[2020] JMCA App 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019APP00053

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**PAUL THOMPSON**	**APPLICANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**UNIVERSITY COLLEGE OF THE CARIBBEAN**	**2ND RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Company for the applicant

Ms Carla Thomas and Mrs Taniesha Rowe-Coke instructed by the Director of State Proceedings for the 1st respondent

Adrian Cotterell instructed by Myers Fletcher & Gordon for the 2nd respondent

29, 31 July 2019 and 3 April 2020

PHILLIPS JA

[1] I have read in draft the thorough and comprehensive judgment of my brother Fraser JA (Ag). I agree with his reasoning and conclusion and have nothing further to add.

STRAW JA

[2] I too have read the judgment of my brother Fraser JA (Ag) and agree with his reasoning and conclusion.

FRASER JA (AG)

Introduction and background

[3] The applicant, Mr Paul Thompson, was Vice-President for Academic and Student Affairs at the University College of the Caribbean (UCC) from 1 September 2015 until his dismissal by letter dated 8 August 2016, which took immediate effect. His dismissal was the penalty imposed after he was charged and found guilty by the UCC of gross misconduct, divulging information to a non-staff member, breach of the confidentiality clause of his contract, and failure to live up to his responsibilities as Vice-President.

[4] Having unsuccessfully appealed the dismissal within the UCC grievance structure, the intervention of the Ministry of Labour and Social Security was sought. This led to the relevant Minster referring the matter to the Industrial Disputes Tribunal (IDT) pursuant to section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act (LRIDA). Following a hearing spanning eight sittings between 10 August 2016 and 5 December 2017, on 8 June 2018, the IDT handed down its award upholding the decision of the UCC. By notice of application filed 14 August 2018, the applicant sought leave to apply for judicial review of the ruling of the IDT before the Supreme Court, seeking certain declarations, an order of certiorari to quash the decision of the 1st respondent affirming the decision of the 2nd respondent and a stay of the decision of

the 1st respondent. Leave was refused by Dunbar-Green J (the learned judge) in a decision handed down on 19 December 2018, the neutral citation for which is [2018] JMSC Civ 93. The learned judge, however, granted the applicant leave to appeal.

[5] On 3 January 2019, the applicant filed in this court a notice of appeal containing two grounds:

> "a) That the learned trial judge erred in law in holding that the appellant was given a hearing by the 2nd respondent; and
>
> b) That the 1st respondent committed jurisdictional error in failing to appreciate that the appellant was denied a hearing by the 2nd respondent before the decision was taken to terminate the employment of the appellant."

[6] The notice of appeal having been filed out of time, the applicant, on 22 February 2019, filed a notice of application for leave to extend time to appeal, seeking orders that the time granted to the applicant to file his appeal in this matter be extended and that the appeal filed be deemed as filed within time.

[7] The main issue raised in this application is whether the court should extend the time for the filing of the appeal to 3 January 2019, the date of filing, it being common ground that the applicant's notice of appeal was filed one day late.

The applicable rules

The time within which the appeal should have been filed

[8] There being no dispute on this issue the court will not have to devote much time to it. It is, however, nevertheless useful to outline the applicable rules which have led to the need for this application.

[9] Rule 1.11(1)(b) of the Court of Appeal Rules (CAR) provides that:

> "1.11 (1) Except for appeals under section 256 of the Judicature (Resident Magistrates) Act[1], the notice of appeal must be filed at the registry and served in compliance with rule 1.15 -
>
> (a) …
>
> **(b) where permission is required, within 14 days of the date when such permission was granted**.; or
>
> (c) …" (Emphasis added)

[10] Therefore, the rule stipulates that where an appellant who requires permission to appeal has obtained it, the appeal must be filed within 14 days of the date on which permission was granted.

How time is calculated

[11] How time is to be calculated is governed by rule 3.2 of the Civil Procedure Rules (CPR), which is incorporated into the CAR by virtue of rule 1.1(10)(f). The latter rule provides:

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[1] This should now be the Judicature (Parish Court) Act

"(10) The following Parts and rules of the Civil Procedure Rules 2002 apply to appeals to the Court subject to any necessary modifications –

(a) …

(f) Part 3 (time, documents);

…"

[12] Rule 3.2 of the CPR states, in part:

"(1) …

(2) All periods of time expressed as a number of days are

to be computed as clear days.

(3) In this rule 'clear days' means that in computing

the number of days –

(a) the day on which the period begins; and

(b) if the end of the period is defined by reference to an event, the day on which that event occurs or should occur are not included.

(4) Where the specified period –

(a) is 7 days or less; and

(b) includes

(i) a Saturday or Sunday; or

(ii) any other day on which the registry is closed, that day does not count.

...

(6) …"

[13] Following that computation regime, permission to appeal having been granted on 19 December 2018, the appeal ought to have been filed by 2 January 2019, rather than 3 January 2019. Therefore, for his appeal to be properly before the court, as acknowledged by all parties, the applicant must obtain the extension of time sought.

The power of the court to extend time

[14] This application is made pursuant to rule 1.7(2)(b) of the CAR which permits the court to extend or shorten the time for compliance with any rule, practice direction, order or direction of the court.

[15] The approach to be adopted by the court in assessing applications for extension of time was established by Panton JA (as he then was) in the case of **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999. This approach has been subsequently approved by this court in a number of cases, including **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23; **Richards (Paulette) v Appleby (Orville)** [2016] JMCA App 20 at para [17] and **Gladstone Shackleford & Ors v Shauna Smith & Anor** [2018] JMCA App 36 at para. [13].

[16] At paragraph 20 of **Leymon Strachan**, Panton JA outlined the applicable principles as follows:

> "The legal position may therefore be summarised thus:

(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.

(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider-

(i) the length of the delay;

(ii) the reasons for the delay;

(iii) whether there is an arguable case for an appeal and;

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[17] The court will, therefore, have to examine in turn each of these four factors in the context of the relevant facts, law, and submissions to determine this application.

The length of and the reasons for the delay

[18] Given the nature of the first two factors, it is convenient to address them together .

[19] Undeniably, the length of delay of one day is relatively minor. In outlining the reasons for the delay, the applicant in his affidavit in support of the application deponed as follows:

"11. Due to the impending Christmas Holiday, it was difficult to give my Attorney-at-Law, Mr. Hugh Wildman, proper instructions to prosecute the Appeal.

> 12. There was also delay as a result of my being out of town and not being able to properly instruct my Attorney-at-Law in filing the Appeal."

