[2016] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 70/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LTD**	**APPELLANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**PETER JENNINGS**	**2ND RESPONDENT**

Mrs Sandra Minott-Phillips QC and Gavin Goffe instructed by Myers Fletcher and Gordon for the appellant

Miss Carlene Larmond instructed by the Director of State Proceedings for the 1st respondent

Douglas Leys QC, Miss Kimone Tennant and Douglas Thompson instructed by Douglas A B Thompson for the 2nd respondent

Ms Tanya Ralph representing the 1st respondent

25, 26, 27 November 2015 and 6 May 2016

BROOKS JA

[1] I have read the comprehensive judgment of my learned sister Sinclair-Haynes JA. It sets out in full all the facts and circumstances pertaining to this appeal from the decision of Sykes J to refuse National Commercial Bank Jamaica Limited (NCB)

permission to apply for judicial review of a decision of the Industrial Disputes Tribunal (IDT). There is, therefore, no need for me to set those out in this brief comment.

[2] It will be sufficient to say that the IDT, after a hearing before it, found that NCB's termination of its employment of Mr Peter Jennings was unjustified. As a consequence it ordered that he be re-instated in his employment or be paid compensation for a particular period.

[3] NCB complains that there are real prospects of success for arguments that the IDT made a number of errors of law in arriving at its decision. It contends that Sykes J was, therefore, wrong to have refused permission for it to apply for judicial review.

[4] It would be tempting, having read the detailed and scholarly judgments of both Sykes J and Sinclair-Haynes JA, to say that the requirement of such comprehensive treatment of the issues suggests that they ought to have been the subject of judicial review. Having considered the matter carefully, however, I have come, not without hesitation, to the conclusion that both learned jurists are correct.

[5] The IDT in its terms of reference was asked to "determine and settle the dispute between the National Commercial Bank on the one hand and Mr. Peter Jennings on the other hand over the termination of his employment". It did just that.

[6] It may be that it took a controversial, if even incorrect, position on the issue of what constituted gross negligence, which was an issue of law. I agree with the reasoning, however, that the flaw was not determinative of the question of whether it

was arguable in law, that its decision should be overturned. It is my view that the larger picture of the IDT's review of the situation leading to Mr Jennings' dismissal was more important in the context of whether judicial review was appropriate.

[7] As has been pointed out by Sinclair-Haynes JA, the courts have consistently taken the view that they will not lightly disturb the finding of a tribunal, which has been constituted to hear particular types of matters. The courts will generally defer to the tribunal's greater expertise and experience in that area. The IDT is such a tribunal. The learned judge of appeal has admirably set out, and examined, all the authorities supporting the principles to which reference has been made above. They need not be set out here.

[8] In this case, NCB summoned Mr Jennings to a disciplinary hearing from which he stood the chance of losing his employment and, as a 33 year banker, his career. The IDT examined the circumstances leading to Mr Jennings' dismissal and found that he was unjustly treated. In its review of those circumstances, it found that he was not given enough time to prepare to meet the case against him. It found that the person who had drafted the charges, which he was to face at the hearing, constituted the tribunal which was to make the decision at the hearing. It further found that he was deprived of legal representation at that hearing and at the appeal from the decision of that hearing. All those issues spoke clearly to the issue of fairness in the context of the case.

[9] There was evidence from which the IDT could have made those findings of fact. It was entitled, from its mandate and its experience, to conclude that he had been

unfairly treated and that his dismissal was unjustifiable. A court should not interfere with such a finding. In those circumstances, judicial review was inappropriate. I agree that the application for judicial review ought to have been refused and that Sykes J was correct to have done so. I would dismiss the appeal.

SINCLAIR-HAYNES JA

[10] This is an appeal by National Commercial Bank Jamaica Ltd (NCB), from Sykes J's order refusing it leave to apply for judicial review of the Industrial Disputes Tribunal's (IDT) decision in favour of Mr Peter Jennings.

Background

[11] Mr Jennings was the branch manager of one of NCB's branches. He was dismissed for allegedly approving eight loans which were either unsecured loans in amounts which exceeded his authorised limit as branch manager to approve, or which were insufficiently secured. It was further alleged that he failed to conduct or to ensure that proper due diligence was conducted as the documentation supporting seven of the eight loans were false. It was NCB's claim that his conduct fell below that which was expected of bank managers and more so, one of his experience. At the time of his dismissal, he had been with NCB for 33 years.

[12] Mr Jennings was summoned by Mrs Audrey Tugwell Henry, NCB's senior general manager in retail banking division, to an internal hearing into the allegations to be held

on 6 November 2012. On 19 November 2012, his employment was terminated. His appeal against that decision to the bank's appeal tribunal was dismissed.

[13] He consequently complained against the dismissal to the IDT. In dealing with the matter, the IDT heard NCB's arguments regarding Mr Jennings' alleged negligence and it also heard Mr Jennings' several complaints about the manner of his dismissal.

Mr Jenning's submission before the IDT

[14] In summary Mr Jennings' complaints were:

1. He had served NCB for 33 years. His success in making a profit for NCB at the various branches he served was described as phenomenal. He had had a blemish-free record with NCB of over 30 years, during which time he had earned many awards for excellence and had met all performance targets. At the time of his dismissal, only one of the eight loans for which he was alleged to have acted improperly was a non-performing loan. All others were fully paid up or, within NCB's policy, performing.

2. He was sent on leave, by letter dated 18 October 2012, without being told the reason and in total ignorance of any allegation against him.

3. Sometime after 6:00 pm on 5 November 2012, he was informed by way of telephone (by the person whom he discovered later

chaired the hearing), to attend a disciplinary hearing at 10:30 the following morning. He subsequently received a letter to that effect on 5 November 2012. Mr Jennings informed the person to whom he spoke on the telephone, that he required legal representation. He was informed by the person that if he attended with an attorney "the meeting would not happen". Mr Jennings was neither informed during the telephone conversation nor in writing as to the kind of representation that was permissible.

4. Less than 18 hours after receiving verbal notice, he received the letter which stated "a series of complex charges, with no particulars of specific actions" by Mr Jennings to support the charges. Mr Jennings was initially denied particulars of the charges against him. On 5 November 2012, when he was eventually notified by way of letter, the charges were too vague to be properly defended. For example, many of the charges included allegations that Mr Jennings acted on the basis of fraudulent letters of employment from loan applicants. The documentary evidence however revealed that the letters, as far as he could have been aware, were genuine. He was only told that they were fraudulent, without specifying reasons for so alleging.

5. NCB did not provide Mr Jennings with a copy of Mr Richard Hines' (the investigator) report which was submitted to NCB and which led to the charges and termination of his employment.

6. Only one of the "allegedly irregular loans" which was placed before the tribunal was classified as a "bad" or "non performing" loan. The others were "performing" even if they were slightly behind. Further, having sent him on leave, he had no influence, nor could he to prevent the others from falling into serious delinquency.

7. Mr Jennings was repeatedly denied the right to be represented by an attorney-at-law of his choice, both at the original disciplinary hearing and at his appeal against his dismissal. NCB insisted that only an NCB employee could represent him. This "[was] unfair, unjustifiable and contrary to NCB's own disciplinary procedures", as NCB was the accuser making disciplinary charges against him. Accordingly, Mr Jennings did not feel comfortable seeking representation from NCB against NCB because this would have been "akin to having an appeal from Caesar to Caesar".

8. No act of impropriety was proven against Mr Jennings in any of the allegations raised. Mr Jennings made it clear at the

disciplinary hearing and to the "appeal body" that he had acted properly and within NCB's policy at all material times.

9. The onus in the proceedings was on NCB to justify its dismissal of Mr Jennings. Reliance was placed on the case of **Industrial Disputes Tribunal v University of Technology Jamaica and another** [2012] JMCA Civ 46. No evidence had been led of any wrongdoing on his part that could justify dismissal, or even that he received a fair and impartial disciplinary process before being dismissed.

10. At all material times, Mr Jennings ensured that he wasn't involved in the due diligence and pre-approval process, which was handed over to Patria Coke, an experienced underwriter, who by the time these matters arose, had been promoted to personal banker. This was in strict compliance with NCB's written credit risk policy, which states as follows:

> "for purposes of checks and balances, there will always be a clear separation of responsibilities, thus the person approving a credit facility cannot be the same person checking the documentation or the security and cannot be the same person approving the service request or the disbursement."

11. The disciplinary hearing was presided over by the same person laying the charges; the "appeal" was to another senior NCB

Manager and not an independent body; and the repeated denial of legal representation for Mr Jennings at the disciplinary hearing and at the appeal, were in flagrant breach of NCB's own Disciplinary Code as well as the Labour Relations Code, regulation 22 and the rules of natural justice.

The disciplinary panel consisted of Mrs Tugwell Henry (Chairman) who had sent Mr Jennings on leave and laid the charges against him; and Mr Norman Reid, who reported directly to Mrs Tugwell Henry in NCB's hierarchy and who was personally involved in one of the matters. The appeal was to a sole adjudicator, Mr Dennis Cohen, to whom Mrs Tugwell Henry reported directly. This was untenable and in breach of any rule of fairness but particularly in breach of NCB's own disciplinary policy and Labour Code. The entire process was micromanaged to keep it within a small, connected line of senior managers.

NCB's submissions before the IDT

NCB's submissions before the IDT are summarized as follows:

1. Mr Jennings approved or granted unsecured loans;

2. A number of loans were approved in a short period of time;

3. Nearly all the information on the loan applications and supporting documents were false or fabricated;

4. Little or no steps were taken to verify the information;

5. The NCB's officer who conducted the investigations testified that he identified a number of red flags which ought to have alerted Mr Jennings to the existence of a problem such as:

    a. Applicants were new customers and were from other parishes;

    b. The salary stated in the job letters in support of the applications ought to have aroused suspicion;

    c. The grammar and syntax used in the letters were poor or inappropriate and ought to have aroused suspicion;

    d. Several of the titles given to the applicants were highly unusual in nomenclature and there were inconsistencies in a number of the applications;

    e. Mr Jennings was the person with the authority to approve the loans. He ought to have ensured that

proper due diligence was carried out especially because of the size of the loans;

f. Little or no verification was done by persons who were processing the loans including Mr Jennings who was the vice-president in charge of the branch;

6. NCB was likely to lose millions of dollars. It expended resources to collect payment on the loans which should not have been approved;

7. NCB permitted its employees to be accompanied by a 'Union/personal representative at disciplinary hearings and Mr Jennings was familiar with the disciplinary policy having himself conducted such hearings;

8. Mr Jennings did not request representation nor an adjournment to prepare his response. He did not seek representation or time to consult with an attorney; and

9. The right to legal representation is an agreement between NCB and the unionized staff. Other employees would have to request permission to be represented by an attorney or someone who was not an employee of NCB. Such requests would be acceded to if the charges were complex or if the outcome depended on the

interpretation of a legal document. It is of significance that NCB, sought to distinguish between ordinary staff having a right to legal representation only in grievance proceedings and not disciplinary proceedings for the first time, in its affidavit in support of its application for permission to apply for judicial review.

Findings of the IDT

[15] In treating with Mr Jennings' complaints and NCB's submissions, the IDT said:

> "Having considered the above matters the Tribunal has no difficulty in coming to the conclusion that Mr Jennings' contract was improperly terminated and accordingly cannot be justified. Consequently, taking into consideration all the circumstances including Peter Jennings' thirty-three (33) years of outstanding and unblemished service to NCB, the following award is made..."

