[2022] JMSC Civ 98

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2020 CV 00031

BETWEEN	**CATHERINE ALLEN**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**FIRST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**SECOND DEFENDANT**
AND	**GUARDIAN LIFE LIMITED**	**THIRD DEFENDANT**

IN OPEN COURT

Mrs. M Georgia Gibson Henlin, Miss Stephanie Williams and Miss Peta-Shea Dawkins for the claimant.

Ms Tamara Dickens instructed by the Director of State Proceedings for the first and second defendants.

Mr. Kevin Powell and Mr Mikhail Williams instructed by Hylton Powell for the third defendant.

Heard: February 14, 15 and 16, 2022 and June 30, 2022

Constitutional Law – Whether claimant's rights under section 16(2) of the Charter of Fundamental Rights and Freedom breached – Whether a non - state entity bound by section 16(2) rights - Whether claimant had an alternative remedy.

PETTIGREW COLLINS J

THE CLAIM

[1] The claimant filed a Fixed Date Claim Form on January 7, 2020. She sought several declarations as well as an injunction. At the commencement of the trial, Mrs Gibson Henlin intimated that she would not be pursuing the claim for the injunction. The declarations sought are that the defendants have breached the claimant's right to a fair hearing, that they have breached her right to a fair hearing within a reasonable time and her right to a fair hearing before an independent and impartial tribunal, which are rights enshrined in section 16(2) of the Charter of Fundamental Rights and Freedom.

[2] The claimant also sought declarations to the effect that the first defendant's decision to adjourn the conciliation proceedings on the application of the employer and without hearing from the claimant, is a breach of her right to a fair hearing as well as a breach of the claimant's right to a fair hearing before an independent and impartial tribunal. The claimant further sought to have the court say that the decision of the first defendant to stay the conciliation proceedings was a breach of the claimant's right to a fair hearing as well as a breach of her right to a fair hearing before an independent and impartial tribunal.

BACKGROUND

[3] A background to the claim will put the orders sought in some context. The claimant Mrs Catherine Allen was employed to the third defendant in the capacity of appointed actuary and vice president. There developed a disagreement between Mrs Allen and the third defendant (who will also be referred to as Guardian throughout this judgment) over its decision to release 1.25 billion dollars in reserve in 2018 without Mrs Allen's approval. Mrs Allen contends that her approval was required. Guardian insists that that was a decision that the Board could properly make without Mrs Allen's approval.

[4] By way of a letter dated August 15, 2018, Guardian terminated Mrs Allen's employment. The basis of the termination as stated in the letter, was

redundancy. Mrs. Allen was escorted to her office by two other vice presidents of Guardian and made to hand over her work computer. It is Guardian's account that the termination had nothing to do with the disagreement, but was a result of the decision of the Board of Directors of Guardian to outsource the functions of the appointed actuary.

[5] As a result of her dismissal, Mrs. Allen filed Fixed Date Claim Form No. 2018 CD 00503 in the Supreme Court, seeking a number of reliefs. I have not been able to ascertain the original date of the filing of this claim but an Amended Fixed Date Claim Form was filed on the 7th of September 2018. The orders sought in the amended claim are many and varied but it would be fair to say that the claim also challenged redundancy as being a proper basis for her termination.

[6] On the 12th of October 2018, Guardian filed a Claim Form (No. 2018 CD 00566) against Mrs. Allen, claiming an injunction and damages for breach of contract, breach of fiduciary duties and breach of confidence. The allegations against Mrs. Allen were that she had access to confidential information in her capacity as vice-president and actuary and that she had emailed confidential information to her personal laptop as well as to unauthorized persons.

[7] On the 18th of October 2018, Mrs Allen was advised by Guardian that investigations done on her laptop revealed that she had breached the confidentiality clause of her contract of employment and that they were considering dismissing her for cause. She did not respond to that letter and by letter dated November 1, 2018, Mrs Allen received another letter terminating her employment for cause. The effective date of her dismissal remained August 15, 2018 as was stated in the letter bearing even date.

[8] On the 17th of December 2018, Mrs. Allen's Attorneys-at-Law Henlin Gibson-Henlin wrote to the Minister of Labour and Social Security (abbreviated versions such as MLSS, the Minister or the Ministry will be used as is convenient) seeking his intervention in resolving the dispute. Between May 2019 and November 2020, the Ministry sought to have the parties engage in conciliation.

[9] By way of letter dated October 28, 2019, Guardian's attorneys objected to Mrs. Allen's referral of the matter to the Minister. It would appear that the basis of that objection was the fact that there were already two claims before the Supreme Court relative to the dispute between Mrs Allen and Guardian; one brought by Mrs. Allen, and the other brought by Guardian Life.

[10] Mrs. Allen took the view that the Minister was being dilatory in undertaking the conciliation process and on the 7th of January 2020, she filed the present claim. By way of letters dated January 15, 2020 and January 24, 2020, Guardian's attorneys wrote to the Minister indicating that they were of the view that it would be prejudicial to continue with the conciliation meeting given the fact of the Court proceedings.

[11] Set out below is a chronology of the events that briefly encapsulate the relevant activities over the period December 17, 2018 to January 7, 2020 when the claimant filed this claim and developments that have taken place since then. This chronology has been adopted from Mrs Gibson Henlin's chronology with few omissions which appear to be reflective of the claimant's view point. The events that I have itemized appear to accurately, neutrally and reasonably reflect events that transpired as may be garnered from the evidence.

THE ISSUES

[12] This claim gives rise to the question of whether the rights conferred by section 16(2) of the Charter of Fundamental Rights and Freedoms were engaged in the circumstances of this case. Specifically regarding the third defendant, the question arises as to whether it is bound by those specific charter rights. The inevitable question of whether the claim is an abuse of process is also raised.

DECISION

[13] It is my considered view that there is no horizontal application of the rights conferred by section 16(2) and so the third defendant is not bound by them. It is also my conclusion that none of the claimant's rights conferred by section 16(2) of the Charter was breached by the first defendant in the circumstances of this case. In fact, the right to a fair hearing and the right to a hearing before an independent and impartial tribunal were not engaged. Although the right to a hearing within a reasonable time was engaged, the right was not breached by the first and second defendants. The delay of two years was such as would trigger a charter enquiry but there was no unreasonable delay that rose to the level of constitutional breach. The claimant had an alternative remedy. The bringing of this claim amounts to an abuse of process. The point whether the Attorney General was a necessary party in this case was not argued and I make no further reference to, or pronouncement on the matter.

CHRONOLOGY OF EVENTS

[14]

December 17, 2018	Claimant referred dispute surrounding the termination of her employment to the Ministry of Labour and Social Security (MLSS)
December 18, 2018	Claimant's Attorneys-at-Law, Henlin Gibson Henlin (HGH), wrote the MLSS outlining the nature of the dispute and requesting urgent and immediate intervention to ensure an expedited resolution of the matter.
December 2018 – March 2019	Several telephone calls to the MLSS to ascertain the status of the matter and urging them to advance same.
March 15, 2019	Henlin Gibson Henlin called the MLSS and was informed by its agent, Michael Kennedy, that the claimant's referral letter was

sent off for legal opinion and that no follow-ups had been done since December 2018 to ascertain the status of the opinion.

April 2, 2019 Letter from HGH to the MLSS informing them that no steps have been taken to convene meetings and that an application will be made to the court for an order of mandamus.

May 6, 2019 Letter from HGH to the MLSS regarding the Minister's inactivity and continued lack of response (this letter enclosed a draft claim and affidavit).

May 13, 2019 Claimant commenced judicial review proceedings bearing Claim NO. SU2019CV02011 for an order of mandamus to compel the Minister to act.

May 14, 2019 Letter from the MLSS to HGH informing that the Ministry has taken steps to arrange a conciliation meeting.

May 20, 2019 Hylton Powell requested Claimant's letter to the MLSS dated December 18, 2018 and informed that their client's position will be outlined and sent in short order.

May 30, 2019 Minister advised Hylton Powell (Guardian's attorneys at law) that the requested letter is confidential and cannot be disclosed.

May 30, 2019 HGH requested update on the scheduling of conciliation from the MLSS.

June 4, 2019 Minister responded to HGH's letter dated May 30, 2019 with proposed dates;

June 4, 2019 Minister informed Hylton Powell of proposed dates and requested a response to its letter dated 24th May 2019.

June 5, 2019 Hylton Powell informed Minister that Guardian Life is represented by Myers, Fletcher & Gordon (MFG) and they will respond to letter dated 24th May 2019.

June 10, 2019 Letter from MFG to the MLSS – Mr Gavin Goffe of MFG informed that the proposed dates are not convenient and proposed June 18 and 20, 2019 at 2: pm. He further stated that if he did not receive the

requested referral letter prior to the conciliation meeting, the meeting would be very short.

June 11, 2019 Letter from the MLSS to HGH requesting clarification on whether local level settlement efforts were made and informing of the dates proposed by MFG for conciliation.

June 11, 2019 and June 13, 2019 Email thread between HGH and the MLSS – HGH confirmed that June 20, 2019 at 2:00 p,m. was convenient and informed that a response to the other aspect of the letter would be forthcoming

June 13, 2019 Letter from the MLSS to HGH that they needed the response to the other aspect of their letter in order to confirm the other party's attendance at the conciliation meeting.

June 14, 2019 Email from M. Georgia Gibson Henlin to Andrea Marshall of the MLSS that they should communicate the confirmed date to counsel.

June 18, 2019 Response from HGH to the MLSS's letter dated June 11, 2019 regarding local level efforts.

July 4, 2019 MLSS asks HGH whether documents requested by the other party at the brief conciliation meeting on June 20, 2019 was provided to them.

July 4, 2019 HGH responds to MLSS's letter dated June 4, 2019 informing, inter alia, that it was the Minister who was to provide those documents.

July 8, 2019 The MLSS tells MFG that they have sent the documents requested and proposed two dates for a conciliation meeting.

July 9, 2019 MLSS asks HGH if any of the dates proposed are convenient?

July 16, 2019 HGH sent the documents requested by MFG and copied the MLSS on the letter. The letter outlines the series of events up to July 16, 2019 and informs MFG that July 25, 2019 at 2:00 p.m. is convenient for conciliation.

July 24, 2019 HGH asks the MLSS to confirm that conciliation will be proceeding as scheduled.

July 26, 2019 Claimant discontinued Claim No. SU2019CV02011

September 10, HGH again suggest that the parties engage in local level

2019	discussions prior to the return to conciliation on the 18th September 2019,
September 17, 2019	Letter from Brocard to Ballantyne Beswick & Company enclosing correspondence in relation to Catherine Allen.
September 17, 2019	BROCARD wrote to the MLSS requesting that the date for the conciliation meeting, 18th September 2019, be vacated so that they can obtain instructions.
September 17, 2019	MLSS informed HGH that the meeting is postponed as Mrs. Angela Robertson retained by Guardian Life and requested that the meeting be postponed so that she may take instructions.
September 17, 2019	HGH wrote the MLSS detailing that the postponement was disconcerting and unacceptable
September 25, 2019	MLSS asked BROCARD whether 'any effort is to be made to have local level discussions" with HGH.
October 7, 2019	HGH wrote to the MLSS as they never responded with a new conciliation date – this is 3 weeks after they unilaterally postponed the previous conciliation meeting.
October 9, 2019	MLSS informed BROCARD that HGH views the delay as an effort to thwart the conciliation process and proposed new dates for a meeting.
October 9, 2019	MLSS informed HGH of the proposed dates (October 28 and 29, 2019 at 10:00 a.m. or 2:00 p.m.)
October 14, 2019	HGH confirmed that October 29, 2019 at or 2:00 p.m. was convenient.
October 28, 2019	MLSS told HGH that the meeting is postponed as BROCARD says this was a duplication of the legal process.
October 18, 2019	BROCARD told the MLSS that they are unavailable for the meeting set for October 29, 2019 at or 2:00 p.m. and

	expressed that this was a duplication of the legal process so the Claimant must make an election.
October 28, 2019 and November 4, 2019	HGH informs the MLSS that unfair dismissal is not dealt with by the court and is a jurisdiction conferred by the LRIDA.
November 22, 2019	HGH informs the MLSS that the Claimant's access to the IDT was being barred by the Minister; HGH renewed their request for a conciliation date and notified that they will access the court if needs be.
November 28, 2019	Letter from the MLSS to BROCARD that the Minister has jurisdiction in the matter and proposed December 11, 2019 at 10:00 a.m. for conciliation.
November 29, 2019	BROCARD informed he MLSS that December 11, 2019 is not convenient.
December 6, 2019	MLSS craved HGH's indulgence as the matter was still before their legal team.
January 7, 2020	Claimant filed Fixed Date Claim Form.
January 14, 2020	MLSS proposed February 5, 2020 at 10:00 a.m. for new conciliation meeting to BROCARD.
January 15, 2020	BROCARD told the MLSS that there is no basis for the matter to be dealt with by the Ministry under the LRIDA and expressed that they would not be available on February 5, 2020 for a meeting.
July 20, 2020	HGH informed the MLSS that they have not heard from them and that the matter in court does not affect the Claimant's right to have her reference dealt with.
September 11, 2020	MLSS proposed September 22, 2020 for a conciliation meeting.
September 11, 2020	HGH expressed their availability to the MLSS.

September 18, 2020	MLSS informed HGH that BROCARD (Mrs. Angela Robertson) is unavailable on September 22, 2020 and that the earliest date is October 12, 2020.
September 25, 2020	Letter from the MLSS to Henlin Gibson Henlin that the meeting is set for October 13, 2020 at 10:00 a.m.
October 12, 2020	Email thread between HGH and the MLSS re the meeting being held via zoom.
October 13, 2020	Conciliation meeting held.
October 30, 2020	MLSS told HGH that BROCARD was unwilling to enter into any negotiation and that further arrangement would be futile; the Ministry held the view that the matter should be referred to the Minister for his decision.
November 4, 2020	BROCARD outlined their client's position the MLSS.
November 24, 2020	MLSS told HGH of BROCARD's OBJECTION TO PROCEEDING WITH THE MATTER and told HGH that if they do not respond within 10 days a decision will be taken to close the matter or further engage the AG's Chambers.
November 30, 2020	HGH responded to the MLSS letter dated November 24, 2020
December 23, 2020	MLSS referred the matter to the IDT.
January 21, 2021	Guardian Life filed a claim for judicial review against the MLSS.
January 28, 2021	Letter from the Industrial Disputes Tribunal to HGH staying proceedings until Guardian Life's matter is concluded.
August 2021	IDT hearing commenced.

CLAIMANT'S SUBMISSIONS

[15] Mrs. Gibson-Henlin QC for the claimant submitted that the Industrial Disputes Tribunal is one established by law to hear industrial disputes including the claimant's. She argued that the claimant's dispute prima facie falls within the definition of an industrial dispute within the meaning of LRIDA so far as is relevant to individual employees. She further stated that the right of access to a court or tribunal is a fundamental right and the Minister's exercise of her discretion cannot be treated as a condition of the availability of the right.

