Trinity Term
[2017] UKPC 20
Privy Council Appeal No 0002 of 2016

JUDGMENT

Jamaica Public Service Company Ltd (Appellant) *v* The All Island Electricity Appeal Tribunal and others (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Mance
Lord Carnwath
Lord Hughes
Lord Hodge
Lord Toulson

JUDGMENT GIVEN ON

6 July 2017

Heard on 7 June 2017

Appellant

B St Michael Hylton QC
Kevin O Powell
Sundiata J Gibbs

(Instructed by Myers Fletcher and Gordon Solicitors)

Respondent (All Island Electricity Appeal Tribunal)
Marlene Malahoo Forte QC
(Attorney General)
Althea Jarrett
(Director of State Proceedings)
(Instructed by Charles Russell Speechlys LLP)

Respondent (Office of Utilities Regulation)
Dr Lloyd Barnett
Annaliesa Lindsay
(Instructed by Simons Muirhead and Burton LLP)

LORD CARNWATH:

Summary

1. The appellant company ("JPS") generates and supplies electricity to the Jamaican public pursuant to the All-Island Electric Licence 2001 ("the Licence"), which grants it the exclusive right to do so throughout Jamaica for a period of 20 years. Its operations are regulated by the Office of Utilities Regulation ("the OUR"), a statutory body established under the Office of Utilities Regulation Act.

2. The Licence provides for the charges for electricity to be set by the OUR in accordance with a formula set out in Schedule 3. In summary (see Schedule 3 para 2(C)) OUR is required to conduct a quinquennial review in accordance with a detailed formula prescribed by the schedule, thereby fixing rates at a level that allows JPS to recover "all prudently incurred costs" in providing the service, including "salaries and other costs related to employment". The first such review was to take effect from 31 May 2004, based on information filed by JPS not later than 1 March 2004. The information was to be related to a "test year", being the latest year for which there were audited accounts, adjusted to reflect (inter alia) (at Part 1(ii)):

> "Such changes in revenues and costs as are known and measurable with reasonable accuracy at the time of filing and which will become effective within 12 months of the time of filing … Extraordinary or Exceptional Items as defined by The Institute of Chartered Accountants of Jamaica shall be apportioned over a reasonable number of years not exceeding five years …"

3. The rates resulting from the quinquennial review were subject to annual adjustment to take account of certain factors specified in Exhibit 1 to Schedule 3, including for example changes in rates of inflation, and (relevant to this appeal) a so-called "Z factor" representing an adjustment for "special reasons not captured by other elements of the formula". The Z-factor was further defined:

> "The Z-factor is the allowed percentage increase in the price cap index due to events that:
>
> a) affect the Licensee's costs;

b) are not due to the Licensee's managerial decisions; and

c) are not captured by the other elements of the price cap mechanism."

4. The present appeal arises from the settlement in 2008 of a long-running dispute between JPS and the unions over levels of pay, resulting in a substantial payment in respect of back-pay due from 2001. The OUR determined that this sum could not be taken into account under Schedule 3 because:

i) It related to costs which were "known and measurable with reasonable accuracy" at the time of the filing in March 2004, and therefore could and should have been included (if at all) in the 2004 review.

ii) Even if that were wrong, there could be no question of an annual adjustment under the Z-factor, since the costs resulted from events due to JPS' "managerial decisions" (excluded by para (b) of the definition).

5. It will be convenient to refer to these issues respectively as the "2004 filing issue" and the "Z-factor issue". To succeed in the appeal, JPS needs to win on both issues.

Factual background

6. In 1990 JPS had entered into Heads of Agreement with the National Workers Union ("NWU") for a proposed job evaluation exercise to be conducted by Trevor Hamilton & Associates, whose recommendations would be binding on all the parties. That exercise resulted in JPS and the NWU agreeing to its compensation levels being placed within the top five to ten percentile of the benchmarked companies surveyed. In 2000 there was a further agreement with the unions for the period 1 January 2000 to 31 December 2001, providing for a further "Job Reclassification/Evaluation exercise" to be conducted by the same firm. To assist the process of re-evaluation there was established a so-called "Oversight Committee" which included representatives of stakeholders at all levels.