[16] In its ruling, the IDT not only recognised its obligation to be guided by the rules of natural justice, it particularized the same as follows:

> "(1) *Audi Alteram Partem* - The accused has a right to be heard.
>
> (2) A man should not be a judge in his own cause; and
>
> (3) A person accused or charged should know what case he has to meet."

In respect of the said rules, the IDT held the view that:

> "...the person accused should be heard in defence of any accusations being made against him and this requires that such accused be allowed to have a representative of his own choice which in the instant case, should have been his attorney-at-law.
>
> ...the procedure should show impartiality and be presided over and/or managed by persons who will be fair and objective, and certainly not a part of the institution which is making the accusation or bringing the charges against the accused.
>
> ...the person called upon to answer charges, should be informed of such charges well in advance, so as to allow him time to understand the charges and to seek legal representation or assistance where he feels this is necessary or helpful in determining the charges brought against him. It is of interest to note that none of the above requirements was followed as can be seen from the following example..."

It cited as examples: the time Mr Jennings was notified to attend the hearing and respond to the charges; his only choice of representation being an employee of NCB; and the denial of his right to an attorney to accompany him and represent him at the appellate level.

[17] It viewed askance the fact that unionized workers in NCB were allowed legal representation while Mr Jennings, a senior member of the managerial group, who was confronted with complex charges which led to his dismissal was denied same. It frowned upon the reason advanced by NCB that the Banking Act did not allow representation by attorneys outside of NCB.

[18] The IDT also made the following findings:

> "A close examination of 'the proceeding [sic] which unfolded before the Tribunal in the presentation of NCB's case,

> demonstrates that there was serious disregard and inherent breaches of the principles and procedures set out above'.
>
> [There was] 'not one iota of evidence to support the allegations of unethical/unprofessional conduct or dishonesty on the part of Peter Jennings'."

The IDT concluded, "having considered the above matters" that it had no difficulty finding that "Mr Jennings' contract was improperly terminated" and could not be justified. Having found that his dismissal was unjustifiable, it ordered his reinstatement or payment to him in lieu in the amount equivalent to 220 weeks total emoluments (at the current rate).

Application for leave for judicial review

[19] NCB, being aggrieved by the IDT's findings and award, sought leave to apply for an order of certiorari to quash the said award and to have the grant of leave operate as a stay of the award until the determination of the judicial review. An alternative interim relief for an interlocutory injunction to restrain the enforcement of the award was also sought. The applications were refused by the learned judge.

The appeal

[20] Being further displeased, by the learned judge's decision, NCB has filed the following grounds of appeal:

> "(1) The learned judge conducted a full hearing on the merits of the case and in so doing failed to properly apply the test of arguability set out in Sharma v Brown Antoine.

(2) The learned judge failed to consider whether the 9 grounds set out in the **Notice of Application for Leave to Apply for Judicial Review filed on May 8, 2015** represented arguable grounds with realistic prospects of success.

(3) The learned judge erred in finding that the only question was whether there was material on which the IDT could ground its decision, when the proper test was whether it was arguable that the IDT made any errors of law." (Emphasis and underlining as in original)

NCB also seeks the following orders:

"(1) The appeal is allowed.

(2) Leave is granted to [NCB] to apply for certiorari to quash the decision of the Industrial Disputes Tribunal in Dispute No.: IDT8/2013 and, upon [NCB] making a claim for judicial review, the first hearing shall take place on a date to be set by the Registrar of the Supreme Court.

(3) The grant of leave will operate as a stay of the award of the Industrial Disputes Tribunal in Dispute No.: IDT 8/2013 pending the final determination of [NCB's] application for judicial review.

(4) The sum of $50,000,000 with interest paid over by NCB and currently held at First Global Bank Limited (A/C No. 1147, Barbados Avenue Branch) in escrow in an interest-bearing account in the name of the 2nd Respondent, Mr Peter Jennings, and his attorney-at-law, Douglas A.B. Thompson, in trust for the proceedings subject of this appeal is to remain in that account in escrow until the determination of the Judicial Review, or the lapse of leave, or further order of the court.

(5) Costs of the Appeal and of applications 113 & 114/2015 heard by this court on June 24 & 25, 2015, are awarded to NCB to be taxed, if not agreed."

Ground 1

The learned judge conducted a full hearing on the merits of the case and in so doing failed to properly apply the test of arguability set out in Sharma v Brown Antoine

Submissions on behalf of NCB

[21] On behalf of NCB, Mrs Sandra Minott-Phillips QC, submitted that the role of the learned judge at the leave stage was to determine whether the case met the threshold test of arguability, and not to resolve disputes of fact or law. She argued that Sykes J over-stepped his bounds and assumed the role of the judicial review judge by:

> "(1) concluding that this Court's conclusion in **Institute of Jamaica v IDT and Coleen Beecher** was inconsistent with the Privy Council's decision in **Village Resorts Ltd v IDT** and **Jamaica Flour Mills v IDT and National Workers Union**;
>
> (2) concluding that the decision in **The Industrial Disputes Tribunal v University of Technology Jamaica and Another** which is currently on appeal to the Privy Council, has '**closed off any further argument'** around the point of whether the court can interfere with the IDT's findings and conclusions once there is available evidence to support the view; and
>
> (3) relying on the dissenting decision of Lord Kerr in the UK Supreme Court's decision in **R (on the application of G) v Governor of X School** to support the IDT's finding that Mr Jennings was "denied the right to legal representation" to which he was entitled under the Audi Alteram Partem rule." (Emphasis, underlining and italics as in the original)

She contended that he made the following findings of fact that would not have been open to the Judicial Review Court to make.

"(1) '*The IDT concluded that the chairman of the internal disciplinary panel actually drafted the charges laid against Mr Jennings'*.

There was no such conclusion in the IDT's award.

(2) '*The IDT had evidence before it that the actual report that formed the basis of the case against Mr Jennings was not given to him before the hearing'*.

There was no such evidence before the IDT or Sykes, J. Mr Jennings did not testify at the IDT or swear an affidavit contesting the application for judicial review. This was a submission from Mr Jennings' counsel at the IDT.

(3) '*The IDT had evidence before it that the right to counsel only applied to the staff members who were part of the union but did not apply to senior management'*.

There was no such evidence. The evidence was that staff members who are part of the Union have a right to legal representation as part of the Grievance Process, but not as part of the Disciplinary Process." (Italics as in the original)."

Submissions on behalf of Mr Jennings

[22] Mr Douglas Leys QC, on behalf of Mr Jennings, disagreed with Mrs Minott-Phillips' interpretation of the test laid down in **Sharma v Brown-Antoine** (2006) 69 WIR 379. He said that the more serious the allegation, the higher the strength or quality of the evidence on an application for leave to apply for judicial review. He argued that the full context of the dicta of Lords Bingham and Walker, in that case, must be considered.

[23] Mr Leys referred the court to the requirements of the Labour Relations and Industrial Disputes Act (LRIDA) and the **Sharma v Brown-Antoine** case in support of

his proposition. He also cited Rawlins JA's statement in **Mitchell v Georges** (2008) 72 WIR 161 which relied on Lord Diplock's statement in **Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd** [1981] 2 All ER 93.

[24] Mr Leys posited that by virtue of the LRIDA, the IDT has autonomy over its proceedings and its jurisdiction which is described as a "discrete regime for the settlement of industrial disputes in Jamaica" and a "distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes". He submitted that apart from section 12 of the LRIDA, which provides for the awards and orders which the IDT ought to make, the LRIDA does not provide guidance on the manner in which the IDT should perform its function.

[25] The LRIDA specifically provides that the IDT is the master of its proceedings. He referred the court to section 20 of the LRIDA. He posited that Parliament, by section 12, ensured the sovereignty of the IDT by legislating that its awards are unimpeachable except on a point of law. For that proposition, he relied on **Industrial Disputes Tribunal v University of Technology and Another** [2012] JMCA Civ 46; the Privy Council decision of **South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union and others** [1980] 2 All ER 689; and **Bulk Gas Users Group v Attorney-General** [1983] NZLR 129.

[26] Mr Leys submitted that section 12(4)(c) of the LRIDA, an ouster provision of the labour relations code, has left the settlement of disputes entirely to the IDT. He urged

the court to carefully consider whether the grounds relied upon by NCB in its notice of application for leave to apply for judicial review concerns the settlement of the dispute which is exclusively within the remit of the IDT or whether they fall within the supervisory remit of the judicial review court. He referred the court to **UTECH and Village Resort Ltd v IDT** (1978) 35 JLR 292. He argued that the learned judge acted within his remit.

The law and analysis

[27] At this juncture, the court is cognizant that it ought not to make pronouncements as to the liability or lack thereof of Mr Jennings in respect of NCB's allegations. The main issue for this court's contemplation is whether Sykes J's decision ought to be disturbed. Answers to the following questions will determine the decision of this court:

(1) Does NCB have an arguable case with a realistic prospect of success that the IDT made errors of law as posited by Mrs Minott-Phillips? or

(2) Was there, as Sykes J determined, material on which the IDT could have grounded its decision?

[28] In the light of Mrs Minott-Phillips' contention that the learned judge failed to properly apply the arguability test set out in **Sharma v Brown-Antoine**, scrutiny of that case, at this juncture, is necessary. At pages 387-388 (paragraph [14]), Lords Bingham and Walker delivering the judgment said:

"...

(4) 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 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 (on the application of N) v Mental Health Review Tribunal (Northern Region)*** [2005] EWCA Civ 1605, [2006] QB 468, at 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 but in the strength or quality of the evidence that will in practice be required for an 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';"

[29] The circumstances in the **Sharma v Brown-Antoine** case are dissimilar to those in the instant case. The central issue in **Sharma v Brown-Antoine** was whether a decision to prosecute was in principle susceptible to judicial review. The then Chief

Justice of the Republic of Trinidad and Tobago was confronted with the likelihood of being charged with the offence of attempting to pervert the course of justice.

[30] The Chief Magistrate had complained that the Chief Justice had endeavoured to influence the outcome of a matter which he had heard against the then leader of the opposition and a former prime minister. In an effort to avert charges being laid against him, the Chief Justice applied for, and obtained leave to seek judicial review.

[31] The Deputy Director of Public Prosecutions unsuccessfully resisted the application. The judge held that the burden which the Chief Justice bore at that stage was to establish that he had an arguable case. She found that he had discharged that burden. The Deputy Director appealed her decision.

[32] The Court of Appeal however disagreed and found that the learned judge had erred as judicial review was not appropriate in those circumstances. The court examined the evidence, which had not been done by the learned judge, and found that there was no reasonable basis for the Chief Justice's complaint that the police advice and the Deputy Director's decision to prosecute him had been influenced by political pressure.