[16] Mrs Gibson-Henlin, submitted further that in establishing the IDT as evidenced by section 7 of LRIDA, the drafters intended to and created an institutional framework to facilitate access to it. Further, that the Minister of Labour is responsible for the tribunal and has an obligation to carry out her duty in order for the objectives of the statute to be achieved. She further argued that the minister's role is an integral aspect of the process and route to actualizing access - to give effect to the objectives of parliament to create an environment for employers and employees to settle their disputes. The minister's discretion, she said, is and was not intended to be a complete barrier. The minister must exercise it and give effect to the aggrieved worker's right of access and she must not do anything to render the right ineffective.

[17] Queen's counsel also argued that the fact that the minister has to exercise a discretion, does not affect the existence of or engagement of rights. The due process right is a free-standing fundamental right of access that can only be curtailed in the context of section 13(2) of the Constitution. The minister must therefore exercise her discretion one way or the other. She cannot refuse to exercise a discretion conferred by law and then say an employee has no right of access because she has not exercised her discretion. More so, submitted counsel, in circumstances where, as here, authority is given to the minister under section 11A(1)(b) and 11(2) to circumvent a party's uncooperative conduct.

[18] It was Mrs. Gibson-Henlin's submission that it is a superficial construction of the LRIDA to suggest that until the minister exercises her discretion, the right

is not engaged. She argues that this argument fails to recognize the nature of the right and also that access to the tribunal is a process. A process which she submits commences with an application to the minister for referral by an aggrieved worker. Further, she argued that the requirement for the minister to exercise a discretion as to whether to make the referral is not dissimilar to a court being asked to consider whether an application for judicial review is arguable or whether a complainant under section 212 of the Companies Act can bring a derivative claim. She said that this does not make the tribunal or court where those applications are considered the ultimate tribunal in either case. It is a mechanism to ensure that only cases that fall within the purview of judicial review, section 212 or the objectives of LRIDA go forward.

[19] It was also Counsel's submission that if the judge, in the cases where the court is the gatekeeper does not act or fails to act with alacrity, the appellant's right of access to the court will be stultified. She said a similar analysis can be made in relation to the duty of the minister to exercise her discretion. If the minister's discretion is not exercised, not only is she a barrier to the IDT but also to the courts to which either party may have recourse for judicial review of her decision if either is aggrieved by the exercise of her discretion either way. A right conferred by the Constitution cannot be curtailed by any law or act of an agent or organ of state save as provided for in section 13(2). If the right is treated as absolutely subject to the exercise of the minister's discretion, it will be rendered nugatory.

[20] Mrs. Gibson-Henlin submitted further that another way of demonstrating that the exercise of the Minster's discretion is not immutable or a condition precedent to the engagement of the right is in reference to the redress clause. In other words, the mere refusal to exercise the discretion may mean that the right is threatened in any of the permutations of the redress clause. Queen's counsel argued that in this case, the claimant's right of access to the IDT (and if necessary) to the court had been infringed and continued to be infringed up to the filing of the claim and thereafter up to August of 2021.

[21] Her further argument was that in construing a fundamental right, the court is required to give a liberal and/or flexible interpretation. Any attempt to fetter

that right submitted counsel, must be closely scrutinised. The characterisation of the minister's discretion as being in the nature of an absolute bar if accepted, would have to be subject to the scrutiny under section 13(2). In that event, the argument continued, the defendants would have failed the test as they have not justified by evidence that this discretion is a reasonable fetter on the right of access provided by section 16(2).

[22] Mrs. Gibson-Henlin further submitted that the 1st and 2nd defendants' interpretation of the guaranteed rights in section 16(2) is flawed as it takes a restrictive approach to the construction of the section. They fail to recognize or give effect to the constitutionally guaranteed right, she argued.

[23] Queen's counsel relied on **Lupeni Greek Catholic Parish and Ors v Romania** App no. 76943/11 which interprets the scope or content of article 6 of the European Convention on Human Rights. She submitted that the scope of the right is not subject to the whims of a state actor such as the minister.

[24] Therefore, argued Mrs. Gibson-Henlin, this application is a proper application for redress in circumstances where the claimant was not only ignored but subject always to the machinations of the 3rd defendant. The 3rd defendant submitted counsel, failed to appreciate that it has/had a duty to participate in the process of promoting access to the IDT. This she said is insofar as the IDT is set up to facilitate the resolution of disputes between the employer and the employee. It can give decisions which settle the matter. Each party must co-operate in the initiating processes contemplated by section 11A in terms of discussions to enable the minister to exercise her discretion. They cannot refuse on specious bases as the employer did in this case, since the employer knows of the special jurisdiction created by LRIDA to deal with unjustifiable dismissal.

[25] Queen's Counsel observed that Brocard is aware, as its principal Ms Robertson specialises in the area of industrial relations law. Similarly, she urged, the minister is endowed with authority in an environment created for the purpose of dealing with a specialised type of dispute. The minister therefore, must be taken to know the limits of the tribunal's jurisdiction to

determine if a termination is justifiable. The minister in this case acted to render the right of access to the tribunal impractical and ineffective as well as theoretical and illusory and subject to her whim. Queen's counsel maintained that the defendant's attitude to the claimant's referral over the 24-month period prior to the referral and the following 8 months after the referral (the 3rd defendant's conduct) was such as to render the right ineffective.

[26] Queen's Counsel argued that the delay rises to the level of a constitutional breach. Whether the section 16(2) right is engaged she said, is usually considered in the context of delay. She submitted that time commences, as with most wrongs, from the time that the aggrieved worker tries to access or is placed in a situation that triggers that right. There is no qualification in section 16(2) as to the existence of the right. The only limitation is as may be justified under section 13(2) counsel submitted.

[27] The claimant's attorney-at-law compared **Crompton v The United Kingdom** Application no. 42509/05 and **Frydlender v France** Application no. 30979/96 to the instant case. She submitted that in the instant case, the nature of the dispute has financial consequences for the claimant and that accessing the IDT is important for her to have her dispute resolved. Further, that the scheme of the LRIDA takes into account, the security of workers. She argued that the security of workers and the right to work has been held in the cases including **Flour Mills** case to be akin to a Constitutional right. Counsel also argued that the issue in this matter is not particularly complex, it was in their ken. In other words, it is the type of matter that the minister should be sufficiently familiar with. The attempts to suggest that unjustifiable dismissal is the same as wrongful dismissal were so barren she argued, that the minister being mindful of his jurisdiction and duty, should not have been swayed. She further argued that as in the **Crompton** case, there were unexplained periods of inactivity up to six months in some cases. It cannot be said she submitted, that the proceedings were dealt with, with the diligence required by section 16(2). Mrs. Gibson-Henlin further proffered that the delay was unjustifiable.

[28] Queen's Counsel submit that although the delay in the **Crompton** and **Frydlender** cases was 11 and 9 years respectively, the court must look at the

principle to appreciate the significance of the right of access provided to the claimant in section 16(2). The principle counsel submitted, is that the section 16 right is to be construed as an integral part of the rule of law. Justice can only be done if the facility provided by such an important provision is actualised for the benefit of the parties for whom it is intended.

[29] In reliance on **Ernest Smith & Co (A Firm) & Ors v The Attorney General of Jamaica** Mrs. Gibson-Henlin submitted that delay, considering all the circumstances is a key factor in finding liability and the length of and the reasons for delay in this matter are inexplicable. She argued that the fact that the minister is required to exercise a discretion is important so that only deserving cases go forward. However, she said, it is not a condition of the existence of the right. It does not, cannot and should not operate as a bar to the engagement of the fundamental right of access to a tribunal established by law for the purpose of resolving industrial disputes. In fact, submitted counsel, where the exercise of the discretion operates as a barrier as here, it is an infringement of the right. Mrs. Gibson-Henlin argued that in the circumstances, the delay/ conduct in this matter infringed the claimant's right of access to the IDT and once there is an infringement the court moves to assess whether the restriction is reasonably justified in a free and democratic society.

[30] On the issue of reasonableness, Queen's Counsel proffered that the burden shifts to the defendants to establish by evidence that the infringement, that is, restriction of the right was justifiable. She submitted that no such evidence was provided by the 3rd defendant. Queen's Counsel urged the court to reject the suggestion by the 1st and 2nd defendants that the delay was caused by covid-19. In support of her argument she stated that the claimant sought access approximately 13 months before covid-19. Further that there were periods of unexplained activity prior to covid-19, and after and during covid-19, the 1st and 2nd defendants allowed the 3rd defendant to frustrate the proceedings without regard for the full terms and effects of its jurisdiction over unjustifiable dismissal as opposed to wrongful dismissal.

[31] Mrs. Gibson-Henlin further submitted that it is a fundamental principle of procedural fairness that a person whose rights are likely to be adversely affected by a decision is entitled to be heard. She proffered that it is an inherent and distinct right from the section 16(2) right. This is so she submitted, even though it is a component of the due process right. For this submission she relied on **Al-tec Inc v Hogan and others**. [2019] JMCA Civ. 9. Mrs Gibson-Henlin argued that over 24 months before referral, the 3rd defendant routinely wrote to the minister requiring the minister to take action adverse to the interest of the claimant. Further, she pointed out that the claimant's counsel was not copied and even historical information provided by the claimant is not taken into account in taking decisions which contributed to the delay in dealing with the matter. The ministry routinely acted on unilateral communications. Queen's Counsel submitted that the claimant's right of access to a fair hearing and a hearing was therefore breached.

[32] She relied on **Mervin Cameron v Attorney General of Jamaica** [2018] JMFC Full 1 and argued that as it relates to the reasonable time, in the instant case, the Minister of Labour and Social Security, as a public authority and an organ of state, knew or ought to have known that the claimant's right to a hearing within a reasonable time would be further impaired if they did not act with reasonable haste to advance the process of redress for the termination issue which the claimant was seeking. Further, that the claimant was at all material times, without a job and without recourse, especially since the minister of labour trampled on the claimant's rights.

[33] Queen's Counsel further argued that the 1st Defendant undertook unilateral acts to the detriment of the claimant. She pointed out that letters from the claimant's attorney-at-law would go unanswered and extreme acts had to be taken by the claimant, such as the commencement of judicial review proceedings for her to get any response at all. Additionally, she argued that no arrangements were made by the minister to give effect to the LRIDA; no reasonable excuse was provided to the claimant for the minister's failure to act; the claimant was merely informed that the ministry was awaiting legal advice. She also advanced that no action was taken by the minister to

advance the process in accordance with the relevant procedures and to facilitate the hearing of the matter by the IDT, given that necessary steps were already taken by the claimant to activate the process. Based on the delay explained above, Queens Counsel submitted to the court that the claimant's right to a fair hearing within a reasonable time has been imperilled. In support of her argument she advanced that in the instant case no evidence is forthcoming to explain the circumstances in which an organ of state failed to execute its function to, within a reasonable period, to refer the matter to the IDT within a reasonable time.

[34] On the issue of remedy, Mrs. Gibson-Henlin submits that there must be an effective remedy. Further, that section 19 of the Charter gives the court a wide discretion to craft effective remedies. Queen's Counsel also relied on **Gairy and another v Attorney General of Jamaica** [2002] 1 AC 167 in support of this submission and stated that it is without doubt that, in the appropriate case, an award of vindicatory damages can be made. Mrs. Gibson-Henlin made the comparison that in criminal cases, in fashioning a remedy, a distinction is made between the right to a fair hearing and the right to a fair hearing within a reasonable time.

[35] Mrs Gibson-Henlin, asserted that in the circumstances of the case, the appropriate remedy for the breach of the reasonable time guarantee is for the declarations to be granted as prayed as well as damages.

[36] She then turned to the measure of damages, and submitted to the court that there is no reason to depart from the usual measure that the claimant is entitled to recover damages flowing directly from the breach.

[37] On the issue of quantum, the claimant's counsel relied on **Nicole-Ann Fullerton v The Attorney General** 2010 HCV 01556 and **Ernest Smith** and submitted that in a similar vein, vindicatory and/or constitutional damages should be awarded to the claimant for the contravention of her constitutional rights under section 16 of the Constitution. However, she argued, the circumstances in this case warrant a higher award than in the **Fullerton** and **Ernest Smith** cases. Queen's Counsel maintained that not only was there

delay and unjustifiable delay on the part of the minister, but the minister's conduct and omission demonstrated a blatant disregard for the claimant's rights. Mrs. Gibson-Henlin opined that the claimant is entitled to constitutional damages in the sum of four million dollars.

[38] The claimant's counsel urged the court to award costs to the claimant. Counsel highlighted that the claimant has been directly affected by the defendants' unreasonable conduct and the claimant has had to struggle in order to get her matter referred to the IDT. This she says includes, proceedings that the claimant had to file in order to compel the minister to act. She further argued that it cannot be said that she acted unreasonably in filing this or the judicial review proceedings as the minister was made aware prior to her doing so.

THE SUBMISSION OF THE FIRST AND SECOND DEFENDANTS

[39] Miss Dickens in her submissions looked at the relevant law and the factual scenario as well as how the first and second defendants are saying the court should view those facts based on the relevant law.

[40] Miss Dickens submitted that pursuant to the 2010 amendment to LRIDA, non-unionized workers were permitted to bring their grievances before the IDT and consequently there arose questions regarding the non-unionized worker's right to access. She pointed to the existence of two conflicting decisions regarding whether the Minister has jurisdiction over redundancies. She also asked the court to note that the Minister was required to tread cautiously; this was especially so where objections were raised. On this basis she said that it was prudent that the minister and his agents take time to advise himself as to when his jurisdiction should be exercised. She submitted that the fact that the Minister and his servants and agents had to take time to consider the legal position accounted for much of the delay.

[41] She pointed to Ms Marshall's affidavit evidence at paragraph 7 of her April 2 2020 affidavit to the effect that when a party reports an industrial dispute,

steps must first be taken to ascertain whether the Minister has jurisdiction to intervene in the matter and noted that Miss Marshall did not give a timeline as to how long it took for her to receive advise. She also said that it must have taken some time for the matter to be assigned to Miss Marshall. She further observed that the claimant's first letter was received at the Ministry in the yuletide season and asked the court to note that there would have been the usual disruption to the work process during that period.

[42] Miss Dickens asked the court to say that against that background, a response that took just under 5 months (and not 6 months as the claimant submitted, was not an unreasonably delayed response.

[43] She adverted to the fact that the claimant has not put forward any evidence as to what is a reasonable timeline for the conciliation process. She said that the authorities consider various factors in determining whether time is reasonable. She said further that the time construct in terms of the processes at the Ministry against the background of available resources is a relevant factor but that there was no evidence in this regard.

