[2012] JMCA Civ 57

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 17/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**MARK LEACHMAN**	**APPELLANT**
AND	**PORTMORE MUNICIPAL COUNCIL**	**1ST RESPONDENT**
AND	**PARISH COUNCILS SERVICES COMMISSION**	**2ND RESPONDENT**
AND	**MINISTRY OF LOCAL GOVERNMENT COMMUNITY DEVELOPMENT AND SPORT**	**3RD RESPONDENT**

Mrs Jacqueline Samuels-Brown QC for the appellant

Curtis Cochrane instructed by The Director of State Proceedings for the respondents

12, 15 June and 7 December 2012

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with the reasons expressed therein as regards our decision on this appeal, and I have nothing to add.

PHILLIPS JA

[2] I too have read the draft of the judgment by Brooks JA. I agree entirely with his reasons and have nothing that I can usefully add.

BROOKS JA

[3] On 15 June 2012, after hearing submissions from Mrs Samuels-Brown QC for the appellant, Mr Mark Leachman, and from Mr Cochrane for the respondents, the Portmore Municipal Council (the Council), the Parish Councils Services Commission (the Commission) and the Ministry of Local Government, Community Development and Sport, we made the following orders:

> "1. Appeal allowed.
>
> 2. Affidavit of Jacqueline Mendez and the attachments thereto struck from the record of proceedings before the Judicial Review Court.
>
> 3. Costs of the appeal and of the application before Donald McIntosh J to the appellant to be agreed or taxed."

At that time, we promised to put our reasons in writing. We now fulfil that promise.

[4] Those orders had their genesis in a decision, delivered on 23 April 2008, by the Commission to dismiss Mr Mark Leachman from his position as a municipal engineer at the Council. Mr Leachman sought and was granted permission to apply for judicial review of that decision. In preparing its case for the hearing of the judicial review, the Commission filed an affidavit, sworn to by Mrs Jacqueline Mendez, the secretary of the Commission. The affidavit contained evidence and attached exhibits, which, Mr

Leachman asserted, were not before the tribunal that enquired into the charges against him (hereinafter called 'the tribunal'). It was the tribunal that made the recommendation for Mr Leachman's dismissal.

[5] Mr Leachman applied to have the affidavit and its exhibits struck from the record. D.O. McIntosh J heard the application, but refused it. The learned judge granted an application that the affidavit, which had been filed out of time, should stand as properly filed. It was Mr Leachman's appeal against those orders that resulted in the order outlined at paragraph [3] hereof. The appeal came to this court as a procedural appeal, but a single judge of the court, having considered the matter in chambers, referred it to us.

[6] The main issue that this court is required to consider is whether documents, which were not tendered in evidence before the tribunal, may properly be placed before the court conducting the judicial review.

[7] The factual background to these formalities had revealed some damaging allegations against Mr Leachman. It is only necessary, for these purposes, to give a bare outline of what those allegations were and of the process that led to Mr Leachman's dismissal.

The background facts

[8] Ms Jeanette Abrahams, a contractor employed by the Council to carry out certain civil works, wrote a letter to the Council alleging that she had paid bribes to several

members of its staff. The bribes, she alleged, were to, among other things, enable her to be paid more expeditiously for work that she had done. She alleged that she had paid Mr Leachman a cheque for $60,000.00. Copies of the cheques to various persons were attached to the letter.

[9] As a result of the allegations, the Council constituted the tribunal. Before the tribunal, Mr Leachman was charged with the following offence:

> "That on or about the 26th day of November 2004 you received and accepted $60,000.00 (Sixty Thousand Dollars) by cheque which you accepted and cashed from Jeanette Abrahams a Contractor…whose work you had to examine and approved [sic] as part of your duty to your employer to enable payments to be made for the work done by the Contractor if the work was properly done; thus creating a conflict of interest between yourself and your employer and the Contractor which resulted in your inability to faithfully carry out your duties to your employer."

The charge is exhibited at page 192 of the record of appeal. The tribunal, having heard the evidence from the Council and Mr Leachman, recommended his dismissal. The Commission acted in accordance with the recommendation.

The grounds of appeal

[10] Mrs Samuels Brown filed eight grounds of appeal against the decision of the court below. The grounds are as follows:

> "(a) The Learned Judge erred in law in having not struck out the Defendant's application to have the Affidavit of Ms. Jacqueline Mendez and its attachments adduced as evidence.
>
> (b) Judicial Review proceedings are by their very nature, proceedings in which the procedure adopted by the

inferior tribunal is reviewed by the supervisory court and does not allow for the eliciting, of or reliance on material not the subject of evidence at the original hearings or proceedings.

(c) In disposing of the application the learned judge failed to take into account that strict rules of procedure are applicable to Judicial Review proceedings.