[33] The Chief Justice appealed to the Privy Council. His appeal was dismissed. The consensus was that the criminal court was the appropriate place to resolve the issues. The Board levelled three criticisms at the learned judge. The first:

> "... [T]he judge approached the question of arguability without any recognition of the very ambitious case the Chief

> Justice was seeking to establish. Nor did she consider which, if any, of the Chief Justice's complaints could not be adequately resolved within the criminal process itself, either at the trial or, possibly, by application for a stay of the proceedings as an abuse of process...." (page 394, paragraph [24])

The second:

> "...[T]he judge was wrong to assume, for the purpose of ascertaining whether there was an arguable case, that the facts as raised by the Chief Justice were true..." (page 394, paragraph [25])

The third:

> "... by referring compendiously to 'the totality of the evidence raised by the [Chief Justice]' the judge gave no indication of the particular evidence which she found persuasive. A judge must of course, when giving reasons for an interlocutory ruling of this kind, make it plain that she is not finding any facts and that the evidence relied on may turn out to be incorrect, incomplete or misleading. But it is ordinarily the duty of a professional judge to give reasons (*Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381), and her failure to do so fully justified the Court of appeal in making its own analysis." (pages 394-395, paragraph [26])

Although the principles enunciated by the Board are helpful, that case was in respect of a judicial review of a decision to prosecute. The Board expressed its full support for the proposition that "judicial review of a decision to prosecute is an exceptional remedy of last resort". The instant case, however, is not so yoked. The real issue is whether NCB provided arguable grounds with a realistic prospect of success.

[34] In respect of Mrs Minott-Phillips' complaint that the learned judge arrived at erroneous findings of fact, it is my respectful view that even if he did so, the crucial

question which remains, is whether, in spite of the learned judge's error, NCB has arguable grounds at the required standard to impugn the IDT's findings.

[35] It is my view that the learned judge's comments on the decision in **Institute of Jamaica v IDT and Coleen Beecher** SCCA No 9/2002, delivered 2 April 2004; **Village Resorts Ltd v IDT** SCCA No 9/2002, delivered 2 April 2004, **Jamaica Flour Mills v IDT and National Workers Union** PCA No 69/2003 (Unreported) delivered 23 March 2005; were *obiter dicta.* Additionally the dicta of Brooks JA in **IDT v UTECH and anor** [2012] JMCA Civ 46 is binding on Sykes J unless reversed by the Privy Council. For that reason it is not necessary to deal further with that complaint.

[36] The criticism of the judge's reliance on Lord Kerr's dissenting judgment in the case **R (on the application of G) v Governor of X School** [2012] 1 AC 167 in support of the IDT's finding that "Mr Jennings was entitled under the Audi Alteram Partem rule" is also without merit. The learned judge expressly stated that the passage was being cited because of the value of legal advice. He rightly pointed out that that case at paragraph 58:

> "... [T]urned on the peculiarities of article 6 of the European Convention on Human Rights and whether a person is entitled to legal representation where there are two connected proceedings to determine a person's civil rights or obligations."

The applicability of the *audi alteram partem* principle will be discussed further under that heading.

[37] Although the IDT did not expressly state that the "chairman of the internal disciplinary panel actually drafted the charges laid against Mr Jennings", there were however exhibits which were tendered before the IDT from which it could have reasonably arrived at that conclusion. Among those exhibits was a letter from NCB which was signed by Mrs Tugwell-Henry. That letter informed Mr Jennings of the charges which were laid against him and briefly outlined the evidence on which NCB relied.

[38] Evidently, the IDT implicitly arrived at a finding that Mrs Tugwell-Henry, who chaired the hearing, drafted the letter in light of its statement that " [in] the case of (2) above, the procedure should show impartiality and [be] presided over and/or managed by persons who will be fair and objective, and certainly not a part of the institution which is making the accusation or bringing the charges against the accused". Its reference to "(2) above" was to the rule of natural justice which it had earlier referred that "A man should not be a judge in his own cause".

[39] Regarding the criticism of the learned judge's finding: "that the IDT had evidence before it that the actual report that formed the basis of the case against Mr Jennings was not given to him before the hearing", it is true that no *viva voce* evidence was adduced before the IDT from Mr Jennings, what was before the IDT, were his submissions. The IDT, it is important to note, is not a court of law which is confined by rules of evidence and court procedure. It is an entirely discrete and specialized forum. I agree with Mr Leys that it is master of its proceedings and determines it procedure.

[40] The absence of *viva voce* evidence from Mr Jennings, was therefore not detrimental to its findings in light of the submissions and documentary evidence which was before it, for example the transcript of the first disciplinary hearing. In that transcript, Mrs Tugwell-Henry referred Mr Jennings to the letter which he received from her, the previous evening. There was no mention by her of the report having been sent to him. That letter merely outlined the charges and the allegations on which they were based. Furthermore was there was no indication in the letter that the report was attached.

[41] The learned judge's finding of fact that the "IDT had evidence before it that the right to counsel only applied to the staff members who were part of the union but did not apply to senior management" *per se* is not inaccurate as it captured the essence of the IDT's finding. The IDT's verbatim pronouncement on that issue was that:

> "The Tribunal has difficulty in accepting, that while unionised workers in the bank are allowed legal representation, in the instant case, a senior member of the managerial group, not being a member of a union, faced with complex charges which led to his dismissal, was denied the right to legal representation for the stated reason that the Banking Act did not allow representation by attorneys outside of the Bank."

This criticism of the learned judge is therefore without merit.

[42] It was NCB's submission that:

> "The right to legal representation is an expressed agreement between the Staff Association (Union) and the Bank; therefore, all other employees who are not members of the Staff Association would have to make a request to be represented by someone other than an NCB employee, including external legal counsel. Requests of that nature are

> considered on a case by case basis on its own merits. For example, it considered the nature of the charges, the complexity of the issues involved and whether, or to what extent, the outcome will depend on the interpretation of legal documents." (page 270 of the transcript)

That submission, in my view, fortified Mr Jennings' position that he ought to have been allowed legal representation. The case against him was not a simple one and the consequences if found guilty were serious. He risked losing his job and faced the possibility of imprisonment. This issue will however be dealt with later in this judgment.

[43] In respect of ground 1, it was posited that the learned judge did not confine himself to the issue which was before him, that is, whether the applicant had an arguable case. Instead he arrived at conclusions which were for the Judicial Review court. He rejected Mrs Minott-Phillips' contention that the IDT did not give sufficient weight to Mr Jennings' breaches. He discussed whether it was fair and equitable to disallow Mr Jennings legal representation and concluded that the IDT finding as it did was within its remit. But should Sykes J's decision be reversed on that basis?

[44] The learned judge had early in his decision, demonstrated that he was mindful of the test enunciated by Lord Bingham in **Sharma**. Having quoted the relevant passage on arguability he said:

> "What this means is that if the prospects of success are highly unrealistic then leave ought to be refused.

It cannot properly be asserted that the learned judge failed to apply the test of arguability set out in **Sharma.** The learned judge examined and analysed the salient

complaints which were before the IDT, and in concluding, said "[there] was no basis for leave to apply for judicial review to be granted because there is no realistic prospect of success". This ground therefore fails.

[45] It is convenient to deal with grounds 2 and 3 together.

Ground 2

> **"The learned judge failed to consider whether the nine grounds set out in the notice of application for leave to apply for judicial review filed on 8 May 2015 represented arguable grounds with realistic prospects of success"**

Ground 3

> "**The learned judge erred in finding that the only question was whether there was material on which the IDT could ground its decision, when the proper test was whether it was arguable that the IDT made errors of law."**

In respect of the instant appeal, an important question is: did the learned judge give proper consideration as to the arguability of appellant's case? The learned judge said at paragraphs [56]-[57] of his judgment:

> "**[56]** The IDT concluded that Mr Jennings' dismissal was unjustifiable. It looked not only at his breach but also at what the employer did. No one has suggested that [the] factors looked at by the IDT were irrelevant. The IDT had the following before it:
>
> a. the chairman of the disciplinary panel signed the letter formulating the charges;
>
> b. the IDT concluded that the chairman actually drafted the charges laid against Mr Jennings;

c. Mr Jennings was told of the disciplinary hearing around 5:00 - 6:00 pm on November 5, 2012 and was summoned to a disciplinary hearing to be held at 10:00 am on November 6, 2012;

d. the right to counsel only applied to staff members who were part of the union but did not apply to senior management;

e. the actual report that formed the basis of the case against Mr Jennings was not given to him before the hearing;

f. Mr Jennings was not allowed to examine before the hearing the evidence that was gathered against him;

g. the disciplinary panel consisted of a Mr Reid who reported to Mrs Tugwell-Henry who in turn reported directly to Mr Dennis Cohen who heard and dismissed the appeal of Mr Jennings;

h. Mr Jennings was told that the only representatives available to him would be from persons within [NCB];

i. Mr Jennings did not ask for a postponement of the disciplinary hearing;

j. the charges were complex.

[57] The IDT's job is to say what it made of the material before it. That is exactly what it did. Whether this or any other court would come to another conclusion is irrelevant. It took into account Mr Jennings' lack of diligence and other matters in order to make the determination. The only question is whether there was material on which the IDT could ground its decision. The answer is clearly yes. Indeed, Mrs Minott Phillips did not contend that there was no evidence to support the position. Her view was that the IDT gave insufficient weight to the breaches by Mr

> Jennings. The answer to that has already been given by the Privy Council in **Jamaica Flour Mills**; those are matters of fact for the IDT to resolve not the court."

What was before the learned judge?

[46] The following complaints of NCB (raised in its notice of application for leave to apply for judicial review) were for the learned judge's decision:

> "1. The [IDT's] finding that gross negligence cannot be established without a deliberate act is a clear error of law.
>
> 2. The [IDT's] finding that NCB breached of any rules of natural justice is an error law.
>
> 3. The [IDT's] finding that NCB's internal disciplinary hearing should not have been conducted by persons who were "...a part of the institution which is making the accusation or bringing the charges against the accused" is arbitrary, irrational and inconsistent with the Labour Relations Code.
>
> 4. The [IDT's] finding that [Mr Jennings] was entitled to have legal representation at his internal disciplinary hearing or an internal appeal hearing is an error of law and is not supported by any legal authority or any locally or internationally recognized principle of industrial relations.
>
> 5. The award is tainted with the bias of the Chairman of the [IDT], who whilst evidence was being led, made remarks that showed that he had pre-judged critical issues, including the question of the right to legal representation at an internal disciplinary hearing and the applicability of [NCB's] duty of secrecy under Banking Act in an internal disciplinary hearing.
>
> 6. The [IDT] failed to resolve the following issues which it was obliged to in order to settle the dispute:

a. whether [Mr Jennings'] actions or omissions represented breaches of his employment contract, or NCB's policies and procedures, or generally-accepted principles of banking;

b. whether [NCB's] duty of secrecy under section 45 of the Banking Act prevents or otherwise affects a banker's right under the Labour Relations Code to be accompanied by a representative to an internal disciplinary hearing;

c. whether [Mr Jennings] made a request for legal representation at his disciplinary hearing;

d. whether there was any actual or perceived bias on the part of [NCB's] employees who conducted the disciplinary hearing;

e. whether [Mr Jennings] had been charged with any crimes in connection with the matters that were the subject of his disciplinary hearing; and

f. whether [Mr Jennings] made any effort to mitigate his loss by seeking alternative employment.

7. The [IDT] declined to exercise its jurisdiction by refusing to permit evidence to be led to establish that Mr Jennings had been charged by the police with fraud in connection with the said matters which were the subject of his disciplinary hearing.

8. The [IDT] unlawfully substituted its discretion for that of NCB in finding:

a. Mr Jennings' actions were not deliberate; and

b. That [he] did not act in an unprofessional manner.

