

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2017

CLAIM NO. AXAHCV 2017/0014

In the matter of Part 60 of the Civil Procedure Rules
2000 of the Eastern Caribbean Supreme Court

AND

In the matter of an Employment Dispute under
Section 7(1)(D) of the Fair Labour Standards Act
R.S.A. c. F15

AND

In the matter of Section 19 of the Labour Department
Act R.S.A. c. L5

BETWEEN:

[1] SOF 82 ANGUILLA HOLDINGS LLC
[2] STARWOOD CAPITAL GROUP
[3] FOUR SEASONS HOTELS LIMITED

APPELLANTS

AND

JOHN HARRIGAN

RESPONDENT

Appearances

Mr. D. Michael Bourne and Ms. Dana Campbell instructed by Keithley Lake and Associates for the Appellants

Ms. Shameica Hodge instructed by Webster for the Respondent

2017: May 16, November 17

Statutory Appeal – Labour Tribunal joining Appellants as parties to labour dispute – Labour Tribunal deeming Appellants ‘successor employers under Act – Appellants not being afforded

opportunity of being heard – Appellants contending that Tribunal only able to assess damages as against original employer pursuant to an order of the Court of Appeal – Appeal allowed – Tribunal not functus officio on the issue of successor employer – Tribunal acting in breach of principles of natural justice by failing to give Appellants an opportunity to be heard.

JUDGMENT

- [1] **RAMDHANI, J.: (Ag.)** This is an appeal from an Order of the Labour Tribunal ('the Tribunal') made on the 9th February 2017, ('the Order') by which it was ordered that the appellants be deemed successor employers and were added as parties to the proceedings before the Tribunal. The matter was heard on the 4th May 2017 and on consideration of the matter the appeal was allowed, and the matter remitted to the Tribunal on the terms and for the reasons set out in this decision.

The Appeal by way of Fixed Date Claim

- [2] The appeal was filed against the Order of the Tribunal on the 20th February 2017 seeking the following relief:
- (i) An Order setting aside the decision of the Labour Tribunal to add the appellants as parties in the proceedings.
 - (ii) An Order setting aside the decision of the Labour Tribunal that the Appellants be deemed successor employers.
 - (iii) An Order directing that the respondent shall pay the costs and expenses of the appellants.
 - (iv) Such further or other relief as this court deems fit.

The background to the Appeal

- [3] The matters which led to this appeal arose out of a labour dispute between the respondent and Viceroy Hotel Group (Anguilla) Limited ('Viceroy'). A Labour Tribunal was convened to then convened to resolve the dispute. On the 3rd of October 2014, the Tribunal made an order declaring that the respondent had been unfairly dismissed by Viceroy.

- [4] On the 29th October 2014, Viceroy appealed to the High Court against the decision of the Tribunal. That appeal was successful, and the Tribunal's decision was overturned. The decision of the High Court was then appealed to the Court of Appeal which reversed the former's findings and remitted the matter back to the Tribunal for an assessment of damages arising out of the unfair dismissal.
- [5] It would appear that when the matter came on before the Tribunal for hearing in September 2016, Counsel who had been appearing for Viceroy attended and informed the Tribunal that they had no instructions to appear on behalf of Viceroy. It was disclosed to the Tribunal that Viceroy had since been dissolved and struck from the Register of Companies.
- [6] It also appeared that following, on the 16th December 2016, the respondent applied to have the appellants joined to the proceedings before the Tribunal on the basis that they were 'successor employers' within the meaning of the Labour Act. By affidavit evidence supporting that application, the respondent contended *inter alia* that:

"6. At all material times Viceroy Hotel Group Anguilla managed the hotel including hiring of employees on behalf of Starwood Capital and SOF VIII Hotel II Anguilla Holdings LLC as their agent.

7. I am informed and do believe that Viceroy Hotel Group Anguilla is no longer managing the hotel and that the Four Seasons Anguilla is now the new manager. Four Seasons Anguilla is therefore the Defendant Company's successor. Starwood Capital, SOF VII Anguilla Limited and Four Seasons are the new employer team."

- [7] The Application before the Tribunal was not served on the Appellants nor were they notified of the hearing; no representations were made on their behalf. The Tribunal stating to be acting in pursuance to sections 16 and 22 of the Fair Labour Standards Act, made an Order on the 9th February 2017, deeming that 'SOF 82 Anguilla Holdings LLC, Starwood Capital Group, and Four Seasons Hotels Limited are deemed successor employers'. It also ordered that the Order be served on the appellants, and directed that the assessment of damages be set for a later date.

The Issues on the Appeal

- [8] The appellants' appeal is grounded in several contentions which have served to frame the issues before the court. First, they contend that the Tribunal did not have any jurisdiction to proceed to consider whether a new employer could be added to the proceedings, as by virtue of the Court of Appeal judgment and referral on the 4th May 2016, the matter had been remitted to the Tribunal for the limited purpose of the assessment of damages; for all other issues the Tribunal was *functus officio*.
- [9] The second issue for the court is framed in the appellant's second contention, namely whether section 16 of the Act vested the Tribunal with jurisdiction to add the appellants as a 'new employer'?
- [10] The third issue is whether the Tribunal acted in breach of the principles of natural justice by exercising any discretion given to it under section 22 of the Act when proceeded to make an order without giving the Appellants an opportunity to be heard.
- [11] The fourth issue for the court is whether the Tribunal erred as a matter of law in its finding that the business of Viceroy has been transferred to the appellants as the new employer?

