[2017] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 22/2017

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

BETWEEN	**WENTWORTH GRAHAM**	**APPELLANT**
AND	**THE JAMAICA STOCK EXCHANGE**	**RESPONDENT**

Mrs Georgia Gibson Henlin QC and Miss Stephanie Williams instructed by Henlin Gibson Henlin for the appellant

Patrick Foster QC, Miss Ayana Thomas and Geoffrey Foreman instructed by Nunes Scholefield, Deleon & Co for the respondent

12 June and 21 July 2017

SINCLAIR-HAYNES JA (DISSENTING IN PART)

[1] The appellant, Mr Wentworth Graham, was seeking to set aside the decision of Harris J refusing to grant the following:

> "(a) an interim injunction to prevent the Jamaica Stock Exchange (the JSE and the respondent) from proceeding with a disciplinary hearing against him

while the Industrial Disputes Tribunal (IDT) is seised of the matter;

(b) an interim declaration that he was suspended from his employment; and

(c) an injunction directing the JSE to permit him to attend work pending the outcome of the proceedings at the IDT, the application - for an interim declaration and any claim filed consequent on directions."

[2] On 21 July 2017 this court, by a majority, dismissed the appeal and awarded costs to the respondent to be agreed or taxed. These are my reasons for dissenting from that judgment.

Background

[3] The appellant commenced working with the Jamaica Stock Exchange (JSE) on 11 January 2001. He was promoted to the office of chief regulatory officer (CRO) for the Regulatory and Market Oversight Division (RMOD) of the JSE on 1 April 2008. The RMOD is the operational arm of the Regulatory and Market Oversight Committee (RMOC) of the JSE. The RMOC was created in 2008 to separate the JSE's commercial functions from its regulatory functions.

[4] By its resolution, the intention of the RMOC was to "ensure a fair, orderly, and transparent market for shares and other securities traded on its Exchange". In performing his duties, the appellant was vested with the power to raise matters of concern without fear of reprisal or conflict of interest. In that capacity he was required to liaise with the general manager, Mrs Marlene Street-Forrest. The appellant was not only promoted, but in a letter dated 12 December 2016, received commendation for the quality of his work. The JSE's expressions of gratitude to the appellant for his "hard work and contribution which positively impacted the company's excellent performance for 2016" transformed that same month to questions being raised about his "efficacy".

[5] This drastic transformation seemingly coincided with the appellant's persistence in requiring the JSE to submit an amended report for the shareholding of its directors, senior managers and their connected parties. The appellant's letter, which, apparently incurred the wrath of his superiors and resulted in their swift and sudden diminished view of his performance, was addressed to Mrs Street-Forrest on 16 November 2016 and stated follows:

> "The Regulatory & Market Oversight Division (RMOD) of the Jamaica Stock Exchange (JSE) is hereby advising your office that the Division has examined the captioned filing and observed an issue that requires corrective action. The issue that has been identified by the RMOD is in relation to the share holding lists for JSE's Directors, Senior Managers and their Connected Parties. The RMOD has determined that the listing does not represent accurate information, and is incongruent to filings by other Listed Companies on the JSE, the conditions of **JSE Rule 407 – Quarterly Financial Statements**, previous notices and explanations from the RMOD to the JSE regarding requisite details that ought to be

> provided to the market, regarding the shareholders' list for financial filings of the Company's Directors, Senior Managers and their Connected Parties; as well as details that have been provided by the JSE to the market as represented in letter dated November 18, 2016 on which the RMOD was copied.
>
> Essentially, the RMOD is hereby advising the JSE that it is required to kindly submit an amended report for the shareholdings of its Directors, Senior Managers and their Connected Parties for the filing of the captioned matter and disclosure to the market. In this regard the RMOD is kindly requesting of your office to submit the amended report by the close of business on November 17, 2016. Please note that if the JSE fails to provide the amended report within the forgoing timeline, the RMOD will have no choice but to treat JSE's filing of its Financial Statements for the period ended September 30, 2016 as non-compliant with the terms **of JSE Rule 407, Quarterly Financial Statements**, which could result in other enforcement actions."

[6] In response to that letter, Mrs Street-Forrest advised him that they were unable to detect the inaccuracy and asked him to provide them "with more specific information".

[7] The appellant provided the specifics as follows:

> "Dear Mrs. Forrest: Good evening. Please be advised that the specific information, as requested, that is represented in the attached letter, are as follows: (1) Pursuant to JSE Rule 407 the JSE ought to file with its Quarterly Statements for the period ended September 30,2016 shareholdings of the Company's Directors and Senior Managers and there[sic] Connected Persons. Essentially, **all** subjects names ought to be published, and their shareholdings, whether with a count of one (1) or greater, or zero/nil ought to be stated. Please be advised that the filing by the JSE for the period ended September 30, 2016 did not provide the requisite details and information pursuant to JSE Rule 407
>
> (https://www.jamstockex.com/wp-content/uploads/2016/11/JSE-Third-Quarters-2016.pdf); (2)

> My office on a number of occasions, in the past, raised the issue with your office and explained the requirements, which the JSE has acted on and provided to the market, in an instance of a Supplemental Report dated November 18, 2015 (please note that in the first paragraph of the attached letter dated November 16, 2016 has a typo of '...November 18, 2016 ...' it should read November 18, 2015). Where fitting the mentioned filing by the JSE could be examined and use [sic] as a guide; (3) Other Listed Companies, such as Barita Investments https://www.jamstockex.com/Barita-investments-limited-unaudited-financial-statements-12-months-ended-30-september-2016/) NCBJ and others, have always provided the market with the requisite details regarding shareholders' lists for Directors and Senior Managers and their connected Parties, which the JSE could examine to allow for guidance. Recognizing the email request below from your office dated November 17, 2016, please be advised that the RMOD has decided to extend the due date for filing the amended document to November 18, 2016. In closing, please note that the RMOD is equally treating the matter as urgent. Kind regards."

[8] He was advised by Mrs Street-Forrest in response, that the rules did not require directors or senior managers to disclose. She also desired his advice as to whether the JSE had not disclosed the required information.

[9] Mr Robin Levy (the JSE's deputy general manager) also disagreed with the appellant and took umbrage to the request. Whereas Mrs Street-Forrest requested the appellant's feedback, Mr Levy advised the appellant that he considered "the matter closed" and expected "no further correspondence on it".

[10] The appellant's upward trajectory swiftly spiralled downwards seemingly consequent on his refusal to heed the request. He responded to Mrs Street-Forest and Mr Levy thus:

> "Thanks for the feedback and the comments have been noted. Recognizing that this is a regulatory matter **please be advised that it is the prerogative of the Regulatory & Market Oversight Division to determine how [to] engage, which includes treating the closed as well as providing further communication to the JSE**. In this regard, kindly be advised that the RMOD will be processing the matter accordingly. Kind regards." (Emphasis added)

[11] His response resulted in a reprimand from the JSE's deputy governor, Mr Livingston Morrison, who wrote:

> "I have taken note of the attached email and the related string.
>
> Please note that it is not clear to me that the JSE Rule 407 supports the view that zero balances are to be included in the filing. In this regard I have reviewed your reasoning on the matter which seems to be grounded in the view that each filing should provide for comparative analysis. It is my view that if the rule was intended to provide for comparative analysis in the manner suggested then it would have required the submission of balances as at the prior reporting date in addition to the current reporting date. In this regard I am not satisfied that we need to insist on reporting of zero balances. Consider that the prior period reports are always available to investors for the purpose of comparative analysis.
>
> **I am also concerned about the tone of your writing which may not be the most appropriate or productive.**
>
> Please consider the foregoing and revert to me as soon as possible." (Emphasis added)

[12] A few weeks after the appellant sent the following mail to Mr Morrison:

> "Dear all: Good afternoon. Please see the attached which is slated for publication on December 15, 2016. Kindly note that the highlighted sections will be further updated. Please

do not hesitate to make contact if there are any concerns. Kind regards."

[13] Mrs Street-Forrest, being displeased with the correspondence, responded:

> "I wish to draw your attention to the JSE's Monthly Regulatory Report for November 2016 (slated for publication on December 15) especially to the area where it was noted that the JSE was non-compliant in its 3rd Quarter submission. As I have indicated to the CRO I strongly object to his assessment and wish to again put on record my disagreement with this position as nothing in the rules of the Exchange requires that the Exchange or any other listed company report zero shareholdings by director or senior management.
>
> **I consider this matter overreaching in regulation and nonsensical and ask for your intervention. In fact I am led to question the efficacy of the regulator.** In fact this is [sic] become time consuming and a drag on time which could be spent in a more productive manner.
>
> Regards." (Emphasis added)

[14] The appellant responded in this way:

> "This email stands as a statement from I, Wentworth Francis Graham, Chief Regulatory Officer (CRO) of the Jamaica Stock Exchange (JSE,) to hereby advise that your assertion in your email below dated December 13, 2016 that **'I [Marlene Street-Forrest, Company Secretary of the JSE] am in fact led to question the efficacy of the regulator'** has been and is causing me anguish and pain. I am the CRO of the JSE, I am 'the regulator.'
>
> The remark is damning to office as CRO of the JSE, and my image.
>
> The remark was circulated to, not only the most senior Director of the JSE and head of the RMOC, but also other RMOC members and Directors of the JSE, my direct reports and a temporary worker of the RMOD. There have been expressions of shock regarding your assertion. As mentioned above the statement has and is causing me anguish and pain.

> Given your statement please note that you are hereby being called upon to provide validation, proof or evidence.
>
> Sharing at this stage that as CRO and 'the regulator' I have written statements regarding my high quality of work, efficacy, professionalism, expertise, management and leadership. In many forms there have been mention that as 'the regulator' I am respected.
>
> Since assuming the role as 'the regulator' of the JSE in November 2007 no market constituent has ever questioned my efficacy ... not one. You are the first. And let me add that at no time has any member of the RMOC, past or present, questioned my efficacy.
>
> Please note that you are required to provide the requisite evidence or proof for the assertion by 10 am Tuesday December 20, 2016; failing which you are required to retract the comment in writing and provide a written apology, which satisfies me, by 4:00 pm on December 20, 2016. Please note that you will be required to circulate the retraction and apology to all recipients of your email (visible and blind copied) dated December 13, 2016.
>
> I have copied Doreen, JSE's HR Manager, on this email given the nature, importance and seriousness of this issue. And kindly note that the Chairman of the JSE and RMOC have been copied given the manner of treatment of the issue at this stage."

[15] There was no response to his mail. Affronted by the lack of response the appellant wrote:

> "Dear Doreen:
>
> Good morning.
>
> It is noted that your office has not responded to my email below dated December 16, 2016, as requested and expected. Neither did you acknowledge my email. I am concerned.

> The presumption is being made that the non-response is an oversight; therefore, this email represents a re-submission of the email below to your office for due processing.
>
> Given this re-submission I am requesting feedback by the close of business on December 19, 2016.
>
> Please note that if there is no response within the specified timeline I will have no choice but to escalate this matter.
>
> Kindly be advised that recognizing that the concern that has been provided to your office involves the GM of the JSE, who is your direct supervisor, as such referral, if exercised, will be made to Board of the JSE through the office of JSE's Chairman.
>
> Let me add that given the circumstance, my office might consider it suitable to also apprise the Board of the JSE of my concern regarding your office's non-response to other matters that my office has referred to your office pertaining to Sherene Nooks-Samuels, and the issuance of instructions from JSE's IT Manager regarding JSE's Mobile to me and others with instructions to sign and submit to the IT Manager.
>
> I wish to state that you ought to recall that we (Doreen/Wentworth) have had meetings on matters pertaining to Shereen and JSEs Mobile Policy. I've clearly explained my concerns given your role as HR Manager of the JSE and I sensed that you understood my concerns. The concerns are serious. A number of weeks have elapsed since engaging your office on the matters, reminders have been provided, yet your office has not provided feedback to my office to allow for my further processing and possibly closure.
>
> As mentioned above I am requesting of your office to respond to my email below dated December 16, 2016 by the close of business on December 19, 2016. If there any issues please advise."

[16] Mr Morrison sent an email on 19 December 2016 requesting that the appellant contact his office immediately. He also stated:

"The attached email string refers.

Please regard this as my directive to cease and desist from further writings on this matter. The potential to undermine our shared responsibility to protect and promote the reputation of the JSE should be obvious." (Emphasis added)

[17] Mr Morrison wrote to the appellant on 20 December 2016, and instructed the appellant to meet with him. He reiterated his instructions that the appellant ought not to deal with JSE matters whilst he was on vacation leave.

[18] Mrs Street-Forrest, in her capacity as general manager, wrote a letter to the appellant dated 13 January 2017. That letter outlined the appellant's job status, from entry in 2001 and the various posts he had held, up to the latest promotion in 2008 as CRO. That letter was a litany of complaints spanning from 2009 to 18 December 2016. The complaints essentially concerned communication issues and personality conflicts primarily with management, chief of which was his insistence that the JSE was in breach of rule 407 of the JSE rules. The letter culminated with instructions that he should not attend work. The last three paragraphs state as follows:

"While we are of the view that the issues raised above together with others not mentioned have contributed to the erosion of the substratum of the employer/employee relationship and that in these circumstances we would be guided by the provisions of Section 22 of the Labour Relations Code, ('the Code') and we are prepared to comply with the same, we feel that given your position at JSE**, we would prior to following to that procedure, invite you to sit with us in order that we could arrive at a mutually agreeable settlement.**

We wish to make it abundantly clear that should you not wish to engage in discussions to arrive at a

> **mutually agreeable settlement, or if you make that choice and it is not successfully concluded, we will commence the process set out in the Code. Either option will entail your non attendance at work with pay until the discussions or hearing process have been completed. In keeping with the process under the Code, you will be provided with a fulsome written document setting out all the issues that may give rise to disciplinary action if any, that may be taken.** You will be invited to a hearing and you will be given an opportunity to state your case in relation to the issues raised in the document and you will have the right to be accompanied by a representative of your choice. Should the outcome not be in your favour you will have the right to appeal the same.
>
> You will be required to inform Mr. Livingstone Morrison, Chairman RMOC by Friday January 20, 2017 which of the two options you would prefer." (Emphasis added)

[19] On 17 January 2017 the appellant responded to the said letter by denying the allegations. He indicated his willingness to meet with the JSE to resolve the issues stated in the letter, with the caveat that the settlement would involve him retaining his job and sought clarification as follows:

> "However, it may be that is not what the JSE has in mind and so I want it to be clarified that I am not prepared to enter into discussions for the purpose of agreeing the termination of my employment. Kindly confirm if this is what the JSE meant by negotiated settlement."

[20] He further stated that his absence from his post was affecting the discharge of his functions as the regulator of the JSE, as there were a number of important matters that were at a standstill. He pointed out that he did not apply for leave, that he did not understand the term "authorised leave" and stated his intention to return to work.

[21] On that same date, the JSE acknowledged receipt of the appellant's email response, and reiterated the instruction that he was not required to return to work or perform his job functions until the process under section 22 of the Labour Relations Code (the Code) was completed. He attempted to enter the premises of the JSE on 19 January 2017 but was prevented from so doing by a security guard.

[22] By letter dated 19 January 2017. Mrs Street-Forest responded to the appellant's request for clarification as follows:

> "**[Re]: Discussion of Issues Affecting the Relationship of Employer and Employee -Yourself and the Jamaica Stock Exchange**
>
> We write acknowledging receipt of your letter dated January 17, 2017 which was addressed to the Chairman of the Regulatory and Market Oversight Committee (RMOC), Mr. Livingstone Morrison and delivered to us on January 19, 2017.
>
> We note the content of the letter and specifically your position as it relates to the option to discuss with us a "mutually agreeable settlement" and the limitation stated by you in relation to the same. This limitation is unacceptable as in our view the possible conclusions of the negotiations ought not to be limited in any way as all options should be on the table for discussion.
>
> In light of the position outlined in your response as it relates to the option set out above and as indicated in our letter to you, **you will receive a letter from the JSE inviting you to attend a hearing, which hearing will give you the opportunity to state your case and respond to the issues which will be outlined in the aforesaid letter**. You have the right to be accompanied at the hearing by a representative of your choice.
>
> As stated in letter dated January 13, 2017, we will not require that you attend work or perform any of your job

> functions until we have completed the process as required under Section 22 of the Labour Relations Code. You will be entitled to and will receive all payments due to you during this period of time.
>
> Please be guided accordingly." (Emphasis added)

[23] On the said 19 January 2017, the appellant's attorney wrote to the Ministry of Labour and Social Security (MOL). She complained that the appellant was "effectively suspended" on 16 January 2017, when he was handed the letter of 13 January 2017, which made it clear that he would be dismissed "with or without his agreement". She noted that the appellant denied the allegations, wished to be reinstated and that he was suspended without the opportunity to respond to the allegations. She also informed the MOL that the appellant had been constructively dismissed by the JSE.

[24] She pointed out that the appellant was prevented from entering the premises on the instructions of the Board. Counsel also complained that the manner of his dismissal was unfair and unjustifiable. She pointed to the fact that the appellant was asked to choose between a disciplinary hearing and accepting a negotiated settlement.

[25] Consequent on resistance from the JSE, the MOL responded on 23 January 2017, indicating that its intervention would have been premature at that juncture, as there was no basis to support Queen's Counsel's assertion that the appellant "was constructively dismissed", and referred Queen's Counsel to section 2 of the Labour Relations and Industrial Disputes Act (LRIDA) under which the dispute could be treated as a suspension of employment.

