[2021] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD - BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN (AG)

SUPREME COURT CIVIL APPEAL NO COA2019CV00072

BETWEEN	**DR O'NEIL LYNCH**	**APPELLANT**
AND	**MINISTER OF LABOUR AND SOCIAL SECURITY**	**RESPONDENT**

Nigel Jones and Matthew Gabbadon instructed by Nigel Jones & Company for the appellant

Miss Althea Jarrett instructed by the Director of State Proceedings for the respondent

23 September 2020 and 8 October 2021

McDONALD-BISHOP JA

[1] I have had the privilege of reading the comprehensive reasons for judgment of Simmons JA. I agree with her reasoning, which accords with my own reasons for concurring in the decision of the court, and there is nothing I could usefully add.

SIMMONS JA

[2] This is an appeal by Dr O'Neil Lynch ('the appellant') against the decision of Wolfe-Reece J made on 31 May 2019, on an application brought by him for judicial review of the decision of the Minister of Labour and Social Security (the respondent) not to refer the dispute which arose from the termination of his contract of employment by the University of the West Indies ('the UWI'), to the Industrial Disputes Tribunal ('the IDT'). The learned judge made the following orders:

"(a) An order of Certiorari quashing the decision of the Respondent made on June 21, 2016 that the Ministry fulfilled its obligation in successfully bringing closure to this industrial dispute and in the circumstances is not obliged to proceed any further is refused.

(b) An order of mandamus compelling the Respondent to refer the Applicant's case to the Industrial Disputes Tribunal for a determination is refused."

[3] On 12 July 2019, the appellant, the applicant in the court below, filed a notice and grounds of appeal seeking the following orders:

"(a) The appeal is allowed and the Order of the learned judge contained in the judgement dated the 31st day of May 2019 is set aside;

(b) Costs of this appeal to the Appellant to be taxed if not agreed; and

(c) Such further and/or other relief."

[4] On 23 September 2020, after considering the submissions in this matter, we made the following orders:

"1. The appeal is dismissed.

2. The order of Wolfe-Reece, J made on 31st May 2019 is affirmed.

3. Costs of the appeal to the respondent to be agreed or taxed."

[5] It was indicated to the parties that the reasons for our decision would be provided, and this judgment is a fulfilment of that promise.

Background

[6] The facts in this matter are not in dispute. The appellant was employed by the UWI as a lecturer in its Tropical Medicine Research Institute, under a fixed term contract which commenced on 1 July 2012 and was slated to expire on 31 August 2015 ('the contract').

[7] By way of a letter dated 14 July 2014, the UWI terminated the contract with immediate effect as of 15 July 2014. The reason given for the termination of the contract was what was termed as the "on-going challenges" with his performance. It was further stated that the said termination was being done in accordance with clause 1.2 of the contract, which states:

> "The appointment is nevertheless terminable by either party giving the other six (6) months' notice in writing, given to terminate not earlier than December 31, for termination in Semester I and May 31, for termination in Semester 2."

The appellant was also informed that he would be paid in lieu of notice and would receive all "entitlements arising from [his] contract".

[8] The appellant took issue with the manner in which his service was terminated, and through his attorneys-at-law, Nigel Jones and Company ('NJ & Co'), responded by letter dated 26 August 2014. This was followed by several pieces of correspondence between NJ & Co and the UWI concerning what the appellant believed was his unfair dismissal and the UWI's breach of natural justice. For convenience, the sequence of the events and the contents of some of those letters have been summarised below:

26 August 2014	NJ & Co wrote to the UWI indicating that the appellant's position was that he had been unfairly dismissed. A request was also made for the appellant's reinstatement to his former post as Lecturer. Alternatively, a request was made for the matter to be referred to the visitor of the UWI within 14 days of receipt of the said letter. It was also alleged that there had been a breach of natural justice as the appellant had not been afforded an opportunity to state his case before a fair and impartial tribunal.
3 November 2014	NJ & Co wrote to the Permanent Secretary of the Ministry of Labour and Social Security ('the Ministry'), indicating that although reference had been made to the jurisdiction and authority of the visitor in its letter of 26 August 2014 to the UWI, it was being proposed as an "alternative approach",

	that the matter be referred to the Ministry's Conciliation Unit and in the event that it was not settled, for it to be referred to the IDT.
6 January 2015	The appellant and the UWI took part in the first conciliation meeting at the Ministry. It was agreed that the UWI's grievance procedure would be invoked, and in the event that there was no resolution of the matter, it would be referred back to the Ministry.
30 January 2015	NJ & Co wrote to the UWI indicating that it was agreed that the UWI's grievance procedure would be invoked as all efforts to resolve the matter had to be exhausted before it could be referred back to the Ministry.
19 February 2015	The UWI wrote to the appellant inviting him to a hearing on 27 February 2015.
27 February 2015	The appellant accompanied by NJ & Co attended the meeting.
4 May 2015	NJ & Co indicated to the UWI that the grievance procedure it had sought to invoke was "inapplicable" as the appellant's employment had been terminated. It was also indicated that in an effort to resolve the dispute, the appellant was willing to continue discussions on condition that he was legally represented at those meetings. It was also indicated that if they did not receive a response within five days, they would revert to seeking the intervention of the Ministry.
27 May 2015	NJ & Co, having received no response from the UWI, wrote to the Ministry advising it of what had taken place since the last conciliation meeting and requested its intervention in order to arrive at a "speedy and amicable solution".

14 August 2015	NJ & Co wrote to the Ministry enclosing copies of its four previous letters and claiming compensation on the appellant's behalf in the sum of $3,572,973.92 and his reinstatement. It was also noted that the UWI had advertised a post that was similar to that from which the appellant had been dismissed. In the circumstances, it was requested that the matter be treated as one of urgency.
28 September 2015	NJ & Co wrote to the Ministry requesting that the matter be referred to the IDT.
7 October 2015	The Ministry acknowledged receipt of the letter dated 28 September 2015 and informed the appellant that the UWI was willing to compensate the appellant for the last seven months of the contract being 1 February 2015 – 31 August 2015 but would not reinstate him.
9 December 2015	NJ & Co responded to the letter of 7 October 2015 advising the Ministry that the UWI's proposed settlement would not be accepted. It was again requested that the matter be referred to the IDT.
19 May 2016	The UWI by letter, again indicated that it was not prepared to "re-engage/re-employ" the appellant and provided a breakdown of the calculation of the proposed settlement sum.
25 May 2016	The second conciliatory meeting was attended by the appellant and the UWI. The parties were unable to reach a settlement.

14 June 2016	NJ & Co wrote to the Ministry asking for its written position/opinion on the situation to enable the appellant to make an informed decision as to the way forward.
21 June 2016	The Ministry responded, indicating that the UWI was willing to compensate the appellant for his service up to 31 August 2015. NJ & Co was also advised that the issue of the appellant's reinstatement was "outside the remit and scope of [the] Ministry" and "well beyond the jurisdiction of any legitimate Tribunal". The Ministry also stated that it had "fulfilled its obligation in successfully bringing closure to [the] dispute and in the circumstances [was] not obliged to proceed any further".

[9] As a result of the respondent's refusal to refer the matter to the IDT, the appellant filed an *ex-parte* notice of application seeking leave to apply for judicial review. Leave was granted on 1 December 2016, and on 9 December 2016, the appellant filed a fixed date claim form for judicial review against the respondent and the UWI. On 18 May 2017, the appellant filed an amended fixed date claim form, in which he sought the following reliefs against the respondent solely:

> "1. An order of Certiorari quashing the decision of the Respondent made on June 21, 2016 that the Ministry had fulfilled its obligation in successfully bringing closure to this industrial dispute and in the circumstances is not obliged to proceed any further;
>
> 2. An order of mandamus compelling the Respondent to refer the Applicant's case to the Industrial Disputes Tribunal for a determination;
>
> 3. Costs; and
>
> 4. Such further and other relief as this Honourable Court may deem fit."

[10] The application was opposed by the respondent on the basis that the matter was within the sole jurisdiction of the visitor and as such, could not properly have been referred to the IDT.