[44] This is a matter in relation to which the claimant may not necessarily have been able to give evidence. It was also pointed out that LRIDA gives no timeline for the settlement of disputes. Ms Dickens alluded to Ms Marshall's evidence which explained the events leading up to the June 20, 2019 conciliation meeting.

[45] It was also the submission that as Miss Marshall pointed out in her evidence, conciliation is a voluntary process and without the agreement of all parties concerned, the process could not take place, and so it is unreasonable for the claimant to say that conciliation was stayed or was adjourned without consultation with the claimant or her attorney at law. Counsel urged that there was not much that Miss Marshall could have done in the circumstances. Her role was merely to facilitate the conciliation. Where a legal objection was being taken by the other party she urged, it was not unreasonable to postpone the conciliation.

[46] Miss Dickens pointed out that within one week of receipt of Henlin Gibson Henlin's letter of May 6, Miss Marshall wrote to Mrs Basanta-Henry of Guardian. She referenced the series of letters written by Miss Marshall between May 14 2019 and June 13, 2019 which resulted in the Conciliation meeting of June 20, 2019. Miss Dickens also pointed out that a further date was fixed on June 20 for a new conciliation meeting but that Miss Marshall exercised initiative and wrote to both parties on July 8 and 9 with a view to moving the process along. This initiative culminated in the conciliation meeting of July of July 25, 2019. She alerted the court to Guardian's objection on the basis of the extant judicial review proceedings. She urged the court to say that evidently, no blame can be laid at the feet of the Minister.

[47] She pointed to the fact that the conciliation meeting was adjourned to the 18th of September and that it was only by way of letter dated September 17, the day before, that the Ministry was advised by way of letter from Brocard, Guardian's new attorney, that they now represented Guardian. She stressed that Brocard's position that they needed to obtain instructions and that the meeting should not be held on the 18th was a matter in relation to which the Minister through his agents could do no more than communicate that information to the claimant which it did by email correspondence the same day.

[48] Miss Dickens adverted to the further efforts by Miss Marshall to convene the meeting whereby she suggested two dates to the parties; October 28 and 29 2019 and that Henlin Gibson Henlin agreed to the 29th. She stressed that Miss Marshall's decision to postpone this meeting was based on Brocard's stance as revealed in their letter dated October 28, 2019 that there was no legal basis for a referral to the IDT and further that Mrs Allen needed to make an election between the continuation of her claim in court and the adjudication in accordance with the provisions of LRIDA. Counsel emphasized that in this case where the Ministry was advised the day prior to the date agreed by Henlin Gibson Henlin for the holding of the meeting that Guardian would not participate, a unilateral decision to postpone could not be described as unreasonable.

[49] She asked the court to bear in mind that the parties are required to exhaust all efforts at settling the matter. According to Counsel, the position of Guardian when yet again, a third attorney became involved on its behalf, was not that it would not pursue conciliation; the claimant was being asked to make an election between her claim in the courts and the IDT and that it was reasonable to wait to see if the claimant would in fact have made an election. It was important she said, that the minister examined the validity of the legal argument that the claimant could not properly pursue her claims as well as the process with the Ministry and for this reason too, it was not unreasonable to postpone the meeting.

[50] The further argument as I understood it, was that the postponement would allow time for Mrs Allen to decide if she would elect between what was perceived to be competing or conflicting claims and that this was also part of the process of the Minister satisfying himself that all attempts at settlement of the dispute was made before he considered if the matter should be referred to the IDT.

[51] Counsel alluded to Miss Marshall's continued efforts at agreeing a date between the parties and to Miss Marshall communicating with the claimant in all instances to advise of Guardian's unavailability or unwillingness to attend, including Brocard's email of November 29, advising that the proposed date of December 11,2019 was not convenient as she was outside of the jurisdiction. She pointed out that on December 10, Mr Kennedy the Chief Director of Industrial Relations directed a memorandum to the Minister ultimately advising that the matter be referred to the IDT.

[52] Reference to the role of Covid 19 in stymying the process was not to be omitted. Ms Dickens also asked the court to have regard to the fact that the minister who initially held the portfolio died and that a new minister assumed responsibility. She pointed out that although Miss Marshall did not depone to that fact, there was an intervening minister (as evidenced by an inter - office memorandum, dated August 13, 2020 before the Honourable Minister Samuda assumed the responsibility subsequent to the passing of Minister Shahine Robinson. She stated also, that Minister Robinson must have been

unwell for some time, although again, there was no specific evidence in this regard. Any new minister it was pointed out, would have needed to acquaint himself with his new role, as well as with the matter before being able to take any steps.

[53] Miss Dickens submitted that in relation to the declarations sought concerning the alleged decision to stay the conciliation proceedings, there was simply no such decision taken, therefore there was no basis established for the granting of those two orders. She advanced further that the two declarations sought with respect to the breach of the right to a fair hearing before an independent and impartial tribunal, have no basis in fact nor in law, as the minister does not sit as a tribunal and was not acting as such. She advanced that even if the Minister could in some remote way be considered as sitting as a tribunal to determine rights, there is no evidence of bias or partiality on the part of the minister. She pointed out that the claim preceded the referral to the IDT. She stated further, that the claimant could not have been complaining about conduct of the IDT since the IDT is not a party to the proceedings.

[54] The claimant's focus concerning access was countered by the observation that no such argument was foreshadowed in the pleadings. She alerted the court to the decision of **Maurice Tomlinson v Television Jamaica Limited and Others** [2013] JMFC Full 5. She cited paragraph 144, 146,147, 148, 150 and 151 where excerpts from **Minister of Home Affairs v Fisher** (1979) 44 WIR 107 and **Patrick Reyes v R** (2002) 60 WIR 42 are set out. These excerpts address the context within which constitutional provisions are to be interpreted.

[55] The essence of that aspect of the submissions is that a constitution is to be given a wide and generous interpretation because of the sui generis nature of the document. Further that a constitution will usually be drafted in broad terms thereby setting down wide and general principles but even where general words are used, such words still have boundaries of meanings. Further, that presumptions relevant to legislation dealing with matters of private law may not be helpful. These provisions will be examined where necessary.The court

was of course asked to look at the provisions of section 16 (2) against the backcloth of that dicta.

[56] Miss Dickens took the court through the meaning of the words “in” and “determining” from the concise Oxford English Dictionary and invited the court to read those words in the context of the section 16 provision. She argued that it would follow that the right to a fair hearing as provided for in three different contexts in the constitution would have to arise during the period of time when a judge or arbitrator is being asked to decide upon a person’s obligations.

[57] Miss Dickens cited the cases of **Al –Tec Inc v Hogan and others** (supra), (paragraphs 154, 155, 158 and 161), **Natasha Richards & Phillip Richards v Errol Brown and the Attorney General** [2016]JMSC Civ 22 as well as the European Court of Human Rights decision of **Beles and Others v Czech Republic** Application No 47273/99 ECHR 2002 (unreported) judgment delivered November 12 2002 in which the scope and content of the right under section 16 (2) of the Charter and provisions of similar component were examined. She also quoted a long passage from the judgment of Wolfe Reece J in **Ernest Smith and Others v The Attorney General of Jamaica** [2020] JMFC Full 7 where she analysed Article 6 of the European Convention on Human Rights, in seeking to interpret our constitutional provisions. I will address the applicable case law at the relevant juncture.

[58] Counsel invited the court to examine the decision of **Al Rawi and others v The Security Service and Others** [2012] 1 AC 531 and note that everything in the relevant passages speak to the scope of what is entailed in the right to a fair trial. The right to put forth argument is one such. She observed that the right to a fair trial is guaranteed regardless of the forum that is being utilized. She postulated that when one looks at what takes place at the ministry and at the point where the minister exercises his discretion, none of the rights guaranteed by section 16 is engaged. She said for example, no one is in jeopardy of having the minister (the decision maker) making a decision adverse to his interest since neither the conciliation officer nor the minister makes a decision regarding rights and obligations of any of the parties to the dispute. The rights under section 16(2) are therefore not engaged up to the

point where the minister makes his decision to refer or not to refer the matter to the IDT.

[59] She countered Mrs Gibson Henlin's submissions on the applicability of the Guide on Article 6 of the European Convention on Human Rights. She said that it is only in exceptional circumstances where prior conduct or acts would be regarded as part and parcel of the proceedings in issue that that the right would be engaged. The court she said, must examine whether in this instance, we are dealing with any exceptional circumstances. She submitted that there are none in this instance. She pointed to para 60 and 61 of **Guardian Life Limited v Ministry of Labour** [2021] JMSC Civ. 114 where the paradigm of the employee's new rights vis a vis his employers and the role and function of the IDT as explained in **Village Resorts Ltd v Industrial Disputes Tribunal** and **University of Technology v Industrial Disputes Tribunal and Others** [2017] UKPC 22, and further submitted that the mandate is to the IDT and not the Minister to provide remedies. She says this fact concretizes her position that it is at the point when the parties are before the tribunal that there will be a consideration of these rights and remedies.

[60] With regard to Mrs Gibson Henlin's submission that authority is given to the Minister under sections 11A (1) (b) and 11(2) of LRIDA to circumvent a party's uncooperative conduct, Miss Dickens submitted that the provision allows the Minister to give directions if he is not satisfied that **all attempts** were made to settle the dispute by all such means as were available to the parties. On her interpretation, there is a condition to be satisfied in order for the minister to give directions as provided for in section 11A (1)(b). It was therefore necessary she said, that the conciliation officer utilize all avenues in an attempt to settle the dispute before the Minister's exercise of his powers under that section.

[61] As it relates to the breaches complained of as a result of the conciliation officer allegedly unilaterally adjourning the proceedings, Miss Dickens asked the court to reject that assertion as the evidence shows adjournments on account of express statement of unavailability on the part of Guardian. She noted that when the matter was adjourned on the 28th of October 2019 for the

purposes of seeking advice, Guardian's lawyer had in any event expressed that she was unavailable. Thus it cannot be said that it was the unilateral act of Miss Marshall and by extension, the Minister.

[62] It was further submitted that once the matter is before the Minister for him/her to make a decision, he/she has two options: to refer, or not to refer the matter to the IDT. She says the right under section 16(2) cannot arise at this stage as it would create an anomaly if a person is to make a request to the Minister, take the view that his right is breached, bring his claim and the court in fact so determines, as could conceivably have happened in this case, and then the Minister decides that it is not a matter that should be referred to the IDT. She went further to say that if for example judicial review proceedings should follow the Minister's decision not to refer the matter to the IDT and the court should then decide that it was properly within the Minister's discretion not to refer the matter, what would result is an incongruous situation where the court would have ruled that there was a breach of a right and the claimant is entitled to damages or some other remedy, when ultimately as it turned out the claimant would have had no right before the IDT.

[63] In was also submitted that in the event the court takes the view that the relevant rights were engaged, the court must still decide whether the length of take taken before the matter was referred was unreasonable. In doing so, the court must still consider the provisions of section 11A of LRIDA and what the Minister was required to do before a referral is made.

[64] Miss Dickens remarked that the jurisprudence out of Strasbourg does not require that there be prejudice to the claimant while those emanating from the Judicial Committee of the Privy Council so require.

[65] She has asked the court to draw parallels from decided cases and also to note where there is no evidence to support certain aspects of the claimant's submissions. She directed the court's attention to the cases of **Patrick Chung v Attorney General and the Director of Public Prosecutions [2019] JMFC Full 3 and Ernest Smith & Co. (A Firm) et al v The Attorney General of Jamaica [2020] JMFC Full 7** when looking at the factors to

consider when the court seeks to determine whether there is delay and note that when there is justifiable reason for delay, that period of time is not to be reckoned in tabulating the period of delay.

[66] On the issue of damages to be awarded in the event of a decision which is adverse to the first and second defendants, it was submitted that there was no evidence of injury to the claimant in this case and so there ought to be no award of damages

THIRD DEFENDANT'S SUBMISSIONS.

[67] Counsel for the 3rd defendant Mr. Powell contended that the claimant's submission that the right to a fair hearing under section 16(2) is engaged when an employee requests the minister's intervention is wrong for several reasons.

[68] Firstly, he argues that the rights protected by section 16(2) of the Constitution are in respect of bodies which exercise judicial or quasi-judicial functions such as the court or the IDT. This is why he says the examples of leave to apply for judicial review or to seek permission to bring a claim for a complainant's remedy under the Companies Act are not proper analogies. According to counsel, in both examples, the rights are engaged because the applications are considered by a body exercising judicial functions, namely, the court.

[69] Counsel, maintained that under section 11A of LRIDA, the minister exercises an administrative function distinct from the quasi-judicial functions exercised by administrative courts or tribunals. Mr. Powell argued that the minister's gate keeping function is more akin to the functions exercised by the Director of Public Prosecutions in deciding whether someone should be charged. Counsel argued that it is only after the person has been charged that the Constitutional right is engaged. Accordingly, he said, it is only after the minister's referral to the IDT that the right under section 16(2) is engaged.

[70] Mr. Powell further contended that the parties' civil rights and obligations for determination in respect of the industrial dispute are dependent on whether the claimant was unfairly dismissed. The minister he said could not determine that as he is not the tribunal established for that purpose. It is only when the tribunal with that power is seised of the matter that the right is engaged. Further, he outlined that there is no automatic right of an employee to access the IDT under section 11A. The only right to which the claimant is entitled is the right to have the minister exercise his discretion lawfully and the remedy for the minister's failure to do so is judicial review. Mr. Powell says this is plain when one considers the wording of section 11A (1) of LRIDA and related provisions.

[71] Mr Powell submitted that the claimant's submission ignores that it was always open to the claimant to seek judicial review of the minister's delay in deciding whether to refer the matter to the IDT. He argued that there was no bar to the court to determine her right to a decision by the minister. In fact, counsel highlighted, the claimant clearly accepted this when in May 2019 she applied to the court for an order of mandamus.

[72] Finally, Mr. Powell in his submissions invited the court to consider the process of conciliation which he says further shows that it could not engage the rights under section 16(2). In this regard counsel relied on the evidence of Ms Andrea Marshall which he says shows that this is entirely a voluntary process where neither the minister nor his agents make decisions affecting the parties' rights. Counsel pointed out that the process is more akin to mediation and says this is more consistent with this courts own assessment of the process which it describes in **Dr O'Neill Lynch v Minister of Labour and Social Security** [2019] JMSC civ 111.

[73] Counsel submitted that neither an employer's nor an employee's civil rights or obligations are subject to determination by the Minister (or his officers) under the conciliation process.

[74] Mr. Powell further asked the court to reject any submission that the attorneys representing the 3rd defendant acted in bad faith. He submits that it is a

serious accusation which could even attract professional sanction. Additionally, he argued, those attorneys are not parties to these proceedings and were not made aware of these allegations or afforded an opportunity to respond to them. He further argued that the allegation is not made based on clear and unequivocal evidence. He submitted to the court that when the evidence is considered carefully none of the instances of bad faith can be said to be made out.