9. The IDT made findings of fact in the absence of evidence, or in circumstances where no reasonable tribunal could arrive at those findings on the evidence before it, including that:

    a. "the Branch was short staffed" at the material time;

    b. because Mr Jennings was given less than 18 hours notice of the hearing, he did not know the case he had to meet;

    c. NCB's unionized employees were entitled to have legal representation at an internal disciplinary hearing; and

    d. NCB should have allowed Mr Jennings legal representation at his disciplinary hearing in circumstances where no such request had been made of NCB."

[47] According to Mrs Minott-Phillips, the learned judge seemingly did not apply his mind to the grounds listed in the application for leave to apply for judicial review; he focused solely on ground 4 and erroneously concluded that NCB's only challenge was to the IDT's findings of facts.

[48] She pointed to the following which she deemed to be errors of fact which she said may be subject to review:

a. The wrongful rejection of evidence which is dealt with at ground 7 of the application for leave to apply for judicial review.

b. The findings of fact in the absence of supporting evidence or where no tribunal could reasonably reach that conclusion on the

evidence. This complaint is dealt with at ground 9 of the application for leave to apply for judicial review.

c. Error of material facts which are dealt with at grounds 6 and 9.

The learned judge, she submitted, ought not to have refused the application without considering and providing reasons for his finding that they held no reasonable prospect of success.

[49] Mr Leys, on the other hand, submitted there were no reviewable errors of fact. He argued that the IDT's refusal to hear evidence that Mr Jennings was charged with fraud was not the kind of fact which would vitiate its jurisdiction. He also argued that the issues complained of in grounds 6 and 9 of the application for leave to apply for judicial review were not consistent with questions of fact which would go to jurisdiction.

[50] It is true that the learned judge did not address each complaint. The question however, is the effect of the learned judge's failure to deal with those matters. It is therefore necessary to examine the said matters.

IDT's alleged erroneous statements of law, rules and principles

[51] Mrs Minott-Phillips complained that the learned judge failed to consider the following grounds in the application for leave to apply for judicial review which were before him:

1. The IDT's finding that gross negligence cannot be established without a deliberate act is a clear error of law.

2. The IDT's finding that NCB breached any rules of natural justice is an error of law.

3. The IDT's finding that NCB's internal disciplinary hearing should not have been conducted by persons who were "a part of the institution which is making the accusation or bringing the charges against the accused" is arbitrary, irrational and inconsistent with the Labour Relations Code.

4. The IDT's finding that Mr Jennings was entitled to have legal representation at his internal disciplinary hearing or an internal appeal hearing is an error of law and is not supported by any legal authority or any locally or internationally recognized principle of industrial relations.

The learned judge in fact did not address all the issues complained of in order to determine their arguablity. It is therefore necessary to examine whether the IDT made errors of law and if it did, whether such errors of law amounted to arguable grounds with realistic prospect of success.

Gross negligence

[52] Mrs Minott-Philips argued that the learned judge was mistaken in his view that the only question for his determination was "whether there was material on which the IDT could ground its decision". That question, she contended, would have been relevant if the administrative decision was only challenged on the grounds of unreasonableness

or irrationality. She submitted that that was not so in the instant case. NCB's complaint concerned the errors of law committed by the IDT.

[53] According to her, the learned judge ought to have separately considered whether the IDT had committed any errors of law, as an error of law would render its decision liable to be quashed as being *ultra vires*. The error of law she submitted, need not go to jurisdiction or appear on the face of the record.

[54] It was her submission that the IDT made erroneous statements of law, rules and principles. She cited the definition given to "gross negligence" by the IDT as a clear error of law:

> "'Negligence' means a 'lack of proper care and attention' whilst 'Gross negligence' means 'wilful negligence' requiring 'a deliberate act on the part' of the employee."

[55] She submitted that there is no material difference between "negligence" and "gross negligence" and there need not be any wilful misconduct or deliberate act for either. She directed the court's attention to Sir Robin Auld's statement in **Spread Trustee Company Limited v Sarah Ann Hutcheson & Others** [2011] UKPC 13 in support of her argument.

Law and discussion in respect of errors of law

Discussion/Analysis

[56] Mr Jennings was charged with the following:

> "i. Actions (including deliberate and/or negligent actions, unethical and/or unprofessional conduct) which will

result, or have to potential the result, in significant financial losses to NCB group;

ii. Actions (including deliberate and/or negligent actions, unethical and/or unprofessional conduct) which bring the NCB Group's name and/or image into disrepute or have the potential to do so;

iii. Engaging in behaviour that causes the NCB Group to question his honesty and integrity in carrying out his functions and duties."

He was found by NCB to be grossly negligent in having:

"a. Authorized appropriation of loan proceeds contrary to the stated purpose of the loan;

b. Approved loans supported by fictitious and fraudulent job letters without conducting, or ensuring that others conducted, such due diligence as was necessary and/or appropriate."

In its deliberation, the IDT considered the evidence and asked itself "a number of relevant questions based on the evidence adduced". The first was whether Mr Jennings "was negligent in the execution of his duty"; and the second, dealt with "the procedural fairness on the part of [NCB] in its conduct with Mr. Jennings".

[57] In respect of the first question, by referring to the Oxford Dictionary, it defined negligence thus: "Lack of proper care and attention". Mrs Minott-Phillips submitted that it thereafter fell into error by resorting to the South African text, Industrial Relations in South Africa, 4th Edition, for a definition of gross negligence. The learned author of that text defines gross negligence thus:

"**Gross negligence** - the negligence must have had severe consequences and it must be proved that these

> consequences resulted from the wilful negligence of the employee. It is important to note that the extent of the damage is not a measure of the degree of negligence. An employee may have been merely remiss, although he may have caused a great deal of damage. This does not constitute gross negligence. On the other hand, another employee who deliberately neglected his duty will be guilty of gross negligence, even, if the damage was not extensive."

In our jurisprudence, wilful action is not an ingredient of gross negligence. The IDT was plainly in error. Note worthily, however, it came to no conclusion on the matter.

[58] In the Privy Council decision of **Spread Trustee Company Limited v Sarah Ann Hutcheson & Others**, to which Mrs Minott-Phillips referred the court, a distinction was plainly drawn between wilful conduct and gross negligence. Sir Robin Auld said, at paragraph 117:

> "On the plain meaning of the words, as a matter of logic and common sense the terms 'negligence' and 'gross negligence' differ only in the degree or seriousness of the want of due care they describe. It is a difference of degree, not of kind, as stated by Millett LJ in *Armitage v Nurse* [1998] Ch 241. Gross negligence, like negligence not so qualified, may be committed in good faith and, therefore, without dishonesty or wilfulness. Indeed, dishonesty - an inherent ingredient of fraudulent or wilful misconduct - is the antithesis of negligence, an inadvertent falling short of a duty to take reasonable care in all the circumstances. To describe such inadvertence, as 'gross' does not turn it into fraudulent or wilful conduct."

Mrs Minott-Phillips sought to rely on the work of Sir William Wade and Christopher Forsyth, Administrative Law, 10th Edition, for the proposition that an error of law need not go to jurisdiction or appear on the face of the record. The learned authors at page

223 examined what they considered to be a "radical conclusion" which "was first drawn by Lord Diplock in a public lecture, saying that the ***Anisminic*** case 'renders obsolete' the technical distinction between errors of law which go to 'jurisdiction' and errors of law which do not".

[59] The learned authors pointed out that that position was adopted by Lord Denning in **Pearlman v Keepers and Governors of Harrow School** [1979] QB 56 and upheld by Lord Diplock in two of his important House of Lords speeches. In **Pearlman**, Lord Denning said, at page 70:

> "I would suggest that this distinction should now be discarded...The way to get things right is to hold thus: **no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it...**" (Emphasis mine)

The learned authors, having reviewed a number of cases in which the issue was dealt, said that:

> "An error of law by an inferior court, therefore, may still give rise to an argument whether it is jurisdictional or not, and in the latter case it may be immune from judicial review. To that extent the old rule may still have life in it."

[60] Mr Leys, however, referred the court to the Privy Council case **South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union and others** [1980] 2 All ER 689; **Bulk Gas Users Group v Attorney-General** [1983] NZLR 129; **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147; **Jones and Others v Solomon** (1989) 41 WIR 299; **R**

v Belfast Recorder, ex parte McNally [1992] NI 217; and **M v Secretary of State for the Home Department** [1996] 1 WLR 507 in support of his contention that the error must be one which affects the tribunal's jurisdiction.

[61] Indubitably, there exists a distinction between errors of law which go to jurisdiction and those which do not. In **South East Asia Fire Bricks Sdn Bhd**, the Board rejected Lord Denning's desire to discard the distinction between errors of law which affect jurisdiction, and those which do not. At page 692, Lord Fraser of Tullybelton, said:

> "...The decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147 shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if 'it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity' ([1969] 1 All ER 208 at 213, [1969] 2 AC 147 at 171 per Lord Reid). But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as a breach of the rules of natural justice, then the ouster will be effective. In *Pearlman v Keepers and Governors of Harrow School* [1979] 1 All ER 365 at 372 [1979] QB 56 at 70, **Lord Denning MR suggested that the distinction between an error of law which affected jurisdiction and one which did not, should now be 'discarded'. Their Lordships do not accept that suggestion**. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane LJ when he said ([1979] 1 All ER 365 at 375, [1979] QB 56 at 74):
>
> > '…the only circumstances in which this court can correct what is to my mind the error of the

> county court judge is if he was acting in excess of jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of "structural alteration...or addition'." (Emphasis mine, italics as in the original)

It is important to note that the wording of the ouster clause in the Malaysian Industrial Relations Act (MIRA) 1967 and section 12(4)(c) of our LRIDA is similar although the LRIDA specifically exempts points of law from a ban on impeachment. Paragraph (a) of section 29(3) of the MIRA reads :

> "Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any Court of law."

Section 12(4)(c) of our LRIDA provides:

> "An award in respect of any industrial dispute referred to the Tribunal for settlement—
>
> (a) ...
>
> (b) ...
>
> (c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."

[62] The issue whether Mr Jennings was grossly negligent, was but one of the issues for the IDT's consideration. In any event the IDT did consider issue of negligence and concluded there was in fact "less than adequate due diligence was applied in each of the questionable loans there is no evidence that this was a deliberate act on the part of anyone". It was also a clear finding of the IDT that the Bank had neither implied nor

demonstrated that either Mr Jennings or the staff derived any benefit form the said loans or fraud.

[63] The question therefore is whether the IDT's erroneous definition of gross negligence was an error which was within its jurisdiction and thereby protected from challenge by the ouster clause? If, as submitted by Mr Leys, the sole question for the IDT's determination was whether Mr Jennings was grossly negligent, the IDT would have committed an error which would have affected its jurisdiction and which would have provided NCB with an arguable case with a realistic prospect of succeeding.

[64] The IDT was however called upon to determine and settle the dispute between the parties in respect of the termination of Mr Jennings' employment which involved many issues. The issue of negligence was an important consideration, but not the sole factor for the IDT's consideration.

