

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
COMMON LAW SIDE
2008/PUB/JRV/00028**

IN THE MATTER of an application for leave to apply for Judicial Review pursuant to Order 53 Rule 3 of the Rules of the Supreme Court (Amendment) Rules 1997.

IN THE MATTER of the Industrial Relations Act, Chapter 321 of the Statute Laws of The Bahamas.

IN THE MATTER of a decision of the Minister of Labour & Social Development refusal to take a representational count by Secret Ballot pursuant to Section 42 (6) (c) (ii) of the Industrial Relations (Amendment) Act, Chapter 321

Between

BAHAMAS HOTEL MAINTENANCE AND ALLIED WORKERS UNION
Applicant

and

WEST BAY MANAGEMENT LIMITED
(trading as "Sandals Royal Bahamian")
First Respondent

and

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
Second Respondent

BEFORE: His Lordship The Honourable
Mr Justice K Neville Adderley

APPEARANCES: Mr Obie Ferguson, Mrs Jennifer Mangra and
Ms Lekeisha Strachan with him, for the Applicant

Ms Paula Adderley, for the First Respondent

Ms Dawn Lewis, Mrs Sophia Thompson-Williams and
Mr Kirkland Mackey with her, for the Second
Respondent

30 April, 25 May, 9 July, 16 July 2009

DECISION

Adderley J

1. This is an application by The Bahamas Hotel Maintenance and Allied Workers Union ("**Maintenance**") by way of Originating Notice of Motion pursuant to Order 53, Rules of the Supreme Court, for judicial review for an order of Mandamus to be directed to the Minister of Labour ("the Minister"), who for the time being is the Minister of Labour and Social Development the Honourable Dion Foulkes. The order sought is to require the Minister to carry out his statutory duty by conducting a poll pursuant to section 42 (6) (ii) of the Industrial Relations Act Chapter 321 Statute Laws of The Bahamas ("the Act") in order to determine whether **Maintenance** or the Bahamas Hotel Catering and Allied Workers Union ("**Catering**") should be the bargaining agent for the non-managerial employees of Sandals Royal Bahamian Hotel ("Sandals") the first respondent herein.

2. The application was supported by affidavits of Lynden Taylor filed 17 November 2008 and 30 April 2009. An affidavit by Harvey Don Cooke was filed 29 April 2009 in support of Sandals. Affidavits of Harcourt Brown filed 29 April 2009 in Supreme Court Action No. 2006/PUB/JRV/37 and 5 February 2007 in this action were used in support of the second respondent.

3. As this action and *Maintenance v Catering and The Attorney General* Action 2008/PUB/JRV/00027 are based on the same facts and law they were heard together.

The facts

4. As confirmed by a copy of the Certificate of Registration dated 22 November 2001 exhibited to the affidavit of Harcourt Brown ("Mr. Brown"), the Registrar of Trade Unions, filed 5 February 2007 and by recent exchanges of correspondence between Mr. Brown, the Minister and **Maintenance** pertaining to its operation, **Maintenance** is and was at all material times a registered trade union under the Act.
5. On 4 July 2006, **Maintenance** made an application to Sandals seeking recognition as the bargaining agent for its non-managerial employees pursuant to section 42 (1) of the Act. This would be the first time that Sandals was unionized.
6. On 14 July 2006, **Maintenance** received a letter from Sandals' Attorneys through its Counsel which was deemed to be a rejection.
7. On 20 July 2006, **Maintenance** responded to Sandals' Attorney informing him that **Maintenance** had in excess of Three Hundred and fifty (350) non-managerial employees who desired **Maintenance** to be their bargaining agent.
8. On 21 August 2006, **Maintenance** made application to the Minister pursuant to section 42 (5) of the Act for a determination that it was entitled to be the bargaining agent for Sandals' non-managerial employees pursuant to section 42(1) of the Act.
9. On 1 September 2006, **Catering** made a similar application to Sandals for such recognition.
10. In a letter dated 12 September 2006, from Michael Reckley, Executive Vice President of the Bahamas Hotel Employers' Association, **Catering** was

informed that it had been recognized as the bargaining agent for the non-managerial employees at Sandals.

11. On 1 November 2006, Mr Brown acting for the Minister wrote the following letter to **Maintenance**:

“November 1st, 2006

Mr. Obie Ferguson
Counsel Advisor
Bahamas Hotel Maintenance
& Allied Workers Union
Nassau, The Bahamas

Re: Poll to determine Bargaining Agent for Employees of West Bay
Management Ltd. D. B. A Sandals Royal Bahamian Hotel

Dear Sir:

Pursuant to the provisions of Article 42 (b) (c) of the Industrial Relations Act Chapter 321 Statute laws of The Bahamas and in view of the fact there are two unions namely the Bahamas Hotel Maintenance and Allied Workers Union and the Bahamas Hotel Catering and Allied workers Union claiming to have as members in good standing, more than fifty per centum (50%) of the bargaining unit employees of West Bay Management Ltd. D.B.A. Sandals Royal Bahamian Hotel.

