

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2010/0370

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2000

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION
OF THE MINISTER OF LABOUR NOT TO PROCEED WITH THE SCHEDULED
POLL AT INDEPENDENCE AGENCIES LTD. ON JULY 14, 2010**

AND

**IN THE MATTER OF AN APPLICATION BY THE TECHNICAL AND ALLIED WORKERS
UNION (GTAWU) FOR AN ORDER OF MANDAMUS COMPELLING THE SAID
MINISTER TO CONDUCT THE SAID POLL IN ACCORDANCE WITH THE LAW**

AND

**IN THE MATTER OF SECTIONS 1, 33, 34, & 35 OF THE LABOUR
RELATIONS ACT 1999**

AND

IN THE MATTER OF SECTIONS 1(a), 11 & 16 OF THE CONSTITUTION

BETWEEN:

**GRENADA TECHNICAL AND ALLIED WORKERS UNION
(GTAWU)**

Applicant

AND

**HONOURABLE KARL HOOD
(Minister of Labour)**

Respondent

Appearances:

Mr. R. Ferguson, with him Mr. T. Lambert for Applicant
Mr. D. Ramdhani for Respondent

2010: October 7
2011: September 22

RULING

- [1] This is an application by the Grenada Technical and Allied Workers Union (TAWU) for leave for judicial review.
- [2] The TAWU is a registered trade union representing workers in various sectors within Grenada. The Defendant is the Minister responsible for labour matters within the meaning of the Labour Relations Act No. 15 of 1999, as amended.
- [3] On the 25th of August 2010, TAWU applied by Notice of Application for leave to apply for judicial review. They requested:
- “(i) A declaration that the Respondent has failed to comply with the mandatory requirements of Section 35(1) of the Labour Relations Act by arbitrarily cancelling a poll scheduled by the Labour Commissioner in relation to the employees at Independence Agencies Ltd. the said scheduled poll being the result of an application to the Respondent by the Applicant to be certified as the Bargaining Agent for the employees at the abovementioned establishment.
 - (ii) An order of Mandamus directing the said Minister to comply with the provisions of the Labour Relations Act, in particular s. 35(1).
 - (iii) Such further or other relief as the Court seems just.
 - (iv) Costs.”
- [4] The grounds of the application were as follows:
- “i) The Respondent failed to comply with the mandatory requirements of section 35(1) of the said Act by cancelling the poll

after the Labour Commissioner had already determined the appropriateness of the bargaining unit at Independence Agencies Ltd.

- ii) The Minister failed to give due consideration to the Labour Commissioner's application of the procedures laid down in section 35(1) (a) (b) & (c) which led to the scheduling of the poll on a specified date.
- iii) The action of the Minister in cancelling the poll amounts to a usurpation of the authority of the Labour Commissioner as provided for under section 35 of the Labour Relations Act.
- iv) The Minister in cancelling the poll has acted inconsistently with the Constitution of Grenada, the Supreme Law which recognizes the fundamental right of assembly and association.
- v) The Minister in cancelling the poll failed to give due consideration to the meaning of a 'bargaining unit' as spelt out under section 2 of the Labour Relations Act."

[5] In support of the application was the affidavit of Mr. Godwin Thomas, a member of the executive committee of the Union, along with exhibits.

[6] There were three affidavits filed in response by the Defendants. The Honourable Minister of Labour, Mr. Ignatious K. Hood, the Labour Commissioner, Mr. Cyrus Griffith, and Labour Officer, Mr. Michael Horsford.

[7] The relevant facts are as follows:

"(6) GTAWU made an application to the Honourable Karl Hood, Minister of Labour, on July 02, 2010 for GTAWU to be certified as the Bargaining Agent for the non-managerial employees of Independence Agencies Ltd., located on the Maurice Bishop

Highway in True Blue, St. George's. The application was signed by Mr. Bert Patterson, General Secretary of GTAWU.

