[2024] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO 66/2015

BETWEEN	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**APPELLANT**
AND	**CARIBBEAN EXAMINATIONS COUNCIL**	**1ST RESPONDENT**
AND	**GERARD PHILLIP**	**2ND RESPONDENT**

Ms Kamau Ruddock instructed by the Director of State Proceedings for the appellant

Emile Leiba and Johnathan Morgan instructed by DunnCox for the 1st respondent

25, 28 October 2022 and 26 January 2024

Judicial Review - Whether the Caribbean Examinations Council (CXC) enjoys immunity from being sued or from "all legal process" - Whether the Industrial Disputes Tribunal (IDT) has jurisdiction to deal with matters involving claims against the CXC - Diplomatic Immunities and Privileges Act - Diplomatic Immunities and Privileges (Caribbean Examinations Council) Order 1998

Public International Law - International Organisations - Whether restrictive doctrine of state immunity should apply - Protocol on Privileges and Immunities of the Caribbean Examinations Council Article III(i)- Whether CXC has adequate dispute resolution facilities - Whether any inadequacy is fatal to immunity

Labour law - Claim for unjustified dismissal

F WILLIAMS JA

Background

[1] This appeal came on for hearing on 25 October 2022, and at the conclusion of the hearing of the submissions, this court, on 28 October 2022, made the following orders:

> "1. The appeal is dismissed.
>
> 2. Costs both here and below to the 1st respondent to be agreed or taxed."

[2] This judgment has been written in fulfilment of our promise to provide brief reasons for the making of those orders.

Brief history

[3] Mr Gerard Phillip, the 2nd respondent (hereafter referred to as 'Mr Phillip'), was appointed on contract with the Caribbean Examinations Council, the 1st respondent, (hereafter referred to as 'the Council') to the post of Assistant Registrar (Syllabus Development) Western Zone Office, with effect from 1 November 2008. The duration of the contract was a period of three years and so ran to 31 October 2011. Thereafter, his contract was renewed for a further period of three years with effect from 1 November 2011 to 31 October 2014. However, his employment was terminated on 8 May 2012, and he initiated proceedings against the Council for unjustified dismissal. The matter was referred to the Industrial Disputes Tribunal (hereafter referred to as 'the Tribunal') by the Minister of Labour pursuant to section 11A(1)(a)(ii) of the Labour Relations and Industrial Disputes Act ('the LRIDA').

[4] The relevant terms of reference were:

> "To determine and settle the dispute between the Caribbean Examinations Council (CXC) on the one hand, and Mr. Gerard Phillip on the other hand over the termination of his employment."

[5] The Tribunal convened its first hearing on 11 March 2013. At that time, the attorneys-at-law representing the Council took the preliminary jurisdictional point that the Council was immune from suit and all legal processes and so was not subject to the jurisdiction of the Tribunal. The Council maintained that this was pursuant to the Agreement Establishing the Caribbean Examinations Council 1972 ('the Agreement') between the Government of Jamaica and the Council. The Tribunal requested proof of this immunity from suit for which the Council contended, but it was not forthcoming. Thereafter, the attorneys-at-law representing the Council failed to attend any further hearing. As a result, the Tribunal proceeded to hear the matter *ex parte* and, on 17 May 2013, made the following award against the Council:

> "a) To reinstate Mr. Gerard Phillip effective 8th August 2012, without any loss of income and entitlement for the period up to 27th May 2013 or up to the date on which the Council reinstates him whichever is earlier.
>
> b) Failure to reinstate as stipulated in (a) above by the 27th May 2013, Mr. Gerard Phillip shall be compensated for 115 weeks without any loss of income and entitlement."

Judicial review

[6] The Council initiated proceedings seeking leave to apply for judicial review for an order of certiorari to quash the Tribunal's said award. It also applied for an order to stay the award pending the outcome of the judicial review proceedings.

[7] The principal ground on which the Council had applied for judicial review of the Tribunal's orders was, in the fixed date claim form, stated thus:

> "1. There is an error of law on the face of the 1st respondent's award dated May 17, 2013, as it was issued in the absence of jurisdiction, as the applicant, in accordance with the provisions of the Diplomatic Immunities and Privileges Act and the Diplomatic Immunities and Privileges (Caribbean Examinations Council) Order 1998 is immune from the process set out under the Labour Relations and Industrial

> Disputes Act from which the 1st respondent derives jurisdiction."

[8] These applications were granted on 23 September 2013, and the matter was subsequently heard by Dunbar-Green J (Ag) (as she then was and hereafter referred to as 'the learned judge'). On 17 March 2015, she delivered a written judgment and made the following orders:

> "1. A declaration that the applicant [the Council] is not subject to the jurisdiction of [the] 1st respondent [the Appellant].
>
> 2. The 1st respondent's [the Appellant's] award dated May 17, 2013 finding that the 2nd respondent's dismissal from the employment of the applicant [the Council] was unjustified, is quashed.
>
> 3. No order as to Costs."

The learned judge's findings

[9] The main findings of the learned judge are reflected at paras. [128] to [130] of the judgment and are as follows:

> "[128] The purpose of the **Diplomatic Immunities and Privileges Act** and the Order is clearly to grant an absolute immunity to the CXC from legal processes including those that are pursuant to the **LRIDA** from which the 1st respondent derives its jurisdiction.
>
> [129] No case law has been brought to this court's attention that is supportive of the proposition that the doctrine of sovereign immunity applicable in this jurisdiction is one that is restrictive. But even if it were accepted that the concept of restrictive immunity has developed in international customary law, employment is a *jure imperii* function, closely connected with the main purpose of the CXC, and the immunity should therefore not be restricted.
>
> [130] In all the circumstances, I find that the 1st respondent's decision against the CXC should be quashed on the basis that its jurisdiction over labour relations matters involving the CXC is ousted and the hearing of a dispute in which the CXC was

a party, violated the principle of international organisation immunity."