[65] In any event, the IDT did not find that Mr Jennings was negligent. Nor did it find that he was guilty of any unethical and or unprofessional conduct. It did find that there was an absence of due diligence which, significantly, it did not attribute to Mr Jennings. It specifically found that, in the circumstances, it would have been improper for him to have been involved in the approval process in respect of the loans in question. The IDT stated:

> "While there is clear evidence that less than adequate due diligence was applied in each of the questionable loans there is no evidence that this was a deliberate act on the part of anyone. On the other hand the evidence was that the Branch was short staffed and tried to utilise its available

> human resource in the best manner, to offer quality customer service and at the same time achieve, maintain and surpass the established branch targets.
>
> [NCB] has not in any way implied or shown where any of the staff, including Mr. Jennings committed fraud or benefitted from the proceeds of the questionable loans. On the other hand, it was the direct testimony of Mr. Richard Hines, [NCB's] investigating officer, that Mr. Jennings was not charged for any fraud, but it was his finding that "a group of scammers" appeared to have infiltrated [NCB].
>
> **The Tribunal does not support the contention that the Branch Manager of a large Branch is expected to peruse every detail of a loan application,** although as he has admitted, the buck ultimately stops with him. **On the other hand, were he to so act, that would be inconsistent with [NCB's] credit risk policy which stipulates as follows:**
>
> > **'**for purposes of checks and balances, there will always be a clear separation of responsibilities, thus the person approving a credit facility cannot be the same person checking the documentation or the security and cannot be the same person approving the service request or the disbursement'." (Emphasis mine)

This complaint is therefore unfounded as this error was not one which affected the IDT's jurisdiction.

The applicability of principles *nemo judex sua causa* and *audi alteram partem*

The principle: *nemo judex sua causa*

[66] Mrs Minott-Phillips also regarded as erroneous, the IDT's statement to the effect that:

> "The principle that a man should not be a judge in his own cause means that a disciplinary hearing should not be

> presided over or managed by persons who are part of the institution which is making the accusation or bringing the charges against the accused." (Italics as in original)

It was her submission that employees are not automatically disqualified from presiding over disciplinary hearings. She directed the court's attention to Purchas LJ's statement in **Sartor v P & O European Ferries (Felixstowe) Ltd** [1992] IRLR 271.

[67] She argued that the IDT made no finding of fact to support the conclusion that Mrs Tugwell-Henry acted as a judge in her own cause. The IDT, she argued, misapplied a public law principle applicable to judicial and quasi-judicial impartiality and concluded that Mrs Tugwell-Henry was automatically disqualified from presiding over the disciplinary hearing because she "was a part of the institution which [made] the accusation or [brought] the charges against [Mr Jennings]".

[68] Mrs Minott-Phillips cited to us the case **Slater v Leicestershire Health Authority** [1989] IRLR 16 as authority for her contention that the fact that Mrs Tugwell-Henry had signed the letter which contained the disciplinary charges would not have automatically disqualified her from presiding over the disciplinary hearing to determine the charges contained therein.

[69] Mr Leys, on the other hand, argued that the appellant has taken the principle *nemo judex sua causa* out of context as the IDT exercises a special statutory jurisdiction to examine whether the circumstances of a dismissal was justifiable. The IDT, he postulated, in arriving at its decision, was not bound by common law notions of fairness

and equity. The IDT was therefore perfectly entitled to look at the manner in which the proceedings were conducted and arrive at its own findings.

[70] He argued that the IDT found that it was unfair that persons, who were responsible for instituting the charges, sat on the various panels which adjudicated on Mr Jennings' dismissal. He submitted that the IDT was entitled to so find. Reliance was placed on Bingham JA's statement in **Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Green (representing the Grand Lido Negril Staff Association)** SCCA No 66/1997, delivered 30 June 1998, for that proposition. He contended that the application (in respect of this complaint) had no real prospect of succeeding as stated by the learned judge.

[71] Mr Leys further submitted that the IDT's decision can only be successfully challenged on the ground that there were serious errors of law. He argued its mandate is wide and so it is able to take into account the factors that it did, such as:

(1) its finding that the proper procedures were not implemented for legal representation ;

(2) persons associated with the charge sat in judgment of Mr Jennings; and

(3) the inadequacy of the notice.

He submitted that in the absence of irrationality, the decision of the IDT cannot be faulted. Although a court might not agree or would have come to another decision, the

test is whether there was material on which it could reasonably have come to the conclusion that Mr Jennings was unjustifiably dismissed.

Law/Analysis

[72] Did the IDT overstep its bounds by its finding that NCB's disciplinary hearing ought not to have been "presided over and/or managed by persons who... [were] making the accusation or bringing the charges against [Mr Jennings]"?

[73] Is the principle that a man should not be judge in his own cause applicable to a disciplinary hearing? The English Court of Appeal case of **Sartor v P & O European Ferries (Felixstowe) Ltd** to which Mrs Minott-Phillips referred us is not supportive of her position. While it is true that an employer is not automatically disqualified from presiding over disciplinary hearings, the requirement is that internal hearings are dealt with fairly.

[74] The principles distilled from **Sartor's** case make it plain that although domestic enquiries ought not to be subject to the formalities of a criminal trial, the principles of natural justice which demand that a person summoned to answer a charge before domestic hearings ought to be apprised of the nature of the charge against him, ought to be afforded enough time to "properly prepare" his defence and the principle *nemo judex sua causa* are applicable and are not excluded from such hearings.

[75] What is made lucent is that unless the errors made by the IDT are fundamental, this court is not authorised to interfere with the decision of the IDT. The important issue is whether, in the all the circumstances, it was fair for Mrs Tugwell-Henry to have

presided over Mr Jennings' disciplinary hearing having signed the letter containing the charges to be determined at that hearing.

[76] Briefly, the facts of **Sartor's** case are that the appellant, Ms Sartor was a stewardess on one of the respondents' ships. She was driving her car from the docks with four passengers. Her car was stopped and searched. She identified her luggage which was searched by two custom officers. She was allowed to proceed as nothing dutiable was seen.

[77] A couple weeks after, she was informed by one of the customs officers that during the search, a "catering-size pack of tea bags" was found in a shopping bag in her car at the time she was stopped and searched. Statements to that effect were given by the custom officers. Consequently, disciplinary proceedings were taken against the appellant. The appellant, who had proceeded on leave, was informed about the hearing by way of telephone.

[78] She enquired what the proceeding was about and reference was made to the custom search. She denied that anything was found. She was however told that it was in respect of "gear". The "gear" was not identified. She attended the hearing with only that information. Whilst on route to the hearing, some 10 minutes before its commencement, she met Mr McTaggart, a trade union official, whom she asked to accompany her.

[79] At the hearing, the master enquired of her whether she was aware of the reason she was summoned. Upon answering in the negative, the master informed her that on

the occasion her vehicle was searched, the tea bags were found. He then read the statement of one of the custom officers to her. (The custom officers did not attend the hearing.) The issue arose whether by virtue of contractual right, the appellant ought to have been told precisely the nature of the charge against her. Lord Justice Farquharson responded in this way (at paragraph 40 of the judgment):

> "If that procedure had been followed, then the appellant would have known the precise nature of the charge against her, but whether she was entitled to be informed as a contractual right or not, in my judgment as a matter of natural justice she ought to have been told the terms of the charge against her in sufficient time for her to properly prepare her defence."

The learned judge was of the view that the appellant was treated unfairly. He said, at paragraph 43:

> "In my judgment the appellant was treated unfairly by not being given advance notice of the charge laid against her in sufficient time to prepare her defence. I recognise, of course, the informality of this type of domestic enquiry and that it is undesirable that it should be subject to the formalities of a criminal trial. At the same time the consequences of the master's finding were extremely serious so far as the appellant was concerned. She was dismissed from the ship and subsequently lost her job in circumstances where it would be difficult to get another in Felixstowe. At the very least she should have been informed in good time of what was alleged against her."

[80] The learned judge, however, noted that the appellant had appealed the decision and was accompanied to the hearing of the appeal by two trade union representatives. At the hearing of the appeal, which was in the form of a rehearing, the appellant was fully aware of the nature of the charge against her and at that point she had ample time

to prepare her defence. Farquharson LJ was of the opinion that at the hearing of the appeal she was no longer disadvantaged.

[81] An important feature of that case was the appellant's refusal to provide the master with the identity of the persons who were in her car when she was asked at the hearings.

[82] Purchas LJ quoted the tribunal as saying:

> "...The problem was that Miss Sartor declined to tell Captain Pearson or the appeal committee who the other people in the car were. In the result it was impracticable for the respondents to identify them. Miss Sartors' refusal not only deprived her of the evidence which might have cleared her, but must also in itself have fuelled the management's suspicion of her guilt.
>
> We have, we hope, made it clear at the outset of this decision that we have no reason to suppose that Miss Sartor was guilty of the offence for which she was dismissed, and we may make that comment without impertinence because we have heard a great deal of the evidence on the point."

The court also considered the other issue of *nemo judex sua causa*. The appellant's representative, Mr Langstaff, had objected to the presence of a Mr Hibbert and a Mr Pellegrotti as the adjudicating tribunal. He said they were both prosecutor and judge, because they were involved in mounting and prosecuting the appellant. They had also interviewed the custom officers before the hearing before the master. Further, Mr Pellegrotti had requested and obtained statements from them. Mr Hibbert had presented their statements to the master and had inspected their original notes.

[83] Purchas LJ held the view that:

> "If it had been a judicial enquiry or trial, there is no doubt that a breach of the maxim *nemo judex sua causa* might be established; but I prefer the argument proposed Mr Hiler that it was not such a proceeding. It was a further step in the administrative enquiry..." (Paragraph 25)

Farquharson LJ held a different view, said:

> "...Messrs Hibbert and Pellegrotti were hearing an appeal in which there was a degree of formality. As already observed, these two had not only investigated the offence but had prepared and launched the proceedings before the master. If a reasonable independent observer, fully informed of all the facts, had been present at the hearing, he would, in my judgment, have characterised it as unfair for these reasons." (Paragraph 48)

[84] In light of the opposing views of the learned judges' on the issue, that case is therefore not supportive of Mrs Minott-Phillips' categorical assertion that the principle *nemo judex sua causa* is inapplicable to internal hearings. It is also of significance that Miss Sartor was charged pursuant to a code of conduct for the merchant navy which provided that "[a] seafarer who [was] alleged to have breached the code [would] be seen in the first instance by a petty officer or officer designated by the master..." The code provided that more serious offences would be dealt with by the master.

[85] Farquharson LJ in observed that before the industrial tribunal, to which the appellant complained, the tribunal had:

> "51 ...correctly identified the issue it had to decide not as whether the appellant was guilty of the offence for which she was dismissed – indeed it was held that the incident fell far short of establishing that – but whether in the circumstances prevailing at the time of the dismissal the respondents were acting reasonably or unreasonably in concluding that the appellant was guilty of the offence. The Tribunal was of course fully

informed of the facts of the case, as it had heard the evidence of all the principal actors. The Tribunal was aware of the complaints about the procedure made by the appellant and conscious of their force. The reasons for its decision included these observations:

> '[The appellant] was not, in advance of her interview with [the master], given any detailed particulars of the charge against her, which she was going to have to face. The appeal procedure can be faulted on the ground that both Mr Pellegrotti and Mr Hibbert had had some previous involvement with the case. It would appear on the face of it that the way the proceedings were conducted was not strictly in accordance with the merchant navy disciplinary procedures ...'