- (7) On July 5, 2010 GTAWU received a letter from Independence Agencies Ltd. indicating that the application to be certified as the Bargaining Agent for the workers at the said Independence Agencies Ltd. was incomplete based on section 34 of the Labour Relations Act.
- (8) On July 5, 2010 GTAWU responded by letter dated July 5, 2010 to Independence Agencies Ltd. GTAWU pointed out that it had fulfilled its obligation by providing the Company with a copy of its application of July 01, 2010 to the Minister.
- (9) On July 9, 2010 GTAWU received a copy of a letter addressed to Independence Agencies Ltd. and signed by the Labour Commissioner. The letter invited Independence Agencies Ltd. and, by extension, GTAWU, to a meeting on July 14, 2010 at 3:15 p.m. to resolve the issue of the application by GTAWU "for certification as bargaining agent of employee (sic) at the Independence Agencies Limited".
- (10) On July 12, 2010 at about 3:00 p.m. a meeting was called by the Labour Commissioner at the Ministry of Labour. The meeting included the following parties: Cyrus Griffith and Adrian Thomas, Labour Commissioner and Deputy Labour Commissioner respectively; Kenrick Sylvester, Kelly Joseph and Hillary Baptiste, Manager, Accountant and Personnel Manager respectively, of Independence Agencies Ltd.; and Godwin Thomas and Trevor Xavier, union officers of GTAWU.
- (11) At the meeting the issues discussed were as follows:

- (a) Independence Agencies Ltd. requested that the Sales Manager, the Warehouse Manager, the Manager's Secretary, the Accountant Assistant, the Customers Supervisor, the Inventory Supervisor and the Warehouse Supervisor be exempted from the Bargaining Unit.
- (b) In response GTAWU stated that while it was willing to cooperate with the company's request, if the workers referred to in subparagraph (a) were to show up on the polling day to vote, they will have to be given the opportunity to exercise their right under the law, since those workers do not fit the description of manager.
- (c) In relation to the workers at CK's Super Value the following transpired:
 - i. the Company suggested that those workers were part of Independence Agencies Ltd. and should be included in the Bargaining Unit;
 - ii. unlike subparagraph (a) above, the Company made no application for the staff at CK's Super Valu with a similar supervisory/managerial role to be exempted from the bargaining unit;
 - iii. when asked by the Labour Commissioner whether it had any interest in unionizing the workers at CK's Super Valu, GTAWU response was no, indicating that its application was for the workers at Independence Agencies Ltd. on the Maurice Bishop Highway;
 - iv. when asked by GTAWU whether CK's Super Valu was registered as Independence Agencies

Ltd., the Company's Management could not give a definitive answer;

- v. the meeting concluded, and all the parties agreed, that the poll will be held for the workers at Independence Agencies Ltd. on the Maurice Bishop Highway;
- vi. the Ministry of Labour suggested that the poll be set for Wednesday, July 14, 2010 at 10:00 a.m.;
- vii. after some minor objections by GTAWU and the Company regarding the time of day suggested by the Labour Commissioner, all parties agreed that the poll should be conducted at 8:30 a.m. on July 14, 2010.

(12) On July 13, 2010 GTAWU received a letter from the Labour Commissioner, Mr. Cyrus Griffith, with the caption "RE: POLL OF NON-MANAGERIAL EMPLOYEES AT INDEPENDENCE AGENCIES LTD." The letter confirmed that Wednesday 14th July 2010 was the date fixed for the poll at Independence Agencies Ltd. The letter also requested that "a list of all non-managerial workers employed at the above named establishment, whom you claim to have as members in good standing", be made available to the Hon. Minister of Labour so as to "facilitate the conduct of the poll".

(13) On July 13, 2010 the Labour Commissioner also wrote to the Manger of Independence Agencies Ltd. advising him that pursuant to an application by GTAWU for certification as bargaining agent for the workers at Independence Agencies Ltd., the Hon. Minister of Labour "intends to institute, and will conduct a

poll of those workers” on 14th July 2010, in accordance with the relevant sections of the Labour Relations Act. The letter further stated that the Labour Commissioner was directed by the Hon. Minister of Labour “to request from you a list of the non-managerial workers employed by the Independence Agencies Ltd. and that you will notify the workers of the time and place of the poll”.

