In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 182

IN THE MATTER OF
SECTION 30A OF THE TRADE UNION ACT, 1965

AND IN THE MATTER OF
THE BERMUDA CONSTITUTION ORDER, 1968

BETWEEN:-

(1) EDWARD E. BENEVIDES
(2) EARLSTON EUGENE FRANCIS
(3) ZOE ELIZABETH MULHOLLAND
(4) LINDELL ASHRETTA CHARMEE FOSTER

Plaintiffs

-and-

(1) THE ATTORNEY GENERAL
(2) THE CORPORATION OF HAMILTON

Defendants

JUDGMENT

(In Court)

Date of hearing: 17th, 18th, and 19th March 2014
Date of judgment: 28th March 2014

Mr Saul Froomkin, OBE, QC, Isis Law Ltd, for the Plaintiff

Mr Gregory Howard, Attorney General's Chambers, for the First Defendant

Ms Juliana M Snelling and Ms Alsha Wilson, Canterbury Law Ltd, for the Second Defendant

Issues

1. This application, which is brought pursuant to section 15(1) of the Bermuda Constitution Order 1968 ("the Constitution"), raised important issues in the field of labour relations.

   (1) A person's right to freedom of assembly and association, including the right to form and belong to trade unions, is protected by sections 1 and 10 of the Constitution. But does that protection cover the right to engage, through a trade union, in collective bargaining with his or her employer?

   (2) The Trade Union Act 1965 as amended ("the 1965 Act") provides a statutory regime for the compulsory recognition by employers of a bargaining unit, and of a certified trade union as its exclusive bargaining agent, for purposes of collective bargaining. If there is a constitutionally protected right to collective bargaining, is that right infringed by section 30A of the 1965 Act, which, subject to a grandfathering clause, defines "*bargaining unit*" so as to exclude management persons?

Facts

2. The First, Second and Fourth Plaintiffs form part of the management team of the Second Defendant. The Plaintiffs contend that the Third Plaintiff also forms part of the management team whereas the Second Defendant contends that she is not a manager but an administrator. For purposes of resolving the constitutional questions before the court, nothing turns on her precise employment status.

3. In June 2011, the Bermuda Public Services Union ("BPSU") negotiated with the Second Defendant to be certified as the exclusive bargaining agent of 23 management and administrative staff of whom 15 were said by the Union to be managers and eight to be administrators. All 23 members of staff were non-unionized at the time, but sought to become members of the BPSU in order to form one bargaining unit under the 1965 Act. They included the four Plaintiffs.

4. On 7th June 2011, the BPSU wrote to the Department of Labour and Training ("the Department") stating that it was applying for the said certification and stating that 13 of 23 staff eligible to form the bargaining unit had joined the Union. Applications for membership from those 13 employees, of whom nine were managers, were enclosed.

5. On 21st June 2011, the Mayor of the Second Defendant wrote to the Department confirming that the Board of the Second Defendant: "*resolved to support the action by the Bermuda Public Services Union to act as the exclusive bargaining agent...*" for non-unionized staff in its employ.

6. On 13th July 2011, the Acting Director of the Department of Labour and Training ordered pursuant to the 1965 Act that: "*the Bermuda Public Service Union shall be certified as the exclusive bargaining unit*" for the non-unionized employees of the Second Defendant.

7. By a memorandum of understanding dated 20th July 2011, the Second Defendant and the BPSU as the sole bargaining agent for the said 23

employees agreed that the existing terms and conditions of employment for those employees would remain as they were from 15th July 2011 to 15th July 2012 or until a collective bargaining agreement was agreed, whichever came first.

8. By a collective bargaining agreement between the Second Defendant and the BPSU dated 19th January 2012, but expressed to come into effect on 1st January 2012 and expire on 31st December 2012, the Second Defendant confirmed that it recognized the BPSU as the sole bargaining agent for the 23 management and administrative employees, who were by now all members of the Union.

9. Following the election of a new Board in 2012, the Second Defendant declined to renew the collective bargaining agreement and has refused to recognize the right claimed by the First and Second Plaintiffs and other management employees to form part of a bargaining unit on the basis that section 30A(2) of the Trade Union Act 1965 defines "*bargaining unit*" as excluding "*management persons*".