Please be advised that the Honourable Minister of Labour shall take a representational count by secret ballot in order to determine what union the employees desire to be their bargaining agent.

Please be further advised that said poll will be held in the conference room at the Department of Labour situated at the first floor, Clarence A. Bain building, Thompson Blvd. on Tuesday 7th November 2006, between the hours of 9:00a.m. and 5:00p.m. All parties are permitted to have representation at and during this exercise. Herewith enclosed, please find a sample of the ballot.

Your usually cooperation is appreciated.

Sincerely,

Harcourt Brown
(for) Minister of Labour”

12. Relying on this the attorneys sent out a memorandum dated 5 November 2006 to all line workers which read as follows:

“M E M O R A N D U M

To: All Line Workers Dated: November 5th, 2009
From: Obie Ferguson, Jr. Subject: **POLL VOTE**

The department Of Labour confirmed to me that Mr. Stephen Zadie, your General Manager, has agreed to allow you time off to vote on Tuesday, November 7th, 2006 at the Department of Labour, Clarence A. Bain Building, Thompson Boulevard, to enable you to determine your desired bargaining representative between the hours of 9:00 a.m. to 5:00 pm.

This is a historic occasion and an opportunity for you to exercise your constitutional rights; therefore, we urge all workers at Sandals Royal Bahamian Hotel to come out and vote for your self and your children's future.

In order to assist you in the above process, your union, the Bahamas Hotel Maintenance & Allied Workers Union, has arranged a shuttle bus to take you to and from the polling station, which would leave the Cable Beach Post Office parking lot every half hour, starting at 9:00a.m. to 5:00p.m., Tuesday, November 7, 2006

Remember a vote is a serious thing to waste.

See you at the Department of Labour on Tuesday, November 7, 2006 at 9:00 a.m.

Obie Ferguson, Jr.
ATTORNEY for
The Bahamas Hotel Maintenance
& Allied Workers Union

Cc: The Hon. D. Shane Gibson, Minister of Immigration, Labour & Training
Mr. Harcourt Brown, Director of Labour & Registrar of Trade Unions
Mr. Stephen Zadie, General Manager, Sandals Royal Bahamian Hotel
President and Secretary General BHM&AWU”

13. On 6 November 2006 upon application for judicial review by **Catering** which challenged the Minister's decision to conduct the representative poll, the Court restrained the Minister by way of interlocutory injunction from conducting the secret ballot that was scheduled for 7 November 2006 pending a determination of the judicial review application.

14. On 24 September 2008, Hall CJ. refused the reliefs sought by the judicial review application and discharged the 6 November 2006 injunction which had prohibited the Minister from conducting a poll.

15. The decision was rendered in ***West Bay Management Limited (trading as "Sandals Royal Bahamian") and Bahamas Hotel Catering and Allied Workers Union v The Attorney General and Bahamas Hotel Maintenance and Allied Workers Union*** Action No. 2006/PUB/JRV/00037. In that action, **Catering** had sought by way of judicial review, the following relief, inter alia:

(1) an Order of Prohibition to prohibit the Minister from taking a representational count by secret ballot as contemplated in [his letter to Sandals] of 1 November 2006.

(2) an Order of Certiorari to quash the purported registration of **Maintenance**.

Hall CJ exercised his discretion to refuse the reliefs sought because of delay. He applied the well known principle enunciated by Hayton J (AG) in **Regina v Securities Commission of The Bahamas, Ex Parte Petroleum Products Limited** [2000] BHS J. No. 30, 1999 No. 1440 that applications for judicial review should be made promptly and in any event within six months from the date when the grounds for the application first arose.

16. By Notice of Appeal filed 22 October 2008 Sandals appealed the decision of Hall CJ to the Court of Appeal.

17. By letter dated the same date as the discharge of the injunction, **Maintenance** made an application to the Minister requesting him to supervise and certify a poll pursuant to Article 42 (6) (c) (ii) of the Act with respect to employees of Sandals which had been scheduled for 15 October 2008..

18. On or about 26 October 2008, the Minister contacted the representative of **Maintenance** and informed him that he was advised to await the outcome of the appeal before acting on his request.

19. On or about 30 October 2008, the Minister made a statement to the press confirming his intention not to proceed with the poll on the ground that Sandals had appealed the 24 September Decision of Hall CJ and that he was awaiting the outcome of the appeal.”

