THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2015/0760

BETWEEN:

EVERLEY NELSON

Applicant

and

THE LABOUR TRIBUNAL

Respondent

RENWICK & COMPANY LIMITED

Interested Party

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Mr. Horace Fraser for the Applicant
Mrs. Brender Portland-Reynolds for the Respondent
Mr. Mark Maragh for the Interested Party

Present: Applicant
Mr. Victor Poyotte on behalf of the Respondent
Ms. Cheryl Renwick on behalf of the Interested Party

2018: April 16.

WRITTEN REASONS FOR DECISION

[1] **CENAC-PHULGENCE, J**: On 16th April 2018, I dismissed the application by the applicant for leave to file a claim for judicial review with no order as to costs. I now provide written reasons for that decision.

[2] The claimant, Ms. Everley Nelson ("Ms. Nelson") was employed with Renwick & Company Limited ("Renwick") from March 2003 until her dismissal on 26th July 2013. At the time of her dismissal, she held the position of sales representative/key accounts.

[3] On 2nd July 2013, Renwick received a written complaint from Ultra Mart Inc. ("Ultra Mart") alleging improper conduct on the part of Ms. Nelson while she was at work at one of Ultra Mart's outlets. The complaint was to the effect that Ultra Mart no longer wished to have Ms. Nelson visit its stores to take orders on its behalf due to her continued aggressive and loud personality.

[4] On 2nd July 2013, Ms. Julie Bonnett ("Ms. Bonnett") informed Ms. Nelson of the complaint and asked her to give her account of the incident which she did. This was done in the presence of Ms. Janice Xavier. On 3rd July 2013, in a letter captioned: "Notice of Disciplinary Hearing-Serious Misconduct", Ms. Nelson was advised that an investigation into the matter was being conducted and that she was being suspended with pay pending the outcome of the investigation. That letter also informed her of a hearing which was to take place on 5th July 2013 and stated that the purpose of the meeting was to give Ms. Nelson an opportunity to present her side of the case to be heard and to respond to the allegations which had been made. She was also advised that she had the right to legal representation.

[5] The hearing did not take place on 5th July 2013 as counsel for Ms. Nelson had insisted that all statements of witnesses and related documents be disclosed before any hearing could take place and also registered objections to Ms. Bonnett sitting as the tribunal, as this presented the reasonable appearance of bias and offended against the rules of natural justice.

[6] The disciplinary hearing finally took place on 23rd July 2013. Present at that hearing were the following persons: Ms. Julie Bonnett, HR Director of Renwick, Ms. Stephanie Waters, Scribe, Ms. Everley Nelson, Mr. Horace Fraser, counsel for Ms. Nelson, Mr. Mark Maragh and Mr. Thomas Theobalds, counsel for Renwick & Company, Mr. Sian Joseph and Ms. Joanna Triune as witnesses. Objection was raised at the hearing by Mr. Fraser to the presence of Ms. Bonnett.

[7] By letter dated 26th July 2013 and signed by Ms. Bonnett as HR Manager, Ms. Nelson was dismissed by Renwick. The relevant portions of the letter stated as follows:

> "On 23rd July 2013 you attended a disciplinary hearing where you were given an opportunity to be heard, to present your case, and be represented by Coun[sel], as it related to the formal written complaint issued to Renwick & Company Limited by Ultra Mart Inc., on 2nd July 2013, of and concerning your conduct.
>
> During the hearing you admitted that your loud tone and animated manner of communicating could have and in this instance, was perceived by the customer, as unprofessional and aggressive. In fact this is just one instance in a pattern of such complaints against you by this customer and others where disciplinary action has been taken and in a few instances, you have issued written apologies.
>
> It is with regret that we now inform you that after careful investigation and consideration of your behaviour on 2nd July 2013, at Ultra Mart, Micoud Street, the Company has come to the conclusion that your behaviour constitutes serious misconduct, sufficiently grave to warrant a major customer of the Company banning you from all their stores and as such, the Company finds it impossible and impracticable to continue the relationship of employment with you.