Relief sought

10. The Plaintiffs seek the following declarations, namely:

    (1) That the definition of "*bargaining unit*" in section 30A(2) of the 1965 Act is void for inconsistency with section 10 of the Constitution in that it hinders them in their freedom to belong to a trade union by prohibiting them from becoming members of a bargaining unit.

    (2) That the certification by the Department dated 13th July 2011 that the BPSU is the exclusive bargaining agent for management and administrative employees of the Second Defendant is valid and of full effect.

(3) That the Plaintiffs and other management employees of the Second Defendant are entitled to be members of the bargaining unit of the BPSU in respect of the Second Defendant.

Statutory regime

The Constitution

11. Section 1 of the Constitution provides in material part:

> **Fundamental rights and freedoms of the individual**
>
> Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:
>
> . . . . .
>
> (b) freedom … of assembly and association;
>
> … the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

12. Section 10 of the Constitution provides in material part:

> **Protection of freedom of assembly and association**
>
> (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required—

(i) in the interests of defence, public safety, public order, public morality or public health;

(ii) for the purpose of protecting the rights and freedoms of other persons; or

(b) that imposes restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

13. Section 15 of the Constitution provides in material part:

Enforcement of fundamental rights

(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this

subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

The 1965 Act

14. Section 30A of the 1965 Act contains various definitions for the purposes of sections 30B to 30S of the Act. The following are of particular relevance:

> "*bargaining agent*" means a union that acts on behalf of workers;
>
> "*bargaining unit*" means, except in section 30F(3) and (4)(b), a group of two or more workers (all being non-management persons) in an undertaking, on behalf of whom collective bargaining may take place;
>
> "*to certify*", in relation to a union, means to certify that union under section 30F … as the exclusive bargaining agent in respect of a bargaining unit; and "certification" and other cognates of "certify" have corresponding meanings;
>
> "*management person*" means a person who in the course of his employment in an undertaking—
>
> > (a) is responsible for the direction and management of the undertaking; or
> >
> > (b) has authority to appoint or dismiss or exercise disciplinary control over workers in the undertaking;
>
> "*non-management person*" means a person who is not a management person;

15. Section 30B of the 1965 Act provides in material part:

> **Application for certification**
>
> (1) A union claiming to have as members in good standing 35 per cent or more of the workers in a proposed bargaining unit may, subject to the provisions of this Part, make application to the Director of Workforce Development to be certified in respect of that proposed bargaining unit.

16. Section 30D of the 1965 Act provides:

> **The bargaining unit**
>
> (1) On receipt of an application under section 30B, the Director of Workforce Development shall assist the union and the employer to determine the bargaining unit that is appropriate in the circumstances ("the appropriate bargaining unit"), having regard to the following factors—
>
> > (a) the community of interest among the workers in the proposed bargaining unit;
> >
> > (b) the nature and scope of the duties of those workers;
> >
> > (c) the views of the employer and of the union as to the appropriateness of the proposed bargaining unit;
> >
> > (d) the historical development, if any, of collective bargaining in the undertaking.
>
> (2) If the union and the employer are not able to agree on the determination of the appropriate bargaining unit within such reasonable period as the Director of Workforce Development may allow, the Director of Workforce Development shall so advise the Minister and the Minister shall refer the issue to the Tribunal for determination; and the order of the Tribunal determining the issue shall be final and shall not be subject to any appeal.

17. Section 30F of the 1965 Act provides:

> **Certification where there is agreement**
>
> (1) This section applies where one union only has made application under section 30B and the employer has agreed to the application.
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> (2) If the Director of Workforce Development is satisfied that more than 50 per cent of the workers in the bargaining unit support the union, he shall certify that union as the exclusive bargaining agent in respect of that unit.

(3) A union party to an agreement to which subsection (4) applies shall be deemed to have been certified under this section, on the date of commencement of the Trade Union Amendment Act 1998, as the exclusive bargaining agent in respect of any bargaining unit of workers in respect of which the agreement designates that union as the exclusive agent for collective bargaining purposes.

