JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

APPLICATION NO COA2023APP00226

BETWEEN	**CAMLA JAMES MORRISON**	**APPLICANT**
AND	**SUTHERLAND GLOBAL SERVICES JAMAICA PLC LIMITED**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman and Co for the applicant

Kwame Gordon and Chevant Hamilton instructed by Samuda and Johnson for the respondent

29 January 2024 and 1 March 2024

Civil Practice and Procedure - Application for leave to appeal - Striking out of claim - Whether Labour Relations Code relevant in determining whether disciplinary appeal panel is biased - Whether there is a real prospect of success on appeal

BROOKS P

[1] I have read in draft the judgment of P Williams JA. I agree with her reasoning and have nothing to add.

SINCLAIR-HAYNES JA

[2] I too have read the judgment of P Williams JA and agree with her reasoning and conclusion.

P WILLIAMS JA

[3] This is an application for permission to appeal the decision of Palmer Hamilton J ('the learned judge') made on 19 September 2023. In the written judgment of her decision, with neutral citation [2023] JMSC Civ 173, she struck out the statement of case of Camla James Morrison ('the applicant'). She also refused the applicant's application for leave to appeal.

[4] In determining whether permission to appeal ought to be granted we are guided by rule 1.8(7) of the Court of Appeal Rules which provides that "the general rule is that permission to appeal will only be given if the court or the court below considers that an appeal will have a real chance of success".

[5] It is accepted that the learned judge was exercising her discretion in arriving at a decision in the applications. The basis on which this court will interfere with the exercise of a judge's discretion is well settled. An appeal against the exercise of a judge's discretion will generally only succeed if it can be shown that it was based on a misunderstanding of law or evidence, or based on an inference that particular facts existed or did not exist, which can be shown to be demonstrably wrong, or the decision is so aberrant that no judge, mindful of her duty to act judicially, could have reached it (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[6] The applicant was employed to Sutherland Global Services Jamaica PLC Limited ('the respondent') pursuant to a contract of employment dated 16 October 2014. On 7 March 2022, her employment was terminated following a ruling flowing from a disciplinary hearing at which the applicant had challenged charges laid against her by the respondent. On 11 March 2022, the respondent was advised that the applicant was appealing the decision. On 21 March 2022, the applicant was given the names of the panel members who would hear the appeal namely: "Symone Mayhew Chairman, Noel Kabit Cruz - Panel member - Sr Manager – Legal - Philippines, Andres Felipe ObandoMesa - Panel Member- Legal Manager - Human Resources - Columbia". Subsequently, she was advised that the

panel had reviewed the notice of appeal and agreed for the hearing to be done on paper and given the time within which she was to submit her written arguments in support of her appeal.

[7] On 20 April 2022, the applicant filed a fixed date claim form with an affidavit in support. She sought the following relief:

> "A. A Declaration that Noel Kabit Cruz and Andres Felipe ObandoMesa are disqualified from acting and presiding as judges of the appellate tribunal established by the [respondent], to preside over the hearing of the appeal of the [applicant] against the decision of the [respondent] at first instance, to terminate the services of the [applicant] as an employee.
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> B. A declaration that Noel Kabit Cruz and Andres Felipe ObandoMesa, being employees of the defendant, are afflicted by bias by virtue of them being employees of the [respondent] which renders them ineligible to sit and preside over the appeal invoked by the [applicant] against the decision of the [respondent] to terminate the [applicant] from its employment.
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> C. An [i]njunction, restraining Noel Kabit Cruz and Andres Felipe ObandoMesa from participating in the appeal brought by the [applicant] against the [respondent], as a result of the decision of the [respondent] to terminate the [applicant] as an employee of the [respondent]…."

[8] In her affidavit in support of her claim, the applicant asserted that she feared that if the appeal proceeded before the two named men, who were employees of the respondent she would not get a fair hearing by an impartial and independent tribunal, which is guaranteed pursuant to both the Constitution of Jamaica and the common law. Further, she asserted that these two named employees, given their connection to the respondent would have a direct financial interest in the outcome of the matter and would not render an impartial determination. In the alternative, the applicant asserted that the presence of the two men on the appeals tribunal raise the apprehension of bias against her, which would compromise the entire appellate process and deprive the applicant of a

fair hearing. In a further affidavit, filed on 28 October 2022, the applicant asserted that she had been informed that the men were not mere employees of the respondent but occupied senior managerial positions and by virtue of that would have a vested interest in the management of the respondent.