Proceedings in the court below

[11] In the court below, Wolfe-Reece J identified the issues to be as follows:

> "(a) whether the court has jurisdiction to refer the dispute between the Applicant and the UWI to the IDT in light of the power of the visitor provided for in the Royal charter.
>
> (b) If the court has jurisdiction, whether Dr. Lynch's application for judicial review of the Respondent's decision should be granted and the orders as set out in the Amended Fixed Date Claim Form be made."

[12] After hearing submissions from both the appellant and the respondent, Wolfe-Reece J made the orders as detailed in paragraph [2] of this judgment. In arriving at her decision, the learned judge found that the appellant was a member of the UWI and was, therefore, a person in respect of whom the visitor had jurisdiction.

[13] In her detailed analysis of the scope of the visitorial authority, the learned judge, at paragraph [26] of her judgment, stated:

> "[26] The UWI was established by the Royal Charter issued by Queen Elizabeth II in 1962. Clause 6 of the said Charter entrusts a visitor/visitors with the authority to 'inspect the University College, it's buildings, laboratories and general work, equipment, and also the examination, teaching and other activities of the University College by such person or persons as may be appointed in that behalf.' A visitorial power stems from an eleemosynary corporation, founded for the purpose of distributing the founder's bounty to such persons as the founder has directed (**Halsbury's Laws of England**, 5th Ed. Volume 8). The principle behind the office of the visitor is that the founder of the eleemosynary corporation is entitled to establish laws to govern the object of his bounty (Brooks J in **Myrie v University of the West Indies and others** CLAIM No. 2007 HCV 04736 relying on **Tudor on Charities**

> 8th Ed. Page 371). The founder is also entitled to be the sole judge, or to appoint a visitor to be the sole judge of the interpretation and application of those laws."

[14] The learned judge also expressed the view that the Charter provided very little guidance in respect of how a matter such as that between the parties was to be dealt with. In this regard, she referred to **Dr Matt Myrie v University of the West Indies and others**, (unreported), Supreme Court, Jamaica, Claim No 2007 HCV 04736, judgment delivered 4 January 2008, ('**Myrie**') in which Brooks J (as he then was) stated that recourse was to be had to the common law to understand the duties of the visitor. Additionally, at paragraph [29], Wolfe-Reece J, having agreed with Sykes J (as he then was) in **Suzette Curtello v University of the West Indies** [2015] JMSC Civ.223 ('**Suzette Curtello (SC)**'), found that:

> "[29] The role of the UWI visitor is not limited to the inspection of buildings, laboratories, examination and teaching as may be gleaned from a first look at the Charter. 'Inspect' in the context of clause 6 extends to examining the operation of the university generally, and ensuring that it is being operated in the manner intended by the Charter and its statutes…The visitorial power 'enables the visitor to settle disputes between the members of the corporation, to inspect and regulate their actions and behaviour, and generally to correct all abuses and irregularities in the administration of the charity' (**Halsbury's Laws of England** 2nd Ed. Volume 8)."

[15] In further examination of the scope of the visitor's jurisdiction, the learned judge relied on the following statement by Hoffman J in **Hines v Birbeck College and another** [1985] 3 All ER 156 at 161 ('**Hines v Birbeck**'):

> "[30] The jurisdictions of the courts on the one hand and of university or college visitors on the other hand are mutually exclusive, the jurisdiction of university or college visitors being dependent entirely on the domesticity of the dispute. A dispute had the necessary domesticity to be the subject of the exclusive jurisdiction of a visitor if it involved members of the university or college and concerned the interpretation or application of internal rules, customs or

> procedures….Accordingly, since the matters in dispute involved, inter alia, complaints of defective procedure, lack of a fair hearing, and questions of membership of a college, they were domestic disputes and were within the exclusive jurisdiction of the college visitor."

[16] After completing her examination of the visitor's jurisdiction, Wolfe-Reece J directed her attention to whether the dispute had the relevant domesticity to fall within the jurisdiction of the visitor. She found that was indeed the case. The learned judge stated:

> "[44] …Similar to the case of **Hines v Birbeck College**, the present matter in dispute involves, inter alia, complaints of improper procedure, lack of a fair hearing, and questions of reinstatement, ***the issues raised have the necessary domesticity and are within the exclusive jurisdiction of the visitor***. Dr. Lynch should invoke that jurisdiction which is still available to him.
>
> [45] Further, it is only until he brings the issue before the visitor, and the visitor acts ultra vires that the court will intervene. I am not of the view that having engaged the Ministers [sic] voluntary conciliation process that it ousts the jurisdiction of the visitor pursuant to the Royal Charter." (Emphasis supplied)

[17] Having considered **Thomas v University of Bradford** [1987] AC 795 ('**Thomas**'), **Duke St John-Paul Foote v University of Technology and Elaine Wallace** [2015] JMCA App 27A ('**Foote v UTECH**') and the more recent judgment of **Suzette Curtello (SC)**, the learned judge concluded that the dispute between the appellant and the UWI "fell squarely within the jurisdiction of the visitor". She also found that that jurisdiction was exclusive, and as such, the court could not intervene.

[18] The learned judge found that in the circumstances of the case, the appellant was obliged to invoke the jurisdiction of the visitor before seeking the court's intervention. At paragraph [40] of her judgment, she stated:

> "[40] The visitor's jurisdiction is not a mere alternative that members of the UWI can pursue, but it is a cross road the Applicant must traverse before seeking redress from the court. Sykes J made it clear in the case of **Suzette Curtello** that it is only after the visitor's jurisdiction has been utilized, that the court may intervene in the dispute."

[19] As a consequence, she refused the orders sought by the appellant.

The appeal

[20] The appellant, who was dissatisfied with that ruling, filed a notice and grounds of appeal on 12 July 2019, challenging the following findings of law:

> " i. That the issue of the Respondent/Defendant having failed to observe the procedure as laid down in the Labour Relations and Industrial Disputes Act 1975 ('LRIDA') by failing to refer the matter to the Industrial Disputes Tribunal ('IDT'), falls squarely within the jurisdiction of the visitor.
>
> ii. That the issues raised by the Appellant/Claimant concern the interpretation and application of the internal procedure for dismissal.
>
> iii. That the issues raised by the Appellant/Claimant have the necessary domesticity and are within the exclusive jurisdiction of the visitor.
>
> iv. That the Appellant/Claimant cannot be granted the order of mandamus compelling the Respondent/Defendant to refer his case to the IDT."

Grounds of appeal

[21] The appellant relied on the grounds of appeal which are set out below. Both grounds were addressed together by counsel.

Ground 1: "The learned judge erred in accepting that the issue of the Respondent/Defendant having failed to observe the procedure as laid down in the LRIDA by failing to refer the matter to the IDT, falls squarely within the jurisdiction of the visitor in circumstances where this issue falls outside the visitorial jurisdiction as it does not concern the Respondent/Defendant's policies and procedures but is in relation to the

Respondent/Defendant's breach of statute and common law which therefore ousts the jurisdiction of the visitor."

Ground 2: "The learned judge erred in failing to accept/and or adequately consider the submission made by the Appellant/Claimant that the matter should be referred to the IDT for determination as the dispute was not settled at the conciliatory meetings held even though there was clear evidence that the issues raised by the aggrieved worker remained unresolved."

Appellant's submissions

[22] Mr Nigel Jones, on behalf of the appellant, submitted that the issue was whether, in light of the fact that the dispute had not been settled using the conciliatory process, there was a dispute which was capable of being referred to the IDT. Reference was made to sections 11(1) and 11A of the Labour Relations and Industrial Disputes Act ('LRIDA'), which gives the respondent the discretion to refer industrial disputes to the IDT.

[23] Counsel directed the court's attention to the letter dated 21 June 2016 from the respondent in which it was indicated that the Ministry had brought closure to the dispute and, as such, was not obliged to proceed any further. Mr Jones also referred to paragraphs 18 and 19 of the affidavit of Michael Kennedy sworn to on 30 June 2017 and paragraph [46] of the judgment of Wolfe-Reece J, which indicated that the dispute between the appellant and the UWI had not been resolved. He argued that despite this state of affairs, the respondent failed to refer the matter to the IDT in breach of section 11 of the LRIDA. He submitted that the learned judge erred when she failed to consider the appellant's contention that there was a breach of that statute and the common law. He argued that in those circumstances, the court could have exercised its jurisdiction to review the respondent's decision; instead, the learned judge focused on whether the dispute was within the jurisdiction of the visitor. Mr Jones submitted that the issue of the respondent's breach of section 11 of the LRIDA was a matter that was outside of the jurisdiction of the visitor. The learned judge, therefore, erred when she found that the issue of the non-referral of the dispute to the IDT fell within the jurisdiction of the visitor.