(4) This subsection applies to any agreement between a union and an employer—

(a) which was in existence immediately before the date of commencement of the Trade Union Amendment Act 1998;

(b) which designates a union for collective bargaining purposes as the exclusive agent of workers in a bargaining unit in that employer's undertaking, whether or not that bargaining unit includes management persons; and

(c) a copy of which immediately before that date was held by the Minister in a register of such agreements.

18. Section 30L of the 1965 Act provides:

Compulsory recognition and duty to treat

Where a union has obtained certification in respect of a bargaining unit and the certification remains in force, the employer shall deal with that union accordingly; and the union and the employer shall, subject to this Part, in good faith treat and enter into negotiations with each other for the purposes of collective bargaining.

Does the Constitution protect the right to free collective bargaining?

19. The leading case on point is the decision of the Privy Council in Collymore v Attorney General [1970] AC 538. The appellants sought a declaration that the Industrial Stabilisation Act, 1965 was *ultra vires* the Constitution of Trinidad and Tobago and was null and void and of no effect. The Act imposed a system of compulsory arbitration by an industrial court set up

under the Act for the settlement of disputes, and prohibited any trade union calling a strike in contravention of its provisions. The appellants claimed that this Act infringed their freedom of association, declared by section 1 of the Constitution of Trinidad and Tobago to be one of the fundamental freedoms "*which have existed and shall continue to exist*". They relied on section 2 of the Constitution, which decreed that no law should "*abrogate, abridge or infringe* ..." that right.

20. The Committee's judgment was delivered by Lord Donovan. He summarized the appellant's argument thus at 546 B – C: "*Freedom of Association*" must be construed in such a way that it confers rights of substance and is not merely an empty phrase. So far as trade unions are concerned, the freedom means more than the mere right of individuals to form them: it embraces the right to pursue that object which is the main raison d'être of trade unions, namely, collective bargaining on behalf of its members over wages and conditions of employment. Collective bargaining in its turn is ineffective unless backed by the right to strike in the last resort. It is this which gives reality to collective bargaining. Accordingly, to take away or curtail the right to strike is in effect to abrogate or abridge that freedom of association which the Constitution confers.

21. Their Lordships rejected these submissions. Lord Donovan stated at 547 E – 548 D:

> The question is whether the abridgment of the rights of free collective bargaining and of the freedom to strike are abridgments of the right of freedom of association.
>
> Both courts below answered the question in the negative; and did so by refusing to equate freedom to associate with freedom to pursue without restriction the objects of the association.
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> Wooding C.J. put the matter thus:
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> "*In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common*

interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country."

It is, of course, true that the main purpose of most trade unions of employees is the improvement of wages and conditions. But these are not the only purposes which trade unionists as such pursue. They have, in addition, in many cases objects which are social, benevolent, charitable and political. The last named may be at times of paramount importance since the efforts of trade unions have more than once succeeded in securing alterations in the law to their advantage. It is also of interest to note what the framers of convention 87 of the International Labour Organisation considered to be comprised in "*Freedom of Association*." Under that subheading the convention articles 1-5 inclusive read as follows:

"*Article 1. Each Member of the international Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.*

Article 2. Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3. 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programs. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4. Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5. Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such

> *organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.*"
>
> All these rights are left untouched by the Industrial Stabilisation Act. It therefore seems to their Lordships inaccurate to contend that the abridgment of the right to free collective bargaining and of the freedom to strike leaves the assurance of "*freedom of association*" empty of worthwhile content.

22. Thus the Privy Council held that under the Constitution of Trinidad and Tobago the abridgment of the right of free collective bargaining does not abridge the right of freedom of association. Although sections 1 and 2 of the Constitution of Trinidad are not identical to sections 1 and 10 of the Constitution of Bermuda, the protection conferred by each Constitution on freedom of association is in substance the same. The decision of the Privy Council in Collymore is therefore binding authority on this Court that under the Constitution of Bermuda the abridgment of the right of free collective bargaining does not abridge the right of freedom of association.