[20] The explanation references difficulties in furnishing his attorney with proper instructions related to the Christmas Holiday and his being out of town. This can scarcely be considered a good reason for the delay. The explanation does not state what exactly was the difficulty, and whether there had been any attempts to make contact by telephone or email so the instructions could have been taken.

[21] However, **Leymon Strachan** makes it clear that, even if the applicant fails to give a good reason for his delay, the court may still grant the extension of time if it determines that the applicant has an arguable case.

Does the applicant have an arguable case?

The relevant facts

[22] In his application for leave to apply for judicial review, before the learned judge in the court below, the applicant set out detailed grounds which incorporate the relevant evidence contained in his affidavit in support of the application filed 14 August 2018. Those grounds are as follows:

> "1. The Applicant was duly appointed to the post of Vice President of Academic and Student Affairs with the 2nd Respondent on September 1, 2015.
>
> 2. On July 15th 2016, the Applicant received an email from the Deputy Executive Chairman of the 2nd Respondent inviting the Applicant to a meeting with herself and the Executive Chairman on Monday July 18, 2016 at 9:00 a.m. The meeting was convened at 11:15 a.m. on the said date;

3. The meeting was convened and present at the meeting were the Executive Chairman, the Deputy Executive Chairman and the Human Resource Manager.

4. At that meeting the Deputy Executive Chairman raised three concerns with the Applicant:- Gross misconduct in Agreeing [sic] to misrepresent his reporting relationship with the former President, Divulging confidential information to persons outside the employment of the 2nd Respondent and having conversations with persons in which the Applicant maligned the 2nd Respondent and its owners. The allegations were denied by the Applicant.

5. Later that day, the Applicant was given a letter by the Human Resource Manager of the 2nd Respondent, stating that the Applicant's response to the allegations raised in the meeting that day were unsatisfactory and that the Applicant was invited ti a hearing regarding the charges of gross misconduct, maligning the 2nd Respondent, its owners and directors, breach of confidentiality and failure to live up to the responsibilities of the Applicant. The meeting was set for July 25, 2016, but did not convene until August 5, 2016 in the Conference room of the 2nd Respondent. This date was indicated in a letter from the Attorney-at-Law for the 2nd Respondent dated August 3, 2016.

6. At that meeting on August 5, 2016, the Applicant' *[sic]* accusers were not present, only the Board member of the 2nd Respondent who conducted the hearing and the Attorney for the 2ndRespondent.

7. At that meeting on August 5, 2016, no mention was made of the Applicant maligning any member of the 2nd Respondent. That allegation was not before the meeting and no witnesses were called for the Applicant to confront.

8. On the 9th August 2016, the Applicant received a letter dated August 8, 2016 from the said Board member who conducted the hearing that he had found the allegations against the Applicant proved and that he had recommended that the Applicant's employment be terminated with immediate effect and that it was accepted by the Board. The letter also indicated that the Applicant could appeal within 5 days;

9. The Applicant exercised his right of appeal and it was convened on September 23, 2016. The Applicant was accompanied at the appeal by his brother;

10. At the appeal, which was chaired by an Attorney-at-Law, the 2nd Respondent introduced evidence in the form of a Cellular phone; which evidence was not brought before the disciplinary hearing of August 5, 2016. The Applicant protested;

11. The 2nd Respondent sought to rely on email evidence from that cellular phone which was in the custody of the 2nd Respondent to allege that the email correspondence maligning the 2nd Respondent had come from the Applicant through the said cellular phone. There was no evidence before the 1st Respondent identifying the Applicant as the person responsible for the email;

12. The 1st Respondent made findings that the Applicant was confronted by his accusers at the meeting convened by the 2nd Respondent on the 18th July 2016;

13. The 1st Respondent made findings that there were allegations that the Applicant maligned members of the 2nd Respondent at the meeting of August 5, 2016 and there was no such evidence to support it;

14. The 1st Respondent also found that the Applicant had admitted to agreeing to misrepresent his reporting relationship with Dr. McGrath, the former President of the 2nd Respondent, when there was no such evidence led before the 1st Respondent;

15. Further, the evidence before the 1st Respondent showed that the 1st Respondent failed to appreciate that at the meeting of July 18, 2016, reference was made to maligning the 2nd respondent by the Applicant. In support of that the 2nd Respondent relied on an email dated August 2, 2016. Such email would have been generated long after the meeting of July 18, 2016;

16. The 1st Respondent placed reliance on this email to find in their findings that the Applicant had maligned the 2nd Respondent.

17. The evidence before the 1st Respondent also reveals that the 2nd Respondent did not comply with its own Grievance Procedure in terminating the employment of the Applicant, namely:

    i. Only the Human Resource Manager of the 2nd Respondent could have convened a Disciplinary Hearing to determine whether the Applicant be dismissed from the employment of the 2nd Respondent.

    ii. Only the President of the 2nd Respondent could have taken the decision to dismiss the Applicant from the employment of the 2nd Respondent.

18. The Grievance Procedure of the 2nd Respondent was tendered into evidence before the 1st Respondent. The 1st Respondent ignored these provisions of the Grievance Procedure of the 2nd Respondent."

[23] The respondents in turn placed evidence before the learned judge, primarily by way of the affidavit of Winston Adams, the Group Executive Chairman of the UCC, filed on 22 August 2018. The respondents also relied on the reasoning in the IDT award in support of their contention that the UCC had justifiable bases to dismiss the applicant and that the IDT was correct in so finding. The key evidence and findings may be summarised as follows:

1) The case was solely based on emails sent to and from Dr Paul Thompson and Dr Troy McGrath during and after Dr McGrath left the employment of the UCC.

2) At the time of his dismissal on 8 August 2016, Dr Paul Thompson was the Vice Principal of UCC reporting to the

Board Chairman Dr Adams as the President, Dr Troy McGrath, had been dismissed in April 2016.

3) The IDT stated that by Dr Thompson's own admission that he sent the recommendation to Dr McGrath, he had responded to a request made via the emails in question. The IDT accepted that he did in fact see the emails prior to UCC bringing them to his attention.

4) The IDT found that the request to provide a fraudulent reference altering the reporting relationship between Dr Thompson and Dr McGrath (on 10 June 2016) was not rejected by Dr Thompson as a response, but he (Dr Thompson) replied:

> "I would most be delighted to speak with anyone who calls or send emails. I hope such contact will be a precursor to your securing a job in which your skills will be appreciated."