[24] The appellant relied heavily on the cases of **Alexander Okuonghae v University of Technology, Jamaica** [2014] JMSC Civ 138 ('**Okuonghae**') and **Thomas** in support of this submission.

[25] Mr Jones submitted that the case of **Okuonghae** could be distinguished, as the issue in that case, was whether the claimant had been dismissed without a hearing and, therefore, in breach of the defendant's internal management policies and procedures. He argued that the issue of whether there had been any legislative breach did not arise. Mr Jones indicated that in the case at bar, the appellant did not abandon that part of his case. He stated that unlike the situation in **Okuonghae**, the appellant's case is not concerned with any breach of the UWI's policies; the issue is whether the respondent, in breach of the LRIDA, failed to refer the matter to the IDT when it was not settled at the conciliatory meetings.

[26] It was further submitted that the referral of the matter to the IDT was permitted as an alternate procedure, as the Rules and Ordinances of the UWI do not set out how grievances, such as that in this case, are to be dealt with. Mr Jones also argued that since the appellant had been dismissed, the visitor had no jurisdiction in the matter. In addition, it was submitted that, whereas the IDT, by virtue of section 12 of the LRIDA, could order the appellant's reinstatement and compensation, the visitor could not provide that remedy. Counsel asked the court to consider the remedy that was being sought to determine the issue of jurisdiction.

[27] The case of **June Chung v Shanique Cunningham** [2017] JMCA Civ 22 ('**June Chung**') was relied on in support of counsel's submission that the learned judge failed to properly exercise her discretion. This error, according to counsel, arose from her failure to consider the appellant's submissions in respect of whether the respondent had breached section 11 of the LRIDA.

[28] In conclusion, it was submitted that the orders in the court below ought to be set aside, as the learned judge erred in finding that the issue of whether the respondent breached the provisions of the LRIDA fell within the jurisdiction of the visitor.

Respondent's submissions

[29] Ms Althea Jarrett submitted that the two grounds of appeal are inextricably linked and raise one issue. That issue is:

> "Whether the dispute between the appellant and the UWI falls within the exclusive jurisdiction of the visitor and if so, whether the respondent in the proper exercise of her discretion under section 11A(1)(a)(i) of the LRIDA ought to have made a referral to the IDT?"

[30] Counsel submitted that the visitor was the sole judge of the internal or domestic laws of the UWI, and as such, the court does not enjoy concurrent jurisdiction in such matters. Reference was made to **Vanessa Mason v The University of the West Indies** (unreported), Supreme Court, Jamaica, Claim No 2008 HCV 05999, judgment delivered 19 January 2009 ('**Vanessa Mason (SC)**'), which was affirmed in **Vanessa Mason v The University of the West Indies** (unreported), Court of Appeal, Supreme Court Civil Appeal No 7/2009, judgment delivered 2 July 2009 ('**Vanessa Mason (COA)**'), to show the exclusivity of the visitor's jurisdiction. Specific reference was made to paragraphs 34 and 39, where Harris JA stated:

> "34. The court's quest in determining the visitor's powers has led to a line of established authorities which have eminently propounded the exclusivity of the visitor's jurisdiction. The historical development of the law relating to the visitor's jurisdiction as distilled by the authorities, originate with the case of **Phillips v Bury** 1 Ld Raym 5 at 8, 91 ER 900, in which, a dissenting judgement of Holt C.J. was upheld by the House of Lords. At page 903 of his judgement Holt C.J. in his pronouncement of the visitor's jurisdiction said:
>
> > '…the office of the visitor by the common law is to judge according to the statues of the college, to expel and deprive upon just occasions, and to

> hear appeals of course. And from him, and him only, the party grieved ought to have redress; and in him the founder hath reposed so entire confidence that he will administer justice impartially, that his determinations are final, and examinable in no other court.'"

And at paragraph 39:

> "39. The jurisdictional authority of the visitor is derived from the power to administer the domestic laws of the University. All members of the University are subject to the domestic laws."

[31] Counsel submitted that based on the above authorities, the issue of whether the visitor has exclusive jurisdiction in relation to a dispute is determined by the domesticity of the dispute. It was further submitted that a dispute has the requisite domesticity if it involves members of the UWI and the interpretation or application of its internal rules and policies. Reference was made to the case of **Thomas** in which Griffiths LJ explained the meaning of domesticity. Specific reference was made to page 820 where Griffith LJ stated:

> "…I am satisfied that in referring to the domestic jurisdiction the judges are using a shortened form of reference to those matters which are governed by the internal laws of the foundation. This will include not only the interpretation and enforcement of the laws themselves but those internal powers and discretions that derive from the internal laws such as the discretion necessarily bestowed on those in authority in the exercise of their disciplinary functions…"

[32] Ms Jarrett submitted that the real issue is that the appellant was not given an opportunity to be heard. In other words, he is dissatisfied with the manner in which his dismissal was effected. This, she said, was evident from the contents of the letter from NJ & Co dated 26 August 2014 to the UWI. She, however, pointed out that the appellant had also asserted that the jurisdiction of the IDT was concurrent with that of the visitor.

[33] Counsel stated that there was no dispute that the appellant, in his capacity as a lecturer, was a member of the UWI. She reminded the court that by his claim, the

appellant sought reinstatement to his post as a lecturer on the basis that the contract had been unjustifiably terminated by the UWI. Counsel submitted that the dispute was concerned with that contract and, as such, was grounded in the domestic laws of the UWI that regulate its governance. Reference was made to **Suzette Curtello (SC)** in support of that submission. Ms Jarrett indicated that the claim against the UWI was discontinued after it had filed an application to dismiss the claim on the basis that the visitor had exclusive jurisdiction. She stated that a copy of the Royal Charter, 1972 ('the Charter') was exhibited in that application.

[34] Counsel stated that there are cases in which the visitor has exclusive jurisdiction and others in which there is concurrent jurisdiction with the court, but the visitor was given precedence. It was also submitted that where a dispute with a university involves questions relating to its internal laws or rights and duties derived from those laws, the visitor has exclusive jurisdiction. Reference was made to **Foote v UTECH** in support of that submission. She also indicated that Morrison JA (as he then was), in his review of **Thomas**, stated that the case decided that the scope of the visitor's jurisdiction included not only the interpretation and enforcement of the university's internal and domestic laws but also the internal powers and discretions derived from them, such as the discretion which had to be exercised in disciplinary matters.

[35] Ms Jarrett indicated that the decision in **Thomas** had been applied in this jurisdiction, and, in arriving at her decision, Wolfe-Reece J considered both **Foote v UTECH** and **Suzette Curtello (SC)**.

[36] It was submitted that, in seeking to rely on an alternative remedy, the appellant misunderstood the exclusive nature of the visitor's jurisdiction. Ms Jarrett argued that based on **Vanessa Mason (COA)**, there could be no concurrent jurisdiction where a dispute falls within the jurisdiction of the visitor. She further submitted that as was stated by Harris JA in **Vanessa Mason (COA)**, the comments of Kelly LJ in **Re Wislang's Application** [1984] NI 63 ('**Re Wislang**'), to the effect that there was a presumptive co-existence of the jurisdiction of the court, were *obiter*. It was argued that the

appellant's allegations that he was unfairly dismissed and was not afforded a fair hearing are matters falling within the UWI's Charter and its statutes. Those documents, it was said, regulate that institution's governance. She posited that it was the appellant's knowledge of the contents of the Charter which caused him to first invoke the jurisdiction of the visitor to settle the dispute.

[37] Where the issue of whether there was a dispute that could properly have been referred to the IDT was concerned, Ms Jarrett highlighted that the Minister, pursuant to section 11A(1)(a)(i) of the LRIDA, has the discretion to refer matters to that body. She argued that the discretion must be exercised properly and within the confines of the law. Ms Jarrett submitted that where there are allegations of unfair dismissal, the IDT does not enjoy concurrent jurisdiction with the visitor. She also submitted that a dispute between a university and its employee over the termination of that employee's employment does not fall within the definition of an industrial dispute under the LRIDA. In the circumstances, had the respondent acceded to counsel for the appellant's proposition that an "alternative approach" be adopted, that would have been an improper exercise of her ministerial discretion. She argued that, in considering whether it was appropriate to make such a referral, the respondent was required to satisfy herself that the IDT had jurisdiction to entertain the dispute. As such, the respondent would have had to consider the law concerning visitorial jurisdiction, which is exclusive in relation to disputes involving members of a university and the interpretation and application of the university's rules, customs and procedures.