The grounds of appeal

[10] Being dissatisfied with the orders of the learned judge, the Tribunal filed its notice and grounds of appeal on 2 June 2015, outlining 10 grounds of appeal (grounds A to J). These were the grounds:

A. "The Learned Judge erred as a matter of law in failing to appreciate that Article XIV of the Order prescribes that interpretation or application of the Order is the remit of the Government of Jamaica and the 1st Respondent and any difference, thereafter, not settled by negotiation or any other form of settlement agreement shall be referred to arbitration.

B. The Learned Judge erred as a matter of law by failing to appreciate that the 1st Respondent does not enjoy absolute immunity from legal processes in Jamaica but only those immunities and privileges specified in Articles 2 to 8 of the Order as codified in paragraph 4 of the Preamble to the Order.

C. The Learned Judge erred as a matter of law by failing to appreciate that the 1st Respondent could not enjoy absolute immunity from all legal processes in Jamaica and also maintain the privilege afforded under Article II(c) of the Order that empowers the 1st Respondent to institute legal proceedings.

D. The Learned Judge erred as a matter of law by failing to appreciate that the Jamaican parliament did not intend that the 1st Respondent enjoy absolute immunity from legal processes in Jamaica as it states [in] Article II (1) that in all legal proceedings, the 1st Respondent shall be represented by the Registrar.

E. The Learned Judge erred as a matter of law by failing to apply proper statutory interpretation techniques to the [sic] Articles 2 to 8 of the Order, in particular Article III, whereby the Learned Judge improperly found that Article III (1) had a broader application than granting immunity to only the property and assets of the 1st Respondent.

F. The Learned Judge erred by finding that the Appellant did not to [sic] give effect to the Labour Relations and Industrial Disputes Act that regulates its decision making power; or that it committed a procedural impropriety, or acted unreasonably in coming to the decision it did;

G. The Learned Judge erred when she failed to give consideration, or any consideration at all to the process set out under the Labour Relations and Industrial Disputes Act which empowers the Appellant to determine and settle industrial disputes which have been referred to it by the Honourable Minister of Labour and [Social] Security;

H. The Learned Judge erred when she failed to consider whether the Appellant in hearing the dispute between the 1st Respondent and the 2nd Respondent acted in accordance with its powers under the Labour Relations and Industrial Disputes Act. Where the 1st Respondent acts within its powers as under the Labour Relations and Industrial Disputes Act there can be no error in law, however dissatisfied the particular party may be with the award.

I. The Learned Judge erred when she failed to apply the proper statutory rule of interpretation in seeking to define the term legal process as used in the statute under issue;

J. The Learned Judge erred as a matter of law in finding that the proceedings of the Appellant is [sic] a process from which the 1st Respondent is immune;"

[11] As there was considerable overlapping of the grounds of appeal, counsel for the parties in the written submissions and in the course of oral arguments grouped the various grounds and argued them together according to the particular group in which they fell and the issues to which they gave rise. There were three broad groupings as follows: (i) grounds of appeal B to E, addressing the question of whether the scope of immunity from jurisdiction is absolute or qualified; (ii) grounds of appeal F to H, dealing with the question of whether the Tribunal acted within the confines of its jurisdiction as encapsulated by the LRIDA; and (iii) grounds of appeal I to J, addressing the question of whether the term "legal process" used in the relevant law and agreement includes the

process used by the Tribunal. A summary of the groupings, along with the substance of the grounds, is set out hereunder:

> "Grounds B to E: The scope of immunity from jurisdiction enjoyed by International Organizations is not absolute or unqualified. No immunity recognized where there is lack of an inadequate internal dispute settlement mechanism.
>
> Grounds F to H: Industrial Disputes Tribunal acted within the confines of jurisdiction as encapsulated by the Labour Relations and Industrial Disputes Act.
>
> Grounds I to J: "Legal process" does not encapsulate the process by which the Tribunal resolves disputes under the LRIDA."

Grounds B to E: Whether the scope of immunity from jurisdiction enjoyed by international organizations is absolute or unqualified; and whether immunity may be denied where there is no internal dispute-settlement mechanism

Summary of submissions

For the Tribunal

[12] Miss Ruddock, on behalf of the Tribunal (in advancing written submissions prepared by another counsel), at the start of her submissions, candidly conceded that, pursuant to section 4 of the Diplomatic Immunities and Privileges (Caribbean Examination Council) Order, 1988 ('the Order'), the Council enjoys general immunity from the courts of Jamaica. She submitted that this is also expressly provided for in Article III (1) of the Protocol on Privileges and Immunities of the Caribbean Examinations Council ('the Protocol'), which has been incorporated into domestic law.

[13] Counsel submitted that international organizations are generally granted absolute immunity from all forms of legal process with respect to acts carried out to facilitate them in achieving their purpose. In support of this point, the case of **Giovanni Porru v Food and Agriculture Organization of the United Nations**, Italy, Tribunal of First Instance (Labour Section), 25 June 1969, Case No 4961, International Law Reports Volume 71, page 240, was cited. In that case, an Italian national brought an employment dispute

before the labour section of the Rome Court, but the court dismissed the case for lack of jurisdiction. Counsel emphasized that, notwithstanding the fact that the court dismissed the case for lack of jurisdiction, the court observed that there was "no rule of customary international law under which foreign States and subjects of international law, in general, are to be considered as immune from the jurisdiction of another State." Based on that dictum in this authority, counsel submitted that such immunity could only be recognized in respect of public-law activities but not in respect of private activities.