23. As the Court of Appeal held in The Bermuda Industrial Union v Bas-Serco Limited [2003] Bda LR 64:

> 112. The relevant provisions of sections 1 and 2 of the Constitution of Trinidad and Tobago which were under consideration in the Collymore case are more cryptic than the combined relevant provisions of sections 1 and 10 of the Bermuda Constitution but the two sets of provisions are clearly in *pari materia*. This Court (which does not have final jurisdiction) is therefore bound by the decision of the Privy Council in the Collymore case on the issue whether or not the abridgment of the rights of free collective bargaining by a statute is an abridgment of the right of freedom of association referred to in general terms by section 1 and particularised in section 10 of the Bermuda Constitution.
>
> 113. Accordingly it is not for this Court in this case to treat the constitutional issue as an open one which justifies examination of the decisions of courts in other common law jurisdictions in search of persuasive authority. The duty of this Court is to apply Collymore on the constitutional issue.

24. In recent years, some other courts of final jurisdiction have taken a different view. A majority of the Supreme Court of Canada has held:

> that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith.

See Ontario (Attorney General) v Fraser [2011] 2 SCR 3 at para 51, explaining the Court's earlier decision in Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia [2007] 2 SCR 391.

25. The Grand Chamber of the European Court of Human Rights, reversing its previous position, held in Demir v Turkey (2009) EHRR 54 at para 154 that:

> having regard to developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "*right to form and to join trade unions for the protection of [one's] interests*" set forth in Article 11 of the Convention, …

26. These decisions illustrate how elsewhere in the world the law of freedom of association as it relates to free collective bargaining has not remained static. In my judgment the topic would merit reconsideration by the Privy Council. If Collymore was argued today, it would not necessarily be decided in the same way. As that decision binds the Court, however, I find that, in Bermuda at any rate, there is no constitutionally protected right to collective bargaining. That finding is dispositive of this case.

If the Constitution did protect the right to free collective bargaining, would that right be infringed by section 30A of the 1965 Act?

27. In deference to the able submissions from all three counsel, I shall nevertheless consider briefly the position in the alternative that sections 1 and 10 of the Constitution did protect the right to free collective bargaining. In this context, I should like to pay particular tribute to the extensive

research in comparative law carried out by Ms Snelling, who appeared for the Second Defendant.

Background

28. Sections 30A – 30S of the 1965 Act were enacted through the Trade Union Amendment Act 1998 ("the 1998 Act"). They introduced a statutory scheme whereby a trade union could compel an employer to recognise the union as a bargaining agent for a group of workers and to enter into a collective bargaining agreement with it. Previously, union recognition and collective bargaining had been voluntary. The difficulty was that sometimes the employer would refuse to recognise the union or enter into collective bargaining.

29. At the invitation of the Government of the day, the Joint Trade Unions of Bermuda submitted a position paper on the fifth draft of the 1998 Bill. They proposed that all references to "*non-management persons*" be deleted from section 30A, which would have permitted management employees to be included in bargaining units. The Opposition moved an amendment to that effect on the third reading of the Bill in the House of Assembly. But the amendment was defeated and the Bill was enacted with section 30A in its present form.

30. The Opposition became the next Government. In 1999 they introduced a Bill to amend the 1998 Act by defining "*bargaining unit*" to mean a group of two or more workers in an undertaking being a bargaining unit comprised of management persons exclusively or non-management persons exclusively. The Bill passed the House of Assembly but was defeated by one vote in the Senate, so it was never enacted.

31. Meanwhile, on 26th March 1998, ie before the 1998 Bill was enacted, the Fraternal Unions of Bermuda made a complaint – Case No 1959 (United Kingdom) – to the International Labour Organisation ("ILO") against the Government of the United Kingdom (Bermuda) concerning *inter alia*

alleged violations of the rights to organize and to bargain collectively of managerial staff. The exclusion of managerial staff from the definition of "*bargaining unit*" in section 30A was one of the factors giving rise to the complaint.

32. The case is now closed. But it has generated various reports by the ILO. The most recent is the Report of the Committee of Experts on the Application of Conventions and Recommendations ("the Committee"), ILO Conference, 101st Session, 2012. This noted that the Committee in its previous comments has requested the Government of Bermuda to indicate any measures taken or envisaged to include management personnel within the scope of the 1965 Act so as to guarantee to them the rights established by the Right to Organise and Collective Bargaining Convention, 1949 (No 98) ("Convention 98"). The Report further recorded that the Committee has taken note of the information with which it has been supplied by the Government of Bermuda. The United Kingdom has ratified Convention 98, which has been declared applicable without modification to Bermuda. But it does not form part of Bermuda's domestic legislation.

