whether to refer the Applicant's complaint to the Employment Tribunal.

3. The main particularised grounds of complaint were that the Respondent's decision not to refer the complaint to the Employment Tribunal:

i. was unlawful by reason of its employee, Mr Glen Lake, failing to have regard to his duty under Sections 37 (1) (b) and 37 (4) (a) of the Employment Act 2000 (the Act) to conduct an inquiry and refer a complaint to the Tribunal where he has reasonable grounds to believe that an employer has failed to comply with a provision of the Act;

ii. was irrational as no reasonable person having the position of Employment Inspector could have believed that there were no reasonable grounds to believe there had been a breach of section 8 or any other part of the Act;

iii. was irrational for not referring any matters outside the scope of section 8 of the Act in circumstances where its decision is inconsistent with an express attempt to mediate such complaints; and for failing to notify the Applicant of its decision not to refer her complaint for some 18 months after receiving the information which it relies upon as the basis for its decision;

iv. further, or in the alternative, was unlawful by reason of the apparent failure to apply his power in a manner which does not contravene Constitutional Rights.

4. Pursuant to Order 53 Rule 3 (3) I granted leave without the necessity of a hearing. The Registrar of the Supreme Court signed said order in my absence pursuant to the powers vested in that office.

5. The Originating Motion was filed and a date was set for the hearing on the 16th of May 2013, which as events turned out came on to be treated as a directions hearing. An application was made by counsel for the Applicant to amend the Notice of Motion to include the Declaration referred to in paragraph 2 above. Directions were given for a contested hearing with a mention date fixed for the 30th of May 2013.

6. A Consent Order was entered dated 30th May 2013 for further directions and for a date to be set in open court for the hearing of the application.

Background Facts

The Plaintiff's Employment History

7. The Applicant was employed by Flanagan's Irish Pub and Restaurant (Flanagan's) for six years from 2004 until 2011. She was first granted a work permit in December 2004 for three months and thereafter on each January for the duration of one year, six further work permits were issued.

8. All permits up until the 3rd of January 2008 to the 3rd of January 2009 referred to the Applicant as working in the capacity of Food and Beverage Server. By the terms of her contract of employment she was remunerated at $5.50 per hour as her gross pay;

had a joint interest with other servers in the 15% service charge added to a customer's bill; and the whole of any sums added voluntarily by a customer to their credit card receipt or left in cash.

9. The last two permits reflected a promotion and referred to her in the capacity of Assistant Manager. The terms of her contract of employment provided that she would work a minimum of 20 hours per week in each capacity of Assistant Manager and Food and Beverage Server. The gross pay for Assistant Manager was stated to be $12.50 per hour.

10. It is the Applicant's case that on or about the 21st of March 2010 without prior warning in writing or otherwise she was demoted from Assistant Manager to Food and Beverage Server with consequential reduction in pay. It is her position that the reduction in pay was a breach of section 8 and or section 24 (2) of the Act and a breach of her contract of employment.

11. It is the Applicant's case that Flanagan's made unlawful deductions from the pool of funds constituted by the 15% service charge. Further, that on sundry occasions Flanagan's made summary deductions from wages without the employee's consent.

12. Thereafter, Flanagan's produced a letter to the Applicant which expressly stated that contrary to previous understandings they would not continue to employ the Applicant after the 3rd of January 2011 for reasons of disruptive behaviour and inability to work with management.

13. Flanagan's did not apply for a further work permit for the Applicant.

14. In all the circumstances the Applicant resigned on the 30th of December 2010 pursuant to section 29 of the Act.

Complaint to the Employment Inspector

15. The Applicant made a formal complaint to the Respondent on the 11th of January 2011 through Mr Glen Lake, Labour Relations Officer. At that time Mr Lake was provided with correspondence that had passed between attorneys for the Applicant and for Flanagan's and copies of the Applicant's pay slips. Mr Lake indicated that he would do several things including contacting Flanagan's to arrange a meeting to resolve the dispute.

16. Between the 11th of January 2011 and the 12th of April 2011 attempts at mediating the dispute proved unsuccessful notwithstanding an offer of settlement by the Applicant for an expressed sum. Thereafter, various letters passed between said attorneys between April 2011 and July 2011 concerning inter alia the deductions from the service charged complained of.

17. The Applicant's attorney wrote to the Respondent on the 2nd September of 2011 confirming that the matter was still in dispute and requesting a further attempt at a

resolution. The Applicant's attorneys sought confirmation that failing resolution the matter would be referred to the Employment Tribunal (the Tribunal). Mr Lake for the Respondent replied by letter of the 6th of September 2011 that he would contact Flanagan's and revert to the Applicant's attorney.

18. Notwithstanding several written requests for an update from the Respondent over a period of some 10 months the Respondent did not attempt to arrange a meeting until September 2012 for an October date. The Applicant had not resided in Bermuda since about the 24th of April 2011 and was not available for the meeting.