7. Until 2001 the Government of Jamaica was the majority shareholder in JPS. In March 2001, the government's controlling interest was acquired by Mirant Corporation, a global energy company based in Atlanta, Georgia. The terms of acquisition included the 2001 Licence. In April 2001, the new management signed a Memorandum of

Understanding with the unions, agreeing to continue amicable discussions on the outstanding issues from the first negotiations.

8. Following completion of the classification exercise in February 2002, JPS engaged Peat Marwick & Partners ("KPMG") to carry out a salary survey to be used to develop a salary structure to complement the reclassification exercise. KPMG benchmarked JPS' salaries against 17 local companies selected by reference to various factors including size and range of activities; 11 of the companies participated in the survey. KPMG submitted their final report in June 2002.

9. A dispute arose between JPS and the unions as to whether the salary structure should be aligned with salaries of the top five to ten percentile of the benchmarked companies, as the unions proposed (in line with the previous position), or the average of the 11 local companies which participated in the survey, as JPS contended. This dispute was referred to the Industrial Disputes Tribunal ("IDT") which on 29 August 2003 made an award resolving the issue of principle in favour of the union, and determining the effective date for the payment of the new rates as 1 January 2001. The IDT did not fix the amounts of pay, but it recommended that the award should be implemented with the guidance of the consultants previously engaged and "in conjunction and in collaboration" with the Oversight Committee. JPS's challenge to this award in the courts failed, ultimately in the Court of Appeal on 7 March 2007.

10. At this stage the Oversight Committee was reconvened and KPMG were re-instructed to assist the process of implementation, as recommended by the IDT. On 6 May 2008, an agreement was concluded whereby JPS agreed to make a net payment of $2.3 billion in back-pay for the years 2001-2007 and JPS' future salary structure was adjusted in accordance with the award.

The OUR determination and the subsequent proceedings

11. On 11 March 2009 JPS filed a Z-factor Submission which sought the OUR's approval for JPS to recover some $4.3 billion (made up of salary payments to employees and related tax) by way of a tariff adjustment using the Z-factor component. In a determination notice dated 2 March 2010 the OUR dismissed the claim. It rejected any argument based on Mirant's asserted ignorance of the previous dealings between JPS and the unions, which should have been revealed by "any prudent due-diligence exercise" and taken into account in the terms of the purchase. (Any such argument has since rightly been abandoned.)

12. On the points now in issue, the OUR held:

i) The claim did not qualify under the Z-factor provision since they were the consequence of "managerial decisions" in that -

> "JPS agreed with the labour unions in 2000 to embark on the reclassification exercise and must have had in its contemplation that it would result in a likely increase in overall workers' compensation";

ii) The relevant costs, "if they were to be considered as legitimate (and this is not conceded)", should have been taken into account in the 2004 submission:

> "The IDT's decision was handed down in August 2003 and as such, sufficient time had been afforded the company to include such salary adjustments in its 2004 Tariff submission. JPS exercised the option instead to submit the matter to the courts for adjudication. This was a managerial decision."

13. JPS appealed under the terms of the Licence (condition 32). That provides for the "Appeal Tribunal" to be chaired by a former judge of the Supreme Court or Court of Appeal, sitting with two other members appointed on the recommendations respectively of the Licensee and the OUR (condition 32(2)). The tribunal is required to "have regard to the legality, rationality and procedural propriety of the Office in arriving at its decision", and has power to "confirm, modify or reverse" the decision in whole or part, or to refer it back to the OUR (condition 32(1)(ii)).

14. On 26 May 2011, following a hearing at which JPS and the OUR were represented by counsel, the Appeal Tribunal dismissed the appeal in a detailed and carefully reasoned decision-letter. Having set out the relevant parts of condition 32, the tribunal commented on its powers (at para 13):

> "The Tribunal regards its procedure as that of a general statutory appeal process due to its power to 'confirm, *modify* or reverse the decision,' while observing the administrative law features as specifically outlined, namely, '... the legality, rationality and procedural propriety of the Office' and '... reasonable standards of procedural fairness and the rules of natural justice ...' (their emphasis)."