[38] Counsel further submitted that by acceding to the appellant's request to refer the matter to the Ministry's Conciliation Unit, the respondent was seeking to facilitate the resolution of the dispute. That process, she explained, was wholly voluntary as, there is no reference in the LRIDA to conciliation. As such, the utilisation of that procedure did not oust the jurisdiction of the visitor.

[39] It was submitted that the learned judge was, therefore, correct in focusing on the scope of the visitorial jurisdiction. Counsel also submitted that her finding that the visitor

had exclusive jurisdiction over the dispute between the appellant and the UWI was correct. She stated that a perusal of statute 17 of the Charter clearly shows that the procedure for dealing with such issues as that between the appellant and the UWI was not followed. The learned judge, she argued, came to the correct decision although she did not refer to statute 17. She reiterated that the respondent would not have properly exercised her discretion had she referred the matter to the IDT.

[40] Ms Jarrett, in addressing the respondent's alleged breach of the LRIDA, stated that the power given to the respondent under section 11 of that Act was discretionary and could not be breached. She argued that the only allegation which could have been properly made was that the respondent exercised that discretion improperly. She stated that had the learned judge ordered that the matter was to be placed before the IDT, the court would have stepped into the shoes of the respondent.

[41] In the circumstances, it was submitted that the appeal was without merit and ought to be dismissed.

The role of the review court

[42] In an application for judicial review, the court is concerned with the illegality, irrationality or procedural impropriety of a decision or award. This was set out in **Council of Civil Service Unions v Minister for The Civil Service** [1984] 3 All ER 935. At pages 953 – 954 of the report, Roskill LJ expanded on these points:

> "...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, **Wednesbury** principles (see **Associated Provincial Picture Houses Ltd v Wednesbury Corp** [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."

[43] It is important to note that an application for judicial review is not in the nature of an appeal. This point was addressed in Wade and Forsyth, 'Administrative Law', 10th edition, where, in addressing the distinction between an appeal and judicial review, the learned authors stated at pages 28 - 29:

> "The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'"

[44] In the Caribbean Civil Court Practice 2011, the learned editors, at page 431, have stated the principle to be as follows:

> "Judicial review of an administrative act is distinct from an appeal. The former is concerned with the lawfulness rather than with the merits of the decision in question, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than its correctness."

[45] Based on the above authorities, Wolfe-Reece J was required to consider whether the decision of the respondent could be impugned on the basis that it was illegal, irrational, procedurally improper or unjust as the appellant contended. The question the learned judge had to ask was whether the respondent's exercise of her discretion was improper where the appellant had not attempted to settle the matter by referral to the visitor before requesting a referral to the IDT. It was, therefore, incumbent on her to consider the basis on which the respondent found that she could not refer the dispute to the IDT. That exercise would have required an examination of jurisdictional issues. Wolfe-Reece J found that the matter was essentially a dispute between the appellant and the UWI and was concerned with the "interpretation and application of the internal procedure for dismissal". I agree. The learned judge did not find that the non-referral of the matter to the IDT fell within the jurisdiction of the visitor, as the appellant seemed to have suggested.

Analysis

[46] This appeal arose from the learned judge's exercise of her discretion. The basis on which this court will disturb such a decision is well settled. It is not the function of this court to substitute its views for that of the learned judge. In order to succeed, the appellant must demonstrate that Wolfe-Reece J, in the exercise of her discretion, erred on a point of law or her interpretation of the facts, or made a decision that no judge "regardful of his duty to act judicially could have reached" (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ('**Mackay**'), in which Morrison JA summarized the principles in **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at 1046). Morrison JA at paragraph [20] of **Mackay** stated:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[47] The appellant has raised two complaints in this appeal. His first complaint is that he was dismissed without a hearing. This was stated in the letters from his attorneys-at-law dated 26 August and 3 November 2014. In the letter of 26 August 2014 to the UWI, it was stated as follows:

> "We are, however, of the opinion that there has been a breach of natural justice in the dismissal of Dr. Lynch in light of the fact that no due process was afforded him. Dr. Lynch was never given a hearing before a fair and impartial tribunal where he would have the opportunity to state his case and be accompanied by his representatives prior to the contract being terminated by the University."

That sentiment was echoed in the letter of 3 November 2014 to the Ministry, albeit in the context of an alleged breach of the Labour Relations Code by the UWI. The appellant sought to address that complaint by engaging in conciliatory discussions with the UWI

under the auspices of the Ministry's Conciliation Unit. As stated previously, this was being done as an alternative to an approach to the visitor of the UWI, who the appellant acknowledged, had the jurisdiction to deal with his complaint.

[48] When the parties failed to reach a settlement, the appellant sought to invoke the provisions of section 11 of the LRIDA by requesting that the respondent refer the matter to the IDT.

[49] The appellant's second complaint is that the respondent, in breach of that section, declined to refer the matter to the IDT as requested.

Whether the dispute fell within the jurisdiction of the Visitor?

[50] Wolfe-Reece J, in answering this question, stated at paragraphs [27]-[30]:

> "[27] The extent of the visitor's power is set out in the corporation's founding documents and the supporting statutes, ordinances and regulations. However, in the instant case very little guidance on the duties and authority of the visitor is provided in the Charter. Brooks J (as he then was) addressed this concern in **Myrie v The University of the West Indies** (supra), when he said
>
> > 'However, except for an express intention to inspect, neither of the Charters nor any of the statutes established there under provide any further guidance as to the duties or the authority of the visitor. It is therefore to the common law that we are obliged to look for enlightenment on the role of the visitor.'
>
> [28] In concluding his decision, the learned Judge said:
>
> > 'The UWI's Charter having provided for a visitor, the visitor is the authority which has the jurisdiction to decide the disputes arising under the domestic law of the institution. That jurisdiction is defined in the common law and the court [should] decline jurisdiction in such circumstances. Dr. Myrie, being a member of the UWI was obliged to follow its domestic procedures for applying for relief. His application to the court is therefore inappropriate.'

> [29] **The role of the UWI visitor is not limited to the inspection of buildings, laboratories, examination and teaching as may be gleaned from a first look at the Charter. 'Inspect' in the context of clause 6 extends to examining the operation of the university generally, and ensuring that it is being operated in the manner intended by the Charter and its statutes** (As per Sykes J (as he then was) in **Suzette Curtello v University of the West Indies** [2015] JMSC Civ. 223). The visitorial power 'enables the visitor to settle disputes between the members of the corporation, to inspect and regulate their actions and behaviour, and generally to correct all abuses and irregularities in the administration of the charity' (Halsbury's Laws of England 2nd Ed. Volume 8).
>
> [30] In **Hines v Birbeck College** [1985] 3 All ER 156 at 161, Hoffman J stated that
>
> > '**The jurisdictions of the courts on the one hand and of university or college visitors on the other hand are mutually exclusive, the jurisdiction of university or college visitors being dependent entirely on the domesticity of the dispute. A dispute had the necessary domesticity to be the subject of the exclusive jurisdiction of a visitor if it involved members of the university or college and concerned the interpretation or application of internal rules, customs or procedures**….Accordingly, since the matters in dispute involved, inter alia, complaints of defective procedure, lack of a fair hearing, and questions of membership of a college, they were domestic disputes and were within the exclusive jurisdiction of the college visitor.'" (Emphasis supplied).