- (14) On July 13, 2010 the manager of Independence Agencies Ltd. submitted a list of 65 non-managerial employees. The list was headed: “INDEPENDENCE AGENCIES LIMITED NON-MANAGERIAL EMPLOYEES”. However, the list indicated that 39 of the 65 employees belong to Independence Agencies Ltd. and the remaining 26 belong to CK’s Super Valu.
- (15) On the morning of July 14, 2010, when the respective parties turned up for the poll, Mr. Carol Bristol QC, the Company’s lawyer, took issue with the lack of participation of the workers at CK’s Super Valu in the poll. Mr. Bristol QC stated that those workers were part of Independence Agencies Ltd.; that they were in the Bargaining Unit, and that they will be part of the poll.
- (16) In response to Mr. Bristol’s, Q.C statement, two points were made:
 - (a) that this poll was being conducted by the Ministry of Labour and no one else; and
 - (b) that the Union and the Company had already met with the Ministry of Labour to determine the Bargaining Unit.
- (17) Elizabeth Cyrus, a Ministry of Labour official, reiterated part of what was stated, but that did not satisfy Mr. Bristol, Q.C, who

repeated that the workers at CK's Super Valu were part of the Bargaining Unit.

- (18) GTAWU produced a few concrete precedents regarding workplaces where the Bargaining Unit was determined in similar circumstances. These precedents were the following:
- (a) there are four (4) different unions acting as bargaining agents for all government employees, and GTAWU is one of these unions;
 - (b) Kentucky Fried Chicken has three (3) different locations for its business operations, but GTAWU represents workers in only one of these locations; and
 - (c) with respect to Gravel Concrete and Emulsion Production, and Caribbean Agro Industries Ltd., GTAWU has two separate certificates of recognition for each workplace – one certificate for the management staff, and the other for the generalized staff.
- (19) Despite those precedents, Mr. Bristol, QC, continued to insist that CK's Super Valu will be part of the Bargaining Unit, and what was done in the past was wrong and should be discontinued.
- (20) At that point an audience was sought with the Ministry of Labour officials present. Mr. Bristol, Q.C, objected. GTAWU's position remained the same, the poll applied for was for the workers at Independence Agencies Ltd.
- (21) Mr. Bristol, Q.C, then advised the Company not to participate in the poll. Immediately thereafter, Mr. Bristol, Q.C, and the Company's management, together with one Ministry of Labour

official, Mr. Michael Horsford, walked out of the Conference Room at Independence Agencies Ltd. The poll was thus aborted.

- (22) The Honourable Minister Karl Hood then spoke with a representative of GTAWU on the telephone. He said that he was cancelling the poll until he received legal advice from the Attorney General's office. The Minister was referred to the precedents outlined in paragraph 12 above, where polls of a similar nature were successfully completed. However, the Minister insisted that he would contact GTAWU after he was advised by Ministry of Legal Affairs.
- (23) On 14th July 2010, the said day, GTAWU wrote to the Ministry of Labour pointing out the facts related to the aborted poll.
- (24) On July 15, 2010 GTAWU communicated with the workers at Independence Agencies Ltd. through the distribution of a letter/pamphlet in which a factual account of the aborted poll was outlined to the workers. The letter/pamphlet was an actual copy of the letter sent to the Hon. Minister of Labour the previous day, July 14, 2010.
- (25) On July 15, 2010 Independence Agencies Ltd. through its General Manager distributed a letter to all its employees. That letter sought to refute the facts outlined in the GTAWU pamphlet of July 15, 2010.
- (26) On July 20, 2010 the General Secretary of GTAWU wrote to the Ministry of Labour regarding a **"DEADLINE FOR POLL AT INDEPENDENCE AGENCIES LTD."** The letter was sent 6 days after the aborted poll. The said letter called on the Minister to follow the requirements of the law which state that the poll must be carried out within 14 days of receipt of the application.

