[2013] JMSC Civ. 64

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 03377

BETWEEN	**OTHNIEL DAWES**	**1ST CLAIMANT**
A N D	**ROBERT CROOKS**	**2ND CLAIMANT**
A N D	**MINISTER OF LABOUR AND SOCIAL SECURITY**	**DEFENDANT**

IN OPEN COURT

Mr. Glenroy Mellish for the claimants.

Miss Marlene Chisholm instructed by the Director of State Proceedings for the defendant.

Heard: 12th March and 24th May, 2013

JUDICIAL REVIEW – ILLEGALITY – MINISTER'S REFUSAL TO REFER DISPUTES TO THE IDT AFTER REQUEST – PRESUMPTION AGAINST RETROSPECTIVE OPERATION OF A STATUTE – LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT SECTION 11A – ORDER FOR CERTIORARI.

EVAN BROWN, J.

BACKGROUND

[1] Both claimants were employed to the National Solid Waste Management Authority (NSWMA) as Public Cleansing Inspectors. In the case of the first claimant, he was dismissed from his employment with immediate effect by letter dated 18th March, 2009. The first claimant sought the intervention of the University and Allied Workers Union (UAWU).

[2] It was his understanding that the UAWU "complained" on his behalf to the management of the NSWMA about what he termed his "unjustified dismissal." There were conciliation meetings between Mr. Aston Johnson of the UAWAU and conciliation officers of the Ministry which failed to resolve the dispute. The dispute remaining unresolved, the UAWU requested the Minister to refer the dispute to the Industrial Disputes Tribunal (IDT).

[3] As it concerns the second claimant, he was summarily dismissed from the NSWMA on the 20th June, 2008. At the request of the second claimant, the Jamaica Civil Service Association (JCSA) intervened. Through the intervention of the JCSA the dispute surrounding the dismissal of the second claimant was also referred to the Ministry. Unsuccessful conciliation meetings were scheduled and may have been held at the Ministry between 16th December, 2008 and 23rd September, 2010 according to the second claimant. Thereafter, the JCSA requested the Minister to refer this dispute to the IDT.

[4] There was uncertainty as to whether the dispute involving the second claimant was referred to, and later withdrawn from the IDT up to November, 2010. In any event, Counsel acting on behalf of both claimants wrote to then Minister of Labour and Social Security, the Honourable Pearnel Charles, urging him to refer both matters to the IDT. The last of a number of letters to the Minister, dated 28th March, 2011, again entreated the Minister to make the referrals to the IDT under section 11A of the **Labour Relations and Industrial Disputes Act (LRIDA)**. The claimants' entreaties appear not to have been acceded to.

[5] On the 7th November, 2011 the claimants were granted leave to apply for judicial review. In their Notice of Application for Court Orders, filed on the 18th May, 2011, the applicants/claimants sought two principal reliefs. First, an order of mandamus to require the Minister to consider the circumstances surrounding the dismissal of the applicants and to make a determination on their request for referral of the disputes to the IDT according to law. Secondly, a declaration that the failure of the Minister to make a reference having regard to the failure of the

parties to reach a settlement by the route of conciliation at the Ministry of Labour and Social Security (the Ministry) is *ultra vires*.

[6] In furtherance of the grant of leave, the claimants filed a Fixed Date Claim Form (FDCF) on the 15th November, 2011. In that FDCF the claimants abandoned the quest for a declaration but maintained the claim for an order of mandamus. The FDCF was supported by evidence of the claimants on affidavit.

[7] The present Minister, the Honourable Derrick Kellier assumed office in January 2012 and became aware of "an unresolved matter regarding the Claimants." In his affidavit which was filed on the 31st July, 2012, the Honourable Derrick Kellier said he noted that the claimants requested his predecessor to refer their dispute to the IDT under the March 23, 2010 amendment of the **LRIDA**. Noting that the claimants' employment had been terminated on dates antecedent to the passage of the amendment, he formed the view that their case fell outside of the ambit of the amendment. The Honourable Minister then decided he was not in a position to exercise his discretion to refer the disputes to the IDT.

[8] The Hon Minister gave two reasons for deciding in the way he did. In the first place, there was no evidence before him that there was any threat of industrial action at the NSWMA. Secondly, there was no evidence before him that a reference ought to be made in the public or national interest. He thereafter communicated his decision to the claimants' Attorney-at-Law by letter dated 6th June, 2012.

