[2022] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO 49/2016

BETWEEN	**UNITED MANAGEMENT SERVICES LIMITED**	**APPELLANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**2ND RESPONDENT**

Miss Stephanie Williams instructed by Henlin Gibson Henlin for the appellant

Ms Althea Jarrett instructed by the Director of State Proceedings for the respondents

20 February 2019 and 8 April 2022

BROOKS JA

[1] I have read, in draft, the judgment of Sinclair-Haynes JA. I agree with her reasoning and conclusion. I also agree that, because of their failure to provide full written submissions, the respondents should not have full costs of the appeal. As has been explained by my learned sister, the respondents did not file written submissions because the appellant did not serve them with written submissions. Whereas the appellant had filed skeleton submissions, there was no advance indication to the court as to the respondents' stance in response to the appeal. The court was obliged, in the circumstances, to rely on only oral submissions on behalf of the respondents.

SINCLAIR-HAYNES JA

[2] Miss Natasha Simpson was employed to United Management Services Limited ('the appellant'), under a fixed-term contract dated 11 July 2011. Her employment was terminated with immediate effect on 16 January 2012. Citing breaches of the rules of natural justice, Mr Howard Duncan, an industrial relations consultant, by letter dated 1 March 2012, requested the appellant to reinstate Miss Simpson, within five days. She was, however, not reinstated.

[3] Mr Duncan consequently, wrote to the Ministry of Labour and Social Security ('the Ministry'), the 2nd respondent, requesting its intervention.

[4] Mr Alrick Brown, a conciliation officer at the Ministry, wrote to the appellant by letter dated 16 April 2012, regarding the termination of Miss Simpson's employment. The appellant was asked to indicate its availability to attend a "conciliatory meeting" at the offices of the Ministry. The conciliatory meeting was held on 17 May 2012 between Ms Simpson and the appellant and was chaired by Mr Brown. The parties were, however, unable to arrive at an amicable resolution.

[5] On 6 July 2012, Mr Brown wrote to the Chairman of the 1st respondent, the Industrial Disputes Tribunal ('the IDT' or 'the Tribunal'). He informed the Chairman that he was directed by the Minister of Labour and Social Security ('the Minister'), in accordance with section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act ('the LRIDA'), to refer the dispute to the Tribunal. Mr Brown says that he copied that referral to both parties by facsimile and by hard copy.

[6] The Director of the Tribunal wrote to the appellant by way of letter dated 10 July 2012, which informed that the Minister had referred the dispute to the Tribunal for settlement and requested the submission of briefs. The appellant's attorneys responded to the Tribunal, by letter dated 16 July 2012 stating, *inter alia*, that they had not received direct notification of the Minister's decision to refer the dispute to the Tribunal, but were so advised by their client.

[7] By letter dated 18 July 2012, the appellant's attorneys, informed the Tribunal that the appellant was unable to submit to the jurisdiction of the Tribunal because neither they nor the appellant had received notification of the Minister's decision to refer the dispute to the Tribunal.

[8] On 23 July 2012, Mrs Melisa Collash-Manahan, on behalf of the Director of the Tribunal, responded to the appellant's attorneys. She informed them that the Tribunal had no alternative but to proceed with the matter in accordance with section 11A(1)(a)(i) of the LRIDA. She asked the attorneys to indicate by 30 July 2012, whether certain dates were convenient for them for the commencement of the hearing.

[9] The appellant's attorneys responded to the Tribunal on the same date (23 July 2012), by letter and indicated as follows:

> "As attorneys on record for the employer pursuant to a referral by the Minister under section 11(A)(1)(b) [sic] of the [LRIDA] we expected to receive a copy of any report or notice of any referral under section 11(A)(2) [sic] of the Act.
>
> We have done the only appropriate thing in the circumstances of this case. We have brought it to your attention that we were not served with or notified of the contents of your letter of the 10th July 2012. We also indicated that we would take steps by copy of same to find out from the Ministry if a notice was sent to us because, in our view, the jurisdiction of the IDT is affected.
>
> …"

[10] On 26 July 2012, the appellant sought to invoke the jurisdiction of the Supreme Court by filing an application for leave to apply for judicial review. The following were the orders sought:

> "1. Leave to Apply for Judicial Review by way of an Order of Certiorari to quash the decision of the 2nd respondent to refer the dispute between the applicant and Natasha Simpson relating to the termination of her employment to the 1st respondent.

2. An Order of Prohibition to prevent the 1st respondent from exercising jurisdiction to hear the matter relating to a dispute regarding the termination of the employment of Natasha Simpson.

3. A stay of proceedings regarding the dispute relating to the termination of the employment of Natasha Simpson pending the hearing of the application for Judicial Review.

4. Such Further and/or other relief as this Honourable Court deems just."

[11] The relevant grounds on which the orders were sought were:

"1. …

2. The [IDT] has no jurisdiction to hear the dispute.

a. The [IDT] is a creature of the [LRIDA]. Accordingly, it has jurisdiction only in relation to matters that are referred to it in compliance with the [LRIDA]

b. The dispute was referred to the [IDT] in breach of the [LRIDA] and/or it was procedurally unlawful in so far as it purports to be a referral under section 11A(1)(a)(i) of the [LRIDA].

c. In these proceedings the dispute could only be properly referred under s. 11(A)(2) [sic] of the [LRIDA] subject to any questions of procedural impropriety or bias.

3. The [Minister] erred as a matter of law in referring the dispute to the [IDT] under section 11A(1)(a)(i) of the [LRIDA] in so far as the dispute at all material times proceeded under or was handled by the [Minister] in accordance with section 11(A)(1)(b) [sic] of the [LRIDA]:

a. The [Minister] in accordance with section 11A(1)(b) gave directions to the parties to resolve the matter in conciliation by way of a letter dated April 16, 2012.

b. The parties attended the conciliation on the 17th day of May 2012 at the Ministry of Labour presided over

by Mr. Alrick Brown the [Minister's] servant and/or agent.

c. The parties had no choice in the naming of the conciliator as contemplated by the section.

d. Subsequent to the conciliation proceedings, [UMS Ltd] did not give a report to the Ministry in accordance with section 11A(2).

e. [The appellant] is not in receipt of a report from Natasha Simpson or her representative to the Ministry.

f. [The appellant] is prejudiced in so far as it is now aware by way of COPY letter delivered to it on the 16th July 2012 that the said Mr Alrick Brown, the Minister's servant and/or agent signed the referral of the matter to the [IDT] on behalf of the [Minister].

4. [The appellant] also relies on the matters referred to in paragraph 3 hereof to allege procedural impropriety in that the conciliation proceedings contemplated an independent and separate arbiter distinct from the [Minister] and or its [sic] servant and/or agents but in this case the procedure was breached in so far as Mr Alrick Brown imposed himself on and presided over conciliation proceedings.

5. [The appellant] also relies on the matters referred to in paragraph 3 hereof to allege bias or a reasonable apprehension thereof on the part of the [Minister] in that Mr Alrick Brown having participated in the conciliation proceedings is not a proper person to make or participate in the decision to refer the matter to the [IDT] whether that referral is pursuant to s. 11(A)(1)(a)(i) [sic] or 11(A)(2) [sic] of the [LRIDA]. In this instance he would have acted as a mediator (a neutral without prejudice proceedings) and decision-maker for the purpose of referring the matter to the [IDT].

6. [The appellant] also avers that if Mr Alrick Brown as the servant and/or agent of the [Minister] was properly entitled to participate in the conciliation proceedings, and thereafter make the referral then it is entitled to reasons in order to be in a position to properly:

a. Challenge the decision of the Minister to make a referral to the [IDT]; or

b. Prepare its brief to the Tribunal as is required of it by the tribunal.

7. …

8. The termination of Natasha Simpson does not fall within the ambit of the [IDT's or the Minister's] jurisdiction as it was done justly in accordance with the terms of her employment contract and in accordance with the Employment Termination and Redundancy Payments Act and in particular section 3(3)(a) thereof whereby the other party Miss Natasha Simpson agreed to the terms of termination with immediate effect with two weeks' salary.

…"

[12] The application for leave was heard on 5 and 11 September 2012 by Campbell J. The learned judge delivered his judgment on 29 April 2016. He refused leave on the ground that "the application for leave for judicial review does not disclose that the applicant has an arguable case with a realistic prospect of success". At paragraphs [22] and [23] of his judgment, he said:

> "[22] The Conciliator, is not a judge who is party to the cause, nor has he a financial interest in a party to the cause or in the outcome of the cause. Neither is he closely connected with a party to the proceedings. There is no evidentiary proof that the Conciliation Officer, is in a 'cause in which he has an interest.' In the Privy Council decision of George Meerabaux v The Attorney General of Belize [2005] UKPC 12, it was held that the relevant test, in circumstances, where there was no personal or pecuniary interest alleged as in the instant case, is to apply the Porter v Magill test. At paragraph 25, inter alia, the court outlined the test as;
>
> 'What the fair minded and informed observer would think. The man in the street, or those assembled on Battlefield Park to adopt Blackman J's analogy, must be assumed to possess these qualities.'

> [23] Those observers would have to examine the legislative structure under which the industrial disputes are managed. The policy of government, where there has been a failure to settle to [sic] provide voluntary conciliation service. That it is the Minister who on his own initiative could refer the matter to the Tribunal. I am inclined to the view that if he had taken these facts into account, the fair-minded and informed observer would not have concluded bias in the Conciliation Officer."

[13] On 29 April 2016, the learned judge acceded to the appellant's request for permission to appeal. The notice of appeal was filed on 10 May 2016 and amended notice of appeal was filed on 8 December 2016. The grounds of appeal will appear later in this judgment.

The application to strike out the notice of appeal

[14] On 6 February 2019, the respondents filed a notice of application to strike out the notice of appeal. This application was supported by Ms Tavia Curtis' affidavit.

[15] The grounds of the application were as follows:

> "1 The appellants have failed to comply with the case management conference orders made on April 17, 2018 to file and serve full written submissions and authorities.
>
> 2. On April 17 2018, at the case management conference held in this matter, the appellants were ordered to file and serve full written submissions and a bundle of authorities on or before December 10, 2018. To date, the appellants have failed to comply with this order.
>
> 3. The further order of the court at the case management conference was that the respondents were to file and serve full written submissions within 14 days of being served with the appellant's written submissions and authorities. The respondents cannot file their written submissions due to the failure of the appellants to comply with the order of the court.
>
> 4. The hearing of this appeal is scheduled for the week of February 18, 2019. The failure of the appellants to comply

with the case management conference orders has prejudiced the respondents.