19. On the 29th of October 2012 the Respondent requested that the Applicant make an offer of settlement to Flanagan's. On the 20thof November 2012 the Applicant made an offer of settlement on certain terms. Mr Lake indicated that he would have a conversation with Flanagan's attorney as he believed that the matter could be resolved without recourse to the Tribunal. The terms were not met and the Applicant's attorney wrote to Mr Lake seeking a transfer of the complaint to the Tribunal.

20. By letter of the 13th of February 2013 Mr Lake for the Respondent informed the Applicant that he determined that Flanagan's had not failed to comply with Section 8 of the Act as alleged by the Applicant.

21. By reply of the 15th of February 2013 the Applicant's attorney submitted in writing in point form how they considered that Mr Lake had incorrectly applied his powers under Section 37 of the Act in not finding reasonable grounds for believing that the employer Flanagan's had failed to comply with the Act and invited Mr Lake to reconsider his decision.

22. Mr Lake replied on the 4th of March 2013 adding further conclusions for refusing to refer the complaint. He stood by his decision, and stated that the Respondent considered the matter to be closed.

The Hearing

23. The main question arising for determination in this Judicial Review application is what is the threshold test to be applied by the Employment Inspector in order to satisfy himself that he has reasonable grounds for believing that an employer has failed to comply with a provision of the Act.

24. Mr Tucker for the Applicant points out that this case marks the first time since the Act came in to force that the court must consider the role of the Employment Inspector appointed under Section 34 of the Act.

25. The Applicant's primary case is that the genesis of the Employment Bill and the enactment of the Employment Act 2000 within Bermuda's Constitutional framework reveal the clear intention of Parliament that an aggrieved employee has recourse to the

Tribunal in every case where the Employment Inspector (the Inspector) is unable to achieve resolution of a complaint by way of conciliation.

26. In the event that the Applicant cannot succeed on her primary case the Applicant's case in the alternative is that if the Inspector is entitled to reject a case and not refer it to the Tribunal, then the test set out in Section 37 (4) of the Act requiring "reasonable grounds to believe" can be no higher than the threshold test engaged in an application such as that to strike out a Statement of Claim in the Supreme Court pursuant to Order 18 rule 19.

27. The Applicant's case is that the Inspector misdirected himself as to the scope of his powers to consider and determine the merits of the Applicant's complaint prior to determining whether the complaint should be referred to the Tribunal for adjudication.

The Statutory Provisions

28. Provision for complaints to an Inspector under the Act are contained in Section 36 which reads:

> (1) An employee shall have the right to make a complaint in writing to an inspector that his employer has, within the preceding three months, failed to comply with any provision of this Act.
>
> (2) A complaint may be made under this section by a trade union or other representative groups on behalf of an employee.
>
> (3) Where a group of employees having the same or substantially the same interest has a complaint pursuant to this Act, one complaint may be made in a representative capacity.

29. Section 3 of the Act defines an "Inspector" as either the Director of Workforce Development or a person designated as an Inspector pursuant to Section 34 of the Act. The Act lays out the duties and powers of an Inspector in Section 37 of the Act including the duty to conduct an inquiry:

> (1) Where an inspector-
>
> (a) receives a complaint under section36; or
>
> (b) has reasonable grounds to believe that an employer has failed to comply with any provision of this Act,
>
> the inspector shall, as soon as practicable, inquire into the matter.
>
> (2) If, for the purposes of any inquiry under this Act, an inspector requires information which the employer, employee or any other person is likely to be able to supply, the Inspector may, by notice in writing, require that person-
>
> (a) to supply that information; and

(b) to produce such documents as may be specified and permit the inspector to take copies,

on such date or within such period of time as may be specified in the notice.

(3) After making such inquiries as he considers necessary in the circumstances, the inspector shall endeavour to conciliate the parties and to effect a settlement by all means at his disposal.

(4) Where the Inspector-

(a) has reasonable grounds to believe that an employer has failed to comply with any provision of this Act; but

(b) is unable to effect a settlement under subsection (3),

he shall refer the complaint to the Tribunal.

30. The Applicant's case is built on the significance of three areas of the statutory scheme. They are, firstly, the statutory framework itself; and secondly, the constitutional and international context in which the Employment Bill was introduced locally.

31. The third, applicable in the alternative to the main submission that the Applicant makes, is that if the inspector acted within the scope of his power, then he incorrectly applied the law and/or his decisions were irrational.

The Statutory Framework

32. Mr Tucker urges that in construing the relevant provisions and adopting a purposive approach to interpretation regard must be had to the aim of the Act which can be found in the preamble:

> "Whereas it is expedient to promote the fair treatment of employers and employees by providing minimum standards of employment, by establishing procedures and notice periods for the termination of employment, by providing employees with protection against unfair dismissal, and by establishing the Employment Tribunal…"

33. Mr Tucker contrasts the role of the Inspector with that of the Tribunal. He points out that there is no express right for either the employee or the employer to be represented by legal counsel at any stage during the inquiry, or to be heard during the inquiry or at any stage before a complaint is dismissed.