[9] Following this decision of the Minister, the claimants filed their "Further Amended" FDCF on the 27th June, 2012 and obtained leave to apply for an order of certiorari from the same judge who granted leave on the 7th November, 2011. The order of certiorari is to quash the decision of the Minister which was communicated in his letter of the 6th June, 2012. The claimants assert the ground of illegality. The "Further Amended" FDCF was supported by evidence of the claimants on further affidavits.

[10] On the substantive judicial review, the claimants seek orders of mandamus and certiorari on the following grounds:

(i) *"The Respondent is empowered by the terms of the statute to exercise a discretion which he has failed to exercise and is therefore acting ultra vires."*

(ii) *"The decision of the Respondent is unreasonable having regard to the time that has passed and the efforts made by the parties to the dispute to settle the dispute in conciliation talks at the Ministry of Labour. In the circumstances where no reason has been given for the Respondent's failure to make a decision, the said decision appears arbitrary, capricious and unlawful."*

(iii) The decision of the Minister *"is unlawful and contrary to the policy of the **LRIDA**."*

CLAIMANTS' SUBMISSIONS

[11] In both his written and oral submissions, counsel for the claimants confined himself to the application for certiorari. He said the order of certiorari is directed at the error of law evidenced by the Minister's decision that the 2010 amendment of the **LRIDA** does not apply to the claimants. Counsel observed that the Minister placed reliance on **R v Ministry of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins ex parte West Indies Yeast Co Ltd** (1985) 22 JLR 407 (**ex parte West indies Yeast Co Ltd**). Learned counsel submitted that the most important issue for this court is whether the amendment on which the claimants rely has a retrospective effect.

[12] Before developing his argument for a retrospective application of the statute, the claimants' counsel outlined what he considered to be the policy of the **LRIDA**. In short, the policy of the LRIDA is to "promote good labour relations." That, the

submission ran, was emphasized by Rattray, P in **Village Resorts Ltd v The IDT & ORS** (1998) 35 JLR 292. Counsel placed stress on what appears at page 299-300 of the then learned President's judgment:

> *"The need for justice in the development of law has tested the ingenuity of those who administer law to humanize harshness of the common law by the development of the concept of equity. The legislators have made their own contribution by enacting laws to achieve that purpose, of which the Labour Relations and Industrial Disputes Act is an outstanding example. The law of employment provides evidence of a developing movement in this field from contract to status. For the majority of us in the Caribbean, the inheritors of a slave society, the movements have been cyclic, first from the status of a slave to the strictness of contract, and now to an accommodating coalescence of both contract and status, in which the contract is still very relevant though the rigidities of its enforcement have been ameliorated. To achieve this* ***Parliament has legislated a distinct environment including a specialized forum, not for the trial of actions but for the settlement of disputes."*** [emphasis added]

Counsel concluded that the wider access to the IDT provided by the 2010 amendment, along with a more liberal definition of an industrial dispute, is further evidence of this policy.

[13] Returning to the question of retroactivity, the claimants' counsel cited **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12 for the court's consideration. This case was decided under the **Property (Rights of Spouses) Act** (**PROSA**). Specifically, the court was directed to paragraphs 64-69 of the judgment of Morrison, J.A. and paragraphs 6-13 of the judgment of Cooke, J.A. It was

contended that in the latter paragraphs Cooke, J.A. demonstrated why the **Property (Rights of Spouses) Act** has retrospective effect.

[14] Counsel for the claimants also relied on a Jamaica Information Service (JIS) report of the then Minister's contribution to the debate on the amending Bill. Here the submission is quoted in full, "he revealed that there were 4 non-unionised workers to every unionized worker, there were 6,000 disputes involving non-unionised workers in 2008 and that the bill was designed to level the playing field."

[15] It was the claimants' counsel's contention that referrals (supposedly concerning individuals) were still being made after **ex parte West Indies Yeast**, though 'severely curtailed'. Finally, it was urged by counsel for the claimants that with no transitional provisions in the Act, "it would lead to a monumental unfairness to deny retroactive application of the Act to disputes arising before ... March 23, 2010."

[16] In his oral submissions, the claimants' counsel expanded on this latter point. It was his argument that if one accepts the Minister's position, one worker with a dispute the day before the commencement and another the day after, the former would not have the benefit of the amendment while the latter would. That he submitted could never be what the legislature intended, on the basis of fairness.