5) The IDT also found that an email dated 13 July 2016, from Dr Paul Thompson states:

> "The recommendations that I wrote in your favour and sent to the Provost in St. Petersburg…" (Exhibit 2 – referenced in the award)

6) The IDT noted that the recommendation tendered into evidence (Exhibit 9 – referenced in the award) was not only

dated 27 June 2016 (a date prior to Dr Thompson being called to a meeting by UCC on 18 July 2016), but is addressed to:

"To Whom It May Concern"

and not to the

"Provost in St. Petersburg."

7) The IDT concluded that Dr McGrath thought that he was corresponding with Dr Paul Thompson in the emails.

8) The IDT deduced from the emails sent to Dr McGrath, that some of the contents related directly, in events and functions, to Dr Thompson's position. The Tribunal opined that only Dr Thompson would be privileged to some of the information conveyed via email to Dr McGrath.

9) The IDT found that Dr Thompson's first meeting was in fact with his accusers Mrs Adams and Mrs Lorna Baxter, Manager of Human Resource, who were all maligned in the emails presented. This meant that neither of these persons could be present in the process of disciplining Dr Thompson, but at Dr Thompson's or his representatives' request could be summoned to give evidence. As a result, during the entire

process, the UCC was represented by its attorneys – Mr Gavin Goffe and Mr Adrian Cotterell.

10) The IDT found that a disciplinary hearing was held and chaired by Mr David Wan, a member of the Board of the UCC, and Dr Paul Thompson was present and represented by his attorney, Mr Leroy Equiano, whilst the UCC was also represented by its attorneys.

11) The IDT found that after being dismissed at the end of the disciplinary hearing, Dr Thompson used the appeal process, which was conducted by attorney-at-law, Ms. Yvonne Joy Crawford, who dismissed his appeal (Exhibit 7 – referenced in the award).

12) The IDT found that though Dr Thompson stated that his email had been compromised, he did not bring any evidence to prove this. In fact, when Ms Crawford sent her first mail in error to pbenjamin@gmail.com it was received and acknowledged by Dr Thompson (Exhibit 8 – referenced in the award).

13) The IDT found that Ms Joy Crawford confirmed that she had been given a cell phone by the UCC which had emails to and from Paul Thompson, some which were printed and some of

which were not. The cell phone, however, was not presented to the IDT.

14) The IDT found that there were breaches in terms of confidentiality by Dr Thompson and the leadership of the UCC was maligned by him.

15) The IDT found that the grievance procedure was in keeping with the Labour Relations Code, that is, a meeting was held, charges were laid, a hearing was held, Dr Thompson's representative attended and the appeal process was utilised.

The decision of the learned judge

[24] Concerning how to approach an application for leave to apply for judicial review, the learned judge followed the well-known test set out in **Sharma Browne-Antoine** (2006) 69 WIR 379 (PC), that the applicant must demonstrate that he has "an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy". She also considered the dicta of Lord Donaldson MR in **R v Secretary of State for the Home Department ex parte Rukshanda Begum** [1990] COD 107 at page 108. where he stated that a judge should only grant leave "…if [she] is clear that there is a point fit for further investigation on a full inter partes basis…". The learned judge noted that this dicta was applied in **Clayton Powell v Industrial Disputes Tribunal & Montego Bay Marine Park Trust** [2014] JMSC Civ 196**.**

[25] In assessing the permissible scope of the review by a court in matters involving a decision of the IDT, the learned judge was guided by the provisions of Section 12(4)(c) of LRIDA. The learned judge also followed the principles set out in the decision of the Judicial Committee of the Privy Council in **University of Technology, Jamaica v Industrial Disputes Tribunal and others** [2017] UKPC 22, and the prior decision of this court in the same matter of **Industrial Dispute Tribunal v University of Technology Jamaica and Another** [2012] JMCA Civ 46. This case makes it clear that the court can only review the findings of the IDT that emanate from errors in law. On the question of what is encapsulated by an "error of law", the learned judge relied on the case of **The King v Carson Roberts** [1908] 1 KB 407 which states that an error of law extends to an error in point of fact. The learned judge also considered **Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Limited** [1981] 2 All ER 93, which establishes that the court should not go into the case in depth at the stage of application for leave, but rather, should only consider whether the applicant has established a realistic chance that his challenge would succeed.

[26] With those principles in mind, the learned judge grouped the sub-issues and dealt with them under the following headings:

i. "Reliance on Cellular Phone";

ii. "Unsupported finding that emails sent by the Applicant";

iii. "No evidence to support finding Applicant was confronted by his accusers at hearing on 18th July 2016";

iv. "Unsupported finding that allegations of maligning made at the meeting of August 5, 2016";

v. "Unsupported finding that Applicant admitted to agreeing to misrepresent his reporting relationship";

vi. "IDT relied on an email of August 2, 2016 to find evidence of maligning and that maligning had been referenced at the July 18, 2016 meeting";

vii. "UCC did not comply with its own Grievance Procedure and this was ignored by the IDT";

viii. "Right to Face Accusers";

ix. "Application for Stay".

[27] In refusing the application for leave, the learned judge, found that none of the IDT's findings which were challenged, "disclosed errors [of] law to justify a review by [the] court", and that the applicant had "therefore failed to advance arguments of a strength and quality for [her] to find that he [had] an arguable case with a reasonable prospect of success". Consequently, she found that it had not been "established that the IDT's findings were irrational, in the sense that no reasonable tribunal could have come to the same conclusions" (paragraph [81] of decision).

The challenge to the decision of the learned trial judge

[28] The applicant challenges the findings of the learned judge that he was given a fair hearing by the 2nd respondent, and that the IDT did not commit any error of law in its findings. Consequently, the applicant maintains that the learned judge was wrong to conclude that he had failed to show that he has an arguable case for judicial review with a realistic prospect of success.

The submissions

The submissions on behalf of the applicant

[29] Mr Wildman submitted that it was clear that the applicant had satisfied the threshold showing that the applicant has an arguable case. The gravamen of the applicant's case, as contended by counsel, is that the applicant was not given a hearing by UCC before the decision was taken to terminate him, as he was not allowed to confront his accusers, nor was he allowed to call evidence to rebut the allegation. He argued that the IDT was wrong to find that what took place on 18 July 2016 was a hearing, and that the learned judge erred in confirming that this was so. He contended that on 18 July there was only a meeting where the applicant was informed of the charges and told that the hearing was to be convened.