For the Council

[14] Mr Leiba contended that the learned judge correctly outlined the current state of the law in relation to international organizations and the immunities they enjoy. He further contended that the purpose of this diplomatic immunity is to ensure that representatives of foreign nations or international organizations can represent the interests of their nations or organizations without fear of being subjected to sanction or the jurisdiction of the host nation. He also referenced The Diplomatic Immunities and Privileges Act ('the DIPA'), which, he submitted, contains the underpinnings of the immunities. Counsel also contended that the main objectives and purposes of the Vienna Convention on Diplomatic Relations 1961 ('the Convention'), the DIPA and the Order were to ensure that nations and organizations may operate freely within foreign territories in which they may be located and should be treated no differently from any other sovereign power.

[15] In the submission of counsel, the majority viewpoint, from a review of the authorities, is that jurisdictional immunities of international organizations are absolute. He acknowledged that, in some of the literature on the topic, it was sought to distinguish the position of international organizations from the position of states. Counsel also contended that the majority position in the literature suggests that treaty provisions provide that international organizations enjoy immunity from every form of legal process. He further submitted that the contention that a restrictive doctrine of state immunity should be adopted in relation to international organizations is a minority view amongst writers on the subject as well as in state practice.

[16] Counsel submitted that the restrictive doctrine involves interpreting treaty provisions establishing immunity from jurisdiction as only applying in the case of acts *jure imperii* (by right of sovereignty) of international organizations. Counsel argued that the contention by the appellant that the restrictive doctrine should be adopted when considering the scope of the immunities of the Council is tenuous and does not conform with the current international trend.

[17] Counsel relied on the Canadian case of **Amaratunga v Northwest Atlantic Fisheries Organization & Another**, 2013 SCC 66, [2013] 3 SCR 866, which, he submitted, has facts similar to those in this appeal. He contended that, in that case, the court rejected the argument that Canadian labour and employment law could be enforced against an international organization which, like the Council, sought to invoke its immunity to prevent the continuation of legal proceedings brought against it for alleged wrongful dismissal. Counsel argued that the court in that case rejected the argument that the international human-rights exception to international organization immunity existed. That argument was rejected, especially because the source of such exception was an international human rights convention which was not incorporated into Canadian municipal law.

[18] Upon the authority of that case, counsel submitted that, just as the United Nations enjoys absolute immunity, the Council in the instant appeal also enjoys absolute immunity via the Order. Also, even on the "functional immunities" approach that was adopted by the court in **Amaratunga**, he submitted that the Council should be immune from the proceedings brought by the appellant. Otherwise, it "would constitute undue interference with [the Council's] autonomy in performing its functions" (see para. 37 of the Council's written submissions, quoting from the **Amaratunga** decision).

[19] Counsel also relied on the United States case of **Mendaro v World Bank** (1983), 230 US App DC 33, and the case of **Broadbent v OAS** 628 F, 2d 27 (DC Cir 1980) to support the contention that international organizations are immune from employment suits.

Grounds B to E continued: Decisions where there is lack of or an inadequate internal dispute-settlement mechanism

Summary of submissions

For the Tribunal

[20] Miss Ruddock submitted that although it is the tendency of courts in the various jurisdictions to uphold the immunity of international organizations, there are cases that indicate otherwise in some employment matters. In counsel's submission, the court in **Beer and Regan v Germany** (Application No 28934/95) Judgment Strasbourg 18 February 1999, and **Waite and Kennedy v Germany** Application No 26083/94, European Court of Human Rights, 18 February 1999, [1999] ECHR 13, established the principle that an international organization will not be entitled to immunity where no alternative forum, in particular, an internal dispute resolution mechanism or appeals process, is available to a claimant, which would deprive them of access to a court.

[21] Counsel submitted that the court in those cases based their approach on Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, she argued, is akin to the constitutional right outlined in section 16(2) of the Jamaican Charter of Fundamental Rights and Freedoms ('the Charter'). She also emphasized that the European Court of Human Rights ('the ECHR') has tended to take account of the existence of such mechanisms in determining the question of immunity. Therefore, where an individual is denied a right of access to internal appeals, the ECHR has taken the approach that a grant of immunity may result in a denial of justice if there is no opportunity for alternative dispute settlement. Upon the authority of the abovementioned cases, counsel submitted that, in the absence of an internal mechanism, the jurisdictional immunity of an international organization should not be maintained.

[22] Accordingly, counsel contended that it is for this court to determine whether jurisdictional immunity should be upheld if there is an absence of adequate internal mechanisms within the Council to appeal a decision to terminate the services of an employee. Counsel argued that a similar issue was examined in the "Meeting of Officials

on Institutions and Associate Institutions" held 22-24 March 2010 in Barbados, where the following was arrived at:

> "**Agreed** that there is a clear need to provide legal recourse and a remedy to members of the Regional Civil Service in instances where there are employment/staff disputes;
>
> **Recognised** that the philosophical justification for the need for an appropriate administrative mechanism is not just for administrative ease and good governance but also the need to ensure that the fundamental right of citizens in the Community to adequate access to justice is protected and given expression."

[23] Miss Ruddock submitted that this demonstrated the importance within the region of the existence of alternative dispute mechanisms within international organizations to accord a fair hearing and due process to aggrieved parties when disputes arise.

For the Council

[24] In response to this ground, Mr Leiba submitted that contrary to the appellant's contentions, provisions are made for the settlement of disputes by virtue of Article XII and Article XIV of the Order. He contended that Article XII of the Order makes it plain that an individual worker employed by the Council is not left without recourse to pursue his or her grouse. Further, counsel submitted that Article XIV of the Order establishes that a scheme is provided for the settlement of disputes, which was available to Mr Phillip in relation to any issue he had with the termination of his employment. Counsel also referred to Article XIV (2) of the Order and submitted that the absence of a forum to hear grievances would not provide a basis on which to limit the immunity of the Council.