- (27) On July 20, 2010 the Minister of Labour responded to GTAWU's letter dated July 14, 2010. The Minister's letter states, among other things, that in order to conduct the poll at Independence Agencies Ltd., the issue of the workers constituting the bargaining unit must be clarified.
- (28) On July 23, 2010 the Honourable Minister, Karl Hood, wrote to GTAWU stating essentially that an application for GTAWU to be certified as bargaining agent must be made for the workers at both Independence Agencies Ltd. and CK's Super Valu.."
- [8] There is a slight variation with respect to who asked whether TAWU had an interest in the workers at CK's Super Valu. Mr. Thomas deponed that it was the Labour Commissioner, whereas Mr. Griffith deponed that it was the Deputy Labour Commissioner who asked the question. That the inquiry was made is not in dispute.
- [9] From all accounts TAWU applied to be certified as the bargaining unit for "all permanent non managerial employees of Independence Agencies Limited".
- [10] At the time of the written application no particular employee location was defined within the application. Mr. Telesford of Independence Agencies wrote to TAWU indicating that the application for certification was incomplete and not in conformity with section 34 of the Labour Relations Act. He requested that they comply with the Act.
- [11] The Union responded indicating they were at a loss as to the assertion that they had failed to comply with the Act. They stated their position and indicated that they were awaiting word from the Minister.
- [12] Several pieces of correspondence were exchanged thereafter between the various parties, and ultimately the Labour Commissioner set the date and time for the poll, the 14th July 2010 at 8:30 a.m. at Independence Agencies, Maurice Bishop Highway.

- [13] Mr. Sylvester on 13th July 2010 on behalf of Independence Agencies sent a list of non managerial employees to the Labour Commissioner. These included employees at Independence Agencies, Maurice Bishop Highway, and CK's Super Valu.
- [14] The poll was aborted on 14th July 2010. No vote took place for reasons stated above.
- [15] It appears that the issue of whether CK's Super Valu was to be party to this poll was addressed at a meeting held on 12th July 2010 between the Labour Commissioner, Independence Agencies and TAWU.
- [16] By way of letter dated 14th July 2010, the Union stated that at the meeting it clearly stated that they were not interested in representing the workers at CK's Super Valu and that the Union had made no application to represent workers at CK's.
- [17] Leave to apply for judicial review is embodied in CPR 56.2(1) (2) (c) and (f), and is as follows:

“56.1 (1) This Part deals with applications –

- (a) by way of originating motion or otherwise for relief under the Constitution of any Member State or Territory;
- (b) for a declaration in which a party is the State, a court, a tribunal or any other public body;
- (c) for judicial review; and
- (d) where the court has power by virtue of any enactment or at common law to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.

(2) In this Part –

Such applications are referred to generally as “**applications for an administrative order**”.

- (3) The term “**judicial review**” includes the remedies (whether by way of writ or order) of –
- (a) certiorari, for quashing unlawful acts;
 - (b) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case; and
 - (c) prohibition, for prohibiting unlawful acts.
- (4) In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant –
- (a) an injunction;
 - (b) an order for the return of any property, real or personal;
or
 - (c) restitution or damages.

56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

- (2) This includes –
- (a) any person who has been adversely affected by the decision which is the subject of the application;
 - (b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);

- (c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
- (d) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application;
- (e) any statutory body where the subject matters falls within its statutory limit; or
- (f) any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution.

56.3 (1) A person wishing to apply for judicial review must first obtain leave.

(2) An application for leave may be made without notice.

(3) The application must state –

- (a) the name, address and description of the applicant and respondent;
- (b) the relief, including in particular details of any interim relief sought;
- (c) the grounds on which such relief is sought;
- (d) the applicant's address for service;
- (e) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued.
- (f) details of any consideration which the applicant knows the respondent has given to the matter in question in response to a complaint made by or on behalf of the applicant;