[17] Learned counsel for the claimants argued that the only person who could complain is the employer. And it certainly would be ludicrous for the employer to complain that he would have gotten away with unfairness. The submission went, before the passage of the amendment, individuals only had the common law right to be given notice before dismissal or payment instead of notice upon dismissal. However, the **LRIDA** recognised the unfairness to the individual who could not access the IDT because of **ex parte West Indies Yeast Co Ltd.**

[18] The claimants' counsel concluded his oral submissions with a look at retroactivity and vested rights. He opined that it is usually said that retroactivity protects vested rights. It was his position that courts have commented on the difficulty in defining what these vested rights are. In any event, the submission continued, there can be no vested right in dismissing someone unfairly, which was the main purpose for establishing the IDT.

DEFENDANT'S SUBMISSIONS

[19] Learned counsel for the defendant, in her written submissions, submitted that there are two issues for the court's determination. First, whether the Minister is compellable by mandamus to refer the claimants' dispute to the IDT? If not, then secondly, whether the Minister lawfully exercised his discretion not to refer the claimants' dispute to the IDT?

[20] It was submitted that since the Minister has exercised his discretion under section 11(A) of the **LRIDA**, the application for mandamus should fail. Before the court the defendant's counsel added that the application for mandamus is now otiose. Otiose because the claimants were granted leave to apply for judicial review as the Minister had not made a decision. Since then, the Minister has made a decision.

[21] The defendant's counsel further submitted that the Minister lawfully exercised his discretion. Learned counsel premised that submission on the proposition that the amendments effected to the LRIDA on the 23rd March, 2010 do not have retrospective operation. Learned counsel sought to ground her position in the presumption against retrospective operation of a statute unless it appears clearly from the statute's provisions.

[22] She contended that if Parliament intended otherwise the language of the statute would have been different. Section 12(4)(a) of the **LRIDA** was prayed in aid by way of illustration. Under that section the IDT is explicitly given the power to

make awards with retrospective effect. Indeed, the draftsman according to counsel, was not shy in using the word 'retrospective' in both sections 12(4) (a) and 12(4) (A).

[23] In her oral submissions learned counsel for the defendant also submitted that the court has to decide first whether the provision is in fact retrospective. Her authority for saying that is **West v Gwynne** [1911-13] All ER Rep Ext 1672. In support of her argument against a retrospective reading of the **LRIDA**, the defendant's counsel also cited **The Colombo Apothecaries Company Ltd v E.A. Wijesooriya and Others** Privy Council Appeal No. 8 of 1969. There it was held that a statute can be made to operate before its enactment provided the language is clear and unambiguous. Finally, counsel for the defendant cited **K. Ram Banda v The River Valleys Development Board** S.C. 31/1966- Labour Tribunal Case 8/24713. In that case it was held that a statute cannot apply retrospectively to terminate a contract of service as that would be an interference with vested rights.

THE ISSUES

[24] The issues for the court appear to be, did the Minister, the person entrusted with the discretion to refer the dispute to the IDT, correctly understand the impact of the 2010 amendment on the **LRIDA** when he held that the disputes were not referable, arising as they did, before the passage of the amendment? In other words, did the Minister misdirect himself in law when he decided that he could not refer the claimants' dispute to the IDT because the 2010 amendment did not have retrospective effect? Secondly, did the Minister misdirect himself in law when he decided that he could not exercise his discretion to refer the disputes to the IDT 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?

LAW AND ANALYSIS

[25] In the celebrated House of Lords decision in **Council of Civil Service Unions and Others v Minister for the Civil Service** [1985] 1 A.C. 374,408, Lord Diplock articulated the scope of judicial review with characteristic perspicuity. Judicial review was declared to be the means by which the courts exercise control over administrative action.

[26] In order to invoke the judicial review jurisdiction of the court, the decision must have certain inherent characteristics. According to Lord Diplock, the effect of the decision upon the subject must be:

> *(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or either*
>
> > *(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or*
> >
> > *(ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be* withdrawn.

[27] Those decisions are reviewable under any of three recognised heads. Without attempting to lay down a closed list, at pages 410-411 Lord Diplock expressed those as illegality, irrationality and procedural impropriety. These grounds for judicial review have been accepted and applied in this jurisdiction for some time. See, for example, **R v Commissioner of Customs and Excise ex parte A. & F. Farm Produce Company Ltd and Andre Chin** (1993) 30 JLR 462.

[28] This application for judicial review is concerned with only the first ground. By illegality Lord Diplock said he meant that "the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to

it." Langrin J (as he then was) adopted and applied this learning in relation to a domestic tribunal in **Regina v The Jamaica Racing Commission ex parte Harold Clemetson** (1994) 31 JLR 390, 395-396. Before the court can declare a questioned decision illegal, the court must construe "the content and scope of the instrument conferring the duty or power upon the decision-maker" (**De Smith's Judicial Review** Sixth edition paragraph 5-003). In ensuring that the decision-maker's power was exercised in harmony with the 'scope and purpose' of the instrument, the court acts as the guardian of Parliament's will.