[25] To support this view, the case of **Re Canada Labour Code** [1992] 2 SCR 50 was cited, in which counsel referred to the dictum of La Forest J at page 91 of the judgment. The exact wording of that dictum at page 91 of the judgment is as follows:

> "Any time sovereign immunity is asserted, the inevitable result is that certain domestic parties will be left without legal recourse. This is a policy choice implicit in the Act itself. ...

> Similarly, the exclusion in the present case is required by policy considerations of international comity and reciprocity."

[26] Counsel contended that the European decisions cited by the appellant are based on European treaty provisions, which have not found their way into Jamaican municipal law and, therefore, cannot be binding on our courts.

Grounds F to H – The Industrial Disputes Tribunal acted within the confines of its jurisdiction as encapsulated by the Labour Relations and Industrial Disputes Act.

Summary of submissions

For the Tribunal

[27] In support of her submissions on these grounds, Miss Ruddock referenced section 8 and the second schedule of the LRIDA and the case of **R v Industrial Disputes Tribunal, ex parte Esso West Indies Ltd** (1977-1979) 16 JLR 73. She submitted that the LRIDA creates a two-tier process. First, the Minister refers industrial disputes to the Tribunal, which then allows the Tribunal to exercise its jurisdiction. In relation to the second tier, she submitted that where the Tribunal exercised its jurisdiction, the officials appointed to sit are not judicial officers and therefore, the powers exercised by the Tribunal are not judicial powers. Hence, a judicial process does not exist at the Tribunal.

[28] Counsel cited definitions in Black's Law Dictionary, which, she argued, showed that a "judicial process" and a "legal process" are denoted as the same thing. She contended that if the process that is carried out by the tribunal under the LRIDA is not a "judicial process" and thus not a "legal process", then the Council would not be immune from the process under the LRIDA.

For the Council

[29] In response, Mr Leiba contended that it was the clear intention of the drafters of the Order that the provisions set out therein were to have a broad meaning. He submitted that, instead of resting on the phrase "legal process" simpliciter, reference is made to

"every form of legal process". Therefore, "every form of legal process" or "legal process" should not be construed narrowly. In the submission of counsel, a narrow interpretation would be inconsistent with the nature and intent of the Order, which grants immunity from any form of legal process in Jamaica. It was further submitted that the question of whether the members of the Tribunal are judicial officers is not determinative or in any way conclusive of whether the Tribunal's functions fall within the definition of "every form of legal process".

[30] Counsel further submitted that the term "legal process", when given its ordinary meaning, means a process set out by operation of law rather than by the agreement of the parties. Therefore, counsel contended that if such a definition is applied, any process set out by statute or by operation of law (as in this case) would fall within the ambit of "legal process." This approach, he contended, is consistent with the concept of diplomatic immunity.

Grounds I to J: "Legal process" does not encapsulate the process by which the Tribunal resolves disputes under the LRIDA.

Summary of submissions

For the Tribunal

[31] Under this ground, it was submitted that the term "legal process", as mentioned in the DIPA and the Order, is not defined, nor is there a definition in the Interpretation Act. Consequently, it was further submitted that the ordinary canons of interpretation are to be applied. Miss Ruddock contended that the term "legal process" is unambiguous and should be given its natural meaning, which, she submitted, is a reference to lawsuits and criminal prosecutions in a court of law. Further, the Tribunal is led by persons with experience in resolving industrial disputes. They are not judicial officers and do not exercise judicial powers. In these circumstances, the Tribunal does not believe it carries out a legal process in resolving industrial disputes. To that end, the Council would not be immune from its jurisdiction.

[32] (It will be seen that these submissions largely repeat those made under the previous issue.)

For the Council

[33] Counsel cited an extract from "Harvey on Industrial Relations and Employment Law", where it was observed that "… Orders in Council may be made giving certain international organizations which have a base in Great Britain immunity from suit and legal process". On that basis, and by way of comparison, counsel submitted that once a body has been created by parliament to resolve legal disputes, proceedings before that body must fall under the definition of "legal process".

[34] Counsel, in support of his arguments, also cited the case of **Omerri v Uganda High Commission** (1972) 8 ITR 14, in which, he contended, an industrial tribunal decided that it had no jurisdiction to hear a complaint of unfair dismissal brought against the Uganda High Commission because the High Commissioner for the Republic of Uganda enjoyed diplomatic immunity. In counsel's submission, the English National Industrial Relations Court upheld the tribunal's decision and emphasized the importance of the concept of diplomatic immunity in the international-law arena.

[35] Counsel also referred to the case of **Empson v Smith** (1965) 2 ALL ER 881 and submitted that a passage extracted from that case was cited with approval in **Omerri** and is instructive in the present appeal. In **Empson** the court, he submitted, reasoned that:

> "Certain things are clear. In the first place it is not for someone who is entitled to diplomatic immunity to claim it in the courts. It is unnecessary to refer to the authorities, but it is clear that proceedings brought against somebody, certainly civil proceedings brought against somebody, entitled to diplomatic immunity are, in fact, proceedings without jurisdiction and null and void unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court."

[36] (It is important to note that the abovementioned quotation actually comes from the case of **R v Madan** [1961] 1 All ER 588 at page 591, per Lord Parker CJ. It is set out in the judgment of Danckwerts LJ at pages 884-885 of the **Empson** judgment.)

[37] Counsel contended that in view of the authorities cited above, it is clear that the definition of "legal process" specifically extends to the powers of a tribunal as an administrative body to adjudicate upon disputes between employers and their employees.

Issue

[38] Based on the grounds of appeal filed and the submissions advanced herein, the main issue to be addressed is whether the Council has immunity from the jurisdiction of the Tribunal and every form of legal process.