- (g) whether any time limit for making the application has been exceeded and, if so, why;
 - (h) whether the applicant is personally or directly affected by the decision about which complaint is made;
 - (i) if the applicant is not personally or directly affected – what public or other interest the applicant has in the matter;
 - (j) the name and address of the applicant's legal practitioner (if applicable); and
 - (k) the applicant's address for service.
- (4) The application must be verified by evidence on affidavit which must include a short statement of all the facts relied on.
- 56.4 (1) An application for leave to make a claim for judicial review must be considered forthwith by a judge of the High Court.
- (2) The judge may give leave without hearing the applicant.
- (3) However, if –
- (a) it appears that a hearing is desirable in the interests of justice;
 - (b) the application includes a claim for immediate interim relief; or
 - (c) the judge is minded to refuse the application;
- the judge must direct that a hearing in open court be fixed.
- (4) The judge may direct that notice of the hearing be given to the respondent or the Attorney General of the relevant Member State or Territory.
- (5) Where the application relates to any judgment, order, conviction or other proceedings which are subject to appeal, the judge

may adjourn consideration of the application to a date after the appeal has been determined.

- (6) The judge may allow the application to be amended.
- (7) The judge may grant leave on such conditions or terms as he or she considers just.
- (8) Where the application is for an order (or writ) of prohibition or certiorari the judge must direct whether or not the grant of leave operates as a stay of the proceedings.
- (9) The judge may grant such interim relief as appears just.
- (10) On granting leave the judge must direct when the first hearing or, in case of urgency, the full hearing of the claim for judicial review should take place.
- (11) Leave must be conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.

56.5 (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.

- (2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –
 - (a) be detrimental to good administration; or
 - (b) cause substantial hardship to or substantially prejudice the rights of any person.”

[18] The Applicant has submitted that the Court ought to grant leave for judicial review because it has fulfilled the requirements as set out in **Romaneta Francis v Public Utilities Authority** – ANUHCv2006/0452 for the grant of leave for judicial review.

[19] They have set out these principles as:

- (i) The Applicant must establish a prima facie case – an arguable case on its merits.
- (ii) The Applicant must have sufficient interest in the matter.
- (iii) The decision maker was empowered by law to make decisions.
- (iv) The decision maker failed to act in circumstances where it ought to have acted.
- (v) The matter is one in which the Court can properly exercise its discretion to grant leave.

[20] The Union here wished to obtain certification to represent certain workers employed with Independence Agencies.

[21] The Labour Relations Act 1999 sets out in section 33 the triggering mechanism for certification:

- “33 (1) A trade union claiming to have as members in good standing a majority of the employees of an employer in a bargaining unit may, subject to the provisions of this Part, make application to the Minister to be certified as the exclusive bargaining agent of the employees in the unit.
- (2) All existing trade unions which were certified as bargaining agents immediately before the coming into force of this Act shall be deemed to be certified as exclusive bargaining agents for the employees in the respective bargaining units.
 - (3) Where no collective agreement is in force and no trade union has been certified under this Part for the bargaining unit, the application may be made at any time.
 - (4) Where no collective agreement is in force but a bargaining agent has been certified under this Part for the bargaining unit, the

application may be made after the expiry of twelve months from the date of certification of the bargaining agent.

- (5) Where a collective agreement is in force the application may be made during the last two months of the term of the collective agreement.”

[22] The applying body is then told in section 34 what it ought to do to further the application:

“34 (1) The application referred to in section 33 shall be in writing, and shall include the following:

- (a) a copy of the trade union’s constitution, where the trade union is newly registered;
- (b) a description of the proposed bargaining unit; and
- (c) facts and documents upon which a trade union relies to demonstrate that the majority of employees in the bargaining unit wish to have the trade union certified as their exclusive bargaining agent;
- (d) any other matter prescribed by regulations.

(2) A copy of the application shall be served on the employer.”

[23] The Minister is mandated to act within a stated time frame of the receipt of the application:

“36 (1) Within fourteen days of the receipt of an application under section 33, the Minister shall either:

- (a) refuse to certify the trade union on the grounds that the bargaining unit identified by the trade union is not appropriate and inform all interested parties in writing of his decision;

(b) institute a poll of the unit specified, by secret ballot in the presence of representatives of all interested parties in order to determine whether the majority of the employees in the bargaining unit wish to have the trade union making the application certified as their sole and exclusive bargaining agent.