[51] The Charter provides for the constitution and government of the UWI and the management of its affairs. The schedule to the Charter is comprised of 41 statutes. By virtue of section 1(f) of statute 2, the appellant, as a member of the academic staff, was a member of the UWI. That remained so even though he was dismissed. In **Thomas**, Lord Griffiths, in addressing the issue of the visitorial jurisdiction, stated at pages 814-816:

"I turn now to consider the scope of the visitatorial jurisdiction. The jurisdiction stems from the power recognised by the common law in the founder of an eleemosynary corporation to provide the laws under which the object of his charity was to be governed and to be sole judge of the interpretation and application of those laws either by himself or by such person as he should appoint as a visitor. In ***Philips v. Bury***, Skin. 447, Holt C.J. described it thus, 1 Ld. Raym. 5, 8:

> 'the office of visitor by the common law is to judge according to the statutes of the college, to expel and deprive upon just occasions, and to hear appeals of course. And from him, and him only, the party grieved ought to have redress; and in him the founder hath so reposed entire confidence that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever.'

In ***Ex parte Kirkby Ravensworth Hospital*** (1808) 15 Ves. 305, 311, Sir Samuel Romilly said in a passage in his argument which has long been accepted as authoritative:

> 'A visitor is … a judge, not for the single purpose of interpreting laws, but also for the application of laws, that are perfectly clear: requiring no interpretation; and, farther, for the interpretations of questions of fact; involving no interpretation of laws.'

As the jurisdiction stems from the power to provide and administer the domestic law of the foundation, it can as a general rule be said only to apply to those who are members of the foundation because only they are subject to those domestic laws. **Nevertheless the jurisdiction has always been held to apply both to admission to and removal from office** in the foundation and many of the old cases concern the election or amotion of fellows at Oxford and Cambridge colleges…." (Emphasis supplied)

He continued at page 821:

> "'**a matter or dispute is 'domestic' so as to be within the visitatorial jurisdiction if it involves questions relating to the internal laws of the foundation of which he is visitor or rights and**

> **duties derived from such internal laws.** Conversely, an issue which turns on the enforcement of or adjudication on terms entered into between an individual and his employer, notwithstanding that they may also be in the relationship of member and corporation, and which involves no enforcement of or adjudication concerning the domestic laws of the foundation, is ultra vires the visitor's authority and is cognizable in a court of law or equity (see 97 L.Q.R. 644). …'
>
> **In the present case, the entire dispute is centred upon the statute ordinances and regulations of the university. Were they correctly applied and were they fairly administered? Such a dispute in my view falls within the jurisdiction of the visitor and not the courts of law, notwithstanding that its resolution will affect Miss Thomas's contract of employment**." (Emphasis supplied)

[52] This point was also addressed by McDonald-Bishop J (as she then was) in **Okuonghae**. In that case, the claimant had been employed by the defendant university as a Laboratory Technologist. His contract of employment provided that it could be terminated without cause by either party giving one month's notice. During the course of his employment, disciplinary proceedings had been brought against him on several occasions. His contract was subsequently terminated by the defendant giving him one month's written notice on the basis of what was particularized as misconduct on his part. The claimant brought a claim in which he claimed damages for an extensive list of alleged breaches including wrongful dismissal, libel, loss of earnings/future earnings and aggravated and exemplary damages.

[53] The primary issue for the court to resolve was whether the court had jurisdiction to deal with those aspects of the claim which alleged breaches of the defendant's internal procedures and policies. It was argued that pursuant to section 5 of the University of Technology Act ('the UTECH Act'), the visitor, being the Governor-General, had the exclusive jurisdiction to resolve any dispute relating to the internal rules and procedures of the defendant.

[54] Section 5 of the UTECH Act provides as follows:

> "5. The Governor-General or the person for the time being performing the role and functions of Governor-General shall be the Visitor of the University, who in the exercise of the visitorial authority, may, from time to time and in such manner as he shall think fit- (a) direct an inspection of the University, its buildings, laboratories and general work, equipment and of the examination, teaching and other activities of the University by such person or persons as he may appoint in that behalf and (b) hear matters referred to him by the Council."

[55] At paragraphs [30] – [32], the court noted the claimant's allegations as follows:

> "[30]…it becomes immediately obvious that the bulk of the claimant's complaint **is about treatment of him by the defendant in administrative matters**. Paragraphs 4 – 8 of the Further Amended Particulars of Claim reveal an allegation that the defendant is liable in damages to him for breach of natural justice, discrimination, bias, unreasonable and unfair treatment and victimization by the defendant, its servants and agents. It contains too complaints about matters relating to his evaluation, promotion, academic training and right to have grievances relating to him properly addressed in accordance with the policies, procedures, rules and regulations of the defendant.
>
> [31] The issues surrounding the claimant's evaluation, promotion, development, and similar matters, as averred in paragraphs 4 – 8, are governed by the defendant's Human Resources Policies and Procedures – General, in particular, those portions falling under the heading 'Performance Review, Planning and Development – Administrative, Technical and Ancillary Staff (Levels 1-9).' **The matters complained of in those paragraphs, clearly, would fall within the internal administrative mechanisms of the defendant even though the claimant has placed them as being part of his contractual arrangement**."

And at paragraph [34]:

> "[34] When one examines the claimant's pleadings against these facts, it is evident that the claimant's complaint is not

> that the notice period was unlawful as being in breach of statute, the common law or in breach of his contract. **His complaint is, generally, that he was dismissed without a hearing and in breach of the defendant's own procedures and/or principles of natural justice** and laws of Jamaica. The claimant has not pointed to the laws of Jamaica that have been breached and by what means. The gravamen of his complaint, clearly, is on the grounds of unfairness arising from alleged breaches of internal processes, policies and procedures. **This is therefore, a claim for unfair or unjustifiable dismissal which on my understanding, the claimant has abandoned**." (Emphasis supplied)

[56] The court in resolving whether the visitor had jurisdiction to entertain the claim stated at paragraphs [41]-[43] that:

> "[41] Megarry V-C, in considering this second question in Patel, noted: 'Jurisdiction to hear complaints, and appeals is a function which may be exercised at any time and not only at times fixed for general visitation. Subject to the restrictions imposed by the founder, **the Visitor has a general jurisdiction over all matter [sic] of dispute relating to the statutes of the foundation and the internal affairs and members of the corporation**.'
>
> His Lordship then made reference to Thomson v University of London [1864] 33 L.J. CH. 625, 634 in which it was stated:
>
> > 'Whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the Visitor.'
>
> His Lordship, then continued:
>
> > 'In particular the Visitor exercises a special jurisdiction to decide private disputes within the corporation according to the special statutes and code of law governing the corporation.'
>
> [42] Cooke, J.A. in Mason at paragraphs [9] and [10], similarly, noted that: '[9] It would seem incontestable that

visitorial capacity embraces every aspect in respect of the governance of all the activities within the purview of the University. Further the University administers and governs the halls of residence. [10] (a) There can be no doubt that where the visitorial jurisdiction exists it is an exclusive jurisdiction.'

[43] Following closely on the guidance of the authorities, it could be said that **these matters set out in paragraphs 4-11 of the Further Amended Particulars of Claim are for the visitorial jurisdiction as they fall squarely within the internal 'policies, practices and regulations' of the defendant to use the claimant's own words in paragraph 8 of the said particulars of claim**. The matters in issue are purely connected to the internal laws, policies and processes governing the defendant and its employees, like the claimant. **They relate exclusively to the private or special rights of the defendant even if clothed by the claimant in the term 'breach of contract.'** The complaint is, simply, that the defendant has failed to observe or adhere to its internal laws." (Emphasis supplied)

[57] At paragraphs [48] – [52] McDonald-Bishop J, stated thus:

"[48] The question that now arises for consideration is whether the claimant is, or was at the time he initiated these proceedings, within the scope of the visitorial jurisdiction, his contract having been terminated. **It could be argued that he no longer stands as a member of the defendant and so is not subject to the jurisdiction of the Visitor**. This issue, or at least one of similar nature, was considered in reasonable detail by Megarry V-C in **Patel**.

[49] In that case, as the headnote depicts (which I will transcribe almost verbatim), the plaintiff was a student at a university incorporated by royal charter and by the terms of the charter was a member and corporator of the university. Having twice failed to pass his examination at the end of the academic year, he was required to withdraw from the university and was refused re-admission until he could provide proof of greater academic ability. By an originating summons, he sued the university for certain declarations in regard to his position, and by a writ sought declarations, an injunction, and damages against a former Vice-Chancellor and Principal of the university, all with the object of securing his re-admission.