Discussion

[39] To resolve this issue, it is best to first look at the creation of the Tribunal and the source and scope of its authority. This can be found in the LRIDA. Part III of the LRIDA deals with the establishment and functions of the Tribunal. Section 7 provides as follows:

> "7. (1)- There shall be established for the purposes of this Act a tribunal to be called the Industrial Disputes Tribunal.
>
> (2) The provisions of sections 8 and 10 and the Second Schedule shall have effect as to the constitution of the Tribunal and otherwise in relation thereto."

[40] It is not necessary to reproduce sections 8 and 10 of the LRIDA verbatim, but instead, they will be briefly summarized. Section 8 provides that the Tribunal shall sit in divisions as necessary, and section 10 makes it clear that the Minister may act in the public interest to settle disputes by making orders and referring matters to the Tribunal for resolution. The second schedule to the LRIDA gives details on the constitution of the Tribunal and the manner in which persons are appointed, how resignations are to be treated and deals with other similar matters.

[41] Having established that the Tribunal was created by the LRIDA, the next logical step is to explore why the Tribunal was created and the functions that it is expected to carry out. Section 11A of LRIDA provides:

> "11A.-(1) Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative
>
> (a) refer the dispute to the Tribunal for settlement -
>
> (i) if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties; or
>
> (ii) if, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do;
>
> (b) give directions in writing to the parties to pursue such means as he shall specify to settle the dispute within such period as he may specify if he is not satisfied that all attempts were made to settle the dispute by all such means as were available to the parties.
>
> (2) If any of the parties to whom the Minister gave directions under paragraph (b) of subsection (1) to pursue a means of settlement reports to him in writing that such means has been pursued without success, the Minister may, upon the receipt of the report, or if he has not received any report at the end of any period specified in hose directions, he may then, refer the dispute to the Tribunal for settlement.
>
> (3) Nothing in this section shall be construed as requiring that it be shown, in relation to any industrial dispute in question, that-
>
> (a) any industrial action has been, or is likely to be, taken in contemplation or furtherance of the dispute; or
>
> (b) any worker who is a party to the dispute is a member of a trade union having bargaining rights."

[42] The relevant sections of the LRIDA that have been reproduced make it clear that the Tribunal was created to settle industrial disputes that may arise or exist. The court acknowledges the clear general authority of the Tribunal to deal with parties within this jurisdiction where jurisdictional issues do not arise. However, this court's quest is to determine whether the Tribunal's authority to resolve disputes is broad enough to apply to international organizations, such as the Council, which seek to assert immunity. Therefore, it is now necessary to look at the source or constituent documents that established the Council.

The Agreement and the Revised Agreement

[43] As both counsel have pointed out, the Council was established by the Agreement which was signed by the Government of Jamaica in 1972. That Agreement was revised in Port-Au-Prince, Haiti, on 27 February 2018, and Jamaica became a signatory on 6 July 2018. Article XXXVIII of the "Revised Agreement Establishing the Caribbean Examinations Council" ('the Revised Agreement') states that:

> "The Original Agreement shall cease to have effect as regards the Parties to this Agreement when this Agreement enters into force."

[44] Of relevance at this juncture is Part II Article XVII of the Revised Agreement, which sets out the immunity of the Council. It states:

> "1. The Council, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. No waiver of immunity shall extend to any measure of execution.
>
> 2. The property of the Council wherever located and by whomsoever held shall be immune from search, acquisition, confiscation, expropriation and any other form of interference, whether by legislative, executive, administrative or judicial action." (Emphasis added)

[45] Article XVII of the Revised Agreement is also reproduced verbatim in Article III(1) and (2) of the Protocol. As a result, there is no need to set out those provisions. However, exploring the Protocol is the next logical step in this discussion.

The Protocol

[46] Article IV of the Protocol is of primary relevance. It states, *inter alia*, that:

> 1. "The premises of the Council shall be inviolable.
>
> 2. The Council may make regulations relating to the premises for the purpose of establishing conditions necessary for the full execution of its functions.
>
> 3. Officials of a Participating Government shall not enter the premises to perform any official duties therein except with the consent of and under conditions agreed by the Registrar. However, in the case of fire or other emergency requiring prompt protective action, or in the event that officials of a Participating Government have reasonable cause to believe that such an emergency has occurred, the consent of the Registrar to entry on the premises by the officials of the Participating Government shall be presumed if the Registrar cannot be reached in time." (Emphasis added)

The Order

[47] In setting out the complete background to the sources of the Council's claim for immunity, it may also be useful to refer to the preamble to the Order, which outlines the following:

> "... AND WHEREAS the Government of Jamaica signed the Protocol on Privileges and Immunities of the Caribbean Examinations Council on the 7th day of September, 1997, which makes provision for the establishment in Jamaica of the Caribbean Examinations Council and for the privileges and immunities to be accorded to the Caribbean Examinations Council.

> AND WHEREAS it is desirable that the privileges and immunities so accorded should become part of the law of Jamaica:"

[48] Mr Leiba also submitted that the Council acted on the resolution contained in this preamble which can be seen in the DIPA, which came into effect in 1962.

[49] The relevant sections of the Revised Agreement, the Protocol and the Order that have been outlined clearly establish that the Council does indeed have certain privileges and immunities granted to it. Also, the Government of Jamaica acknowledged and agreed to the Council's immunity by signing the Agreement in 1972 and a Supplemental Agreement in 1973 (which was signed in Jamaica). The Government of Jamaica also signed the Order on 7 September 1997 and the Revised Agreement on 6 July 2018. This simply means that if the functions of the Tribunal and its role in trying to resolve the dispute between the parties fall within the definition of "every form of legal process", then the Council must enjoy the exemption or immunity it claims, notwithstanding the Tribunal's general authority to resolve industrial disputes. An exploration of the meaning of the phrase "every form of legal process" vis-à-vis the functions of the Tribunal and the facts of this case will also be necessary. Mr Leiba contended that it was the clear intention of the drafters of the Order that the provisions set out therein were to have a broad meaning.