[26] On 24 January 2017, Queen's Counsel responded that the matter was being treated as a dispute relating to the appellant's suspension, and requested a date for the conciliation meeting. On 7 February 2017, the MOL responded and informed Queen's Counsel that the JSE had declined the MOL's invitation to attend a conciliatory meeting which was aimed at amicably resolving the dispute. The MOL quoted the reasons proffered by JSE for its refusal:

> "(i) 'at no time did our client suspend Mr. Graham whether for investigatory or disciplinary reasons'."
>
> (ii) The **Jamaica Stock Exchange** has 'every intention of complying with Section 22 of the Labour relations Code' whereby Mr. Graham will be given an opportunity to state his case at a hearing.
>
> (iii) 'Any request by the **MOL** for our client to attend any conciliation meetings prior to the above would be premature and without proper legal foundation as no disciplinary action of any kind has been taken by our client against Mr. Graham to date. In the circumstances therefore no industrial dispute as defined by Section 22 of the **Labour Relations and Industrial Disputes Act (LRIDA)** would exist over which your Ministry would have jurisdiction'."

[27] On 9 February 2017, the appellant's attorney responded and referred to the contents of the JSE's letter that *inter alia* that the appellant "was sent on 'authorised leave' pending the determination of settlement discussions or a disciplinary hearing in relation to his employment". Learned Queen's Counsel directed the MOL to a number of authorities in support of her contention.

[28] By way of letter dated 10 February 2017, the MOL resisted Queen's Counsel's request but it eventually capitulated on 13 February 2017, apparently after having received a letter from the appellant's attorney that day, which further pointed them to the relevant law. On 13 February 2017, the appellant's attorney was advised by the MOL that the JSE and their attorneys were invited to attend a conciliatory meeting on 17 February 2017, to "amicably discuss the matter". The JSE refused to attend as they were of the opinion that there was "no basis for a meeting".

[29] Subsequent to the JSE's refusal to attend the conciliatory meeting, by letter dated 24 February 2017, but delivered on 1 March 2017 (Ash Wednesday), the JSE invited the appellant to attend a hearing which listed several issues against him. The JSE proposed dates for the hearing. He was also advised of the venue and provided with the names of the panellists.

[30] The appellant's attorney acknowledged receipt of the letter on 7 March 2017 and indicated that they were taking instructions. They further informed that their response was without prejudice to the appellant's "existing report to the Ministry of Labour". The JSE objected on the basis that the MOL lacked the requisite jurisdiction.

[31] Consequent on the JSE's objection on 10 March 2017, the appellant applied for a judicial review of the refusal by the Minister of Labour and Social Security (the Minister) to allow the appellant to vindicate his rights in relation to his suspension under LRIDA at the IDT. The matter first came before the court on 15 March 2017 and was adjourned by agreement to 19 April 2017. The appellant instructed his attorney to

request, in lieu of an interim injunction, an undertaking from the JSE not to proceed with a disciplinary hearing. However, subsequent to the hearing, in a letter dated 21 March 2017, the MOL referred the dispute relating to the appellant's suspension, to the IDT for settlement. Consequent on the Minister's referral of the dispute to the IDT, the appellant discontinued proceedings against the Minister and the Attorney General. In the referral letter from the Minister to the IDT's chairman dated 21 March 2017, the Minister referred the matter to the (IDT) in accordance with section 11A(1)(a)(i) of LRIDA. The terms of reference were as follows:

> "To determine and settle the dispute between The Jamaica Stock Exchange on the one hand and Mr. Wentworth Graham on the other hand over the suspension of his employment."

[32] On 24 March 2017, the IDT instructed the parties to provide their briefs within nine days. Sometime in April 2017, the appellant received a copy of an unsigned letter dated 18 April 2017 from the JSE, which was addressed to Mrs Street-Forest. This letter appears to be from the panellists who noted that the proposed dates for the hearing had been rejected. In that letter, the panellists expressed that consideration of the appellant's attorney's schedule was necessary. They requested that the appellant and his attorney propose convenient dates within the first three weeks of May before 28 April 2017.

[33] The JSE was however not in a position of readiness as it was unable to provide the appellant with a copy of the disciplinary code which was necessary for the hearing. By letter dated 4 May 2017 the JSE's attorney, forwarded to the appellant's attorney the

appellant's personnel file and advised that they were instructed that with regard to the copy of the JSE's Disciplinary Code, which the appellant had requested, "the JSE [was] in the process of finalizing the same".

[34] Another unsigned letter dated 8 May 2017 addressed to Mrs Street-Forrest from the panellists was sent to the appellant's attorney advising that the hearing was fixed for 12 and 15 May 2017. The letter further advised that if the appellant failed to attend, the panel would proceed to convene and hear the matter. It also advised of the venue.

[35] Consequently, on 8 May 2017 the appellant's attorney responded to the JSE's attorney and pointed out that they (JSE's attorney's) ought to have known, based on the correspondence with the IDT that Mrs Gibson Henlin, Queen's Counsel with conduct lof the matter, would have been out of the office during the month of May. Counsel also pointed to the following concerns which arose:

> "Dear Madam:
>
> **Re: Claim No 2017 HCV 007788 - Wentworth Graham v The Jamaica Stock Exchange**
>
> Reference is made to the captioned matter.
>
> As you are aware, based on correspondence with the IDT, the month of May is not convenient for Henlin Gibson Henlin. Queen's Counsel who has conduct of the matter is out of office on firm business.
>
> In addition, a number of concerns arise from your letter:
>
> 1. It evidences your client's intention to proceed with the intended disciplinary hearing even

though the issue is before the Court and pending a ruling fixed for the 16th May 2017. It is clear that your client intends to flout the jurisdiction of the Court that is seised of the matter. We are concerned with this as you are also aware of the Court's consideration of the matter and it is expected that you would respect the Court's jurisdiction.

2. The letter evidences an intention to "steal a march" on the employee insofar as the proposed dates are dates prior to the hearing of the matter in Court.

3. Your client and its panel are deliberately placing the employee in an invidious and disadvantageous position. You are aware that he cannot participate in 'the hearing' at this point having appeared before the Court and argued that it should not proceed due to the proceedings relating to his suspension that is fixed for hearing on the 19th September 2017 at the IDT.

4. The continuing unilateral communication between you, the panel and the employer notwithstanding the knowledge of our client's address and also that he is represented by Henlin Gibson Henlin.

Apart from the foregoing, you will recall that we indicated on our client's behalf that we are not able to properly prepare a response for the disciplinary hearing for three reasons:

1. Our client requires a copy of his complete personnel file in order to answer the allegations stated in the letter of the 24th February 2017. The request has been outstanding since the 8th March 2017 and was only done on the 5th May 2017.

2. We have not received the addendum to the JSE disciplinary code. As you have

indicated in your letter of the 5th May 2017 this code that is to guide the disciplinary hearing is still being 'finalized'.

3. We are not available during the month of May;

Finally, we hereby again invite you and your client to engage our client in discussions to resolve the matter of his intended termination in accordance with section 19 of the Labour Relations Code.

We also wish to advise that we have brought your client's proposed action to the attention of the Court and await a response from the Registrar of the Supreme Court to guide our future steps in the matter. Nunes Scholefield DeLeon & Co. has been advised of the details of the communication with the Court."

[36] On 19 April 2017 the appellant filed an amended notice of application for court orders in which the appellant sought the following:

"1. An interim declaration that the appellant has been suspended from his employment from the 16th January 2017.

2. An interim declaration that the Respondent is obliged in this case to comply with the directions of the Ministry of Labour and Social Security to attend the Industrial Disputes Tribunal for the settlement of the dispute between the Appellant and the Respondent;

3. An injunction restraining the Respondent from proceeding with disciplinary hearing(s) against the appellant pending the outcome of the proceedings at the Industrial Disputes Tribunal or further order for this court;

4. An injunction directing the Respondent to permit the appellant to attend work and perform his duties pending the outcome of the proceedings at the Industrial Disputes Tribunal and the application for

the interim declaration and any claim filed consequent on directions herein;

5. Costs.

6. Such further and/or other relief as this Honourable Court deems just including but not limited to directions to the appellant to file a Claim against the Respondent within such time as this Court may direct."

[37] The grounds on which the appellant sought these orders against the respondent are as follows:

"1. Pursuant r. 17.1 and r. 17.2 of the Civil Procedure Rules 2002.

2. The appellant was suspended from his employment by letter dated the 13th day of January 2017.

3. The matter concerns a dispute relating to the suspension as contemplated by section 2(b)(ii) of the Labour Relations & Industrial Disputes Act (LRIDA) of the appellant from his employment or duties with the Respondent.

4. The appellant was suspended from his position as Chief Regulatory Officer of the Regulatory & Market Oversight Committee or Division of the Respondent on the 16th January 2017.

5. The appellant referred the matter of his suspension or action to the Ministry of Labour and Social Security on the 19th January 2017 in accordance with the Labour Relations & Industrial Disputes Act (LRIDA).

6. The Ministry of Labour and Social Security invited the appellant to consider treating his reference as a suspension and excluding reference to constructive dismissal as an alternative on the 23rd January 2017.

7. The appellant complied on the 24th January 2017.

8. The Ministry of Labour and Social Security had initially refused or neglected to discharge the duty to treat with or to refer the dispute concerning the applicant's suspension in accordance with section 11A of LRIDA to the Industrial Disputes Tribunal notwithstanding several requests of them on the appellant's behalf to do so.

9. The Respondent has refused to submit to the jurisdiction, directions or requests of the Ministry of Labour and Social Security on the ground that it has no jurisdiction as a suspension has not taken place.

10. The Ministry of Labour and Social Security by letter dated the 21st March 2017 has now referred the dispute to the Industrial Disputes Tribunal in accordance with section 11A(1)(a)(i) of the Labour Relations & Industrial Disputes Act.

11. The Respondent's act of refusing to attend conciliation proceedings at the directions, request or invitation of the Ministry of Labour and Social Security or to otherwise deal with the appellant's dispute relating to his suspension is in breach of his contract of employment and the full terms and effects of the Labour Relations & Industrial Disputes Act including sections 2, 3 and 11A and 11B thereof.

12. In relation to the Respondent, it is appropriate that the Claim for relief for declarations and injunctions be made against it.

13. The Respondent unless restrained intends to proceed with the disciplinary hearing.

14. A separate common law action for breach of contract is not being pursued because LRIDA is incorporated into the appellant's contract of employment. In addition, LRIDA section 3 contemplates that employers and workers will adhere to the principles for promoting and developing healthy labour relations including those underlying the Labour Relations Code.

a. LRIDA and the Code "provides the comprehensive and discrete regime for the settlement of industrial disputes in Jamaica"

15. The appellant has a personal and public interest in ensuring that the provisions of the Labour Relations & Industrial Disputes Act is [sic] complied with.

16. The appellant has a right to be heard having regard to the full terms and effect of LRIDA.

17. The appellant has an interest akin to property in his job.

18. The appellant's employment may be or is likely to be terminated by the Respondent without reference to its obligation under the contract of employment to comply with and have regard to the labour laws of Jamaica including LRIDA and the Labour Relations Code.

19. The appellant has a legitimate expectation that the Respondent would comply with LRIDA and the labour Relations Code and is entitled to the protection thereof.

20. The appellant's employment may be terminated without reference to his right to obtain redress in relation to his suspension under section 2 of LRIDA.

21. Time is of the essence as the appellant's employment has been suspended and there is no indication that the Respondent intends to deal with the dispute relating to his suspension prior to holding a disciplinary hearing which could lead to the termination of his employment.

22. Section 11B provides a limitation period within which the dispute is to be dealt with.

23. The time limit for making the application has not been exceeded.

24. There are special circumstances for the grant of the reliefs and injunctions in this case."

[38] The appellant instituted proceedings on 24 April 2017 in which he claimed the following *inter alia*:

> "1. A Declaration that the Claimant is entitled to the benefits and rights conferred by his contract of employment including [sic] the statutory procedures and rights conferred on him under the Labour Relations industrial Disputes Act, Regulations and the Labour Relations Code.
>
> 2. A Declaration that the Defendant is required to comply with and/or exhaust the proceedings and procedures provided under the Labour Relations & Industrial Disputes Act and its regulations for dealing with disputes which include the Claimant's suspension.
>
> 3. A Declaration that the Defendant is required to comply with and/or exhaust the proceedings and procedures provided for under the Labour Relations & lndustrial Disputes Act and its regulations for dealing with disputes including the Claimant's suspension prior to embarking on disciplinary proceedings arising from the same facts.
>
> 4. A declaration that the Claimant is entitled to remain and/or continue in his employment in accordance with its terms.
>
> 5. An injunction restraining the Defendant from proceeding with or otherwise convening disciplinary hearing(s) against the Claimant pending the outcome of the proceedings relating to the Claimant's suspension at the Industrial Disputes Tribunal;
>
> 6. Damages for breach of contract of employment;
>
> 7. Damages for libel;
>
> 8. Damages for loss of Investment income since 2008 to date;
>
> 9. Alternatively, damages being retroactive salary from 2008 to date;

..."

The judge's findings

[39] The learned judge, in refusing the appellant's application for an interim injunction, found that there were serious issues to be tried but was of the opinion that damages could be an adequate remedy. She noted also that there was no evidence that the JSE was not "a viable organization and therefore would not be in a position to meet an award of damages if one should be made against it". She rejected Mrs Gibson Henlin's submission that the appellant was deprived of his job without reference to the "specially created regime".

[40] The learned judge also found that the balance of convenience lies in the respondent's favour. In so finding, she said:

> "[69] In weighing the balance of convenience I remind myself that I may take into account the prejudice which the appellant may suffer if no injunction is granted; the prejudice to the JSE if it is; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking and the likelihood of either party being able to satisfy such an award. The fundamental principle is that the court should take 'whichever course seems likely to cause the least irremediable prejudice to one party or the other.'
>
> [70] The course, in my view, that would result in the least irremediable harm would favour the JSE and the withholding the injunction for the following reasons:
>
> i) The injunction would require that the JSE continue to pay the appellant his full salary and emoluments until the outcome of the dispute regarding his alleged suspension and more likely than not until the outcome of the

disciplinary proceedings. The court is not unmindful that after the IDT's determination, there may well be an appeal. This may take several months or even years. In practical terms this could result in significant costs to the JSE which will not be recoverable in any event.

ii) The injunction would require that the disciplinary hearing to resolve the allegations made against the [appellant] be halted, and for how long this would be anyone's guess, in light of my observations above. This would affect not only the rights of the [JSE] as an employer, to conduct disciplinary proceedings but also those of the [JSE] to have the allegations against him resolved in a timely manner. This is an essential factor in a healthy industrial relations landscape.

iii) There is no evidence that the [appellant] would be in a position to satisfy a cross-undertaking in damages.

iv) The [appellant] would suffer less prejudice proceeding to the disciplinary hearing. From the evidence it would appear that the hearing will be conducted by persons who are unconnected to the [JSE] and the parties involved who are experienced in the field of industrial relations. The result of those proceedings is unknown. It could well be that the allegations are not made out against the [appellant] and he retains his job. However, should that not be the case and he is dissatisfied with the decision, he is not without a remedy. He could seek redress at the Ministry of Labour or before the courts."

The appeal

[41] Being utterly displeased with the learned judge's refusal to accede to his requests, the appellant appealed and had filed the following grounds of appeal:

> "a. The Learned Judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing to grant the orders sought in the Amended Application for Court Orders.
>
> b. The Learned Judge erred as a matter of fact and/or law in finding that damages would be an adequate remedy in this case.
>
> c. The Learned Judge erred as a matter of fact and/or law in failing to recognize that the Appellant cannot be compensated in damages if he were to lose his job and also his right to approach the tribunal in relation to his suspension prior to the disciplinary hearing.
>
> d. The Learned Judge erred as a matter of fact and/or law in failing to recognise that the Appellant has an interest akin to a property right in his job which cannot be compensated for in damages."

[42] The appellant sought the following orders:

> "a. Injunction restraining the Respondent from proceeding with disciplinary hearing(s) against the [appellant] pending the outcome of the proceedings of the [IDT] is granted.
>
> b. Injunction directing the Respondent to permit the [appellant] to attend work and perform his duties pending the outcome of the proceedings of the [IDT] and the application for interim declaration and any claim filed consequent on directions herein is refused.
>
> c. Costs to the Appellant to taxed if not agreed."

The appellant's submissions

[43] Mrs Gibson Henlin had submitted that Harris J exercised her discretion wrongly because she misunderstood both the law and the evidence.

The appellant's evidence

[44] The appellant pointed to the fact that he was commended in a letter dated 16 December 2016, by the JSE's company, board and management and which was signed by Mrs Street-Forrest. It is necessary to quote the letter which she signed.

> "Dear Wentworth,
>
> **The Board and Management of JSE thank you for your hard work and contribution which positively impacted the company's excellent performance for 2016.**
>
> This year saw us making strides in achieving some of our strategic goals as we have been realizing positive results throughout the organization. **This has given rise to the payment of an incentive which is incorporated in your salary.**
>
> As we look forward to next year with its challenges, we trust that with your continued commitment and dedication we will be able to successfully achieve our objectives.
> We take this opportunity to extend to you and your family our best wishes for the holidays and the gift of peace and prosperity throughout 2017." (Emphasis added)

[45] Yet four days prior to the signing of this letter, the appellant's efficacy was questioned by Mrs Street-Forrest. Even more significant is that on 16 January 2017, upon his return to work expecting to meet with Mr Morrison at his (Mr Morrison's) invitation, he was handed a letter which accused him of behaviour which contributed to

the erosion of the substratum of employee relationship and which warranted his exclusion from the property.