52 The Tribunal concluded, however, that none of these matters constituted a fundamental defect, nor taken together did they constitute such a flaw in the procedure as to make the respondent's decision unreasonable. The Industrial Tribunal accordingly dismissed the application. The appellant then took her case to the Employment Appeal Tribunal but the decision was upheld by a majority who said that the Industrial Tribunal was entitled to take the view that this was not a failure in procedure of a fundamental nature and that it caused no injustice. The question for this Court is whether those decisions of the two Tribunals were correct."

[86] The learned judge examined the powers of the Court of Appeal in such matters and said (at paragraph 53):

> "The powers of the Court of Appeal are limited in this context, and in the present case we have to consider whether:
>
> 1. there were any procedural failures; and
>
> 2. whether such findings involved defects sufficiently serious as to render the employer's

> decision to dismiss unfair. For my part I would hold that the procedural defects at the hearing before the master were of that degree of seriousness but it has to be recognised that those defects were cured by the opportunity to appeal. On the hearing of the appeal the appellant was well aware of the allegation against her and she had the opportunity to call witnesses if she so wished. In those circumstances the Industrial Tribunal were entitled to hold, as they did, that the defects were not fundamental. The role of Mr Hibbert and Mr Pellegrotti in the proceedings causes rather more difficulty. One must recognise that the Industrial Tribunal has considerable knowledge and expertise in the field of industrial relations, with which the Court of Appeal is not equipped, and it is not for any member of this Court to substitute his view for those of the Tribunal unless it is perverse. In holding, as it did, that the defects in procedure in the present case were not fundamental the Industrial Tribunal was making a decision which was open to it on the facts and one with which this Court is not entitled to interfere."

Additionally, Mrs Minott-Phillips' reliance on the case **Slater v Leicestershire Health Authority** is equally misplaced. In that case, on 7 July 1984, Mr Slater, the appellant, a nurse, was accused of beating an elderly mentally deranged patient on his buttocks. He was suspended from duty by Mr Sivewright, the director of nursing services. Investigations into the matter was conducted soon after by Mr Sivewright and a doctor examined the red marks on the patients buttocks and concluded they were consistent with slaps as against restraint as was alleged by the appellant.

[87] On 9 July 1984, the appellant was informed by Mr Sivewright by way of letter that he had concluded his investigations. The appellant was summoned to attend a

disciplinary hearing on 23 July 1984. The letter not only stated the particulars of the charge, but also that the matter was serious and he was strongly advised to attend with a representative. A copy of the letter was attached for his representative.

[88] He was found guilty of gross misconduct and his employment was terminated. He was informed of his right to appeal. His internal appeal was also dismissed. That appeal was technically a rehearing of the matter. His subsequent appeal to the Industrial Tribunal (IT) was also dismissed.

[89] He appealed further to the Employment Appeal Tribunal (EAT). The issue before the EAT was essentially whether Mr Sivewright who had conducted the inquiry should have decided the matter. His appeal was dismissed. He appealed to the Court of Appeal. He complained that his dismissal was unfair because Mr Sivewright, who was a witness to the marks on the patient's buttocks, who conducted an investigation and had formed the view that the marks were the result of a slap and restraint, was also the prosecutor, judge and decision maker.

[90] The Court of Appeal noted that the function of the disciplinary inquiry and the internal appeal tribunal was to "try fairly the allegations against Mr Slater, to decide whether they had been made out and, if and to the extent that they had, to decide what should be done about it". The Court of Appeal examined the reasons which the IT advanced for its decision. In dismissing the appeal, Parker LJ said, at paragraph 32:

> "In my view there is considerable force in the submissions made by the appellant, the more particularly perhaps because it appears that Mr Sivewright was the person to

> decide who should be called at the disciplinary hearing. It is now known that at the hearing various matters were not investigated, such as the fact that there was no record of the buttock mark or slap in the nursing record, that Mr Hawksley's initial accident report did not mention it, that there was on any view only one mark where Nurse Allan had spoken of two, and that Dr Heap, who later said that the mark could have been caused by restraint rather than a slap, was not called. But these matters go to the question whether Mr Sivewright conducted the hearing fairly. The IT having heard all the evidence, including that of Mr Sivewright, concluded that he had. They were entitled so to do, and in any event that issue does not now arise."

In the instant case, the charges against Mr Jennings were serious. In fact they resulted not only in his dismissal, but criminal proceedings were also instituted against him. The allegations were of negligence, *inter alia*, which necessitated reasonable time for scrutiny of the documents. Instead, he was literally given overnight to prepare his defence and he was not provided beforehand with a copy of the investigator's report.

[91] An attribute of internal hearings ought to be fairness. The IDT opined that "[t]he second question for the Tribunal to address [was] the matter of procedural fairness on the part of [NCB] in its conduct with Mr. Jennings". The finding of the IDT that Mr Jennings was not afforded sufficient time to understand the charges against him and to prepare his defence cannot be regarded as perverse. Nor can its finding that:

> "...the procedure should show impartiality and be presided over and/or managed by persons who will be fair and objective, and certainly not a part of the institution which is making the accusation or bringing the charges against the accused"

be considered perverse.

[92] Furthermore by virtue of section 22(ii)(d) of the Labour Relations Code, NCB was obliged to ensure that "details of disciplinary action should be given in writing to [him] and to his representative". The finding of the IDT that Mr Jennings was not afforded sufficient time to prepare his defence, cannot be regarded as unreasonable.

[93] Unlike **Sartor's** case, I am of the view that the defects were not cured by the internal appeal in the instant case as he was forbidden to attend with his attorney. It is pellucid from the authorities, that whether an internal hearing can be presided over by persons from the organization, is dependent on the peculiar facts and circumstances of each case and ultimately whether the procedure was fair. Before the IDT was the transcript of the first hearing from which it could deduce whether Mrs Tugwell-Henry's conduct of the hearing was fair. As pointed out, the finding of the IDT ought not to be interfered with lightly, as industrial tribunals have tremendous knowledge and proficiency in these matters, which the court lacks.

The *audi alteram partem* principle

[94] The learned judge in dealing with Mr Leys' submission opined at paragraph [59] – [60]:

> "**[59]** …This court is not saying that there is any rule of law that requires lawyers to participate in internal disciplinary processes but where an employee is faced with what might, in real and practical terms, be a career ending (not just termination of employment with the particular employer) disciplinary hearing it may be prudent to give very, very careful thought as to whether the person should be allowed legal representations [sic].

[60] Lord Kerr JSC made this point at page 205, paragraph 110:

> 'Ex post facto contributions from a legal adviser necessarily suffer from the handicap that they must seek to displace adverse findings rather than have the chance to pre-emptively nullify them. Legal representation, if it is required in order to achieve an article 6 complaint process, is surely required where it can be deployed not only to best effect but also to achieve a real and effective contribution to the fairness of the proceedings. This is not confined to providing an effective challenge made to the case presented against the person who is the subject of disciplinary proceedings. It includes advising that person on how to participate in the proceedings, as well as introducing relevant further evidence that may have a crucial impact on the forming of the first views on the actual issues'."

It was as a result of the learned judge's reliance on Lord Kerr's dicta, that Mrs Minott-Phillips took issue. Additionally, regarding the difficulty the IDT expressed that it had in accepting that a unionized worker was entitled to legal representation but a senior manager was denied the right to legal representation (outside of the bank) because of the Banking Act and its view " that the principle of *audi alteram partem* required that Mr Jennings should have been accompanied by his attorney-at-law to the disciplinary hearing", Mrs Minott-Phillips contended that it is only in criminal cases and cases in which a person's civil rights are to be determined, that such a right exists. The instant case, she said is not such a case. For that proposition she cited the case **R (on the application of G) v Governors of X School** [2011] UKSC 30.

[95] She posited that the denial of a non-existent right cannot legally constitute injustice or a denial of natural justice. The removal of a benefit to which Mr Jennings was not lawfully entitled could not therefore constitute discrimination or inequality of treatment.

[96] She submitted that the IDT's aforementioned findings were expressed as "rules" and "principles" of general applicability which were independent of the facts of the instant case. She argued that the IDT's findings were derived from their imperfect understanding of the rules and principles which incorrect findings led them to the conclusion that the dismissal was unjustifiable. It was her submission that any one of those errors was sufficient to warrant a full hearing by the Judicial Review Court.

[97] Mr Leys however contended that the IDT's conclusion was that an accused person should be heard in defence of any accusation made against him. That required the accused to be allowed a representative of his choice which in the instant case, should have been an attorney and this was a factor which the IDT considered in arriving at its decision.

[98] The IDT, he said, considered that the unionized staff members, which are lower in level, are entitled to legal representation while the senior staff members were not. He submitted that those were matters which are within the purview of the IDT and which system it found to have been unfair.

[99] Mr Leys contended that by virtue of section 22(i)(c) of the Labour Relations Code, which also governs the IDT, a worker is entitled to be accompanied by his representative

at disciplinary hearings. The IDT was therefore within its jurisdiction to conclude that Mr Jennings was unjustifiably dismissed because he was denied the right to have his legal representative accompany him to the initial and appellate disciplinary hearings of his case.

Discussion

[100] I cannot accept Mrs Minott-Phillips' *carte blanche* submission that the IDT was "completely wrong in law" in stating that "[t]he *audi alteram partem* principle requires the person accused to be allowed to be accompanied by an attorney-at-law at his disciplinary hearing". Her reliance on the Irish Court of Appeal case **In Re Hone and Another's Application** [1987] NI 160 does not support that position. Careful examination of the case is necessary in the circumstances.

[101] **In Re Hone and Another's Application** concerned prisoners, Michael Joseph Hone and Richard McCartan, who were serving life sentences in the Maze prison. They were charged with offences against prison discipline. Mr Hone was charged for throwing a cup of tea in the face of a warder and using his boot to kick the warder. Mr McCartan was charged with two counts of assault.

[102] It ought to be noted at this juncture that Hone accepted that he had thrown tea in the warden's face. The dispute concerned the quantity and whether he had kicked the warden while wearing boots as was alleged or flip flops as he claimed. Upon appearing before the Board of Visitors for unrelated offences, Messrs Hone and McCartan requested but were refused legal representation. They were found guilty and

were granted leave to apply for judicial review. On the facts of that case, the court disallowed the application.

[103] Mr Hone had advanced five reasons in his written request for legal representation which were in summary: (i) the seriousness of the charge; (ii) lack of knowledge of the law; (iii) inability to defend himself; (iv) his incapability of defending himself; and (v) the Board's inability to be impartial. At the trial he asserted that he was incompetent to defend himself.

[104] The Board retired and considered his claim. Having heard Mr Hone advance his claim, and having observed his demeanour, the Board formed the view that his claims were unmeritorious, because he was intelligent, articulate and had sufficient knowledge of the law. It was of the opinion that there was charge of assault against him was not a difficult area of the law.

[105] Leave was granted to apply for judicial review. Several grounds were filed. The essence of the grounds of appeal was that the Board of Visitors had erred in refusing legal representation before them. Mr Hone also complained that the trial judge had misdirected himself in holding that by virtue of the Prison Rules, an assault for which he was charged was not "one of the more serious offences" and that the penalty was less than more serious offences. In the case of Mr McCartan, at his attorney-at-law's request, the trial judge ruled on the preliminary point whether a sentenced prisoner appearing before a visitor was entitled to legal representation.