34. By contrast pursuant to Section 35, the Tribunal has exclusive jurisdiction to "hear and determine complaints and other matters referred to it" as provided by the Schedule. Section 38 requires the Tribunal to conduct a hearing and provide the employer and employee or their legal counsel the opportunity to present evidence on oath and make submissions. The Schedule to the Act confers a power on the Tribunal to be assisted by an assessor.

35. It is the Applicant's principal case that these procedural distinctions demonstrate that the Inspector was not intended to adjudicate complaints and determine substantive rights but only to conduct an investigation, attempt resolution by way of conciliation and failing that, to refer the complaint to the Tribunal.

36. To underscore the Applicant's submission Mr Tucker referred the court to the Explanatory Memorandum of the Bill, the relevant part of which states:

> "The Employment Tribunal is established (by clause 35 and the Schedule) to determine complaints which the inspector has been unable to resolve by mediation under clause 37".

To the Applicant, this represents the clear intention of Parliament that all complaints not resolved by the Inspector through conciliation are to be referred to the Employment Tribunal.

37. To further substantiate his case Mr Tucker relies on a comparative analysis of Section 36 of the Act and its legislative antecedents: the Canadian Prince Edward Island Employment Standards Act 1992 Section 30 (3), and Sections 30 and 31 of the CARICOM Model Harmonisation Act-emanating from the member states of the Caribbean.

38. The Prince Edward Island Employment Standards Act 1992 Section 30 (3) only refers to the "reasonable grounds" test as an alternative to a complaint made by an aggrieved employee as the impetus for commencing an inquiry. Section 30 (3) provides:

> "Where an inspector receives a complaint under subsection (2) or has reasonable grounds to believe that there has been a failure to comply with this Act, the inspector shall inquire into the matter."

There is no further reference to the 'reasonable grounds' test in this act.

39. Sections 30 and 31 of the CARICOM Model Harmonisation Act provide that a worker who considers his employment has been unjustly terminated is entitled to take that matter to an impartial body such as a court, labour tribunal or arbitrator. The Applicant argues that this right to be heard before an independent tribunal was implemented in the Employment Act 2000 subject only to first participating in the mandatory inquiry and conciliation process under the mandate of the Inspector.

40. Mr Tucker further draws upon Section 3 of the Bermuda Labour Relations Act 1975 which includes the provision of a mandatory conciliation procedure. It provides in part that where the Director or any officer authorised by him is unable to effect a settlement of a labour dispute the Director shall report such dispute to the Minister. If the parties consent and the Minister thinks it fit he can refer the dispute to arbitration by one or more Arbitrators or the Permanent Arbitration Tribunal.

41. The Applicant argues that on a comparative analysis of the above referred legislation the court should conclude that the Act expressly seeks to implement a system that provides the employee with an unfettered right to complain to a national judicial body without interference by a non-judicial member of the executive branch of Government.

42. He further contends that the phrase "reasonable grounds to believe there has been a failure to comply with the Act" should be treated as it is in the Canadian legislation to indicate a distinct power afforded to an inspector to initiate an inquiry of his own volition. It is his position that the test therefore does not denote a threshold test for referral of a complaint to the Tribunal, a separate independent adjudicating body.

43. And finally, that consistent with the role of the Director in Section 3 of the Labour Relations Act, the role of the Inspector under the Act has a purely conciliatory function, with no power to substantively adjudicate the existence or extent of labour rights.

44. The Applicant further prays in aid the Explanatory Memorandum to the Employment Bill 2000. He points out that rather than indicate that the Inspector has the power to refuse to refer a complaint to the Tribunal it actually expressly states that the purpose of the Tribunal is to determine complaints that cannot be resolved by conciliation.

45. Miss Dill for the Respondent disagrees with the Applicant's position. She argues firstly that the Explanatory Memorandum to the Bill was only intended as an aid to Parliament at the Bill stage and as such is not a part of the Act. Secondly that Parliament was not bound to slavishly follow the legislative antecedents to the Act.

46. She therefore disagrees with the suggestion (made by the court) that section 37 (4) of the Act may have resulted from sloppy drafting or the draftsperson having taken an ill-conceived shortcut. She disagrees with Mr Tucker's submission that Section 37 (4) being entirely novel (in comparison to the Labour Relations Act and the legislative antecedents), was likely unintended. It is her position that the policy behind the legislative intent is clear, that meritless claims should be weeded out by section 37 (4).

47. Her position is that notwithstanding the Act's legislative genesis, Parliament was not bound to follow any of their provisions.

48. While the provisions of the Act were not derived from the United Kingdom's Employment Rights Act 1996, counsel for the Applicant drew attention to the similarity in role to that of the Advisory, Conciliation and Arbitration Service (ACAS) whose officers act as an independent third party to settle claims without recourse to the Tribunal.

