

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2011/0568

BETWEEN:

ANTIGUA & BARBUDA FREE TRADE UNION

Claimant

AND

THE ATTORNEY GENERAL
THE LABOUR COMMISSIONER

Defendants

Appearances:

Ms. E. Deniscia Thomas for the Claimant
Ms. Alicia Aska, Crown Counsel II for the Defendants

2012: January 25

Ruling

[1] **Remy J.:** On 28th September 2011, and with the leave of the Court granted on the 14th September 2011, the Claimant Antigua & Barbuda Free Trade Union, filed a Fixed Date Claim Form “seeking Judicial Review and other administrative orders and declarations against the Defendants namely (1) the Attorney General and (2) the Labour Commissioner, claiming the following relief:-

- (a) An Order of Certiorai to remove and quash the outcome of the Secret Ballot proceedings held on 8th March, 2011 to determine the Sole Bargaining Agent of the Line Staff Employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy.
- (b) An Order of Prohibition preventing the Labour Department from recognizing the Antigua Workers Union as the Certified Sole Bargaining Agent of the Line Staff Employees of

Pastries Limited t/a Epicurean Fine Foods and Pharmacy until the determination of these proceedings.

- (c) A Declaration that the decision of the Labour Commissioner declaring the Claimant's petition as invalid as a Claim of Intervention is null and void.
- (d) A Declaration that the decision of the Labour Commissioner to bar the Claimant from participating in secret ballot proceedings to determine the Certified Sole Bargaining Agent of the Line Staff Employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy is contrary to the provisions of the Labour Code Division J, and more particularly, Section J6.
- (e) A Declaration that the decision of the Labour Commissioner to bar the participation of the Antigua and Barbuda Free Trade Union from the proceedings to determine the sole bargaining agent of the Epicurean Line staff is in breach of Section 13(1) of the Constitution Order of Antigua and Barbuda 1981 and in breach of the Constitutional Rights of the said Epicurean Line Staff to choose a bargaining unit of their choice.
- (f) Damages
- (g) Costs."

[2] The Claimant's claim was supported by an Affidavit sworn to on the 28th September 2011 by Mr. Stafford Joseph, General Secretary of the Claimant.

[3] On the date set for the first hearing of the matter, Counsel for the Claimant as well as Counsel for the Defendants informed the Court that they did not wish to cross-examine the parties and further agreed that they would file submissions in the matter for the Court's consideration.

[4] The facts of this case can be gleaned from the Affidavit in Support sworn by Mr. Joseph, as well as from the submissions of Counsel. These are as follows:-

- (1) On the 2nd December 2010, the Antigua and Barbuda Workers Union (the ABWU) filed a petition with the Labour Commissioner (the 2nd Defendant) to resolve an employee representation question in accordance with Section J6 of the Antigua and Barbuda Labour Code (the Labour Code).
- (2) On or about the 16th December 2010, the Labour Commissioner issued a Notice to Resolve an Employee Representation Question involving the Line Staff employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy. The Notice called for any Union interested in representing the staff to file a claim of intervention by the 23rd December 2010 supported by a minimum 30% of the employees concerned, and that "failure to do so may result in the exclusion of the Trade Union from the secret ballot to determine the sole bargaining agent."
- (3) On or about the 22nd December 2010, Mr. Joseph hand delivered to the Labour Department branch of the Government of Antigua & Barbuda a "Petition to Resolve Employee Representation Question" dated 20th December 2010. This Petition was supported by the requisite minimum 30% of the Line Staff employees and an Affidavit attesting to that fact.
- (4) On or about the 6th January 2011, Mr. Joseph received communication from the 2nd Defendant stating that the Petition filed by him could not go forward as it should have been stated as a "Claim of Intervention."
- (5) A letter was written through the Claimant's Solicitors to the 2nd Defendant explaining that the position taken by him was wrong in law and inviting him to make a joint request for an official interpretation. The 2nd Defendant failed to do so. The Claimant also wrote to the Attorney General and the Solicitor General. No response was received from the Attorney General; however the Solicitor General responded, declaring that the correct approach was for the Labour Commissioner (the 2nd Defendant) to have made the referral himself as the Solicitor General was not in a position to grant such assistance to a non-government party (department).