[106] The trial judge ruled it was a matter for the Board's discretion and was also satisfied that the Board had correctly assessed Mr Hone and that he was capable of representing himself. Consequently, he found that the Board had properly exercised its discretion in refusing legal representation. The trial judge's decision was affirmed by the Court of Appeal. (It is important to note that, although there was no absolute right to legal representation, both the trial judge and the Board considered Hone's case before refusing the application for legal representation.)

[107] On appeal it was argued, *inter alia,* on behalf the appellants that they were entitled at common law to legal representation regardless of the gravity of, or circumstances of the case. The court considered*, inter alia*, whether at common law there was an absolute right to legal representation. In the interest of brevity, I will concern my analysis solely on the issue of the right to legal representation before inferior tribunals.

[108] Lord Lowry LCJ carefully examined the circumstances of the appellants' cases and a number of other cases in respect of boards and tribunals in arriving at the decision that there was no absolute right. It was held that the Board had discretion whether or not to allow legal representation and in the circumstances of Messrs Hone and McCartan, the Board had properly exercised its right in refusing same.

[109] On appeal, in respect of Hone, two questions were before the court. The question which is pertinent to this matter was whether there was an absolute right at common law to legal representation. In considering whether there was in fact such a

right, Lord Lowry LCJ, in arriving at his decision examined a number of decisions including **Fraser v Mudge and Others** [1975] 1 WLR 1132 in which Lord Denning placed hearings into matters regarding indiscipline in prisons, in the armed forces and on the sea, into a special category. In that case, an application by the plaintiff, Mr Fraser, a sentenced prisoner, for an injunction to restrain the Board of Visitors from hearing a charge against him of assaulting a prison officer until he was allowed legal representation was refused. His appeal to the Court of Appeal was dismissed.

[110] In **Fraser v Mudge**, the plaintiff sought to rely on an earlier decision **Pett v Greyhound Racing Association Ltd** [1969] 1 QB 125 in which Lord Denning MR and Lord Russell had held that the applicant was entitled to legal representation at his enquiry. At pages 1133-1134, in the former case, Lord Denning MR said:

> "But it seems to me that disciplinary cases fall into a very different category. We all know that, when a man is brought up before his commanding officer for a breach of discipline, whether in the armed forces or in ships at sea, it never has been the practice to allow legal representation. It is of the first importance that the cases should be decided quickly. If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation. I do not think we ought to alter the existing practice. We ought not to create a precedent such as to suggest that an individual is entitled to legal representation."

[111] Although legal representation was refused in the **In Re Hone and Another's Application** case, it was plain that in an appropriate case, legal representation can be

allowed. Roskill LJ (as he then was), in agreeing with Lord Denning, in **Fraser v Mudge**, also makes it quite plain. At page 1134, Roskill LJ said:

> "In so far as reliance is place upon *Pett v Greyhound Racing Association Ltd*. [1969] 1 Q.B. 125, that case is clearly distinguishable, because there was there a contractual or quasi-contractual relationship between the plaintiff and the defendant, since the plaintiff held a licence from the defendants which the defendants were intending to revoke. The present case arises under the Prison Rules 1964 made under the Prison Act 1952." (Italics as in original)

Roskill LJ examined the case **Pett v Greyhound Racing Association Ltd**, which preceded **In Re Hone and Another's Application**. In **Pett v Greyhound Racing Association Ltd**, Lord Denning had made it plain that the right to legal representation was not absolute. Mr Pett who was a greyhound trainer was accused of doping a dog. The dog was consequently withdrawn from the race. At the disciplinary hearing, Mr Pett requested but was refused legal representation on the ground that legal representation would "frustrate the stewards' intention to conduct their meetings expeditiously and with complete fairness".

[112] In hearing the interlocutory appeal, Lord Denning however disagreed. He held the view that the charges against Mr Pett were serious and affected not only his reputation but his livelihood. He was therefore of the opinion that in the circumstances, that is, the seriousness of the charges, Mr Pett ought to have been represented. Lord Denning however made it plain that the right to legal representation in the circumstances was not attributed to the common law, but to natural justice. Lord

Russell, in agreeing with Lord Denning, said it would have been "contrary to natural justice" if any other course were to be taken in the case. Lord Russell also said (at page 135) that:

> "There is...nothing in the contract to overcome or deny what appears to be a common law right of the plaintiff to do by agent or representative, including counsel, that which under the procedure he is entitled to do..."

[113] Lord Denning acknowledged that a contrary view had been expressed by Maugham J. But here is how Lord Denning regarded that view. He said, at pages 132-133:

> "I am aware that Maugham J. once expressed a different view. In *Maclean v Workers' Union*, speaking of domestic tribunals, he said:
>
> > 'Before such a tribunal counsel have no right of audience and there are no effective means of testing by cross-examination the truth of the statements that may be made.'
>
> All I would say is that much water has passed under the bridges since 1929. The dictum may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation. (*In re Macqueen and the Nottingham Caledonian Society* seems to have been such a case). **But the dictum does not apply to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import. Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor**." (Emphasis added)

[114] In examining the cases Lord Lowry in **In Re Hone and Another's Application** made an interesting observation. At page 169, he said:

> "It may be that Lord Denning and Russell LJ in using variously the words 'contrary to natural justice' and 'the common law right' intended to equate these terms, on the basis that the common law requires the rules of natural justice to be applied in adjudication by all bodies having judicial or quasi-judicial functions."

[115] The substantive matter was heard by Lyell J in **Pett v Greyhound Racing Association Ltd (No2)** [1970] 1 QB 46. He held (at page 62 paragraph D), that:

> "That the common law right to appoint an agent for any purpose is qualified by exceptions is stated in the passage from the judgment of Stirling J. quoted by Lord Denning M.R. It seems to me that that right must be ousted when it is sought to be exercised in circumstances in which another rule of the common law does not permit it."
> Rule 49 of the rules of the club is entirely silent as to how an inquiry by the local stewards is to be conducted and the defendants contend that at common law the only duty imposed on the local stewards as persons empowered to make quasi-judicial decisions is to observe the rules of natural justice. The Court of Appeal did not accept this contention and appears to have accepted that *Reg. v Assessment Committee of St. Mary Abbotts, Kensington* [1891] 1 Q.B. 378, C.A., was authority to the contrary."

At page 63, Lyell J said:

> "In view of the many authorities that domestic tribunals are subject to the duty of observing what are called the rules of natural justice and any procedure laid down or necessarily to be implied from the instrument that confers their power, I am unable to follow the views expressed by the Court of Appeal, that the plaintiff is entitled to appear by an agent unless such right was expressly negatived by the rules of the club."

[116] In **Enderby Town Football Club Ltd v Football Association Ltd** [1971] Ch 591, the County association had fined and censured the club for gross negligence. The club appealed and requested permission to be represented by solicitor and counsel at

the hearing of the appeal. The request was refused based on the association's rule which excluded legal representation. In that case, Lord Denning MR, in answering the following question which he posed, whether a party who was charged before a domestic tribunal was "entitled as of right to be legally represented"; at page 605 paragraph (d), said:

> "Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. **It is a matter for the *discretion* of the tribunal. They are masters of their own procedure: and, if they, in the proper exercise of their discretion, decline to allow legal representation, the courts will not interfere."** (Emphasis mine, italics as in the original)

In the instant case it was a complaint of NCB that the IDT had failed to resolve the issue: whether "the banker's duty of secrecy under s.45 of the Banking Act prevents or otherwise affects a banker's right under the Labour Relations Code to be accompanied by a representative to an internal disciplinary hearing". The effect of section 45 of the Banking Act on the appellant's right to legal representation will be considered under that complaint later in this judgment.

[117] At page 606, Lord Denning further stated that:

> "Natural justice required that Mr. Pett should be defended, if he so wished, by counsel and solicitor. So we intervened and granted an injunction. Subsequently Lyell J. thought we were wrong. He held that Mr. Pett had no right to legal representation...But I think we were right. Maybe Mr. Pett had no positive right, but it was a case where the tribunal in their discretion ought to have allowed it."

The cases make it abundantly clear that legal representation is not an absolute right to persons appearing before an inferior tribunal, but rather such tribunal has discretion to allow legal representation. That fact notwithstanding, such boards are obliged to exercise their discretion properly. The authorities confirm that the refusal of legal representation, in circumstances where the charges are serious and the accused person's livelihood and reputation are at stake in contractual circumstances, would constitute an improper exercise of the discretion. Boards are required to conduct their enquiries fairly. Fairness includes the proper exercise of its discretion. Whether NCB's disciplinary body's exercise of its discretion was correct, is therefore open to scrutiny.

[118] In light of the foregoing, the IDT's statement, as articulated by Mrs Minott-Phillips in her written submissions, that:

> "[t]he principle of *Audi Alteram Partem* requires the person accused to be allowed to be accompanied by an attorney-at-law to his disciplinary hearing"

cannot be regarded as "completely wrong".

[119] The IDT, in the light of the terms of reference, would have been correct in examining whether NCB had exercised its discretion correctly. Although the learned judge did not consider that issue in detail, that would not have provided NCB with an arguable ground which had a realistic prospect of success.

[120] NCB further complained that the IDT arrived at the following conclusions without evidence:

a. The Branch was "short staffed" at the material time.

b. Mr Jennings was given less than 18 hours notice of the hearing, he did not know the case he had to meet;

c. NCB should have allowed Mr Jennings legal representation at his disciplinary hearing in circumstances where no such request had been made of NCB.

d. The wrongful rejection of evidence which is dealt with at ground 7 of the application for leave to apply for judicial review.

e. Error of material facts which are dealt with at ground 6.

[121] The learned judge in stating that: "[It] is not being urged that the IDT had no evidential foundation for its finding of fact" erred. A complaint of NCB was that the IDT's conclusion that the branch was short staff at the time with was without evidential basis.

[122] The IDT did not provide a transcript of the evidence which was adduced before it. The court was only provided with a summary of the evidence. I can find nothing in the documentary evidence which was before the IDT in which the issue of "short staff" was raised. The only evidence as to staff is to be gleaned from the transcript of the initial disciplinary hearing. In that transcript, there was mention of some names of employees; however it is not possible to say whether those persons were the only persons employed.

[123] It would be speculative, in light of the absence of the IDTs transcript, to conclude that the IDT relied on that evidence in arriving at its decision that the bank was short staffed. Nevertheless, as stated before, negligence was not the sole issue before the IDT. An error in that regard would not therefore go to jurisdiction.

[124] As regards the allegation that there was no evidence to support the conclusion that "Mr Jennings was given less than 18 hours' notice of the hearing, he did not know the case he had to meet" the appellant's submission before the IDT was that Mr Jennings received a telephone call from Mrs Tugwell-Henry sometime after 6:00 pm on 5 November 2012 to attend a disciplinary hearing at 10:30 the following morning. He subsequently received a letter to that effect on the same evening which purported to contain the charges against him.

[125] There was no evidence from NCB countering Mr Jennings' the assertion that he was summoned after 6:00 pm. In fact NCB's transcript of the disciplinary hearing refers Mrs Tugwell-Henry saying at the inception of the proceedings, "You received a letter last night outlining the charges?" The complaint that the IDT erred in its finding that he was given less than 18 hours is therefore without basis.