[46] It was the appellant's evidence that the JSE was in breach of his contract of employment and the labour laws of Jamaica which are incorporated into his contract of employment by virtue of its inclusion in the employee's handbook. He averred that, by its letter of 13 January 2017, the JSE demonstrated its intention not to be bound by LRIDA and the Code. He further averred that JSE ignored the LRIDA and the Code by its issuance of the letter of suspension.

[47] The letter, he indicated, gave him two options which would result in the termination of his employment. He was either to engage in discussions to arrive at a "mutually agreeable settlement" and if those discussions were not concluded successfully the JSE would embark on the process "set out in the Code". He pointed out that the letter was signed by Mrs Street-Forrest. He was instructed not to return to work and to advise the JSE of his decision in relation to the two options he was given by 20 January 2017.

[48] The appellant further averred that it was his belief that the letter which suspended him was issued in bad faith because in his capacity as regulator he had ruled adversely against the JSE. He asserted that there was a conflict of interest. He complained that the letter dated 13 January 2017 was prepared in advance of the meeting, and he was not given an opportunity to make representation, particularly in respect of the issue concerning JSE rule 407, and the issues alleged in the letter dated

13 January 2017 when compared to the letter dated 16 December 2016 which commended him on his performance.

[49] It was his evidence that his request for clarification as to what was meant by "negotiated settlement" and whether the discussions would result in his termination was based on the tone of the respondent's letter; the fact that he did not apply for vacation leave having just returned from his vacation leave and having had critical issues to attend to was an indication that the respondent intended to terminate his employment.

[50] He informed them that he would attend work and he attempted to do so on 19 January 2017. Upon his return, in the presence of other employees, he was prevented from entering by a security guard who advised him that he was acting on instructions.

[51] On that day, by way of letter, Mrs Street-Forest informed him that any limitation placed on the JSE would be unacceptable as "the possible conclusions of the negotiations ought not to be limited in any way as all options should be on the table for discussion". He was advised that the matter would proceed to a disciplinary hearing. He asserted that he made all attempts "as were available to [him] to end or deal with [his] suspension" attending work and agreeing to a discussion.

[52] The appellant further asserts that he is a worker within the meaning of the LRIDA. He deponed that the disciplinary hearing is based on the same facts which resulted in his suspension and which has been referred to the IDT.

[53] He pointed to the difficulty he encountered in attempting to have the JSE give effect to the terms of LRIDA. The fact that the parties were informed by MOL as early as 24 January 2017 that there was an issue as to whether the appellant was "effectively suspended" indicated that the matter fell within the jurisdiction of the LRIDA.

[54] The JSE however refused to attend the conciliation meeting which was scheduled for 17 February 2017. He directed the court's attention to the fact that it was subsequent to JSE's refusal to attend the said meeting that the JSE invited him to select a date for the disciplinary hearing. On 7 February 2017, the MOL informed his attorney by way of a letter that the JSE indicated he was not suspended neither for investigatory or disciplinary reasons.

[55] On 21 March 2017, before the hearing was scheduled, the MOL advised his attorney by way of letter that the dispute in respect of his suspension had been referred to the IDT.

[56] On 24 March 2017, by way of letter, the IDT requested the case briefs. His attorney complied and provided the respondent's attorney with copy. The said copy was however returned by the respondent's attorney who advised that they would await their copy from the IDT.

[57] Upon receiving the referral of the matter to the IDT, in March 2017 confirming the IDT's acceptance of jurisdiction over the issue of his suspension, his attorney communicated with the respondent's attorney concerning the continuation of these

proceedings and that of the IDT in light of the fact that the IDT's acceptance of jurisdiction over the matter.

[58] On 18 April 2017, the respondent's attorney advised that it would proceed with the disciplinary hearing.

[59] An unsigned letter dated 18 April 2017 from the disciplinary panel was forwarded by the respondent stating its intention to proceed with the disciplinary hearing although the IDT was seised of the matter. The appellant was not provided with contact information for the said panel which would allow him to communicate with them.

[60] The issue "over" the appellant's "suspension" is set for hearing by the IDT on 19 September 2017. The respondent is however seeking to pre-empt a finding by the IDT by conducting a disciplinary hearing before the IDT hears the matter.

[61] The appellant averred that he was blamed for delaying the disciplinary hearing although the JSE is seeking to proceed after the matter was referred to the IDT. In attempting to preserve his right to proceedings before the IDT, he requested from the JSE the necessary documents to assist in preparing his case but has not received all. The very code under which he is to be judged was not yet available.

[62] The appellant has expressed fear that the proceedings and consequently his rights at the IDT will be rendered nugatory if the disciplinary hearing is allowed to proceed. It was the appellant's evidence that it would be unfair and unjust to allow the respondent to proceed with the disciplinary hearing notwithstanding the proceedings at

the IDT. He indicated that proceedings at the IDT are specialised proceedings under the LRIDA from which he can obtain remedies that this court is unable to grant. He however pointed out that the IDT cannot grant interim measures to enforce or preserve its jurisdiction.

[63] Consequently, he approached the court to ensure that his rights at the IDT are preserved and protected as intended by his contract of employment, the LRIDA and its regulations and the Code. He fears that he risks losing his job instead of benefitting from the framework which the LRIDA, the regulations and Code provide.

[64] It was also his complaint that the JSE continues to refuse to act in accordance with the LRIDA and to accept that he has been suspended although the matter had been referred to the IDT. He stated that the JSE has accused him of attempting to delay the disciplinary hearing although its request to attend the hearing was sent after it was aware that a request was made to refer the matter to the IDT and has refused to cooperate and which process it has attempted to frustrate.

[65] He urged the court to prevent the JSE from frustrating the proceedings at the IDT by restraining the JSE because it has expressed its intention to embark on the disciplinary hearing and at the same time insists that he has not been suspended**.**

[66] By his further affidavit he deponed that although his attorney has instructed the JSE not to proceed with the disciplinary hearing because the hearing is based on the same facts which resulted in his suspension, and that matter was referred to the IDT, the respondent is insistent on proceeding with the hearing.

[67] Further, on 21 March 2017 the MOL advised the attorneys that the issue in respect of his suspension was referred to the IDT for settlement. At the IDT's request, case briefs were sent to the IDT and the JSE's attorney.

[68] He averred that unless restrained, the JSE will continue to act in a manner to frustrate the proceedings of the IDT while continuing to insist that he has not been suspended.

The respondent's evidence

[69] Mrs Street-Forest sought to enumerate the issues which she alleged had affected the relationship between the JSE and the appellant as follows:

> "i. the [appellant's] persistent claim that he was entitled to a retroactive increase in salary despite being told that the JSE had considered his request but did not agree to the same;
>
> ii. his claim for compensation due to losses he had claimed to incur when at no time did the JSE indicate or undertake that they would make such a compensation;
>
> iii. incurring excessive mobile charges on his company issued telephone and his failure to settle the outstanding bill;
>
> iv. the incident involving his then Administrative/Regulatory Assistant and the turnover of personnel in his department;
>
> v. his persistence in maintaining that the JSE was in breach of rule 407 when discussions were held with him in which he agreed and understood that there was no legal or regulatory requirement to publish certain information that he requested and his proceeding to publish same;

vi. communication dated 18 December 2016, demonstrating a lack of respect for the general manager.

vii. communication with a listed company which demonstrated a lack of understanding on his part of the importance of the image of the stock exchange which could undermine the worth and stature of the organization."

[70] According to Mrs Street-Forest, the appellant was informed that those issues, "contributed to the erosion of the substratum of the employer/employee relationship". It was her evidence that the JSE was prepared to engage the procedures provided by the LRIDA but offered to have discussions with the appellant prior to proceeding under the LRIDA.

[71] During those discussions and the proposed hearing, in order to facilitate the process, he was not required to attend work. She accepted that in spite of the letter, the appellant attempted to attend work but was prevented from entering. In fact, it was her evidence that it was the appellant's wife who had been collecting his payslips on his behalf.

[72] She also accepted that it was as a result of the appellant's response to her letter dated 17 January 2017, in relation to the two options he had been given, that she informed him by letter 19 January 2017, that he would be given an opportunity to state his case and respond to the issues which, at that point they intended to provide to him.

[73] The appellant was informed by the chairman of the JSE, Mr McNaughton, in a subsequent letter dated 24 February 2017 which detailed the issues which resulted in

the "breakdown in trust and confidence" in him. He was given four dates for the hearing and was advised of the venue and the names of the two panellists whom Mrs Street-Forrest said were not employees of the JSE and who were impartial, independent and experienced in industrial matters. He was advised that he was allowed to be represented at the hearing but was informed not to attend work until after the matter was resolved. She however averred that the JSE did not suspend the appellant.

[74] The JSE, she deponed, was entitled to make that request in order to efficiently manage its operations including its human resources. According to her, "[no] adverse action was taken against the [appellant] whether in relation to his salary and other emoluments and his position as CRO has not been filled and cannot be as he still occupies that post".

[75] The JSE was advised by its attorney at law that no industrial dispute existed that required its attendance at the meetings at the MOL. The MOL was consequently advised by their attorney that they would not attend conciliatory meetings. The MOL nonetheless issued another invitation which was also declined by the JSE.

[76] Mrs Street-Forrest listed what she alleged to be inaccuracies in the appellant's affidavit in support of application for court orders as follows:

> "i. In Paragraph 10 the [appellant] says that he was appointed by the Board of the JSE and was 'the most suitable person for the position of CRO given [his] direct and central role in research and formulating a 'Project Plan' in establishing the Regulatory & Market Oversight Division (RMOD)'. The [appellant] was not appointed by the Board but by the JSE through the

normal channel of appointing certain categories of employees. At no point was it indicated that he was the '***most suitable person for the position of CRO'***- The JSE's culture is to ensure upward mobility for its staff members. While the internal candidate might not be the most suitable candidate for the position, the JSE makes every effort to promote internally while providing the necessary facilities to ensure professional developments through training, coaching and educational assistance. The [appellant] appointment as CRO was done upon the recommendation from the Executive Chairman and the General Manager. In relation to his role in establishing RMOD it is the case that the [appellant] was required to do some research in respect of formulating the RMOD but this venture was a team effort starting at the Board level led by the former Executive Chairman, Roy Johnson, and included myself as General Manager and Mrs. Doreen Parsons Smith, the HR Manager.

ii. Paragraph 12 the [appellant] incorrectly stated that The RMOC and RMOD were created to bring the JSE's operations '***in line with Stock Exchanges worldwide***'. The JSE as part of its strategic objectives, thought that there were clear advantages in demutualization and this decision was taken independently of what other exchanges were doing.

iii. For the avoidance of doubt the RMOD is not a separate entity from the JSE as suggested in the affidavit. It is a division of the JSE.

iv. In paragraph 21 of his affidavit the [appellant] suggests that I acted in a manner which conflicted with my position and role as the JSE's Company Secretary by questioning his actions. As Company Secretary I had the right and indeed the responsibility to speak with my Board regarding matters of regulation of the JSE as a listed entity.

v. I also deny that I ***'pursued a course of action'*** which led to the [appellant] being suspended. The [appellant] was not suspended from his job - he still

occupies the position of CRO and is in receipt of his full remuneration.

vi. The incentive given to the [appellant] and referred to in paragraph 26 of his affidavit was sent to all staff members in recognition that as a team all were instrumental in making the JSE successful in attaining its overall targets.

vii. The letter sent to the [appellant] requesting that he not attend work was not '***as a direct consequence of the fact that the*** [***appellant***] ***made'*** an adverse ruling' against the JSE. My letter dated 13th January 2017 and the JSE letter dated 27th February 2017 set out a number of issues that gave rise to the need for a disciplinary hearing. It should be emphasized that the request for the [appellant] not to attend work was an administrative decision and was clearly not a decision taken by the JSE in relation to any of the matters that are to the subject of the disciplinary hearing which is to be presided over by persons independent of the JSE."

[77] She agreed that the minister referred the matter to the IDT to settle the issue of the appellant's alleged suspension on 21 March 2017. The JSE has however been advised that there is no legal basis for the declarations sought. She also agreed that LRIDA and the Code apply to the appellant's contract but asserted that the JSE has at all material times, throughout all its dealings, complied with the requirements.

[78] It was her evidence that the appellant was informed of the issues and given an opportunity to state his case before an independent panel. She asserted that it is the right of the JSE to conduct a "fair and impartial disciplinary hearing in relation to the [appellant] and any decision which is made by the panel will not be under their control".

[79] The appellant is also entitled to appeal that decision to an independent panel and can further appeal that decision subsequent decision to the IDT. The JSE, she deponed, refused the MOL's invitation to attend conciliatory meetings for reasons stated but it did not indicate that it would not comply with the IDT meeting which has been scheduled.

[80] She denied the appellant's allegation that he was required to sell his shares as a condition of being appointed CRO and that he would be compensated. She said it was a condition of his employment as CRO that he was required to dispose of personal shares in companies listed and regulated by the JSE and he was aware of that condition before he accepted the job. She also rejected his claim to an entitlement to retroactive salary from 2008 and his claim that he was defamed.

[81] According to Mrs Street-Forrest, the JSE has a right to proceed to disciplinary proceedings. The proceedings will be conducted by persons who are not employees of JSE and would lend impartiality and independence to the process. According to her, the proceedings before the IDT in respect of the said suspension are separate and distinct from the issues to be determined at the disciplinary hearing. The IDT, by virtue of its terms of reference, cannot determine the issues which are the subject of the disciplinary hearing and which are to be resolved by the independent panel.

The respondent's submissions

[82] Queen's Counsel, Mr Foster contended that:

"a. The appellant does not have a good arguable appeal;

b. The appeal herein and rights of the applicant would not be rendered nugatory if the injunction pending appeal was refused;

c. There was no evidence before the court that the applicant will be deprived of his job without regard to the Code or that the independent disciplinary panel who will conduct the disciplinary hearing has acted improperly or unfairly or it is inevitable that they will do so.

d. The balance of convenience favours the refusal of the grant of the injunction."

Law/discussion

[83] It is settled law that this court's function in respect of appeals from a judge's refusal to grant an injunction is one of review only. This court ought to forbear from interfering with a judge's exercise of discretion in refusing to grant the injunction and to impose instead its independent discretion unless, as expressed by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, at page 1046:

> "... it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no

> reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

[84] In **G v G** [1985] 2 All ER 2259, Lord Fraser of Tullybelton, in examining the various expressions employed in determining whether the exercise of a judge's discretion ought to be disturbed, made it plain that a Court of Appeal ought only to interfere when:

> "... it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

[85] This court's intervention is further circumscribed by the principles enunciated by Lord Diplock in **American Cyanamid Co v Ethicon Ltd** [1995] 1 All ER 504 and Lord Hoffman in **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] 1 UKPC 16; [2009] 1 WLR 1405 in determining whether to interfere with the exercise of a judge's discretion in refusing to grant the injunction.

Ground a and the orders sought (paragraphs [36] and [41] herein)

Ground a

> "The Learned Judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing to grant the orders sought in the Amended Application for Court Orders."

The order sought at 1

> "An interim declaration that the [appellant] has been suspended from his employment from the 16th January 2017."

[86] In refusing to grant this order, the judge referred to learned Queen's Counsel Mr Foster's submission that the issue of the appellant's suspension was before the IDT and it was for the IDT to determine that issue. She further agreed with Mr Foster's submission as to the undesirability of the court and the IDT determining the matter concurrently. She said:

> "Mr. Foster posited that the [appellant] having invoked the jurisdiction of the IDT the court cannot at the same time in concurrent proceedings determine this question. This could lead to the anomaly of the court ruling one way and the IDT another. This could ultimately result in inconsistent or contradictory decisions."

Analysis

[87] That issue has been placed before the IDT. It would be wholly undesirable for this court to seek to adjudicate on that issue. The learned judge cannot therefore be faulted.

The order sought at 2

> "An interim declaration that the Respondent is obliged in this case to comply with the directions of the Ministry of Labour and Social Security to attend the Industrial Disputes Tribunal for the settlement of the dispute between the Applicant and the Respondent."

[88] The terms of the appellant's employment are set out in the JSE Group Employee's Handbook, at page 175 as follows:

> "In the event that disciplinary action needs to be taken, it should be done in conformity with the Disciplinary **Code (per addendum 2)** subject to the relevant labour laws."

[89] By virtue of having incorporated the labour laws into his contract of employment, in my view, the JSE has submitted itself to the jurisdiction of the IDT. The appellant is thereby entitled, as Queen's counsel Mrs Gibson Henlin submitted, to the benefits of the LRIDA, the regulations and the Code in all matters which affect his employment including disciplinary matters.

Section 22 of the Code reads:

> "Disciplinary Procedure
>
> (i) Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should -
>
> (a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;
>
> (b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;
>
> (c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;

(d) provide for a right of appeal wherever practicable to a level of management not previously involved; (e) be simple and rapid in operation.