The LRIDA BEFORE MARCH 23, 2010

[29] The **LRIDA** entered the Jamaican legislative landscape on the 8th April, 1975. This Act has been described as "the most important piece of legislation regulating industrial relations in Jamaica" in **Industrial Relations Law and Practice in Jamaica** page 149. The **LRIDA** became the vehicle through which certain deficiencies in the old law were to be corrected. One such deficiency was the inability of the tribunal under the **Public Utility Undertakings and Public Services Arbitration Law** to order reinstatement where it found a dismissal to have been unjustified. The tribunal could only award compensation.

[30] The following is a summary of the main provisions of the **LRIDA**: (i) establishment of a permanent arbitration panel in the IDT, (ii) provision for the settlement of disputes in the essential services, (iii) provision for the settlement of disputes in non-essential services establishments proclaimed by the Minister to be of national interest, (iv) rights of workers in relation to trade union membership, (v) the taking of representational poll to determine bargaining rights, (vi) reinstatement of workers found to have been unjustifiably dismissed by the IDT, (vii) the making of legally binding awards by the IDT, (viii) the appointment of boards of enquiry and (ix) the promulgation of a Labour Relations Code. (See **Industrial Relations Law and Practice in Jamaica** page 150)

[31] Section 3 of the **LRIDA** mandated the Minister to prepare and lay before the Houses of Parliament a draft labour relations code (LRC). The LRC should contain practical guidance which "would be helpful for the purpose of promoting good labour relations." The guidance given by the LRC should be in accordance with, among other principles:

> *"The principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration."*

The LRC was laid before the Parliament in 1976. The **LRIDA** also gave the Minister power to "make regulations for the better carrying out of the provisions of [the] Act."

[32] As was observed by Rattray, P this troika of instruments, that is, the **LRIDA**, LRC and Regulations, "provide the comprehensive and discreet regime for the settlement of industrial disputes in Jamaica." (See **Village Resorts Limited v The Industrial Disputes Tribunal and Others** (1998) 35 JLR 292,299) Against this background, it is noteworthy that the **LRIDA** "was intended to provide third-party settlement of disputes generally and not only those related to essential services."(See **Industrial Relations Law and Practice in Jamaica** page 150) In the view of the author of that text, the chief point of distinction between the old and new law is the facility for the resolution of disputes. Under the old law the "arbitration tribunals were ad hoc and appointed for each dispute." However, under the **LRIDA** "a permanent IDT was established to deal with all disputes."

[33] Industrial dispute was given a closed meaning under the **LRIDA**. In so far as is relevant for present purposes, section 2 of the **LRIDA** defined industrial dispute as:

> *"a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, where such dispute relates wholly or partly to-*
>
> *(a) ....*

(b) engagement or non-engagement, or termination or suspension of employment, of one or more workers."

[34] 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 the failure of these methods that the referral is made by the Minister. For example, section 5(3) of the **LRIDA** commands the Minister to refer a dispute concerning the taking of a ballot, which he has failed to settle.

[35] Perhaps most demonstrative of the dispute settlement policy of the **LRIDA,** is the deemed 'implied procedure' enshrined in section 6 (2) dealing with collective agreements made after the effective date. The parties are enjoined to 'first endeavour' to settle their dispute or difference by negotiation between themselves. Where the parties have so endeavoured but failed to resolve the issue, any or all of them may in writing request the Minister to assist in its settlement by means of conciliation. It is only if the Minister's conciliatory intervention and their own negotiation endeavour fail that they may then request the Minister in writing to refer the dispute or difference to the IDT. Indeed, it has been elsewhere stated that section 6 evidences the general legislative policy for the settlement of disputes: ***ex parte* West Indies Yeast Co. Ltd.** (1985), 22 J.L.R. 407, 410-411.

[36] This theme also runs through the provisions of section 9 which deals with industrial disputes in an undertaking which provides an essential service, with one exception. That is, in the case of an unlawful industrial action taken in contemplation or furtherance of an industrial dispute, the Minister may refer that dispute to the IDT as soon as he is satisfied of its unlawful character: section 9 (6) of the **LRIDA**. Therefore, in the case of an unlawful industrial action in an establishment providing an essential service, the Minister does not need to be

satisfied of local efforts to resolve the industrial dispute before making a referral to the IDT.