Law

33. The starting point for a challenge to the constitutionality of section 30A of the 1965 Act is that there is a presumption in favour of the constitutional validity of an impugned enactment. See, for example, the decision of the Court of Appeal of Guyana in Attorney General v Mohamed Alli and Others (1987) 41 WIR 176 at 189 per Massiah C. But as Lord Diplock stated in Attorney General of the Gambia v Jobe [1984] AC 689, PC, at 702 C:

> This presumption is but a particular application of the canon of construction embodied in the Latin maxim *magis est ut res valeat quam pereat* which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations.

34. To establish an infringement of section 10 of the Constitution the Plaintiffs must show that they have been "*hindered*" in the enjoyment of their freedom of peaceful association. Although no authority was cited to me on the point, I am satisfied that the hindrance must be more than merely trivial.

35. The onus then shifts to the Defendants to show that the hindrance is contained in or done under the authority of a law that is "*reasonably required*" pursuant to section 10(2)(a).

36. Formerly, the courts would presume that any duly enacted statute was reasonably required. See Attorney General v Antigua Times Ltd [1976] AC 16, PC, at 32 E – F. It was for the person challenging the requirement to rebut the presumption. But nowadays it is for the person seeking to defend the statute to justify the requirement. See Worme v Commissioner of Police [2004] 2 AC 430, PC, at para 41.

37. This latter approach was followed in Bermuda by the Court of Appeal in Attride-Stirling v Attorney General [1995] Bda LR 6 and by this Court in Richardson v Raynor [2011] Bda LR 52, where at para 13 Kawaley J (as he then was) relied on both Worme and Attride-Stirling.

38. The parties are agreed that sections 10(2)(a)(i) and (ii) are to be read disjunctively. The requirement at section 10(2)(a)(ii) that the law in question is reasonably required for protecting the rights and freedoms of other persons does not require that those rights and freedoms are those protected by the Constitution. However in such a case only "*indisputable imperatives*" can justify interference with enjoyment of a Constitutional right.

39. This is by parity of reasoning with the approach taken by the European Court of Human Rights ("the European Court") to interference with rights and freedoms other than those protected by the European Convention on Human Rights ("the European Convention"). See the decision of the Grand Chamber in Chassagnou and others v France (2000) 29 EHRR 615 at para 13. The European Court has taken a broad view of what the rights and

freedoms of others might include. Eg in Chapman v United Kingdom (2001) 33 EHRR 399 at paras 80 – 82 it held that measures to pursue the enforcement of planning controls were justified as they protected the rights of others through preservation of the environment.

40. If the Defendants discharge this burden, it is for the Plaintiffs to show that the thing done under the authority of the law is not "*reasonably justifiable in a democratic society*". See Worme v Commissioner of Police at para 41. The Privy Council considered the meaning of these words in de Freitas v Ministry of Agriculture [1999] 1 AC 69 at 80 C – H. They expressly approved and adopted the analysis of Gubbay CJ in Nyambirai v National Social Security Authority [1996] 1 LRC 64 at 75:

> he saw the quality of reasonableness in the expression "*reasonably justifiable in a democratic society*" as depending upon the question whether the provision which is under challenge "*arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual*." In determining whether a limitation is arbitrary or excessive he said that the court would ask itself:
>
> > "*whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*"

41. It is important not to elide the "*reasonably required for protecting the rights and freedoms of other persons*" test, where the onus lies on the party seeking to uphold the impugned legislation, with the "*reasonably justifiable in a democratic society test*," where the onus lies on the party challenging that legislation. Nevertheless, when considering whether the law in question is reasonably required for protecting the rights and freedoms of others, it will be helpful to bear the factors set out by Gubbay CJ in mind.

42. It will also be helpful to consider how the right to collective bargaining relates to the right to freedom of association. That relationship was analysed thus by the Supreme Court of Canada in the majority judgement delivered by McLachlin CJ and LeBel J in Fraser at para 46:

> Second, and more fundamentally, the logic of Dunmore and Health Services is at odds with the view that s. 2(*d*) protects a particular kind of collective bargaining. As discussed earlier, what s. 2(*d*) protects is *the right to associate to achieve collective goals*. Laws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless. It is in this derivative sense that s. 2(*d*) protects a right to collective bargaining: see Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 S.C.R. 815 … However, no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.