5. Should the appellants now be given an extension of time to comply with the court's order so as to keep the hearing date of the week of February 18, 2019, the respondents would be denied the time period of 14 days to consider the appellants written submissions before filing and serving their own written submissions and also denied the sufficiency of time to prepare for the hearing of this appeal

6. The appellants have been dilatory in prosecuting this appeal from the date leave to appeal was granted in the Supreme Court. Leave was granted to appeal on April 29, 2016 and Notice of Appeal filed on May 10, 2016. Skeleton submissions ought to have been filed on May 31, 2016 however these were filed by the appellants on December 8, 2016."

An affidavit in response, sworn on 11 February 2019 by Nicola Richards, was filed on the said date.

[16] We heard and refused the application. The appeal consequently proceeded. We now provide in writing our reasons for refusing the respondents' application to strike out the notice of appeal. Hereunder are the parties' submissions.

The respondents' submissions

[17] Counsel for the Director of State Proceedings, Ms Jarrett, provided the court with a chronology of events that commenced with the refusal of the appellant's application for leave to apply for judicial review and concluded with the case management orders made by F Williams JA. She reminded the court of its repeated advice to litigants and their attorneys-at-law that it will not allow the Court of Appeal Rules ('CAR') and the court's orders to be breached with impunity.

[18] Relying on rule 2.20(2) of the CAR, learned counsel directed the court's attention to the appellant's disobedience of the court's order which required full written submissions to be filed by 10 December 2018. The appellant's failure to comply, she submitted,

resulted in the respondents' inability to file their full submissions in compliance with the order of F Williams JA, which required the respondents to file their full submissions within 14 days of being served with the appellant's full written submissions.

[19] Miss Jarrett further directed the court's attention to the fact that not only has the appellant not complied with F Williams JA's order but it has also failed to apply for an extension of time within which to comply. Counsel also drew the court's attention to the fact that, notwithstanding the clear order of F Williams JA at the case management conference on 17 April 2018 that full written submissions were to be filed by the appellant by 10 December 2018, the appellant has curiously averred that it was upon being served with the respondents' notice of application to strike out, that they were made aware that the skeleton submissions filed on 8 December 2016 did not require expansion. She argued that the respondent's failure to file skeleton submissions is no answer to the appellant's breach of F Williams JA's order which required the appellant to file full submissions.

[20] Counsel referred the court to the case, **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21 ('**Homeway Foods**') in which McDonald-Bishop JA (Ag) (as she then was) expressed the court's firm stance on the failure of litigants to comply with the provisions of the CAR and the court's orders. She submitted that the principles espoused in that case are equally applicable to orders of the court as they are to the CAR.

[21] Counsel also relied on **Gerville Williams and Others v The Commissioner of the Independent Commission of Investigations and Others** [2014] JMCA App 7, in which the court expressed its abhorrence for breaches of its orders and the CAR. According to counsel, the appellant in the instant case, unlike the appellants in **Gerville Williams**, has further failed to apply for an extension of time to comply with F Williams JA's orders.

[22] Learned counsel further contended that the appellant's response, as set out in the affidavit of Nicola Richards, is unacceptable and reflects a total disregard for the importance of the court's orders. She pointed to the fact that it was by the letter dated 9 February 2019, which they received on 12 February 2019, that the respondents were notified of the appellant's intention to rely on the skeleton submissions.

[23] Counsel posited that assuming that notification could be considered as service of the full submissions, the respondents would nonetheless be entitled, by virtue of F Williams JA's order, to 14 days within which to file their full written submissions in response. Those 14 days would have expired on 26 February 2019; well beyond the dates scheduled for the hearing of the appeal.

[24] Counsel argued that the appellant's failure to comply with the case management conference order for full written submissions has prejudiced the respondents.

[25] Counsel further directed the court's attention to the appellant's following dilatory conduct of the matter: Skeleton submissions were filed outside of the prescribed time. Miss Jarrett further pointed to the fact that F Williams JA's case management orders were made in April 2018. The appeal was set for hearing the week commencing 18 February 2019 and the appellant's decision to rely on the skeleton submissions was disclosed on 9 February 2019. Counsel argued that not only will the respondent be prejudiced. Non-compliance with rules and orders negatively impacts court fixtures and steals valuable time from other litigants. Counsel also directed the court's attention to:

a) the absence of an explanation as to the reason for the non-compliance; and

b) the fact that the period of non-compliance was over two months.

The appellant's response

[26] Ms Richards' affidavit opposing the application was filed on 11 February 2019. She averred that it was upon receipt of the respondents' application to strike out that the attorneys were alerted to the fact that there was a failure on their part to advise the court and the respondents that they had taken the view that there was no need to expand on the skeleton submissions that had been filed and served on 8 December 2016.

[27] She, however, averred that the respondents should suffer no prejudice because the skeleton submissions were very detailed. The respondents, she averred, were required to respond to them in accordance with the rules but failed to do so.

[28] Ms Richards further averred that having received the respondents' application, she wrote to the respondents and informed them that the appellant would only rely on the skeleton submissions and an additional case which was delivered subsequent to filing the submissions.

[29] By way of her oral submissions, counsel for the appellant, Ms Williams, relied on McDonald-Bishop JA (Ag)'s statement in **Homeway Foods** that striking out should be considered as a draconian or extreme measure and, therefore, ought to be considered as a sanction of last resort. The appellate court, she submitted, is less constrained than a court of first instance in resorting to it as an appropriate sanction in the circumstances of a given case. The reason, she posited, is that the juncture at which a matter arrives at the appellate court, the aggrieved party would have had the matter already determined by the lower court and if he is dissatisfied, it is reasonable to require him to act promptly.

[30] Ms Williams further submitted that the skeleton submissions, which were filed, were sufficiently detailed to allow the respondents to identify the issues and the extent of the challenge to the decision of the lower court. In light of the facts of this case, the respondents were not significantly prejudiced by the appellant's failure to file full written submissions. Notwithstanding the late filing of the submissions, the respondents could have responded to the skeleton submissions which had been provided in 2016. She

directed the court's attention to the fact that the case management conference before F Williams JA was held in 2018.

Discussion

[31] On 17 April 2018, F Williams JA made, among others, the following case management orders:

> "1. …
>
> 2. The appellant shall file and serve full written submissions with a bundle of authorities on or before 10 December 2018. The said submissions are also to be filed electronically with the Registrar of this court.
>
> 3. The respondents shall file and serve full written submissions with a bundle of authorities within 14 days of being served with the appellant's submissions. The said submissions are also to be filed electronically with the Registrar of this court.
>
> 4. The appeal is set for hearing for a day in the week commencing 18 February 2019.
>
> …"

[32] The Civil Procedure Rules, 2002 ('CPR') have heralded a culture of intolerance for disregard of the rules of court and its timelines by imposing strict sanctions. Rule 26.3(1)(a) of the CPR permits the court to strike out a statement of case or part thereof for failure to comply with the time limits fixed by a rule, practice direction or court order. By virtue of rule 2.14 of CAR, this court is authorised to exercise the powers conferred under part 26 of the CPR. Rule 26.3 reads:

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings; …"

[33] Rules 1.13(a), (b) and (c) of the CAR provides:

> "The court may –
>
> (a) strike out the whole or part of a notice of appeal or counter-notice;
>
> (b) set aside permission to appeal in whole or in part, and
>
> (c) impose conditions upon which an appeal may be brought."

[34] The Caribbean Court of Justice in **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 2)** (2006) 69 WIR 52, enunciated the important factors to which a judge ought to have regard, whilst deliberating whether a matter ought to be struck out. Those principles were adopted by McDonald-Bishop JA (Ag) and encapsulated in **Homeway Foods** as follows. At paragraphs [51] – [55], the learned acting judge of appeal stated:

> "[51] … It is duly accepted, as their Lordships have postulated, at paragraph [40], that the approach of the court, in determining whether to strike out a party's case, must be holistic and so a balancing exercise is necessary to ensure that proportionality is maintained and that the punishment fits the crime. According to their Lordships, at paragraph [44], the discretion of the court is wide and flexible to be exercised as 'justice requires' and so it is impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case.
>
> [52] Some of the pertinent considerations that have been enunciated by the CCJ, at paragraphs [45] to [47], have been distilled and set out in point form below, simply for ease of reference rather than on account of any rejection of their Lordships' formulation.
>
> > (i) Strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context, fairness means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.

(ii) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, that is a situation which calls for an order striking out that party's case and giving judgment against him.

(iii) The fact that a fair trial is still possible does not preclude a court from making a strike out order. Defiant and persistent refusal to comply with an order of the court can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and, to some extent, a symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is any type of disobedience that may properly be categorized as contumelious or contumacious.

(iv) It must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance, which cannot be assessed without examining the reason for the non-compliance.

(v) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance.

(vi) It is also relevant whether the non-compliance with the order was partial or total.

(vii) Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(viii) Other factors, which have been held to be relevant, include such matters as (a) whether the party at fault is suing or being sued in a

> representative capacity; and (b) whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.
>
> (ix) Regard may be had to the impact of the judgment not only on the party in default, but on other persons who may be affected by it.'"

[35] This court has also repeatedly expressed to counsel and litigants that failure to comply with timelines and the rules of this court will not be lightly countenanced. This court, since the advent of the CPR and the CAR, has embraced and referred to the following view expressed by the learned authors of Blackstone's Civil Practice 2004, 1st edition. At paragraph 71.41, the learned authors registered their view on the 'Dismissal for Non-Compliance' with the rules of the appellate court thus:

> "Where the rules on lodging documents, skeleton arguments etc. are broken, an appeal may be considered for dismissal… The court sees it as its duty to protect the interests of respondents, who already have a decision of a competent authority in their favour, by insisting on all reasonable expedition and strict compliance with the timetable laid down…"

[36] More recently, the Privy Council, in **Crick and another v Brown** [2020] UKPC 32 in upholding the decision of the Court of Appeal of Trinidad and Tobago, expressed the court's displeasure at the litigants' failure to comply with timelines. It was made plain that failure to obey the court's rules and timelines ought not to be lightly countenanced. Lord Sales, on behalf of the Board, set out the pertinent facts of the case, at paragraphs 4 and 5, thus:

> "4. The Cricks wholly failed to comply with the directions. No written submissions were filed or served by them at all. As a result, Mr Brown did not file written submissions either. Instead, when the appeal was called on for hearing on 12 April 2017 counsel for the Cricks asked

> for an adjournment to enable him to prepare and file written submissions. Counsel for Mr Brown did not object to the request.
>
> 5. But the Court of Appeal most certainly did object, and rightly so. No excuse was offered for the failure by the Cricks to file their written submissions in compliance with the court's directions. The appeal had been listed for a hearing taking up the whole day. If an adjournment were granted, it would mean that a day of the court's time would be wasted and another day would have to be found in future to hear the appeal. This would have been to the detriment of other litigants, the hearing of whose case would have to be pushed back in time as a result. This could not be justified. Waiting times for the hearing of appeals in Trinidad and Tobago are long, and the Court of Appeal is rightly concerned to keep them within bounds or reduce them so far as is possible since justice delayed is justice denied. Having regard to the interests of other litigants, the Court of Appeal refused the Cricks' application for an adjournment. There is no appeal against that decision."