[50] In relation to this submission, I have considered para. [61] of the learned judge's written judgment, reported as: **The Caribbean Examinations Council v The Industrial Disputes Tribunal and Gerard Phillip** [2015] JMSC Civ 44. There she referred to the case of **Amaratunga**, and stated that, in a note to para. 30 of **Amaratunga**, the court approved the definition of "legal process" as used in the Canadian case of **Re Selkirk** (1961), 27 DLR (2d) 615 (Ont CA). In **Re Selkirk**, Schroeder JA observed that:

> "The word "process" viewed as a legal term is a word of comprehensive signification. In its broadest sense it is [equivalent] to "proceedings" or "procedure" and may be said

> to embrace all the steps and proceedings in a case from its commencement to its conclusion. "Process" may signify the means whereby a Court compels a compliance with its demands. Every writ is, of course, a process, and in its narrowest sense the term "process" is limited to writs or writings issued from our out of a Court under the seal of the Court and returnable to the Court."

[51] This quotation from **Selkirk** is useful because, when a broad interpretation is applied to the wording of the relevant legislation, it is clear that the phrase "legal process" in the DIPA and the Order applies to the Tribunal and the orders made by the Tribunal in relation to the Council. We are in agreement with the submission on behalf of the Council that a narrow interpretation would be inconsistent with the intent of the drafters of the Order, which grants immunity from every form of legal process in Jamaica.

[52] In respect of immunity in general, with the helpful concession made by Miss Ruddock at the start of the hearing of the appeal, we need not start from the very beginning and explore every aspect of immunity. In the appellant's written submissions on the ground dealing with immunity, it is only required to repeat at this juncture that it was conceded at para. 17 "… that international organizations are generally granted absolute immunity from all legal process in respect of all acts carried out to achieve their purpose". It was submitted that, by virtue of section 4 of the Order, the Council generally enjoys immunity from the jurisdiction of the courts of Jamaica. Also mentioned in the submissions was Article III(1) of the Protocol, which grants the Council, its property and assets immunity unless it is expressly waived. Based, therefore, on those submissions, it is apparent that the appellant has already conceded that the Council does, in fact, enjoy some immunity – in particular, with respect to acts carried out to achieve its purpose.

[53] In the court's view, the case of **Giovanni Porru** cited by the appellant for the dictum that "no rule of customary international law under which foreign States and subjects of international law in general are to be considered as immune from the jurisdiction of another State", actually lends greater support to the Council's case. This is so based on (i) the similarity of facts between that case and the instant case, both cases

treating with the same matter of a questioned termination of employment; and (ii) the eventual outcome, which was that the court dismissed the case for lack of jurisdiction on the basis of immunity.

[54] Like any non-human entity, the Council, being an organization, cannot act on its own, but needs employees to prepare and execute its plans and programmes and generally to do its work. In the instant case in which Mr Phillip was employed to the Council in the post of Assistant Registrar (Syllabus Development), it may assist to examine his role against the background of the Council's functions. What, then, is the role of the Council? Its duties are set out in Schedule III to the Caribbean Examinations Council Act ('the CXC Act') as follows:

> "DUTIES
>
> The Council shall-
>
> (a) conduct such examinations as it may think appropriate and award certificates and diplomas on the results of the examinations so conducted;
>
> (b) review and consider annually its examinations held in any territory of the Area and remit to each Participating Government-
>
> (i) an analysis of data on the performance of candidates classified by subject and territory;
>
> (ii) a digest of submissions from National Committees along with such other information as may be considered necessary;
>
> (iii) an annual report of the Council's activities;
>
> (c) consider, having regard to standard, the advisability of inviting and, if thought fit, invite any other examining Body to conduct examinations in the Area and award certificates and diplomas on the results of such examinations, advise any Body so invited on such adaptation of the examinations as the Council may think necessary and generally, assist any Body so invited in the conduct of such examinations in the Area;

> (d) appoint a School Examinations Committee in accordance with Article X;
>
> (e) appoint from among its members an Administrative and Finance Committee which shall include a representative from each of the Participating Governments of Barbados, Guyana. Jamaica and Trinidad and Tobago and four representatives from the other Participating Governments;
>
> (f) receive from any National Committee or other Committee established under this Agreement reports and recommendations on any matters relevant to the purposes of the Council and consider such reports and recommendations;
>
> (g) on the invitation of any Government in the Caribbean conduct any examinations which the Council considers feasible."

[55] From even a cursory review of these duties and a consideration of Mr Phillip's title and role as Assistant Registrar (Syllabus Development), a clear dovetailing of the two emerges: both generally and specifically with regard to the duties set out at (a), (c) (f) and (g). To briefly refer to just one example, using paragraph (c), adaptation of examinations, based on review and advice, would naturally involve syllabus development. Mr Phillip's role and function, therefore, would be inextricably linked with the primary functions of the Council. It is consequently apparent that the factual basis for the decision in the **Porru** case also exists on the facts of this case and that the engagement and separation of employees (and especially one at Mr Phillip's level) are functions carried out in the course of the performance of the Council's duties and so would be covered under the "functional immunities" approach. It will be remembered that that is the restrictive approach, and so more difficult to satisfy.