49. In the United Kingdom employment case of *Clarke v Redcar and Cleveland Borough Council* [2006] I.C.R. 897 the Employment Appeal Tribunal chaired by a Judge stated the following principles as they applied to an Acas officer:

(a) the Acas officer provides assistance to the parties;
(b) an Acas officer has no responsibility to see that the terms of the settlement are fair to the employee;
(c) the expression "promote a settlement" must be given a liberal construction capable of covering whatever action by way of such promotion as is applicable in the circumstances of the particular case;
(d) the Acas officer must never advise as to the merits of the case;
(e) an Acas officer is not obliged to go through the framework of the legislation. Indeed it might defeat the officer's very function.

Counsel for the Applicant suggests that the Inspector under the Act, like the Acas officer, should perform conciliatory functions only.

50. Adopting a common sense approach, I do not consider it odd at all that after an investigation and attempt at conciliation in a case initiated in the first place by an Inspector acting pursuant to section 37(1)(b), the Inspector would be required by subsection (4) to refer only such cases as he continues to have reasonable grounds for believing the employer has failed to comply with any provision of the Act, where he has not been able to settle the matter.

51. In my estimation subsection (4) provides a clear indication that the Inspector has been provided with a self-regulating power so that he does not unnecessarily engage the Tribunal process by his belief, which on subsequent reflection he finds unsustainable.

52. I do not accept Mr Tucker's contention; I do not think that the role of the Acas officer is helpful in determining the statutory role of the Inspector for the purposes at hand. That said, the principles no doubt could be very helpful to an Inspector in attempting conciliation.

53. However, and notwithstanding that it does not fall to be determined, I suggest that the role of the Inspector as contained in section 37 subsection (5) of the Act is consistent with the role of the Acas officer, therefore I make the following digression. Section 37 (5) provides as follows:

> "Where, in relation to an employer, any relevant grievance procedure is established (whether under a contract of employment, collective agreement or otherwise) to deal with employees' complaints, the inspector shall not, except with the consent of all parties, attempt to settle the complaint under this section or refer the complaint to the Tribunal unless and until there has been a failure to obtain a settlement by means of that procedure."

54. It is clear beyond peradventure that there are two instances in which the Inspector can become involved. Firstly, the parties can consent to the Inspector's involvement ab initio. In this instance the Inspector can attempt to settle the complaint or refer the complaint to the Tribunal. Secondly, where there is no consent, once the grievance procedure has failed, the Inspector can attempt to settle the complaint or refer the matter to the Tribunal. The necessary implication in either instance is that if the Inspector attempts a settlement but fails to reach a settlement, he must refer the complaint to the Tribunal.

55. The reason for this is clear and unambiguous. There is no "Reasonable Grounds" test in section 37 (5); nor are there any other qualifying words in the subsection that suggest that the Inspector can otherwise dispose of a complaint. Another way of putting it is that if the Inspector fails at a settlement of the complaint such failure is not dispositive of the complaint. The complaint must be referred to the Tribunal. It would seem to me that when carrying out the functions pursuant to section 37 (5) of the Act, the above referred principles applicable to the Acas officer could provide meaningful guidance to an Inspector.

56. I return now to the question at hand of what the proper approach to the interpretation of the Act is. This question came before Kawaley J (as he then was) in ***Matthews v Bank of Bermuda Limited*** [2010] Bda L.R. 56. Therein he quoted with approval Acting Chief Justice of the Eastern Caribbean Court of Appeal (as he was then) Denis Byron's rejection of a technical construction of an act that would have excluded an employee's right to recourse to a tribunal in the case of ***Universal Caribbean Establishment-v-Harrison*** (1997 56 WIR 241:

> " …where the main object and intention of a statute is clear, it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of the draftsman, unless such language is intractable…but the policy which dictated the statute may be taken into account"

57. Kawaley J went on to express the view that where any ambiguities occurred in the Act they should be resolved in favour of giving employees the most ample and generous rights, consistent with the policy underlying the antecedents of the legislation, not to mention the Act itself.

58. Referring to derivations of statutory provisions, Kawaley J expressed this view:

> "When construing legislation in Bermuda, which is more often than not based on foreign precedents, it is always desirable to identify what the antecedents of the relevant local provisions are."

59. Upon a closer look, I find that unlike the Bermuda Act, section 30 (2) of the Prince Edward Island Employment Standards Act provides the Inspector with the express power to make a determination of facts in limited circumstances. However, subsection

(8) provides an employee who is not satisfied with the determination of the inspector with the right to make a complaint directly to the Employment Standards Board.

60. Therein lays a clear indication that the drafters of section 37(4) of our Act were expressing the intent of Parliament in making a pellucid and distinct departure from the Prince Edward Island Employment Standards Act section 30(3).