[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 cases 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.

[38] This requirement of prior action runs the gamut of section 10 of the **LRIDA**, under which the Minister may act in the national interest in the case of non-essential services. The Minister may, by order subject to negative resolution of the House of Representatives, declare that industrial action taken in contemplation or furtherance of an industrial dispute "is likely to be gravely injurious to the national interest." It must first appear to the Minister that there is an existing industrial dispute and industrial action in contemplation or furtherance thereof has begun or is likely to begin. The Minister's declaration is predicated on the real or apparent interruption in the supply of goods or services "of such a nature, or on such a scale, as to be likely to be gravely injurious to the national interest."

[39] On or before the date of the publication of the order, the Minister must cause both a copy of the order and written directions to be served on the parties to the dispute. The written directions must do two things. First, the directions must require the parties to refrain from taking or continuing their industrial action in contemplation or furtherance of the dispute. Secondly, the directions should require the parties to adopt the means available to them to settle the dispute within thirty days of the date of service. The referral is not contemplated until the

Minister has received written information that all the means available to the parties for settlement of the dispute were unsuccessfully adopted.

[40] Unlike under sections 9 and 10 of the **LRIDA** the Minister's referral under section 11 is at the request of all the parties to the dispute. However, if there is an extant collective agreement between the parties with procedure for the settlement of the dispute, the Minister will not make the reference unless that procedure was exhausted. At any time before the IDT commences to deal with the dispute, the referral may be withdrawn by the Minister upon the written request of all the parties. Section 11 is made subject to sections 9 and 10.

[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 the means available to them. In giving directions, the Minister 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).

[44] Section 12 of the LRIDA addresses the time within which the IDT is to make its awards. Secondly, subsection (3) speaks to the giving of reasons for an award, if the IDT "thinks it necessary and expedient." Thirdly, under subsection 4 the awards may be made with retrospective effect from the date of the dispute. By a 2002 amendment, inserting a subsection (4A), the retrospecivity of subsection (4) could be made to a date earlier than the date of the dispute. As a corollary, a new subsection (4B) sets out the circumstances contemplated by subsection (4A). Among them is subsection (4B) (b), under which the award may be made from the date of dismissal in the case of an unjustifiably dismissed worker.

[45] Fourthly, section 12 (4) (c) makes the awards of the IDT unimpeachable in any court, save on a point of law. Fifthly, under subsection (5) (a) the IDT has the power to (i) order the cessation of industrial action or (ii) order employees to desist from taking industrial action connected with a dispute referred to it. In 1986 an amendment made the IDT competent to make this order on the application of a party to the dispute, in spite of the absence of a disputing party from the hearing. This is of course if the IDT is satisfied that the circumstances justify that course.

[46] The order made by the IDT is deemed to be served on the parties specified in the order and all persons engaged in or threatening to take industrial action once it is published in the prescribed manner. Subsection (5C) defines the expression "published in the prescribed manner." That is, either publication in the Gazette and at least one local daily newspaper with national circulation or, at least two broadcasts over local commercial electronic media. The latter is resorted to where it is 'impracticable' to do the former: subsection (5B). In addition, any order made by the IDT has effect against all persons falling under the umbrella of the persons named in the order, whether or not they are so named: subsection (5C).

[47] As a sixth provision, subsection (5) (b) speaks to the competence of the IDT to encourage alternate dispute settlement to its arbitration procedure and to assist the parties in that regard. Seventhly, subsection (5) (c) speaks to the various orders the IDT can make in the case of a worker found to have been unjustifiably dismissed. Whereas subsection (4) (c) makes the award of the IDT both unappealable and unimpeachable save on a matter of law, subsection (6) makes the award binding on the employer, trade union and workers to whom it relates.

[48] Additionally, under this subsection the award substantively impacts the contract of employment from the effective date of the award. That is, it becomes an implied term of the contract that the rates of wages and other conditions of service are payable and observable respectively, in accordance with the award. Under subsection (7), on questions of wages, hours of work or any other terms and conditions of employment regulated by statute, the IDT is forbidden to make awards inconsistent with the enactment. Similarly, the subsection proscribes the making of an award that is inconsistent with the national interest.