> Accordingly, …your behaviour was both disrespectful and unprofessional to a longstanding and significant customer of the Company and warrants that your employment with Renwick and Company Limited be terminated effective today Friday 26th July 2013. …"

[8] Ms. Nelson complained to the Labour Commissioner that she was unfairly dismissed and set out the grounds of complaint which were that: (a) the allegation of serious misconduct was not proved within the ambit of section 133 of the **Labour Act**;[1] (b) the tribunal in arriving at its decision to dismiss the complainant took irrelevant and extraneous matters into consideration; (c) the hearing was conducted in breach of the rules of natural justice; (d) the decision to dismiss Ms. Nelson was harsh, unwarranted and unreasonable; (e) the hearing of the allegation of serious misconduct was a sham as the conduct of the proceedings gave the impression that the decision was predetermined before the hearing; and the suspension was totally unwarranted, unreasonable and constituted a penalty before the determination of the case contrary to section 142 of the **Labour Act**.

[9] The Labour Tribunal delivered its decision on 4th September 2015 and did not find in favour of Ms. Nelson.

Application for leave to file a claim for judicial review

[10] The applicant seeks the leave of the Court to file a claim for judicial review against the decision of the Labour Tribunal dated 4th September 2015 and seeks leave to claim the following relief:

(a) A declaration that the Labour Tribunal misdirected itself and therefore erred in law when it sought to find evidence of actual bias which is in contradiction to the applicant's claim of lack of fairness in the proceedings and the real likelihood of bias.

(b) A declaration that decision of the Labour Tribunal in relation to the allegation of breach of natural justice is wrong in law.

[1] Chap. 16.04, Revised Laws of Saint Lucia, 2013.

(c) An Order of certiorari to quash the decision of the Labour Tribunal.

(d) A declaration that the decision of the disciplinary tribunal is vitiated on the ground of breach of natural justice and lack of fairness and is therefore set aside.

(e) An order directing that the matter be remitted to the Labour Tribunal for an assessment of damages.

(f) Costs.

[11] The Tribunal's findings as contained in its decision of 4th September 2015 can be summarized as follows:

1. Section 131 of the **Labour Act** sets out the grounds for deeming a dismissal unfair. None of the grounds stated in that section applied to the case of Ms Nelson.
2. By virtue of the descriptions of Ms. Nelson's behaviour towards Ms. Tribune, including the account of Mr. Sian Joseph and Ms. Nelson's own view of her general demeanour, it could be inferred that Ms. Nelson was loud and aggressive towards the Ultra Mart representative. The Tribunal found that the incident was so unsatisfactory to Ultra Mart that it caused them to complain to Renwick & Company about the representation being given to them. So unacceptable was the treatment that Ultra Mart requested to have no further interaction with Ms. Nelson. The Tribunal concluded that certainly this request constituted a situation which may have reasonably resulted in a discontinuation of business between Renwick & Company and their customer, Ultra Mart and the Tribunal concluded that there was serious misconduct on Ms. Nelson's part.
3. That while reference had been made to previous complaints made against Ms. Nelson, the letter of dismissal of 26th July 2013 stated that the decision to dismiss was based on Ms. Nelson's conduct on 2nd July 2013 and the fact that Ultra Mart found it impossible and impracticable to continue a working relationship with Ms. Nelson.

4. That the burden was on Ms. Nelson to prove that she was denied a fair hearing because Ms. Bonnett was investigator and adjudicator and was therefore biased towards her which rendered the decision to dismiss her unfair and Ms. Nelson had failed to discharge that burden. Reference was made to the case of **J-Mayo-Deman v Lewisham College**[2] and the dicta of Lord Johnston to the effect that the fact that the same person conducted both the investigation and the disciplinary hearing in the absence of any suggestion that there was lack of good faith or bias does not amount to a breach of natural justice.
5. Ms. Nelson had failed to put forward any evidence to support her allegation that the hearing which had been conducted was a sham.
6. The suspension of Ms. Nelson from 2nd July 2013 until a decision was made in the matter on 26th July 2013 was fair and well within the legal right of Renwick & Company given section 142 of the **Labour Act**.
7. Ms. Nelson should be compensated for an additional six (6) days' vacation leave.