(6) On the 8th March 2011, the 2nd Defendant held secret ballot proceedings to the exclusion of the Claimant to determine the Certified Sole Bargaining Agent of Pastries Limited.

[5] In addition to what was stated in paragraph 4 above, Mr. Joseph further deposed that the employee representation question is an important one "as it impacts on the issue of the constitutional rights of the said Line Staff employees to representation of their choice and to an expression of their right to freedom of assembly and association guaranteed by 13(1) of the Antigua and Barbuda Constitution Order 1981." He stated that the interpretation of the Labour Commissioner was wrong and that his decision that the Claimant be barred from participating in the process to determine the sole bargaining agent was unconstitutional. Further, that the decision was illegal.

[6] On October 5th 2011, the 2nd Defendant filed an Affidavit in Response in which he deposed that the Claimant's Petition filed on the 22nd December 2010 was not a Claim of Intervention pursuant to Section J7 of the Labour Code, and that the Claimant had filed a Petition instead of a Claim of Intervention. The 2nd Defendant further deposed that he had complied with Section J7 of the Labour Code as it relates to the procedure in making a Union become the sole bargaining agent. He stated that the Labour Code makes it quite clear as to what should happen or the procedure to be followed when a petition has been filed.

[7] On the 12th October 2011, Mr. Joseph filed an Affidavit in Reply in which he deposed that in as much as its document was submitted subsequent to the Notice placed on the bulletin board by the 2nd Defendant, the said document could only be rightly regarded as a Claim of Intervention. Further, that the sole requirement of Section J7 for a Claim of Intervention is for any other interested registered Union to show that they have received the support of at least 30% of the employees involved. Mr. Joseph further deposed that the failure of the 2nd Defendant to include the Claimant on the ballot for the Secret Ballot proceedings was contrary to law and that the 2nd Defendant misdirected himself on the proper law and interpretation of the law regarding the process of selection of the Certified Sole Bargaining Agent.

ISSUES

[8] The issues that fall to be determined by the Court are:-

- (a) Whether the Petition filed by the Claimant is a Claim of Intervention pursuant to Section J7 of the Antigua and Barbuda Labour Code Cap 27 of the 1992 Revised Laws of Antigua & Barbuda.
- (b) Whether or not the Second named Defendant acted ultra vires and therefore erred in his decision to determine the employees' representation question with respect to the employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy.

THE CASE ON BEHALF OF THE DEFENDANTS

[9] The Defendants advanced a number of submissions in support of their contention that the Claimant was not entitled to the relief claimed. I now turn to consider those submissions.

[10] One submission of Learned Counsel is that the document filed by the Claimant on the 22nd December 2010 is not a Claim of Intervention and cannot be construed as such for the following reasons:-

- (a) There is nothing on the document that suggests the Claimant is asserting a claim of intervention as stipulated in Section J7 of the Labour Code.
- (b) The reference on the letter and the body of the letter clearly state that the Claimant is filing a Petition.
- (c) The letter also refers to and has attached to it an Affidavit, which states that the Claimant has at least 30% of the employees representation. This is a requirement pursuant to Section J6 of the Labour Code as an oath is needed for filing a Petition, whereas an Affidavit or an oath is not a requirement for filing a claim of intervention under Section J7 of the Labour Code.

[11] It is the further submission of Learned Counsel for the Defendants that the Claimant “has taken the position that they complied with Section J7 of the Labour Code ‘asserting a Claim of Intervention within the time limit of five (5) days.’” Counsel states that the Claimant failed to rectify their error and did not request an extension of time to comply with Section J7 of the Labour Code and therefore there was no Claim of Intervention by the Claimant when the balloting was conducted. Learned Counsel therefore concludes and submits that the Second Defendant was correct in the course he adopted in not treating the Petition filed by the Claimant as a Claim of Intervention.