[56] The Council has, therefore, succeeded on this ground by showing that its activities as an international organization were undertaken in the course of pursuing its specific purpose or one of its specific purposes. It is important to observe as well that the Revised Agreement, the Protocol and the Order are very clear in outlining the Council's immunity in very broad terms. None of these instruments has sought to place any limitation on the

extent of the immunity or stated that the immunity was only applicable in certain circumstances. So, the logical view is that the Council's immunity is general and absolute. I go further to say that granting immunity only in matters of public law but removing it for matters of private law would still allow for there to be interference in the Council's operations and thus would run counter to the fulfilment of its objectives in the various countries in which it operates. The very instruments that were referenced in the appellant's submissions make it clear that the Council does indeed have general, absolute immunity.

[57] A consideration of some of the other authorities cited also favours the position advanced by the Council that, in this case, the said immunity is applicable in general and absolute terms.

[58] In **Omerri**, for example, Mr Omerri brought a claim against the Uganda High Commission for unfair dismissal. The industrial tribunal in London considered the matter and decided that the claim should be stayed, as the High Commissioner of Uganda had diplomatic immunity, which he did not waive and so the tribunal had no jurisdiction to proceed with the case. The Hon Sir John Donaldson, at page 2, observed as follows:

> "… civil proceedings brought against somebody, entitled to diplomatic immunity, are in fact, proceedings without jurisdiction and null and void unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court."

[59] The principles in **Omerri,** and the similarity in the facts of that case and the instant case, serve to reinforce this court's finding that (i) the privileges and immunities established by the Revised Agreement, the Protocol and the Order apply to the Council in this appeal; and (ii) that the learned judge in the court below was correct in so finding. Also, as mentioned before, there is no indication whatsoever that the Council expressly or even impliedly waived its immunity. Therefore, Mr Phillip erred in initiating a claim against the Council before the Tribunal for relief in respect of his separation from the Council; and, for the same reason, the Tribunal erred when it purported to assume

jurisdiction in the matter and made its orders against the Council. In the circumstances, the learned judge cannot fairly be faulted for having so found in the court below

[60] In the article "The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?" Eur J Int Law (2016) 27 (3): page 763, the learned author looked at the importance of "Functional Necessity" for international organizations and made this observation:

> "The rationale for the 'functional necessity' test is that IOs [international organizations] need immunity to enable them to fulfil their functions independently, by preventing member states (and, particularly, the host state) from exerting undue influence. From the perspective of employees, the immunity of IOs is beneficial in that it protects the independence of their staff and ensures uniformity in the application of internal rules. However, this immunity does not and should not exempt IOs from respecting human rights norms – these obligations continue to apply, but it is their enforcement that is impeded by immunity. The 'functional necessity' justification for immunity has often been interpreted as granting de facto absolute immunity to IOs, including in employment disputes."

[61] This passage emphasizes the practical necessity of the privileges and immunities that are afforded to the Council for it to function freely and independently in Jamaica. This court agrees with the learned judge that the DIPA and the Order grant absolute immunity to the Council from "every form of legal process", and this immunity would also apply to the Tribunal's decision to assume jurisdiction and to make the orders that it did against the Council.

[62] The United States case of **Mendaro** is also persuasive authority supporting the view of the necessity for immunity for an organization like the Council, even concerning employment matters, as in the instant appeal. In **Mendaro** there was an appeal to decide whether the International Bank for Reconstruction and Development ('the World Bank') could be sued in United States courts by employees who sought redress for employment grievances. In **Mendaro**, the court made the following observations:

> "… the purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory… But beyond economies of administration, the very structure of an international organization, which ordinarily consists of an administrative body created by the joint action of several participating nations, requires that the organization remain independent from the intranational policies of its individual members… and most large international organizations have established administrative tribunals with exclusive authority to deal with employee grievances."

[63] **Mendaro** is persuasive (as the learned judge correctly found) because it is only logical that the Council should enjoy absolute immunity even from claims by employees, in order to prevent interference by external bodies and to maintain its independence while operating in Jamaica. To allow the orders made by the Tribunal against the Council to stand would set a precedent that is contrary to the functional needs of the Council. Therefore, the Council's decision to terminate Mr Phillip's employment should be free from adjudication by the Tribunal despite the Council not having an internal mechanism to handle such grievances at the time of the application. The lack of an internal mechanism to settle disputes was not fatal to the Council's case, the guidance of La Forest J in **Re Canada Labour Code** (referenced at para. 63 of **Amaratunga** and at para. [24] hereof), having been respectfully accepted and adopted.

[64] The court also finds the Canadian case of **Amaratunga**, referred to by the 1st respondent, to be quite persuasive. In **Amaratunga,** the appellant worked at the Northwest Atlantic Fisheries Organization ('NAFO') (an international organization) from 1988 until 2005, when his employment was terminated. He commenced a wrongful dismissal claim against the NAFO, but that international organization claimed immunity under the Northwest Atlantic Fisheries Organization Privileges and Immunities Order ('the NAFO Immunity Order'). The first-instance judge (Wright J) rejected the NAFO'S immunity defence and allowed the application for the dismissal of the suit to proceed to trial. The Court of Appeal for Nova Scotia allowed NAFO's appeal and determined that NAFO

enjoyed immunity from all claims. On Mr Amaratunga's appeal to the Supreme Court of Canada, the headnote discloses that it was held (allowing the appeal in part) that:

> "NAFO is entitled to immunity, except from A's separation indemnity claim under the Staff Rules. Without immunity, an international organization would be vulnerable to intrusion into its operations by the host state and that state's courts. However, no rule of customary international law confers immunity on international organizations. Instead, they derive their immunity from treaties, or in the case of smaller international organizations like NAFO, from agreements with host states."

[65] With respect to that aspect of the judgment in **Amaratunga**, allowing the appeal in part, that does not take away from the utility of that authority in the instant appeal. That part of the judgment had to do with a separation indemnity that the NAFO recognized was due to be paid. The NAFO had, in fact, already paid half of the amount without demur. More significantly, there are important similarities between **Amaratunga** and the instant appeal. In **Amaratunga**, the lower court rejected the NAFO's claim for immunity, just as the Tribunal rejected the Council's assertion of its immunity. We agree with the view of the Federal Supreme Court that the NAFO, in fact, had the immunity it claimed. In the present case, it is the court's view that a grant of general and absolute immunity creates a layer of protection which allows the Council to freely execute its duties in fulfilment of the purpose for which it was established in Jamaica.