[50] On the question whether the court had jurisdiction, it was held, inter alia, that (1) the Visitor's jurisdiction was exclusive and that all the matters of which the plaintiff complained were of a nature which fell within it; (2) **the jurisdiction extended not only to those who were admittedly members of the university but also to all disputed questions of membership, and so applied to the plaintiff in his challenges both to the termination of his membership and to the refusal to re-admit him**; and (3) the court accordingly had no jurisdiction.

[51] Megarry V-C made some useful pronouncements on this aspect of the case that I find necessary to re-state in undiluted terms in applying them to the instant case. His Lordship noted:

> 'Now the plaintiff relied strongly on the definition of students in statute 1. He was plainly not at present 'following' any course of studies in the university. Accordingly, he said, he was not one of the students of the university who by virtue of statute 2 were 'members of the university' and so were corporators by virtue of the reference to 'members of the university' in clause 1 of the royal charter. Furthermore, by similar reasoning, he was not one of the 'undergraduate students of the university' who by clause 1 of the royal charter were made corporators. **Therefore, being plainly no member of the university and no corporator, he stood outside the visitatorial jurisdiction**…
>
> **The plaintiff further contended that he had ceased to be a member of the university by reason of his failure to re-register at the university after his first year ended**…
>
> The cogency of the plaintiff's argument on this point plainly rests on a foundation of the Visitor's jurisdiction being confined to those who are admittedly members of the university. If that foundation were sound in law, there would be some force in the contention, though there would also be problems, not least in relation to the relief which the plaintiff is seeking in the proceedings. However, for the reasons that I have given, I do not think that the Visitor's jurisdiction is

> confined in this way. **It is not restricted to disputes between members but extends to all questions of disputed membership; and that plainly includes the question whether the plaintiff was validly dismissed from the university and whether he was validly refused re-admission to it**…
>
> Questions whether examination results were unlawfully withheld and whether certain appointments to the Student Progress Committee were unlawful plainly fall within the visitatorial jurisdiction over internal matters and the proper construction of the university legislation; and I cannot see that the plaintiff has any legitimate interest in them save as a student member of the university within that jurisdiction. Nothing that happened in 1973 has taken away the jurisdiction of the Visitor over the matters of which the plaintiff complains.' (Emphasis as in original).

> [52] **It does appear to me, by parity of reasoning, that although the claimant is no longer a member of the defendant, he is challenging the validity or legality of his dismissal that involves matters pertaining to the treatment of him as an employee by the defendant. These matters complained of all relate to his standing as an employee of the defendant and involve the application to him of the rules and regulations of the defendants**. **I can see him having no legitimate interest in such matters except as an employee or (disputed employee) of the defendant. It means that the termination of his services would not take away from the jurisdiction of the Visitor over the matters of which he complains**. He, therefore, falls within the jurisdiction of the Visitor as a 'disputed' employee." (Emphasis supplied)

[58] It was, therefore, clear to the court that to the extent that the issues concerned the internal policies and procedures of the university, those issues ought to have been resolved by the visitor. This was notwithstanding any attempt by the claimant to couch his complaint as a breach of his employment contract and counsel's submission that due

to the termination of the contract, the visitorial jurisdiction was inapplicable. This issue has also been addressed in several other cases.

[59] In **Re Wislang** at paragraphs 80-81, the principle was stated in the following terms:

> "…But what the authorities show, as I read them, is that matters may well be in breach of a contract of employment, yet within the visitorial jurisdiction, if those matters are of an internal domestic character or touch upon the interpretation of execution of private rules and regulations of the university…"

[60] In **Hines v Birbeck**, the plaintiff, who was a professor of economics at the University of London, was paid by the defendant college. The affairs of the university were governed by the University of London Act 1978 and university statutes. The affairs of the college were governed partly by that Act and university statutes and partly by the college's own charter and statutes. The visitor for both institutions was the Crown. The plaintiff, who had been dismissed after disciplinary proceedings were brought against him, brought an action for unlawful dismissal. He conceded that he was subject to the jurisdiction of the university's visitor. However, it was asserted on his behalf that the college visitor had no jurisdiction in the matter on several grounds and, in particular, that the breaches of the college's disciplinary procedures, which had occurred, amounted to a breach of his contract of employment with the college. Alternatively, it was argued that the alleged breaches amounted to the wrongful interference with the plaintiff's contract of employment with the university so that in either case, the claim was founded on the general law of contract or tort, which were outside the jurisdiction of the college or university.

[61] Hoffmann J, who delivered the judgment of the court, stated at page 163:

> "In ***Herring v Templeman*** [1973] 2 All ER 581 at 591 Brightman J said that complaints of defective procedure and lack of a fair hearing were 'essentially matters which touch the internal affairs or government of the college and

> are therefore matters confined by law to the exclusive province of the visitor'. The authority of this statement is unaffected by the subsequent appeal (see [1973] 3 All ER 569). Furthermore, the substance of the dispute is whether Professor Hines should be removed from his post at the college and thereby expelled from its membership. Questions of disputed membership are also for the visitor (see ***Patel v University of Bradford Senate*** [1978] 3 All ER 841, [1978] 1 WLR 1488)."

[62] In **Thomas**, the respondent was a lecturer who had been employed by the appellant university. The university purported to terminate her employment, and she brought an action in which she sought a declaration that the university's decision to dismiss her was *ultra vires*, null and void as the procedure adopted did not comply with the disciplinary rules and procedures contained in the university's charter, statutes, ordinances and regulations, which were incorporated in her contract of employment. She also claimed damages for breach of contract or, alternatively, arrears of salary. The university applied for a stay of the proceedings on the ground that it was a purely domestic matter which was in the exclusive jurisdiction of the visitor. The judge at first instance refused the application, and the respondent suffered a similar fate in the Court of Appeal.

[63] On appeal to the House of Lords, leave was granted to the university to amend the relief sought to that of an order for the statement of claim to be struck out on the ground that the court had no jurisdiction to entertain the action. The appeal was allowed. At pages 820 – 821, Lord Griffiths stated:

> "**This then leads me to consider what is meant by the reference in the cases to the 'domesticity' of the visitatorial jurisdiction**. The word is clearly not used with the width of its everyday meaning. Nothing could be more domestic in its everyday sense than the arrangements in the kitchens or for the cleaning of the premises, but no one suggests that the domestic staff of a university fall within the visitatorial jurisdiction. **I am satisfied that in referring to the domestic jurisdiction the judges are using a shortened form of reference to those matters which**

are governed by the internal laws of the foundation. This will include not only the interpretation and enforcement of the laws themselves but those internal powers and discretions that derive from the internal laws such as the discretion necessarily bestowed upon those in authority in the exercise of their disciplinary functions over members of the foundation. It is only if 'domesticity' is understood in this sense that any principle emerges that can be of general application to determine whether or not a given matter falls within the visitatorial jurisdiction. What is not permissible is to regard 'domesticity' as an elastic term giving the courts freedom to choose which disputes it will entertain and which it will send to the visitor. This approach necessarily involves the concept of a concurrent jurisdiction, and as I have endeavoured to show this is not the way in which our law has developed.

I would adopt the following passage from Dr. Smith's latest article 'Visitation of the Universities: A Ghost from the Past – III' (1986) 136 New Law Journal 567-568:

> 'Once it is recognised that the supervision of the statutes, ordinances, regulations etc. of the foundation is the basis of the visitatorial jurisdiction, then it becomes a relatively simple matter to define the scope of the visitor's powers, for any matter concerning the application or the interpretation of those internal laws is within his jurisdiction, but questions concerning rights and duties derived otherwise than from such internal laws are beyond his authority. Thus a matter or dispute is 'domestic' so as to be within the visitatorial jurisdiction if it involves questions relating to the internal laws of the foundation of which he is visitor or rights and duties derived from such internal laws. Conversely, an issue which turns on the enforcement of or adjudication on terms entered into between an individual and his employer, notwithstanding that they may also be in the relationship of member and corporation, and which involves no enforcement of or adjudication concerning the domestic laws of the foundation, is ultra vires the visitor's authority and is cognizable in a court of law or equity (see 97 L.Q.R. 644). …'

> **In the present case, the entire dispute is centred upon the statute ordinances and regulations of the university. Were they correctly applied and were they fairly administered? Such a dispute in my view falls within the jurisdiction of the visitor and not the courts of law, notwithstanding that its resolution will affect Miss Thomas's contract of employment**." (Emphasis supplied)

[64] In examining Ms Thomas's case, the House of Lords found that her complaint was not that her conduct did not justify removal but that the correct procedure was not followed. Lord Ackner stated at page 828:

> "The source of the obligation upon which Miss Thomas relied for her claim is the domestic laws of the university, its statues and its ordinances. It is her case that the university has failed either in the proper interpretation of its statues or in their proper application. Miss Thomas is not relying upon a contractual obligation other than an obligation by the university to comply with its own domestic laws. Accordingly, in my judgement, her claim falls within the exclusive jurisdiction of the visitor, subject always to judicial review."