43. I find this analysis insightful, although in my judgment, in a Bermudian context, a test of "*making it impossible*" to act collectively rather than, say, "*substantially impairing*" the possibility of collective action, would raise the bar too high for the party challenging the impugned legislation. The Constitution, by parity of reasoning with the case law on the European Convention, is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. See, for example, Waite and Kennedy v Germany (2000) 30 EHRR 261, ECHR, at para 67. As stated by Lord Diplock in Attorney General of the Gambia v Jobe at page 700 H:

> A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

Reasonably required or reasonably justifiable

44. The rationale for excluding management employees from collective bargaining units was cogently expressed by the Government of Bermuda in its reply to the 26th March 1998 complaint to the ILO. See the ILO Interim Report – Report No 313, March 1999, at para 208:

> The concept of restricting workers in a certified bargaining unit for collective bargaining purposes to non-management persons is not unusual and in fact exists in most countries. Managers are required to train employees, direct their work and correct them when problems arise. In a unionized industry, managers must also represent the interests of the employer in collective bargaining as well as grievances and other day-to day dealings with labour. It is simply not possible for management to function properly, if managers have a dual loyalty, serving as members of management while at the same time being subject to union rules and regulations.

45. The Defendants submit that, in light of these considerations, section 30A of the 1965 Act is reasonably required to protect the rights and freedoms of employers to manage effectively their workforce and workplace. They further submit that prohibiting trade unions to which both management and non-management employees belong from acting as bargaining agents for management employees safeguards the unions from the risk that management will come to dominate their leadership. The 1994 Report of the ILO's Committee of Experts on Freedom of Association and Collective Bargaining stated at paras 87 and 88 that such restrictions were in principle compatible with freedom of association.

46. Interestingly, in Canada, notwithstanding the constitutionally protected right to collective bargaining, both Federal and Provincial legislation exclude managers from the definition of "*employee*" for the purposes of collective bargaining. At a Federal level, section 3 of the Canada Labour Code 1985 defines "*employee*" but states that the definition does not include a person who performs management functions. I was referred to numerous analogous provisions in Provincial legislation, which I need not recite.

47. The rationale for these exclusions in Canada is much the same as the rationale in Bermuda. See the decision of the British Columbia Labour Relations Board in Re Highland Valley Copper (1998) 45 CLRBR (2d) 1 at para 98a. The Board cited with approval at para 24 a previous decision of the Board, Re Cowichan Home Support Society (1997) 34 CLRBR (2D) 121 as authority for the proposition that the problem of undivided loyalty could not be overcome by placing supervisors in a different bargaining unit.

48. In the United States, Congress enacted the 1947 Taft Hartley amendments to the National Labour Relations Act to exclude supervisors from the protection of the Act. The amendments were enacted to overturn a majority decision of the Supreme Court, Packard Co v NLRB, 330 US 485 (1947) that foremen could constitute an appropriate unit for collective bargaining. In a blistering dissent in Packard, cited with approval by the majority of the Supreme Court in NLRB v Bell Aerospace Co, 416 US 267 (1974), Douglas J expressed concern that if management could constitute an appropriate unit for collective bargaining under the Act, whether or not they formed a separate union, that would tend to redefine "*the basic opposing forces in industry*" not as management and labour but as owner and employee: "*The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership*."

Conclusions

49. I am satisfied that management employees are hindered by section 30A of the 1965 Act from engaging in collective bargaining with their employers. This hindrance is substantial. It is true that management employees are in theory free to engage in collective bargaining with their employers outside of a statutory framework. But without statutory compulsion that freedom will in many cases likely prove illusory.

50. As to the public sector, the Second Defendant, although it did not say so in express terms, appeared from the arguments on which it relied to be opposed

to collective bargaining with its management employees in principle. I think that it is most unlikely to engage in collective bargaining with them voluntarily.