[12] The rival submissions of Learned Counsel for the Claimant on this issue are as follows:-

- (a) The Claim of Intervention is an important part of the process of resolving an Employee Representation question, yet it is not defined within the legislation and no prescribed form exists for such a claim.
- (b) The legislation, while failing to specifically define a claim of intervention, provides a format (as opposed to a form) for what constitutes a valid claim of intervention.

These requirements are:-

- (1) A petition containing the signatures of at least 30% of the employees concerned
- (2) Document is submitted by a registered union
- (3) The document is submitted as a result of a previously posted notice, and
- (4) It is submitted within the time specified

[13] It is the further submission of Learned Counsel for the Claimant that the Claimant “fully satisfied all these requirements.” Counsel submits that “the claim of intervention is a petition – a petition containing the signatures of at least 30% of the employees involved in the employee-representation question which is the subject of Division J.” It is the contention of Learned Counsel that “the principle difference between the petition referred to in J6 of the Labour Code and the claim of intervention referred to in J7 of the said Code is that the Claim of Intervention is a petition

filed by a registered union subsequent to a Petition (filed first in time) received by the Labour Commissioner concerning the employee representation question of the same set of employees.”

ANALYSIS

The relevant provisions of the Labour Code are as follows:-

“J6..

Any employee or his registered bargaining agent, or any employer or his registered bargaining agent, may initiate the procedures leading to such secret ballot , by the filing with the Labour Commissioner of a Petition to Resolve Employee-Representation Question, which Petition shall describe the bargaining unit in which the question has arisen, and shall assert, under oath, either that –

- i). at least thirty percent of employees herein have designated or selected a named or petitioning trade union, not presently recognized by their employer, as their sole bargaining agent, to represent them in collective bargaining;
- ii).
- iii).
- iv).

“J7..

- (1) Immediately upon receipt of a Petition, under section J6, the Labour Commissioner shall cause a copy thereof to be posted on the bulletin board of the Labour Department, along with a notice calling upon any registered trade union (other than that for which the Petition seeks certification or decertification as sole bargaining agent) which has been designated or selected by at least thirty percent of the involved employees to assert a claim of intervention within five days.”

- [14] Counsel for the Defendants seems to take issue with the fact that the Claimant filed an Affidavit which is not strictly mandated by Section J7 of the Labour Code. Counsel submits that Section J6 stipulates that “a Petition must describe the bargaining unit in which the employees’ representation question has arisen, and assert under oath that at least 30 per cent of the employees have designated or selected a name or petitioning trade union to represent them in collective bargaining; whereas Section J7 of the Labour Code states that a Claim of Intervention must be asserted”. With the utmost respect, the Court is of the view that this submission is entirely without merit. With respect to the document submitted by the Claimant, the Court is of the view that the fact that the letter addressed to the 2nd Defendant and which accompanied the Affidavit was captioned “Re: Petition to resolve Employee - Representation Question” is referable to the (earlier) Petition

filed by the Antigua and Barbuda Workers' Union. The Court is of the further view that the reference in the body of the letter that "...The Antigua and Barbuda Free Trade Union hereby file a Petition..." is to be taken together with and read in conjunction with the accompanying Affidavit, which states that the Claimant has obtained 30% of the signatures of the employees.

[15] The "Notice" which was issued by the Labour Commissioner and dated December 16, 2010 is hereby reproduced:-

"December 16, 2010

NOTICE

The Antigua & Barbuda Workers' Union in accordance with Section J6 of the Antigua & Barbuda Labour Code, Cap 27, has filed a petition to resolve an Employee Representation Question in respect of the Line Staff Employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy located on Friar's Hill Road, St. John's, Antigua.

Pursuant to Section J7 any registered Trade Union, which has been designated by at least thirty percent (30%) of the Employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy to represent them, must file a claim of intervention on or before Thursday 23rd December, 2010.

Failure by any registered Trade Union to file a claim of intervention by the said date (Thursday 23rd December 2010) MAY (my emphasis) result in the exclusion of any such union from participating in a Secret Ballot to determine the Certified Sole Bargaining Agent for the employees concerned.