[126] The complaint that there was no evidence for concluding that "NCB should have allowed Mr Jennings legal representation at his disciplinary hearing in circumstances where no such request had been made of NCB" is also baseless. Before the IDT was Mr Jennings' complaint that upon being summoned by telephone to the hearing of 6 November 2012, he enquired whether he should take an attorney and he was informed

that the bank would not have an attorney and if he took one the hearing would be postponed or not happen. It was also before the IDT that Mr Jennings had insisted that Mr Brady, his attorney at law, who had accompanied him to the appellate hearing, be allowed to represent him before them. NCB was however adamant that it would not allow him to do so. Consequently Mr Jennings refused to participate and left. The hearing proceeded in his absence. The evidence as to the foregoing is supported by the contents of letter from Mr Dennis Cohen dated 12 December 2012 to Mr Jennings. It was therefore entirely within the IDT's remit to have accepted that submission.

[127] I also regard as unmeritorious, the complaint that the IDT refused to permit evidence "to be led to establish that [Mr Jennings] had been charged by the police with fraud in connection with the said matters which were the subject of his disciplinary hearing". Indeed that evidence could have been prejudicial with little probative value at that stage.

[128] In respect of the complaint that the IDT failed to resolve the following issues which it was obliged to in order to settle the dispute:

(a) Whether Mr Jennings' actions or omissions represented breaches of his employment contract, or NCB's policies and procedures or generally accepted principles of banking;

(b) Whether the banker's duty of secrecy under section.45 of the Banking Act prevents or otherwise affects a banker's right under the

Labour Relations Code to be accompanied by a representative to an internal disciplinary hearing;

(c) Whether Mr Jennings made a request for legal representation at his disciplinary hearing;

(d) Whether there was any actual or perceived bias on the part of NCB's employees who conducted the disciplinary hearing;

(e) Whether Mr Jennings had been charged with any crimes in connection with the matters that were the subject of his disciplinary hearing;

(f) Whether Mr Jennings made any effort to mitigate his loss by seeking alternative employment.

[129] NCB's assertion that the IDT failed to consider and resolve the issue at a above, is without basis. It is palpable from the following statement of the IDT that it considered the complaint.

> "The Tribunal does not support the contention that the branch manager of a large branch was not expected to peruse every detail of a loan application, although as he has admitted, the buck ultimately stops [sic] with him. On the other hand, were he to so act, that would be inconsistent with the Bank's credit risk policy which stipulates as follows:
>
> '**for purposes of checks and balances, there will always be a clear separation of responsibilities, thus the person approving a credit facility cannot be the same person checking the documentation or security and cannot be the same person approving the service request or the disbursement**." (See page 15 of the decision)

In respect of (b) above, section 45 of the Banking Act states:

> "45. (1) Subject to subsection (2), no official of any bank and no person who, by reason of his capacity or office has by any means access to the records of the bank, or any registers, correspondence or material with regard to the account of any customer of that bank shall, while his employment in or, as the case may be, his professional relationship with the bank continues or after the termination thereof, give, divulge or reveal any information regarding the money or other relevant particulars of the account of that customer.
>
> (2) Subsection (1) shall not apply in any of the circumstances specified in the Fourth Schedule.
>
> (3) Any person who contravenes subsection (1) shall be guilty of an offence."

[130] It is curious that this section is alleged to be so important to keep out legal representation (who are generally bound by rules of confidentiality in respect of their clients) for senior managers in their disciplinary hearing yet does not appear to be of concern viz a vis unionized workers in their disciplinary hearing. In any event, it was NCB's submissions before the IDT that legal representation was allowed depending on the complexity of the matter.

[131] Furthermore, legal representation does not necessarily involve the perusal of confidential documents. As indicated by Sykes J starting at paragraph [59] of his judgment:

> "**[59]** This court agrees with Mr Leys that NCB did not necessarily have to permit the lawyer to be present to cross examine witnesses. The participation of the lawyer may have involved written submissions on either procedural or substantive points. This court is not saying that there is any

rule of law that requires lawyers to be participate [sic] in internal disciplinary processes but where an employee is faced with what might, in real and practical terms, be a career ending (not just termination of employment with the particular employer) disciplinary hearing it may be prudent to give very, very careful thought as to whether the person should be allowed legal representations [sic].

[60] ….

[61] The point is that legal representation at an early stage can have a decisive impact on the overall outcome. What the IDT was saying was that in this case is this [sic]: NCB recognised in its agreement with members of the staff association (which excludes senior managers) that in some instances both the bank and the employee may resort to lawyers. If this is so with lower level employees then should not a manager who is faced with a possible career-ending hearing not be afforded legal representation? Was this approach by NCB just, fair and equitable in all the circumstances? Mr Jennings was told the evening of November 5 that the following morning he would face charges and a hearing into matters that have brought his honesty and integrity in issue. Where would the time come from to find and consult with counsel or indeed any other person before the hearing? Where would Mr Jennings find a lawyer or any other person to assist him after 5:00 pm or 6:00 pm on November 5? Had Mr Jennings been able to consult, could it be that he would have been advised to ask for adjournment? This is the point that Lord Kerr JSC is making. Legal representation is not only about refuting charges. It can include advice on how to manage the proceedings. Even if Mr Jennings was permitted representation by counsel or someone from NCB would that person be adequately prepared to provide real and effective assistance to Mr Jennings in sixteen hours when, on the available material, not even the very report that formed the foundation of the charges was given to Mr Jennings, to say nothing of access to the files in question at that time of day? Is it being said that Mr Jennings and whomever his adviser was to spend a sleep deprived night preparing for this hearing? In addition there was a body of evidence that suggested that there was a separation of function between those who checked the documentation for accuracy and

> veracity and those who actually approved the loan. What impact this separation would or ought to have on the proceeding and should this be probed so that a clearer picture could emerge? The charge sheet did not make it clear whether the allegation was that Mr Jennings personally oversaw the approval process by examining the documentation himself, saw what has been termed the red flags, decided to ignore them and granted the loans or was it being said that as the manager ultimate responsibility rests with him.
>
> **[62]** Having regard to the vagueness of the details of the charges, the absence of legal representation, the short time for preparation and the complexity of the charges the IDT concluded that the dismissal was unjustifiable. From this court's perspective, this type of assessment is for the IDT and not for any court. These are matters of fact and their interpretation which the IDT is required to do.
>
> **[63]** What the IDT was saying is that when all things are looked at including the fact that a thirty three year banker was being hauled before a disciplinary proceeding that could end his career not only with NCB but with the entire banking community in the small island of Jamaica given at most sixteen hours' notice to defend serious allegations of dishonesty, something is not fair, just and equitable about the dismissal. Add to this that the presiding 'judge' of the disciplinary panel also played a role of chief prosecutor formulating or preparing the charges. Add to this the inability to secure legal representation at the appellate stage, can it really be said that dismissal was fair, just and equitable?
>
> **[64]** This court concludes that the IDT acted within its remit."

[132] I agree that the IDT clearly dealt with the matter. As already stated, the IDT found that Mr Jennings should have been allowed a representative of his choice which they plainly found ought to have been an attorney. It opined that his denial by NCB to that right was contrary to the principle of natural justice. An important consideration as earlier noted, was that Mr Jennings was "a senior member of the managerial group who

faced complex charges which led to his dismissal". That complaint is therefore has no real prospect of success.

[133] The IDT in fact dealt with the issue of bias in its finding that the procedure ought to have to have been managed and presided over by persons who would be fair and objective.

[134] In respect of the complaint at (f) above, NCB's submission before the IDT was that there was no evidence on which it could find that Mr Jennings had suffered damage to his reputation and ability to work in the financial sector. It is true that the IDT did not deal with the issue concerning Mr Jennings' failure to mitigate his loss by seeking employment. Its omission to do so however does not provide NCB with an arguable case with a realistic prospect of success.

[135] NCB not only alleged negligence of an egregious kind against Mr Jennings, its submission to the court was that Mr Jennings was criminally charged. In those circumstances, diffidence on Mr Jennings' part in applying for employment elsewhere in the financial sector is understandable as it was likely, that in an interview he would have had to disclose the reasons for his dismissal, one of which was an allegation of dishonesty.

Conclusion

[136] In determining whether the learned judge, in refusing leave to challenge the decision of the IDT, failed to consider the arguability of NCB's case, as to whether it made errors of law, it is important to understand precisely what was referred to the IDT

for its decision. The matter referred to the IDT for settlement in accordance with the following terms of reference was:

> "To determine and settle the dispute between the National Commercial Bank on the one hand and Mr. Peter Jennings on the other hand over the termination of his employment."

[137] Answers to the following questions which have been distilled from Lord Reid's statement in the House of Lords decision of **Anisminic** which sets out the circumstances in which a judge ought to interfere with a tribunal's exercise of its discretion are helpful:

1. Did the IDT in arriving at its decision, fail to consider an aspect or aspects of the dispute referred to it, or fail to do what it ought to have done or did what it ought not to have done?

2. Did the IDT have the power to make the orders it made?

3. Can it be properly asserted that it failed to comply with the principles of natural justice?

4. Was the decision given in bad faith or can it be asserted that although the decision was given in good faith, the IDT failed to understand what it was required to do, thereby ignoring the question remitted to it and dealt instead with some other question?

5. Was it that the IDT refused to consider some relevant matter or that it took into account that which it was not entitled to?

[138] Although the IDT was patently wrong in its definition of gross negligence, the IDT was called upon, not to determine whether Mr Jennings was grossly negligent, but rather its task was to determine whether in all the circumstances the termination of Mr Jennings' employment was justifiable.

[139] In considering the question before it, the IDT was not constrained by rules of court and technicalities of court proceedings. Section 20 of the LRIDA confers upon the IDT the power to "regulate their procedure and proceedings as they think".

[140] The following statement of Donaldson LJ (as he then was) in **Union of Construction, Allied Trades and Technicians v Brain** [1981] IRLR 224, at page 227 paragraph 22:

> "...Whether someone acted reasonably is always a pure question of fact, so long as the Tribunal deciding the issue correctly directs itself on the matters which should and should not be taken into account. But where Parliament has directed a Tribunal to have regard to equity - and that, of course, means common fairness and not a particular branch of the law – and to the substantial merits of the case, the Tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane. It should, therefore, be very rare for any decision of an Industrial Tribunal under this section to give rise to any question of law. And this is quite plainly what Parliament intended.
>
> Of course, a tribunal can approach this simple question in a way which is other than that which Parliament intended. However, where Parliament has given to the Tribunal so wide a discretion, in my judgment, appellate courts should be very slow indeed to find that the Tribunal has erred in law..."

The IDT rightly considered the appropriate factors in arriving at its decision that Mr Jennings was unfairly dismissed. Given its jurisdictional latitude, it was within its purview, in determining whether Mr Jennings dismissal was justifiable to consider the issues which it did.

[141] Accordingly, in my view the IDT's decision ought not to be disturbed as it cannot be properly advanced that the complaints have any real prospect of success.

[142] In the circumstances I would dismiss the appeal.

P WILLIAMS JA (AG)

[143] I have read in draft the comments of my brother Brooks JA and the judgment of my sister Sinclair-Haynes JA and agree that this appeal should be dismissed.

BROOKS JA

ORDER

Appeal dismissed. No order as to costs.