61. In my view, when construing the Act section 37 (4) subsection (a) must be read as conjunctive to subsection (b) by the use of the word "but". The canons of construction upon which counsel for the Applicant so ardently relies are resorted to by a Judge as semantic rules, not as legal rules. A Judge therefore begins with the assumption that the act is using language in the natural and ordinary meaning of words.

62. What is more, counsel for the Applicant's reliance on extrinsic materials, such as the Explanatory Memorandum to the Employment Bill 2000, and the antecedent legislation from Canada and the Caribbean, compelling as they may seem, fail to assist the court because in instances of construction such materials are not usually relied on to explain specific provisions in detail.

63. I do not take the suggestion made in the above mentioned decision of the Kawaley J in ***Matthews*** in which he positively approved identifying the foreign antecedents to local legislation, as displacing the preference that must be given to textural interpretation in so far as reasonably possible. I find this particularly so in the instant case where there is no ambiguity in the language used at all.

64. Accordingly I reject the Applicant's first position, that the court should read into the Act a meaning different from its clear and expressed words. Therefore I reject the submission that any complaint made to an employment inspector which cannot be resolved by conciliation must be referred to the Employment Tribunal.

The Constitutional Context

65. It is trite law that a statutory authority such as the Respondent must exercise its powers in a way that is consistent with is empowering legislation. Counsel for the Applicant relies on the Bermuda Constitution which (with rare exception) does not permit Parliament to enact legislation inconsistent with the fundamental rights and freedoms guaranteed by Article 6 of the Bermuda Constitution 1968.

66. In particular counsel relies on the Article 6(8) guarantee of a fair hearing within a reasonable time before an independent and impartial adjudicating authority. The Applicant's position is that the Employment Tribunal is the adjudicating authority under the Act not the Inspector. Counsel argues therefore that the right thus guaranteed must not be impeded by mere procedural rules where the bringing of proceedings is designed to protect substantive rights. For this the Applicant relies on ***Discover Reinsurance Company v PEG Reinsurance Company Limited*** [2006] Bda LR 88 at 10.

67. The Applicant's case is that the Employment Act confers substantive rights upon employees which are to be distinguished from the inclusion of mere procedural rules. It is her case that the requirement that an employee first participate in an inquiry and conciliation procedure conducted by the Inspector before a complaint can be referred to the Tribunal is a procedural rule.

68. In *Davis v Minister of Economy Trade and Industry* [2012] Bda LR 58 Kawaley J, (as he then was) anticipated how the rule governing the inquiry process could result in an impediment to an employee's access to an independent tribunal. He opined:

> "I merely note for present purposes the risk that if inspectors set the bar for the requisite belief under section 37(4)(a) too high, there will be at least the perception that the Executive is determining the civil rights and obligations of employees which section 6(8) of the Constitution guarantees will be determined by an independent tribunal."

69. The Applicant argues that when an inspector refuses to refer a complaint made under section 37(1)(a) to the Employment Tribunal the inspector impedes an employee's access to an independent adjudicating authority for the determination of the employee's rights under the Act.

70. Counsel for the Applicant, asserts that the threshold test in Section 37(4) of the Act "reasonable grounds to believe that an employer has failed to comply with the Act" as a threshold test is entirely novel and likely unintended. Once more relying on the dicta of Kawaley J in *Matthews* counsel has called upon the court to ensure that the object of the statute is achieved and that the language is construed as far as possible in favour of giving the employees the most ample and generous rights.

71. Counsel is asking the court to consider the principle of legality incorporating the presumption that legislation should be interpreted as far as possible so that it does not interfere with established rights and freedoms. To my understanding, this principle emphasises that a court should not impute to a legislature an intention to interfere with fundamental rights unless the intention is manifested by unmistakable and unambiguous language as opposed to uncertainty or inferences.

72. I accept that counsel for the Applicant has referred to a sound principle. If the above referred phrase is unintended by Parliament as Mr Tucker suggests, then it does not express Parliament's intention to interfere with fundamental rights (consistent with common law notions of fairness). In other words the phrase "reasonable grounds to believe that an employer has failed to comply with the Act" must be construed as consistent with giving the employee the most ample and generous rights.

73. As indicated above I do not accept that the court should alter the threshold test to amount to, in essence, a permissive test such as that found in the foreign legislation. A closer look at the test is instructive.

The Reasonable Grounds To Believe Test

74. I have found above that the fundamental rights guaranteed by the Constitution were not supplanted by what appears to be a restrictive procedural provision in section 37 (1) and (4) of the Act, in particular the requirement for an Inspector's reasonable belief in order to refer a complaint made under section 37 (1) (a).

75. The right complained of as having been violated in this case is that the Inspector impeded the Applicant's access to an independent adjudicating authority for the determination of the Applicant's civil rights under the Act by refusing to refer the complaint to the Employment Tribunal.