[75] The 3rd defendant's counsel referred the court to the instances of bad faith alleged by the claimant. He pointed firstly, to the September 17, 2019 letter. He submitted that a proper examination of this letter shows that it only enclosed a letter from the third defendant to the claimant. Further, that it is obvious that the attorney's instructions at that point clearly do not include the dispute but was limited to sending the letter to the claimant's attorney and counsel was not cancelling any of the claimant's entitlements.

[76] Counsel next made reference to the claimant's submission that Guardian's attorneys and the ministry's enquiries about local level efforts to resolve the dispute were evidence of bad faith. In support of his submissions counsel directed the court to the September 4, 2018 and September 5, 2018 letters. He submitted that these letters were written three months before the claimant sought the minister's intervention and in relation to proceedings, which the claimant in her submissions has characterized as irrelevant to the referral of the industrial dispute. Further submitted counsel, the evidence is that Guardian did not consider the claimant's attorneys' letter as a genuine attempt at settlement. Against this background counsel urged the court to accept that it was reasonable for the 3rd defendant's attorneys to have enquired about local level efforts to settle the claim.

[77] Mr. Powell then pointed the court to the claimant's attorneys' complaint that they were not copied on letters from the 3rd defendant to the 1st defendant and to their suggestion that the 3rd defendant attempted to frustrate the process when they applied for judicial review and did not make the claimant a party to those proceedings. His response to the former was that the claimant's attorneys routinely wrote to the ministry without copying the 3rd defendant. In

support of this, he referred the court to several correspondence dated December 17, 2018, April 2, 2019, May 6, 2019, June 18, 2019, November 4, 2019 and November 22, 2019. In relation to the latter, he said the claimant did the same thing when she filed a claim seeking to have the minister refer the matter to the IDT, without more.

[78] As regards the claimant's submission that judicial review is part of the process because an employee has access to the court if they do not agree with the minister's decision not to send the dispute to the IDT, Mr. Powell made three observations. Firstly, he submitted that the claimant cannot have it both ways. If an employee has a right to apply for judicial review, then an employer has a corresponding right to do so where the minister makes the referral.

[79] Secondly, counsel submitted that the filing of the claim by the claimant in May 2019 obviously contradicts the submissions being advanced that the minister's failure to exercise her discretion is a barrier to the court. He highlighted that the claimant accessed the court without any hindrance and voluntarily discontinued her claim.

[80] Thirdly, Mr. Powell asked the court to consider that the grant of constitutional relief is discretionary and the submissions made by the claimant together with her own action strongly supports an argument that the claimant should have applied for judicial review to resolve the issue of her dispute being referred to the IDT.

[81] Counsel additionally submitted that there was no frustration of the conciliation proceedings as the evidence suggests otherwise. He asked the court to consider correspondence dated June 10, 2019, where the 3rd defendant's attorney requested documents from the 1st defendant to prepare for conciliation meeting. He pointed out that this was not a new request as a similar request was made in letter dated May 20, 2019 letter from Hylton Powell to the 1st defendant. He also directed the court to a June 11, 2019 letter where the 1st defendant asked the claimant to provide them with a copy of the December 17, 2018 letter and argued that the claimant's attorney's response may be described as uncooperative as they refused to consent to

disclosure of the document. This argued counsel, resulted in the adjournment of the conciliation meeting.

[82] To buttress his argument, counsel also highlighted that at the second conciliation meeting scheduled for September 18, 2019, the 3rd defendant changed attorneys on July 30, 2019 and the claimant's attorneys-at-law were made aware. He invited the court to take judicial notice of the long vacation that ensued immediately after this communication. Also, that the 3rd defendant's new attorneys came on the record on September 17, 2019. Counsel submitted that it would not be unreasonable to those attorneys to be taking instructions and unable to attend a conciliation meeting on September 18, 2019.

[83] Mr. Powell then asked the court to consider the third conciliation meeting on October 29, 2019. At this time, he pointed out that the 3rd defendant's attorneys were instructed and had articulated their legal objection by letter dated October 28, 2010 which he submitted might have helped to guide the settlement discussions during conciliation. Furthermore, he argued it was not a refusal to participate in conciliation.

[84] Mr. Powell argued that in any event, the claimant's submissions that the 3rd defendant had a duty to facilitate the claimant's access to the IDT and/or participate in conciliation is misconceived. Further, that there is no such duty under section 11A of the LRIDA or in the Labour Relations Code and none of the authorities on which the claimant relies supports this argument. Additionally, he argued that the minister did not require the 3rd defendant's participation in the conciliation process or consent or agreement to refer the matter to the IDT. In fact, stated counsel, the correspondence from the claimant to the 1st defendant consistently showed that they were pushing and urging the 1st defendant to set more and more conciliation meetings. He submitted that this is evidence of the claimant volunteering to attend conciliation until the 3rd defendant's attorneys asked her to elect between the courts and the IDT as a condition to submit further to her demands for attendance at conciliation meetings.

[85] On the issue of damages, Mr Powell submits that the claimant's requests for damages is contrary to the authorities. He relied on **Brendan Bain v University of the West Indies** [2017] JMFC Full 3 where he said the court acknowledged the horizontal application of certain constitutional rights and obligations but observed that vindicatory damages are more appropriate in cases where the defendant is a state entity. He also argued in reliance on the same authority, that constitutional damages should be expressly pleaded and the claimant has not pleaded or given any evidence of any losses which she may have suffered even using the ordinary measure of damages. Counsel urged the court to reject the passing suggestion that the claimant was prevented from working as there is no evidence of this and in any even the evidence shows otherwise.

[86] Additionally, Mr. Powell indicated to the court that in all the cases in which constitutional redress has been considered appropriate, the conduct of the offending party has been held to be above and beyond what would entitle the complaining party to redress under some parallel remedy. Accordingly, he submitted that even if the court finds that the claimant's right protected by section 16(2) were infringed, there is no evidence of any behaviour or conduct on the part of the 3rd defendant that rises to the level that could justify an award of constitutional damages. In all the circumstances counsel submitted that the claim should be dismissed with costs to the 3rd defendant.

THE LAW

The constitutional Provisions

[87] Section 16(2) of the Charter of Fundamental Rights and Freedoms provides:

> ***"In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."***

[88] Section 19 of the constitution provides an avenue to a citizen who is aggrieved, to vindicate those rights if any of them has been, is being, or is likely to be infringed. Section 19 of the constitution states as follows:

> ***(1) "If any person alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter, which is lawfully available, that person may apply to the Supreme Court for redress."***
>
> ***(2) "Any person authorized by law, or, with the leave of the Court, a public or a civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this chapter.***
>
> ***(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this chapter to the protection of which the person concerned is entitled.***
>
> ***(4) Where any application is made for redress under this chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.***

[89] The rights guaranteed under the Charter are not absolute but are subject to limitations as set out in section 13(2). That section provides as follows:

> ***Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society (a) this Chapter guarantees the rights set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17;***

[90] Section 18 deals with the status of marriage, section 49 with alterations to provisions of the constitution, section 13(9) with matters having to do with limitations on freedom of movement and 13(12) with the retention of certain laws that were in place before the commencement of the Constitutional Amendment Act of 2011. Those provisions are of no relevance in these proceedings.

[91] The provisions of section 13(4) and (5) are also relevant in that it is by virtue of section 13(4) that the claimant is able to bring a claim of this nature against the state and by virtue of section 15(5) against someone other than the state. The sections state:

> ***(4) This Chapter applies to all law and binds the legislature, the executive and all public authorities.***
>
> ***(5) A provision of this chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.***

The approach to the interpretation of Constitutional Provisions

[92] As observed by Ms Dickens in her written submissions, in the case of **Maurice A Tomlinson v Television Jamaica Limited and Others** [2013] JMFC Full 5, the court addressed the question of how Charter rights should be interpreted. At paragraphs 144 to 149, it was said that:

> ***[144] In Minister of Home Affairs v Fisher (1979) 44 WIR 107, Lord Wilberforce held that a constitution is to be given 'a generous interpretation' because a constitutional instrument is 'sui generis, calling for principles of interpretation of its own, suitable to its character … without necessary acceptance of all the presumptions that are relevant to legislation of private law' (pp 112 – 113).***
>
> ***[145] His Lordship added bills of rights 'call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' in order that individuals receive the full measure of the fundamental rights and freedoms referred to' (p 112).***
>
> ***[146] His Lordship went on to say that '[r]espect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language' (p 112 – 113). No doubt these words were added in anticipation of the argument that may be made that on this view, namely, '[t]his is in no way to say that there are no rules of law which should apply to the interpretation of a constitution' (pp 112 – 113).***
>
> ***[147] As recently as 2002, it was held in Reyes (Patrick) v R (2002) 60 WIR 42 [26] (Lord Bingham):***
>
> > ***As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it***

> ***were found in a will or a deed or a charter party. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society.***
>
> ***[148] This passage reflects what is called the living document theory of constitutional interpretation as distinct from the originalism or textualist school of thought (Justice Antonin Scalia of the United States Supreme Court being a contemporary proponent of the latter). It is vital to observe that Lord Bingham was insistent that despite the generous interpretation no judge has the licence to read his own personal views into the text. It would seem to me that the prophylactic against that happening is paying attention to the language actually used in its context (immediate and the surrounding context).***
>
> ***[149] In 2004, on appeal from Jamaica, the Judicial Committee of the Privy Council in Watson v R (2004) 64 WIR 241,259 ([42]) (Lord Hope) held, in relation to the interpretation of human rights provisions, that:***
>
> > ***Guidance as to how this issue should be approached is not to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in s 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to.***

[93] Daye J observed in paragraph 36 of **Arthur Williams v Andrew Holness** [2015] JMFC F1 that one cannot strictly apply the cannons or rules of interpretation of legislation to the Constitution and that by necessary implication, certain fundamental principles may be incorporated in the document without the use of express words. He also referenced **Spencer v the Queen** and **Hughes v The Queen,** (reported April 2, 2000 a case from the Eastern Caribbean Court of Appeal where Byron CJ remarked that the duty of the court is to "*give life and meaning to the high ideals and principles entrenched within the Constitution*"

The three rights conferred by section 16(2)

[94] At paragraph 167 of **Ernest Smith & Co et al v Attorney General of Jamaica** Wolf Reece J dealt with the interpretation of Article 6 of the European Convention on Human Rights in relation to civil matters. Article 6 is of relevance simply because it confers rights which are similar to those guaranteed by section 16(2) of our Charter. We may therefore look for guidance from documents which offer any assistance with the interpretation of the provision and from decided cases brought pursuant to those provisions. Article 6(1) of the European Convention of Human Rights provides as follows:

> ***In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.***

[95] At paragraph 168 of the judgment, Wolfe Reece J referenced the pronouncement of Lord Hope of Craighead in the House of Lords decision of **Porter and another v Magill**- [2002] 1 All ER 465, where it was explained that three distinct rights are guaranteed by the provision. They are the right to a determination within a reasonable time, the right to a fair trial and the right to trial before an independent and impartial tribunal. These rights it was explained, are closely related, but can, and should be considered separately. She observed that in **Herbert Bell v Director of Public Prosecutions of Jamaica and another** 1985 2 All ER 585 and **Mervin Cameron** (supra), the same view has been held. She further pointed out that unlike in **Herbert Bell** and the majority in **Mervin Cameron**, Lord Hope of Craighead determined that the rights are free standing in civil cases, with the reasonable time guarantee being independent of the right to a fair trial.

The right to a fair trial

[96] In **Al-Tec Inc Ltd. v James Hogan and Renee Latibudaire** [2019] JMCA Civ 9, a case cited by Miss Dickens, the nature and content of the right to a fair trial was discussed by Edwards JA in her very comprehensive judgment. It is important to reproduce excerpts from this judgment as it demonstrates a point which is critical to the decision in this case. In that case, Edwards JA observed that the right is not absolute and may be abrogated pursuant to the provisions of section 13(2) of the Charter. She alluded to the judgment of Batts J. in **Natasha Richards and Phillip Richards v Errol Brown and the Attorney General of Jamaica** [2016] JMFC Full 05 and his discussion regarding the rights enshrined in section 16(2). She further went on to examine the similar right conferred by Article 6(1). At paragraph 154, she quoted an excerpt from the Guide to Article 6: Guide. She referenced paragraphs 78 and 79 which are as follows:

> ***78. The right to a fair trial, as guaranteed by Article 6(1) must be construed in light of the rule of law, which requires that litigants should have an effective judicial remedy enabling them to assert their civil rights (Beles and Others v The Czech Republic…)***
>
> ***79. Everyone has the right to have any claim relating to 'his civil rights and obligations' brought before a court or tribunal. In this way Article 6(1) embodies the 'right to a court' of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect (Golder v The United Kingdom).***

[97] She continued at paragraph 155 where she made reference to the case of (**Beles and Others v The Czech Republic** Application No. 47273/99 ECHR 2002 (unreported) judgment delivered November 12, 2002 where it was said as follows:

> ***"The Court has already stated on a number of occasions that the right to a fair trial, as guaranteed by Article 6(1) of the Convention, must be construed in the light of the Rule of Law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights….***
>
> ***…the ' right to a court', of which the right of access is one aspect, is not absolute. It is subject to limitations permitted by implication, in particular where the conditions of admissibility of***

> ***an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard… nonetheless, the limitations applied must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Furthermore, limitations will only be compatible with Article 6(1) if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued. See Guerin v France judgment of 29 July 1998, Reports 1998-V, p 1867 & 37." (Emphasis added)]***

[98] At paragraph 156 she observed that

> ***The scope and content of the right to a fair trial includes not only compliance with the principle of equality of arms but also the right to cross examine witnesses, right of access to facilities on equal terms and to be informed of and be able to challenge reasons for administrative decisions. See Beles and Others v the Czech Republic and Law of the European Convention on Human Rights Harris DJ, O'Boyle M & Warbrick C (1995) London Butterworths at 206 -214.***

[99] At paragraphs 157, she reproduced a quotation from the case of ***Al Rawi and Others v The Security Service and Others*** *[2012] 1AC 531* where Lord Kerr in his dissenting judgment at pages 592 to 593 addressed the value of knowing the case that one must meet and the need to be given the opportunity to challenge the opponent's case, noting that those principles occupy a central place in the precept of a fair trial.

[100] At para 158, Edwards *JA* also relied on a quotation **from George Blaze v Bernard La Mothe and The Attorney General**, where the need for parties to court proceedings to have knowledge of and be able to comment on evidence adduced as well as the value of cross examination as a critical component of the adversarial process was also explained.

[101] Paragraph 159 dealt with the right to know and thus to be able to challenge the opposing party's case and the centrality of the right to fairness of the trial process and generally to be able to call evidence in mounting that challenge as was discussed in **Tariq v Home Office** [2011] UKSC 34. Paragraph 161 addresses the right to make legal submissions on points of dispute and to be aware of and be able to comment on evidence adduced and observations submitted for the purposes of being able to influence the court's decision.