The Court's Analysis and Findings

Issues No.1, 2, and 4 - The powers of the Tribunal under section 16 of the Act, the question of *functus officio*, and whether the appellants are successor employers

- [12] For practical purposes these three matters will be dealt with together.
- [13] It is the appellants' position that in 2014, the Tribunal had reached a decision in respect of the party it found Viceroy was liable for the respondent's unfair termination. When, therefore the matter was remitted to the Tribunal for assessment of damages the issue as

to whom liability attached was not open as this had already been determined. The appellants relied on **Chandler v Alta. Assoc. of Architects** [1989] 2 S.C.R. to support their contention that the Tribunal could not revisit its earlier final decision.

- [14] If the appellants are right about this, this would have the effect of disposing of the entire appeal.
- [15] If the court were to disagree with the first argument, the appellants contend in the alternative that in this case having regards to the facts presented by them, there could be no basis for the Tribunal to hold that section 16 of the Act applied to allow the Tribunal to deem the appellants successor employers. This is because they say they simply acquired the business of Barnes Bay Development Ltd. by buying the 'property' of the employers at an auction. The appellants in that context then simply entered into a management contract with Viceroy to manage a hotel on the site.
- [16] This court disagrees with the appellants on the first point. It would be startling to find that a Tribunal in the shoes of this Tribunal, faced with 'apparently new employers', the old employers having disappeared for some reason or the other, would be barred from considering the issue of successor employer.
- [17] On one view, the circumstances as existed here amounted to a fundamental change of circumstances which would entitle the Tribunal to address their minds to this issue in context of section 16 of the Act. Even the case relied on by the appellants make this crucial point. The full passage reads:

"I do not understand Martland J to go so far as to hold that functus officio has no application to administrative tribunals. Apart from English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once a tribunal has reached a final decision in respect of a matter which is before it in accordance with its enabling statute that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstance. It can only do so if authorized by statute or if there has been a slip or error within the

exceptions enunciated in Paper Machinery Ltd. v J.O. Ross Engineering Corp [1934] S.C.R. 186.

To this extent the principle of functus officio applies. It is based however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to an appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by the enabling legislation.”

- [18] The appellants placed emphasis on the *functus officio* part of this quoted passage to make their point. But this very passage speaks to approaching the question in a flexible and less formalistic manner.
- [19] The legislation by section 16 gives the court the power to determine an issue of successor employer. When the Tribunal sat in 2014, the question of successor employer was not before the Tribunal, and so that issue was never determined by the Tribunal. For this reason, the Tribunal could not in any sense be considered *functus*. It is absurd to hold that a Tribunal such as this could not have the power to consider under the Act even at the stage of damages whether another entity had taken over all the business and the liabilities of the former employer deemed to be liable in damages for unfair dismissal. The Labour Act is designed to resolve disputes not defer them, and for this reason, section 16 must be construed in a purposive manner to facilitate this and to allow this Tribunal, even at this stage to deal with this issue. Further, as a matter of justice this Tribunal must be allowed to address their minds to this point and to make a ruling.
- [20] For these reasons, I hold that the Tribunal is quite entitled to visit this issue in the circumstances of this case.

- [21] The determination of this question is largely factual, and for the reasons which follow, I will decline to determine whether the appellants were indeed successor employers but will remit this matter to the Tribunal for them to consider this matter afresh.

Issue No. 3 – Whether the Tribunal failed to observe the principles of natural justice in joining the Appellants as successors employers without affording them an opportunity to be heard.

- [22] The appellants have contended that the Tribunal proceeded *ex parte* to deem the Appellants 'successor employers' without giving them an opportunity to be heard.
- [23] The respondent has contended that this was merely a provisional ruling and that it would be revisited when the appellants appear before the Tribunal for the assessment hearing. There were statements that the Tribunal was simply attempting to regulate its own procedure when it acted as it did.
- [24] I agree with the appellants on this matter. For starters, I cannot see how anyone can consider that this order deeming the appellants as successor employers could be viewed as provisional. It does not say so on the face of the order. It simply states that the Tribunal has found that the appellants are deemed to be successor employers.
- [25] I also accept that this is a crucial matter affecting rights, and the principles of natural justice must be the compelling guide for all such proceedings. The principle as referred to by Lord Dyson in **Al Rawi v Security Service** [2011] UKSC 34 at paragraph 22 was commended to me by the appellants. It is worth citing:

"...the court's powers to regulate its own procedure is subject to certain safeguards. The basic rule that (subject to certain established and limited exceptions) the court cannot exercise its powers to regulate its own procedure in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with common law principles of natural justice and open justice. To put the same point in different way, the court should exercise the power to regulate its procedure in a way which respects these two important principles which are integral to the common law right to a fair trial."

[26] Even if this Tribunal had purported to make a provisional order, the manner in which it approached the matter and the actual order which it made gives an offends against the principles of natural justice. I cannot see how such an order could have been made in the absence of the Appellants. They should have been asked to attend for the purposes of considering whether that determination could be made.

Conclusion and Orders.

[27] The appellants appeal is allowed in part. The Order of the Tribunal declaring that the appellants shall be deemed successor employers in accordance with section 16 of the Act is discharged. The matter will be remitted to the Tribunal for a full hearing on the issue as to whether the appellants are to be considered such successor employers. They will of course be give a reasonable and full opportunity to be heard on this point. The appellants will have its costs of EC\$2,500.00.

Darshan Ramdhani

High Court Judge (Ag.)

By the Court

Registrar