[37] Having proceeded with the appeal, the issue which arose was whether, having failed to notify the court or the respondent by filing the submissions on which they intended to rely, they should have been allowed to present submissions. The Court of Appeal upheld the respondent's objection on the ground that it would be unfair to allow the Cricks to advance oral submissions of which the respondents had not been notified. Also, the court's members would have been deprived of the opportunity to prepare for the hearing by pre-reading the written submissions in support. The Board agreed with the Court of Appeal's observation that to allow oral submissions in those circumstances:

> "…. was liable to jeopardise the efficient and effective use of the time which had been made available that day for the hearing of the appeal."

It was in those circumstances that the court refused to give permission for the Cricks' counsel to present the appeal by way of substantive oral submissions**.**

[38] Unlike the **Cricks'** case, the appellant herein had filed its skeleton submissions which it asserted, encapsulated its submissions. The court was, therefore, not bereft of the appellant's arguments. In fact, from those submissions, the court would have been

aware of counsel's intended arguments. Instead of striking out the appeal, it was our view that lesser sanctions could have been imposed, which included confining the appellant to the arguments stated in the skeleton submissions. While it is accepted that the respondents, having been ordered to file theirs within 14 days of the filing of the appellant's, were unable to comply with the court's order, they were, however, aware of the appellant's intended arguments. The respondents could have been guided by the appellant's skeleton submissions in preparing their response but they chose instead not to file their submissions.

[39] It is important also to indicate that the **Gerville Williams** case, relied upon by the respondents, is distinguishable. The appellants, in that case, were charged with the offence of failing to comply with a lawful order given by the Commissioner under the Independent Commission of Investigations Act. They were placed before the Resident Magistrate's Court (now Parish Court) for the Corporate Area.

[40] At the commencement of the trial on 21 May 2011, points *in limine* alleging breach of their constitutional rights against self-incrimination were raised on behalf of the appellants. Those submissions, however, did not find favour with the learned Resident Magistrate who consequently ruled against them.

[41] The appellants sought and were granted an adjournment of the matter by the learned magistrate to allow them to institute constitutional proceedings in the Supreme Court. Their argument failed in the Full Court. Aggrieved by the decision of those courts, on 13 June 2012, the appellants filed notice and grounds of appeal against the Full Court's decision.

[42] Subsequent to the filing of the notice of appeal, the registrar, by way of notice dated 21 June 2012, notified all parties of the steps required by the CAR to advance the appeal. The notice directed their attention to, *inter alia*, the rules relating to the deadlines for the filing of skeleton submissions and the record of appeal. On 8 April 2013, the registrar wrote to the appellants' attorneys-at-law and advised them of their failure to

comply with the requirement to file the record of appeal. The 1st respondent's attorneys-at-laws also advised the appellants' attorneys-at-law that they had not been served with a copy of the skeleton arguments. No response was received by either the registrar or the 1st respondent.

[43] The constitutional claim having failed in the Supreme Court, the appellants' trial in the Resident Magistrate's Court resumed on 28 August 2012. The trial continued for several days, over a period in excess of a year with the appellants' full participation. By notice filed on 31 May 2013, the 1st respondent applied for an order to dismiss the appeal for want of prosecution. The appellants consequently applied for an extension of time within which to comply with the rules. Their application was refused, and the appeal was dismissed for want of prosecution.

[44] There are also other distinguishing features as follows. In **Gerville Williams**, although skeleton arguments were filed, they were not served on the respondents, and no record of appeal had been filed. The registrar and the respondents' attorneys had directed the attention of the appellants' attorneys to their default, but the appellants took no step to rectify the default. Instead of pursuing the appeal, the appellants actively participated in the trial.

[45] In the instant case, skeleton arguments were both filed and served, albeit late, and, upon being notified of its default to file full submissions, the appellant immediately notified of its intention to rely on its skeleton submissions which the respondents would have had in their possession for over a year. It was for these reasons that we refused the respondents' application to strike out the appellant's case and awarded costs to the respondent in any event.

The appeal

[46] The appellant relied on the following grounds of appeal as set out in their amended notice and grounds of appeal filed 8 December 2016:

"a. The learned Judge erred as a matter of fact and/or law when he failed to consider the Appellant's submission that there was no dispute within the meaning of the [LRIDA] insofar as the Appellant acted in accordance with Section 3(3)(a) of the [ETRPA] such that the conditions precedent for the referral were not met which includes the fact that:

> i. the worker was dismissed in accordance with the terms of her written contract of employment; accepted the payment in lieu of notice as provided for in her contract, which has to date not been returned; and after the passage of six weeks, sought to request reinstatement.

b. The learned Judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in dismissing the appellant's application for judicial review:

> i. The conditions precedent for the exercise of the Minister's jurisdiction had not been met.
>
> ii. the matter fell within and/or the 2nd Respondent dealt with it under s.11A(1)(b) and 11A(2) of the Act.
>
> iii. the Minister and the 2nd respondent did not observe or follow the procedural requirements under these sections and wrongly referred the alleged dispute to the [IDT] under s.11A(1)(a) of the [LRIDA].
>
> iv. Section 11A(1)(a) is restricted or limited to collective bargaining agreements and/or to the Minister acting on his own initiative.

c. The learned Judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in finding that the fair-minded and informed observer would not have concluded that there was a danger or real risk of apparent bias in the composition of the conciliation proceedings panel and/or the way the conciliation proceedings were conducted and also having regard to the legislative framework that is set out in s. 11A(1)(b) and 11A(2) being a separate and distinct mechanism from s.11A(1)(a) of the [LRIDA].

> d. The learned Judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in finding that the Application for leave for Judicial Review does not disclose that the Applicant has an arguable case with a realistic prospect of success."

Submissions

[47] Ms Williams relied on the written submissions filed on behalf of the appellant, which were amplified during her delivery. The written submissions acknowledged that the appeal concerned the exercise of the learned judge's discretion and this court will, therefore, not interfere unless it is found that the learned judge exercised his discretion on the basis of a misunderstanding of the law or evidence that was before him, or on the basis of an inference that particular facts existed or did not exist, which can be shown to be demonstrably wrong, or further, if the learned judge's decision was so aberrant that it must be set aside. Relying on the cases of **Attorney General of Jamaica v John Mackay** [2012] JMCA App, and **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37, learned counsel submitted that this case warrants the interference of this court and that the appeal should be allowed.

Counsel submitted that the preponderance of evidence is of such a nature, that had the learned judge properly addressed his mind to the facts and law and the relevant scheme of the LRIDA, it would have been pellucid that the appellant's case is an arguable case and has a realistic prospect of success.

Submissions on ground (a)

[48] The issue arising from this ground is whether or not there was a dispute capable of being referred to the IDT in light of the terms of Miss Simpson's employment contract, regarding termination.

[49] It was the appellant's submission that there is no dispute or industrial dispute as contemplated by the LRIDA in the instant case. Learned counsel for the appellant contended that the LRIDA contemplates that, although an industrial dispute includes the termination of a worker, regard must also be had to the terms and conditions of

employment. There can, therefore, be no dispute over which the IDT can preside if there is compliance with the terms and conditions of the employment.

[50] Counsel directed the court's attention to the fact that the contract of employment between the appellant and Miss Simpson provided for payment in lieu of notice in the event of termination. Miss Simpson not only accepted the term of employment, she further accepted payment in lieu of notice. That payment was not returned although Miss Simpson had the right to either accept or reject the payment. The appellant and Miss Simpson were therefore *ad idem* up to the juncture at which she accepted the payment in lieu of notice.

[51] It was six weeks after her dismissal that Miss Simpson sought reinstatement and purported to refer the matter to the Ministry alleging failure, in relation to her dismissal, to observe the principles of natural justice. In those circumstances, counsel contended that there is no dispute over which the Tribunal can preside.

[52] Relying on Theobalds J's statement in **R v Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins Ex Parte West Indies Yeast Co Ltd** (1985) 22 JLR 407 ('**Ex Parte West Indies Yeast Co Ltd**') at pages 413G – 414C, in support of this submission, counsel for the appellant further contended that, in refusing the appellant leave to apply for judicial review, the learned judge erred as a matter of law and on the facts because of his failure to consider these circumstances.

[53] In her oral submissions, Ms Williams relied on the case **of Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security** [2018] JMSC Civ 103 ('**Spur Tree Spices'**). In that case, employees were summarily dismissed, reinstated and paid for the period they were dismissed, after which the matter was referred to the IDT, as a dispute, when the company sought to hold a disciplinary hearing for the reinstated employees.

[54] Learned counsel noted that D Fraser J (as he then was), in considering whether there was a dispute, reviewed the case of **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and National Workers Union** [2005] UKPC 16 (**Jamaica Flour Mills**'). Relying on the analysis by the learned judge in **Spur Tree Spices**, it was counsel's submission that a distinction should be drawn between circumstances where payment has been accepted and there had been no referral to the Minister and circumstances where payment is accepted where a referral has already been made. Counsel directed the court's attention to the fact that, in the instant case, at the time of acceptance, no referral was made to the Minister and the funds have not been returned.

[55] It was counsel's contention that, on the facts, there was no industrial dispute as defined by section 2 of the LRIDA which could be referred to the IDT pursuant to section 11A of the LRIDA.

[56] In seeking to counter the submissions made on behalf of the appellant, Ms Jarrett contended Ms Simpson's acceptance and encashment of the cheque offered in lieu of notice, is not determinative that she waived her right to have the dismissal referred to the Tribunal under the LRIDA. She submitted that the facts and circumstances of each case have to be examined to determine whether there had been a waiver.

[57] Learned counsel argued that there was no evidence that the appellant had, between 27 January 2011 and 12 March 2011, altered its position or taken the view that Ms Simpson had waived her rights under the LRIDA.

[58] Ms Jarrett further submitted that the issue of whether Ms Simpson had received the maximum benefit at the time of her dismissal was one for the Tribunal's determination. In support of her submission, she relied on the cases of **Jamaica Flour Mills**, **National Workers Union** and **Spur Tree Spices**.

Discussion and analysis of ground (a)

[59] Miss Simpson was dismissed in accordance with the terms of her written contract of employment. She accepted, without demur, payment in lieu of notice as provided for by her contract which payment, the appellant indicated, she has to date not returned.

[60] The arguments posited on that ground of appeal, do not appear in the portion of Campbell J's judgment that outlines the applicant's submission. Counsel's submissions, to which the learned judge referred, were that the conditions precedent to the exercise of the Minister's jurisdiction had not been met and that there was no dispute in an undertaking as required by the Act. There is, however, no mention made of Miss Simpson's acceptance of payment in lieu of notice or her failure to return the sum.

[61] Miss Simpson agreed to the terms of her contract, which provided for the termination of her employment with immediate effect with two weeks' salary. But is that a bar to her challenging her dismissal as unjustifiable or wrongful?

[62] Section 3 of the Employment (Termination and Redundancy Payments) Act ('ETRPA') governs the minimum period of notice required to be given by an employer upon the termination of the contract of employment of an employee continuously employed for four or more weeks. The relevant section reads, in part:

> "3.—(1) The notice required to be given by an employer to terminate the contract of employment of an employee who has been continuously employed for four weeks or more shall be—
>
> (a) not less than two weeks' notice if his period of continuous employment is less than five years;
>
> …
>
> and shall be in writing unless it is given in the presence of a credible witness.
>
> …
>
> (3) The provisions of subsections (1) and (2) shall not be taken-

> (a) to prevent either party to a contract of employment from waiving his right to notice at the time of termination, or from accepting a payment in lieu of notice, or from giving or accepting notice of longer duration than that of the relevant notice specified in those subsections.
>
> …"

[63] The Privy Council in **Jamaica Flour Mills** dealt with a similar matter in which three employees were dismissed by Jamaica Flour Mills Ltd with immediate effect. Each letter of dismissal was accompanied by a cheque. Two of the former employees encashed their cheques.

[64] It was contended, on behalf of Jamaica Flour Mills, that the dismissals were in accordance with their contracts of employment and could not, therefore, be categorized as unjustifiable for the purposes of the LRIDA. It was further argued that the two former employees, by encashing their cheques, had waived their statutory rights under the LRIDA. Counsel for the Jamaica Flour Mills contended that waiver in the circumstances was grounded on the doctrine of estoppel by conduct.

[65] The Privy Council, however, held that the IDT was entitled to draw a distinction between the issue of redundancy and the "settling of the dispute" between the parties. At paragraph 17 of its judgment, the Board said:

> "…The terms of reference required the Tribunal 'to determine and settle the dispute …'. The Tribunal did so. They were able to do so without definitively deciding the redundancy issue. In effect, as the Court of Appeal judgments pointed out, the Tribunal assumed in favour of JFM that its redundancy case was well-founded. The absence of a definitive finding can give JFM no ground for complaint."

The Privy Council also held that the IDT was entitled to enquire into the issue of waiver. That issue has been discussed more fully below.

[66] It is, however, uncertain whether, in the instant case, the argument concerning the issue of waiver was presented to the learned judge.

[67] Miss Simpson's employment contract, dated 11 July 2011, included the following termination clause:

> "**TERMINATION**
>
> The arrangements, as set out, can be terminated by either party giving two (2) weeks notice [sic] in writing at the end of which time your employment will cease. It will also be our right to terminate the arrangements with immediate effect by paying you two weeks salary."

[68] Her termination letter, dated 16 January 2012, reads in part:

> "We have lost confidence in you as an employee and as a result we are terminating your services with us effective today, Monday, January 16, 2012.
>
> ….
>
> Please report to our office…to collect your final payment on Friday, January 27, 2012."

[69] Miss Simpson was not given two weeks' notice in writing, however, her contract of employment expressly provided that she could be terminated either by written notice or with immediate effect and the payment of two weeks' salary. Her contract of employment and the letter of dismissal support counsel's contention that her termination accorded with the terms of her contract, which conforms with the provisions of the ETRPA.

[70] According to the learned authors of the text Commonwealth Caribbean Employment and Labour Law, the term "wrongful or unlawful" dismissal refers to the termination of the employment contract in breach of the provisions which govern the expiration of the contractual term (see page 134).

[71] This court has repeatedly cited with approval Wooding CJ's definition of wrongful dismissal in **Fernandes (Distillers) Limited v Transport and Industrial Workers' Union** (1968) 13 WIR 336. The learned Chief Justice, at page 340, explained:

> "…A wrongful dismissal is a determination of employment in breach of contract which cannot be justified at law…."

[72] The learned authors of Halsbury Laws of England, Volume 41 (2021) also explained wrongful dismissal as follows:

> "A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:
>
> (1) The employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed or without the requisite notice, as the case may be; and
>
> (2) His dismissal must have been without sufficient cause to permit his employer to dismiss him summarily.
>
> In addition, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed, or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground."

[73] Lord Dyson SCJ, in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence** [2012] 2 All ER 278, explained unfair dismissals at paragraph 40 of his judgment thus:

> "…A dismissal may be unfair because it is substantively unfair to dismiss the employee in the circumstances of the case and/or because the manner in which the dismissal was effected was unfair. The manner may be unfair because it was done in a humiliating manner or because the procedure adopted was

> unfair inter alia because the agreed disciplinary procedure which led to the dismissal was not followed. It may be unfair because defamatory findings were made which damage the employee's reputation and which, following a dismissal, make it difficult for the employee to find further employment. Any such complaint was intended by [the UK] Parliament to be adjudicated on by the specialist employment tribunal…"

The learned authors of Smith and Woods Employment Law, 10th edition, at page 418, distinguished between unfair and wrongful dismissal as follows:

> "… unfair dismissal involves an enquiry into the overall merits of the dismissal (substance and procedure) whereas the common law action for wrongful dismissal essentially … looks typically at the form of the dismissal."

[74] In **Ex Parte West Indies Yeast Co Ltd**, Smith CJ, at pages 409I and 410A - D, observed:

> "Dealing with the topic 'Dismissal at common law- lawful and wrongful' the view is expressed in para. 11 (28.01) that even if a dismissal 'is justifiable at common law, it is not necessarily justified under the statute; it is possible for an employee to succeed in a complaint of unfair dismissal even if he would lose in an action for wrongful dismissal.' The statute to which reference is made in the quotation is the Employment Protection (Consolidation) Act 1978 (UK). Then dealing with the topic, 'The impact of Unfair Dismissal', the learned author says at para 11 (29.20) (op. cit):
>
> > 'The provision of unfair dismissal protection was designed to achieve a number of objectives. Together with contracts of Employment Act 1963 and the RPA … it marked a trend towards recognizing that the employee has an interest in his job which is akin to a property right. **A person's job can no longer be treated purely as a contractual right which the employer can terminate by giving an appropriate contractual notice**.'
>
> Finally, it is stated at para. 11 (29.22) that '**in essence, (unfair dismissal) differs from the common law in that it permits tribunals to review the reason for the**

> **dismissal**. **It is not enough that the employers abides [sic] by the contract.** If he terminates it in breach of the Act, even if it is a lawful termination at common law, the dismissal will be unfair. So the Act questions the exercise of managerial prerogative in a far more fundamental way than the common law could do." (Emphasis added)

It is, therefore, settled law that compliance with the contract of employment does not preclude the invocation of the LRIDA and the subsequent involvement of the IDT.

[75] In light of the circumstances of this case, although a claim for wrongful dismissal might not be sustainable, the issue of whether the dismissal is unjustifiable arises.

[76] Unjustifiable dismissal, unlike that of wrongful dismissal, concerns the merits of the dismissal. An employee can therefore be terminated wrongfully and unfairly and seek redress for both.

[77] The term "industrial dispute" is defined in section 2 of the LRIDA. The relevant portion reads:

> "… a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, and-
>
> (a) …
>
> (b) in the case of workers who are not members of any trade union having bargaining rights, being a dispute relating wholly to one or more of the following:
>
> > (i) the physical conditions in which any such worker is required to work;
> >
> > (ii) **the termination or suspension of employment of any such worker**; or
> >
> > (iii) any matter affecting the rights and duties of any employer or organization representing employers or of any worker or organization representing workers;" (Emphasis added)

[78] The LRIDA does not preclude a claim for unfair/unjustifiable dismissal because of compliance with the employment contract, the ETRPA and an acceptance of payment in lieu. The decision of the Privy Council in **Jamaica Flour Mills** provides guidance and answers to counsel for the appellant's submission that Ms Simpson:

(i) accepted the payment in lieu;

(ii) has not sought to return the monies paid over; and

(ii) sought reinstatement after the passage of six weeks.

[79] In **Jamaica Flour Mills**, Lord Scott dealt with waiver as a specie of estoppel by conduct. In addressing the issue of whether the encashing of cheques by two former employees constituted a waiver, it was his view that the Board did not consider the case to be one in which the employees were put to an election between inconsistent remedies., At paragraph 20, the learned Law Lord expressed the following view:

> "As to JFM's waiver point, which affects only Mr Campbell and Mr Gordon, their Lordships would reject the point for the same reasons as those given in the courts below. Waiver, as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the alleged waiver. **If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present.** An objectively ascertained intention to waive is the first requirement. JFM's case falls at this hurdle. The cashing of the cheques took place after the Union had taken up the cudgels on the employees' behalf, after the dispute had been referred to the Tribunal and after arrangements for the eventual hearing had been put in train. In these circumstances the cashing of the cheques could not be taken to be any clear indication that the employees were intending to abandon their statutory rights under s 12(5)(c)." (Emphasis added)

He went on in paragraph 44 to further observe:

> "Nor is there any indication, or at least no indication to which their Lordships have been referred, that JFM or any

> representative of JFM thought that the two employees were intending to relinquish their statutory rights. **Even assuming that the cashing of the cheques could be regarded as a sufficiently unequivocal indication of the employees' intention to waive their statutory rights, the waiver would, in their Lordships' opinion, only become established if JFM had believed that that was their intention and altered its position accordingly. There is no evidence that JFM did so believe, or that it altered its position as a consequence.** The ingredients of a waiver are absent. Their Lordships would add that they do not see this as a case where the employees were put to an election between inconsistent remedies, ie cashing the cheques or pursuing their statutory remedy." (Emphasis added)

The Board's reasoning was followed in **Spur Tree Spices**.

[80] Lord Goff, in the House of Lords case **Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India, The Kanchenjunga** [1990] 1 Lloyd's Rep 391, distinguished between an election and equitable estoppel. At page 399, he said:

> "There is an important similarity between the two principles, election and equitable estoppel, in that **each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary, of the relevant party's rights.** But there are important differences as well. In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. **His election has generally to be an informed choice, made with knowledge of the facts giving rise to the right.** His election once made is final; it is not dependent upon reliance on it by the other party. **On the other hand, equitable estoppel requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation. No question arises of any particular knowledge on the part of the representor, and the estoppel may be suspensory only.** Furthermore, the representation itself is different in character in the two cases. The party making his

> election is communicating his choice whether or not to exercise a right which has become available to him. **The party to an equitable estoppel is representing that he will not in future enforce his legal rights**. His representation is therefore in the nature of a promise which, though unsupported by consideration, can have legal consequences; hence it is sometimes referred to as promissory estoppel." (Emphasis added)

[81] In directing the court's attention to Miss Simpson's acceptance of payment, it is apparent that counsel for the appellant sought to rely on the doctrine, waiver by estoppel (estoppel by conduct). The Privy Council in **Jamaica Flour Mills** outlined the conditions that must be satisfied before such a conclusion can be drawn. Distilled from that case are the followings requirements:

> "(i) The first is an objectively ascertained intention to waive. If a person's conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present.
>
> (ii) There must also be some indication that the representee thought that the person, through his conduct, was intending to relinquish his or her rights. The representee must therefore have believed that that was the intention of the person and altered its position accordingly."

[82] In determining whether Ms Simpson intended to relinquish her right to institute legal proceedings, examination of the circumstances under which she accepted the payment is important. She was dismissed on 16 January 2012 and instructed to collect her final payment on 27 January 2012. The letter contesting her dismissal is dated 1 March 2012. Miss Simpson had, however, not provided the court below with an affidavit.

[83] The appellant's application for leave to apply for judicial review, filed and dated 26 July 2012, indicates that notice of the application was not given to Miss Simpson, or her representative, Mr Duncan. Ms Kerine Brown-Gentles' affidavit, filed in support of the application for leave, does not refer to Miss Simpson's acceptance of payment. It also does not provide the details of the events surrounding her acceptance. The court is also

ignorant as to the actual date of the payment and the manner in which the payment was made.

[84] The following assertion was, however, made at paragraph 1 of the appellant's submissions:

> "She was required to collect her final payment on the 27th January 2012. The final payment was made to and accepted by her which included payment in lieu of notice as provided for in her contract of employment."

[85] It is also uncertain whether she was in fact paid on the 27 January or on some other date.

[86] No finding was made by the learned judge in respect of Miss Simpson's acceptance of payment and whether such conduct, objectively assessed, constituted a waiver. This court is, therefore, ignorant as to whether or not Miss Simpson contested her dismissal prior to 1 March 2012. In light of the paucity of evidence in that regard, I am unable to arrive at a definitive conclusion on the issue. Moreover, there is no affidavit evidence that the appellant believed that Miss Simpson, through her conduct, was intending to relinquish her right to institute legal proceedings and that the appellant consequently altered its position to accord with that belief.

[87] It is a well-known adage that: "he who asserts must prove". It is settled law, in respect of estoppel, that the court must be satisfied that the representation (whether by words or by conduct) was unequivocal and was relied upon in circumstances where it would be inequitable for the representor to withdraw that representation. Worthy of mention is that, although the authorities suggest that an election is final, waiver by estoppel may be suspensory only and is a more flexible doctrine.

[88] The acceptance of payment *per se* is not sufficiently unequivocal of an intention not to dispute a dismissal. The well-known statement, "circumstances alter cases", must also be borne in mind. The loss of a job is the loss of income which can have the domino

effect of the inability to meet obligations and thus influence the acceptance of payment without any intention to waive the right to pursue legal redress.

[89] Theobalds J's following statement in **Ex Parte West Indies Yeast Co Ltd**, at pages 413 and 414, regarding the acceptance of payment in lieu of notice on which the appellant relied, has to be considered in the context where there was evidence that the employees in **Ex Parte West Indies Yeast Co Ltd** accepted the letters of dismissal and the payment "without demur" per Gordon J at page 414I. Theobalds J, said, in part at page 413H - 414B:

> "… The letters of dismissal … speak of payment of salary for the month of April as well as one month's salary in lieu of notice … The managing director of the company further deponed that 'the said employees accepted payment to/of the said sums paid in lieu of notice.' It has not been contended by or on behalf of any of the employees who saw fit to complain to the Ministry of Labour that they were unjustifiably dismissed that any of these sums were ever refunded. … It would seem that if one is sincere in a contention of unjustifiable dismissal, the company's payment of unearned wages should be returned to the company at the earliest opportunity. Once you accept payment then you are accepting the terms on which such payment is made or offered and the contract of employment is legally brought to an end. This is the position at common law, this is given statutory recognition by the Employment (Termination and Redundancy Payments) Act."

[90] He then opined at page 414B-C:

> "To adopt the argument of the learned Senior Assistant Attorney General 'if the dismissals were lawful then there would be no dispute at all.' There was no dispute at all. Indeed by the offer and acceptance of the letters of dismissal and the payment that followed same the company and the employees could only be said to have been an *ad idem* up to that point."

[91] Gordon J was of like mind. At pages 414F – I and 415A – B, he said:

> "Seven to ten days after they accepted letters of termination of their employment and payment of amounts due to them in lieu

> of notice in accordance with the provisions of the Employment (Termination and Redundancy Payment) Act, the three former employees … wrote to the Ministry of Labour and Employment seeking that Ministry's intervention in matter of a 'dispute' that existed between them and their former employer.
>
> …
>
> The respondents did not challenge their dismissal but accepted the letters and payments without demur. The applicant company was not informed of the respondent's dissatisfaction with the manner of their dismissal until they received notification from the Ministry of Labour and Employment."

[92] He continued:

> "The respondents could have brought themselves under the umbrella of the former Act [the Labour Relations and Industrial Disputes Act] if they had intimated to the applicants on the receipt of the letters of dismissal, their dissatisfaction and/or rejection of the letter, thus initiating a dispute while the relationship of employer/employee existed.
>
> After this condition ceased to be by virtue of the respondents' acceptance, without protest of their letters of dismissal, the relationship between the parties became that of employer and former employees."

Smith CJ did not address this issue. Neither was there any analysis by either Theobalds J or Gordon J of the law of estoppel by conduct. The focus of the learned judges was on the basic contractual principles of offer and acceptance.

[93] At first blush, the argument regarding the absence of a dispute over which the Tribunal can preside is attractive for the following reasons:

(i) Miss Simpson was terminated in accordance with the terms of her contract of employment and she accepted the payment in lieu of notice (therefore the parties were apparently *ad idem*); and

(ii) there was compliance with the ETRPA.

[94] That argument is, however, not supported by the authorities. In fact, it is settled law that the acceptance of payment in lieu of notice does not necessarily bar a challenge to the dismissal as being unfair, nor is such acceptance *per se* a waiver of the employee's right to institute proceedings challenging the termination as wrongful or unjustifiable.

[95] The acceptance of payment in lieu of notice is not an automatic bar to a challenge to the dismissal as being unfair or even wrongful, nor is such acceptance, without more, a waiver of the employee's right to institute proceedings challenging the termination as wrongful or unjustifiable. Moreover, there is no evidence that Miss Simpson was offered and accepted severance payment without demur. In light of the foregoing, this ground, in my view, fails.

Ground (b)

[96] The issue which emanates from this ground is whether the conditions of section 11A of the LRIDA had been satisfied, thereby authorising the Minister to refer the matter to the IDT. Sections 11A(1) and (2) of the LRIDA provide:

> "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."

Submissions on ground (b)

[97] According to learned counsel for the appellant, the Minister has no jurisdiction to act on his own initiative to refer a dispute to the Tribunal pursuant to section 11A(1)(a) if that dispute is not the subject of a collective agreement. Counsel submitted that in cases, such as the instant case, where means of settlement attempted pursuant to section 11A(1)(b) have been unsuccessful, the Minister must give directions in accordance with section 11A(1)(b). Thereafter, he must follow the steps set out in section 11A(2).

[98] It was counsel's submission that the learned judge fell into error by refusing to accept that, when properly construed in conjunction with section 6, the term "such other means as were available to the parties," in section 11A(1)(a)(i) of the LRIDA, could only apply to collective bargaining agreements. Counsel drew the court's attention to the learned judge's failure to provide reasons for his rejection of those submissions except to assert that he was unable to accept counsel's submissions.

[99] Counsel also directed the court's attention to the learned judge's acceptance of the submission that the Minister is only authorised to act in the public or national interest. Those submissions were made by the appellant's counsel in relation to the Minister's discretion to act on his own initiative under section 11A(1)(a).

[100] Counsel submitted that, in interpreting legislation, it is the court's duty to interpret the words used. The court ought not to go behind the words of the statute and create a construction it considers to be more appropriate or just. Counsel relied on the dictum of Lord Simonds in **Magor and St Mellons Rural District Council v Newport**

Corporation [1951] 2 All ER 839, at page 841, which she considered instructive as regards statutory interpretation.

[101] Learned counsel further submitted that the effect of the 2010 amendment to the LRIDA was to capture employees who are not members of a trade union, having bargaining rights, under the jurisdiction of the LRIDA. The amendment included disputes between a non-unionised employee and employer within the meaning of industrial disputes under the Act but did not change the scheme of the Act.

[102] Counsel posited that, although by virtue of the 2010 amendment, the non-unionised employee was brought under the Act, the amendment did not confer upon the Minister, the power to treat with the non-unionised employee in the same manner as the unionised employee. According to counsel, the learned judge's failure to appreciate this distinction resulted in his refusal of the application for leave, which decision was demonstrably wrong.

[103] Learned counsel directed the court's attention to Smith CJ's statement in **Ex Parte West Indies Yeast Co Ltd**, at page 412I, on which she relied in support of her submissions that if a dismissal has not given rise to a dispute which threatens industrial peace, as would occur if, for example, an employee is represented in the dispute by a trade union which also represents workers currently employed to his former, and who may take industrial action if the dispute is not settled, the Minister is not empowered to act.

[104] Ms Jarrett, on behalf of the respondents, argued that there is no reference to section 11A(1)(b) in any of the documentation. She contended that the invitation to the parties to a conciliation meeting at the Ministry could not be read as a direction under section 11A(1)(b).

[105] Counsel argued that the Minister was entitled to refer the dispute to the Tribunal. She relied on the amendments to the LRIDA that were made in 2010. Those amendments, she argued, allowed for the inclusion of non-unionised workers and altered the definition

of the term "industrial dispute". She submitted that **Ex Parte West Indies Yeast Co Ltd**, having pre-dated those amendments, could not be relied on for its reasoning on this issue.

[106] Learned counsel further contended that the case does not contemplate a situation of unfair dismissal. That is to say, it does not contemplate that a dismissal may be unfair even if there was compliance with the terms of the employment contract. Ms Jarrett posited that employment contracts are subject to the LRIDA. The instant case concerned the manner of Ms Simpson's dismissal. She referred to the fact that Miss Simpson was summarily dismissed and that the letter suggested that it was for cause.

Discussion and analysis on ground (b)

Conditions precedent for referral by the Minister

[107] Section 2 of the LRIDA defines collective agreement. It states:

> "'collective agreement' means any agreement or arrangement which-
>
> (a) is made (in whatever way and in whatever form) between one or more organizations representing workers and either one or more employers, one or more organizations representing employers, or a combination of one or more employers and one or more organizations representing employers;
>
> (b) contains (wholly or in part) the terms and conditions of employment of workers of one or more categories."

[108] Section 6 of the LRIDA reads:

> "(1) Every collective agreement which is made in writing after the 8th April, 1975, shall, **if it does not contain express procedure for the settlement, without stoppage of work**, of industrial disputes between the parties, be *deemed to contain the procedure specified in subsection (2) (in this section referred to as the implied procedure).*
>
> (2) The implied procedure shall be-

> (a) **the parties shall first endeavour to settle any dispute or difference between them by negotiation**; and
>
> (b) where the parties have tried, but failed, to settle a dispute or difference in the manner referred to in paragraph (a) any or all of them may request the Minister in writing to assist in settling it by means of conciliation; and
>
> (c) all the parties may request the Minister in writing to refer to the Tribunal for settlement any dispute or difference which they tried, but failed, to settle by following the procedure specified in paragraphs (a) and (b)." (Emphasis added)

[109] In **Ex Parte West Indies Yeast Co Ltd,** the Full Court considered the conditions precedent to the exercise of the Minister's power to refer a dispute to the Tribunal. At page 412F - I, Smith CJ said:

> "It will be seen that the provisions of s 11A are consistent with the scheme and policy of the Act in that a reference may not be made to the (Tribunal unless the Minister is satisfied that the parties have tried themselves to settle the dispute without success. What the section does in addition is to give the minister power to act 'on his own initiative'. The reason for this is not difficult to find. Under s.9, essential services, the Minister may act only on a written report made to him by or on behalf of a party to the dispute. Under s. 10 where he may act in the public interest, the Minister has to follow the rather lengthy procedure of making an order (which may be countermanded by the House of Representatives), publishing it and serving it to the parties and giving them thirty days to settle the dispute themselves; the parties must then be given time to nominate the members of a special Tribunal to hear the dispute and settle it. Under s. 11 the Minister may act only on the written request of all parties to the dispute.
>
> What s. 11A clearly does is to give the Minister freedom to intervene and take action in respect of *any* industrial dispute in spite of the restrictive procedures which the other sections require. However, in my opinion, he is not authorised to act with complete freedom. His powers are governed by the scheme and policy of the Act and by the express provisions of the section." (Emphasis as in original)

[110] The learned Chief Justice further opined:

> "I agree with the contention of counsel for the applicant company that the Minister is authorised to act only in the public or national interest or in the interest of industrial peace. **In my view, he has no authority to act in the interest of a dismissed ex-employee where his dismissal has not given rise to a dispute which threatens industrial peace,** as would occur if, for example, he is represented in his dispute by a trade union which also represents workers currently employed to his former employer who may take industrial action if the dispute is not settled. Views similar to my own were expressed by Bingham, J., in the *Kaiser Bauxite Co.* case (supra) when he said (at p.15) that 'even with this added power which the Minister had (s. 11A) the entire scheme of the Act does not contemplate such a dispute as related between an employer on the one hand, and the non-unionised worker on the other hand which does not in any way threaten industrial peace." (Emphasis added)

[111] The Full Court consequently held that the Minister is authorised by section 11A to refer a matter to the Tribunal under section 11A if the employee's dismissal gives rise to a dispute which threatens industrial peace. The Minister was only authorised to act in the public or national interest or in the interest of industrial peace.

[112] That ruling excluded a large number of persons accessing the Tribunal because, in many cases, the dismissal of an employee would not give rise to a dispute which threatened industrial peace. That ruling resulted in an amendment to section 11A of the LRIDA. Subsection 3 was added. It reads:

> "Nothing in this section shall be constructed as requiring that it be shown, in relation to any industrial dispute in question, that:
>
> (a) Any industrial action has been, or is likely to be, taken in contemplation or furtherance of the dispute; or
>
> (b) Any worker who is a party to the dispute is a member of a trade union having bargaining rights."

[113] At page 329 of the text, Commonwealth Caribbean Employment and Labour Law, the authors stated as follows:

> "Perhaps the most far-reaching power afforded to the Minister, in the quest to minimise industrial action, is that delineated by Section 11A of the Act, where he may act on his own initiative to refer a matter to the IDT for settlement. Once he is satisfied that a dispute exists, that attempts made to settle it have proved futile, **and** that all the circumstances surrounding the dispute constitute an urgent or exceptional situation, then, even without the consent of the parties, he may proceed to refer the matter. Prior to the 2010 amendment to the LRIDA, before the Minister could exercise this wide power, he had to ensure that the dispute related to a collective group of workers, and had the capability of disrupting industrial peace and he had to act expeditiously; otherwise, he would have acted *ultra vires*. However, the amendment has removed these prerequisites..." (Emphasis added)

[114] The highlighted 'and' ought to be 'or'. That notwithstanding, the extract does accurately convey that there were certain prerequisites that the 2010 amendment erased.

[115] By virtue of this amendment, if the Minister is satisfied that an industrial dispute exists in any undertaking, and one of the two conditions is fulfilled, he can exercise his power to refer the dispute to the Tribunal. That is:

> (i) If he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available in 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 to do so.

[116] In the instant case, the Minister expressed his satisfaction that an industrial dispute existed, and the parties having attempted conciliation without success, the condition of section 11A(1)(a)(i), would have been fulfilled. This was the section on which the Ministry referred the dispute, by the letters dated 6 and 10 July 2012.

Whether section 11A(1)(a) is to be read in conjunction with section 6 which deals with collective agreements.

[117] The legislative definition of "collective agreement" is an agreement negotiated and agreed by employers and unions utilising the collective bargaining process.

[118] Section 6 of the Act is a deeming provision. If a collective agreement does not contain an express procedure for the settlement of industrial disputes, without work being interrupted, it shall be deemed to contain the dispute resolution procedure outlined in subsection 2.

[119] It is instructive that section 11A commences thus, "Notwithstanding the provisions of sections 9, 10 and 11 …". It is, therefore, necessary to examine the provisions of sections 9, 10 and 11 to properly understand section 11A.

[120] Section 9 deals with industrial disputes in an undertaking, which provides an essential service. Such disputes may be reported to the Minister in writing by any party to the dispute or by any person acting on behalf of any such party. Subsection (2) provides that the report shall state:

> "(a) whether the person making the report knows of any steps which have been taken towards a settlement of the dispute, and if so, what are those steps and the results thereof; and
>
> (b) whether there is in force any collective agreement between the parties to the dispute, and if so, whether such agreement includes express procedure for the settlement of disputes of the kind referred to in such report."

[121] Subsection (3) provides that upon receipt of a report, the Minister shall, during the period of 10 days beginning on the day on which he receives the report, refer the dispute to the Tribunal for settlement if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties. If the Minister is not satisfied that all attempts were made to settle the dispute, he may, instead, give directions in writing to the parties to pursue such means as he "shall specify".

[122] Section 10 confers upon the Minister the power, in cases of non-essential services, where industrial action has begun or is likely to begin, to act in the national interest. By virtue of section 10(3)(b), the Minister is required to direct the parties to "adopt such means as are available to them for the settlement of the dispute…". It is after those modes of settlement fail, that the Minister may refer the dispute to the Tribunal.

[123] Section 11(1) of the LRIDA provides that subject to the provisions of subsection (2) and sections 9 and 10, the Minister may, at the request in writing of all the parties to any industrial dispute, refer such dispute to the Tribunal for settlement. Subsection (2) speaks to a collective agreement being in force. It reads:

> "If the Minister is satisfied that any collective agreement in force between the parties which have requested him to refer a dispute to the Tribunal under this section includes procedure for the settlement of that dispute he shall not refer that dispute to the Tribunal under this section unless attempts were made, without success, to settle that dispute by such other means as were available to the parties."

[124] Sections 9 and 11 mention collective agreements. By so doing, it was the intention of the legislators to underscore the need to pursue either the express procedures or implied procedures for the settlement of disputes prior referral to the Tribunal.

[125] An important observation is that section 9 speaks to a report in writing to the Minister by any party. Section 11 also requires that a request be made in writing but this section requires, that the request be made by all the parties. No collective agreement is mentioned in sections 10 and 11A where the Minister is not acting on the request of the parties but acting at his own discretion.

[126] Referrals pursuant to section 11A(1)(a)(i) ought only to be made if the Minister is satisfied that all attempts were made without success to settle the dispute. By virtue of section 11A(1)(b), if the Minister is not satisfied that all attempts were made to settle the dispute, the matter ought not to be referred to the Tribunal. He may, however, direct the parties to pursue means of dispute resolution and may specify a period for the resolution

of the matter. As mentioned above, section 11A(2) contemplates that the Minister may then refer the matter to the IDT if:

> a. he receives a report in writing from any of the parties that they are still unable to settle the dispute; or
>
> b. he receives no report during the period specified by him for the resolution.

Section 11A(1)(b) applies if the Minister is not satisfied that all attempts were made to settle the dispute. If he is, however, so satisfied, the need for such directions becomes unnecessary. The matter would therefore be captured by section 11A(1)(a).

[127] For matters in which there is no collective agreement in force, but the employer's dispute resolution policy and various dispute resolution procedures have been exhausted by the parties, section 11(1)(b) is inapplicable. If that interpretation as posited by counsel for the appellant is correct, in the absence of a collective agreement, the Minister would be prevented from relying on section 11A(1)(a)

[128] In the case of non-unionised employees for whom there is no collective agreement in force, the LRIDA, importantly, does not require a collective agreement to be mandatory. The wording in sections 9 and 11(2) contemplates those collective agreements may or may not exist. The report to be given under section 9(2)(b) must indicate "**whether** there is in force any collective agreement …". Section 11(2) states: "**If** the Minister is satisfied that any collective agreement in force…" (emphasis added). The words "whether" and "If", however, contemplate that collective agreements may or may not be **in existence where** a **dispute arises**. It is pellucid that it was the intention of the drafters of the LRIDA that collective agreements should be recognized and the dispute resolution mechanism prescribed by these agreements, whether expressly or impliedly, should be followed.

[129] It was obviously the legislators' desire to prevent the Tribunal from being inundated with matters which could have been settled by other means. An appearance before the Tribunal should be a last resort. A general condition precedent is that, before referring the matter to the Tribunal, the Minister must be satisfied that the parties were unable to resolve their dispute by other means. The legislators were also mindful of situations in which the matter needs to be resolved urgently, for example, there is pandemonium. Provision has, therefore, been made for urgent referral to the Tribunal, for example pursuant to section 11A(1)(a)(ii).

[130] In **Ex Parte West Indies Yeast Co Ltd**, Smith CJ examined section 6 of the LRIDA at pages 410 and 411. The learned judge opined that, consistent with the provisions of section 6, sections 9, 10 and 11 emphasise the importance placed on parties to a dispute being encouraged and allowed to settle their disputes themselves before the Tribunal is called upon to do so. At page 411C-D, he opined:

> "Section 9 authorises the Minister to make a reference only 'if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties'. Section 10 contains similar provisions. Section 11 appears to be the Minister's authority for making the reference referred to in s.6(2)(c); but in any event, the Minister may not make a reference unless unsuccessful attempts were made by the parties to settle the dispute by the procedure of their collective agreement **where there was one**." (Emphasis added)

[131] Earlier, at page 410I-411A, Smith CJ had observed that:

> "Reference was made to s. 6 dealing with collective agreements and the implied procedure (set out in subsection (2)) for the settlement of disputes, a reference to the Tribunal being the final step in the procedure. It seems to me that the legislature is here stating the general scheme which should govern the settlement of industrial disputes, the ultimate aim being, as expressly stated in the section, the settlement of such disputes *without the stoppage of work*." (Emphasis as in the original).

[132] Although **Ex Parte West Indies Yeast Co Ltd** predated the 2010 amendment, which transformed the Act significantly, Smith CJ's observation, as to the legislators' desire that disputes should be settled without the stoppage of work, is still paramount. In furtherance of that aim, the amendments to the LRIDA allows the majority of Jamaican workers' *locus standi* before the IDT. Should attempts to resolve matters amicably fail, the parties are then required to request in writing, the assistance of the Minister. If the minister's attempt to effect the required rapprochement also fails, the parties may, at that juncture, request, in writing, that the matter be referred to the IDT.

[133] In light of the foregoing, it is obviously the general legislative policy of the Act that parties ought to exhaust other dispute resolution means prior to invoking the intervention of the IDT. This is the intention whether or not there is a collective agreement. The general policy is that referrals to the IDT are discouraged. Indeed, the intention was that it ought to be a last resort for most cases. Parties were encouraged to pursue other dispute resolution avenues before approaching the IDT. This was the intention whether or not there is such an agreement.

[134] The interpretation ascribed to section 11A(1)(a) by counsel for the appellant confines the application of the section to collective agreements, which essentially shackles the Minister, thus preventing him from acting in instances where there is no collective agreement in force, but the parties have exhausted all reasonable dispute resolution procedures. Such an interpretation would obviate the requirement to give any directions pursuant to section 11A(1)(b).

[135] Counsel's contention that, by virtue of section 11A(1)(a), the Minister has no jurisdiction to act on his own initiative to refer a dispute to the Tribunal that is not the subject of a collective agreement is not supported by the provisions of the LRIDA as they were amended in 2010. The LRIDA was originally enacted *inter alia* to achieve greater trade union recognition. The Act was an acknowledgement of the right to join trade unions. It was the legislative intent to promote industrial relations peace by allowing parties the latitude to utilise a voluntary framework to settle their disputes.

[136] The restrictive scope of the legislative framework was transformed by the amendments. It is pellucid that consequent on the 2010 amendment to section 11A, the Act is more inclusive in its application as the individual non-unionised employee now has standing/ falls within its ambit.

[137] Should a restrictive interpretation of section 11A(1)(a)(i) by reference to section 6 of the Act, which deals with collective agreements, be applied, the non-unionised employee would be excluded. Such an interpretation undermines the standing of the non-unionised employees, as the Minister, in the absence of collective agreement, would be prevented from referring such a dispute to the Tribunal.

[138] There is no express reference to section 6 nor is there any binding case law that limits section 11A(1)(a) to collective agreements.

Such other means as were available to the parties

[139] In addressing this issue, the learned judge opined:

> "[18] Mrs. Gibson Henlin, submitted that the worker who is not a member of a Trade Union with bargaining rights would not be a party to a collective bargaining agreement as contemplated by Section 6 of the Act. It follows that such other means as were available to the parties 'under section 11A(1)(a)(i) would not apply to that category of worker by reference to section 6 of the Act.' Therefore, some other statutory scheme would be necessary. This according to Mrs. Gibson Henlin, would be by reference to section 11A(1)(b). The procedures for settlement outlined in Section 6 are relevant for collective bargaining agreements. The Minister is empowered pursuant to the Amended LRIDA, and can on his own initiative make a reference. There is no statutory requirement how a non-unionised employee, should be dealt with pursuant to Section 6. The term such other means as are available to the parties contemplates, among others means [sic], the holding of conciliatory meetings."

[140] Learned counsel holds steadfastly to the view that the term "such other means as were available to the parties," in section 11A(1)(a)(i) of the LRIDA could only apply to

collective bargaining agreements. The pertinent question which arises is: what is to be gained or what mischief is being solved if the term only applies to collective bargaining agreements? What would be the rationale?

[141] In respect of collective agreements which do not contain express dispute resolution terms, section 6(2) contemplates the following dispute resolution process:

(i) negotiation;

(ii) conciliation; after which

(iii) referral to the Tribunal by a request in writing by all the parties.

Negotiation and conciliation would be the other means available to the parties.

[142] Subsection 2(a) requires that the parties first endeavour to settle any dispute or difference between them by negotiation. By virtue of subsection 2(a), the parties are required to attempt to first arrive at an amicable arrangement before invoking the jurisdiction of the IDT.

[143] The negotiation process generally has no neutral third party. Should the negotiation fail, the parties may then solicit the assistance of a third party. The implied procedure prescribed by the Act, reveals that there are stages regarding the formality in the dispute resolution procedure; moving from an informal process, to more formal methods**.**

[144] Collective agreements with dispute resolution provisions will likely contemplate similar dispute resolution means, in light of the fact that except for adjudication, there are not many other methods. The ability to engage in alternative means of dispute resolution, however, is not dependent on the existence of a collective agreement.

[145] There is, therefore, no benefit to be derived or mischief to be avoided if the term "such other means as were available to the parties", was interpreted solely by reference to section 6.

[146] The learned judge's view that the term "such other means as are available to the parties" contemplates, among others, the holding of conciliatory meetings, in my view, cannot be impugned. Before referring the matter to the Tribunal, the Minister needs only be satisfied that an industrial dispute exists in an undertaking and that the parties have pursued the means available to them but have been unable to resolve the matter. Those means need not be predicated on section 6(2).

[147] Of significance is the fact that the appellant has not specifically contended that the Minister was premature in his referral because of the existence of other dispute resolution methods which they could have successfully pursued. The complaint registered in the affidavit and exhibits filed on behalf of the appellant, in the lower court, concerned the lack of notification of the referral to the Tribunal and a lack of notification of the date of the Minister's decision. The crux of the submissions filed and argued in this court centred on the procedural requirements of sections 11A(1) and 11A(2).

[148] In light of the foregoing, this ground also fails.

Ground (c)

[149] The issue which arises on this ground was that of bias in the conduct of the conciliation proceedings in light of the legislative framework of sections 11A(1)(a), 11A(1)(b) and 11A (2).

Submissions on ground (c)

[150] On this ground, Ms Williams rested on the written submissions filed on behalf of the appellant. In those submissons, counsel for the appellant contended that Mr Alrick Brown's involvement in the conciliation proceedings tainted the process with "bias or is sufficient to warrant the appearance of bias". According to counsel, a direction from the Minister pursuant to section 11A(1)(b) does not contemplate the involvement of the Minister or an agent of the Ministry, in the attempts made to settle the dispute.

[151] Instead, pursuant to the section, the Minister must specify the means of settlement that the parties should pursue. Counsel for the appellant argued that the instant case is different from the Ministry's current focus on conciliation proceedings presided over by the Minister or his agents. Counsel directed our attention to Mr Brown's letter of 16 April 2012, which, she posited, merely directed the convening of a "conciliatory meeting". The letter, however, did not state that the Minister had specified that the parties pursue conciliation. Consequently, there was no direction capable of amounting to a direction of the Minister.

[152] It was counsel's submission that, assuming the letter of 16 April 2012 could be deemed a direction by the Minister, section 11A(1)(b) does not contemplate the involvement of the Minister in the proceedings because the Minister has to refer the matter to the IDT. The section, counsel submitted, was included to avoid the appreciable and very real possibility of bias.

[153] Counsel further submitted that the section contemplates that the direction be given to the parties, not the Minister's agent. It is the parties who are to revert to the Minister with a report and not the Minister's agent. Mr Brown's participation in the conciliation proceedings was, therefore, improper and a procedural irregularity. Counsel relied on the case of **Meerabux v Attorney General of Belize** [2005] 2 WLR 1307, which she considered helpful as it outlined the test for bias as stated in **Porter v Magill** [2002] 2 AC 357).

[154] Learned counsel submitted that the learned judge highlighted the correct test but improperly addressed his mind to it. Instead, the learned judge considered that it is the policy of the government, where there has been a failure to settle, to provide voluntary conciliation services, and it is the Minister, who on his own initiative, ought to refer the matter to the IDT. The learned judge then deduced that a fair-minded observer would not have concluded bias. Counsel, however, submitted that the Minister's initiative does not apply to the individual dispute. The procedure adopted by Mr Brown was, therefore, not supportive of a policy argument.

[155] Learned counsel contended that the learned judge failed to address his mind to whether a member of the Ministry, albeit from a different department, ought to have been the conciliator in the first place, since this raises a conflict of interest.

[156] Ms Jarrett, on behalf of the respondents, as noted above, submitted that there was nothing in the procedure that Mr Brown followed, suggesting that the conciliation was a referral pursuant to section 11A(1)(b) or an attempt to settle the parties dispute in accordance with that provision.

[157] Learned counsel submitted that the alternative dispute mechanism that the Ministry provides is not mandatory. She contended that Mr Brown was a "mere" conciliation officer and that he had made a recommendation to the Minister. It was also Ms Jarrett's submission that there was no evidence that Mr Brown had attempted to incorrectly influence the Minister in his decision to refer the dispute to the Tribunal.

Discussion and analysis on ground (c)

[158] The learned authors of the text Commonwealth Caribbean Employment Law, at pages 80 and 81, refer to the role played by Ministries of Labour and Labour Commissioners in industrial dispute resolution in various jurisdictions. At page 80, the learned authors state:

> "In the labour sphere, the Ministries play a critical role in the provision of conciliation and mediation services consequent on the legislative framework in place to settle and determine industrial disputes."

[159] It is, therefore, not an unusual practice for Ministries to be involved in the dispute resolution process. This view is also supported by section 6(2)(b) of the LRIDA.

[160] The learned judge, at paragraph [23] of his judgment, indicated that it was the policy of the government to provide voluntary conciliation service. He expressed that view thus:

> "The policy of government, where there has been a failure to settle [sic] to provide voluntary conciliation service."

The question therefore is, was Mr Brown's participation, as an employee of the Ministry, improper?

[161] By way of his affidavit of 29 August 2012, Mr Brown averred that he was the Acting Director, Industrial Relations and a senior conciliation officer in the Ministry. He further stated that he was the conciliation officer who chaired the conciliation meeting between the appellant and Miss Simpson. The appellant's attorney-at-law and Miss Simpson's consultant, Mr Duncan, were also present.

[162] The 11th edition of Osborn's Concise Law Dictionary, edited by Mick Woodley, at page 103, defines conciliation as:

> "the bringing together of employers and employees in an endeavour to settle disputes."

[163] Conciliation is a non-adjudicative process. It is an entirely different process. The conciliator lacks the power to decide for the parties. His role is to encourage an amicable resolution of the dispute and is not focused on interpreting the propriety of past actions. Although the conciliator's role is to encourage settlement; the parties are the ultimate decision-making authority. The Minister himself usually does not participate in dispute resolution meetings. He will, however, where an industrial dispute arises and the ministry considers it appropriate, provide the parties with access to conciliation officers.

[164] The instant case is one such. The parties were unable to arrive at an amicable settlement of the dispute. An important observation is that the allegations of bias levelled at Mr Brown are peculiar, as there is no allegation that Mr Brown had any personal or pecuniary interest in the matter and no decision was imposed on the parties. Assuming it can be asserted that Mr Brown is the Minister's agent, on an objective examination of the matter, that fact would, in any event, be irrelevant.

[165] It is not the role of the Minister, or his agent, to assess the merits of the parties' respective positions in a dispute. Nor do they adjudicate upon any dispute. The Minister's role is to determine whether a dispute exists that has not been resolved by means available to the parties. Neither the Minister, nor his agent, at any point, assumed the role of a decision-maker of the substantive dispute between the parties.

[166] Importantly, it is not the decision of a Tribunal or adjudicative body that the appellant seeks to impugn, it is the participation of a conciliation officer, believed to be the Minister's agent, at a meeting at which no decision was made; and importantly, the appellant's counsel was present. Of significance also is that there is no evidence that either Mr Brown or the Minister intended to sit on the Tribunal and/or participate in the Tribunal's hearing which would have rightly incurred the appellant's concern.

[167] Mr Brown, as a representative of the Minister, has not conducted any investigations, nor has he made or participated in any decision in respect of the appellant. His role was merely to encourage an amicable settlement. This was unlike the role of the auditor in **Porter v Magill** who had conducted extensive investigations and was also the decision-maker at an audit hearing where parties had representation. Evidence was led and submissions were made.

[168] The case of **Meerabux v Attorney General of Belize** is instructive, as the issue for the court's determination was personal pecuniary interest. The Privy Council held that in the absence of a suggestion or allegation of personal or pecuniary interest, the test enunciated in **Porter v Magill** ought to be applied; that is:

> "whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased."

Of significance is that on the authority of **Porter v Magill**, one man's decision can also be considered a tribunal. **Porter v Magill** concerned the local government elections held in May 1986 in England. The Conservative Party retained control of a city council but with a much-reduced majority. Believing that homeowners were more likely than council

tenants to vote Conservative, the council leaders formulated a policy to sell council properties in eight marginal wards. Upon receiving legal advice that such targeted sales would be unlawful; the policy was revised to extend designated sales across the city while maintaining the target sales in the marginal wards.

[169] A report was prepared and the revised policy enjoyed majority party support. Measures to implement the policy were introduced and the progress of the policy was monitored. Opposition councillors objected on the basis that the policy prevented the council from meeting its statutory obligations as a housing authority. Consequently, in July 1989, pursuant to section 17 of the Local Government Finance Act 1982, they notified an auditor of their objection.

[170] Having completed his investigation into the statutory objections in January 1994, the auditor announced his provisional findings in a press statement which attracted considerable publicity. After an audit hearing, held over 32 days, in May 1996, the auditor gave a final decision. He found that three councillors and three officers had, by wilful misconduct, jointly and severally caused a loss of approximately £31,000,000.00 to the council which they were liable to make good.

[171] It was also contended, among other things on the appellant's behalf, that the manner in which the auditor conducted himself in making his statement on 13 January 1994 indicated an appearance of bias on his part, which affected all stages of his investigation, both before and after that date. Further, it was contended that the common law right to an unbiased judge was infringed. The House of Lords disagreed.

[172] At paragraph 105, Lord Hope expressed the following view:

> "…the auditor made an error of judgment when he decided to make his statement in public at a press conference. The main impression which this would have conveyed to the fair-minded observer was that the purpose of this exercise was to attract publicity to himself, and perhaps also to his firm. It was an exercise in self-promotion in which he should not have

> indulged. But it is quite another matter to conclude from this that there was a real possibility that he was biased. Schiemann LJ said at p 1457D-E, that there was room for a casual observer to form the view after the press conference that the auditor might be biased. Nevertheless, he concluded, at p 1457H, having examined the facts more closely, that there was no real danger that this was so. I would take the same view. The question is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias. The auditor's conduct must be seen in the context of the investigation which he was carrying out, which had generated a great deal of public interest. A statement as to his progress would not have been inappropriate. His error was to make it at a press conference. This created the risk of unfair reporting, but there was nothing in the words he used to indicate that there was a real possibility that he was biased. He was at pains to point out to the press that his findings were provisional. …"

[173] The facts of **Porter v Magill** are distinguishable from those in the instant case.

[174] In **Meerabux v Attorney General of Belize,** the appellant was a former judge of the Supreme Court of Belize. On 18 September 2001, following complaints of misbehaviour filed by the Bar Association of Belize and by an attorney-at-law, he was removed from office by the Governor-General on the advice of the Belize Advisory Council ('the BAC').

[175] On 29 October 2001, he filed a notice of motion pursuant to section 20 of the Belize Constitution in which he complained that the rights afforded him under sections 3(a), 6(1) and 6(8) of the Constitution had been infringed and requested of the court, declarations to that effect and an award of damages.

[176] It was argued on his behalf that the decision of the Belize Appeal Court, that he had misbehaved while performing his duties as a judge, and its advice to the Governor-General that he should be removed from office, were fundamentally flawed for two reasons. However, only the first is relevant for the purposes of this judgment.

[177] It was also contended that Mr Ellis Arnold, who presided over the proceedings in his capacity as the chairman of the BAC, was also a member of the Bar Association of Belize, which had made the majority of the complaints of misbehaviour. It was submitted that Mr Arnold was automatically disqualified from taking part in those proceedings by reason of his membership of the Bar Association, or alternatively, that a fair-minded and informed observer would have concluded that there was a real possibility that he was biased.

[178] The Privy Council disagreed. The Board concluded that, in those circumstances, mere membership of the Bar Association *per se* could not be a ground to disqualify the chairman. The fair-minded and informed observer would have considered all the facts and would have considered Mr Arnold's membership of the association in its proper context, which would have included the fact that Mr Arnold had not participated in the decisions which had led to the laying of the complaints by the association. The Board also considered the following:

> a. the fact that the first proviso to section 54 (ii) of the Constitution directed the chairman to preside where the BAC is convened to discharge its duties; and
>
> b. the fact that, in Belize, for persons qualified to practise as an attorney-at-law, membership of the Bar Association was compulsory.

[179] The facts of that case are also distinguishable from the instant case. The **Meerabux v Attorney General of Belize** case concerned a decision-making body. There was a challenge to the conclusion of that body because of the participation of Mr Arnold. In my view, on an examination of the facts of the instant case by the fair-minded and informed observer, it is improbable that such an observer would be able to conclude, that there was a real possibility of bias.

[180] In the ground of appeal, counsel for the appellant complained that "[T]he composition of the conciliation proceedings panel and/or the way the conciliation proceedings were conducted" is suggestive of impropriety. Mr Brown, however, was not a member of any panel which considered that matter and, therefore, was in no position to impose any findings on the parties. Moreover, the appellant has failed to establish that a direction from the Minister pursuant to section 11A(1)(b) does not contemplate the involvement of an agent of the Ministry, in the attempts made to settle the dispute.

[181] No authority has been relied upon which precludes it, nor is the court aware of any. Having perused the submissions and authorities, the question is extant: "What was improper about Mr Brown's involvement?" By virtue of the Act, neither the Minister nor any agent of his has authority to arrive at any decision on the merits.

[182] The dispute was referred to the Tribunal pursuant to section 11A(1)(a)(i). There is no requirement that compliance with section 11A(1)(b) should precede a referral pursuant to section 11A(1)(a). In cases in which matters are referred pursuant to section 11A(1)(a), there may be situations which might not require a direction from the Minister as the parties have tried to settle the matter, through various means, unsuccessfully.

[183] In light of the fact that the dispute was referred pursuant to a particular section, in my view, this court is only required to be satisfied that the conditions precedent for referral under that section have been satisfied. That notwithstanding, on an examination of section 11A(1)(b), the wording of the section confers upon the Minister, the discretion to determine the time period. He is, however, not mandated to do so and neither does section 11A(2) make the receipt of a report a mandatory requirement prior to the referral of the dispute to the Tribunal.

[184] It is apparent that it was the desire of the framers of the legislation that the section be the triggering act for the referral; consequently, they settled on:

(i) notification, by either party, by way of a report, or

(ii) the expiration of the time period, fixed by the Minister, for the settlement of the dispute.

[185] The parties, however, ought to be notified of the referral. In this case, the appellant was notified by way of letter dated 10 July 2012.

[186] In light of the foregoing, the referral was properly made pursuant to section 11A (1)(b). Therefore, in respect of this ground, the views of the learned judge cannot be faulted. This ground also fails.

Whether the learned judge erred in the exercise of his discretion

[187] The issue which remains is whether the learned judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in finding that the application for leave for judicial review does not disclose that the applicant has an arguable case with a realistic prospect of success".

[188] Having regard to all that has been stated before, I do not think that the judgment of Campbell J is vulnerable to such serious criticism.

[189] In light of the foregoing, I am of the view that the appeal ought to be dismissed.

Costs

[190] On the issue of costs, at the hearing, after we refused the respondents' application to strike out the appeal of the appellant, we awarded costs of the application to the respondents in any event. With regard to the costs of the appeal, the respondents have succeeded, and, in keeping with established principles, are entitled to an award of costs. This is despite the fact that the matter concerns judicial review. Rule 56.15(5) of the CPR, which ordinarily restricts costs orders against parties seeking judicial review, is not incorporated into the CAR (see rule 1.8(10) of the CAR).

[191] The respondents did, however, inconvenience the court and embarrass their opponents, by failing to file either skeleton arguments or full written submissions. A

sanction should be applied. I am of the view that the appropriate order should be that they should only have two-thirds of their costs.

D FRASER JA (AG)

[192] I have read, in draft, the judgment of Sinclair-Haynes JA. I too agree with her reasoning and conclusion, both on the outcome of the appeal and on the issue of costs.

BROOKS JA

ORDER

1. The appeal is dismissed.

2. The decision of Campbell J, made on 29 April 2016, is affirmed.

3. The respondents shall have two-thirds of their costs of the appeal, which costs are to be agreed or taxed.

4. If any party is of the view that some other order for costs should be made, the party seeking such other order should file and serve submissions in that regard within 14 days of the date of this order, and any responding party should file its submissions within 14 days of service of the opposing party's submissions. Unless the court receives submissions within 14 days of the date of this order, the above order as to costs shall stand.