[49] Subsection (9) makes the failure to comply with any order or requirement of the IDT an offence. The offence is triable in the Resident Magistrates Court. In the case of an employer, the penalty is a fine not exceeding five hundred thousand dollars and for any other person it's a fine not exceeding fifty thousand dollars. Where the offence is a continuing one, the offender becomes liable to a further penalty of twenty thousand dollars and two thousand dollars per day, respectively. Subsection (8) makes a certified copy of any award, order, requirement or decision of the IDT, signed by the chairman, prima facie evidence in all proceedings, legal and otherwise, relating to the award, order, requirement or decision. Questions of interpretation of awards are to be referred to the chairman and the issued is determined by the division which made the award: subsection (10).

[50] Section 13 of the **LRIDA** makes it an offence for both employer and employee to take part in an unlawful industrial action. It may be recalled that section 9 (5) sets

out the parameters of an unlawful industrial action. Section 14 of the **LRIDA** addresses the competence of the Minister to appoint Boards of Inquiry and matters ancillary thereto. Under section 15 of the **LRIDA** the Board must inquire into and report on the matters referred to it by the Minister. It is lawful for the Board to make interim reports and the Minister may publish any information or conclusion coming out of the inquiry.

[51] Sections 16, 16A, 17, 18 and 19 of the **LRIDA** deal with matters which may be compendiously categorized as procedural; they affect the conduct of the IDT and Boards of Inquiry. These include who may appear before either body; hearing of a dispute in the absence of a party; compelling the attendance of witnesses, whether to give oral testimony or to produce documents; the capability to sit either in private or public and enforcing compliance with the orders upon pain of conviction before a Resident Magistrate. Section 20 of the **LRIDA** imbues both bodies with the power to regulate their procedure and proceedings as they see fit.

[52] The manner of the remuneration of the IDT and Boards of Inquiry is articulated in section 21 (1). Personal immunity is given to the members of the IDT and Boards of Inquiry under section 21 (2) of the **LRIDA.** That is, they cannot be sued personally in respect of anything done in good faith in the course of the operations of either body.

[53] Section 11A was judicially considered before the amendment of 2010. In ***ex parte* West Indies Yeast Co. Ltd**, *supra* page 411, the meaning that the court accepted was that the Minister's power to refer a dispute was "only exercisable where industrial peace, the national economy or the public interest is threatened." Consequently, the Minister is without authority to act on behalf of "dismissed ex-employees" unless their dismissal gave "rise to dispute which threatens industrial peace".

[54] The learned Chief Justice accepted the reasoning of Bingham, J (as he then was) in **R v Industrial Disputes Tribunal, *ex parte* Kaiser Bauxite Co** (unreported 17 Feb. 1981), *supra* page 412-413. In that case Bingham, J (as he then was) said:

> *"even with this added power which the Minister had (s.11A) the entire scheme of the Act does not contemplate such a dispute as related between an employer on the one hand, and the non-unionised worker on the other hand which does not in any way threaten industrial peace."*

According to the learned Chief Justice, with whom the other members of the Full Court agreed, the industrial dispute must exist in an undertaking before it becomes referable: ***ex parte* West Indies Yeast.** Since industrial peace and stability existed after the dismissals, the court held the factual basis for referral to be absent.

[55] The court in **R v Minister of Labour, Social Security and Sport, *ex parte* Cremo Ltd**, M122/1998 (unreported) accepted and applied the principle declared by ***ex parte* West Indies Yeast Co. Ltd.** This case also concerned a dismissed former employee. Walker, J (as he then was) found at page 7 that "the Minister's reference was not prompted by a need to achieve or to preserve industrial peace, nor was it made in the public or national interest." He too accepted as dispositive of the case before him the fact of industrial calm at Cremo Ltd since the dismissal. Walker, J held that the dispute, "far from being an industrial dispute in the undertaking at Cremo Limited, was no more than what one might call a "one-on-one" dispute between the parties."

THE 2010 AMENDMENT

[56] **The Labour Relations and Industrial Disputes (Amendment) Act, 2010 (LRIDA 2010)** section 2 deleted the previous definition of an industrial dispute and substituted a dichotomized definition for the unionized and non-unionized

worker. Section 2(a) speaks to the former and section 2(b) addresses the latter. Since we are concerned only with the latter, only section 2(b) is set out below.

Under section 2:

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

Although a dichotomized definition was substituted relative to the unionized and non-unionized worker, like its predecessor, the substituted definition of an industrial dispute still contemplates the possibility of its existence between one worker and an employer. Reference need only be made to the similarly worded umbrella clauses appearing in both definitions of an industrial dispute.