[102] In **Al -Tec** (supra), the common thread that runs through the entire discussion in the paragraphs mentioned with reference to the nature and content of the right to be heard, which is part and parcel of the right to a fair trial, is that all the conduct envisaged are conduct within the course of proceedings. It is also important to note that it is true that there was no issue in that case surrounding the question of pre-trial conduct or occurrences and that fact no doubt, would have imposed limitations on, and qualified the focus and content of the discussion.

The right to trial before an independent and impartial tribunal

[103] Arguably, the most important of the three rights guaranteed is trial before an independent and impartial tribunal established by law. The essence of the right entails two distinct aspects: the right to a hearing before a neutral authority and that aspect of the right which underpins the concept of the rule of law. A neutral authority is one free of bias and prejudgment. The need for a matter to be heard before an independent and impartial tribunal and all that it entails need not be expounded upon in the circumstances of this case.

The right to trial within a reasonable time

[104] In **Bell v Director of Public Prosecutions and the Attorney General of Jamaica** [1985] 2All ER 585, when considering whether the claimant's right to a trial within a reasonable time had been breached, Lord Templeman observed that in deciding "***whether a reasonable time had elapsed, consideration must be given to the past and current problems which affects the administration of justice in Jamaica***" See page 589 g of the judgment.

[105] The Judicial Committee of the Privy Council was concerned in **Bell** with the interpretation of the then section 20 (1) of the Jamaican Constitution. The Board concluded that the accused did not have to show any specific prejudice before being entitled to have the charges against him dismissed because of unreasonable delay in bringing him to trial. In a judgment delivered by Lord Templeman, the Board identified and adopted a modified version of the four-part test enunciated in **Barker v Wingo** (1972) 407 US 514, in assessing

whether the appellant had been deprived of a fair trial within a reasonable time. These factors were the length of the delay, the reason given by the prosecution to justify the delay, the efforts made by the accused to assert his rights and the prejudice to the accused. Powell J said at page 530-531 of the **Barker v Wingo**:

> ***"Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an enquiry is necessarily dependent upon the peculiar circumstances of the case.***

[106] With regard to reasons given by the prosecution to justify the delay, Powell J said at page 531:

> ***"A deliberate attempt to delay the trial in order to hamper the defence should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts, should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay".***

[107] On the matter of the responsibility of the defendant to assert his right it was said that:

> ***"whether and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent, by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.***

[108] Finally, on the matter of prejudice Powell J at page 532 opined that:

> ***"Prejudice of course should be assessed in the light of the interests of the defendant which the speedy trial right was designed to protect. This court has identified three such interests (i) to prevent oppressive pre trial incarceration (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired…"***

[109] In **Mervin Cameron**, the claimant was charged in 2013 by the police for two cases of murder. He remained in custody until he was offered bail in 2017. Up

to the time of the filing of his claim in March 2017, a preliminary inquiry which had commenced, had not been concluded. This was in circumstances where based on the evidence placed before the constitutional court, the criminal case against Mr Cameron was extremely weak. Sykes C J in his dissenting but very illuminating judgment, considered at length the critical questions of the length of the delay and the reasons for the delay. He placed some reliance on the minority judgment of Cromwell J in the Canadian case of **Barrett Jordan v Her Majesty the Queen and the Attorney General of Alberta, British Columbia Civil Liberties Association and Criminal Lawyers Association(Ontario)(Interveners)** [2016] 1 SCR 631; 398 DLR (4th) 381.

[110] Sykes CJ summarized Cromwell J's proposition that in any given case, the questions to be asked regarding delay are 1, is an unreasonable delay enquiry justified? 2. What is a reasonable time for the disposition of a case like this one? How much of the delay that actually occurred counts against the state? 4. Was the delay that counts against the state unreasonable? In answering the first question, it was opined, the court should examine the time between charge and completion of trial and decide whether that time period triggers a Charter enquiry. With the exception of the specific reference in **Barker v Wingo** (supra) to whether and how a defendant asserts his rights, these are essentially the same considerations as were set out in that case and applied in **Bell** (supra).

THE CLAIM AGAINST THE THIRD DEFENDANT

[111] Before I embark on the legal position, I make the observations which follow regarding Guardian's conduct. Guardian's argument that the claimant should elect between her claims before the court and the IDT was in my view, illogical. In the first place, the fact that the matter was referred to the Minister, very clearly did not mean that it would of necessity culminate in proceedings before the IDT. The very purpose of holding conciliation proceedings was to see if the matter could be settled without further action.

[112] Assuming the attempts at settlement failed, then the Minister would make a decision to refer or not to. To expect the claimant to abandon her court case for wrongful dismissal without any settlement of her grouses in sight was grossly unreasonable. Indeed, it might have been foolhardy on her part to have abandoned her claim before the court without having some guarantee that the matter would be settled at the Ministry level or would proceed to a hearing before the IDT. She had already and it can only be said, in good faith, discontinued her claim for judicial review in anticipation that the conciliation would have proceeded and it did not.

[113] Further, Henlin Gibson Henlin had made it abundantly clear that in their understanding of the law, the matters before the court could coexist alongside conciliation proceedings and the referral and consequent proceedings before the IDT if matters progressed to that stage. The claimant could have found herself in the invidious position of having no recourse by abandoning her court claims at a stage when she had no guarantee that a resolution would be reached, at the Ministry level. I say at the Ministry level because she was not guaranteed a referral to the IDT. It is quite odd that it was also Guardian who was saying that the Minister had no authority to deal with redundancy where the matter involved a non- unionized worker; yet Guardian expected the claimant to abandon her court claim without any guarantee of a settlement.

[114] With regard to the section 16(2) rights, the Full Court made certain pertinent observations in the case of **Brendan Courtney Bain v The University of the West Indies** [2017] JMFC Full 3. The court examined the provisions of section 16(2) and made the following utterance:

> *[**353] Having regard to the wording of this section; and in particular to the underlined words,*** [court or authority established by law were the underlined words] ***it is difficult (if not impossible) to see how the defendant could properly be held responsible for any breach of this particular right. The section clearly makes reference only to courts and authorities established "by law"; and the advisory committee referred to in the evidence, that was established by the University could never be said to have been established "by law". It seems to me (accepting the submissions of the Attorney-General) that the section must be construed to mean that the framers of the Charter must have intended for this right to be given and guaranteed by the state; and not by an entity such as the defendant. To my mind, there can be no other***

interpretation. The aspect of the claimant's case that is based on this constitutional provision must therefore be rejected.

[115] It is recognized that there was no detailed discussion of the point in that case. Secondly, the right there discussed was that to a fair hearing by an independent and impartial court or authority established by law. There was no separate consideration of the rights as distinct rights and it was also said that the advisory committee of the university that had made the decision could not be regarded as one established by law. I am mindful of those limitations.

[116] It is my view that Mrs Gibson Henlin's reliance on **Lupeni Greek Catholic Parish and Others v Romania** is misplaced and particularly so, as far as the third defendant is concerned. In that case the court observed that article 6(1) may be relied on by anyone who considers that an interference with the exercise of one of his or her civil rights is **unlawful** and complains that he or she has not had the possibility of submitting that claim to a tribunal meeting the requirements of article 6 (1). The court went on to state that where there is a serious and genuine dispute as to the lawfulness of such an interference going to the existence or the scope of the civil right being asserted, Article 6 (1) entitles the individual to a determination of that question of domestic law by a tribunal. It was also observed that the right of access to the court is not absolute but are subject to limitations by implication and by its nature, such rights are regulated by the state.

[117] This observation must be viewed against a background where the right of access is considered as an inherent aspect of the safeguard of the principle of the rule of law and the avoidance of arbitrary power by some authority capable of proscribing the rule of law and /or exercising such power.

[118] It was said that the right of access to a court must be "practical and effective" not theoretical or illusory. See **Bellett v France** 4 December 1995 36 series A no.333-B. It was said also, that for the right of access to be effective, an individual must have a clear practical opportunity to challenge an act that is an interference with his rights. Further that the right of access includes not only the right to institute proceedings, but also the right to obtain a determination. The court determined in **Lupeni** that the applicants were able to submit

evidence and benefit from adversarial proceedings and so were not prevented from bringing their action for restitution and that the domestic courts in fact examined the claims brought before them and delivered reasoned judgments.

[119] Our constitutional guarantee, like the guarantee provided by Article 6-1, is the guarantee of the principle of the rule of law and the avoidance of arbitrary power. It seems to me that it must be the state or a state functionary who can interfere with this access. The barring of access may occur for example in circumstances where the state by some measure, or absence of measure, or conduct does not allow for a process of adjudication. Such measure may be by legislation or otherwise which for example, determines that a court or some other adjudicatory tribunal has no jurisdiction to hear a matter or particular types of matter at all or on its merits. A scenario may also be envisaged whereby the state does not create a state institution or facility or allows for a process so that a guaranteed right can be exercised. Section 13(5) of the Constitution makes it clear that a provision of the chapter binds natural and juristic persons if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

[120] Any argument that the third defendant had a duty to participate in promoting access to the IDT must fail where the argument is based on some notion of a duty derived from the provisions of LRIDA. Mrs Gibson Henlin relied on a passage from **Jamaica Flour Mills Limited v the Industrial Dispute Tribunal** Civil Appeal No. 7/2002 where an excerpt from **Village Resorts Ltd v The Industrial Disputes Tribunal Supreme Court** SCCA No. 66/97 delivered 30th June 1998 (unreported) was referenced. It was said in the latter case that the Industrial Relations Code "*indicates as one of management's major objectives good management practices and industrial relations policies which have the confidence of all. It mandates that the development of such practices and policies are a joint responsibility of employers and all workers and trade unions representing them, but the primary responsibility for their initiation rests with the employers. Essentially therefore the Code isa road map to both employers and workers towards the destination of cooperative working environment for the maximization of production and mutually*

beneficial human relationships". Forte P went on to say in **Flour Mills** that the above statement in **Village Resorts** "emphasizes the conciliatory flavour and intendment of the act."(see page 21 of the judgment.) So far as I can discern, the regulatory framework of LRIDA requires the Minister to act and really places no onus or duty on an unwilling employer. Mr. Powell says this is plain when one considers the wording of section 11A (1) of LRIDA and related provisions. I agree.

[121] While I accept that Guardian, a juristic person had a duty to participate in the process in order to resolve a labour dispute, it cannot be said that this duty necessarily entails facilitating the claimant's access to the tribunal. Guardian and the claimant, though not necessarily parties on equal footing from the standpoint of resources and in certain other respects, each was seeking to secure its/her rights and protect interests which in this instance are discordant and do not intersect. In circumstances where each was pursuing its/her own interest vigorously, even if there were acts that were selfish or even conceivably rose to the level of bad faith (and I make no insinuation of bad faith), those acts could not give rise to a breach of the claimant's constitutional rights. Unreasonable conduct in the circumstances of this case on the part of a non - state entity cannot have the effect of breaching the claimant's constitutional rights.

[122] I take the view that there is no horizontal application of the rights enshrined in section 16(2) and so Guardian could not breach the claimant's rights in that regard. For reasons which will become clearer, and which I find more convenient to discuss in examining the case against the first and second defendants, even if the view were to be taken that a non - state entity is bound by the relevant rights, the circumstances of this case do not permit a finding that the rights were breached.

[123] At the commencement of the trial of this claim, the third defendant's attorney at law made an application for the claim against his client to be struck out. Based on the material then presented, I formed the view that it was not the appropriate course of action. Counsel suggested then that perhaps the court could reserve its ruling to the end of the trial. In retrospect that might have

been the appropriate course. Upon a more comprehensive review of the relevant law, I have determined as I indicated.

WHETHER THE RIGHTS CONFERRED BY SECTION 16(2) OF THE CONSTITUTION WERE ENGAGED AS FAR AS THE FIRST AND SECOND DEFENDANTS ARE CONCERNED

[124] In the instant case, as far as the first and second defendants are concerned, we are primarily concerned with the question of whether the rights conferred by section 16(2) of the constitution became engaged at the stage the claimant is saying that they were breached. Mrs Gibson Henlin's argument is that getting to the tribunal is a process and that the framers of LRIDA created that institutional framework to facilitate access and that access is contingent on the minister performing his functions which of necessity involves him exercising his discretion.

[125] Miss Dickens complained that the claimant had not pleaded her case in such a way as to alert the defence that she was saying that the defendants' conduct had effectively blocked her access to being able to exercise the guaranteed rights. I proceed with my analysis on the assumption that it was not necessary for the claimant to have made specific reference to a denial of access. In any event, the declarations sought and the evidence presented, would have hinted at a claim of denial of access. The arguments presented certainly confirmed that position.

[126] Miss Dickens' argument that incongruity would result in an instance where it is assumed that the section 16(2) right is engaged prior to a decision being made by the minister, and the minister belatedly exercises his discretion not to refer and it turns out upon review by a court, that the decision by the minister not to refer the matter to the tribunal was a proper exercise of the discretion, is not an unattractive one. Still, one must always bear in mind the various permutations of the redress clause and see whether having regard to section 19(1), this is necessarily so. Section 19 (1) allows a claim to be brought where there has been a breach, where the right is being breached or

where **it is likely** to be breached. As it turned out in this case, it was determined that the claimant had a right to have her matter heard by the IDT. Upon a reading of section 16(2), it very clearly does not encapsulate a right of access in the textual content. The real question is whether this right is bestowed by implication.

[127] Mrs Gibson Henlin's submission is that a right of access is a part of the constitutional guarantee. Access refers to the means or the opportunity to enter. The question of access was looked at in much detail in the European Court of Human Rights case of **Golder v The United Kingdom,** Application no. 4451/70. I shall examine this case at great length.

[128] The applicant Mr. Golder was an inmate in a penal institution in the United Kingdom. He was accused by a particular prison officer of being involved in a prison disturbance. Another officer subsequently stated that the applicant was not involved. The officer who initially accused the applicant later expressed some uncertainty as to his involvement in the incident. Mr Golder was advised of the likelihood of being criminally charged in connection with the incident. In March of 1967 he petitioned the Secretary of State, seeking a transfer to another facility and requesting permission to consult a solicitor with a view to taking civil action for libel.

[129] There were rules in place having the force of a statutory instrument, which prevented prisoners from communicating with outside persons without the leave of the Secretary of State. On the 26th of October 1969, the applicant wrote to his Member of Parliament and to a Chief Constable in November 1969, about the disturbance and the ensuing hardships visited upon him as a result. On the 6th of April 1970, the Home Office directed the prison governor to advise the applicant that the Secretary of State had fully considered his petition but was not prepared to grant his request for a transfer and that no grounds had been found to take action in regard to the matter raised in his petition.

[130] The applicant complained before the Commission regarding the stopping of his letters and the refusal of the Home Secretary to permit him to consult a

solicitor. The Government of the UK submitted that Article 6-1 did not confer on the applicant a right of access to the courts but conferred only a right in any proceedings he may institute to a hearing that is fair.

[131] Among the questions which arose for determination, were whether Article 6-1 of the European Convention on Human Rights secure to persons desiring to institute civil proceedings a right of access; if the article secures such right of access, are there inherent limitations relating to this right, or its exercise, applicable to the facts of the case. It was assumed in that case that the right which the applicant wished to invoke was a civil right. It was observed that Article 6-1 does not state a right of access to the courts or tribunal in express terms. Further, that it enunciates rights which are distinct, but stems from the same basic idea and which taken together, constitute a single right not specifically defined in the narrower sense of the term. It was for the court to determine whether access to the courts constitute one factor or aspect of that right. The court in this case took into consideration provisions of the Vienna Convention which contains the guiding principles on the interpretation of treaties, although it had not yet come into force. The provision in essence is that treaties are to be interpreted in good faith in accordance with the ordinary meaning given to the terms of a treaty in its context and in light of its object and purpose.

[132] It was observed that while the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not necessarily follow that a right to the very institution of such proceeding is thereby excluded. Later in paragraph 35 of the judgment, it was stated that “it would be inconceivable … that Article 6-1 should describe in detail the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The “fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings”. The court continued at paragraph 36 that the right to access constituted an element which was inherent in the right guaranteed. On the question of whether the impediment based on the prison rules requiring

the permission of the Secretary of State constituted a justifiable legitimate limitation on the exercise or enjoyment of that right, it was decided that in the circumstances of the case, the applicant could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was thus determined that the Home Secretary failed to respect the applicant's right as guaranteed by Article 6-1.

[133] As pointed out by Miss Dickens, determination means the process of determining something and in particular in a legal context, 'the settlement of a dispute by the authoritative decision of a judge or arbitrator'. Further the word 'in' is defined as "expressing a period of time during which an event happens or a situation remains the case" The definitions were provided in a context where the court was asked to read the provisions of section 16 (2), bearing in mind those meanings. Thus the section could be read as follows: "the period of time during which the settlement of a dispute by the authoritative decision of a judge or arbitrator of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interest, he shall be entitled to a fair hearing…" Applying a literal interpretation, that position is undoubtedly correct. But even if one were to look to other rules of interpretation, the construction in my view, may well remain the same. One must always bear in mind however, that a constitution must be given a wide and generous interpretation because of its sui generis nature. Further, a constitution is drafted in broad terms thus setting down wide and very general principles but that even where general words are used, those words still have boundaries of meanings.

[134] As distilled from the case of **Al-Tec** (supra), the right of access is one aspect and any necessary limitation to such access should not restrict or reduce access in such a way as to impair the essence of the right. The proportionality test will be applicable to any restriction to access. Access was discussed in terms of the right of access to facilities on equal terms. In the context, access must be understood to be access to facilities during the determination of legal proceedings. "In the determination of legal proceedings" is here understood to mean during the course of legal proceedings. I say that because the right of

access was discussed right alongside the principle of equality of arms, the right to be informed of and to be able to challenge reasons for administrative decisions, the right of cross examination, which is perhaps the most essential component embodied in the adversarial process, and the right to call witnesses, all as essential elements of the right to a fair trial. Again, I cannot lose sight of the fact that the discussion there might have been delimited by the facts of the case at hand and was confined to a discussion on the right to a fair trial only.

[135] Mr Powell pointed out that as demonstrated in **Mervin Cameron** where Sykes J made the distinction between when the right in section 14 (3) and section 16(1) is triggered, the event which triggers the engagement of the respective provision may differ. He rightly said that one should determine the starting point having regard to the language used. It is well to remember however that certain fundamental principles may be incorporated in the document without the use of express words.

[136] It is of interest that in **Golder** there were dissenting judgments as it relates to the application of Article 6-1. In his judgment, Judge Zekia in assessing the provision in terms of the textual material, made the observation that:

> ***The above Article (art. 6-1), read in its plain and ordinary meaning, refers to criminal charges brought against a person and to the civil rights and obligations of a person when such rights and obligations are sub judice in a court of law. The very fact that the words immediately following the opening words of the paragraph, that is, the words following the phrase "In the determination of his civil rights and obligations or of any criminal charge against him" deal exclusively with the conduct of proceedings, i.e., public hearings within a reasonable time before an impartial court and pronouncement of judgment in public, plus the further fact that exceptions and/or limitations given in detail in the same paragraph again exclusively relate to the publicity of the court proceedings and to nothing else, strongly indicate that Article 6 para. 1 (art. 6-1) deals only with court proceedings already instituted before a court and not with a right of access to the courts. In other words, Article 6 para. 1 (art. 6-1) is directed to the incidents and attributes of a just and fair trial only. Reference was made to the French version of Article 6 para. 1 (art. 6-1) and specifically to the words "contestations sur ses droits" in the said Article (art. 6-1). It has been maintained that the above quoted words convey a wider meaning than the corresponding English words in the English text. The words in***

the French text embrace, it is argued, claims which have not reached the stage of trial. The English and French text are both equally authentic. If the words used in one text are capable only of a narrower meaning, the result is that both texts are reconcilable by attaching to them the less extensive meaning. Even if we apply Article 33 of the Vienna Convention in order to find which of the two texts is to prevail, we have to look to the preceding Articles 31 and 32 of the same Convention for guidance. Having done this I did not find sufficient reason to alter the view just expressed. So much for the reading of the text which no doubt constitutes "the primary source of its own interpretation".

[137] Judge Zekia also looked at various other provisions in the Article and determined that if it was intended to make the right of access an integral part of Article 6, it would have been so included, since the provision was included in defining the other human rights in the other provisions of the Article. In examining the object and purpose of the provision, Judge Zekia also commented that the article 6-1 provisions as expressly stated, without the right of access being 'integrated' into it, although containing procedural matters, are nevertheless fundamentals in the administration of justice and the scope of the operation of those provisions is wide. To reinforce the point, the judge noted that upon examination of the *travaux preparatoires* of the Declaration, the early draft expressly included the words "right of access" but that these words were omitted from the Article when it took its final form.

[138] Judge Sir Gerald Fitzmaurice expressed that the Convention did not expressly or in terms give expression to a right of access but that the right is read into the convention on the basis of general considerations external to the provision itself. He also expressed that it would be futile in the circumstances of the case to even consider whether Article 6 – 1 provides a right of access, since the applicant had not in the circumstances been denied access.

[139] At paragraphs 19 20, 21 and 22 of the judgment, the judge made the following points:

"19. Clearly, it would be futile to discuss whether or not Article 6.1 (art. 6-1) of the Convention afforded a right of access to the English courts unless Golder had in fact been denied such access, - and in my opinion he had not. He had, in the manner already described, been prevented from consulting a solicitor with a view - possibly – to having recourse to those courts; but

this was not in itself a denial of access to them, and could not be since the Home Secretary and the prison authorities had no power de jure to forbid it. It might nevertheless be prepared to hold, as the Court evidently does, that there had been a "constructive" denial if, de facto, the act of refusing to allow Golder to consult a solicitor had had the effect of permanently and finally cutting him off from all chances of recourse to the courts for the purpose of the proceedings he wanted to bring. But this was not the case: he would still have been in time to act even if he had served his full term, which he did not do, being soon released on parole.

20. I of course appreciate the force of the point that the lapse of time could have been prejudicial in certain ways, - but it could not have amounted to a bar. The fact that the access might have been in less favourable circumstances does not amount to a denial of it. Access, provided it is allowed, or possible, does not mean access at precisely the litigant's own time or on his own terms. In the present case there was at the most a factual impediment of a temporary character to action then and there, but no denial of the right because there could not be, in law. The element of "remoteness", of which the English legal system takes considerable account, also enters into this. Some distance, conceptually, has to be travelled before it can be said that a refusal to allow communication with a solicitor "now", amounts to a denial of access to the courts - either "now", or still less "then". In no reasonable sense can it be regarded as a proximate cause or determining factor. Golder was not prevented from bringing proceedings: he was only delayed, and then, in the end, himself failed to do so. A charge of this character cannot be substantiated on the basis of a series of contingencies. Either the action of the authorities once and for all prevented Golder's recourse or it did not. In my opinion it did not.

21. Just as the Court's Judgment (so it will be seen later) completely fails to distinguish between the quite separate concept of access to the courts and a fair hearing after access has been had, so also does it fail to distinguish between the even more clearly separate notions of a refusal of access to the courts and a refusal of access to a solicitor, which may - or may not - result in an eventual seeking of access to the courts. To say that a thing cannot be done now, is not to say it cannot be done at all, - especially when what is withheld "now" does not even constitute that which (possibly) might be sought "then". The way in which these two distinct matters are run together, almost as if they were synonymous, in, for instance, the last part of the fourth section of paragraph 26 of the Judgment, constitutes a gratuitous piece of elliptical reasoning that distorts normal concepts.

22. In consequence, even assuming that Article 6.1 (art. 6-1) of the Convention involves an obligation to afford access to the courts, the present case does not, in my view, fall under the head of a denial of access contrary to that provision…

[140] Much of the reasoning of both Judge Zekia and Sir Fitzmaurice's are not in keeping with the liberal approach that should be applied in interpreting constitutional provisions. A clear example of this is Sir Fitzmaurice's opinion that the Convention law should be narrowly interpreted as this is law which is made based on the agreement of state parties and that it should not be construed as providing for more that it contains or more than is necessarily to be inferred from what it contains. And further, that inference or implication can only be regarded as necessary if the provision cannot operate or function without it.

[141] According to Sir Fitzmaurice Article 6(1) has ample scope without the right of access being implied. Therefore, he said, the court should leave it to contracting states to amend the Convention if they agree that it should guarantee a right of access. It is not, he said, for the courts to do so by adopting a wide interpretation without clear justification based on the language of the text or inferences to be drawn from it. According to him, the floodgates of wide unjustified interpretations will be opened in other areas if this is accepted. Further, a restrictive interpretation of Article 6(1) should be adopted he said, especially in relation to provisions which have uncertain meanings as the Convention is dependent on the continued support of contracting states, it significantly impacts the contracting states domestic legislation and an extensive interpretation may impose obligations which contracting states did not intend to be bound. Additionally, he argued that it is almost impossible to establish the intentions of the contracting states at the time the Article 6(1) was inserted in the Convention and it is inconceivable that if they wanted to insert a right of access they would not have done so explicitly.

[142] The observation in the dissenting judgment of Sir Gerald Fitzmaurice that it would be futile to decide whether Article 6-1 provides a right to access when Mr Golder had not been denied access at all is perhaps not apt in the circumstances of the present case, because the argument was that the act of preventing him from consulting a solicitor could have been considered a constructive denial, only if, de facto, refusing to allow him to consult a solicitor

had the effect of permanently denying him all chances of recourse to the courts.

[143] Again, in the context of constitutional provisions of a state, there would be no room for the argument that a provision should be narrowly interpreted so as to be accommodating to various different states. I have outlined certain aspects of the dissenting judgments in order to demonstrate that a number of the arguments made against interpreting the Article 6 -1 right so as to include a right of access, require a narrower interpretation than one ought to accord to a constitutional provision. I do however place some reliance on the argument that states may create avenues of access. It is clear that in our instance, such other avenues exist. The question is whether the existence of other avenues to access is sufficient guarantee against the infringement of all three rights.

[144] In the instant case, the failure of the Minister and or his agents to act could not have had the effect of permanently denying the claimant access to the IDT simply because the minister may be compelled to act.

[145] One ought readily to accept the argument that by being in a state of abeyance when the Minister delays in making a decision one way or the other, access is impeded. It was accepted in the main judgment of the court in **Golder** that the concept of access needed to be defined but Judge Fitzmaurice queried whether a right of access might not mean simply such right as the domestic law of the state concerned provides, or at any time may provide for. But with the wide and generous interpretation to be applied to the Jamaican constitutional provision, that a right to access is conferred by the provisions of section 16(2), should not be ruled out.

[146] The claimant as well as the defendants' attorneys at law were at pains to point out the role of the Minister pursuant to the Labour Relations and Industrial Disputes Act. It is not the scenario in our legal and constitutional arrangement that the Minister's timely decision was by itself the only process that made it possible for the claimant to have access to the tribunal and consequently, to the three accepted constitutionally guaranteed rights. This of course does not mean that the minister or his agent had the right to disregard the claimant's

right to have the decision made to refer or not to refer within a reasonable time.

[147] I do not accept entirely Mr Powell's submission that the only right to which the claimant was entitled is the right to have the minister exercise his discretion lawfully. She also had a right to a decision made by the Minister in a timely manner. That is not to say that the processes at the ministry had to be in the nature of judicial proceedings. Mr Powell's further submission was that it is only when the tribunal with the power to determine the claimant's civil rights and obligations is seised of the matter that the section 16(2) rights are engaged. This may not necessarily be so in respect of the right to a fair trial and the right to a hearing within a reasonable time.

[148] As demonstrated in the case of **Dr Oneil Lynch v Ministry of Labour and Social Security** the Minister exercises a discretion whether to refer a matter to the IDT. (paragraph 47). He does so if he finds that there is an industrial dispute within the meaning of section 2 of LRIDA and he is satisfied that attempts were made to settle the dispute without success. If he had chosen not to exercise his discretion to refer the matter, then no right to a fair hearing before an independent and impartial tribunal could have arisen. Independence and impartiality are attributes of the tribunal hearing the proceedings.

[149] One may complain of being deprived of a hearing before such a tribunal in possibly two different scenarios: firstly, where one is barred from access to such a tribunal or secondly where the tribunal which assumes jurisdiction over such a matter arguably does not possess those qualities or attributes. The right to a hearing before an independent and impartial tribunal is not activated in circumstances where there is no institutional bar, before the minister exercises his discretion in favour of the worker by determining that the matter is referred to the tribunal. This important because of the right of the claimant to apply for judicial review. As explained when looking at the right to a fair hearing, the minister's conduct did not and could not abrogate that right.

[150] It is specifically spelt out in the context of a criminal case that the right to due process is activated when one is charged and by parity of reasoning, when

one is issued with a summons advising him of the charge. The rights have not been so defined in the context of determining civil rights and obligations or in legal proceedings.

[151] I am fully alert to the non - binding nature of the Strassbourg cases. However, I find to be quite persuasive the majority position in **Golder.** I therefore take the view that based on the relevant Charter provision, a right of access is not excluded. When one considers the Minister's failure as at the time this claim was instituted and as it turned out eventually, tardiness in acting there was the likelihood of breaching the claimant's right to a hearing within a reasonable time. This is so especially having regard to the minister's ultimate ruling. A hearing before the IDT was likely to be delayed and as it turned out, was in fact delayed; it was not however abrogated. To that extent, it could not have operated to breach the claimant's right to a hearing before an independent and impartial tribunal. Whether the right to a trial before an independent and impartial tribunal would be engaged or not was contingent on how the Minister chose to exercise his discretion. It is accepted that unlike in **Golder** where there was a series of contingencies, in this case, there was only one, but it makes no practical difference as the Minister's decision may or may not have resulted in a hearing before a tribunal.

[152] There was no evidence put forward in this case to show how the delay could have breached the claimant's right to a fair hearing having regard to the characteristic features of a fair hearing as explained in **Al – Tec** supra. There is no evidence for example, that the delay meant that some of those features would no longer be available. The delay could however and did in the final analysis, delay access, thereby giving rise to the complaint of breach of the reasonable time guarantee which is an integral aspect of claimant's case.

THE DECISIONS TO STAY AND TO ADJOURN CONCILIATION PROCEEDINGS;

[153] The right to a fair hearing requires that an individual such as the claimant in this instance, should not be penalized by decisions affecting her rights unless she has been given prior notice of a hearing and a fair opportunity to answer

or participate and the opportunity to present her own case. The mere fact that a decision affects her rights or interests is sufficient to subject the decision to the procedures required by natural justice. The right to a fair hearing, quite apart from being a right accorded constitutional protection, is one of the two pillars of natural justice. The claimant alleges as constituting the breach of her right to a fair hearing the fact that her counsel was not copied on decisions taken by the ministry or in relation to communication between the third defendant's attorneys at law and information provided by the claimant was not taken into account in making decisions which contributed to the delay in dealing with the matter and that the ministry routinely acted on communications from one party only. Specifically, that the conciliation proceedings were in one instance adjourned on the application of the employer and in another instance, the conciliation proceedings were stayed without hearing from the claimant in each instance. The Minister in considering whether to refer a matter to the IDT, exercises an administrative function. There is no question here as to the right to a hearing before the Minister. The claimant never contended for such a hearing, as indeed the statute empowering the Minister to refer the matter does not embody any provisions conferring any such right. The hearing the claimant yearned to have was that before the IDT or conceivably before a court in the event she was displeased with the Minister's decision.

[154] The minister could not determine the claimant's civil rights and obligations vis a vis the third defendant as he is not the tribunal established for that purpose. Further, the exercise undertaken by the Minister cannot be regarded as legal proceedings as his functions in this regard are administrative.

[155] The right to a hearing or to a fair hearing arises it is accepted, outside the context of judicial or even quasi - judicial proceedings. It may arise in the context of executive decision making process as in **Symbiote Investments Limited v Minister of Technology** [2019] JMCA App 8, where it was decided that there was a right to be heard. It is however difficult to see how it could arise in the context of a functionary of the MLSS attempting to make arrangements for the holding of conciliation meetings between the claimant

and her employer. I hold that view fulling recognizing that the conduct of the functionary is effectively the conduct of the Minister. The functionary was not engaged in making any determination as to the claimant's civil rights or obligations that were in dispute. Neither was she engaged in any legal proceedings which could result in a decision adverse to the claimant's interests.

[156] I accept Ms Dickens' submission that conciliation is a voluntary process and without the agreement of all parties concerned, the process could not take place and so it could not properly be said that conciliation was stayed or adjourned at the instance of the first defendant. If one party indicates a reluctance or that a date was not convenient then the Ministry had no option but to adjourn the process. There was not much that Miss Marshall could have done if the third defendant declined for whatever reason to participate. In this instance, the reason communicated by Miss Marshall to Henlin Gibson Henlin, was that the Ministry had been advised that Guardian had retained a new attorney at law who requested the postponement so that she could take instructions. It cannot escape notice that on the occasion of the adjournment of the September 18, 2019 conciliation meeting, the evidence reveals that it was on the 17th of September that Brocard wrote to the Ministry advising of her unavailability for the meeting. Henlin Gibson Henlin was informed on that same day that the conciliation meeting would be postponed. Miss Marshall's role was merely to facilitate the conciliation.

[157] In the other instance, a legal objection was being taken by Guardian. Miss Marshall could hardly have insisted that the conciliation proceed. I may add at this point that the claimant clearly took the view that Guardian's new attorney was or could have been instructed because that same attorney had written to the claimant advising her of the cancellation of her group insurance. Whether or not the explanation that counsel needed time to take instructions was genuine, was not for the Ministry to enquire into. Conceivably, that position could have been taken by the Ministry to mean that the probability of a settlement was still alive.

[158] Any consultation with the claimant prior to adjourning, could hardly have been with a view to deciding whether the conciliation session would take place as arranged; it could only be by way of advising the claimant of the third defendant's position that was communicated to the Ministry. Even if there were instances when the communication was lacking as between the claimant and the Ministry, that is a far way removed from saying that was a breach of her right to a fair hearing or to a hearing before an independent an impartial tribunal. one regards the right of access as part of the right conferred or not.

EXISTENCE OF OTHER ADEQUATE MEANS OF REDRESS

[159] In relation to the rights conferred by Article 6 in the case of the Convention, state parties have the primary responsibility to secure to their citizens or to persons within their jurisdiction those rights. I accept Mrs Gibson Henlin's argument that the section 16 right is to be construed as an integral part of the rule of law and that justice can only be done if the facility provided by such an important provision is actualised for the benefit of the parties for whom it is intended. However, where a public authority fails or refuses to act or acts improperly in our jurisdiction, there is clearly no automatic breach and even where there is, the right is not to be vindicated through a constitutional claim when another adequate remedy is available.

[160] As earlier observed, the Minister may be compelled to act. This point was made in the seminal case of **Council of Civil Service Unions and Others v Minister for the Civil Service** [1985] AC 374 and applied in numerous cases, especially in the labour law arena within this jurisdiction. The remedy for the minister's failure to act is judicial review and there was no bar to an application to the court to determine her right to a decision by the minister. There was a remedy which the claimant recognized was available to her. As Mr Powell observed, the claimant must have so recognized when she made her application for leave to apply for judicial review in May 2019.

[161] Accepting as I do, the majority judgment in **Golder** that a right to access is conferred under Article 6-1,and thus by analogy that such a right may be

conferred by our Charter provisions, in circumstances where there was another route through judicial review for the claimant to attain her desired end result, she is barred from constitutional relief via section 19 if of course judicial review is to be regarded as an adequate remedy.

[162] In **Deborah Chen v The University of the West Indies,** Mc Kenzie J refused to allow the claimant to pursue a constitutional claim. The claim was struck out in circumstances where it was determined that the claimant had an alternative common law remedy. Simmons JA in the recent Court of Appeal judgment confirming the decision of Henry McKenzie J, summed up the matter by observing that:

> ***"The appellant had the benefit of counsel from the outset and should have commenced proceedings for judicial review. Instead, she filed a claim for constitutional relief, which according to the decisions of Ramanoop and Harrikissoon, should be a remedy of last resort and is not a "general substitute for the normal procedures for invoking judicial control of administrative action" (per Lord Diplock in Harrikissoon)."***

[163] The claimant cited the case of **Merson v Cartright and Another** [2005] UKPC presumably with a view to establishing that the existence of an alternative means of redress does not necessarily preclude the bringing of a constitutional claim. That case is wholly distinguishable as it deals with the question of the award of constitutional damages alongside damages for the nominate torts and the question of whether there was duplication in the award.

[164] Case law has made it clear that it is an abuse of process to seek to avail one's self of a constitutional remedy when there is another avenue through which adequate redress may be achieved.

[165] In **Durity v Attorney General of Trinidad and Tobago** 2002 UKPC 20, the question of whether the claimant had an alternative remedy and whether the claim was an abuse of process were addressed. On the facts of that case, it was ultimately decided that there was no abuse of process but it was nevertheless observed by the Judicial Committee of the Privy Council that ***"it will usually be important to consider whether the impugned decision or***

conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction." (see paragraph 35 of the judgment).

[166] The appropriateness of the use of a constitutional remedy also was examined at length in **The Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15. The following principles were expounded at paragraphs 23 to 26 of the judgment:

> ***23."The starting point is the established principle adumbrated in Harrikissoon v Attorney-General of Trinidad and Tobago [1980] AC 265. Unlike the constitutions of some other Caribbean countries, the Constitution of Trinidad and Tobago contains no provision precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available. The Constitution of the Bahamas is an example of this. Nor does the Constitution of Trinidad and Tobago include an express provision empowering the court to decline to grant constitutional relief if so satisfied. The Constitution of Grenada is an instance of this. Despite this, a discretion to decline to grant constitutional relief is built into the Constitution of Trinidad and Tobago. Section 14(2) provides that the court "may" make such orders, etc, as it may consider appropriate for the purpose of enforcing a constitutional right.***
>
> ***24. In Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268 (emphasis added).***
>
> ***25. In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A***

typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

26. That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206.

[167] **Ramanoop** was applied in **Brandt v Commissioner of Police and others (Montserrat)** [2011] UKPC 12, and **Rohan Fisher v Attorney General of Jamaica and Assets Recovery Agency** [2021] JMFC Full 4. At paragraph 35 of **Brandt**, it was authoritatively laid down that:

> ***…. to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature "which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate". The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328….***

[168] The case law demonstrates that constitutional relief is a measure of last resort and that where there is otherwise available adequate means of redress, constitutional relief, should not be sought unless the circumstances include some special feature that makes it appropriate to take this action. In the absence of this feature it would be considered a misuse of the court's process to seek constitutional relief.

[169] As was said at paragraph 115 of **Rohan Fisher v Attorney General of Jamaica and Assets Recovery Agency** (supra):

> ***"What is evident from the cases referred to is that although the Courts have a somewhat flexible approach when it comes to constitutional matters the flexibility only comes into play where there are some special features in the case. So therefore, it is not impossible to invoke the constitutional jurisdiction of the court even where there is an alternative remedy, however there must***

> ***be some special feature. It would therefore be incumbent on the Claimant to demonstrate the existence of this special feature in his case, which he has failed to do. The Claimant has therefore failed to establish that he has exhausted all available alternative remedies."***

[170] The claimant has not advanced any special feature of her case showing that the remedy of judicial review was not adequate so as to take the proceedings out of the category of cases where judicial review may be regarded as an inadequate remedy.

WHETHER IN LIGHT OF THE FACTUAL CIRCUMSTANCES THERE COULD HAVE BEEN A BREACH OF THE CLAIMANT'S RIGHTS

[171] Although I am firmly of the view that the claimant had an alternative remedy, and hence it is not strictly necessary to do so, I will examine the matter in terms of the time construct to see if in all the circumstances the section 16(2) right to a hearing within a reasonable time would have been infringed. Apart from the two specific complaints regarding the adjournment of the conciliation proceedings and the alleged staying of the conciliation proceedings, which I have already addressed, the complaints regarding the deprivation of the rights to a fair trial and to a trial before an independent and impartial tribunal was alleged in this case presumably because of the purported hindrance to access by the claimant as at the time of the filing of her claim. There were no specific complaints such as bias regarding any particular tribunal. Neither was it alleged that that there was any unfairness such as the denial of the facilities and the other benchmarks by which a fair trial is gauged. The substance of the complaint is really the length of time that transpired and the circuitous route to the Minister's desk. It is that process which triggers the reasonable time enquiry.

[172] I now embark upon the question of whether in the circumstances, especially given the length of time that transpired, the claimant's persistent efforts and the reasons offered for the delay in the Minister making a ruling on the matter, there is a proper basis for saying that the reasonable time guarantee was breached. In **Patrick Chung v Attorney General and the Director of Public**

Prosecutions, a case cited by Miss Dickens**,** Harris J (as she was then),observed that the applicable position in Jamaica when looking at whether for the purposes of a breach of section 16(1) of the Charter, a criminal charge has been heard within a reasonable time, the relevant period begins at the earliest time when a defendant is officially advised as to the likelihood of criminal proceedings being initiated against him which in that context would be when he is charged or served with a summons. It was the submission that a similar analysis ought to be made in a civil case as parallels can be drawn between a civil case and the criminal case in this regard.

[173] Miss Dickens pointed to paragraph 11 of **Ernest Smith & Co. (A Firm) et al v The Attorney General of Jamaica** where it was said that the JCPC's approach in the case of **Bell v DPP** was to accept the methodology employed in the US case of **Barker v Wingo** (supra) where the issue was whether the right to a speedy and public trial was breached. In the cases decided against the background of Article 6 - 1 of the European Convention on Human Rights, it has been said that "reasonableness" has to be assessed against the background of the circumstances of the case, considering such factors as the complexity of the case, the conduct of the applicant and relevant authorities; and what was at stake for the applicant in the dispute. In **Bell v DPP,** Lord Templeman referenced the need for the courts of Jamaica to balance the fundamental rights of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration.

Is an unreasonable delay enquiry justified.

[174] In "tweaking" the method of assessment in a criminal case so as to be applicable in a civil case as Sykes CJ suggested, when dealing with the time consideration, the relevant point of commencement for reckoning time would be the date Mrs Allen wrote to the minister; that is December 2018. The parties all seem to agree that the relevant period of delay would be two years.

[175] In answering this question by dint of Cromwell J's methodology, is to decide on an objective basis what amounts to a reasonable time from the date of the

referral to the time the Minister made a decision. It is within this context that institutional delay and inherent time requirements of the particular case becomes relevant. The institutional delay in this scenario would include the time taken for communication between the Ministry and the parties with a view to firstly ascertaining whether local level discussions had taken place and if it did not, invite the parties to engage in such discussions, allow time for the discussions to take place and thereafter arrange conciliation meeting or meetings if necessary. In this instance, if the two years' delay does not trigger a Charter enquiry, that should be the end of the matter. I accept Miss Dickens' submission that the claimant has not put forward any evidence as to what is a reasonable timeline for the conciliation process. It is accepted that the process of referring a matter to the IDT ought not to be nearly as time consuming as the trial process, particularly where a case meanders through various stages of hearing. It may reasonably be said that in the context of an administrative decision as to whether a referral to the IDT should be made, a Charter enquiry is triggered where the process took some two years.

What is a reasonable time for disposition of the case – Is the delay reasonable in light of the circumstances of the case.

[176] In undertaking this enquiry, it is critical that this court has regard to what was required in the process after the matter was referred to the Minister. This may be demonstrated by an assessment of the processes and procedures to be employed before a matter is referred to the IDT. This explanation was undertaken by E Brown J (as he was then) in the case of **Othniel Dawes and Robert Crooks v Minister of Labour and Social Security** [2013] JMSC Civ. 164. The claimants were employed to the National Solid Waste Management Authority (NSWMA) as Public Cleansing Inspectors. Following their dismissal from their employment, the unions which represented them participated in unsuccessful conciliation meetings. Thereafter the unions requested the Minister to refer the matters to the Industrial Disputes Tribunal. Upon a refusal to refer the matter to the IDT on the basis that the request for referral was made under the March 23, 2010 amendment of LRIDA and the claimant's

dates of dismissal preceded the date of the amendment, the claimants applied and were granted leave to apply for judicial review.