[12] The issues for the Court's consideration are:

(1) Whether the applicant has met the threshold for leave to apply for judicial review.

(2) Whether there has been unreasonable delay in making the application.

[13] In deciding an application for leave to file a claim for judicial review, I remind myself that I am not concerned with the merits of the decision which the Labour Tribunal made on 26th July 2013, nor am I required to perform an in-depth analysis of the applicant's case. It is the legality, rather than the merits of the decision; the jurisdiction of the decision maker and the fairness of the decision making process that occupy the Court's attention at this time. The role of the court in judicial review is merely supervisory and therefore the question is not whether the judge

[2] 2003 EAT 08/12/2003.

disagrees with what the public body has done or the final decision but rather whether there is some recognizable public law wrong.[3]

Whether the applicant has met the threshold for leave to apply for judicial review

[14] It is well-known that the requirement for leave to file a claim for judicial review is designed to filter out claims which are groundless or hopeless at an early stage.

[15] Rule 56.2(1) of the **Civil Procedure Rules 2000** ("CPR") requires that an application for judicial review be made by a person who has a sufficient interest in the subject matter of the application. There is no doubt in this case that Ms. Nelson has a sufficient interest in the subject matter of the application. The decision of the Tribunal concerned her and there can be no clearer indication of sufficient interest than this.

[16] The applicant must show that there he has an arguable case with a realistic prospect of success. I am guided by the dicta in **Sharma v Browne-Antoine**[4] which states:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy … But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:
>
> > "the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an

[3] See James v Ministry of Education SLUHCV2005/0862 (delivered 19th March 2006, unreported); Leacock v Attorney General of Barbados BB 2005 HC 24 at [26].
[4] [2007] 1 WLR 780 at 787.

> allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen" (my emphasis.)

[17] I will now address the grounds of the application. Section 448 of the **Labour Act** states:

> "Any party to an application or matter before the Tribunal shall be entitled to apply to the High Court for judicial review in respect of any decision of the Tribunal on grounds including one or more of the following—
> (a) the Tribunal did not have jurisdiction in the proceeding;
> (b) the Tribunal exceeded its jurisdiction in the proceeding;
> (c) the decision was obtained by fraud;
> (d) the decision is *ultra vires*; or
> (e) the decision is erroneous in law."

[18] The application for leave must set out with sufficient clarity the grounds which are relied upon. The grounds of the application as set out in the notice of application are as follows:

> (a) "Section 140 of the Labour Act guarantees to an employee the right to natural justice before he or she can be dismissed in circumstances where the hearing of a complainant is necessary.
>
> (b) A fundamental tenet of natural justice is the right to a fair hearing before an independent tribunal. This negates against a man being a judge in his own cause and dispensing justice in circumstances where the real likelihood of bias is present.
>
> (c) When the Human Resource Manager (a representative of Renwick) received the complaint, investigated the complaint and summoned the Applicant to answer the allegation of misconduct, she (Renwick) became a party interested in the dismissal of the Applicant.

(d) When the Human Resources Manager (Renwick) sat on the Tribunal to hear the complaint and cross-examined witnesses she became a prosecutor and a judge in her own cause.

(e) The fairness of the proceedings were [sic] compromised which vitiates the tribunal's decision to recommend dismissing the Applicant."

[19] The grounds stated in an application form the basis of that application and it is this that a court uses to analyse the merits of an application. The affidavit in support of the application is supposed to provide the evidence to support the grounds stated in the application. When one examines the grounds of the application, there is nothing which speaks to the decision-making process of the Labour Tribunal, or that the Labour Tribunal exceeded its jurisdiction or that the decision of the Labour Tribunal was wrong in law. In fact, a close analysis of the grounds reveals very similar grounds to those raised before the Labour Tribunal. The affidavit in support of the application at paragraphs 14 and 15 is the first mention of any wrongdoing on the part of the Labour Tribunal. Those paragraphs speak to the Labour Tribunal going behind the case which was presented and enquiring into evidence of actual bias which was never the thrust of Ms. Nelson's complaint. The written submissions/skeleton arguments filed in support of an application for leave to file a claim for judicial review are to provide the legal basis for the grounds which have been articulated in the application. They are not to be used to introduce grounds which did form part of the application.