[30] In respect of what transpired on 5 August 2016, counsel argued that it was unfair as the applicant was not given the opportunity to contest the charges, since none of the persons who had accused him of sending the emails were available for questioning at the hearing. Counsel contended that the applicant was therefore unable to dispute that the emails came from his address and that he was the author of the emails. The emails, he submitted, were insufficient to require a response from the applicant. The emails had no address, and they were only attributed to the applicant when new evidence, the phone, was presented to the panel at the appeal hearing.

[31] Counsel compared the circumstances in the instant matter with those in two previous decisions of the IDT, namely IDT 3/2015 between Ranger Protection and Security Company Limited and Courtney Wilson (9 November 2016) and IDT 33/2016

between Island Concrete Company Limited and Levi Stone (7 June 2017). He contended that in the latter two awards, in which the IDT found the dismissals were unjustifiable and could not stand because there had been no hearing, the relevant circumstances were indistinguishable from those in the instant matter. He submitted that there ought to be consistency in the principles applied by the IDT in making awards.

[32] He also relied on the cases of **General Council of Medical Education and Registration of the United Kingdom v Spackman** [1943] 2 All ER 337, **Naraynsingh v The Commissioner of Police [2004] UKPC 20**, and **R v Secretary of State for the Home Department, ex p Doody**, in support of the application.

The submissions on behalf of the 1st Respondent

[33] The 1st respondent opposed the application on the basis that the appeal has no merit. Concerning the role of a court in judicial review proceedings where a decision of the IDT is challenged, counsel Ms Thomas relied on the authority of **Holiday Inn Sunspree Resort v the Industrial Disputes Tribunal & Ors** [2016] JMCA Civ 9 for the proposition that the learned judge would not have been entitled to disturb the decision of the IDT once she was satisfied that it had correctly applied the law and that there was evidence before it on which it could base its conclusion. Counsel submitted that there was more than sufficient evidence on which the IDT could have based its decision.

[34] Regarding the contention that no hearing was held, Ms Thomas referred to the applicant's own affidavit evidence in support of the application in the court below, where, at paragraph 15, he stated that, "on August 5th 2016, a hearing was conducted by Mr. Wan". She submitted that it was evident that in making reference to a hearing being held on 18 July 2016 the IDT was simply setting out the applicant's case, and the true finding of the IDT was that the disciplinary hearing was held on 5 August 2016. She maintained that, as noted on page 11 of the award, what occurred on 18 July 2016 was the applicant's first meeting which was with his accusers Mrs Adams and Mrs Lorna Baxter. This, the IDT found, meant that those persons could not participate in disciplining Dr Thompson. Importantly, it was submitted, the decision notes that the IDT found that a hearing was held and chaired by Mr Wan, and Dr Thompson was present with his attorney (page 12 of the award).

[35] Ms Thomas contended that, having made that finding and having relied on the correct law (section 3(4) of the LRIDA, and section 3 of the Labour Relations Code (LRC)), the IDT found, which it was entitled to do, that the grievance procedure followed was in accordance with the LRC and as such the dismissal was fair, in that, a hearing was held and all the procedures in the code had been complied with. Counsel pointed to section 22 of the LRC which deals with disciplinary procedure, and highlighted paragraph (i)(c), which gives the worker the right to state his case and be accompanied by his representatives. She argued that the accusers need not be present in order for the hearing to be fair, and that what the LRC requires is that the worker be apprised of the allegations against him and be given an opportunity to state his case. In

that regard, she asserted that the case of **Naraynsingh** relied on by Mr Wildman does not require that the accused must be able to confront his accusers.

[36] She argued that there was evidence which suggested that the emails had come from the applicant's account, and therefore, the onus was on him to show that they were not his emails. However, she contended, he only gave a bare denial, and did not seek any evidence as to a print out of the emails. Counsel also pointed to the fact that the IDT found that the applicant could have requested that the accusers be present but there was no such request. Ms Thomas submitted that there was no need for UCC to have had witnesses at the hearing as the contents of the emails spoke for themselves. Counsel also noted that there was evidence that the applicant's attorney had requested evidence of the charges and there was no complaint that what was requested was not received. Further, his attorney had enquired about witnesses and the constitution of the panel.

[37] Counsel made the point that the IDT's decision recounted evidence given by Dr Wan which demonstrated that the applicant was given the opportunity to and did respond to the charges. Ms Thomas invited the court to consider that, Dr Thompson's response, noted at page 6 of the award, is that he denied sending or receiving any of the emails and asserted that his email had been hacked. Further, she pointed out that, at page 10 of the award, the record showed that the IDT had regard to Dr Thompson's own admission in his response emailed to Dr McGrath, that he had sent the requested

recommendation. Counsel argued that there was no evidence that the applicant had gotten a request for the recommendation by any other means other than by email.

[38] Accordingly, Ms Thomas contended that the IDT's findings that the LRC had been observed, and that the applicant had been afforded a hearing, were correct and were not unreasonable, as there was sufficient evidence to support these findings. Consequently, the learned judge was correct in not disturbing the decision of the IDT and refusing to grant leave to apply for judicial review.

The submissions on behalf of the 2nd Respondent

[39] Relying on the principles outlined in the case of **Leymon Strachan**, Mr Cotterell, counsel for the 2nd Respondent, argued that the applicant should not be granted an extension of time to file his appeal, as he does not have an arguable case. The bases of this submission are that (1) the IDT's findings of fact are clearly supported by evidence which is not slender; and (2) the applicant was given a fair hearing by the employer in keeping with what is required by law.

[40] Counsel argued that, for this application, the relevant test is similar to the one that was applicable in the court below, that is, whether the applicant has an arguable case with a realistic prospect of success. That test, counsel submitted, is set out in **Sharma v Browne-Antoine**, which has been applied by our courts in **National Commercial Bank Jamaica Limited v Industrial Disputes Tribunal & Peter Jennings** [2015] JMSC Civ 105, and was examined in **Clayton Powell v Industrial Disputes Tribunal & Montego Bay Marine Park Trust**.

[41] Counsel contended that, having applied the well-known authorities concerning the role of the IDT and the circumstances in which the judicial review court will intervene, the learned judge was correct to find that there was sufficient evidence to ground the IDT's findings and that there were no errors of law made by the IDT which could undermine its decision that the applicant's dismissal was justifiable. Hence the standard outlined in **Sharma** had not been met and there was no basis for the learned trial judge to have interfered with the IDT's decision.