(ii) The disciplinary measures taken will depend on the nature of the misconduct. But normally the procedure should operate as follows—

(a) **the first step should be an oral warning, or in the case of more serious misconduct, a written warning setting out the circumstances;**

(b) **no worker should be dismissed for a first breach of discipline except in the case of gross misconduct;**

(c) action on any further misconduct, for example, final warning suspension without pay or dismissal should be recorded in writing;

(d**)** **details of any disciplinary action should be given in writing to the worker and to his representative;**..." (Emphasis added)

[90] An issue for consideration is whether by inviting the appellant to discuss the matter and having listed the complaints in the letter of 13 January 2017, the JSE had commenced the process of triggering the Code. Section 6 of LRIDA provides:

"(1) Every collective agreement which is made in writing after the 8th April, 1975, shall, if it does not contain express procedure for the settlement, without stoppage of work, of industrial disputes between the parties, be deemed to contain the procedure specified

in subsection (2) (in this section referred to as the implied procedure).

(2) The implied procedure shall be-

(a) the parties shall first endeavour to settle any dispute or difference between them by negotiation; and

(b) where the parties have tried, but failed, to settle a dispute or difference in the manner referred to in paragraph (a) any or all of them may request the Minister in writing to assist in settling it by means of conciliation; and

(c) all the parties may request the Minister in writing to refer to the Tribunal for settlement any dispute or difference which they tried, but failed, to settle by following the procedure specified in paragraphs (a) and (b)."

[91] The appellant by way of the letter dated 13 January 2017 which he received whilst he was on leave, was informed of the issues the JSE had with him. He was invited to have discussions in an attempt at arriving at a "mutually agreeable settlement" prior to engaging section 22 of the Code.

[92] It is useful to restate the relevant portion of the letter which reads:

> "...we would be guided by the provisions of *Section 22 of the Labour Relations Code, ('the Code')* and we are prepared to comply with the same, we feel given your position at the JSE, we would, prior to following that procedure, invite you to sit with us in order that we could arrive at a mutually agreeable settlement."

[93] By that letter he was also informed that if he refused to engage in discussions, or if he did, and the outcome was not agreeable, they would commence process under the Code. He was also instructed that he was not to attend work.

[94] The respondent's response by letter of 19 January 2017, to the appellant's request for clarification as to the meaning of "mutually agreeable settlement" and the meaning of the term "authorized leave", was to inform him that he would "receive a letter from the JSE inviting [him] to attend a hearing". It was also as a result of that query that the JSE informed him that he could attend the meeting with a representative. From the JSE's response, it was made pellucid that his termination was likely.

[95] On the said 19 January 2017, the jurisdiction of the LRIDA was invoked by the appellant's attorney's letter to the MOL in which the appellant sought the intervention of the MOL.

[96] The Code specifically provides that such matters should be dealt with expeditiously. Section 21 of the Code provides that:

> "All workers have a right to seek redress for grievances relating to their employment and management in consultation with workers or their representatives should establish and publicize arrangements for the settling of such grievances. **The number of stages and the time allotted between stages will depend on the individual establishment. They should neither be too numerous nor too long if they are to avoid frustration**. The procedure should be in writing and should indicate –
>
> (i) that the **grievance be normally discussed first by the worker and his immediate supervisor—commonly referred to as the 'first stage';**
>
> (ii) that if unresolved at the first stage, the grievance be referred to the department head, and that the **worker delegate may accompany the worker at**

this stage—the second stage, if the worker so wishes;

(iii) that if the grievance remains unresolved at the second stage, it be referred to higher management at which stage it is advantageous that the worker is represented by a union officer; this is the third stage;

(iv) that on failure to reach agreement at the third stage, the parties agree to the reference of the dispute to conciliation by the Ministry of Labour and Employment;

(v) a time limit between the reference at all stages;

(vi) an agreement to avoid industrial action before the procedure is exhausted." (Emphasis added)

[97] Indeed, on 19 January 2017, the JSE had merely indicated its intention to send the appellant a letter inviting him to a hearing for which no date was set. It is true that it would have been desirable that the parties, as a first step, engage in discussions. The Act in fact requires that the parties, before approaching the MOL, should first seek to settle their "dispute or difference" by negotiation. Section 20 of the LRIDA however states:

> "Subject to the provisions of this Act the Tribunal and Board **may regulate their procedure and proceedings as they think fit**." (Emphasis added)

[98] From the correspondence between the parties on the matter, it is likely that such discussions might have been futile as the appellant was not prepared to "enter into discussions for the purpose of agreeing the termination of [his] employment" but was only prepared "to meet to resolve the issues...provided that the settlement" involved the retention of his job. The JSE did not agree to his terms. Based on the JSE's

response, the appellant could reasonably have inferred that the meeting to which he was invited was apparently to negotiate the terms of his separation from the company.

[99] In light of the expressed intention of the LRIDA that such matters ought to be expeditiously dealt with, the appellant approaching the MOL, cannot in my view be considered in breach of the procedure outlined by section 6 of LRIDA as it was evident that there would be no agreement and valuable time would have been wasted. Furthermore, the appellant not being a unionised worker and as a senior employee, the other steps outlined were inapplicable. On the appellant's evidence, the JSE had not disclosed its established arrangements for settling such grievances pursuant to section 22.

[100] Considering the apparent futility of proposed discussions and the resistance of the JSE to submit itself to the jurisdiction of the MOL at that stage, the MOL in keeping with the intention of the legislators, in my view, properly sought to have the parties' grievances aired with the required dispatch, by inviting them to attend a conciliatory meeting pursuant to section 6 of LRIDA. That meeting was fixed for 17 February 2017.

[101] The JSE informed the MOL on the day the parties were to attend the conciliatory meeting of their intention not to attend. In my view, the JSE's refusal was not in keeping with the spirit of the legislation to which it contracted to submit especially in light of the fact that the intention of the legislators is that these matters are to be dealt with expeditiously.

[102] An important consideration is that the appellant was a very senior employee who was not only prevented from doing his job; he was "locked out" of his place of employment. He was not even permitted to enter for the purpose of collecting his payslip. The legislators were obviously mindful that the urgency of some matters might require, in the interest of justice, the truncating of some of the stages in deserving cases. The MOL, in inviting the parties to attend a conciliatory meeting, would have considered the circumstances sufficiently urgent to do so without a disciplinary hearing.

Was the JSE able to proceed expeditiously with the disciplinary hearing?

[103] Of significance is that the JSE had not yet invited the appellant to attend a hearing before he approached the MOL. The invitation to attend the hearing was approximately one week after the conciliatory meeting was scheduled to be heard. Of importance also is that the JSE's subsequent letter of 24 February 2017, which invited the appellant to attend the disciplinary hearing, consisted of 37 pages outlining the issues. Although dated 24 February 2017, it was delivered to the appellant on 1 March 2017 and had caused another package to be delivered to him on 2 March 2017.

[104] The proposed dates for the hearing were 8, 9, 16 and 17 March 2017. Those dates provided the appellant with approximately one or two weeks to instruct his attorney in respect of the numerous allegations documented in the letter.

[105] It is of significance that up to the point in time that the date for the conciliatory meeting was set, the JSE was not in a position of readiness to commence a disciplinary hearing. On 8 March 2017, the appellant's attorney had requested a copy of the

appellant's personnel file for which she undertook to pay and a copy of the JSE disciplinary code which was referred to at clause 14 of the JSE's handbook. The disciplinary code was never provided. The personnel file was however provided on 8 May 2017.

[106] Neither the appellant, his attorney nor the panellists were provided with the disciplinary code which was to guide the process as it had not yet been finalized. The JSE was therefore not in a position of readiness to proceed with the hearing as the parties including the panellist would have been without proper guidance.

[107] The disciplinary procedure outlined in the Code at section 22(1) was not yet agreed and provided in writing. Importantly also on 23 January 2017, when the appellant commenced the process of approaching the IDT, the JSE had informed him of their intention to follow the procedure as laid down by the Code. As a senior employee, he was however already relieved of his duties and excluded from his place of employment without any prior discussion. In light of the senior position he holds, his exclusion from the premises and job was a matter which required urgent attention.

The proposed hearing before the IDT

[108] It is apparent that the MOL regarded the matter as sufficiently urgent by accelerating the process to the stage of a conciliatory meeting. The terms of reference communicated by the IDT dated 21 March 2017 were as follows:

> "To determine and settle the dispute between the Jamaica Stock Exchange on the one hand and Mr Wentworth Graham on the other hand over the suspension of his employment."

[109] The IDT's regime is a discrete one. It provides, as pointed out by Rattray P in **Village Resorts Limited v The Industrial Disputes Tribunal and Others** (1998) 35 JLR 292 at page 299 and relied on by the learned judge, that:

> "The Act, the Code and Regulations therefore provide the comprehensive and discrete regime for the settlement of industrial disputes in Jamaica..."

[110] Recently in the Privy Council, in the matter **University of Technology of Jamaica v Industrial Tribunal and Others** [2017] UKPC 22 Lady Hale in delivering the Board's decision (at paragraph 23) approved Rattray P's explanation of the IDT's remit and function in **Village Resorts** when he said:

> "The Labour Relations and Industrial Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the work place, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law."

[111] In the instant case, the learned judge therefore correctly expressed the view that the:

> "The [appellant] having elected to have this issue placed before the IDT, it is for the Tribunal to determine whether he has been suspended or not. There are two positions being put forward, one from the appellant and the other from the respondent. It is for the IDT to resolve the factual conflicts that have risen between the parties in order to determine if the applicant has been suspended or not. If I were to embark upon this exercise, it would require by necessity that I trespass upon the terrain of the IDT. Any

> decision that I make would effectively interfere with the Tribunal's discrete and specialized jurisdiction to settle disputes referred to it (as has been done in this case)."

[112] The issues for determination of the panel at a hearing is whether the allegations levelled against the appellant are justified and if so, what sanction ought to be imposed. His separation from the JSE is a likely outcome.

[113] The remit of the IDT is wide and discrete as observed above. Its scheme is entirely different. It is not bound by the rules of court proceedings. Those terms of reference before the IDT encompass the dispute between the parties and are not limited merely to the question of whether he was suspended. In determining and settling the dispute "over the suspension of his employment" the IDT is empowered to examine and consider all the issues surrounding his exclusion from the premises and his job and if suspended whether it was justifiable.

[114] There is no challenge that the issue in this matter is an industrial dispute which is governed by the LRIDA. Industrial dispute is defined by section 2 of LRIDA to include

> "The termination or suspension of employment of any such worker."

[115] As noted, the JSE, by its rules, agreed to be governed by the LRIDA. The letter of 24 February 2017, by which the JSE attempted to adhere to the Code by inviting the appellant to a hearing, was sent after the appellant had invoked the jurisdiction of the LRIDA and the invitation by the MOL to the parties to attend the conciliatory meeting.

[116] I am mindful that this matter is set for hearing before the IDT. In my view, it would be inappropriate for this court to usurp the function of the IDT before which the matter is to be determined. I will however opine that in light of the foregoing, the JSE was obliged/ought to comply with the directives of the MOL.

The order sought at 3

> "An injunction restraining the Respondent from proceeding with disciplinary hearing(s) against the[appellant] pending the outcome of the proceedings at the Industrial Disputes Tribunal or further order for this court."

[117] The learned judge in her analysis referred to the oft cited principles enunciated in **American Cyanamid Co** and endorsed in **Olint** by Lord Hoffmann, who adopted and clarified the principles enunciated by Lord Diplock.

[118] The learned judge also noted that this court in **Heather Montaque v GM and Associates Limited and Another** [2013] JMCA App 7, applied the principles articulated by Lord Diplock in **American Cyanamid** and Lord Hoffmann in **Olint.**

[119] Harris J, at paragraph [54], referred to Chadwick J's dictum in **Nottingham Building Society v Eurodynamics Systems Plc and others** [1993] FSR 468 at 474 that "the overriding consideration for the court is to take the course that is likely to involve the least risk of injustice if it [granting or withholding the injunction] turns out to be wrong".

Analysis

[120] In **Olint**, Lord Hoffmann in explaining the purpose of an injunction endorsed the views expressed by Lord Diplock in **American Cyanamid** regarding the critical factors which a judge ought to consider in granting an injunction. He said:

> "16 ...The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> 17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other...
>
> 18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been

> wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.
>
> 19 ...What is required in each case is to examine what on the particular facts of the case the consequences of granting or with-holding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that court will feel, as Megarry J said in **Shepherd Homes Ltd v Sandham** [1971] Ch 340, 351, 'a high degree of assurance that at trial it will appear that the injunction was rightly granted'." (Emphasis added)

Serious issues to be tried

[121] The learned judge found that there were several serious issues to be tried which she enumerated as follows:

> "i). Whether or not to proceed with the disciplinary hearing while the dispute concerning the applicant's alleged suspension is still pending would be in breach of the terms and conditions of his employment in light of the incorporation of the provisions of the LRIDA and the Code in his contract of employment;
>
> ii) whether by taking steps to proceed with the disciplinary proceedings, the JSE is acting in a manner designed to frustrate and circumvent the objectives of the LRIDA and Code by seeking to deprive the applicant of the benefits conferred by them in relation to the determination of his suspension which is before the IDT in breach of the terms and conditions of his employment.
>
> iii) whether the disciplinary hearing (and in particular an adverse outcome) would prevent the applicant from adjudicating or pursuing the dispute relating to his suspension at the IDT as contemplated and provided for in his contract of employment."

The balance of convenience: in whose favour it lies?

[122] Although the learned judge acknowledged that there were serious issues to be tried, in determining where the balance of convenience lies, she failed to advert to the relative strength of appellant's case should the injunction turn out to have been wrongly granted or withheld. In determining the course that would result in the least irremediable harm, the learned judge failed to properly balance the scales. Her concentration was solely on the likely prejudice to the JSE. Her findings in that regard have been stated at paragraph [40] herein.

[123] Mr Foster agreed with the learned judge's assessment of the balance of convenience having regard to the length of time it would take to resolve the dispute and the risk of prejudice to the appellant, who is still being paid his full salary and emoluments despite not attending work, and despite the respondent's contention that it had lost trust and confidence in the appellant. He had asked that the court bear in mind that the outcome of the disciplinary proceedings is unknown and may yet be determined in the appellant's favour and also that the appellant has other means of redress if he is dissatisfied with the outcome.

[124] That reason for withholding the injunction in my view, unreasonable. The JSE's evidence is that he is not suspended. In the light of that evidence, he would be entitled to his salary in any event until the due process of the law has taken its course, or and if he is found to be culpable of acts which require his dismissal or suspension. Worthy of note is that the disciplinary act of barring him from his job occurred prior to any discussion.

[125] Importantly also, the IDT is already seised of the matter which has been set for 19 September 2017. True it is that an appeal might emanate from its decision. But to yield to the jurisdiction of the IDT at this point in time, in my view, is certainly to advance the matter thus reducing the period before its completion especially in light of the JSE's lack of readiness to proceed. Indeed, had the respondent attended the conciliatory meeting, the delay which has been occasioned might have been obviated as all the issues would have been ventilated at that meeting which might have resulted in an amicable resolution. To allow the respondent to convene a hearing at this juncture would further delay the matter.

[126] Another reason proffered by the learned judge for withholding the injunction is that:

> "The injunction would require that the disciplinary hearing to resolve the allegations made against the applicant be halted, and for how long this would be anyone's guess in light of my observations above. This would affect not only the rights of the JSE as an employer, to conduct disciplinary proceedings but also those of the applicant to have allegations against him resolved in a timely manner. This is an essential factor in a healthy industrial relations landscape."

[127] The learned judge's statement that the injunction would require the disciplinary hearing to be halted, in my view, belies the evidence. As observed above, the unchallenged evidence is that the disciplinary hearing had not commenced. He was invited to have discussions. The appellant on the other hand, had taken steps with the necessary promptitude to have the matter heard pursuant to the LRIDA and the Code and therefore ought not to be penalized for expediting the matter. As observed, the JSE

was not in a position of readiness at the point in time that the appellant approached the MOL. Indeed, it was the respondent who sought to halt the proceedings which had properly commenced pursuant to the LRIDA and the Code.

[128] The learned judge also stated that:

> "It could well be that the allegations are not made out against the applicant and he retains his job. However, should that not be the case and he is dissatisfied with the decision, he is not without a remedy. He could seek redress at the Ministry of Labour or before the courts." In my view, consideration is to be given to the fact that the appellant had sought redress at the MOL and the IDT, was seised of the matter before the JSE sought properly to convene a hearing."

[129] In my view, consideration is to be given to the fact that the appellant had sought redress at the MOL, and the IDT was seised of the matter before the JSE sought properly to convene a hearing.

[130] Whereas it is not entirely correct to say that the JSE has completely ignored the process under the LRIDA, in my view, the appellant having commenced the process before the JSE commenced disciplinary hearing, the JSE ought to have submitted to the process by attending the conciliatory meeting which would have resulted in the issues being ventilated with the necessary celerity which is required of a matter of this nature involving a very senior employee having been excluded, not only from performing his duties, but also from the property by a junior employee.

The issue of prejudice

The panellists

[131] The learned judge's finding that:

> "The applicant would suffer less prejudice to the disciplinary hearing. From the evidence it would appear that the hearing will be conducted by persons who are unconnected to the JSE and the parties involved and who are experienced in the field of industrial relations. The result of those proceedings is unknown. It could well be that the allegations are not made out against the applicant and he retains his job. However, should that not be the case and he is dissatisfied with the decision, he is not without a remedy. He could seek redress at the Ministry of Labour or before the courts."

[132] In concluding that "[t]he applicant would suffer less prejudice proceeding to disciplinary hearing", the learned judge, as already stated, said:

> "From the evidence it would appear that the hearing will be conducted by persons who are unconnected to the JSE and the parties involved and who are experienced in the field of industrial relations."