[65] The above statement on the scope of the visitorial jurisdiction was approved by this court in **Foote v UTECH**. At paragraph [36], Morrison JA stated:

> "…It may be convenient to begin with the leading modern authority on the jurisdiction of the visitor, which is the decision of the House of Lords in **Thomas v University of Bradford** [1987] 1 All ER 834. The issue in that case was whether the complaint by a member of the academic staff of a university that she had been wrongfully dismissed fell within the jurisdiction of the High Court or that of the university visitor. It was held that the jurisdiction of a university visitor, which is based on his position as the sole judge of the internal or domestic laws of the university, is exclusive and not concurrent with the court's jurisdiction. The scope of the visitor's jurisdiction included the interpretation and enforcement, not only of those laws themselves, but also of internal powers and discretions derived from them, such as the discretion which necessarily had to be exercised in disciplinary matters. **Accordingly, if a dispute between a**

> **university and a member of the university over his contract of employment with the university involves questions relating to the internal laws of the university or rights and duties derived from those laws, the visitor has exclusive jurisdiction to resolve that dispute**." (Emphasis supplied)

[66] This issue also arose for consideration in the more recent case of **Vanessa Mason (SC)**. In that case, the claimant, who was a student of the defendant university, had been expelled from her dormitory after complaints had been lodged against her. By letter dated 5 December 2008, the university required her to vacate the dormitory pending further investigations into the matter. In her claim against the university, the claimant sought to prevent her expulsion in addition to other remedies. It was submitted that in taking such action, the university was in breach of its contract to provide the claimant with accommodation. The court identified the basis of her claim as being whether the letter of 5 December 2008 could terminate the contract between the claimant and the university.

[67] The university objected to the claim on the basis that the matters raised in the claim were properly to be determined by the visitor. In response, counsel for the claimant argued that the visitorial jurisdiction was not unlimited and that where the domestic and internal laws are silent on the issue, the visitor has no jurisdiction.

[68] R Anderson J, in examining the jurisdiction of the visitor *vis-a-vis* that of the courts, had this to say at pages 9 and 10 of the judgment:

> "…Also in **Hines v Birkbeck**…**when there was a dispute over a contract of employment, the court held that since the matters in dispute involved inter alia, complaints of defective procedure, lack of a fair hearing, and questions of membership of a college, they were domestic disputes and were within the exclusive jurisdiction of the college visitor**. As stated by Hoffmann J (as he then was):
>
> > 'The visitor is a domestic forum appointed by the founder for the purposes of regulating the foundation's

> domestic affairs in accordance with its statutes including determination of domestic disputes. As Megarry J said in Patel v University of Bradford Senate: 'The visitor has a general jurisdiction over all matters in dispute relating to statutes of the foundation and its internal affairs and membership of the corporation.'

In discussing the jurisdiction of the visitor as compared to that of the courts in matters of this kind and whether the nature of the cause of action affected that issue, the learned judge had this to say:

> 'In **Thorne v University of London** [1966] 2 ALL ER 237 another dissatisfied candidate for a law degree complained that his examination papers had been negligently marked. He framed his action as a common law claim in damages for negligence but it was nevertheless struck out in the ground that it related to a domestic dispute within the university. This decision of the Court of Appeal makes it impossible to argue, at least in this court, that the nature of the cause of action determines whether the case falls within the visitor's jurisdiction. The only plausible alternative criterion is that the question is determined by the domesticity of the dispute. For one thing, it is settled law that the jurisdictions are mutually exclusive. The authorities also make it clear that, irrespective of whether the courts would be as well or better qualified to deal with the particular case, a dispute has the necessary domesticity if it involves members of the corporation and the interpretation or application of its internal rules, customs or procedures…
>
> **In my judgment the dispute is no less domestic because the rules, customs or procedures in issue are alleged to constitute terms of a contract or because their construction of the questions of fact involved in their application are equally conveniently justiciable in a court**'." (Emphasis supplied)

[69] The respondent's position was accepted by the court, which found that the provision of accommodation by the university was clearly a dispute which would appropriately be within the visitor's jurisdiction.

[70] The claimant, who was dissatisfied with that decision, filed a notice of appeal in this court (see **Vanessa Mason (COA)**). It was argued on her behalf, that the jurisdiction of the visitor was limited to the application and interpretation of the internal laws of the university and did not encompass the common law of contract. It was further argued that the breach of contract on which she based her claim did not depend on or concern the application or interpretation of the internal laws of the university and was therefore outside the jurisdiction of the visitor.

[71] The court found at paragraph 11 that:

> "11. The essence of the complaint … is that the University contravened its internal laws. This being so the ineluctable conclusion is that in the appellant's dispute with the University, the visitor has exclusive jurisdiction."

[72] In arriving at its decision, the court relied on (i) the decision in **Thomas** and (ii) the following dicta in **Re Wislang's** where at page 81, Kelly LJ stated:

> "…But what the authorities show, as I read them, is that matters may well be in breach of a contract of employment, yet within the visitorial jurisdiction, if those matters are of an internal domestic character or touch upon the interpretation of execution of private rules and regulations of the university…"

[73] Moreover, at paragraph 50 of **Vanessa Mason (COA)**, the court explained that:

> "50. … The appellant, being a member of the University of the West Indies, is subject to its Charter, Statutes, Ordinances and Regulations. The dispute between the respondent and herself arose out of a contractual license which she enjoyed in acquiring residence in the Mary Seacole Hall. The relief being sought by the appellant, by way of her claim, is for restoration of her license in order for her to continue in occupation of the hall of residence and for damages for the unlawful deprivation of the use of the accommodation therein….This complaint, being grounded in the domestic laws of the respondent, namely, its Charter, Statutes, Regulations and Ordinances, falls completely within the province of the visitor…"

[74] It is clear from these cases that any attempt by the appellant to couch his complaint as a breach of contract would not be sufficient to oust the jurisdiction of the visitor. The crux of the appellant's complaint, similarly to those in **Hines v Birbeck** and **Thomas**, was the lack of a fair hearing, which allegedly emanated from the failure of the UWI to follow the correct internal procedures.

[75] The provisions regarding the dismissal of the academic staff of the UWI are set out in statute 17(u) of the Charter, which states:

> "Subject to the Charter and these Statutes the Council shall be the governing body of the University and shall exercise all powers thereof. Without derogating from the generality of its powers it is specifically declared that the Council shall exercise the following powers:
>
> (u) To exercise powers of removal from office and other disciplinary control over the academic staff, the senior administrative staff and all other staff in the University. Provided that in the case of the academic and senior administrative staff this power shall be exercised for the reasons, on the grounds, in the manner and pursuant to the procedures set out in Ordinances which shall include the following rights:-
>
> (i) to appear and be heard by the Council or any person or body to whom the Council has delegated this function under Statute 31;
>
> (ii) to be represented by a person of his choice from among members of the academic and senior administrative staff;
>
> (iii) to call and examine witnesses;
>
> (iv) to appeal to the Chancellor."

[76] The appellant, as a member of the UWI, was entitled to the benefit of the above procedure before his contract was terminated. Article 6 of the Charter states that Her Majesty, her heirs and successors:

> "shall be and remain the visitor and visitors of the University and in the exercise of the visitorial Authority from time to time and in such manner as We or They shall think fit may inspect the University, its buildings, laboratories and general work, equipment, and also the examination, teaching and other activities of the University by such person or persons as may be appointed in that behalf."

This article, as was stated by Sykes J in **Suzette Curtello (SC)**, does not confine the jurisdiction of the visitor to the "inspection of buildings, laboratories, examination and teaching". It extends to the general operations of the UWI, which are governed by the Charter and its statutes (see also **Myrie**).