[42] In respect of the applicant's complaint that he did not get a fair hearing, counsel submitted that there was sufficient evidence before the IDT for it to find, as it did, that in keeping with the procedure outlined in section 22 of the LRC, the employer had discharged its obligation to give the applicant a fair hearing.

[43] Regarding the specific challenge that the applicant was not given the opportunity to confront his accusers as no witnesses were called, counsel argued that the LRC does not require an employer to act as a prosecutor would in a criminal trial, leading evidence and calling witnesses in order to establish a case against an accused. Further, counsel contended that the employer is not mandated to carry out a quasi-judicial function, as an internal administrative hearing is not a trial (see **Ulsterbus Limited v Henderson** [1989] IRLR 251).

[44] Counsel submitted that the UCC had all the evidence it required to prove the case against the applicant by virtue of the emails, and there were no witnesses to be called. Further, counsel advanced that the applicant was not prevented from calling

evidence in support of his contention that he did not send the emails, and there was no refusal by the chairman to consider evidence tendered by him. Therefore, counsel argued that the applicant was given a full opportunity to state his case, and he did by confirming that the email address which appeared in the emails was his, but denying that the words in the emails were. Counsel submitted that the applicant's defence being a bare denial, "it was no fault of the UCC that his case was unconvincing". Counsel again relied on **Ulsterbus**, for the proposition that it would be incorrect to find that an error of law occurred in finding that a dismissal was unfair simply because the applicant did not face his accuser at the disciplinary hearing.

The submissions on behalf of the applicant in reply

[45] In his reply, Mr Wildman agreed that the principles were not in doubt, but contended that the application of those principles by the learned judge was clearly wrong. Given the importance of procedural fairness as highlighted by the case of **University of Technology, Jamaica v Industrial Disputes Tribunal and others**, counsel argued that the IDT's decision can be impugned, as none of the persons on the UCC panel saw the applicant's email address on any of the eight emails, and though the applicant's attorney had, by letter, asked UCC if there would be any witnesses, he got no response. Counsel cited the case of **Malloch v Aberdeen Corporation** [1971] 2 All ER 1278 in support of his contention that the applicant had not been given a proper opportunity to challenge the allegations against him. Mr Wildman further submitted that UCC could not say who sent the emails, as anyone at the UCC would have been privy to the information in the emails and could have authored them.

[46] Concerning whether there was a fair hearing, Mr Wildman argued that the evidence shows that the IDT found that there had been a hearing on the 18th when this was not the case. He submitted that the **Ulsterbus** case relied on by the 1st respondent could be distinguished on the facts as in that case there had been a thorough investigation and everything was before the IDT which was not the situation in the instant case. Further, he contended that the case did not contradict the position that there was a duty on the part of the employer on 5 August 2016, to allow the applicant to challenge those who asserted that he was the author and sender of the emails which formed the hub of the complaint against him.

[47] Concerning the reference said to have been sent by the applicant, Mr Wildman submitted that the evidence was that although the applicant had admitted he had sent it, this had nothing to do with the UCC, and the reference did not contain any mention of him being the supervisor.

The submissions on behalf of the 2nd respondent in further response

[48] Counsel Mr Cotterell sought and obtained leave to make a few further submissions. Firstly, he sought to clarify that one of the concerns about the conduct of the applicant was that he agreed in an email to do a fraudulent reference, not that the reference which he gave, exhibited at page 24 of his affidavit filed 14 August 2018, was actually fraudulent. Counsel further submitted that at the IDT hearing, Ms Crawford agreed that she didn't see anything in the letter that he agreed to do anything fraudulent.

[49] Secondly, counsel argued that the applicant did not deny that the email address to which Ms Crawford sent an email in error was his. Counsel also pointed out that the applicant's full email address pbenjamint@gmail.com, was displayed in the emails exhibited at pages 28, 42 and 48 of the applicant's affidavit filed 14 August 2018, however, other emails just displayed the name "Paul Thompson" as he was a contact of Dr McGrath and the emails were retrieved from Dr McGrath's phone.

Discussion and Analysis

The Law

[50] The IDT and the ambit of its functions are established by the LRIDA. The most relevant provisions of the LRIDA in the circumstances of this case, are sections 12(4)(c), 12(5)(c) and section 20 the effect of which, are outlined in the review of the case of **University of Technology, Jamaica v Industrial Disputes Tribunal and others** which will shortly be undertaken.

[51] Also relevant for the proper assessment of the decision of the IDT is section 22 of the LRC, which outlines the prescribed rules relating to disciplinary proceedings in the context of labour relations.

[52] Section 22 provides as follows:

> "(i) Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should –

(a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;

(b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;

(c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;

(d) provide for a right of appeal. Wherever practicable to a level of management not previously involved;

(e) be simple and rapid in operation.

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

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

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

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

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

…"

[53] The seminal case of **University of Technology, Jamaica v Industrial Disputes Tribunal and others** clarified and settled a number of principles in relation to the nature of the unique powers granted to the IDT, and the scope of the review of a decision of the IDT that may be conducted by a court. Some of the key findings and

principles which may be extracted from the judgment of Lady Hale, writing for the Board, are:

a) By virtue of section 11 of LRIDA, the IDT is empowered to hear and settle employment disputes referred to it by the relevant Minister;

b) Where the dispute involves the dismissal of a worker, section 12(5)(c) empowers the IDT to utilise one or more of a range of remedies, in favour of the aggrieved worker, if it finds that the dismissal was "unjustifiable". The Board adopted the view of Rattray P expressed in the Court of Appeal decision of **Village Resorts Ltd v Industrial Disputes Tribunal** (1998) 35 JLR 292 that "'unjustifiable' …equates…to the word 'unfair'…";

c) The IDT has an original jurisdiction to decide whether a dismissal is unjustifiable and is the master of its own procedure. In the judgment of the Court of Appeal, which was described as "impressive" by the Board, it was noted at paragraph [12] that section 20 of the LRIDA provides that subject to the provisions of the LRIDA, "the Tribunal and a Board [of Inquiry] may regulate their procedure and proceedings as they think fit". It was further noted at paragraph [13], that, "the IDT is not bound by the ordinary or strict rules of evidence, provided there is no breach of the rules of natural justice

(see **R v The Industrial Disputes Tribunal**, **Ex- Parte Knox Educational Services Ltd** (1982) 19 JLR 223, 231C).

d) In respect of the scope of review of a decision of the IDT by a court, section 12(4)(c) of LRIDA provides that:

> "(4) An award in respect of any industrial dispute referred to the Tribunal for settlement –
>
> …
>
> (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**." (Emphasis added)

At paragraph 30 the Board found that, for the purposes of the LRIDA, an error on "a point of law" is an error that will ground a claim for certiorari on the grounds of 'illegality, procedural impropriety or unfairness, and irrationality or Wednesbury unreasonableness'.

e) Given the provisions of section 12(4)(c), as noted at paragraph 30, a court reviewing a decision of the IDT:

> "…has to accept the findings of fact of the IDT, unless there is no basis for them. And the reviewing court is not entitled to substitute its own view of the merits of the case for those of the IDT. If there has been an error of law, the case would normally have to be sent back for reconsideration by the IDT, unless there was only one decision open to it on a correct view of the law."

f) Elaborating on the effect of the wide fact-finding powers of the IDT the Board stated at paragraph 27 that:

> "27…The Court of Appeal was also correct to hold that "the IDT was not restricted to examining the evidence that was before UTech's disciplinary tribunal. The IDT was carrying out its own enquiry. It was not an appellate body, it was not a review body, but had its own original jurisdiction where it was a finder of fact" (para 34). Furthermore, the Court of Appeal was correct to hold that 'the IDT is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of dismissal, even if those matters were not considered by, or even known to, the employer at that time' (para 40)."

[54] In light of the guidance offered by the Board in the case of **University of Technology, Jamaica v Industrial Disputes Tribunal and others**, the question for this court in reviewing and assessing the arguments and supporting authorities advanced by the parties is therefore: does the applicant have an arguable case that the learned judge erred when she found that the IDT had not made an error on a point of law, and in particular, that the applicant "has not established that the IDT's findings were irrational in the sense that no reasonable tribunal could have come to the same conclusions?" (paragraph [81]).

[55] The applicant contends that he did not receive a hearing as required by law. Through counsel, he relied on the case of **Naraynsingh v The Commissioner of Police,** which, though not involving an employment dispute, considered the role of adequate investigations by public bodies in order to satisfy the demands of fairness,

before that body took actions adverse to a person. In **Naraynsingh**, the appellant a man of good character, had his firearm's licence revoked because, while a large number of persons were attending his house to execute process in relation to a civil debt, it was alleged that an unlicensed firearm and ammunition were found on the premises. The appellant was duly charged, however, the case was eventually dismissed due to the non-attendance of the complainant. The Commissioner of Police, having obtained a report from a senior officer, wrote to the appellant inviting him to respond to the allegations, as notwithstanding the dismissal of the charges, the fact remained that the firearm and ammunition were found in his possession. The appellant's attorney responded on his behalf indicating that the appellant maintained that he knew nothing of how the firearm or ammunition got onto the premises. The Commissioner wrote back months later indicating that the firearm licence was cancelled for the reasons earlier stated.

[56] The Judicial Review Court and the Court of Appeal upheld the Commissioner's decision. However, on appeal to the Judicial Committee of the Privy Council, it was held, reversing those decisions, that the Commissioner was not entitled to have come to the conclusion he did without undertaking an investigation concerning where, in what circumstances, and by whom the unlicensed firearm and ammunition were found, and whether anyone else was present at the time of the finding; in a context where the appellant was contending the illegal items were a "plant" he knew nothing about. Importantly, at paragraph 23 of the judgment, the Board also said that it would not always be important for the Commissioner to obtain more information about

circumstances that led to a revocation decision than was obtained in the instant case. That was because the Board acknowledged that there would be situations where, unlike in the case they were deciding, further information was unavailable or the facts were "plain enough".

[57] In **Malloch v Aberdeen Corporation**, the appellant was sent a notice under the relevant statutory provision informing him of his proposed dismissal, for his failure to register after a change of the law governing teachers. The respondent corporation refused to receive his written representations or to provide him an opportunity to be heard before passing a resolution effecting the threatened dismissal. It was held that the only explicable reason for the legislation requiring the giving of notice was to provide the teacher with an opportunity to prepare his defence, and without affording the teacher a hearing, a responsible public body could not be said to have reached a fair decision. Accordingly, since the appellant had not only shown that he had in principle the right to make representations before the decision was taken to dismiss him, but also that if permitted to state his case, he had a case of substance to make, his appeal was allowed and the case remitted with a direction to reduce the resolution for dismissal and the consequent letter of dismissal. Thus the decision of the Corporation was reversed.

[58] In **General Council of Medical Education and Registration of the United Kingdom v Spackman**, during proceedings held by the General Medical Council (GMC) to determine whether S was guilty of infamous conduct in a professional respect,

S having committed adultery with a married woman with whom he had a professional relationship, S was denied permission to call fresh evidence not utilised in the divorce proceedings to negative the court's finding of adultery. The GMC then proceeded to erase S's name from the medical register. It was held in the House of Lords, affirming the decision of the Court of Appeal, that the refusal to hear the fresh evidence meant that there had not been the "due inquiry" required by the Medical Act 1858. The order directing the erasure of S's name was, therefore, quashed.

[59] None of these cases offer particular assistance to the applicant. In all three cases the circumstances obviously required further investigations to be conducted, or the admission of additional evidence at a hearing to ensure the aggrieved person was given a fair opportunity to resist the adverse action contemplated against him. Importantly, however, the Board made it clear in **Narayansingh** that the requirements of fairness would depend on the particular circumstances of each case, and that there may be instances where further investigations in a particular situation are unnecessary if the facts are "plain enough".

[60] The applicant also cannot derive any solace from either of the two IDT awards in which he submitted dismissals of workers were set aside as unjustifiable, in circumstances similar to the instant case. Examination of those awards actually reveal circumstances quite dissimilar from the instant case. In Courtney Wilson and Ranger Protection and Security Company Limited, the IDT found several defects with the hearing in that matter not evident in the instant case. These included that Mr Wilson

was not informed of the charges in writing before the hearing; he was not advised he had the right to be accompanied by a representative; he was not given an opportunity to face any of his accusers who had provided reports against him; and he was only given the limited time of approximately twenty-four hours to prepare his defence, which was unreasonable.