The learned judge concluded that the:

> "[appellant] would suffer less prejudice proceeding to the disciplinary hearing. From the evidence it would appear that the hearing will be conducted by persons who are unconnected to the [respondent] and the parties involved who are experienced in the field of industrial relations."

[133] The learned judge concluded that the hearing would be conducted by persons who are unconnected to the JSE; however, the appellant and indeed the court at that juncture was bereft of vital information about the panellists. Indeed, it was a complaint of the appellant, which the learned judge failed to consider, that the appellant knew nothing about the panellists.

[134] The learned judge did not advert to the appellant's complaint that he did not know who the panellists were and that they were selected by the respondent through whom they communicated although the appellant's attorney was known to the JSE and so too the appellant's address.

[135] The only evidence that these persons are unconnected to the JSE came from Mrs Street-Forrest who is one of, if not the appellant's main accuser. No details concerning the panellists were provided.

[136] Apparently, the issue which ostensibly culminated in the appellant's "efficacy" being questioned by Mrs Street-Forrest and other managers/directors and their connected parties was the appellant's insistence that such persons declare balances of zero and below. The appellant's complaint that Mrs Street-Forrest, who is not an independent party, is only communicator with the panellists.

[137] The appellant's complaint that there was a unilateral communication between JSE via Mrs Street-Forrest and the panellists was ignored by the learned judge. A factor of significance is that the letter inviting him to the disciplinary hearing which was sent to Mrs Street-Forrest was unsigned by the author. An important issue is whether that letter should have formed a part of the court's record.

[138] Furthermore, the JSE failed to act with the necessary celerity in convening the disciplinary hearing whereas the appellant, not only triggered the proceedings under the Act with alacrity, but also those proceedings had overtaken the need for a disciplinary hearing. As observed above, the unchallenged evidence is that the

disciplinary hearing had not commenced. He was merely invited to have discussions. The appellant has taken steps with the necessary promptitude to have the matter heard pursuant to the LRIDA and the Code and therefore ought not to be penalized. Indeed, it was the respondent who sought to halt the proceedings which had begun pursuant to the LRIDA and the Code.

Relative strength of the parties' cases

[139] The learned judge failed to consider the relative strength of the parties' cases. The issue over the appellant's suspension has been directed to the IDT. That issue, as above stated, is for the IDT's determination. It would therefore be undesirable to arrive at any finding in that respect.

[140] Although the learned judge's reticence in making the declaration sought is understood, it was nevertheless necessary, in considering whether to grant or withhold the injunction, to examine the relative strength of each party's case. This was necessary in order to arrive at a just decision as to where the least irremediable prejudice lay. Lord Diplock in **America Cyanamid** admonished in this regard:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters, to be dealt with at trial ...".

[141] The learned judge was obliged to examine, as Lord Hoffmann directed, "the relative strength of the parties' cases" in respect of the alleged suspension. Examination

of the strength of the parties' cases and the "consequences of granting or withholding the injunction" was crucial in determining which party was likely to suffer irremediable prejudice. Such an examination was therefore necessary to assist the learned judge in determining whether at the trial "the chances that it will turn out" that the injunction was "wrongly granted are low" or whether there is "a high degree of assurance that at trial it will appear that that the injunction was rightly granted". Lord Hoffmann plainly stated that:

> "What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham [1971] Ch 340, 351*, "a high degree of assurance that at the trial it will appear that at the trial [sic] the injunction was rightly granted."

[142] The appellant did not apply for leave. Mrs Street-Forrest's evidence was that the JSE did not suspend the appellant but that "the JSE did not require [the appellant] to attend work while either discussions with him or the hearing was being arranged in order to facilitate either of those two processes". It was also her evidence that "he was not required to attend work until the issues raised in the [JSE's] letter dated 13th January were addressed" and he was asked "not to report to work until the procedure required by the Code was completed".

[143] By his letter of 17 January 2017, the appellant informed the respondent of his intention to return to work because he did not apply for vacation. In **Richard Duncan**

v The Attorney General Civ App No 13 of 1997 delivered 8 December 1997 in the Court of Appeal of Grenada, Bryon CJ, in considering a similar issue, opined at page 13 as follows:

> "The Concise Oxford Dictionary 8th edition, describes, 'Leave' as 'Permission to be absent from duty'. ... It is for the benefit of the worker.
>
> The character of absence from duty is also relevant because not every absence from duty is leave. The requirement to absent oneself from duty, even with pay, can be a disciplinary sanction. For example, a temporary removal for disciplinary reasons is the sanction of suspension. A permanent exclusion from the performance of one's employment would be neither a grant of leave nor a suspension. In my view it would be a matter of fact to be determined from the circumstances whether an indefinite exclusion is in reality permanent. A permanent exclusion would, in effect be a removal from office, by whatever euphemism it is described. **The payment of emoluments will impact on the question of financial loss, but a professional person or senior public servant will suffer other substantial losses, such as loss of reputation and loss of the satisfaction of discharging duties, loss of the opportunity for promotion and so on. The payment of salary would be only one factor to be considered in deciding whether the officer in receipt has been removed from office It is not conclusive. An officer who is prevented from discharging the duties of his office and against his will and without lawful authority has been removed from office even if he is in receipt of salary...**
>
> It is unthinkable that the constitution could intend that the PSC could arbitrarily order a public servant to be prevented from performing his job for an indefinite period.
>
> The Staff Orders categorise a variety of types of leave.. These include 'departmental leave' 'leave on ground of urgent private affairs'; 'overseas leave prior to retirement; 'leave prior to resignation'; ' vacation leave'; 'sick leave' There is no provision for the grant of leave to facilitate

> improvements in the organisation of a department or Ministry.
>
> An allegation that one's absence from work is necessary for making improvements in the workplace is a serious complaint about one's ability or attitude. Requiring an officer to be absent from work for that purpose is not for his benefit. It implies dissatisfaction with the officer. In my view it cannot be leave." (Emphasis added)

[144] In the instant case, an issue was whether, without an application from the appellant for leave, the JSE's request that the appellant not attend work until the procedure under the Code was completed, albeit he received his salary, was not, as Zacca CJ found in **Regina v Commissioner of Police, ex parte Leslie Harper** (1994) 31 JLR 34 "to indefinitely suspend [him]". In that case, Zacca CJ found that there was "an effort to disguise the appellant's suspension under the guise of the grant of vacation leave".

[145] In the instant case, there is however a strong indication that there was no such attempt at disguise. The JSE's act of directing the guard to prevent the appellant from entering the premises provides a strong argument that he was not merely sent on leave, as persons on leave can still access the compound, but rather, in my view, is strongly supportive of the appellant's contention that he was suspended. Of consideration is that it was Mrs Street-Forrest's evidence that the appellant was sent on leave to facilitate the discussions and the hearing. She however provided no explanation as to how his absence from the job could facilitate the discussions and the hearing.

[146] The appellant however contends that he was suspended. If suspended, he would have been removed without first having had the opportunity of a hearing. The issue "over his suspension" therefore needs to be resolved urgently and the IDT is already seised of the matter.

[147] A further and very pertinent consideration is the expense of engaging counsel both at the hearing and before the IDT. Had the learned judge consider the relative strength of the parties cases she might very well have arrive at a different conclusion.

[148] In my view, the fact that the process which the appellant has invoked under the LRIDA has advanced to the end stage, that is, determination by IDT, the disciplinary hearing ought to yield as the JSE is, to my mind, seeking to commence the process a fresh.

[149] The foregoing compels me to the view that the JSE ought to be restrained from proceeding with or otherwise convening a disciplinary hearing against the appellant pending the outcome of the proceedings before the IDT which is set for 19 September 2017. In my view, in failing to restrain the JSE from proceeding with the disciplinary hearing, the learned judge erred.

The order sought at 4

> "An injunction directing the Respondent to permit the [appellant] to attend work and perform his duties pending the outcome of the proceedings at the Industrial Disputes Tribunal and the application for the interim declaration and claim filed consequent on directions herein."

[150] I am of the view that that issue ought to be reserved for IDT which is the appropriate forum for its determination.

[151] In respect of ground (a) in the grounds of appeal, Mrs Henlin Gibson's complaint that the learned judge erred in not granting the order sought at number 3 is therefore meritorious.

Grounds b, c and d as referred to at [paragraph 41] herein

Adequacy of damages

[152] For convenience, grounds b, c and d will be dealt with together.

> "The learned judge erred as a matter of fact and/or law in finding that damages would be an adequate remedy in this case."
>
> "The Learned Judge erred as a matter of fact and/ or law in failing to recognise that the Appellant cannot be compensated in damages if he were to lose his job and also his right to approach the tribunal in relation to his suspension prior to the disciplinary hearing."
>
> "The learned judge erred as a matter of fact and law in failing to recognise that the Appellant has an interest akin to a property right in his job which cannot be compensated for in damages."

[153] The learned judge disagreed with Mrs Gibson Henlin's following submission:

> "[the appellant's] interest in his job is akin to a property right and his right to this property interest and deprivation without reference to the specially created regime cannot be adequately compensated in damages..."

Her disagreement with Mrs Gibson Henlin's view was predicated on her view that:

> "Firstly, the evidence does not support that he has been deprived of job without any reference to the 'specially created regime'. Secondly, in the context of the substantive claim, if liability is ascribed to the respondent in respect to

> all the causes of action pleaded, damages would still be the appropriate and adequate remedy to compensate him for any loss he suffers.
>
> I have noted that there is no evidence before the court that the JSE is not a viable organization and therefore would not be in a position to meet an award of damages if one should be made against it."

The learned judge also expressed the view that there was no evidence that the appellant would be in a position to satisfy a claim under the cross-undertaking.

Submission on the appellant's behalf

[154] Mrs Gibson Henlin submitted that there is no evidence on which the learned judge could have found that the appellant would not be able to honour its undertaking. Queen's Counsel argued that the learned judge has "in effect converted the undertaking and the grant of the injunction into a rich man's charter". It was her further submission that the appellant ought not to be denied the grant of an injunction because he provided no undertaking as to damages unless he is given the opportunity to fortify that undertaking.

[155] It was also her submission that the court below was notified of the appellant's ability to fortify his undertaking as to damages with his own property or the assistance of a third party and that he is still able to do so.

[156] She postulated that in light of the circumstances of this case, the court, ought to have allowed the appellant to fortify his undertaking as to damages.

[157] Learned Queen's Counsel contended that damages cannot adequately compensate the appellant in respect of the declaratory reliefs and his rights and interest under LRIDA. The appellant, she submitted, is entitled to the benefit of the LRIDA and the Code in resolving the issue of his suspension. The loss of that right she submitted cannot be compensated for in damages.

[158] It was Queen's Counsel's submission that the learned judge erred by her failure to take into account the fact that the appellant has an interest in his job that is akin to property. She submitted that if the disciplinary hearing proceeds, without reference to the IDT's hearing of the dispute, the appellant would be deprived of the opportunity of enforcing his right under LRIDA in relation to his suspension. She submitted that this would be the result because by that time he would be disputing not only his suspension but also a likely termination.

[159] Such action, she submitted, will render nugatory the appellant's right to have the dispute in relation to his suspension heard. She also contended that the JSE's argument that the employee will be heard at the IDT in any event ought not to be entertained as this renders the rights which LRIDA confers on the appellant nugatory.

[160] At that juncture, she posited, his approach to the IDT would concern his dismissal which is an entirely different stream. The loss of the appellant's job and reputational damage in those circumstances cannot, she contends, be adequately compensated in damages**.**

[161] She further argued that the learned judge, in her refusal to grant the injunction on the basis that damages are an adequate remedy, erred in failing to consider that the appellant has an interest akin to property in his job. Queen's Counsel postulated that if the respondent were allowed to proceed to a disciplinary hearing in all the circumstances on the same facts on which the suspension is grounded, it could likely to result in termination.

[162] She submitted that the concern is premised on the disregard for the MOL in relation to conciliatory proceedings and the fact that the IDT was seised of the matter in relation to the application for injunction to prevent the hearing. She expressed concern that the JSE is of the view that it is able to proceed with the disciplinary hearing even while the court was considering the grant of injunction.

[163] Counsel pointed to the JSE's disregard for the process of the court by attempting to fix the disciplinary hearing before the application before the court would have given its decision.

[164] Queens' Counsel submitted that the high degree of hostility and steadfast move towards a process intended to circumvent the LRIDA should be halted and ought properly to be regarded as a serious issue to be tried in respect of the appellant's entitlement and his right to access the "discrete" regime of the IDT in respect of the dispute. The judge, she contended, was in error in finding that damages would be an adequate remedy.

[165] It was Mrs Gibson Henlin's further submission that this matter initially joined public law remedies with the relief against the respondent. The undertaking in damages should not be required because of the public law and the public interest element of the matter. This matter, she submitted, clarifies and enforces a statute and the rights which the statute confers. The learned judge also erred by failing to consider the appellants request to fortify his undertaking as to damages.

[166] Learned Queen's Counsel argued that the JSE ignored the LRIDA and the appellant's rights under the said Act by its refusal to obey the "directives or invitation" of the MOL without reference to the terms of his contract which incorporates the Labour laws.

[167] It was also her submission that the learned judge failed to take into account the fact that LRIDA introduces a new and specialised regime with new remedies distinct from the common law for employers and employees. An employee is no longer restricted to his remedies under the contract such as damages for wrongful dismissal. The IDT is able to grant reinstatement and damages calculated by reference to normal wages, remedies and relate to rights and interests.

Submissions on behalf of the respondent

[168] Learned Queen's Counsel Mr Foster contended that the learned judge was correct to find that damages would be an adequate remedy because there was no evidence that any specific code under the LRIDA has been breached; there is no allegation that the panel hearing the matter is not independent; and, the determination

as to whether the appellant was suspended does not affect the respondent's right to hold a disciplinary hearing and there was no evidence that the appellant has been deprived of his job. Queen's Counsel cited **Longley v The National Union of Journalists** [1987] IRLR 109 to support his argument that the fear that an employee will lose his job is not a sufficient basis upon which to grant an injunction. He also indicated that the appellant's substantive claim was for breach of contract, libel, retroactive salary and loss of income which are all compensated by damages. Mr Foster also posited that the declarations sought are vague and seek to enforce rights under the LRIDA without any indication as to what right under the LRIDA has been breached. He submitted that declarations do no more than indicate what always has been and so the application for such would not affect the learned judge's finding that damages would be an adequate remedy.

[169] Counsel indicated that based on **Intercontex and Another v Schmidt and Another** [1988] FSR 575 and **TPL Limited v Thermo-Plastics (Jamaica) Limited** [2014] JMCA Civ 50, the court requires convincing evidence of the assets and liabilities and no such evidence was provided in the instant case. He also submitted that the appellant did not provide an undertaking as to damages and while he agreed that in exceptional circumstances, this undertaking could be dispensed with, he submitted that, as per **TPL Limited v Thermo-Plastics (Jamaica) Limited**, no evidence was placed before the court that this was an exceptional case.

The appellant's ability to provide an undertaking as to damages

[170] The learned judge stated as a reason for withholding the injunction that, "There is no evidence that the [appellant] would be in a position to satisfy a cross-undertaking in damages".

[171] Rule 17.4(2) of the CPR speaks to the issue of providing such an undertaking. It reads:

> "Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order."

[172] An applicant's inability to provide the necessary undertaking as to damages does not automatically disqualify his application for an injunction. The learned judge was invested with the discretion to grant the injunction in spite of the risk that it might turn out that the appellant is not be able to give the undertaking.

[173] In the exercise of her discretion, the learned judge was obliged to consider all the relevant circumstances of the case. This view was expressed in the following passage from Stephen Gee's work, Mareva Injunction and Anton Piller Relief, 2nd edition, Chapter 9 under the heading, "The Undertaking in damages" and was cited with approval by this court in **Paul Chen Young and Others v Eagle Merchant Bank Jamaica Limited and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 2, 3, 4, 5, 45 and 46/2000, judgment delivered 23 July 2002. The passage reads:

> "Even though the plaintiff is impecunious, the court may, in rare cases where the merits are strongly in favour of the plaintiff, in the exercise of its discretion, still decide to grant the relief sought, accepting the risk that the undertaking may not be honoured if called upon in due course. **Alen v Jambo Holdings** [1980] 1 WLR 1252. Alternatively, the court may require the undertaking to be fortified **Baxter v Claydon** [1952] WN 376...,"

[174] Regarding therefore Mrs Henlin Gibson's complaint that the appellant's offer to fortify his undertaking was ignored, Phillips JA considered a similar issue in **David Orlando Tapper v Heneka Watkis-Porter** [2016] JMCA Civ 11. The learned judge in that case had expressed doubt as to the appellant's ability to give a cross undertaking as to damages without having afforded him the opportunity to fortify his undertaking. This court found that the learned judge erred in so finding. Phillips JA stated this courts position thus:

> "[42] In addressing the issue of whether damages would be an adequate remedy for the respondent, at paragraph [15] of his judgment, the learned judge stated that he had a doubt as to whether the appellant could give a cross undertaking as to damages. **I am unable to find a basis for this doubt since there was no evidence before the court that the appellant could not satisfy an undertaking as to damages and no opportunity was given for him to fortify this undertaking.** Therefore, his finding in this regard would also be erroneous." (Emphasis added)

In the absence of good reason, the learned judge was palpably wrong in rejecting the appellant's offer to fortify his undertaking without allowing him the opportunity to do so.