[77] It was within that context that the learned judge was required to consider the matter which was before her. This is a matter in which the appellant has complained that the UWI failed to adhere to its internal rules and procedures pertaining to his dismissal. There is therefore, in my view, sufficient domesticity to ground the jurisdiction of the visitor. It was clear from the abovementioned authorities that in such circumstances, the visitor had exclusive jurisdiction to deal with the issue (see **Thomas** and **Okuonghae**). That is to say, there was no concurrent jurisdiction between the visitor and the court or the IDT. This accords with the principles as stated in **Suzette Curtello (SC)** and **Foote v UTECH**. Her conclusion that the dispute fell within the exclusive jurisdiction of the visitor was, in my view, correct.

Whether there was a dispute that could properly have been referred to the IDT?

[78] An examination of section 11 of the LRIDA was a convenient starting point in our quest to ascertain whether the learned judge fell into error when she approached the matter by first addressing the issue of the visitorial jurisdiction. Sections 11(1) and 11A of the LRIDA, which ground the Minister's discretion, state:

> "11(1) Subject to the provisions of subsection (2) and sections 9 and 10 the Minister may, at the request in writing of all of the parties to any industrial dispute, refer such dispute to the Tribunal for settlement."

and

"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 those directions, he may then, refer the dispute to the Tribunal for settlement." (Emphasis supplied)

[79] It is clear from the above that before taking any action, the respondent must be satisfied that the parties' attempts to settle the dispute by the other means that were available to them were unsuccessful. This matter would not fall into the category of urgent or exceptional, and as such, condition (ii) was inapplicable.

[80] The use of the word "may" in section 11A(1) of the LRIDA, confers on the respondent the discretion to refer disputes to the IDT "where the minister is satisfied that an industrial dispute exists in any undertaking…". If the respondent is not so satisfied, such referral should not be made.

[81] Attempts were made to settle the matter between the appellant and the UWI by way of the conciliatory process. That route was taken at the suggestion of counsel for the appellant in the letter dated 3 November 2014. In the letter of 26 August 2014, NJ & Co had requested that the appellant be either reinstated or the matter referred to the visitor. It is evident from the above correspondence that the appellant had accepted that the visitor had jurisdiction in the matter. The involvement of the Conciliation Unit was suggested as "an alternative approach".

[82] The matter between the appellant and UWI was not resolved at the conciliation meetings. However, before any decision to refer the matter to the IDT could have been made, the respondent, in accordance with section 11A (1)(a)(i) of the LRIDA, would have to be satisfied that there was an industrial dispute and that attempts to have it settled by other available means were unsuccessful.

[83] The appellant did not seek the intervention of the visitor, and as such, failed to avail himself of "the other means as were available" by which the matter could have been settled as is required by section 11A (1)(a)(i) of the LRIDA. In those circumstances, having agreed with the learned judge that the visitor had the exclusive jurisdiction to deal with the matter, it was my view that there was no basis for the exercise of the Minister's discretion to refer the matter to the IDT. The submission of the dispute to the Ministry's Conciliation Unit did not change the position as that referral was not underpinned by any statutory provision. It was wholly voluntary. Therefore, the attempt to settle the dispute by that method did not, in my view, oust the jurisdiction of the visitor.

[84] The appellant submitted that the learned judge failed to address the matter as one in which the respondent breached her statutory obligation to refer the matter to the IDT. In this regard, he sought to rely on the case of **Okuonghae**. The claim in this matter, as in **Okuonghae**, was borne out of a complaint of being dismissed without a hearing and, therefore, in breach of the principles of natural justice, the university's statute's, policies and procedures. The appellant failed to convince the court below that the matter was concerned with any breach by the respondent of the LRIDA. Respectfully, this alleged

breach by the respondent was not the critical issue for the consideration of Wolfe-Reece J. The appellant's primary complaint, to which the learned judge was obliged to have regard, was that he was dismissed by the UWI, without a hearing which was a breach of the procedure in statute 17 of the Charter. That complaint logically gave rise to a consideration of the visitorial jurisdiction in determining whether the respondent acted illegally or irrationally in refusing to refer the matter to the IDT. Accordingly, **Okuonghae**, does not assist the appellant.

[85] I was also of the view that the case of **June Chung**, which was cited by counsel for the appellant, did nothing to advance the matter. That case was an appeal against the decision of the Master wherein the appellant's application to set aside the default judgment entered in favour of the respondent was refused.

[86] The appeal was allowed, the default judgment set aside and the appellant given permission to file her defence within 14 days. In arriving at its decision, the court found that the learned master erred in failing to address the issue of whether the proposed defence had a reasonable prospect of success. The court also found that the Master did not demonstrate how the issue of whether the appellant had proffered a good explanation for the failure to file either the acknowledgement of service or the defence was resolved. P Williams JA, who delivered the judgment of the court, stated at paragraph [89] that the learned master "…did not demonstrably consider any of the unchallenged material the applicant had presented explaining the delay in applying to set aside the default judgment". She continued at paragraphs [90] and [91]:

> "[90] Further, the learned master did not demonstrate how she resolved the other discretionary consideration of whether there had been a good explanation for failure to file either the acknowledgement of service or the defence. In this regard the appellant had asserted that she had thought her legal position would have been maintained while her attorneys-at-law tried to settle the matter. She later learnt that the pertinent documents had not been filed until after the settlement discussions had failed.

> [91] The role of her previous attorneys-at-law became a pertinent matter for the master to have considered. She did make mention of the "unfortunate lapses of the [appellant's] previous attorneys" when she reviewed the submissions that had been made. She failed to show any appreciation of whether this could have provided an explanation for the failure to file the relevant documents in a timely manner."

[87] In the circumstances, the court found that the master failed to apply the principles for the proper exercise of the discretion under rule 13.3 of the CPR.

[88] That is not the position in the present case, where the learned judge correctly identified the issues. The appellant in the instant case sought judicial review of the decision of the respondent, who he said failed to act in accordance with the LRIDA. In arriving at her decision, the learned judge examined section 11 of LRIDA and found that the respondent had a discretionary power. Wolfe-Reece J recognized that before the issue of whether the respondent had properly exercised her discretion could be addressed, a determination had to be made as to whether the matter fell within the visitor's exclusive jurisdiction. In other words, the non-referral to the IDT was a secondary issue. The learned judge considered whether the visitor had the jurisdiction to deal with the matter, the breadth of that jurisdiction and whether attempts had been made to utilise that jurisdiction. In so doing, the learned judge adopted the correct approach in the face of the rather curious submission that the respondent, by refusing to proceed any further with the matter, had breached the LRIDA.

[89] Having considered the provisions of section 11A (1)(a)(i) of the LRIDA, it is my view that there was no dispute which could have properly been referred to the IDT. As was stated by Sykes J in **Suzette Curtello (SC)**, the remedy for commencing a claim, where there is visitorial jurisdiction, is the striking out of that claim. In this case, the remedy was the refusal of the application for judicial review on the basis that the matter having not been referred to the visitor, there had been no attempt to settle the matter by "all such means as were available to the parties". There was no basis on which the ministerial discretion could have been exercised. The learned judge was therefore correct

when she refused to grant an order of *certiorari*, quashing the decision of the respondent not to proceed any further with the matter. There was, in the circumstances, no reason for this court to consider whether it would have been appropriate for a court of law to direct the respondent to refer the matter to the IDT.

Conclusion

[90] Wolfe-Reece J was, in my view, correct in her approach to the determination of the matter before her. The learned judge recognised that the issue of whether the visitor had the jurisdiction to deal with the dispute between the appellant and the UWI was central to the determination of the appellants' application.

[91] I agreed with her finding that the visitor had exclusive jurisdiction to deal with the dispute between the appellant and the UWI and that in such circumstances, there was no basis on which the respondent's discretion could have been invoked under sections 11 and 11A of the LRIDA. Accordingly, the learned judge was not in error when she refused to grant the orders sought by the appellant by way of judicial review of the respondent's decision not to refer the dispute to the IDT.

[92] These are my reasons for agreeing with my learned sisters that the court should make the orders detailed at paragraph [4] above.

DUNBAR GREEN JA (AG)

[91] I have read the draft reasons for judgment of Simmons JA. I agree with her reasoning and have nothing useful to add.