76. It is trite law that not all constitutional rights are absolute; some are flexible and vary according to the interest that can be affected in the context in which they apply. The key determinant is the statutory text, read in the light of the circumstances to which the legislation has been directed. The court must look at the practical exigencies of the decision making involved and where relevant the particular circumstances of the case.

77. Given that a refusal to refer the complaint has serious adverse consequences for an employee and that it is the Tribunal that has statutory fact finding powers consequent on the parties appearing and making submissions in an adversarial context, an inspector's reasonable belief cannot be based on an assessment of the merits of the case or the inspector would be usurping the function of the Tribunal.

78. Miss Dill for the Respondent, relying on Kawaley J's dicta in *Davis* that the test for rejecting a complaint at the preliminary stage under Section 37 is a simple one, submits that the test that the judge was referring to was whether the Inspector had reasonable grounds to believe that the employer had failed to comply with any provision of the Act.

79. I do not intend to be discourteous to Miss Dill however with all due respect to counsel, her submission admits of no analysis whatsoever. It does not delimit the scope of the boundary of "reasonable grounds to believe". As such it is not capable of persuasion or guidance.

80. In considering the test for reasonable grounds to believe, counsel for the Applicant draws an analogy to the approach taken by a Judge of the Supreme Court in a Strike Out application under Order 18 rule 19 of the Rules of the Supreme Court. He submits that the Employment Inspector must apply a standard which is no higher than that employed by such a Judge when considering whether to strike out a statement of claim before any evidence has been heard.

81. Under Order 18 rule 19 a Judge may strike out a statement of claim on the basis that it discloses no reasonable cause of action. When considering such an application the judge must only consider the allegations contained in the Statement of Claim. Counsel for the Applicant relies on the dicta of Auld LJ in *Electra Private Equity Partners*

(Ltd Partnership) and Ors v KPMG Peat Marwick (a Firm) and Ors [1999] EWCA Civ 1247 at p17:

> "it is trite law that the power to strike out a claim under RSC Order 18 r. 19 …should only be exercised in "plain and obvious" cases… However, the court should proceed with great caution in exercising its power of strike out on such a factual basis when all the facts are not known to it, when they and the legal principles turning on them are complex…".

Auld LJ went on to observe that the power to strike out is a draconian remedy which should only be employed in clear and obvious cases where it was possible to say without more that a particular allegation was incapable of proof.

82. Mr Tucker argues that although the Inspector has a dual role under section 37, that is, to investigate the complaint and to conciliate, the Inspector can only consider the allegations in the complaint when determining whether or not to refer the complaint to the Tribunal. He submits that this is the necessary implication to be drawn from the reasonable grounds test under section 37(1)(b) which exists as a precursor to conciliation.

83. I believe that Mr Tucker makes a valid point with the analogy drawn between the approach of a Judge under a Strike Out application and an inspector when considering whether there are reasonable grounds to believe that an employer has failed to comply with any portion of the Act.

84. It seems eminently sensible that there should only be a single reasonable grounds test whether it arises under Section 37(1) (a) or (b) of the Act. I find therefore that similar to the approach taken by a Judge in a Strike Out Application, the Inspector's starting point for determining whether or not reasonable grounds exist to refer the matter to the Tribunal requires the Inspector to consider only the allegations in the complaint.

85. I find further that the purpose and intent of the requirement for the Inspector to conciliate would be defeated if matters arising therein could be used by the Inspector to the prejudice of the Application or the Applicant as the case may be. In any event materials provided or information gleaned on an investigation and conciliation procedure is inadequate to fully flesh out all the facts and the applicable legal principles involved in a complaint.

86. My findings are consistent with the caution of Kawaley J in the above referred *Davis* case of the risk that "if inspectors set the bar for the requisite belief under section 37(4)(a) too high, there will be at least the perception that the Executive is determining the civil rights and obligations of employees which section 6 (8) of the Constitution guarantees will be determined by an independent tribunal".

87. On the basis that I have accurately understood the statutory function of the Inspector, I find that the following propositions are correct:

a. Reasonable grounds for believing that an employer has not complied with a section or sections of the Act arise when a complaint, taken on its own discloses some breach of the Act.

b. There must be some chance of success; however the weakness of the complaint is no bar to referral to the Tribunal.

c. Reasonable grounds for belief include any case where the complaint raises some question fit to be determined by the tribunal, such as a question of law or interpretation of the Act, or part thereof, or arising thereunder.

88. It is axiomatic that where a complaint is dated after the time fixed by Section 36 of the Act, unless the context adequately explains the delay, the Inspector may be justified in not referring the complaint to the Tribunal. These propositions should provide guidance to ensure a fair process and prevent an inspector from exceeding his or her mandate under the Act.

89. In summary, I find that an Employment Inspector does have the power to not refer a complaint made under section 37 to the Tribunal. An inspector however cannot dismiss a complaint to the exclusion of a fair process. This is particularly so where the method or procedure employed transgresses Article 6(8) of the Constitution by altering the fundamental nature of the Employment Act.