The Law

20. Lord Diplock in ***Council of Civil Service Union et al v Minister for Civil Service*** [1985] AC. 374 at p 408 E – 409 A (“**C.C.S.U.**”) described judicial review as follows:

“Judicial review, now regulated by R.S.C., Ord, 53 provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the “decision-maker” or else a refusal by him to make a decision.

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons other than the decision-maker, although it may affect him too. It must affect such other person either:

- (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
- (b) by depriving him of some benefit or advantage which either

- (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or
- (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a “legitimate expectation” rather than a “reasonable expectation,” in order thereby to indicate that it has consequences to which effect will be given in public law whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a “reasonable” man, would not necessarily have such consequences.”

21. The courts will not hesitate to issue an order of mandamus in appropriate cases. For example, in ***Rodrick Wood v the Land Surveyors’ Board*** 2005/Pub/Jrv/00028 Hall, CJ issued an Order of Mandamus to the Land Surveyors’ Board to receive an applicant’s application according to the law as it then existed, notwithstanding the Board’s attempt to add additional pre-qualifications not then required by law and which they were not empowered to demand. In ***Commonwealth Electrical Workers Union v the Minister of Labour and Immigration and the Attorney General*** FP/PUB/JRV/00001/200 Maynard J (AG), as he then was, issued an Order of Mandamus directed to the Minister when the Minister had failed to act in accordance with his public duties pursuant to section 20(3) of the Act mandating him to cause an officer to attend to supervise the ballot of the Union for the purpose of determining a strike action as required by law.

22. The Act imposes a duty on the employer to recognize a trade union of which more than fifty per centum of the relevant employees are members: Section 41(1) reads as follows:

“41.(1) Every employer shall recognise as the bargaining agent for employees employed by him, a trade union of which more than fifty per centum of the employees in his employment, or in a bargaining unit of such employees, are members in good standing or, in the event of there being more than one trade union claiming to have as members in good standing more than fifty per centum of such employees, that trade union which the minister determines in accordance with subsection (5) or 6) of section 42 to be the union entitled to such recognition and, subject to the provisions of this Act, shall, when called upon by such union, treat and enter into negotiations with that trade union for the purposes of collective bargaining.”

23. It is the responsibility of the trade union to seek recognition as the bargaining agent. This process is set forth in section 42(1) of the Act:

“42(1) A trade union which seeks recognition by an employer as bargaining agent for employees employed by him, shall make its claim for such recognition in writing to the employer specifying the bargaining unit, if any, in respect of which recognition is sought, and shall serve a copy of such claim on the Minister.

(2) Within fourteen days (or such longer period as the trade union and the employer may agree, a copy of which agreement shall be forwarded to the Minister) of the date of the receipt of such a claim, the employer shall give notice in writing to the union stating whether he accepts or rejects the claim and, where he rejects the claim, he shall state the reason for such rejection, and shall forward to the Minister a copy of the notice of acceptance or rejection at the time when the notice is given to the union.

(3) Where an employer fails to accept a claim for recognition within the period specified in subsection 2), he shall be deemed to have rejected the claim on the day following the expiry of that period.

(4) Where such a claim has been, or is deemed to have been, rejected, the union making the claim may, not later than fourteen days after the rejection or the receipt of notice of rejection of the claim, as the case may be, submit the matter to the Minister for determination.

24. If there is more than one union vying for recognition the Minister is mandated to take a representational count. The circumstances in which he should exercise that mandate is set forth in section 42 (6) (c) and (d) following:

“42. (6) In the event of there being more than one union claiming to have as members in good standing more than fifty per centum of the employees concerned, then the Minister shall determine, as soon as may be after the receipt of a submission under subsection (4), whether the union making the claim or any other union is entitled to recognition as the bargaining agent for the employees concerned, and for that purpose the Minister shall have the following powers, that is to say-

...

- (c) to determine whether more than fifty per centum of the employees concerned desire the union making the claim or any other union to be their bargaining agent; and, for the purpose of so determining, the Minister-
 - (i) may require the union to submit the names of all the members of the union in good standing, employed by the employer concerned at the date of the union’s application for recognition as a bargaining agent; and
 - (ii) shall take a representational count by secret ballot in order to determine what union the employees desire to be their bargaining agent, and in the taking of such count the Minister may place on the ballot paper, in addition to the names of the unions making the claim; the name of the union recognized as the bargaining agent, if any;
- (d) when considering any matter submitted under subsection (4), to take into account any change in the circumstances which in his opinion occurred since he received the matter and which is relevant to the determination being made.”