[9] On 21 April 2022, an affidavit in response was filed by Mr Venton Brown, who was then employed to the respondent as the associate vice president human resources, on behalf of the respondent. He asserted that the two men were not employees of the respondent. Mr Cruz was an attorney-at-law employed to Sutherland Global Services Philippines Inc, while Mr Mesa was an attorney-at-law employed to Sutherland Global Services Colombia, SAS. He also asserted that those entities belonged to the same group of companies of which the respondent was a member. He further asserted that pursuant to the respondent's disciplinary policy and the Labour Relations Code ('the Code'), the respondent had on numerous occasions utilized disciplinary and appeal panels consisting of its management team, this being a normal industrial practice of long standing. The respondent's disciplinary policy formed part of the employment contract between the applicant and the respondent. He explained that the respondent always insisted that the panel members should not have prior involvement with the matter. He asserted that in keeping with that practice, neither of the two men had any prior involvement with this matter.

[10] On 27 October 2022, the respondent filed the amended notice of application for court orders seeking *inter alia* that the fixed date claim form be struck out. In her judgment, the learned judge identified the main issue for determination as being whether the statement of case ought to be struck out pursuant to rules 26.3(1)(b) and (c) of the Civil Procedure Rules 2002. She was satisfied that pursuant to rule 26.3(1)(c) if the cause of action disclosed no reasonable grounds for bringing the claim, it should be struck out.

[11] The learned judge noted that the applicant's contention surrounded the issue of bias. The learned judge acknowledged the test for bias as set out by this court in **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society**

[2013] JMCA Civ 15. She noted that the Code clearly provided for "a right of appeal, wherever practicable to a level of management not previously involved". She found that since the Code, which she noted has been described "as close to law as you can get, provides for members of a company to preside over disciplinary appeals" (para. [21]), there was no need to embark on a discussion whether the two men were qualified to sit on the panel. She acknowledged that there are several cases emanating from this jurisdiction regarding the strength of the Code and was guided by **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and the National Workers Union (Intervenor)** (2005) UKPC 16.

[12] The learned judge found that there was no evidence that the two men were in fact employed to the respondent. She further found that there was no evidence of them playing a leading role in the respondent or that they had anything to do with the disciplinary process. She noted that the evidence showed that the men were employees of the group of companies but they operated under their own legal entity out of the Philippines and Columbia respectively. She could see no basis in law for the declaration the applicant was seeking. Thus, she concluded the applicant's statement of case ought to be struck out as an abuse of the process of the court. She was satisfied that the statement of case was incurably bad.

[13] The main thrust of the submissions made by Mr Hugh Wildman ('Mr Wildman'), on behalf of the applicant, was that the learned judge's reliance on the Code was misplaced. He contended that the two men as part of the group of companies had a vested and financial interest in the respondent and a fair-minded observer would conclude that the applicant would not get a fair hearing. In response Mr Kwame Gordon ('Mr Gordon'), on behalf of the respondent, submitted that the Code was relevant in setting out the accepted constitution of the panel that could hear the appeal. The learned judge was obliged to take the Code into consideration. Further, Mr Gordon submitted, the fact that the men were employed to separate legal entities outside of the island and removed from any dealings in the respondent meant that a fair-minded observer armed with all the

relevant information would not be unduly suspicious and conclude that there was a real perception of bias.

[14] Having considered the helpful submissions of counsel along with the material provided, we have come to the clear conclusion that the applicant has failed to reach the high threshold required to successfully challenge the learned judge's exercise of her discretion. We agree with the submissions made by the counsel for the respondent that the learned judge was correct to have recognised the relevance of the Code which was incorporated in the employment contract of the applicant. As such it was entirely permissible for the applicant's appeal to be heard by "a level of management not previously involved". Hence, the learned judge did nor err in finding that a declaration that they were disqualified could not properly be made. Further, the fact that the companies to which the men were employed were entirely different legal entities within the group to which the respondent belonged was not sufficient to assert that they were "afflicted by bias". We cannot say the learned judge was wrong to have arrived at her conclusions and striking out the claim on the basis she did. Mr Wildman has failed to establish that the applicant has an appeal with a real chance of success. The application for permission to appeal should accordingly be refused. The respondent should have its costs to be agreed or taxed.

BROOKS P

ORDER

1. Application for permission to appeal the orders on Palmer-Hamilton J, made on 19 September 2023, is refused.

2. Costs to the respondent to be taxed if not agreed.