[61] In Levi Stone and Island Concrete Company Limited, Mr Stone's dismissal for making unauthorized stops and letting out concrete was deemed unjustifiable as the entire investigative process leading up to his dismissal was improperly done. The dismissal came about because after Mr Stone had delivered some concrete to a customer, the customer followed him and saw him letting off some concrete at another site. The customer reported her observations to the company and a representative of the company went to the customer's premises and ascertained that she had received only 2/5^{ths} of the amount she should have received. The company then terminated the services of Mr Stone, four days after he had performed the delivery. Some of the missteps identified by the IDT in the investigative process, were that a) Mr Stone should have accompanied the company's representative when he went to verify the amount of concrete provided to the customer, so that he could have made an input in the process if he wanted to; b) he was not informed that the measurement of the concrete was going to be done to ascertain if what was supposed to have been delivered was in fact delivered; c) he was not taken to the premises where the customer said she saw him disposing of what she concluded was her concrete; d) he was not asked to show the spot where he said he washed out the residual concrete

from the truck, and e) most importantly, he did not get an opportunity to confront his accuser.

[62] On the facts of these two awards, it is clear that in each case, the aggrieved party was not provided adequate time or opportunity to prepare his defence having been made aware of the charges, nor allowed to have a representative for a hearing. In both cases, a significant factor was also that neither aggrieved party was permitted to confront his accusers. This particular issue will be addressed further later in this judgment.

[63] In contrast to the cases and IDT awards relied on by the applicant, is the decision in **Ulsterbus Ltd v Henderson**. In that matter, H, a bus conductor, was accused of failing to issue tickets to the value of fares collected. After an investigation and formal disciplinary hearing, H was dismissed. His appeals within the company having been unsuccessful, he appealed to the Industrial Tribunal which allowed the appeal, primarily on the ground that he had not been permitted at any stage to question those making the allegations, either before his dismissal or in the course of his appeal, and that those persons had been unavailable to give evidence before the Industrial Tribunal. The Tribunal also pointed out that it was not made clear in the company's disciplinary procedure that offences of this nature could warrant dismissal, and that given H's long good record, a reasonable employer would have considered a lesser sanction.

[64] In restoring the initial decision to dismiss, the Court of Appeal held that it was clear that the appellant company had carried out a careful investigation and had reasonable grounds for concluding H was guilty. Consequently, it was not necessary for a quasi-judicial investigation to have been conducted where H would have been given a chance to confront and question witnesses. It was also held, that, as it would be obvious to any employee that failure to give tickets for payment received was a very serious offence likely attracting dismissal, the appellants had not acted unreasonably in dismissing H, even though the disciplinary procedure did not stipulate that would have been the penalty for offences of this nature.

[65] On the question of whether the applicant was afforded a hearing, the facts of the instant case are clearly distinguishable from those cases relied on by the applicant, and are more in keeping with the decision in **Ulsterbus Ltd v Henderson**. In that regard, the learned judge made a number of key findings in relation to the factual conclusions arrived at by the IDT, which are important to now rehearse.

[66] Concerning the complaint that the UCC did not follow its own grievance procedure, based on the case of the **University of Technology, Jamaica v Industrial Disputes Tribunal and others**, the learned judge found that the IDT was not obliged to take into account the 'UCC's internal procedures', but that it was apparent that it had in fact done so, having regard to its finding that the procedure was in compliance with the LRC. The learned judge was mindful of the fact that, pursuant to

Halsbury on Employment Law (page 483), "the overall fairness of the dismissal, including any procedural matter, was a question of fact for the tribunal".

[67] Importantly, the learned judge also took into account that section 22(1) of the LRC requires that the disciplinary procedure should "ensure fair and effective arrangements", and "be simple and rapid in its operation". Therefore, while UCC's grievance procedure provided that the Human Resource Manager (HRM) should chair the disciplinary hearing, and that only the President could terminate the applicant's employment, the IDT was not constrained by the UCC's procedure, nor did it have to be "formulaic or pedantic". Accordingly, the learned judge determined that it was open to the IDT to accept the evidence that the HRM could not conduct the disciplinary proceedings as she was one of his accusers, and that there was no indication that Dr McGrath had been replaced in the post of President. Therefore, it was within the purview of the IDT to find that the disciplinary procedure had been in conformity with the LRC. This court is also constrained to observe that, in the circumstances that existed, had there been an attempt to follow UCC's procedure to the letter, that would have resulted in a process contrary to the very tenets of natural justice, which the applicant contends should be jealously observed.

[68] On the critical issue concerning whether the applicant's right to a fair hearing was violated by his not being given the opportunity to confront his accusers, the learned judge found that nothing in the LRC required that the employee be given the opportunity to face his accusers (para. [78]). Further, she found that, based on the

decision in **Ulsterbus Ltd v. Henderson** [1989] IRLR 251, had the IDT found that the dismissal was unjustifiable solely on the basis that the applicant had not faced his accusers, it would have committed an error in law.

[69] With respect to the applicant's contention that there was no evidence to support the IDT's finding that he had been confronted by his accusers at the meeting of 18 July 2016, the learned judge found that the award of the IDT disclosed no such finding. She noted that there was no reference to a hearing on that date, but rather that on that day, which was the applicant's first meeting, he met with his accusers, Mrs Adams and Mrs Lorna Baxter. There was also, the learned judge found, no reference to the applicant being 'confronted by his accusers'.

[70] The issue of the importance of an accused worker being able to confront his accusers was raised in both of the IDT awards relied on by the applicant. However, apart from the fact that that is not a requirement under the LRC and that there is flexibility in disciplinary proceedings being carried out in an employment context, the nature of each case is ultimately a critical determinant of the importance to be attached to the opportunity to confront accusers.

[71] In the awards relied on by the applicant, that opportunity was vital, given that in each award, the case was made out against the aggrieved worker based on what was said by his accusers. That is not the situation in the instant case. The main evidence against the applicant was the emails, which, in effect, the IDT found spoke for themselves. In that context, the "accusers" were really the contents of the emails

themselves, and the circumstantial evidence relating to dates and other factors which linked them to the applicant and the accusations made against him. In any event, as outlined in the affidavit evidence of Mr Adams and accepted by the IDT, the first meeting the applicant had was with his accusers, who had all been maligned in the emails presented.

[72] In respect of the applicant's contention that the IDT's allowance of the production and use of the cellular phone for the first time at the appeal hearing was unfair, at paragraph [43] of her judgment, the learned judge found, relying on Harvey on Industrial Relations and Employment Law, Butterworths, May 1994, that the appeal, as part of UCC's disciplinary proceedings, could not be treated as a court hearing with strict rules of evidence and procedure, other than those required by natural justice. It was therefore, she found, open to the IDT to accept or reject the evidence as presented. The learned judge also considered para. 41.4.7 of the UCC's Disciplinary Procedure which provides that the appeal hearing should be "a review of the case to consider appropriate new documentation, the evidence recorded and the decision of the disciplinary hearing".