25. In ***City Markets Ltd v Bahamas Commercial Stores, Supermarkets and Warehouse Workers Union*** [2002] BHS J No. 33, No. 33 of 2000, Ganpatsingh JA, as he then was, in considering the validity of the decision of the Minister under section 42 (5) when determining the bargaining unit including section 42(5)(d) which is identical to section 42(6)(d), gave his view of what the Minister’s duty entails at paragraph 11:

“ ... No doubt the Minister has a constitutional duty to discharge his delegated authority fairly and honestly and to the best of his ability, to be judged in the light of the practical realities, in ascertaining the desire of the employees ...”

and at 13 in relation to the scope of the minister’s powers:

“... The amplitude of his powers extend to taking steps and making such enquires as were in his opinion appropriate. The only criteria in this regard, would be one of relevance...”

26. The Act appears to treat time as of the essence because it sets out strict time lines in which certain matters must be done when a union wishes to claim recognition. Section 42(6) mandates the Minister to determine “... as soon as may be after the receipt of a submission...”. Judges have pointed to the need for timeliness in dealing with this issue. This is what Osadabay J, as he then was, had to say in ***Dravo Bahamas Rock Limited v Commonwealth Transport and Allied Workers Union*** (“***Dravo***”) Action No. 1627 of 1991 in the Supreme Court on its common law side:

“...The tenure of the Act demonstrates that in such matters time is of the essence if justice is to be done. A trade union seeking recognition must show or prove that it commands the membership in good standing (*sic*) at least fifty percent (50%) of the employees in the bargaining unit for which it seeks recognition. If the trade union is to secure such a recognition it must act or pursue the recognition at the time when membership support is at its peak. It must strike while the iron is still hot...”

I think this dicta is consistent with the wording of the Act and is no less relevant because it was made in ***Dravo*** which concerned an application for an injunction.

Conclusions

27. It has been argued by counsel for the second respondent that in determining whether the applicant is entitled to recognition, the question is whether it is reasonable for the Minister to consider what would be the outcome

of the legal proceedings challenging the validity of the registration of the applicant. The decision in ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 K.B. 223 was cited as authority but reasonableness is the wrong test in this case. The correct test is whether it is relevant. That is what Ganpatsingh JA meant in ***City Markets Ltd v Bahamas Commercial Stores*** when he said in the Court of Appeal: "The only criteria in this regard would be one of relevance". Under section 42 (6)(d) the Minister can only take into consideration a matter "...which is relevant to the determination being made ...". The determination being made is set out in section 42(6)(c), namely, "... whether more than fifty percent of the employees concerned desire the union making the claim or any other union ". Simply put, it is the view of the court that the outcome of the appeal cannot be said to be relevant to determining the desire of the employees.

28. Counsel also contend that the Minister has not refused to conduct a representational count and that he has not made a decision which is amenable to mandamus. It seems to the court, following ***C.C.S.U.***, that from the date it received the Minister's letter dated 1 November 2006 **Maintenance** and its members had a legitimate expectation that the Minister would conduct the poll shortly thereafter as he is required by law to do. That was interrupted by the injunction of 6 November 2006 but now that the impediment to his conducting the poll has been removed by the discharge of the injunction, it would amount to a procedural impropriety for him not to proceed. Furthermore, apart from being irrelevant it appears that **Maintenance** did not have an opportunity to be heard on his reason for not proceeding.

29. By allowing his determination to abide the outcome of Sandals' appeal the Minister is agreeing, without the consent of the opposing party, to reimpose the injunction on himself which the court discharged and is granting a stay of the effect of the decision in Action No. 2006/PUB/JRV/00037. This appears to be usurping the function of the court since under the Rules of the Court of Appeal an

appeal from this court does not act as an automatic stay. A party interested in obtaining a stay pending his appeal must make an application to the court for a stay. It is in the court's discretion to determine whether or not a stay would be granted. The Rules are to create certainty for litigants. **Maintenance** has a judgment from the court dismissing the very application which is being made to the Court of Appeal; there is no stay of that judgment, and it has the right to rely on it and to expect those affected to abide by it.

30. Needless to say it is irrelevant that Sandals has voluntarily recognized **Catering** because it cannot usurp the delegated authority of the Minister to carry out the process of determination.

31. I am aware, as submitted by the respondents, that the grant of an Order of Mandamus is discretionary. Having considered the facts I do not consider this a proper case for me to exercise my discretion to refuse the relief sought nor am I persuaded by the other arguments advanced by opposing counsel all of which I have considered even though I have not mentioned them specifically.

Ruling

32. For the foregoing reasons, I grant the Order of Mandamus as prayed. I direct the Minister to carry out his statutory duty pursuant to section 42(6)(c) of the Act by taking a representational count by secret ballot in order to determine which union the non-managerial employees desire to be their bargaining agent with Sandles. Time is of the essence in conducting the poll which should be carried out forthwith but in any event on or before Friday 14 August 2009.

33. Costs shall follow the event to be paid by the respondents to the applicant to be taxed if not agreed.

K Neville Adderley
Justice