[20] There is nothing in the grounds of the application which supports the relief for which leave is being sought on this application. Counsel for the Labour Tribunal, Mrs. Brender Portland-Reynolds ("Mrs. Portland-Reynolds") submitted that Ms. Nelson had failed to demonstrate that the conduct of the Labour Tribunal was contrary to the provisions of the legislation or to present any evidence of any procedural impropriety with respect to the decision of the Labour Tribunal. Counsel went further that when one examines section 140 of the **Labour Act**, the principles of natural justice were at all times adhered to. Ms. Nelson was afforded

a fair hearing, she was given the opportunity to make representations, she was advised of the accusation of misconduct and the particulars of such and she was represented by her counsel at the hearing.

[21] Mrs. Portland-Reynolds argued that Ms. Nelson is attempting by this application for leave to file a judicial review claim to provide herself with another opportunity for the matter and evidence to be heard and that it is not the function of the court to have the matter re-heard. I must agree with the submissions of Mrs. Portland-Reynolds.

[22] Counsel for Renwick, Mr. Mark Maragh ("Mr. Maragh") relying on the submissions filed on 5th August 2016 argued that the complaint before the Labour Tribunal was based on unfair dismissal, which the Tribunal found was not applicable in this case, as Ms. Nelson's complaint did not fall within any of the stated circumstances in section 131. Nevertheless, the Labour Tribunal went on to consider the grounds which had been raised on the complaint before it.

[23] Having assessed the application for leave to file a claim for judicial review, it provides the Court with no basis for the grant of leave. As pointed out, none of the grounds relate to any wrongs committed by the Labour Tribunal, and the proposed relief which is to be sought is in no way related to the grounds in the application. That being a critical element of the application, it is bound to fail. Notwithstanding, the Court still considered the one ground which could be distilled from the affidavit of the applicant in the interests of fairness as neither the respondent nor the interested party had raised the matter of the grounds of the application.

[24] Counsel for Renwick went on to point out that even if the issue of bias were to be considered, Ms. Nelson would still not have an arguable case. The Court was referred to the case of **O'Reilly and Another v Anthony Ellis t/a The Lifeboat**[5] in which the case of **Rowe v Radio Rentals Ltd.**[6] was cited. In **Rowe**, Browne-Wilkinson J considering the issues relating to the conduct of internal disciplinary submissions said:[7]

> "… It is very important that internal appeals procedures run by commercial companies (which usually involve a consideration of the decision to dismiss by one person in line management by his superior) should not be cramped by legal requirements imposing impossible burdens on companies in the conduct of their personnel affairs. There may be some exceptional case (which we cannot now think of) in which the rule that justice must appear to be done might apply to the full extent that it applies to a judicial hearing. But, in general, it is inevitable that those involved in the original dismissal must be in daily contact with their superiors who will be responsible for deciding the appeal therefore the appearance of total disconnection between the two cannot be achieved. Moreover, at the so-called appeal hearing (which in this and many other cases is of a very informal nature) the initial dismisser is very often required to give information as to the facts to the person hearing the appeal. It is therefore obvious that rules about total separation of functions and lack of contact between the appellate court and those involved in the original decision simply cannot be applied in the majority of cases."