90. Where an Inspector delves into a consideration of the merits, that is, making a judgment based on facts presented by the parties about the breach complained of his or her action would by-pass a hearing before an independent Tribunal. Under the scheme of the Act, the Tribunal is the independent arbiter empowered to determine factual disputes and adjudicate upon the civil rights and obligations of the employee under the Act.

91. If, which I do not believe, I am wrong on my view of the role of the Inspector then the following considerations fall to be determined.

Was The Employment Inspector's Decision Unlawful And Or Irrational?

92. Much of what counsel for the Applicant complains of derives from the written reasons that the Inspector provided to the Applicant. While the Act does not specifically require the Inspector to put reasons for the refusal to refer a complaint to the Tribunal in writing, I believe that the day has long passed where a government administrator or statutory decision maker will escape review because there is no written record of his or her reasons.

93. The court's ability to draw inferences can fill the gap where reasons are not provided. However a decision can be protected by written reasons especially with matters such as the exercise of an administrator's discretion. Government accountability all but

mandates that reasons be provided, transparency underscores the need for reasons to be in writing.

94. The Applicant submits that the Inspector's decision can be impugned for being unlawful because the Inspector acted in excess of his power by adjudicating the dispute between the parties. In support of this complaint Mr Tucker referred to inter alia (i) the Inspector making a factual finding that the parties had agreed to vary the terms of the Applicant's contract; (ii) the Inspector made a determination on the issue concerning the distinction between a voluntary "tip" and a mandatory "commission"; (iii) the Inspector failed to appreciate that the Tribunal can hear matters that are not strictly breaches of the employment Act; and (iv) that he wrongly considered facts supplied by one party and determined issues based on "the balance of probabilities".

95. Mr Tucker raises a point that appears to invite interpretation by the Tribunal concerning the power of the Tribunal as established by section 35 of the Act. Section 35(2) provides: "The Tribunal shall have jurisdiction to hear and determine complaints and other matters referred to it under this Act." It is Mr Tucker's position that "other matters referred to it" means matters that may not be strictly set out in the Act. Mr Tucker submits that deductions from credit card charges fall to be determined there under.

96. Miss Dill defends the Inspector's finding of fact that the Applicant and the Respondent had agreed to the lowering of her wages. Miss Dill can be credited with having made spirited submissions, some of which had logical appeal. However, her submissions are all based on the merits considered by the Inspector and in defence of the inspector's reasons. They are therefore misplaced for the purposes of determining the legality of the Inspector's actions, as complained of by the Applicant in this judicial review.

97. The issue for the court is not what the distinction is between tips, bonuses, or commissions for example. The issue is whether making an assessment of those distinctions falls under the Act to be determined by the Inspector (as opposed to the Tribunal).

98. In his letter of the 13th of February 2013 Mr Lake informed the Applicant's attorney that he had completed his investigation and had determined that Flanagan's had not failed to comply with section 8 of the Act as alleged in the complaint.

99. Section 8 of the Act prohibits unauthorised deductions from an employee's wages except in certain circumstances, in particular (for present purposes) by subsection (1)(a) under the employee's contract of employment, or subsection (1)(b) the employee has signified in writing his/her agreement or consent to the making of the deduction.

100. Section 8 subsection (2) provides that where the total amount of wages paid on any occasion by an employer to an employee is less than the total amount payable on that

occasion, the amount of the deficiency shall be treated as a deduction for the purposes of subsection (1).

101. Mr Lake stated that he reached his determination based on the description of wages contained in section 3 of the Act. He then went on to say "the Act is silent on the term gratuity however, following extensive consultation; a gratuity is for the purposes of section 3 of the Act, a tip."

102. In my view it is highly undesirable for an Inspector to ground his decision to not refer a matter to the Tribunal on the basis of his interpretation of and opinion on the law. The inspector cannot extend his jurisdiction to making such findings and opinion. The issue complained of is one of strict law and fact; quintessentially circumstances in which the Tribunal is empowered under the Act to solicit legal advice in carrying out its functions.

103. In his letter of the 4th of March 2013 the inspector made it clear to the Applicant's attorney that he had determined on the totality of the evidence that a mutual agreement existed between the Applicant and Flanagan's that the Applicant would be returned to her original post and wage once a qualified Bermudian was hired. He went on to rely on "unrefuted (sic) evidence from the employer" that such discussions had occurred. Mr Lake also stated that no evidence existed that at the time of the discussions or shortly thereafter that the Applicant had objected.

104. Again the court's concern is whether the Inspector had the power under the Act to make such findings of fact "on the balance of probabilities" or otherwise. If he did not, then he acted outside of his legal competence. A difficulty arises immediately as to whether without hearing from the parties the Inspector would have been in a position to fairly assess the inherent probability or improbability of the complaint.