(2) After due determination as referred to in subsection 1(b) the Minister shall within seven days after the poll has been conducted either:

(a) refuse to certify the trade union on the grounds that it has not satisfied the requirement that a majority of employees in the bargaining unit wish to have the trade union certified as their sole and exclusive bargaining agent and inform all interested parties of his decision; or

(b) shall issue his certificate to the trade union gaining the requisite majority as the bargaining agent for that unit and shall inform all interested parties that he has done so.

(3) A trade union whose application under this part has been unsuccessful shall not be entitled to make further application to the same employer in respect of the same or substantially the same bargaining unit until the expiration of ninety days."

[24] The Labour Commissioner is then to determine where necessary the bargaining unit appropriate in the circumstances. Section 35 of the Act reads as follows:

"35 (1) The Labour Commissioner shall on any application for certification under section 33 first determine where necessary, the bargaining unit considered appropriate in the circumstances and in so doing the Commissioner shall have regard to:

- (a) the community of interest among the employees in the proposed bargaining unit;
 - (b) the nature and scope of the duties exercised by the employees in the proposed bargaining unit; and
 - (c) the views of the employer and the trade unions concerned as to the appropriateness of the bargaining unit.
- (2) When making a determination under sub-section (1), the Commissioner may include additional employees in or exclude employees from the bargaining unit.”

[25] I pause here to state that in terms of subsection (2) of this section, the Labour Commissioner in making the requisite determination has a discretion to include or exclude employees from the bargaining unit.

[26] At the meeting (referred to at exhibit GT8) on 12th July 2010, the Labour Commissioner appears to have done so upon being informed by the Union that it had no interest in the employees of CK’s Super Valu. Having been so informed by the Union, the Minister proceeded, as he was mandated to do, to schedule a poll for the 14th July 2010.

[27] The poll having been scheduled for the 14th July 2010 was aborted. It never got off the ground for reasons stated earlier in this ruling.

[28] The law does not require the applicant for judicial review to argue in depth the detailed and substantive issues involved in their proposed claim. The power of judicial review can be described as a power given to superior Courts to review decisions, acts or omissions of public authorities in order to ensure that these bodies act within the parameters of their given powers.

[29] The Minister of Labour, acting under the Labour Relations Act, is a person or body performing public law duties or powers and as such his/her actions are susceptible and subject to judicial review. The Court is empowered to look at and investigate

the exercise of those powers to ensure that the Minister and any other public functionary act in accordance with the powers conferred by the Act.

[30] It is clear that the Union has sufficient interest in the subject matter of the application before the Court, and it claims to be adversely affected by the actions taken by the Minister with respect to the conduct of the poll. The Union has therefore satisfied the Court that it has standing to come before the Court with this application.

[31] The Union is of the view that they have an arguable case for judicial review and that there is a real prospect of success in that there has been an abuse of power because the Minister has overstepped the bounds of his authority as provided for by the Act. They argue that there is a real possibility of success on this ground.

[32] The Respondents argue that there is an alternative remedy in section 39 of the Act to which the Applicants have failed to avail themselves. The Applicant's view is that section 39 is not applicable in the circumstances.

[33] I have looked at all the affidavits and exhibits filed in the matter as well as the very helpful submissions of Counsel for both parties.

[34] It is settled that judicial review proceedings are the procedures by which the Court exercises supervisory jurisdiction over tribunals and public bodies.

[35] Lord Hailsham LC in **Chief Constable of North Wales Police v Evans** (1982) 1 WLR 1155 stated as follows:

“It is important to remember in every case that the purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of the purpose to substitute the opinion of the judiciary or of the individual judges for that of the Authority constituted by law to decide the matter of question.”

[36] The Court, however, must decide whether administrative decisions have been arrived at by the proper/correct means.