[73] Consequently, the learned judge considered that the phone showed the original source of the emails, which, from the applicant's own evidence, had been sent to his lawyer and there was no assertion that the production of the phone disclosed any new emails at that stage (paragraph [41]). Accordingly, she found that it was clear the IDT accepted that the applicant in fact saw the emails prior to them being brought to his

attention by the UCC, and that as a result, the applicant had not established any unfairness in the fact of the phone being introduced at the appeal stage.

[74] The applicant also contended that there was no evidence before the IDT that the emails were sent by the applicant. The learned judge, however, found that despite there being no witness to their composition, the evidence was within the emails themselves. Therefore, the IDT having examined the content of the emails, and having heard from Mr Wan, Mrs Crawford and Mrs Adams, was entitled to find that it was reasonable for the UCC to conclude that it was the applicant's email address which had been used to send the relevant emails and that he was one of the few persons privy to the information contained in the emails.

[75] Another complaint made by the applicant was that the IDT had found that there were allegations levelled at the meeting of 5 August 2016, that maligning statements had been made by the applicant. The learned judge found that complaint was wholly unsupported by the evidence since the only reference in the award to a meeting was to the one held on 18 July 2016. This was so notwithstanding her acknowledgment, at paragraph [53] of her judgment, that both the applicant and the IDT in its award, had used the terms "meeting" and "hearing" interchangeably. In respect of the IDT, in the background to its award, the 18 July 2016 proceeding was referred to as a "hearing", while later in its findings it was characterised as a "meeting". The applicant, at paragraphs 5 – 7 of his detailed grounds in support of his application, referred to the proceedings, on 5 August 2016, as both a "meeting" and a "hearing".

[76] While bearing this fluidity of expression in mind, the learned judge highlighted that at page 4 of the award, the IDT outlined the evidence which had been given by Mrs Adams that, in the letter dated 3 August 2016 inviting the applicant to attend a hearing on 5 August 2016 to answer to the allegations against him, it was indicated that one such allegation was his maligning of the UCC and the reputation of its leadership in several emails (paragraph [55]). Consequently, the learned judge found that there was before the IDT evidence as to the charges, the emails and the evidence of Dr Wan, on which it could confirm or refute the evidence of the applicant, and as such, she found that no unreasonableness or error in law had been established.

[77] The judgment of the learned judge also showed that there were multiple complaints made by the applicant in his application for leave which were unsupported by an examination of the IDT award. In addition to the previous two examples, the learned judge also determined that the applicant's assertion that the IDT found that he had admitted agreeing to misrepresent the reporting relationship between himself and Dr McGrath, did not faithfully reflect the findings in the award.

[78] The true finding of the IDT, the learned judge found, was that the applicant had not rejected the request to misrepresent the relationship, and his response "disclosed awareness of the request and agreement to accede to it" (para [57]). She noted that, in coming to this finding, the IDT had regard to Ms Crawford's report referring to the relevant emails which contained the request and the applicant's response. Ms Crawford's report noted in particular that the applicant in his email response had stated

"I would be most delighted to speak to anyone who calls or sends emails. I hope such contact will be the precursor to your securing a job in which your skills will be appreciated…".

[79] The learned judge also referred to the IDT's finding that, based on the applicant's own admission that he had sent a recommendation to Dr McGrath, the applicant had responded to a request made via the relevant emails in question. The learned judge additionally highlighted that the IDT also considered that: 1) in an email attributed to the applicant, dated 13 July 2016, he had spoken about sending the recommendation to "the Provost in St. Petersburg", and 2) the recommendation tendered in evidence was dated 27 June 2016, prior to the applicant being called to a meeting on 18 July 2016, and was addressed to: "To whom it may concern" not to the "Provost in St Petersburg". Thus, the learned judge concluded that it was open to the IDT what to make of the emails, and from the evidence considered by the IDT, it was not a "baseless conclusion" that the "email exchange between Dr McGrath and the applicant disclosed the agreement for misrepresentation by the applicant of his reporting relationship with the former President".

[80] In respect of the complaint that the IDT relied on an email of 2 August 2016, sent after the 18 July meeting, the learned judge found that the IDT had erred in finding that all the emails justified the July 18 meeting. Notwithstanding this, she considered this to be an inconsequential error that did not prejudice the applicant as, at

the July 18 meeting, he was aware of the "allegations that he wrote the maligning emails".

[81] The above detailed review of the findings of the learned judge, discloses that there was ample basis for the conclusion at paragraph [81] of her judgment as follows:

> "None of the IDT's findings which were challenged disclosed errors in law to justify a review by this court. The Applicant has therefore failed to advance arguments of a strength and quality for me to find that he has an arguable case with a reasonable prospect of success. In particular, he has not established that the IDT's findings were irrational in the sense that no reasonable tribunal could have come to the same conclusions."

[82] If the learned judge made any "error" it was in being legally charitable in thereafter granting leave to appeal, when her comprehensive judgment, with which we entirely agree, showed that the applicant had no arguable case with a reasonable prospect of success. Viewed in this light, the court's unavoidable decision to refuse the application for extension of time to file an appeal, the notice of which having been filed only one day late, is not harsh, but the only decision dictated by the law and evidence.

[83] The court having concluded that the applicant has no arguable case, there is no need to go on to consider any question of prejudice to the respondents. The omnibus considerations of the overriding interests of justice also do not arise for consideration, given that the specific and major discretionary factor, namely whether the applicant has an arguable case, has not been decided in his favour.

Conclusion

[84] In the premises, I would refuse to grant the application seeking to extend time to file an appeal and to deem the appeal filed out of time on 3 January 2019 as properly filed. The appeal filed on 3 January 2019 is therefore invalid and the judgment of Dunbar-Green J dated 19 December 2018, upholding the award of the Industrial Disputes Tribunal dated 8 June 2018, remains in effect. I would also make no order as to costs.

[85] I cannot end without extending sincere apologies to the parties and counsel for the delay in the delivery of this judgment. The inconvenience no doubt occasioned, is deeply regretted.

PHILLIPS JA

ORDER

1. The application for orders that leave be granted to extend time to appeal, and that the appeal filed be deemed as filed within time, is refused.

2. No order as to costs.