[57] 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 new subsection reads:

> *(3) Nothing in this section shall be construed as requiring that it be shown, in relation to any industrial dispute in question, that-*

(a) *any industrial action has been, or is likely to be, taken in contemplation or furtherance of the dispute; or*

(b) *any worker who is party to the dispute is a member of a trade union having bargaining rights.*

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.

THE QUESTION OF RETROSPECTIVITY

[58] According to Lord Brightman, sitting in the UK Privy Council:

*A statute is retrospective if it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. (**Yew Bon Tew v Kenderaan Bas Mara** [1983] A.C. 553, 558)*

The most time honoured statement of the presumption against retrospectivity is to be found in **Carson v Carson and Stoyek** [1964] 1 W.L.R. 511, 516-517. There Scarman J. (as he then was) quotes with approval the following passage from **Maxwell on The Interpretation of Statutes**. He said:

"I begin my consideration of the question by a reference to a passage in Maxwell on The Interpretation of Statutes, 11th ed. (1962), p. 204, which has been so frequently quoted with approval that it now itself enjoys almost judicial authority: Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation ... They are construed as operating only in cases or on facts which came into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have retrospective

operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

Perhaps no rule of construction is more firmly established than this---that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regard matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. But if the language is plainly retrospective it must be so interpreted."

[59] The last paragraph appears in the judgment of Wright, J in the much older case of **In re Athlumney Ex parte Wilson** [1898] 2 Q.B.547, 551-552. The question in that case was whether a later statute which mandated that interest be calculated at a rate not exceeding five per cent operated retrospectively on a debt proved before its passing at a rate exceeding five percent. Giving effect to the learning in the last paragraph quoted from **Maxwell on Statutory Interpretation**, Wright J held that the alteration was not a merely in procedure but that the right to prove a debt was indistinguishable from a right of action before winding-up. A retrospective construction of the Act would therefore deprive the claimant of his pre-existing right of action.

[60] This takes us to the rationale for the presumption. According to **Bennion on Statutory Interpretation** 5th ed 2008 at page 316, "the true principle is that *lex prospicit non respicit* (law looks forward not backward)." In **Phillips v Eyre** (1870-71) LR 6 QB 1, a case arising out of the Morant Bay Rebellion, Willes, J gave perhaps the best elaboration of the thinking behind the presumption. At page 23 of the judgment he had this to say:

"Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of men is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on the faith of the then

existing law. Accordingly, the Court will not ascribe retrospective force to new law affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature."

[61] To emphasize the point, if emphasis is needed, Willes, J, at page 26, cited with approval the dictum of Chase, J in **Calder v Bull** 3 Dallas 386, who said:

> *"Every law that takes away or impairs rights vested agreeably to existing law is retrospective and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect."*

[62] Since injustice and oppression are the likely consequences of retrospectivity, it is therefore unsurprising that courts look askance at an interpretation that leads to such a result. Straughton L.J. summarizes the point in **E.W.P. Ltd. v Moore** [1992] 1 Q.B. 460,474:

> *"One requirement of justice is that those who have arranged their affairs, ... in reliance on a decision of these courts which has stood for many years, should not find that their plans have been retrospectively upset."*

It is therefore clear that there is a bias against giving retrospective force to legislation affecting vested rights in Anglo-American courts, unless that is the intention of the legislature.

[63] The law in this area developed on apparently parallel tracks, the one substantive and the other adjectival. If the statute was held to affect substantive law the presumption against retrospectivity applied, unless the statute showed a contrary intent. However, if the enactment was held to be procedural the presumption didn't apply. **Cross: Statutory Interpretation** 3rd ed. p.187, speaks of "the

presumption against the retrospective operation of statutes concerned with the substantive law" which he said "could perhaps be treated as a facet of the presumption against interference with vested rights."

[64] Implicit in Cross' approach is the idea that the presumption against retrospectivity, being a possible corollary of the presumption against the interference with vested rights, is primarily, if not all together, about legislative changes in the substantive law which impact vested rights. That was the view expressed by Lord Denning in **Blyth v Blyth** [1966] A.C.643, 666. Lord Denning said:

> *'The rule that an Act of Parliament is not to be given retrospective effect only applies to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure, or the admissibility of evidence, or the effect which courts give to evidence."*

This case concerned the presumption of condonation of adultery in divorce proceedings. There was one sexual encounter between the parties during their estrangement in 1958. The husband petitioned for divorce on the 13th December, 1962. By the time the petition came on for hearing on the 9th November, 1964, the Matrimonial Causes Act, 1963 had come into force.