15. On the merits, the tribunal started by summarising what it described as "managerial decisions prior to March 2004", going back to the job evaluation exercise

initiated by JPS in 1990, and the new exercise in 2000. It noted in particular the nature of the dispute referred to the IDT in 2002 (at para 30):

> "JPS, on the one hand, and the unions, on behalf of the employees on the other hand, were not in agreement on the formula to be used in the said exercise. JPS placed the salary structure, unilaterally, within the average of the top eleven (11) companies in the market, whereas both the Hamilton and the KPMG report placed the Company in the top '5 - 10 percentile' of the market. JPS initially, refused to agree to pay any retroactive compensation; JPS subsequently compromised and agreed to a retroactive payment to 1 April 2001. The unions claimed payments retroactive to 1 January 2001."

16. It continued:

> "(33) JPS was therefore, since 29 August 2003, aware of its compensation obligations in respect of the payment of the new salaries of its employees. JPS was seized of certain relevant facts,
>
> (a) the salary structure was within the range of the top five to ten percentile of the four (4) top companies in the market,
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> (b) 500 of JPS's employees whose salaries were below the market were to be brought up to the market minimum, the others to remain without any loss,
>
> (c) payment was to be retroactive to 1 January 2001.
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> (34) This Tribunal is of the view, that these are sufficient facts, in the possession of JPS, to have enabled it to calculate the cost of the salary payments due, '... with reasonable accuracy ...' as required by paragraph 1 of Schedule 3.
>
> (35) Despite the fact that there is no indication that JPS sought to activate the Oversight Committee, that did not preclude JPS from calculating such costs based on its own view of its liability and so include it in its 2004 application to the OUR, for a new PBRM [Performance Based Rate-making Mechanism] rate

> review, in accordance with Schedule 3, paragraph 2(C). The regulatory scheme of the Licence did not permit JPS to ignore its provisions and seek repayment of its costs outside of the period in which it may be claimed."

17. With regard to the Z-factor issue, it commented that this provision "contemplates costs arising unexpectedly, outside of the control or without any influence or act on the part of JPS - a random occurrence" (para 38).

> "(39) This Tribunal is of the view that, on the facts, JPS' costs would have been affected and were not 'captured by other elements ...', thereby satisfying the provisions of (a) and (c), above. However, on the facts available to the OUR the (b) provision was not satisfied. It was not unreasonable to find that the 'events' involved in the reclassification salary review exercise were all due to the managerial decisions of JPS, the corporate entity, over the years 1999 to 2002. The OUR did not thereby act irrationally in its Determination."

18. JPS applied for judicial review of the tribunal's decision. The application was dismissed by the Supreme Court on 22 March 2013 and by the Court of Appeal on 13 March 2015. The leading judgment was given by Phillips JA in the Court of Appeal, to which it will be necessary to return.

The appellant's submissions before the Board

19. Before the Board, Mr Hylton QC, on behalf of JPS, challenges the view that the IDT decision left the company with everything needed to determine with "reasonable accuracy" the relevant employment costs. He submits that there was no evidence, or no sufficient evidence, on which the tribunal could reasonably have formed that view (citing *Mahon v Air New Zealand Ltd* [1984] AC 808, 820; [1984] 3 All ER 201, 210 per Lord Diplock). The conclusion was, he submits, contradicted by the IDT's own recommendation that the Oversight Committee should be reconvened for this purpose, with the assistance of the previous consultants. This is borne out by the fact that when the committee was eventually reconvened in 2007, it took them a year to complete their work, following a new market survey. Furthermore, even if the costs were measurable at the time of the IDT decision, it was clear that they would not become "effective" until the committee had completed its work, which would be long after the 12-month period set by the definition.

20. On the Z factor issue, he submits, as he did below, that the reference in the Licence to "management decisions" must be taken as applying to future management

decisions, that is decisions taken since the date of the Licence. That would be consistent with the purpose of the Licence designed to provide protection of JPS (now under the control of private investors) against the effect of private decisions over which they would have had no control. The Z-factor was designed to take account of costs incurred as a result of events occurring between rent reviews, which would include the costs arising from the settlement in this case.

Discussion

21. The initial decision was that of the OUR, but the provision in condition 32 for appeal to a specially constituted tribunal is an important part of the overall scheme. Notwithstanding the specific reference in the condition to "legality, rationality and procedural propriety", there was no challenge (here or below) to the tribunal's own view of its role as going beyond that of strict judicial review in the conventional sense. The Board has accordingly heard no argument on the precise scope of its power to review issues of fact or evaluation of fact, rather than pure law, or as to the material which could be taken into account in that exercise. However, the special composition of the tribunal, including not only a senior judge, but representatives of the two main parties, can be seen as supporting the tribunal's approach. There may be some parallels with the broader approach adopted to review for errors of law within the new United Kingdom tribunal system: see, for example, *Revenue and Customs Comrs v Pendragon plc* [2015] UKSC 37; [2015] 1 WLR 2838, per Lord Carnwath JSC at paras 47-51. By contrast, the tribunal's own decision is challengeable in the courts only on conventional judicial review grounds.

22. It is not now in issue that the costs claimed by JPS were in principle legitimate matters to be taken into account in the Schedule 3 exercise, provided the relevant calculations were submitted at the proper time. As is now common ground, they were "prudently incurred costs" within the statutory definition. The OUR gave no reason for this point being "not conceded" and none has been given to the Board. The OUR's reasons for dismissing the claim are also open to the criticism that they failed to address the relevant test. The OUR commented simply that the JPS had had "sufficient time" following the IDT decision to make the necessary salary adjustments. It failed to address in terms the crucial question, which is not simply one of sufficient time, but whether the company had the necessary information to render the relevant amounts "known and measurable with reasonable accuracy" at that time. In these circumstances, the tribunal was justified in looking in some detail at the information which was available at the time and in forming its own view on the application of the test.

23. Mr Hylton does not rely on any specific error of law in the tribunal's reasoning, but argues instead that their conclusion was unsupported by the evidence. In particular he points to the role in that process of the oversight committee and the consultants, as envisaged by the IDT's own decision. However, in the Board's view, in agreement with

the Court of Appeal, the tribunal had ample material to support its conclusion. In particular, it was entitled to attach weight to the definition of the issues before the IDT and the terms of its "award", as opposed to what were no more than "recommendations" to assist the process of implementation.

24. The issue before the IDT was correctly identified by the tribunal. As Phillips JA held (para 61), the company's challenge was not to the correctness of the figures or "the empirical data", but to the "hierarchical structure", an issue which was resolved in favour of the unions. Nor, as she said (para 65), was there anything in the IDT decision to indicate that a further market survey was required at that stage, even if that may have become a prudent course by the time (some six years after the KMPG report) when the exercise was eventually completed. As Dr Barnett points out, for the OUR, that award (absent any stay or other step to protect their position) was in principle effective and enforceable from the time it was given, regardless of the subsequent legal proceedings. Nor was it any part of JPS' case in those proceedings that the dispute went beyond the issues of principle, and extended to the detailed calculations. For these reasons, the Board agrees with the Court of Appeal in rejecting JPS' challenge on the 2004 filing issue.

25. This conclusion makes it strictly unnecessary to reach a conclusion on the Z-factor issue. However, a brief comment may be appropriate. The Board has some reservations about the approaches of both sides to the expression "managerial decision". Mr Hylton's attempt to confine that phrase to decisions made since the date of the Licence is, as the Court of Appeal held, unsupported by the wording or the policy of the Licence. On the other hand, the Board has some doubts about the tribunal's simple reliance on "managerial decisions of JPS, the corporate entity, over the years 1999 to 2002" involved in the reclassification exercise. It is right of course that the final costs were in part attributable to managerial decisions made by JPS before and after the change of control, and that (as Mr Hylton accepts) the change of controlling shareholders makes no difference in principle. But those decisions were only part of the story.

26. Even on the OUR's case, the event which triggered the duty to pay was the decision of the IDT. If, following that decision (and contrary to the finding of the Appeal Tribunal), it had not been possible to estimate the relevant costs in time for the 2004 filing, it would be surprising, and potentially unfair to JPS, if there were no mechanism to allow them to be taken into account by way of annual adjustment once the uncertainty had been resolved. The respondents were unable to identify any policy reason for excluding them altogether, nor any mechanism for taking them into account other than the Z-factor. It seems to the Board at least arguable that, in the context of the annual review, the reference to "events … due to managerial decisions" should be read as a reference to decisions more directly connected to matters arising since the quinquennial review. However, in the absence of detailed argument, it would be wrong to do more

than raise that possibility for possible consideration if and when it arises in a future case.

27. For these reasons the Board will humbly advise Her Majesty that the appeal should be dismissed, and that, subject to any submissions received within 14 days, the respondents' costs of the appeal should be paid by the appellant.