.....
Labour Commissioner

Cc. The General Secretary
Antigua Trades & Labour Union
The General Secretary
Antigua and Barbuda Free Trade Union"

[16] The letter submitted to the Labour Commissioner by the Claimant and dated 20th December 2011 is hereby reproduced:-

"Re: Petition to Resolve Employee – Representation Question"

The Antigua and Barbuda Free Trade Union hereby file a Petition on behalf of the Line Staff Employees of Epicurean Fine Foods and Pharmacy, located on Friar's Hill Road, St.John's, Antigua W.I.

The Line Staff Employees of the above mentioned business establishment have requested that the Antigua and Barbuda Free Trade Union become their Sole Bargaining Agent.

Attached, please find a copy of my affidavit and the signatures of the Employees.

Yours truly,

.....
Stafford Joseph
General Secretary
Antigua and Barbuda Free Trade Union"

[17] The Second Defendant's letter dated 6th January 2011 and addressed to Mr. Joseph, is hereby reproduced :-

"January 6, 2011

Mr. Stafford Joseph
The General Secretary
Antigua and Barbuda Free Trade Union
Scotland Street
Ottos New Town
St. John's
Antigua

Dear Mr. Joseph,

RE; SUNDRY WORKERS/PASTRIES LIMITED t/a EPICUREAN FINE FOODS & PHARMACY

EMPLOYEE REPRESENTATION QUESTION

The Labour Department is in receipt of the petition dated 20th December, 2010 to resolve an Employee Representation Question regarding the Line Staff Employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy. Please be advised that the written petition should have been stated as a claim of intervention. Unfortunately, it did not state claim of intervention.

A claim of intervention should have been filed within five days of the petition having been posted by the Labour Department; these five days ended on the 23rd December, 2010. The petition filed by

the Antigua and Barbuda Free Trade Union, which was received by the Department's registry on 23rd December, 2010, cannot go forward since another union has already filed a petition. Unfortunately, it is now too late for a claim of intervention to be entertained.

Thank you for your understanding.

Sincerely,
Labour Commissioner."

- [18] Section J7 (1) of the Labour Code states that a trade union, for example, the Claimant, must "assert a claim of intervention" and must do so within five days. "Claim of intervention" is not defined. According to the Collins dictionary, the word "assert" is defined inter alia as "state positively", "declare", "affirm as true", or "to maintain or enforce". The word "intervention" is defined inter alia as "the act of intervening" or "interference". The verb "intervene" is defined as "to come in to help settle a dispute", or "to come in to modify, settle, or hinder some action."
- [19] Based on the above definitions, and in the absence of a precise definition of "claim of intervention" in the Labour Code, the Court is of the respectful view that it cannot be held that what was submitted to the 2nd Defendant by the Claimant was not in substance and essence a claim of intervention for the purposes of the Labour Code, even if the words "claim of intervention" were not used. The fact that the documents submitted by the Claimant were subsequent to the Notice posted at the Labour Department lends credence to the submission of the Claimant that the document submitted on its behalf was a Claim of Intervention. In the view of the Court, the document (namely the letter) submitted by the Claimant together with the attached Affidavit can only objectively be viewed as a claim of intervention for the purposes of the Labour Code.
- [20] In relation to the 2nd Defendant's letter dated the 6th January, 2011, the Court makes the following observations:-
- (a) The letter states that the Claimant's "petition" was received by the Department's Registry on the 23rd December, 2010. Both Mr. Joseph's Affidavit in Reply as well as the Submissions of Counsel for the Defendants state that the document was delivered to the Labour Department on the 22nd December, 2010.

- (b) In any event, the Court is of the view that quite a period of time elapsed between the receipt of the document and the date of the 2nd Defendant's response. Counsel for the Defendants submits that the Claimant "failed to rectify their error and did not request an extension of time to comply with section J7 of the Labour Code."
- (c) In the view of the Court this is significant, in light of the fact that the 2nd Defendant did not invite the Claimant to request or seek such an extension. In fact, the 2nd Defendant made it abundantly clear to the Claimant that it was "now too late for a claim of intervention to be entertained."