The nature of the appellant's interest in his job

[175] The Code recognises that the employee's right to work and right to be treated with dignity. Sections 2 and 3 of the Code provide:

> "Purpose
>
> 2. The code recognizes the dynamic nature of industrial relations and interprets it in its widest sense. It is not confined to procedural matters but includes in its scope human relations and the greater responsibilities of all the parties to the society in general. Recognition is given to the fact that management in the exercise of its function needs to use its resources (material and human) efficiently.
>
> **Recognition is also given to the fact that work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction.**
>
> The inevitable conflicts that arise in the realization of these goals must be resolved and it is the responsibility of all concerned, management to individual employees, trade unions and employer's associations to co-operate in its solution. The code is designed to encourage and assist that co-operation.
>
> Application
>
> 3. Save where the Constitution provides otherwise, the code applies to all employers and all workers and organizations representing workers in determining their conduct one with the other, **and industrial relations should be carried out within the spirit and intent of the code. The code provides guidelines which complement the Labour Relations and Industrial Disputes Act; an infringement of the code does not of itself render anyone liable to legal proceedings, however, its provisions may be relevant in deciding any question**." (Emphasis added)

[176] Wolfe CJ in **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal** (unreported), Supreme Court, Jamaica, Suit No M105 of 2000, judgment delivered on 17 December 2001, examined the Code and extracted the relevant principles. He said:

> "The Labour Relations Code endorses the following principles, viz, that –
>
> (i) work is a social right and obligation not a commodity
>
> (ii) respect and dignity must be accorded to workers
>
> (iii) industrial relations should be carried out with the spirit and intent of the Code
>
> (iv) Communication and consultation are essential features."

[177] Indubitably, therefore, the appellant has a right to work. The Code mandates that any attempt at depriving him of this right is to be conducted in a dignified and respectful manner. Importantly, it must be carried out within the spirit of the Code.

[178] As pointed out by Queen's Counsel, for the appellant, on the appellant's application before the IDT, revocation of the suspension was an option. The disciplinary hearing, as indicated, had not commenced before the appellant sought to address the issue of his suspension. Should the JSE be allowed to proceed with the disciplinary hearing at this juncture, a recommendation that his employment be terminated is not unlikely. Such a ruling would, as Mrs Gibson Henlin submitted, render the proceeding before the IDT, which were commenced earlier, nugatory. It is certainly questionable whether the forcible exclusion from his job prior to a hearing conformed to the spirit of

the LRIDA and if not, whether damages can be an adequate remedy if it is found to have violated the LRIDA.

[179] I am in agreement with Mrs Henlin Gibson's submission that payment of the appellant's salary cannot adequately compensate the appellant's right to vindicate his interest in his job at the IDT or to attend work and perform his duties.

[180] As I have indicated earlier, the appellant commenced the process of challenging his exclusion from his job under the LRIDA before the JSE had commenced disciplinary hearing. That process had advanced to the end stage. Of significance was the JSE's refusal to attend the conciliatory meeting at which all issues concerning his "exclusion from his job and the property" would have been ventilated with the celerity required of a matter of this nature which as noted, involves a very senior employee having been excluded not only from performing his duties, but also prevented from entering the property by a junior employee on the Board's instruction.

[181] Had the JSE acceded to the MOL's request to attend the conciliatory meeting, there exists a likelihood that the dispute might have been resolved thus shortening the process. (See section 22 of the Code set out in paragraph [89] herein).

[182] Section 3(1) of the Act provides that:

> "The Minister shall prepare and lay before the Senate and the House of Representative ... the draft of a labour relations code, containing such practical guidance as in the opinion of the Minister would be helpful for the purpose of promoting good labour relations in accordance with-

"(a) the principle of collective bargaining freely conducted on behalf of workers and employers and with due regard to the general interests of the public;

(b) **the principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration;**

(c) the principle of developing and maintaining good personnel management techniques designed to secure effective co-operation between workers and their employers and to protect workers and employers against unfair labour practices...." (Emphasis added)

[183] In my view, the JSE displayed apparent disregard for due process by its failure to attend the conciliatory meeting and its determination to proceed to disciplinary hearing by fixing hearing dates whilst the court below was deliberating, ought not to be countenanced. The issue of the appellant's suspension is vital, especially in light of his seniority and the likely effect on his professional reputation for which damages might not adequately remedy.

[184] In light of the foregoing, I am of the view that the learned judge wrongly exercised her discretion in finding that damages would be an adequate remedy. In the circumstances, grounds b, c and d ought to have succeeded and the appeal and the injunction ought to have been granted.

F WILLIAMS JA

[185] I have read in draft the judgments of Sinclair-Haynes JA and Straw JA (Ag) and I agree with the reasoning and conclusion of Straw JA (Ag) and have nothing further to add.

STRAW JA (AG)

[186] This appeal challenged V Harris J's refusal to grant interim orders sought by Mr Wentworth Graham (the appellant) against the Jamaica Stock Exchange (the respondent). The appellant also sought: (i) an injunction to prevent the commencement of disciplinary hearings against the appellant pending the outcome of proceedings before the Industrial Disputes Tribunal (IDT) and (ii) an order that would allow the appellant to return to his employment at the respondent company pending the said outcome. The appellant contended that *inter alia*, the learned judge, in refusing to grant the orders he had sought, erred in her assessment as to whether damages would be an adequate remedy and in deciding where the balance of convenience lay. However, the respondent asserted that the learned judge correctly exercised her discretion when she refused to grant those orders.

[187] On 21 July 2017, by a majority, we made the following orders:

> "1. The appeal against V Harris J's decision dated 18 May 2017 is dismissed.
>
> 2. Costs to the respondent to be taxed if not agreed."

We promised to give reasons for that decision and this judgment is given in fulfilment of that promise.

Background

[188] The appellant has been the respondent's chief regulatory officer, in its regulatory and market oversight division, since 1 April 2008. The respondent is a limited liability company, duly incorporated under the laws of Jamaica, with registered offices at 40

Harbour Street in the parish of Kingston. The appellant reports directly to the regulatory and market oversight committee of the respondent's board, whose chairman is Mr Livingstone Morrison. The respondent's general manager and company secretary is Mrs Marlene Street-Forrest.

[189] In November 2016, a dispute arose between the appellant and other senior employees of the respondent company as to the proper interpretation to be accorded to rule 407 of the Jamaica Stock Exchange Rules (JSE rules). Between November and December 2016, the appellant in a number of correspondences, contended that based on his interpretation of that rule, all the respondent's directors, senior managers and their connected parties ought to list their shareholdings regardless of whether they held shares. In a number of correspondences to the appellant between November and December 2016, Mrs Street-Forrest, Mr Robin Levy (the respondent's deputy general manager) and Mr Morrison, all conveyed to the appellant that they disagreed with his interpretation of the JSE rules and indicated that in fact there was no such requirement in the rules.

[190] On 12 December 2016, the appellant submitted a regulatory report which indicated that the respondent was not compliant with its 3rd quarter submission (which related to the above mentioned dispute). Mrs Street-Forrest, in an email dated 12 December 2016 to Mr Morrison and Mr Ian McNaughton (chairman of the respondent), indicated that she strongly disagreed with the report, considered it to be "overreaching

in regulation and nonsensical", and asked for their intervention. The appellant voiced his objection to this email in another email dated 16 December 2016.

[191] In a letter dated 13 January 2017, from Mrs Street-Forrest to the appellant, Mrs Street-Forrest stated that since 2009, the appellant had demonstrated personality conflicts and communication issues which had led to a breakdown of confidence between employer and employee and which, if allowed to continue, may affect operations within the respondent company. She went on to cite seven instances in which the appellant's conduct was a cause for concern and indicated that there were other areas of concern not mentioned in the letter. As a result of these issues, she invited the appellant to consider two options. Under the first option, the respondent would comply with the provisions relating to disciplinary procedures stipulated in section 22 of the Labour Relations Code (the Code). The second option was presented to the appellant by virtue of the role and function he performed at the respondent company, and it entailed an invitation to the appellant to attend a meeting involving the interested parties, so that a "mutually agreeable settlement" could be achieved prior to the commencement of disciplinary proceedings. The letter went on to state that regardless of the option chosen by the appellant, it would entail his "non attendance at work with pay until the discussions or hearing process have been completed". The appellant was also informed that, in keeping with the Code, he would be provided with a full written account of all the issues which may give rise to disciplinary action, if any was to be taken; he would be invited to a hearing and given the opportunity to state his

case in relation to the issues raised; he had the right to representation; and he also had the right to appeal if he was aggrieved by the decision.

[192] The appellant received this letter on 16 January 2017 at a meeting he attended with Mr Morrison. The appellant in a letter to Mr Morrison dated 17 January 2017, denied all the allegations contained in the letter dated 13 January 2017; expressed a willingness to meet and resolve issues, provided that it did not include his termination; asked for clarification as to the meaning of the term "authorized leave"; and also indicated his intention to return to work on 19 January 2017. Mrs Street-Forrest in a letter in response dated 19 January 2017, indicated that the limitation proposed by the appellant in his letter dated 17 January 2017 was unacceptable as "the possible conclusions of the negotiations ought not to be limited in any way as all options should be on the table for discussion". Mrs Street-Forrest also stated that the respondent would be conducting a hearing as per section 22 of the Code; that the appellant would receive a letter inviting him to the hearing; that he would be entitled to mount a defence to the issues raised and be accompanied by his legal representative; and she also reiterated that the appellant was still not required to attend work. The appellant was also instructed to advise the respondent of his decision by 20 January 2017. The appellant did in fact return to work at the respondent company on 19 January 2017, but he was prevented from entering the respondent's building by a security guard. In a letter dated 24 February 2017, from Mr Ian McNaughton to the appellant, Mr McNaughton outlined various allegations against the appellant, declared the

respondent's intention to conduct a disciplinary hearing against the appellant and suggested hearing dates.

[193] Having been served with the letter from the respondent communicating its intent to conduct disciplinary hearings, the appellant sought the intervention of the Minster of Labour and Social Security (the Minister) under the Labour Relations and Industrial Disputes Act (LRIDA) in order to obtain a referral from the Minister to the IDT. Initially, the Minister had refused to intervene and so on 10 March 2017, the appellant filed a notice of application for court orders against the respondent, the Minister and the Attorney General seeking an injunction, declarations in relation to the actions of the respondent, and judicial review of the Minister's refusal to refer the matter to the IDT. The application was made on the basis that *inter alia*, the respondent had failed to comply with the Code, and had breached the implied term of trust and confidence contained in his contract of employment by *inter alia*, 'suspending' him without a hearing. That notice of application for court orders was subsequently amended and filed on 19 April 2017, after the Minister had referred the matter, as requested, to the IDT and as a consequence, the action against the Minister and the Attorney General was discontinued. This amended notice sought the following interim orders:

> "1. An interim declaration that the [appellant] has been suspended from his employment from the 16th January 2017.
>
> 2. An interim declaration that the Respondent is obliged in this case to comply with the directions of the Ministry of Labour and Social Security to attend the [IDT] for settlement of the dispute between the [appellant] and the Respondent;

3. An injunction restraining the Respondent from proceeding with disciplinary hearing(s) against the [appellant] pending the outcome of the proceedings at the [IDT] or further order of this court;

4. An injunction directing the Respondent to permit the [appellant] to attend work and perform his duties pending the outcome of the proceedings at the [IDT] and the application for the interim declaration and any claim filed consequent on directions herein.

5. Costs"

[194] The appellant also filed a claim on 24 April 2017, seeking various declarations; an injunction preventing the respondent from proceeding with the disciplinary hearing until a determination of the IDT proceedings; and damages for breach of contract, libel, loss of investment income since 2008 to date, or in the alternative, damages being retroactive salary from 2008 to date.

The judgment of Harris J

[195] The amended notice of application filed on 19 April 2017, was heard by Harris J on 1 and 3 May 2017. In deciding whether to grant an interim declaration that the appellant had been suspended from his employment, the learned judge noted that both parties had competing contentions surrounding this issue. As a consequence, the learned judge found that since the appellant had elected to place his matter before the IDT, it was for the IDT to decide whether he had indeed been suspended by resolving the factual conflicts between the parties. The learned judge, after considering the cases of **Village Resorts Limited v The Industrial Disputes Tribunal and Others** (1998) 35 JLR 292, **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2015] JMSC Civ 105 and **The Industrial**

Disputes Tribunal v University of Technology and Another [2012] JMCA Civ 46 stated at paragraph [27] of her reasons for judgment, that if she were to embark upon an analysis of whether the appellant had been suspended, she would in effect be trespassing upon IDT's terrain, and would therefore interfere with its "discrete and specialized jurisdiction to settle disputes referred to it".

[196] The learned judge also examined whether she ought to grant an injunction directing the appellant to attend work pending the outcome of proceedings before the IDT. She indicated that such a consideration would involve an analysis of whether the appellant was suspended, and if so, whether his suspension was justified. As a consequence, the learned judge also found, in reliance on **Village Resorts**, that a determination of this issue was within the remit of the IDT which could make any order it deemed fit having regard to all the circumstances in the instant case.

[197] For Harris J, the main issue to be decided was whether she ought to grant an injunction restraining the respondent from proceeding with disciplinary hearings against the appellant pending the outcome of proceedings before the IDT. After perusing the submissions of counsel for both parties on this point, the learned judge considered the principles to be utilised by the court when making a determination as to whether to grant an interim injunction as stated in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 and **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16, and as applied by this court in **Heather Montaque v GM and Associates Limited and Another** [2013] JMCA App 7, at paragraph [16].

[198] The learned judge found that there were indeed serious issues to be tried, and at paragraph [62] of her reasons for judgment listed the issues that arose as follows:

> "i) whether or not to proceed with the disciplinary hearing while the dispute concerning [the appellant's] alleged suspension is still pending would be in breach of the terms and conditions of his employment in light of the incorporation of the provisions of the LRIDA and the Code in his contract of employment;
>
> ii) whether by taking steps to proceed with the disciplinary proceedings, the [respondent] is acting in a manner designed to frustrate and circumvent the objective of the LRIDA and Code by seeking to deprive the [appellant] of the benefits conferred by them in relation to the determination of his suspension which is before the IDT in breach of the terms and conditions of his employment;
>
> iii) whether the disciplinary hearing (and in particular an adverse outcome) would prevent the [appellant] from adjudicating or pursing the dispute relating to his suspension at the IDT as contemplated and provided for in his contract of employment."

[199] In deciding whether damages would be an adequate remedy, the learned judge noted that in the substantive claim, the appellant himself is seeking damages for breach of contract, libel, retroactive salary and loss of investment income, and so in her view, damages would indeed be an adequate remedy for the appellant. While the learned judge found attractive an argument made by Mrs Gibson Henlin QC that the appellant's interest in his job was "akin to a property right", she nonetheless concluded that this was not an issue in the instant case since, in her view, there was no evidence that the appellant was deprived of his employment without reference to a "specially created regime" under LRIDA and the Code. Harris J further opined that even if the respondent

were to be found liable on all aspects of the substantive claim, the appellant could still be adequately compensated by damages. The learned judge also noted that no evidence existed before her that the respondent could not give an undertaking as to damages.

[200] In assessing where the balance of convenience lay, the learned judge said at paragraphs [69]-[70] of her written reasons that:

> "[69] In weighing the balance of convenience I remind myself that I may take into account the prejudice which the [appellant] may suffer if no injunction is granted; the prejudice to the [respondent] if it is; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking and the likelihood of either party being able to satisfy such an award. The fundamental principle is that the court should take 'whichever course seems likely to cause the least irremediable prejudice to one party or the other'.
>
> [70] The course, in my view, that would result in the least irremediable harm would favour the respondent and the withholding the injunction for the following reasons:
>
> v) The injunction would require that the respondent continue to pay the [appellant] his full salary and emoluments until the outcome of the dispute regarding his alleged suspension and more likely than not until the outcome of the disciplinary proceedings. The court is not unmindful that after the IDT's determination, there may well be an appeal. This may take several months or even years. In practical terms this could result in significant costs to the [respondent] which will not be recoverable in any event.
>
> vi) The injunction would require that the disciplinary hearing to resolve the allegations

made against the [appellant] be halted, and for how long this would be anyone's guess, in light of my observations above. This would affect not only the rights of the [respondent] as an employer, to conduct disciplinary proceedings but also those of the [appellant] to have the allegations against him resolved in a timely manner. This is an essential factor in a healthy industrial relations landscape.

vii) There is no evidence that the [appellant] would be in a position to satisfy a cross-undertaking in damages.

viii) The [appellant] would suffer less prejudice proceeding to the disciplinary hearing. From the evidence it would appear that the hearing will be conducted by persons who are unconnected to the [respondent] and the parties involved who are experienced in the field of industrial relations. The result of those proceedings is unknown. It could well be that the allegations are not made out against the [appellant] and he retains his job. However, should that not be the case and he is dissatisfied with the decision, he is not without a remedy. He could seek redress at the Ministry of Labour or before the courts."

[201] On 18 May 2017, the learned judge made the following orders:

"1. Interim declaration that the [appellant] has been suspended from his employment from the 16th January 2017 is refused.

2. Injunction restraining the Respondent from proceeding with disciplinary hearing(s) against the [appellant] pending the outcome of the proceedings at the [IDT] is refused.

3. Injunction directing the Respondent to permit the [appellant] to attend work and perform his duties pending the outcome of the proceedings at the [IDT] and the application for the interim declaration and

any claim filed consequent on directions herein is refused.