[25] Judge Serota QC concluded in **O'Reilly** as follows:[8]

> "**It is inevitable** as the authorities to which we have referred have shown, **that in cases of small business it would be extremely difficult, to find someone to conduct disciplinary hearings or an appeal who is wholly dissociated from the relevant circumstances. Indeed it is a common occurrence even in the case of larger organisations for those conducting investigations or appeals to have some connection with those concerned with the dismissal.** We have regard to those authorities and also to the fact that it is inappropriate to subject the reasoning of the Employment Tribunal to meticulous criticism if it can be seen that it correctly directed itself as to the law." (my emphasis)

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[5] Appeal No. UKEAT/0414/04/ILB, delivered 23rd November 2004.
[6] [1982] IRLR 177.
[7] Rowe, at para 13.
[8] O'Reilly at para 30.

[26] Counsel for Renwick submitted that there was ample evidence that Ms. Nelson had been treated fairly and reasonably. She was allowed an opportunity to question witnesses and to call her own if she so desired. Counsel argued that Ms. Nelson had the principles of natural justice applied to her.

[27] I agree with the submissions of the interested party, Renwick. The circumstances of this case must be borne in mind. This is a private company which has an HR Manager who sees to the human resource issues of the Company. I do not think that receiving a complaint and summoning an employee to answer to that allegation of misconduct are acts which are sufficient to lead to a conclusion of actual bias or even a real likelihood of bias. There would have to be evidence to support such an allegation and there was no such evidence presented before the Labour Tribunal. I am of the view that Ms. Bonnett by receiving the complaint, summoning Ms. Nelson to answer to the complaint and then convening the hearing was engaging in activities which were part of the usual functions of an HR Manager. As **O'Reilly** establishes, it would be to impose onerous requirements on a business to ask that hearings not include the HR Manager who is in most instances single-handedly responsible for all HR matters at a company. Ms. Bonnett's actions in this case were in keeping with her role as HR Manager.

[28] The Labour Tribunal did consider the question of bias albeit perhaps one may want to say that the decision may not be in legal language and did not specifically mention real likelihood of bias. The fact that the Labour Tribunal stated that the mere fact that the same person conducted both the investigation and the disciplinary hearing in the absence of any suggestion that there was lack of good faith or bias suggests to me that they were considering the question of a real likelihood of bias and concluded that that was not enough to raise a likelihood of bias and there needed to have been actual evidence of bias or a lack of good faith. I am not concerned to determine whether that decision was correct or not but to determine whether the Labour Tribunal considered what was before it. The

fact that a decision may be deemed incorrect does not necessarily amount to an error of law.

[29] I do not find that the cases referred to by Mr. Fraser, counsel for Ms. Nelson are applicable to the circumstances of this case. In the cases cited,[9] the person who had participated in and been part of a decision adverse to the applicant, had then participated in appeal proceedings brought by the applicant challenging the adverse decision. It is understandable how in such a case, there was a finding of bias. In yet another case, the Chief Constable who had dismissed a sergeant, was then part of the committee which deliberated on the sergeant's appeal from Chief Constable's sentence of dismissal. In the instant case, Ms. Bonnett had only dealt with the investigation and disciplinary hearing in relation to the allegation of misconduct against Ms. Nelson. She had not been part of any further hearing challenging the decision to dismiss her, and in those circumstances, it would be hard to see the bias which Ms. Nelson has alleged.

[30] As pointed out in **O'Rielly**, approving data of Lord Denning in the case of **Ward v. Bradford**[10] "we must not force those disciplinary bodies to become entrammelled in the nets of legal procedure. So long as they act fairly and justly, their decision should be supported."

Conclusion

[31] Based on all of the foregoing, I find that the applicant, Ms. Nelson has not satisfied the test for the grant of leave to file a claim for judicial review as set out in **Sharma**. That being the case there is no need to consider the second issue of whether there has been delay in making the application for leave.

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[9] Frome United Breweries Company Limited et al v Keepers of the Peace and Justices for County Borough of Bath [1926] AC 586; The Queen on the Prosecution of Shaw v Lee and others, Justices of Wakefield (1882) 9 QBD 394; Cooper v Wilson and Others [1937] 2 K.B. 309.
[10] (1971) 70 LGR 27 at p. 35.

Order

[32] The application for leave to file a claim for judicial review is dismissed with no order as to costs.

Justice Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar