[2025] UKPC 1
Privy Council Appeal No 0046 of 2023

JUDGMENT

Mitoonlal Persad and another (Appellants) *v* Registration, Recognition and Certification Board (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Sales
Lord Stephens
Lady Simler
Lady Wise

JUDGMENT GIVEN ON
3 January 2025

Heard on 4 November 2024

Appellant
Anand Beharrylal KC
Omar Sabbagh
Kiel Taklalsingh
Stefan Ramkissoon
(Instructed by Sovereign Chambers (Trinidad))

Respondent
Robert Strang
(Instructed by Charles Russell Speechlys LLP (London))

LADY WISE:

1. Mr Persad, the first appellant, was dismissed from his employment with Royal Bank of Canada on 18 January 2018. He was at the relevant time a member of the second appellant, the Sanctuary Workers' Trade Union. Mr Persad wanted to challenge his dismissal as unfair. He and his employer engaged in attempts to conciliate their dispute. The employer raised an issue of whether Mr Persad was a "member in good standing" of the union in terms of the Industrial Relations Act. If so, that would have the consequence of Mr Persad being able to take his case to the specialist Industrial Court. Determination of that issue was within the sole jurisdiction of the respondent, the Registration, Recognition and Certification Board ("the RRC Board"). The RRC Board decided that the statutory requirement for being a member in good standing was not satisfied in Mr Persad's case. The High Court disagreed, but the Court of Appeal overturned the High Court's decision and reinstated the decision of the RRC Board. Mr Persad and the union challenge that decision on a number of grounds.

The Industrial Relations Act

2. Part I of the Act provides for the establishment of a specialist Industrial Court, to hear and determine trade disputes and related matters. Part II establishes the RRC Board, the membership of which includes representatives of both worker and employer organisations. In terms of section 23(1), the Board is tasked with, among other matters, the determination of questions referred to it by the Minister. This includes any questions about membership of a union in good standing, issues of certificates of recognition of unions under Part III of the Act, the conduct of ballots and determination of a wide variety of related disputes. Certification of recognition of a union is important for collective bargaining purposes and for the resolution of trade disputes such as that by Mr Persad against his employer. Section 51 of the Act restricts the categories of those who can make reports of unresolved trade disputes to the relevant Minister. These can be made only by the employer, the recognised majority trade union or, where there is no recognised majority union, by any trade union, of which the worker or workers who are the parties to the dispute are members in good standing. The issue in this case relates to whether Mr Persad is a worker in good standing of the Sanctuary Workers' Union.

3. The key provision for the purpose of this appeal is section 34(3) which provides;

> "(3) All questions as to membership in good standing shall be determined by the Board, but a worker shall not be held to be a member in good standing, unless the Board is satisfied that –

> (a) The union of which it is alleged the worker is a member in good standing has followed sound accounting procedures and practices;
>
> (b) The particular worker has –
>
> (i) Become a member of the union after having paid a reasonable sum by way of entrance fee and has actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the application was made or deemed to have been made; ……."

There are four matters in total about which the Board must be satisfied in terms of section 34(3), but only the first two arise for discussion in this case.

4. Section 23 of the Act has two provisions that seek to oust the jurisdiction of the courts in relation to the RRC Board's activities. Read shortly, section 23(6) provides that decisions of the RRC Board shall not be challenged in court proceedings and court orders are not to be made that prohibit, restrain or otherwise interfere with the Board or any proceedings before it. In terms of section 23(7), the Board is the sole authority competent to interpret and apply the Act and court proceedings cannot be brought on those matters.

Practice Note No 2

5. The RRC Board issued two Practice Notes providing guidance on its approach to applications. Practice Note No 2 was promulgated in 2008. It provides that:

> "In order to satisfy the requirements of Section 34 of the Industrial Relations Act, Chapter 88:01, the records, documents and evidence to be furnished by the Trade Union and Employer shall be as follows:…."

Three separate sections follow, detailing the evidence to be provided by the Trade Union, the Employer and the Casual Worker respectively. Paragraph 3 of the section confirming the evidence to be provided by the Trade Union seeks:

> "Evidence that the applicant paid the required entrance fee and contributions, by:
>
> i) Entries on a Union's Collection Sheet which must include the actual dates moneys were received by the Collector showing the periods and dates covered by the individual payments;
>
> ii) The Collection Sheet must be signed and dated by the Collector, and the entries therein must be made out by the Collector or other persons who collected moneys from the workers.
>
> iii) Cash book/Day Book.
>
> iv) Bank Book and/or Deposit Slips for stated periods."

6. The RRC Board's longstanding practice, pursuant to Practice Note No 2, has been to seek evidence that a union has deposited fees and dues into a bank account and can account for the relevant transactions.

The facts and the proceedings below

7. The Sanctuary Workers Union was formed in February 2017. Mr Persad became a member on 10 January 2018 and paid the necessary entrance fee and contributions thereafter. He was dismissed from his employment with Royal Bank of Canada on 18 January 2018. On 20 April 2018, in the context of Mr Persad's challenge to that decision, the union reported the dispute to the relevant Minister and negotiations ensued. In the course of those, the employer's representative questioned whether Mr Persad was a member in good standing of the union. That matter was referred by the Minister to the RRC Board.

8. By prior arrangement, officers of the RRC Board attended at the union's offices on 3 August 2018 to inspect its books, records and documents insofar as relevant to the issue of Mr Persad's membership in good standing. A letter of 24 July 2018 had been sent by the Board's secretary to arrange the meeting and to highlight what documents were expected. Bank books and bank deposit duplicates were specifically mentioned in the letter, which emphasised that the documentation should conform to the standards laid down in Practice Notes Nos 1 and 2. At the 3 August meeting, the president of the union informed the Board's representative that the union had not yet opened a bank

account. He explained that it was a new union with few members and had not yet collected substantial funds. By letter of 6 August 2018, the Board's secretary asked the union's president to confirm the position as stated at the meeting and enclosed copies of Practice Notes Nos 1 and 2. The union president responded by letter of 16 August 2018. He confirmed the lack of a bank account, narrating that membership of the union was very small and the bank charges associated with holding a bank account could not be justified, albeit that once membership deposits were at a level that made economic sense to do so, a bank account would be opened. He asserted that the union had followed sound accounting practices.

9. The Board met on 11 November 2019 and decided that Mr Persad was not a member in good standing of the union. That decision was conveyed to the union on 27 November 2019 by letter and accompanying certificate. It was not the Board's practice to issue reasons for such decisions. Mr Persad's legal representatives requested reasons for the decision and these were ultimately given by letter of 27 February 2020. The reasons recorded the union's admission that it did not have a bank account and referred to the longstanding practice that entrance fees and contributions should be deposited in such an account and that the union should have evidence of the relevant transactions. Reference was made also to the union's own rules, which stated that it would use a reputable banking institution, which had been breached by the absence of any bank account. The criteria for membership in good standing had not been satisfied.

10. Mr Persad and the union brought a judicial review of the RRC Board's decision in the High Court. On 8 November 2021 Charles J allowed the claim, concluding that Practice Note No 2 was *ultra vires,* as the Act gave no power to create regulations or subsidiary legislation. The decision was also illegal in that it breached section 34 by adding an additional requirement that the union hold a bank account before it could comply with the statutory test. Further, the union had not been informed of the Practice Note requirement and had not been given an opportunity to be heard on it, or on the union's breach of its own rules. In any event, the Board's decision was disproportionate in that it had resulted in the restriction of Mr Persad's right to access justice. The court's jurisdiction to determine matters was not ousted where the Board had made an error of jurisdiction and had been in breach of the rules of natural justice.

11. The RRC Board appealed against the High Court's decision. On 28 September 2022, the Court of Appeal allowed the appeal and dismissed the appellants' claim. The judgment giving reasons for that decision was issued on 3 March 2023. In holding that the Board had acted *ultra vires* in issuing Practice Notes the trial judge had erred. Seeking evidence such as a bank book and deposit slips was also in keeping with good public administration and gave transparency to what the Board would consider when exercising discretion on "sound accounting procedures and practices" in terms of section 34(3). The decision had not deprived Mr Persad of access to justice as he would still have recourse to the courts and to the common law.