[37] In **R v Secretary of State for Environment ex parte Nottinghamshire County Council** (1986) AC 240, Lord Scarman stated:

“The ground upon which the courts will review the exercise of an administrative discretion by a public officer is abuse of power. Power can be abused in a number of ways; by a mistake of law in misconstruing the limits imposed by statute (or by common law) upon the scope of the power; by procedural irregularity; by unreasonableness in the Wednesday sense; or by bad faith or improper motive in its exercise.”

[38] At this stage of the proceedings the Applicant has to show the Court that they have established a prima facie case on the merits. The Court is not here concerned with determining the substantive issues, but the Applicant must show that they have established a prima facie case in support of their application for judicial review. As I have already stated, there is no doubt of the Union's interest in the proceedings.

[39] Counsel for the Respondent argues that leave ought not to be granted to the Applicant on the grounds that:

- (i) The provision contained in section 36 of the Act is not mandatory but should be considered as directory.
- (ii) The Minister having found that the Bargaining Unit was not appropriate properly exercised the powers given him under section 36(1) to refuse to certify the Union.
- (iii) That a proper construction of the relevant section of the Act would lead to the conclusion that the Minister is not bound by the Labour Commissioner's determination that a bargaining unit is appropriate.
- (iv) They assert that there is an alternative remedy under section 39 of the Act.

[40] I quote like Blenman J from Graham Aldous and John Alder's "Applications for Judicial Review Law & Practice":

“The notion of ultra vires extends beyond the notion of exceeding the wording of a statutory provision. Thus the exercise of a discretion may be ultra vires because a body has no power to do something in a particular way. This may conveniently be referred to as ultra vires unreasonableness although in fact it covers a number of vitiating factors. The classic explanation of unreasonableness in this context is to be found in the speech of Lord Greene MR in *Associated Provincial Picture Houses Ltd. v Wednesday Corpn.*:

... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corpn* gave the example of the redhaired teacher dismissed because she had red hair. This is unreasonable in one sense. In another, it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another. “

This dictum has become so well known as to be referred to as the *Wednesbury Principle*. This second category of ultra vires includes:

- (1) Decisions taken in bad faith;
- (2) Decisions made without consideration of relevant matters (including the fettering of discretion by adopting rigid rules of policy, or by agreement, or improper delegation);
- (3) Decisions made taking into account irrelevant matters;
- (4) Decisions which no reasonable authority could come to; and

(5) Decisions taken without regard to procedural requirements including the rules of natural justice.”

[41] I am satisfied that having regard to all the submissions and the affidavits and exhibits that the applicant Union has established a prima facie case. I prefer the arguments of Counsel for the Applicants to that of the Respondents.

[42] Whether the sections are to be construed as mandatory or directory or what the proper construction of the words of the legislation ought to be are matters which are appropriate for the trial of the substantive matter.

[43] Whether the Minister acted in accordance with the provisions of the Act or whether there was a poll or not can only be determined after a full hearing of all the issues at hand.

[44] I am of the view that a full hearing of this matter is appropriate in order to ascertain whether the Minister acted in accordance with the Act, whether a poll was conducted within the meaning of the Act, and whether the Union can avail itself or ought to have availed itself of the remedy in section 39 of the Act.

[45] For the reasons given above, I would grant leave to the Union to file judicial review proceedings by way of Fixed Date Claim Form against the Honourable Minister of Labour.

[46] I would, in the interest of time, give the following directions:

(1) Leave is granted to the Applicant to file and serve a Fixed Date Claim Form and Affidavit/s in Support seeking judicial review within fourteen (14) days of the date of delivery of this ruling.

(2) Leave is granted to the Respondent to file Affidavit/s in Response within fourteen (14) days of the receipt of the Fixed Date Claim Form and affidavit/s.

- (3) Leave to the Applicant to file Affidavit/s in Response within seven (7) days thereafter, if necessary.
- (4) Parties to file and serve Statements of Facts & Issues & Law on or before the 31st October 2011.
- (5) All parties deponing must attend for cross-examination unless their attendance is dispensed with in writing.
- (6) Pre trial review to be fixed by the Court Administrator.

[47] The Court thanks Counsel for their insightful submissions.

Margaret Price Findlay
High Court Judge