105. I find that the Inspector's conclusion was not based on a rational consideration of the complaint or the facts. Section 6 of the Act requires an employer to give to the employee a written statement of employment setting out certain particulars including the gross pay, job title and description. Subsection (5) requires the employer to amend the statement of employment where the employer and employee agree to the change of any term of employment. The Inspector failed to take those requirements into account. He firstly adjudicated the matter, and secondly provided an irrational basis for doing so notwithstanding a clear allegation of breach on the face of the complaint.

106. I find as fact and law that the Employment Inspector failed to appreciate the nature of his function and role as an inspector and conciliator. His decisions in the instances referred to above were tainted with considerations made outside the established procedure of the Act as I have found it to be, and in violation of the Applicant's Constitutional right to be heard by an independent tribunal.

107. Mr Tucker has raised four points that he submits demonstrate the irrationality in the inspector's decision to refuse to refer the Applicant's complaint to the Tribunal. They

are that the Inspector: (i) decided that the wages complaints concerning breaches of the Act did not occur within the 3 months' timeframe specified in section; (ii) notwithstanding his deciding that the wage complaint fell outside the time frame, he investigated the complaint and attempted conciliation; (iii) failed to inform the Applicant for some 18 months after receipt of information of his refusal, and, (iv) found that the Applicant's complaints disclosed no reasonable grounds to believe that there was a breach of any provision of the Act.

108. On the first point Miss Dill for the Respondent argues that Ms Fleming's complaint is about reduction in wages as a result of the alleged demotion. It is Ms Dill's position therefore that the Applicant's complaint is out of time because the alleged demotion occurred more than 3 months before the complaint was filed. Further, she referred the court to two authorities from England and Wales that determined that gratuities paid by a customer on a food bill become the property of the employer hence do not form a part of an employee's wages. (*Nerva and others v R L & G Ltd* [1995] IRLR 200, and a decision of the court of Appeal in *Nerva and others v R L & G Ltd* [1996] IRLR 461 CA. Accordingly in her submission the decision of the Inspector to determine the issue as he did was not irrational.

109. Given that Bermuda's economy has a strong tourism base and as such depends heavily on the service industry, it was irrational in my view for the Inspector to assume for himself a matter of great public importance such as the issue of determining the distinction between wages, tips, gratuities and commissions and whether they fall to be determined as part of the complaint filed under the Act.

110. On the issue of the alleged demotion from Manager to food and Beverage Server Miss Dill prayed in aid section 2(3) of the Act in submitting that the Applicant had rights under her last work permit in which she was recognised as a Manager that were more favourable to her than the provisions of the Act. She submitted that notwithstanding the fact that she may have actually been demoted to Server the description under the work permit being more favourable prevailed over the provisions of the Act.

111. I do not believe that counsel for the Respondent has fully grasped the complaint that has been made. Firstly, it would be irrational for the Inspector to determine that the complaint was made out of time when on the face of the complaint the demotion and consequent reduction in wages would have been continuous until the Applicant ceased working at Flanagan's in December of 2010, the complaint having been made in January of 2011.

112. Secondly, the Applicant's last work permit indicates that she held the position of Manager in circumstances where she was in fact working and being paid as a Server. No reasonable inspector could believe that the Applicant's rights under the work permit in such circumstances put her in a more favourable position than her rights

under the Act. Counsel's reliance on section 2(3) is entirely misplaced as that section is not at all applicable.

113. As to delay, an Inspector is accountable to an applicant to bring to his or her notice within a reasonable time his/her decision to refer or not to refer a complaint to the Tribunal. In all of the circumstances a delay of some 18 months from investigation to dissemination of his decision was irrational. Such a delay plainly opens the decision to grave suspicions.

Conclusion

114. In all the circumstances I find that the decision of the Inspector made under Section 34 of the Act involved an improper exercise of the power conferred by the Employment Act in pursuance of which it was purported to be made. In particular I find that the Inspector failed to observe the standard of fairness required by section 6(8) of the Constitution. I find that that the Inspector took irrelevant considerations into account in the exercise of his power; and exercised his power for a purpose other than the purpose for which the power is conferred. In addition I find that the Inspector failed to take relevant considerations into account in exercising his power, and exercised his power in such a way that no reasonable person could have done in the circumstances.

Orders

115. Accordingly the court makes an order of Certiorari setting aside the decision of the Inspector to not refer the Application to the Employment Tribunal. Further the court makes an order of Mandamus requiring the Inspector to perform the duty of an inspector and consider the Applicant's Complaint for transfer to the Employment Tribunal.

Costs

116. As to costs, the Applicant has been wholly successful; therefore the ordinary principle that costs follow the event should apply. The Applicant is entitled to her costs unless the Respondent applies within 7 days of the date hereof to be heard as to good reasons to the contrary.

Dated this day of November 2013.

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Charles-Etta Simmons
Puisne Judge