12. Further, the Board had not fettered its discretion. While Practice Note No 2 used the word "shall", the context was important. The letter to the union requesting documents had indicated only that those documents "should" comply with Practice Notes Nos 1 and 2. In any event, the evidence revealed that the requirements of the Practice Note had not been rigidly applied in this case: valid consideration had been given to the union's position. On natural justice, the undisputed trail of letters and events illustrated that the union had been given opportunities, which had been taken up, to comment on the Board's intention to rely on the documents required by Practice Note No 2. However, the Board had failed to advise the union of the issue relating to potential breach of its own rules and had not given it an opportunity to make submissions on that. To the extent that such a failure was in breach of the rules of natural justice, it had no effect as the failure to comply with section 34(3)(a) and Practice Note No 2 was a separate failure leading to the decision.

13. The trial judge's approach to the ouster clauses in the Act was also erroneous. Section 23(6) and (7) had been examined by the Court of Appeal in *Aviation Communication and Allied Workers Union v Registration, Recognition and Certification Board,* 13 October 1998 (Civil Appeal No 35 of 1995) ("ACAWU v RRCB"). There the court had held that section 23(6) and (7) did not oust the court's jurisdiction in respect of challenges based on lack of jurisdiction or breach of natural justice. The trial judge in this case had been free to examine those issues in the present case. However, in also addressing challenges based on rationality and proportionality, the judge had failed to apply the reasoning in ACAWU v RRCB. Once the Board was acting within its duties and functions and not in a manner contrary to the rules of natural justice, its decisions were immune from challenge.

14. In any event, the requirement of proportionality was met in this case. The evidence of the chair of the Board confirmed the important policy objectives behind seeking bank account documentation. The corresponding inconvenience to the union of opening and maintaining a bank account was minor, thus the policy was proportionate. There was no irrationality and no denial of any right to access justice.

The appeal to this Board

15. By the time of the hearing before this Board, there was less focus on the *ultra vires* challenge. The central arguments advanced were whether the RRC Board had misinterpreted its own Practice Note by imposing a mandatory requirement for a bank account, or had at least fettered its statutory discretion by not permitting any exception to its longstanding policy on bank accounts.

16. For the reasons that follow, the Board agrees with the Court of Appeal that the RRC Board was entitled to make the decision that the requirements of the statutory test

had not been satisfied. The Industrial Relations Act includes a mandatory restriction on those parties who can access the Industrial Court, by the imposition of the "member in good standing" test in section 34(3). It is for the RRC Board to form a judgement on what constitute "sound accounting procedures and practices" as part of that test. The adoption of a general policy to aid decision making in such a context is likely to be of assistance to all concerned. In this case, Practice Note No 2 represents the communication of that policy. As the Court of Appeal explained (at paragraph 27), the issuing of Practice Notes on the point was "*in keeping with good public administration as it gives some transparency and guidance to applicants as to the matters that the [RRC Board] would consider when exercising its discretion as to what are sound accounting practices"*.

17. As Practice Note No 2 was the articulation of the RRC Board's long standing practice in relation to what documents would satisfy the requirements of section 34(3) of the Act, it should be read as a whole. The appellants sought to focus on paragraph 3 and contended that cash books could be seen as an alternative to bank books, in the absence of the conjunctive "and" from the list. If there was satisfactory evidence that the worker had paid the required entrance fee and contributions, then paragraph 3 of the Practice Note had been satisfied and to find otherwise was a misinterpretation of its terms. That argument overlooks two matters. First, the list in paragraph 3 is, on the face of it, cumulative. Paragraphs 3iii) and iv) are not listed as alternatives and it is understandable that both would be required to reconcile the payments made by the member with the monies continuing to be held by the union. Secondly, it is clear from the preamble to the Practice Note that what follows is a list of records, documents and evidence to be produced by the Trade Union to satisfy the requirements of section 34(3). There was no misinterpretation involved in expecting to receive all of the documents listed.

18. Where an administrative body has an unqualified discretion, it must act reasonably and its decisions can be challenged if there has been no real or genuine exercise of that discretion. While policies may differ in terms of their apparent flexibility or rigidity, their exercise must contemplate exceptions. Accordingly, implementing a policy in a way that permitted no consideration of exceptions would amount to an unlawful fettering of discretion: *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, at 625; *R (DJ) v Welsh Ministers* [2020] PTSR 466, at para 68. In looking for evidence that fees and contributions of union members would be kept in a bank account, the RRC Board was adopting a policy that was, on the face of it, unobjectionable. The available evidence supports a conclusion that the underlying rationale of the policy was to eliminate the potential for fraudulent activities associated with money (Affidavit of RRC Board Chair, G Baker, paragraph 17). Clearly, an audit trail of fees and contributions being received and held in a bank account would assist in allaying any concerns of that nature.