4. Costs to the Respondent to be taxed if not agreed."

The appeal

[202] The appellant filed an appeal against Harris J's decision on 18 May 2017, challenging several findings of fact and law on the following grounds:

"a. The Learned Judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing to grant the orders sought in the Amended Application for Court Orders.

b. The Learned Judge erred as a matter of fact and/or law in finding that damages would be an adequate remedy in this case.

c. The Learned Judge erred as a matter of fact and/or law in failing to recognize that the Appellant cannot be compensated in damages if he were to lose his job and also his right to approach the tribunal in relation to his suspension prior to the disciplinary hearing.

d. The Learned Judge erred as a matter of fact and/or law in failing to recognize that the Appellant has an interest akin to a property right in his job which cannot be compensated for in damages."

[203] The appellant sought the following orders:

"a. Injunction restraining the Respondent from proceeding with disciplinary hearing(s) against the [appellant] pending the outcome of the proceedings at the [IDT] is granted.

b. Injunction directing the Respondent to permit the [appellant] to attend work and perform his duties pending the outcome of the proceedings at the [IDT] and the application for interim declaration and any claim filed consequent on directions herein is refused.

c. Costs to the Appellant to be taxed if not agreed."

Injunction pending appeal (Application no 86/2017)

[204] As the date for hearing before the IDT in relation to the appellant's 'suspension' is 19 September 2017, the appellant believes that he is facing a present danger of the disciplinary hearing being held which may result in the termination of his employment. Therefore, on 18 May 2017, the appellant filed an application for *inter alia*, an injunction pending appeal restraining the respondent from proceeding with disciplinary hearings against the appellant. This application was made pursuant to rule 2.11 of the Court of Appeal Rules (CAR) which sets out the powers of a single judge and in particular, rule 2.11(1)(c) of CAR which allows the single judge to make an order "for an injunction restraining any party from dealing, disposing or parting with the possession of the subject matter of an appeal pending the determination of the appeal".

[205] Being the single judge who heard the application, in my view, there was an issue as to whether in the instant case, I had the jurisdiction to entertain this application. Based on my interpretation of rule 2.11(1)(c) of CAR, a "disciplinary hearing" is not a tangible item capable of being possessed, and so was not a "subject matter" of the appeal that a single judge could restrain by preventing any "dealing, disposing or parting with" it's possession. Both counsel for the appellant, Mrs Georgia Gibson Henlin QC, and counsel for the respondent, Mr Patrick Foster QC, were of the view that I could properly consider the matter as rule 2.11(1)(c) of CAR should be interpreted as restraining the dealing with, disposing of, or parting with the subject matter of the appeal. It was Mrs Gibson Henlin's further contention that the "subject matter" did not only relate to tangible items.

[206] However, based on my interpretation of rule 2.11(1)(c) of CAR, it could properly be interpreted to relate to an injunction restraining something that is indeed tangible, and as a consequence, a disciplinary hearing could not fit into the concept of possession of the "subject matter" of an appeal since it could not be "dealt with, disposed of, or parted with". Nonetheless, this issue became moot because both parties agreed to advance the actual hearing of the appeal, in lieu of pursuing the application for an injunction, if a sufficiently early date could be set. At that time, case management orders were made, and the matter was set for the appeal which is now being considered.

Discussion and analysis

[207] This court is being asked to discharge Harris J's orders refusing to grant injunctive relief that would in effect stay disciplinary proceedings pending the hearing before the IDT, and her refusal to direct that the appellant is permitted to attend work and perform his duties. However, in her written submissions, Mrs Gibson Henlin did indicate that she was only seeking injunctive relief to prevent the commencement of disciplinary proceedings against the appellant. As a consequence, I must embark upon a review of the trial judge's decision to determine if she made any errors in law or misinterpreted the facts in the exercise of her discretion, or made a decision that was so aberrant that it is deemed to be 'demonstrably wrong' (see **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1). I am also mindful of the

caution given in those cases that an appellate court ought not to set aside a judgment merely on the basis that it would have exercised its discretion differently.

[208] In determining whether Harris J was demonstrably wrong, regard must be had to the principles to be considered when granting an interim injunction. These principles have been stated by Lord Hoffmann in **NCB v Olint** at paragraphs 16-18 where he said:

> "[16] ...It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> [17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that

> the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in *American Cyanamid* [1975] 1 All ER 504 at 511:
>
> > 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'
>
> [18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

[209] The principles outlined by Lord Hoffmann in **NCB v Olint** and those stated by Lord Diplock in **American Cyanamid**, were appropriately summarised by Phillips JA in **David Orlando Tapper v Heneka Watkis-Porter** [2016] JMCA Civ 11 at paragraph [36] as follows:

> "1. The court must be satisfied that there is a serious issue to be tried, that is, that the claim is not frivolous or vexatious.
>
> 2. The court should then go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought. In considering where the balance of convenience lies, the court must have regard to the following:
>
> (i) Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not

be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.

(ii) If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case.

(iii) In deciding whether to withhold or grant the injunction the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

(iv) If the balance of convenience is even then the court should preserve the status quo."

[210] In this appeal, Harris J found that there are serious issues to be tried in the substantive claim. I must state that I am in agreement with that finding, and it is of note that such a finding was not contested by either party. However, there are competing contentions with regard to where the balance of convenience lies. I must therefore assess whether the balance of convenience lies in favour of granting or refusing the injunction having regard to: (i) whether damages would be an adequate remedy for either party; (ii) could either party give the requisite undertaking as to damages; and (iii) what is the relative strength of each party's case having regard to the risk of irremediable prejudice to each party. In deciding these issues, the grounds of appeal, as listed above will be considered together as they concern the issue of whether

the appellant is entitled to have his dispute heard by the IDT, in relation to his alleged 'suspension', before a disciplinary hearing is held (arising from the same facts) by the respondent.

The adequacy of damages

[211] At paragraphs [64]-[67] of her judgment, Harris J set out her reasons for concluding that damages would be an adequate remedy at follows:

> "[64] The substantive claim in this matter is for breach of contract, libel, retroactive salary and loss of investment income. The [appellant] is himself seeking damages as the redress for those purported ills. I am inclined to agree with learned Counsel Mr. Foster that it does appear that damages would be an adequate remedy.
>
> [65] Learned counsel Mrs. Gibson-Henlin submitted that damages could not adequately compensate the [appellant] because as she said, 'his interest in his job is akin to a property right and his right to this property interest and deprivation without reference to the specially created regime cannot be adequately compensated in damages.'
>
> [66] As attractive as this submission may seem, and I will admit that it did at first cause the court some anxiety, I must disagree. Firstly, the evidence does not support that he has been deprived of his job without any reference to the 'specially created regime'. Secondly, in the context of the substantive claim, if liability is ascribed to the respondent in respect to all the causes of action pleaded, damages would still be the appropriate and adequate remedy to compensate him for any loss he suffers.
>
> [67] I have noted that there is no evidence before the court that the [respondent] is not a viable organisation and therefore would not in a position to meet an award of damages if one should be made against it."

[212] Mrs Gibson Henlin submitted that the learned judge had wrongly concluded that damages would be adequate for the appellant, as she had conflated the relief sought in damages, with the relief sought in declarations. She also contended that the appellant had a right to vindicate his interest in his job at the IDT, and the learned judge had failed to take into account the law consequent on LRIDA, including the fact that he has a right akin to a property interest in his job.

[213] However, Mr Foster indicated that the learned judge was correct to find that damages would be an adequate remedy for the appellant because: (i) there was no evidence that any specific code under LRIDA had been breached; (ii) there was no allegation that the panel hearing the matter is not independent; (iii) the determination as to whether the appellant was suspended did not affect the respondent's right to hold a disciplinary hearing; and (iv) there was no evidence that the appellant had been deprived of his job. Mr Foster further contended that the declarations sought were vague and seek to enforce rights under LRIDA, without any indication as to what right under LRIDA had been breached. He submitted that declarations do no more than indicate what always has been, and so the application for such would not affect the learned judge's finding that damages would be an adequate remedy. Mr Foster also argued that damages would be an adequate remedy for the appellant, since the appellant's substantive claim was for breach of contract, libel, retroactive salary and loss of income, which are all compensated by damages.

[214] Based on the issues raised in this aspect of the appeal, the questions to be considered are: (i) on what basis should the hearing be postponed pending a determination as to whether the appellant was indeed suspended and (ii) was there evidence that the disciplinary hearing would result in the appellant being deprived of his job without reference to the specially created regime established by LRIDA.

Should the disciplinary hearing be suspended?

[215] In order to support her argument that the hearing should be suspended, Mrs Gibson Henlin relied on **Hill v C A Parsons & Co Ltd** [1972] Ch 305 and **Irani v Southampton and Southwest Hampshire Health Authority** [1985] IRLR 203.

[216] In **Hill v Parsons**, the plaintiff was an engineer employed to the defendant company since 1936. In May 1970, the defendant company made an agreement with the 'DATA' trade union that as a condition of service, all technical staff were required to join DATA after 12 months. In a letter dated 19 May 1971, the defendant gave the plaintiff one month's notice of a change of the conditions of his employment, whereby he was required to become a member of DATA. He failed to join DATA, and so on 30 July 1971, the defendant gave the plaintiff and 37 other professional employees, one month's notice of termination of employment. The plaintiff was then aged 63 and would have retired in two years. He therefore filed a writ seeking *inter alia*, an injunction restraining the defendant from implementing its notice terminating his employment. His motion was refused at first instance.

[217] On appeal to the Court of Appeal of England and Wales, it was held (by a majority) that the notice to terminate was invalid, since there was a requirement in the plaintiff's employment contract that he should be given six months notice before he was terminated. The length of notice was important in that case because an amendment had been made to the United Kingdom Industrial Relations Act 1971 (the Act), and Part II of the Act (which had not yet come into force), would have had the effect of conferring important rights on workers in respect of trade union membership. Part II of the Act also drew a distinction between registered and unregistered trade unions, wherein an unregistered trade union could not make or enter into particular agreements. The trade union in the instant case (DATA) was unregistered, and under Part II of the Act, the plaintiff would have had the right to become a member of a registered trade union. Additionally, any agreement made that compelled workers to join a particular trade union would have been unlawful under the Act, and employers who sought to enforce such agreements by terminating their employees, would be guilty of unfair dismissal. The Act empowered the industrial tribunal to recommend reinstatement, but where that had not been done, the plaintiff (by virtue of his age) would only be entitled to two years' salary or £4,160, whichever is less. As a consequence, if the notice was found to be effective the plaintiff would have been forced to leave his employment with little compensation, but if the notice was ineffective he would have been able to remain employed to the defendant until he retired and could not be forced to join DATA. In those circumstances, the majority found that consequences of not granting the injunction were so severe, and there was

so much at stake, that damages would not be an adequate remedy for the plaintiff, and so the court granted an injunction restraining the implementation of the termination letter.

[218] **Hill v Parsons** was applied and followed in **Irani**. In that case, the plaintiff (an ophthalmologist) was appointed by the defendant health authority on a temporary basis, part-time. A dispute arose between the plaintiff and the consultant in charge at the health authority, and the plaintiff was asked by the defendant to stay away from work. A panel was convened ad hoc to investigate the facts and the same panel heard the plaintiff and the consultant separately. The panel thereafter submitted a report to the defendant which the plaintiff was prevented from seeing. Utilising that same report, the defendant concluded that since the differences between the plaintiff and the consultant were irreconcilable, and since the plaintiff was the consultant's junior and working part-time, the plaintiff should be terminated. The defendant wrote a letter to the plaintiff outlining options for termination of his employment, but that letter was devoid of any complaint as to the plaintiff's conduct or professional competence. The letter referenced the plaintiff's right to appeal to the regional health authority, but that right had no contractual basis. However, by virtue of statute, the provisions of a "blue book" had been incorporated into the plaintiff's contract of employment. Under section 33 of the blue book, the plaintiff had access to various procedures for resolving disputes between employing authorities and employees. The plaintiff therefore sought an interlocutory injunction restraining the defendant from implementing a termination notice, without first exhausting a procedure laid down in section 33 of the blue book.

[219] In **Irani**, Warner J, at page 203, referred to and quoted from the judgment of Megarry J in **Chappel v Times Newspaper Ltd** 1975 ICR 145, where he analysed the reasons why **Hill v Parsons** was such an exceptional case as follows:

> "There were three main grounds for this decision. First, there was still complete confidence between employer and employee. The defendant did not want to terminate the plaintiff's employment but he had been coerced by the union. Second, the Industrial Relations Act 1971 was expected to come into force shortly. It had been passed but the relevant parts had not been brought into operation. As soon as the Act was in force, one probable result would be that the closed shop would no longer be enforceable and that the plaintiff would be free to remain a member of the union of his choice. He would also obtain the rights conferred by the Act to compensation for unfair dismissal if he was then dismissed. Third, in the circumstances of the case, damages would not be an adequate remedy."

[220] Warner J found that the defendant authority had made no complaint about the plaintiff's conduct or professional competence. He also found that the plaintiff's contract of employment incorporated provisions of the blue book, which provided procedures for resolving disputes, and so the plaintiff would not have exhausted all the procedures prescribed by section 33 of the blue book. Accordingly he held that damages would not be an adequate remedy for the loss of the plaintiff's employment, and he granted the injunction. He concluded at page 209 that:

> "If I were to decline to grant the injunction sought..., I would in effect be holding that, without doubt, an authority in the position of the defendant is entitled to snap its fingers at the rights of its employees under the blue book... [and] despite the existence in the blue book of sections 33 and 40, a health authority is entitled to dismiss a medical practitioner summarily and to say that, if and in so far as his rights under those sections are infringed, his remedy lies in damages only... It means that for the price of damages -

> and the authorities show that damages at common law for wrongful dismissal are not generous - a health authority may, among other things, ignore the requirement...
>
> If it is not right, nor can it be right, in my view, that, in the case of a more junior practitioner, the employing authority can ignore the rules in the blue book."

[221] **Hill v Parsons** and **Irani** seem to suggest that the grant of an injunction that interfered with the employee and employer relationship is exceptional, and should only be done after consideration had been given to whether there was trust and confidence between the employer and the employee and whether, in light of all the circumstances, the risk to the appellant if an injunction was not granted was so severe that damages would not be an adequate remedy.

[222] Mr Foster had asked this court to consider the treatment by other courts in relation to a stay of disciplinary hearings in **Longley v The National Union of Journalists** [1987] IRLR 109 and **Ali v London Borough of Southwark** [1988] IRLR 100.

[223] In **Longley**, a decision of the Court of Appeal of England and Wales, although the plaintiff had established that there were serious issues to be tried, the court found that he had not shown that he was bound to succeed at trial so as to exclude consideration of the balance of convenience. In that case, the balance of convenience was against granting the injunction as the trial judge had correctly taken the view that "a domestic tribunal, which has not embarked upon a hearing should not be restrained unless it has acted improperly or it is inevitable that it will do so".

[224] In **Ali**, disciplinary charges were brought against care assistants including the plaintiff. A schedule of specific allegations supporting the charge was attached, but no documents were enclosed constituting evidence supporting the allegations. The plaintiff would be allowed access to legal representation, to give evidence and call witnesses, but would be unable to challenge any evidence used to support the charges itself. The plaintiff sought an injunction restraining the council from hearing the disciplinary charge without adducing evidence and witnesses to support it, on the basis that the hearing would be a breach of the disciplinary procedure incorporated in her contract of employment that evidence should be heard before a finding is made as to whether the charge is proven. Millet J, in the High Court, Chancery Division, refused the application, having concluded that he ought to leave it to the tribunal to decide how to proceed (paragraph 60). He also stated that if he were wrong on that principle, he would still refuse the injunction for another reason as follows:

> "Even if I had come to the conclusion that what was proposed would be a breach of contract, I would have concluded that the appropriate remedy for the plaintiffs sounded in damages only. The court will intervene by way of injunction in an employment case to restrain dismissal only where it is satisfied that the employer still retains confidence and trust in the employee or, if he claims to have lost such trust and confidence, does so on some irrational ground."

[225] Both **Longley** and **Ali** show that courts are not quick to interfere with the ability of a domestic tribunal to conduct a disciplinary hearing unless the hearing is being held in circumstances where the employer still retains confidence and trust in his employee, and/or where the employer claims to have lost such trust and confidence on some

irrational ground, and/or where there is cogent evidence challenging the integrity and propriety of the disciplinary hearing.

[226] Of course, the facts in **Longley**, as submitted by Mrs Gibson Henlin, can be distinguished, as it did not involve any issue of a statutory right to have a worker's suspension referred to a tribunal, apart or distinct from the process of a disciplinary hearing. With reference to **Ali**, Mrs Gibson Henlin suggested that the reasons in the letter dated 13 January 2017 were irrational, bearing in mind that Mrs Street-Forrest had commended him in a letter dated 16 December 2016 "for his hard work and contribution which positively impacted the [respondent's] excellent performance for 2016".

[227] However, it is a feature of the present case that a decreased level of trust and confidence existed between both parties at the time of the alleged 'suspension'. This was evident in the letters and emails written on both sides. Although Mrs Gibson Henlin disputed that there was any issue with the appellant's conduct, the email from Mrs Street-Forrest to Mr McNaughton dated 12 December 2016; the letter dated 13 January 2017 from Mrs Street-Forrest to the appellant; and the letter dated 24 February 2017 from Mr McNaughton to the appellant, indicated several areas of concern that the respondent had with particular aspects of the appellant's conduct and professional competence, and may represent a rational basis for holding a disciplinary hearing. Moreover, Mrs Street-Forrest in her first affidavit dated 29 April 2017, at paragraph 20(vi), deponed that the letter commending the appellant was a letter "sent to all staff

members in recognition that as a team all were instrumental in making the JSE successful in attaining its overall targets". Whether these are indicative of genuine or substantive issues, is not a matter for the determination by this court, at this time, but it is indeed an issue to be canvassed by the IDT.