Other considerations

[66] Although the foregoing discussion is, in the court's view, enough to dispose of the appeal in the Council's favour, there are also other practical considerations that help to support the conclusion that the immunity to the Council is general and absolute.

[67] This can be seen, for example, when one looks at the wording of Article IV (1) of the Protocol, which states: "The premises of the Council shall be inviolable". That provision is underscored by the wording of Article IV(3), which proscribes unauthorized entry onto the Council's premises. It states:

> "Officials of a Participating Government shall not enter the premises to perform any official duties therein except with the consent of and under conditions agreed by the Registrar."

[68] Similarly, this is what Article III(ii) of the Protocol states:

> "The property of the [Council] wherever located and by whomsoever held shall be immune from search, acquisition, confiscation, expropriation and any form of interference, whether by legislative, executive, administrative or judicial action."

[69] The definition of "property" in the Protocol is also instructive – in particular, by its breadth. It indicates that "property" includes:

> "…all forms of property including funds and assets belonging to or held or administered by the[Council], and in general all income accruing to the [Council]."

[70] These provisions are significant, as they raise an important question: if, for the sake of argument, the Tribunal's orders were to be allowed to stand, were not voluntarily complied with and had to be enforced by court processes, such as a writ of execution, how could that be executed, having regard to the provisions just referred to? This query is even more poignant in pointing to the greater likelihood of absolute immunity and, in particular, immunity from the process of the Tribunal. So, if the Tribunal's functions are not included in the very wide term "every form of legal process", and it had jurisdiction over the Council, how would its decisions and orders be enforced against the Council? From all indications, any enforcement against the Council would be impossible by the usual methods.

[71] A close reading of the LRIDA shows as well that the contention that the Tribunal's functions do not approximate to "judicial process" and so cannot be characterized as coming within the meaning of the phrase "every form of legal process" might not be the Tribunal's strongest point. This view has arisen from an examination of the nature of the powers given to the Tribunal. Section 12, for example, makes quite clear the binding and final nature of the Tribunal's decisions and orders, stating that its orders:

> "(c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."

[72] By way of further example, section 12(9) stipulates that persons who disobey the Tribunal's orders commit a criminal offence and are subject to fines of up to $500,000.00 in the case of an employer and $50,000.00 in the case of any other person.

[73] Sections 17 and 18 of the LRIDA are also instructive. They read as follows:

> "17. (1) The Tribunal and a Board shall have power to summon any person to attend before the Tribunal or the Board, as the case may be, and to give evidence or to produce any paper, book, record or document in the possession or under the control of such person;
>
> (2) A summons under this section shall be in the form prescribed in the Third Schedule;
>
> (3) A summons under this section may be served either personally or by registered post;
>
> (4) The Tribunal and a Board shall have power to administer oaths to or take the affirmation of any witness appearing before them.
>
> 18 (1) Any person summoned to attend and give evidence or to produce any paper, book, record or document before the Tribunal or a Board –
>
> (a) shall be bound to obey the summons served upon him;
>
> (b) shall be entitled, in respect of such evidence or the disclosure of any communication or the production of any such paper, book, record or document to the same right or privilege as he would have before a court;
>
> (c) shall be entitled to be paid from public funds, his expenses, including travelling expenses, at the rates prescribed by the Witnesses Expenses Act for witnesses who are entitled to have their expenses paid from public funds:

Provided that the Tribunal or a Board may disallow the whole or any part of such expenses in any case if it thinks fit.

(2) Any person who-

(a) without sufficient cause, fails or refuses to attend before the Tribunal or a Board in obedience to a summons under this Act, or fails or refuses to produce any paper, book, record or document which he was required by such summons to produce, or

(b) being a witness, leaves the Tribunal or the Board, as the case may be, without the permission of the Tribunal or the Board; or

(c) being a witness, refuses, without sufficient cause, to answer any question put to him by or with the permission of the Tribunal or the Board; or

(d) wilfully obstructs or interrupts the proceedings of the Tribunal or the Board,

shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding fifty thousand dollars." (Emphasis added)

[74] It will be observed that the powers bestowed on the Tribunal by the LRIDA approximate, quite closely, those given to courts and other tribunals and would appear to make the Tribunal, at the very least, a quasi-judicial body. However, this discussion is not strictly necessary to arrive at the conclusion to which we have already come, dismissing the appeal.

Conclusion

[75] Having regard to the authorities and the circumstances of this appeal, we are of the view that the learned judge was correct in holding that the Tribunal erred in assuming jurisdiction in this matter involving the Council, in circumstances in which the Council enjoys absolute immunity in Jamaica from "every form of legal process", and had not waived its immunity. In passing, it is observed that this court can discern nothing incongruous with the Council being clothed with the power to initiate legal proceedings,

yet being granted absolute immunity from suit. However, we hasten to say that we did not have the benefit of authorities and arguments to convince us that those circumstances cannot co-exist.

[76] Therefore, the appellant was not successful in demonstrating any error on the part of the learned judge in arriving at the findings, which she did.

[77] It was for the preceding reasons that we made the orders that are reflected at para. [1] of this judgment.

SIMMONS JA

[78] I have read, in draft, the reasons for judgment of F Williams JA. They accord with my reasons for concurring with the order at para. [1].

V HARRIS JA

[79] I too have read the draft reasons for judgment of F Williams JA, which accord with my reasons for concurring with the order at para. [1] herein.