19. The evidence also illustrates that the policy was subject to the possibility of exceptions. There would have been no rational basis for asking the union to provide an explanation for the lack of a bank account unless that was so. That explanation having been tendered, the Board met and considered the material produced, which included that explanation (Affidavit of G Baker, paragraph 14). The request by the Board for supplementary information provides clear support for a conclusion that, far from fettering the Board's discretion, the policy as articulated in the Practice Note No 2 was not mandatory and could be departed from. The material available to the Court of Appeal all tended to confirm that the RRC Board had been engaged in the proper exercise of its statutory jurisdiction.

20. So far as the alleged breaches of natural justice are concerned, the Board agrees with the Court of Appeal's decision that the union was afforded opportunities to address the bank account issue. This was clear from the correspondence, in particular the RRC Board's letters of 24 July and 6 August 2018. The first of those letters confirmed that the documents required by the Practice Note should be provided to conform with accepted standards. In response to the second letter, the union took up the opportunity to respond by giving an explanation in the letter from its President on 16 August 2018. He relied specifically on the level of bank charges compared with deposits received and made reference in the letter to the union's recent formation and small membership. The explanation was clearly directed at the issue of whether the union had followed sound accounting practices and procedures, the determination of which was exclusively for the RRC Board. A request for additional information where the records and documents produced are inadequate was consistent with Rule 23(2) of the RRC Board's rules.

21. On the breach by the union of its own rules, the Court of Appeal found that there had been a failure to inform the union of this alleged breach, which deprived them of the opportunity to comment or make representations. The Board has concluded that the Court of Appeal was correct in finding that this denial of an opportunity to address the issue was immaterial, given the stand-alone reason for the decision that the union had not followed sound accounting practices and procedures. The absence of a bank account, coupled with consideration of the explanation for that, constituted a sufficient basis for the determination that the requirements of section 34(3) had not been satisfied.

22. In relation to the ouster provisions in section 23(6) and (7) of the Act, the Court of Appeal relied on its own earlier decision in *ACAWU v RRCB*, which imposed a limit on the scope of those provisions, stating;

> "Once… it is a matter that falls within the functions and responsibilities of the Board then the Board can interpret and apply the Act in any way it thinks fit in relation to those functions and responsibilities. It may do so correctly or incorrectly and, if incorrectly, it is immune from being put

> right by any court. If, however, the error made does affect the jurisdiction of the Board then it may be put right, as, for example, if it seeks to deal with a matter outside of its functions and responsibilities. (*South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363). Also, if it violates the rules of natural justice as for example, if it makes orders against a party without hearing that party or if one of its members has a real interest in the matter before it."

23. As the appellants were able to litigate the alleged breaches of natural justice in this case, proper regard was given to the Court of Appeal's formulation of the exceptions to the general ouster of the court's jurisdiction. In the absence of any constitutional challenge to the validity of the legislation under discussion, the provisions of section 23(6) and (7) exclude recourse to the courts on decisions such as that made by the RRC Board in the appellants' case other than relating to errors that go to jurisdiction or breaches of natural justice. The Court of Appeal reiterated its position on the limited scope of those exceptions in the more recent case of *Attorney General of Trinidad and Tobago v Desalination Co of Trinidad and Tobago*, 16 October 2020 (Civil Appeal Nos P284 and P287 of 2015). Accordingly, there is there is no scope for any proportionality argument.

24. In any event, had the proportionality argument been justiciable, this case does not involve a fundamental deprivation of the right to access justice. Access to the Industrial Court appears to confer a benefit, in that the remedies that court can grant (such as reinstatement of a dismissed employee) go beyond those available in the ordinary courts. Insofar as there is any right to access the Industrial Court it is a conditional one, exercisable only if the provisions of section 34(3) are satisfied. Mr Persad's general ability to access justice and challenge the decision of his former employer has not been negated by the RRCB's decision. First, he was afforded the limited recourse to the courts to address any errors going to jurisdiction or breaches of natural justice formulated by the Court of Appeal in *ACAWU v RRCB*. Secondly, the Board's decision does not preclude an application to the ordinary courts. Accordingly, there is no need to revisit the Court of Appeal's approach on this issue.

25. For the reasons given, the Board dismisses the appeal.