[228] Mrs Street-Forrest, in her first affidavit filed 28 April 2017, at paragraph 13, indicated that the panellists were not employed to the respondent and they are experienced in industrial relations matters in Jamaica and would lend impartiality and independence to the disciplinary hearing. At paragraph 25 of that same affidavit, Mrs Street-Forrest indicated that pursuant to the Code the respondent had a right to conduct a fair and impartial disciplinary hearing and that the panel would not be subject to the respondent's direction or control. Although, Mrs Gibson Henlin had questioned Harris J's finding on the issue of the independence of the panel, that aspect of Mrs Street-Forrest's affidavit was not contested. Accordingly, no evidence was adduced, here or in the court below, challenging the independence and/or impartiality of the panel.

[229] Additionally, as indicated by Mr Foster, the holding of a disciplinary hearing will not affect any finding that the IDT may make in relation to whether the appellant was indeed suspended. Moreover, the appellant is still employed to the respondent company, he is still receiving his full salary and emoluments, and his post at the respondent company has not been filled (per Mrs Street-Forrest at paragraph 16 of her affidavit filed 28 April 2017). From a strictly procedural standpoint, there is no statutory

or other basis to conclude that the disciplinary process should not proceed in a timely matter. The instant case is not one pending dismissal which could result in a loss to the appellant of consideration of statutory compensation or even reinstatement by the IDT. It of note that the appellant was invited to have discussions prior to any disciplinary hearing, but was not minded to enter in any such discussions unless the retention of his position could be affirmed.

[230] In all these circumstances, while it may be arguable as to whether the appellant is being deprived of the right to his job, in my view, in the instant case, there are no exceptional circumstances nor is there a real risk of injustice or undue prejudice to the appellant if the disciplinary hearing is held, that would force one to conclude that damages would not be an adequate remedy, and so warrant the grant of an injunction.

Would the appellant be deprived of the protection he ought to enjoy under LRIDA?

[231] The next issue to be considered is whether the appellant would be denied access to the regime established by LRIDA if the injunction is refused.

[232] In order to demonstrate that the judge was in error, Mrs Gibson Henlin relied on several authorities that discuss the effect of LRIDA and the Code on contracts of employment. She admitted that those cases arose in the context of termination of employment by reason of redundancy or dismissal, but nonetheless she contended that they are instructive insofar as they set out the context and tone in which a court ought to regard the rights created by LRIDA and the Code.

[233] To that extent, she is right. In **Village Resorts**, the Court of Appeal, by a majority verdict, accepted that LRIDA had effected a change, to the extent that a worker now has an interest in his job akin to an interest in property, and that by virtue of section 12(5)(c)(i)-(iv) of LRIDA, the IDT, is able to grant remedies to aggrieved workers hitherto unknown at common law. By virtue of section 12(4A) of LRIDA, the IDT is even empowered to make an award in respect of an industrial dispute with retrospective effect from as far back as when the dispute first arose. Sykes J's in his assessment of the role of the IDT in **NCB v Peter Jennings**, said that the IDT is not bound by either the employer's or employee's view of the matter and that this process is not a strict black letter law process but takes into account notions of justice, fairness and equity (paragraph [53]). Sykes J also referred to and quoted **Village Resorts** in **NCB v Peter Jennings** at paragraphs [9] and [10] where, in commenting on **Village Resorts**, he said:

> "[9] ...Rattray P held that the dictum cited in the immediately preceding paragraph was not necessary for the decision. His Lordship also observed that had the case been one of a common law action for wrongful dismissal then the common law principles would still apply but that was not the case. Rattray P advanced this general proposition (not only in response to **Hotel Four Seasons** case, but to all cases that come to court via the IDT route) '*must be decided on a consideration of the provisions of the Labour Relations and Industrial Disputes Act, the Regulations made there under and the Labour Relations Code'* (Rattray P at page 303 H). The learned President stated quite unambiguously, that the '*provisions of these legislative instruments have nothing to do with the common law and… constitute a modern regime with respect to employer/employee relationships*' (Rattray P at page 303 I).

> [10] Rattray P noted that the IDT is '*vested with a jurisdiction relating to the settlement of disputes completely at variance with basic common law concepts, with remedies including reinstatement for unjustifiable dismissal which were never available at common law and within a statutory regime constructed with concepts of fairness, reasonableness, co-operation and human relationships never contemplated by the common law* (page 304 E - F)."

[234] These concepts, as discussed by Rattray P, were endorsed by the Privy Council in **Jamaica Flour Mills Ltd v Industrial Disputes Tribunal and Another** [2005] UKPC 16. Indeed, in the Full Court decision of the Supreme Court in **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal** (unreported), Supreme Court, Jamaica, Suit No M105 of 2000, judgment delivered on 17 December 2001, Wolfe CJ summarized the principles endorsed by the Code at page 9 of the judgment as follows:

> "[i] work is a social right and obligation not a commodity
>
> [ii] respect and dignity must be accorded to workers
>
> [iii] industrial relations should be carried out with the spirit and intent of the Code
>
> [iv] Communication and consultation are essential features."

[235] Wolfe CJ at page 14 of **Jamaica Flour Mills**, also quoted, Rattray P's comment on the Code in **Village Resorts** that:

> "Essentially, therefore, the Code is a road map to both employers and workers towards the destination of a cooperative working environment for the maximization of production and mutually beneficial human relationships."

[236] This court also takes into account section 3(4) of LRIDA, which stipulates that the IDT is entitled to take into account any provision of the Code which is relevant to any dispute under consideration and states as follows:

> "A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."

[237] By virtue of the cases aforementioned and the provisions contained in LRIDA, undoubtedly, the appellant is entitled to the statutory protections offered by LRIDA, the Code, the IDT and common law. However, in my view, any consideration of breaches of LRIDA or the Code, could not prevent the march towards a disciplinary hearing, as that hearing is part and parcel of the LRIDA regime to which both employer and employee are subject. This is so even if the IDT adopted a broad based approach in canvassing all the contentious issues between the parties. Additionally, as indicated by Harris J (at paragraph [70]), there is no substantial risk to appellant if the disciplinary hearing is held, as that process may very well result in the appellant's exoneration and return to work and if it does not, he is not without a remedy. It should also be noted that the issue of suspension or termination of employment is a matter that can be considered by the IDT based on the appropriate section of LRIDA.

[238] While Mrs Gibson Henlin had complained that the respondent had not acted in accordance with the Code, she failed to indicate to the court, as Mr Foster had

submitted, any particular breach of the Code. Harris J was therefore correct to find that there was no evidence that the appellant is being deprived of his job by unfair procedures in breach of LRIDA or the Code. In that regard, it is also to be noted, that based on my interpretation of section 3(4) of LRIDA, Parliament's intention and focus were on the IDT having the overarching jurisdiction to consider all issues relating to the breach of any code, rather than legal proceedings being generated.

[239] Mrs Gibson Henlin also submitted that the respondent had failed to participate in efforts made towards conciliation by the Minister. However, that argument must be considered within the context of the respondent's assertion that the appellant had not been suspended. She did not contend, and cannot contend, that the disciplinary hearing being considered is not part and parcel of the guidelines established under the Code, which was itself established by virtue of section 3 of LRIDA.

[240] In light of all the above, in spite of the fact that the appellant's claim includes declaratory rights, it is my view that the trial judge cannot be faulted by her findings, firstly, that there is no evidence that the appellant would be deprived of his job without any reference to 'the specially created regime' and, secondly, that damages would be adequate in all the circumstances, bearing in mind that he is merely being subjected to a disciplinary procedure which is incorporated into his contract of employment.

The undertaking as to damages

[241] In relation to the learned judge's finding at paragraph [67] of her reasons for judgment that the respondent was able to honour its undertaking as to damages, Mrs

Gibson Henlin contended that the learned judge had in effect converted the undertaking and the grant of the injunction into a "rich man's charter". She referred the court to **Evans Marshall & Co Ltd v Bertola SA and Another** [1973] 1 WLR 349 at page 380 H per Sachs J and the book, Commercial Litigation: Pre-Emptive Remedies, 3rd edition at pages 155-159.

[242] Mr Foster argued that based on **Intercontex and Another v Schmidt and Another** [1988] FSR 575 and **TPL Limited v Thermo-Plastics (Jamaica) Limited** [2014] JMCA Civ 50, courts require convincing evidence of the assets and liabilities of the appellant when deciding whether to grant an injunction, and no such evidence was provided in the instant case. He also submitted that the appellant did not provide an undertaking as to damages, and while he agreed that in exceptional circumstances, this undertaking could be dispensed with, he submitted that, as per **TPL Limited**, no evidence had been placed before the court that this was an exceptional case.

[243] It is indeed apparent that Harris J made an assumption that the appellant would not be able to satisfy any cross-undertaking as to damages since there was no evidence from the appellant concerning his ability to fulfil any such obligation. Is such an assumption correct?

[244] In **TPL limited**, Mangatal JA (Ag), in delivering the judgment of the court, at paragraph [67], stated that while there is no rule 'writ in stone' that the court must require evidence as to a party's ability to give a cross-undertaking as to damages before an interlocutory injunction is granted, the proper usual practice and law is, and has

been, to require evidence both of a willingness and an ability to provide a proper undertaking as to damages. She commented that it would be impossible otherwise to carry out the balancing exercise required by the court in **American Cyanamid** and **NCB v Olint**, to arrive at a proper assessment of which course is likely to cause the least irremediable prejudice, without requiring some substantiation of the applicant's posture and capacity to pay. While this assessment must take place for both parties when the court is examining the balance of convenience, it is to be noted that Mangatal JA's emphasis was on the applicant requiring the imposition of the injunction, bearing in mind rule 17.4(2) of the Civil Procedure Rules, 2002 which mandates that the party applying for an interim remedy, must undertake to abide by any order as to damages unless the court otherwise directs.

[245] In **Paul Chen Young and Others v Eagle Merchant Bank Jamaica Limited and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 2, 3, 4, 5, 45 and 46/2000, judgment delivered 23 July 2002, Downer JA at page 59 to 60 of the judgment referred to and quoted from 'a useful passage' in Mareva Injunctions and Anton Piller Relief, 2nd edition, chapter 9 captioned "The Undertaking in damages" that:

> "Even though the plaintiff is impecunious, the court may, in rare cases where the merits are strongly in favour of the plaintiff, in the exercise of its discretion, still decide to grant the relief sought, accepting the risk that the undertaking may not be honoured if called upon in due course. ***Allen v. Jambo Holdings*** [1980] 1 WLR 1252. Alternatively, the court may require the undertaking to be fortified **Baxter v Claydon** [1952] WN 376…"

[246] In **Tapper** at paragraph [42], Phillips JA regarded the trial judge's statement that he had a doubt as to whether the appellant could give a cross-undertaking as to damages, as an erroneous finding, as there was no evidence before the court that the appellant could not satisfy an undertaking as to damages, and he was not given an opportunity to fortify this undertaking.

[247] In all these circumstances, one can safely conclude that evidence of the financial capability of the respondent, as considered by a particular court, may be more pressing in one set of circumstances than in another. However, bearing in mind that the respondent is not the party applying for the injunction, and is a company responsible for paying the appellant's salary and that of other employees, bearing in mind also that the appellant is pursuing claims against the respondent for damages in relation to breach of contract, libel, retroactive salary and loss of income, it cannot be said that the learned judge's finding that the respondent was capable of satisfying an award of damages, was palpably wrong. Therefore, Harris J's finding concerning the respondent's ability to satisfy any award of damages without more, would not be sufficient to arrive at a conclusion that her finding that damages would be adequate remedy for the appellant, is essentially an error.

[248] Mrs Gibson Henlin had also complained that the trial judge committed an error of law as she acknowledged but failed to give due consideration to the appellant's request to fortify his undertaking as to damages. This, she argued, in reliance on **Tapper** and **Southway Group Limited v Esther Wolff and Another** 1991 WL 838513, by itself,

is a ground for allowing an appeal. Mr Foster, on the other hand, submitted that the appellant did not provide an undertaking as to damages or provide evidence of his ability to provide such an undertaking.

[249] The appellant, being the party requesting the imposition of the injunction, would usually been required to give an undertaking as to damages and would normally provide the court with some evidence of his financial ability. It is clear that the appellant had requested an opportunity to fortify his undertaking through counsel. Harris J did not consider this issue at all, nor did she consider whether the requirement to give such an undertaking ought to be dispensed with. However, it is important to note, that at paragraphs [69] and [70] of her reasons, the learned judge did assess the appellant's ability to give an undertaking as to damages along with other several other issues, in an effort to assess where the balance of convenience lay. I would agree that the issues surrounding the appellant's ability to give or fortify an undertaking as to damages should have been given proper consideration, however in light of the all issues raised in the instant case, in my view, Harris J's failure in that regard would not affect the outcome of the appeal.

The risk of prejudice/relevant strength of each party's case

[250] Harris J weighed the issues of prejudice to either party, to what extent compensation may be made by an award of damages or enforcement of a cross undertaking, the likelihood of either party being able to satisfy such an award and, overall the risk of irremediable prejudice. However, there was no assessment of the relative strength of each party's case in her consideration of the issue of prejudice. An

assessment of the relevant strength of each party's case is only one of the factors that a court may take into account when deciding whether to grant an injunction, and may be more essential in certain circumstances than in others.

[251] As indicated, there is a dispute between the parties as to whether the appellant has actually been suspended and if so, whether it was justified in light of the guidelines established by LRIDA and the Code. In the present case, it would be difficult to do an assessment of the relevant strength of each party's case, as this would depend on a trial judge's assessment of the evidence concerning the conduct of the parties and the terms of the contract of employment, and would involve an acceptance of one party's version of events in relation to the appellant's conduct and professional competence. Indeed, in **American Cyanamid**, Lord Diplock warned against conducting a preliminary trial of the action in making as assessment as to where the balance of convenience lies. At page 407-408 he said:

> "The use of such expressions as 'a probability,' 'a prima facie case,' or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction

> was that 'it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing': *Wakefield v. Duke of Buccleugh* (1865) 12 L.T. 628, 629."

[252] Accordingly, Harris J was correct to find that all the issues raised in the instant case are matters to be canvassed by the IDT in relation to the principles of fairness, equity and justice.

[253] The lack of evidence to suggest whether either party is able to give an undertaking as to damages, and the inability to assess the relevant strength of each party's case due to the divergent contentions, may also lead one to conclude, that there is an inability to properly assess where the balance of convenience lies, although Harris J concluded that it lay in favour of the respondent on an overall assessment of the factual circumstances before her. In **Tapper**, it is suggested that, where there is a difficulty in assessing the balance of convenience, the status quo ought to remain. Indeed, Lord Diplock in **American Cyanamid** said at page 408:

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."

[254] The present status quo is that no injunction has been granted. Based on the varied competing contentions of the respective parties, there is a difficulty in assessing the balance of convenience without embarking upon a preliminary trial. Accordingly, **Tapper** and **American Cyanamid** suggest, the status quo ought to remain and the learned judge would have indeed been correct to refuse the orders sought.

[255] In weighing the risk of prejudice, I must also comment that the appellant was aware from as early as 16 January 2017 (in the letters dated 13 and 19 January 2017 from Mrs Street-Forrest to him), that the respondent had intended to assert its right to hold a disciplinary hearing pursuant to section 22 of the Code, prior to the appellant's assertion of his right to access the IDT on 19 January 2017 (as evidenced in a letter from his attorney to the Minister dated 19 January 2017). In fact, the letter written by his attorney dated 19 January 2017 to the Ministry of Labour and Social Security seeking that Ministry's intervention, incorporates sections of Mrs Street-Forrest's letter of the same date, which indicates that Mrs Street-Forrest's letter notifying the appellant of the respondent's intent to hold disciplinary hearings was done in advance of his request to the Ministry. Moreover, the letter from the Ministry acknowledging receipt of the letter from the appellant's attorney dated 19 January 2017, is dated 23 January 2017. Accordingly, both parties had competing rights, and as indicated there were no exceptional circumstances or real risk of prejudice to the appellant that was highlighted in the instant case that would warrant interference with disciplinary hearing.

Conclusion

[256] Harris J had come to the conclusion that damages would be adequate for the appellant and the grant of the injunction more prejudicial to the respondent. It cannot be said that her overall analysis of the circumstances that gave rise to that finding was palpably wrong. Any failure to allow the appellant the opportunity to fortify an undertaking may only have been a significant lapse if she had concluded that, while damages would not be adequate for the appellant, she would be refusing any order for an injunction based on his perceived lack of financial ability. Since Harris J made no such conclusion, I am of the view that the reasons for her decision are sound in principle and there is no basis to interfere with the exercise of her discretion. Although the learned judge failed to assess the relevant strength of each party's case, the difficulty in assessing the same, would also have made it difficult to assess where the balance of convenience lies, which would ultimately result in a refusal by the court to grant the injunction sought. Accordingly, I formed the view that the appeal ought to be dismissed with costs awarded to the respondent to be taxed if not agreed.

SINCLAIR-HAYNES JA

ORDER

Application for injunction refused. Costs to be agreed or taxed.