(d) The evidence contained in the affidavit of Jacqueline Mendez, and/or the documents attached thereto, are, as a matter of law, inadmissible as constituting hearsay material and/or no foundation having been laid for their admissibility.

(e) It is not permissible in Judicial Review proceedings to close evidential gaps which exist in the proceedings being challenged.

(f) At disciplinary proceedings [a] defendant is entitled to cross examine on and otherwise rebut evidence adduced in the proceedings. [This defendant] having been denied that opportunity it is unfair and impermissible to allow the untested evidence to be adduced at the review court.

(g) The Constitution of Jamaica guarantees to a person whose civil rights are affected, the right to a fair hearing. This includes the procedural protections of the rules of evidence as it relates to the admissibility of documents, the right to cross-examine and call rebuttal evidence to evidence properly admitted.

(h) The learned Judge erred in failing to take into consideration that the same procedural protections as obtains [sic] in criminal trials for accused persons applies [sic] to persons facing disciplinary proceedings."

An analysis of the main issue, which has been identified, obviates the need to consider each of those grounds individually.

The relevant law

[11] The resolution of the main issue before this court requires the recognition of two fundamental principles. The first is that an inferior tribunal is master of its own proceedings. It is not bound by strict rules of evidence. It may admit any material that tends to establish or disprove any fact in issue before it. That material may include hearsay. The important factor to be borne in mind is that, in conducting its proceedings, the tribunal must observe the rules of natural justice. It must allow the party which is adversely affected by the material, the opportunity to comment on and question that material. The tribunal must also apply its process uniformly for all parties before it.

[12] A number of decided cases establish those principles. Those authorites were comprehensively reviewed by Smith CJ in **R v The Industrial Disputes Tribunal, Ex-Parte Knox Educational Services Ltd** (1982) 19 JLR 223. In that case, the learned Chief Justice was assessing the role of the Industrial Disputes Tribunal (IDT). He not only stated that the IDT may admit hearsay evidence, but also said at page 232B:

> "In my opinion, it was for the Tribunal to decide whether any of the documents produced before it had any value as evidence and was entitled to use such of them as it considered to be of value in arriving at its decision."

I respectfully agree with that view.

[13] The second fundamental principle to be observed is that a court of judicial review has a circumscribed role. The scope of judicial review has been summarised as

pertaining to assessing the illegality, irrationality or impropriety of the procedure and decision of the inferior tribunal. This scope was explained in **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935. At pages 953j – 954a, Roskill LJ said:

> "...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, ***Wednesbury*** principles (see ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."

He explained that the court, in conducting judicial review, is "only concerned with the manner in which those decisions have been taken" (page 954b).

[14] Lord Diplock, in **Council of Civil Service Unions v Minister for the Civil Service**, said at page 950g of the report, that judicial review is available in respect of decisions of an inferior tribunal regardless of whether the "decision-making power is derived from a common law [or] a statutory source".

[15] The court of judicial review does not act as an appellate tribunal, its purpose is to review the process adopted by the inferior tribunal. This was explained by Cooke J (as he then was) at page 29 of **In re Grand Lido Hotel Negril** Suit No M-98/1995 (delivered 15 May 1997). He said:

> "...this court does not perform an appellate function but concerns itself with reviewing the approach of the tribunal. **The primary question to be asked is if the tribunal has [taken] into consideration factors that were not relevant? Or conversely did it ignore relevant factors? Can it be said that its decision was outside the bounds of reasonableness?**" (Emphasis supplied)

[16] It is for the reason that the court of judicial review is primarily concerned with the procedure used by the inferior tribunal, that that court will usually only consider the evidence that was before the inferior tribunal. Normally, fresh evidence is not considered. This was explained in **Ashbridge Investments Ltd v Minister of Housing and Local Government** [1965] 3 All ER 371. The question for the court in that case was whether fresh evidence should have been produced to the court of judicial review. That court was charged with deciding whether the Minister of Housing was correct in designating a particular building as being a house. Lord Denning MR, at page 374g, explained that in earlier decided cases, there was no material provided to the parties, on which the minister's decision could be assessed. On that basis, fresh evidence, as to the content of that material, could be allowed. He said however, that the practice had since changed. He continued thus:

> "Nowadays, when the material is available, it seems to me that the court should limit itself to that material. **Fresh evidence should not be admitted save in exceptional circumstances**. It is not correct for the [review] court to approach the case absolutely de novo as though the court was sitting to decide the matter in first instance. The court can receive evidence to show what material was before the Minister; but it cannot receive evidence of the kind which was indicated in the present case so as to decide the whole matter afresh." (Emphasis supplied)

[17] One of the reasons for excluding fresh evidence in judicial review is that "the court may thereby find itself put in the position of being asked to decide the merits of the case rather than acting as a court of review". This was the opinion of Harrison J in **Regina (Dwr Cymru Cyfyngedig) v Environment Agency of Wales** [2003] EWHC 336 (Admin), expressed at paragraph 58 of his judgment.