[177] At the judicial review hearing, the claimants sought orders for mandamus and certiorari. One of the issues before the court was whether the minister misdirected himself in law when he decided that he could not exercise his discretion to refer the disputes to the IDT unless it fell within the definition of an industrial dispute as defined in the legislation prior to the 2010 amendment, that is, in the absence of evidence of either a threat of industrial action at the NSWMA or that a reference ought to be made in the public or national interest.

[178] Evan Brown J at paragraph 34, said in relation to the LRIDA:

> ***. "Under the LRIDA a system of referrals of industrial disputes to the IDT is set down. The referral to the IDT is a last resort in the vast majority of cases, as the legislative scheme contemplates the use of various settlement methods before referral to the IDT. It is only upon failure of these methods that the referral is made by the Minister…"***

After demonstrating the dispute settlement policy of the LRIDA by reference to sections 6(2) and 9. Brown J said at paragraph 37:

> ***. "In most other cases the Minister's referral of the industrial dispute to the IDT is preceded by other grievance resolution procedures. Where the Minister acts on a written report, he has to be satisfied that the parties exhausted such means as were available to them to settle the dispute. If no report was made to him, the Minister may either refer the dispute to the IDT or give directions to the parties. If he chooses to make a referral, he must similarly be satisfied of the resort to and failure of other means available to the parties for the resolution of that dispute. In case in which the Minister gives directions to pursue specified means of dispute resolution, the referral does not come until he has been advised of the failure of that specified means."***

[179] The learned judge examined the provisions of LRIDA before and after the 2010 amendment, in relation to section 11A before the amendment he said at paragraph 41- 43

> ***41. "Under section 11A the Minister may on his own initiative refer an industrial dispute to the IDT if he is satisfied that the dispute should be settled expeditiously. That he may do notwithstanding the provisions of sections 9, 10 and 11. He may do so in one of two sets of circumstances. First, he may make***

the referral upon being satisfied of the parties' unsuccessful resort to the means available to them. Secondly, he may make the referral if it is expedient to do so. That expedience is demonstrated by circumstances surrounding the dispute constituting an urgent and exceptional situation, in the opinion of the Minister.

42. Instead of referring the dispute to the IDT, the Minister may give directions to the parties under section 11A (1)(b), as he could under section 9(3)(b). The Minister may give directions if he is not satisfied that the parties made all attempts to settle the dispute by all means available to them. In giving directions, the Minster will specify the means to be pursued to settle the dispute. Additionally, he may fix a time within which the dispute should be settled.

43. If the Minister has not received a report from the parties at the end of the time fixed for the settlement of the dispute, the Minister may refer the dispute to the IDT. He may also refer the dispute to the IDT upon the written report of any of the parties that the means the Minister specified for settlement of the dispute were unsuccessfully tried. In this latter respect the provision of section 11A(2) is similar to that of section 9(4).

[180] Brown J, then considered the 2010 amendment. At paragraph 57 he said "Section 3 of the LRIDA 2010 effected two changes to section 11A of the LRIDA. First, the words "and should be settled expeditiously" were deleted from section 11A(1). Secondly a new subsection 3 was inserted." The import of the deletion and the introduction of the new subsection is that a procedural prescription has been set out for the Minister in the exercise of the discretion to refer a dispute to the IDT.

[181] At paragraph 87 Brown J held after detailed consideration of the reason for the amendment that "under Section 11A of the LRIDA in the post 2010 era, it is no longer a condition that the Minster be satisfied that the dispute "should be settled expeditiously". Referral to the IDT is still a matter of last resort and the Minister may still give directions to the parties under s.11A(2). The critical change is that the Minister's referral is no longer predicated on a threat to industrial peace, the national economy or the public interest. Under s. 11A(3)(b), the Minister does not have to show that any industrial action has been, or is likely to be taken in contemplation or furtherance of the dispute."

Consequently, the court found that the minister's decision not to refer the matter to the IDT was illegal and should therefore be quashed.

[182] Bearing in mind all the matters set out by Brown J, it seems clear enough that the Minister could not simply upon a request by the claimant, without either deciding that it was expedient to make a referral, or that all attempts to settle the matter by other means had been made before referring the matter to the IDT. That expedience which would warrant a referral without being satisfied that all attempts to settle had been made, may only be demonstrated by circumstances of the dispute which rendered it urgent and exceptional in the opinion of the minister. The claimant has not demonstrated that the circumstances of her case were urgent and exceptional so as to warrant a referral before the minister was satisfied that all attempts at settling the dispute had been made. It must be borne in mind as Brown J said that referral to the IDT is for the most part, a measure of last resort.

How much of the delay is to be counted against the state

[183] The next question is how much of the delay is to be counted against the state. In addressing institutional resources there is need for a balance to be struck between absence of sufficient resources and the need for the powers that be to put in place sufficient resources so that Charter right can be duly observed. More importantly however, are the reasons advanced. While I cannot help but say that the actions of Guardian stymied the process, the actions of Guardian cannot be attributed to the Minister in circumstances where some effort was being made to advance the matter. Miss Dickens has sought to explain the delays on the part of the Minister. In some instances, reasonable explanations have been advanced.

[184] Mrs Gibson Henlin advanced that there was an initial period of inaction of some 6 months. It was not in fact six months, but a period of under 5 months. There was undeniable tardiness in this period but one cannot ignore the explanations offered. It is to be noted that the flurry of letters from Miss Marshall and the consequent responses from Henlin Gibson Henlin and Guardian seemed to have been propelled by two things; Mrs. HGH's letter of

May 6, 2019 and apparently, more so the service upon the Ministry of Mrs Allen's application for leave to apply for judicial review. By the 4th of June, the Ministry had proposed dates which was not convenient to Guardian's new attorney.

[185] I also accept Miss Dickens' position that the time construct in terms of the processes at the Ministry against the background of available resources is a relevant factor, although a balance must be struck between such constraints and the need to observe the Charter right to a hearing within a reasonable time. In **Lupeni**, it was observed that repetition of judgments and the quashing of previous findings and remitting of the case due to errors in the lower courts as well as lack of clarity and foreseeability with regard to the domestic law, which rendered examination of the case difficult and in large measure contributed to the delay were in essence institutional problems, that is shortcomings in the justice system. Such shortcomings it said, was imputable to the national authorities and essentially did not provide justification for the delay. That observation is apposite in this case. In that instance, the delay was some 10 years and was held to infringe the right to a hearing within a reasonable time.

[186] It may reasonably be argued that the jurisprudence and practice surrounding labour relation disputes and the referral of matters to the IDT ought to be sufficiently familiar to the Minister but as Miss Dickens submitted, it was not unreasonable that the Minister should have sought to take legal advice having regard to the existence of two conflicting decisions emanating from the supreme court on the matter of the non- unionized worker's right to access when the dismissal is on the basis of redundancy. The time required to address that issue however, should not ordinarily have been months. It must be remembered that there were three different ministers holding the portfolio during the period, with one of them being ill during the period. All parties agree that the matter was regarded as quite a contentious one. It is not therefore unreasonable that the ministry personnel would also have been exercising caution in determining how the matter proceeded. It is accepted however that the Ministry's position as evidenced in an internal memorandum

dated August 13, 2020 directed to Minister Mike Henry that it was at that time premature to refer the matter to the IDT, reflected a lack of appreciation for Guardian's position that it was not amenable to conciliation on account of the claimant maintaining her court action as well as seeking to have the matter dealt with under LRIDA.

[187] In relation to matters such as Guardian engaging a new attorney at law and the new attorney not being privy to certain documents, no fault can be ascribed to the Minister. She pointed to the fact that it was by letter of June 9, 2019 that the Ministry was advised of the involvement of the new attorney for Guardian. This was on the first occasion when a new attorney at law was engaged. It is noted that it was being made to appear by letter of Henlin Gibson Henlin dated July 4, 2019, that it was the Ministry's fault why the meeting was being adjourned, when in fact, it was Mr Goffe who had advised that he could not proceed without the necessary documents. This letter of July 4 must be understood in context because the claimant was there saying that Mr Goffe was alleging that his request from the Ministry for a copy of Mrs Allen's letter of complaint was not met. However, one cannot ignore what transpired before.

[188] In the letter dated June 11, 2019 from the Ministry to Henlin Gibson Henlin, the Ministry had intimated that Mr Goffe, Guardian's new Attorney, was 'demanding' a copy of Mrs Allen's letter of December 18, 2018 referring the matter to the Ministry. This was against a background where the Ministry was saying to Henlin Gibson Henlin that the letter did not reveal whether there was any local level effort at resolving the dispute. The letter made it clear that it was on that basis that Guardian, through Mr Goffe, was demanding the copy letter of referral and enquiry was made as to whether Henlin Gibson Henlin had any objections to Mr Goffe being provided with a copy of the letter. Henlin Gibson Henlin's response was not helpful either, and did not further the process. The response by way of letter dated June 18, 2019 from Henlin Gibson Henlin was that if "you [the writer was Miss Marshall] are not of the view that the letter can be sent without our authorization, then we will not provide our consent." It is quite arguable that but for this stance, it is probable

that some kind of discussions could have taken place on the 20th of June 2019. This is a relevant factor in the context of the reasonable time guarantee, as the conduct of the claimant is also to be in the reckoning.

[189] The Minister cannot properly be said to be responsible for the fact that the meeting of the 20th of June did not in any way advance the matter. I have not detected any instance of any deliberate attempt on the part of the Ministry to stall the process. Many of the reasons advanced fall in the category of neutral reasons which ought to be taken into account when calculating the length of the delay, albeit to be weighed less heavily in assigning blame to the Minister. Other reasons advanced were valid reasons which offered some justification for delay.

[190] In many of the cases where the courts found that there was unreasonable delay that rose to the level of a constitutional breach, there were extended periods of delay. In **Crompton v The United Kingdom** (supra), the applicant who was employed to the Ministry for Economic Affairs of the French Republic was advised in December 1985 that he would be dismissed. He lodged applications for judicial review in February, March and June of 1986. His applications were dismissed in 1989. The applicant gave notice of appeal in October 1989. He lodged his grounds of appeal in February 1990. In a judgment dated May 1995, and served on the applicant October 1995, the appeal was dismissed. The court considered in that case that an employee who considers that he has been wrongly dismissed or suspended has an important personal interest in receiving a judicial decision on the lawfulness of that decision in a prompt manner because employment disputes require expeditious having regard to what is at stake for the individual concerned who would have lost his means of subsistence. In that case, the court considered the delay excessive and a violation of the reasonable time standard.

[191] In **Lupeni Greek Catholic Parish and Others v Romania** (supra) the assets of the Greek Catholic Church were confiscated and transferred to the state and the Orthodox Church. Decree 126/1990 permitted a joint committee to determine the legal status of the property seized, failing which the applicants could seek to have their rights determined by the courts. The applicants'

attempts to recover possession of the property before the Joint Committee were unsuccessful. On May 23, 2001, the applicants commenced recovery proceedings in the County Court. Following two rounds of litigation and remissions first from the High Court and then from the Court of Appeal, the matter was finally considered by the County Court. Appeals from the County Court to the High Court resulted in the delivery of a final decision on June 15, 2011.The applicants petitioned the European Court of Human Rights where they complained inter alia, that their right to access to the court and to a fair hearing within a reasonable time under Article 6 of the Convention were breached.

[192] In relation to the right to a fair trial within a reasonable time, the court held that there had been a violation of the right. The court considered that in respect of the second applicant the case was before the court for 10 years, three weeks and heard at three jurisdictional levels. In relation to the first and third applicants, for five years and heard at three jurisdictional levels. It considered the reasonableness of the length of the proceedings. In this regard, the court noted that the applicants cannot be criticized for any delay in the proceeding. It was also noted that the stay of the proceedings sought by the applicants was aimed at reaching a settlement. Additionally, that the proceedings were suspended on several occasions to accommodate the parties initiating the joint committee procedure. The court also took account of the several remissions from the higher courts to the lower court and considered that this is usually done due to errors by the lower court. This the court pointed to short comings in the judicial system. The court also considered that the case was not a complex one and concluded that these shortcomings were imputable to the national authorities.

[193] **In Frydlender v France** Application no. 30979/96 the court found that the proceedings went on for 9 years and 8 months. Of that period the Conseil d'Etat took six years to deliver judgment for which they provided no explanation. Further, the delay could not be explained by the complexity of the case nor the applicant’s conduct. The court found that the length of time

was excessive and that this breached the applicant's right to a trial within a reasonable time.

[194] This court is in no way suggesting that it be necessary tht delays be as extended as they were in the cases decided under Article 6 – 1. It is fully recognized that the delay in each of those instances was indeed quite excessive. The more important factor however is the absence of any reasonable explanation offered for the delay.

Has the claimant contributed to the delay and has she asserted her rights

[195] On the matter of the responsibility of the claimant to assert her rights, there was no reticence on her part. Her attorney at law incessantly made contact with the Ministry urging that the process be accelerated and in many instances, voicing displeasure at the pace at which the matter was moving. With the exception of the one instance explained at paragraphs 183 and 184 above, the claimant may fairly be said to have been cooperative and did what needed to be done to facilitate the process.

Has there been any prejudice occasioned by the delay

[196] On the question of prejudice, there is no doubt that the uncertainty as to what the outcome might be must have created some anxiety on the part of the claimant. Mrs Gibson Henlin alluded to the fact that there are financial consequences, since the claimant was put out of her job.

CONCLUSION

[197] In the end result, the claimant's case fails. There is no horizontal application of the rights conferred by section 16(2) of the Charter of Fundamental Rights and Freedom. The right to a hearing before an independent and impartial tribunal and the right to a fair hearing were not engaged as far as the first and second defendants are concerned. Even though the right to a hearing within a reasonable time was engaged, the right was not breached by the first and second defendants. The fact of the delay meant that access was delayed,

hence the engagement of that right. Although the time frame of two years was such as would trigger a charter enquiry, in the absence of evidence as to what is a reasonable timeframe, and in light of the explanation offered by the Ministry and by extension the Minister, there was no unreasonable delay that rose to the level of constitutional breach. This is so especially in light of the process which of necessity had to be undertaken before a referral is made by the minister.

[198] In any event, the claimant had another adequate alternative remedy in the way of judicial review which was available to her and which she declined to pursue. The availability of that remedy also meant that the claimant's right of access to trial before an independent and impartial tribunal was not denied. It has not been demonstrated by her that the right to a fair trial was affected.

[199] From a purely natural justice perspective, there was no breach of the claimant's right to a fair hearing or to a hearing before an independent and impartial tribunal as it relates to the adjournment of the conciliation proceeding in September of 2019. The claimant was not then entitled to be heard.

[200] Costs are awarded to the defendants to be taxed if not agreed.

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Andrea Pettigrew-Collins
Puisne Judge