51. As to the private sector, the Bermuda Employers' Council made a written submission to the Government on the draft 1998 Bill in which they noted that under the voluntary system of labour relations in Bermuda, past practice had always been that managerial staff were excluded from the bargaining unit. The hotel industry and Cable & Wireless were cited as examples. The Second Defendant led evidence that this remains the case in the hotel industry.

52. However, I am also satisfied that, for the reasons set out in the Government's reply to the 26th March 1998 complaint to the ILO, legislation restricting the right of management employees to participate in bargaining units is reasonably required for the purpose of protecting the rights and freedoms of (i) employers to manage effectively their workforce and workplace and (ii) other stakeholders, such as members of the public who rely on the goods and services which the employer's business or undertaking provides. Thus I am satisfied that the legislative objective is sufficiently important to justify limiting a fundamental right. In reaching this conclusion I place no reliance on the reasoning of Douglas J in Packard. Whatever its merits, it does not in my judgment provide sufficient reason to curtail the right to freedom of assembly.

53. I am further satisfied that the measures designed to meet the legislative objective, namely the total exclusion of management from any bargaining unit under the 1965 Act, are rationally connected to it. The real question is whether those measures are no more than are reasonably required to accomplish the objective.

54. The Defendants, on whom the onus lies, have not satisfied me that they are. I accept that management can reasonably be excluded from the same bargaining unit as non-management employees, and hence that the

Plaintiffs' constitutional rights have not been infringed. But the Defendants have not shown that it is reasonably necessary to exclude all management persons from any bargaining unit whatsoever, eg one comprised solely of management employees in a union comprised solely of management employees, and irrespective of whether the person concerned is a senior manager or a middle manager.

55. Management employees owe a duty of loyalty to their employer in the sense that they are obligated to carry out their various job functions in a professional way. They must not put themselves in a position where a conflict of interest prevents them from doing so. That duty would not in my judgment be compromised by the mere fact of their organising collectively to negotiate better pay and conditions. Their obligation to their employer is contractual not feudal.

56. Where would that leave section 30A? If the Constitution protected the right to collective bargaining then the definition in that section of "*bargaining unit*" would be unconstitutional. I would have been minded to make a declaration to that effect and leave it at that, rather than striking down or attempting to rewrite the offending section, which would therefore have remained in force. It would then have been for the Legislature to consider how best to amend it so as to pass constitutional muster. One way to do so would have been to enact the 1999 Bill. But as I am bound by authority to hold that the Constitution does not protect the right to collective bargaining, these considerations do not arise.

Certification

57. The Director of Workforce Development has in breach of the 1965 Act certified a bargaining unit that included management employees. The Court must ask what consequences did the Legislature intend should flow from that breach. See the speech of Lord Steyn, giving the judgment of the majority of the House of Lords in R v Soneji [2006] 1 AC 340 at para 23:

> Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.

58. This approach was approved by Stuart-Smith JA, giving the judgment of the Court of Appeal in DPP-v Roberts [2008] Bda LR 37 at para 18.

59. The situation is complicated by the fact that although the BPSU, when it applied for certification, claimed to have as members in good standing 35% or more of the workers in the proposed bargaining unit, of those 13 members, nine were management employees. If the managers are excluded: (i) the application for certification did not meet the statutory threshold of 35% in section 30B (1); and (ii) at the date of certification, the Director of Workforce could not reasonably have been satisfied that more than 50% of the workers in the proposed bargaining unit supported the BPSU, as required by section 30F (2).

60. The BPSU and the Second Defendant could not confer on the Director of Workforce Development a jurisdiction to certify a bargaining unit that included management employees when under the 1965 Act he had no such jurisdiction. They cannot rewrite the statute. See, by parity of reasoning, the judgment of the Privy Council, delivered by Lord Millet, in Strachan v The Gleaner Co Ltd [2005] 1 WLR 3204, PC, at para 28: "*the parties cannot by consent confer a jurisdiction on the court which it does not possess*".

61. In the circumstances, I am satisfied that the Legislature intended that the certification should be void from the outset. The non-management employees may of course make a fresh application for certification, which I would expect to be unopposed.

62. The application is therefore dismissed. I shall hear the parties as to costs.

DATED this 28th day of March, 2014

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Hellman J