[18] The Court of Appeal of England, in **R v Secretary of State for the Environment and Another, *ex parte* Powis** [1981] 1 All ER 788, has given guidance as to the circumstances in which fresh evidence may be admitted by the court of judicial review. That guidance is useful for the instant case and is accurately set out in a portion of the headnote of the report of the case, at page 789 b:

> "The categories of fresh evidence which was admissible on a judicial review were limited to (a) evidence to show what material was before the person making the decision, (b) evidence required to determine a jurisdictional or procedural error, and (c) evidence of misconduct by a party or the person making the decision. That limitation applied to proceedings for *certiorari* generally, whether to quash the decision of an inferior tribunal after a hearing or to quash the decision of a minister when there was no hearing."

[19] In deciding what is admissible as evidence, it is to be noted that, "[t]he usual rules of evidence apply to judicial review claims as to any other type of claim" (see Halsbury's Laws of England 4th Ed Vol 1(1) (2001 reissue) paragraph 171). The rules of evidence include the general ban on hearsay. Whereas hearsay is admissible before an inferior tribunal on the conditions mentioned at paragraphs [11] and [12] above, it is

not, subject to the established exceptions, admissible before the court of judicial review.

[20] It is in the context of those principles that the issue raised in the instant case will be considered.

Application to the instant case

[21] The material, which Mr Leachman seeks to have excluded, is the affidavit of Mrs Mendez and the documents exhibited to that affidavit, namely, Ms Abrahams' letter and the copies of the cheques that were attached to that letter. Mrs Samuels-Brown submitted that whereas Mr Leachman was not objecting to the letter being placed before the court of judicial review, he strongly opposed the production of the cheques. The cheques, learned Queen's Counsel argued, were not adduced into evidence before the tribunal and Mr Leachman had no opportunity to cross-examine on them. Additionally, Mrs Samuels-Brown submitted, the cheques, other than that said to have been given to Mr Leachman, have no probative value.

[22] Mr Cochrane, appearing for the respondents, argued that the documents ought properly to be admitted as, not only were they not new material, but they were highly relevant to the review proceedings. Learned counsel pointed to the record of the proceedings before the tribunal. He referred to page 96 thereof. There, Mr Leachman agreed that he received "a cheque for Sixty Thousand Dollars ($60,000.00) signed by Ms. Jeanette Abraham [sic] in [his] name". At the same page of the record, Mr Leachman was given "the letter" during the course of cross-examination. He read it

into the record (page 97). At page 98 of the record, Mr Leachman was handed "the cheque". Learned counsel marshalling evidence for the Commission then put the following question to Mr Leachman:

> "That letter was shown to you with that cheque that was made payable to you for Sixty Thousand Dollars ($60,000.00) signed by [Ms Jeanette Abrahams], correct?"

Mr Leachman answered "Yes". Despite that answer, the cheque was not tendered in evidence. It is to be noted that Ms Abrahams did not appear before the tribunal.

[23] Having identified those portions of the transcript, Mr Cochrane accepted that the material sought to be tendered before the review court, included hearsay documents. He argued that the court of judicial review would not be asked to assess the cheque and that it was being proffered "for completeness". Learned counsel submitted that the documents did not constitute "fresh evidence". He argued that they were "material".

[24] The flaw in Mr Cochrane's submissions, when considered against the background of the principles of law identified above, may be analysed as follows:

a. The documents which Mrs Mendez seeks to put into evidence constitute hearsay. They are not being tendered by their author.

b. Although the documents could have been placed in evidence before the tribunal, the fact that they were not so admitted, means that they are not admissible before the court where strict rules of evidence apply.

c. Even if the documents did not constitute hearsay, no exceptional circumstances have been shown to exist to allow fresh evidence to be placed before the court.

In the circumstances, the documents are not admissible before the court of judicial review.

[25] The learned judge was, understandably, eager to have full disclosure made. He was concerned that the documents had not been placed before the tribunal and desired that Mr Leachman "should demonstrate the utmost clean hands and not seek to hide behind clever foot-works or seek to conceal any evidence merely because it may expose his credibiliy or lack thereof" (page 2 of the record). To the extent that the learned judge was of the view that the material constituted evidence, I respectfully find that he was in error. His ruling that Mrs Mendez' affidavit and its exhibits should stand as filed, should, therefore, be set aside.

Conclusion

[26] A court of judicial review is bound, not only by the strict rules of evidence, which preclude the admission of hearsay, but it is also constrained as to what is admissible before it as fresh evidence. It is only in exceptional circumstances that fresh evidence will be admitted by that court. In the instant case, the Commission has failed to show that any exceptional circumstances exist to allow such admission and, in any event, the material sought to be admitted was clearly hearsay. It is for those reasons that we made the orders set out at paragraph [3] above.