[21] The Court notes that there is nothing in either Section J6 or J7 of the Labour Code which states that failure to assert a claim of intervention would be fatal. In fact, the Notice issued by the 2nd Defendant is again significant. What is stated in the Notice is that "failure... to file a claim of intervention ... **MAY** (my emphasis) result in the exclusion of any such union from participating in a Secret Ballot to determine the Certified Sole Bargaining Agent ..."

[22] Further, the Court is of the view that the 2nd Defendant failed to comply with Section J7 (2) of the Labour Code. Section J7 (2) provides:-

"Within five days thereafter, the Labour Commissioner, using the means described in section B5 (2) (a) **SHALL** (my emphasis) call all interested parties together or otherwise seek to settle the matter by voluntary adjustment or settlement, the only acceptable settlements in such a matter being ---

- (a) an agreement by all parties that a secret ballot, as described in section J 11, be conducted by the Labour Commissioner; or
- (b) an agreement by the Petitioner that the Petition be withdrawn.

[23] The Court notes that "interested parties", referred to in Section J7 (2) is also not defined. Even if the Court were to accept the contention of the 2nd Defendant that the document filed by the Claimant was a petition and not a claim of intervention, the Court is of the view that the Claimant, having filed and submitted the documents (whatever they may be called,) falls within the class and ambit of "interested parties".

[24] In his Affidavit in Support, Mr. Joseph averred inter alia:-

"That I verily believe that the decision of the Labour Commissioner and the actions flowing therefrom in electing a certified sole bargaining agent for the said employees was illegal and that this illegality resulted from him having misdirected himself on the proper interpretation of the law. Thus the basis for the Claimant seeking judicial review on the grounds of illegality and procedural impropriety."

[25] It is the submission of Learned Counsel for the Defendants that the Claimant is not entitled to the remedies sought in its claim as the decision of the second named Defendant in not allowing the Claimant to participate in the secret ballot for the Epicurean Limited Line staff was not tainted by illegality or procedural impropriety (unfairness). Counsel further submits that the second named Defendant acted in accordance and within the confines of the Labour Code and did not act outside the scope of its powers in coming to its decision to exclude the Claimant from the secret ballot which determined the employee representation question with respect to line staff at Pastries Ltd. t/a Epicurean Fine Foods and Pharmacy Ltd.

[26] It is now settled law that the Court exercises a supervisory jurisdiction over tribunals and public bodies by means of judicial review. However, in exercising this jurisdiction, the Court is not concerned with the merits of the decision of that tribunal or public body, but is concerned with the legality of the decision. De Smith's Judicial Review, 6th edition at page 226, paragraph 5-003 states that "the test of illegality is whether the decision-maker strayed outside the terms or authorized purposes of the governing statute."

[27] In the instant case, the Court is of the view that, based on its findings as stated above, the 2nd named Defendant did stray outside the terms of the Labour Code. He failed to acknowledge and accept the Claimant's document as a claim of intervention. He also failed to comply with the mandatory provisions of Section J7 (2) of the said Labour Code. In arriving at his decision not to include the Claimant from further participation in the process, namely the secret ballot, the 2nd Defendant therefore acted outside the scope of his powers, and therefore acted illegally.

CONCLUSION

[28] Based on the reasons given above, judgment is given in favour of the Claimant Antigua and Barbuda Free Trade Union and I hereby make the following Order:-

ORDER

- (1) The Order of Certiorari to remove and quash the outcome of the Secret Ballot proceedings held on 8th March, 2011 to determine the Sole Bargaining Agent of the Line Staff Employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy is granted.
- (2) The decision of the Labour Commissioner declaring the Claimant's petition as invalid as a Claim of Intervention is null and void.
- (3) The decision of the Labour Commissioner to bar the Claimant from participating in secret ballot proceedings to determine the Certified Sole Bargaining Agent of the Line Staff Employees of Pastries Limited t/a Epicurean Fine Foods and Pharmacy is contrary to the provisions of the Labour Code Division J, and more particularly, Section J6.
- (4) The Defendants to pay to the Claimant prescribed costs in accordance with the Civil Procedure Rules (CPR) 2000, unless otherwise agreed.



Jennifer A. Remy

High Court Judge