[65] Section 1 of the Act inaugurated a change in the law, allowing the husband to testify in rebuttal of the presumption of condonation. The husband's evidence related to events which antedated the passage of the Act. At first instance his evidence was ruled inadmissible as, it was felt, to do otherwise would give the section a retrospective effect. Lord Morris of Borth-Y-Gest observed with Harman L.J. in the Court of Appeal that the Act contained no provision that it should not apply to proceedings which were current when the Act was passed: **Blyth v Blyth**, *supra* page 656. Later on the same page Lord Morris quoted and

expressed himself in agreement with Willmer L.J. who declared in the Court of Appeal:

> *"I think that the section is to be construed as governing the procedure to be followed in all cases brought to trial after the Act came into force, irrespective of the date of the events to which the evidence may be directed. To say that this involves the section being given retrospective effect is, I think, perhaps misleading. The true view is rather that the section looks forward to the conduct of trials that take place after the coming into force of the Act."*

[66] The apparent rationale for this approach is encapsulated in the following statement in **Bennion on Statutory Interpretation** 5th ed 2008, at page 320, "because a change made by the legislator in procedural provisions is expected to be for the general benefit of litigants and others, it is presumed that it applies to pending as well as future proceedings." Therein lies the import of Lord Morris of Borth-Y-Gest joining in the observation of Willmer L.J. in **Blyth v Blyth,** *supra*, that no provision of the Matrimonial Causes Act enjoined the court not to apply it to proceedings pending at the time of its passage. So, the presumption was not rebutted.

[67] This point is poignantly illustrated in **R V Makanjoula R v Easton** [1995] 3 All ER 730. A change was made in the law requiring a warning in sexual offences trials and trials of accomplices (s 32(1) **Criminal Justice and Public Order Act** 1994 (**CJPO Act**)). That change came into force after both accused were charged and committed but before their trial. The contention on appeal was that the trial judge should have given the corroboration warning which was required before the amendment, as to do otherwise gave the law a retrospective operation.

[68] Lord Taylor of Gosforth, CJ replied in language which gives substance to the dichotomy in the concept of retrospectivity. At page 732 he said:

"The general rule against the retrospective operation of statutes does not apply to procedural provisions (see Bennion on Statutory Interpretation (2nd edn, 1992 p 218 and the cases there cited). Indeed the general presumption is that a statutory change in procedure applies to pending as well as future proceedings. Here, the change effected by s 32(1) was clearly procedural."

This view is concordant with that expressed by Wright J in ***ex parte* Wilson**, *supra*.

[69] The learned Chief Justice noted that s 32(4) excludes the operation of s 32(1) to trial and committal proceedings which began before the date the Act came into effect, but not otherwise. Lord Wright CJ went on to hold that since the section came into force before both trials began, the section applied. It seems logical that absent s 32(4), s 32(1) would have applied to committals and trials pending at the time the **CJPO Act** came into effect. This is of course in harmony with the thinking in **Blyth v Blyth,** *supra*.

[70] While Lord Brightman acknowledged this disjunction in the cases on retrospectivity, he also stated that

*"There is, ... said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed." (**Yew Bon Tew v Kenderaan Bas Mara**, supra)*

Lord Brightman felt, however, that labels such as "retrospective" and "procedural" are potentially misleading. That is so because a statute may be both retrospective and prospective in relation to the same case: **Yew Bon Tew v Kenderaan Bas Mara**, *supra*. His Lordship emphasized his point in this way,

"whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive: **Yew Bon Tew v Kenderaan Bas Mara**, *supra* page 562. Therefore, the interpreter court must seek the intention of the legislature, expressed in the words of the statute, aided by the canons of interpretation and any Interpretation Act: **Yew Bon Tew v Kenderaan Bas Mara**, *supra*, page 559.

[71] The question before the court was whether the claimants could issue a writ in 1975 in reliance on a 1974 amendment to the Malaysian Public Authorities Protection Ordinance of 1948. The amendment substituted a 36 months limitation period for the previous 12 months. The claimants' cause of action had become statute barred from 1973, the events giving rise to the action having occurred on the 5th April, 1972. The appeal rested on two propositions. First, that a Limitation Act which does not extinguish a cause of action is procedural. Secondly, a statute which is procedural is prima facie retrospective.

[72] The Privy Council endorsed the approach of the lower courts which was to eschew a broad brush approach to classifying all limitation statutes as procedural and to consider whether what the statute did affected substantive rights. Their Lordships agreed that the appropriate approach to construing the statute was not in the epithet assigned but seeing whether in a given case a retrospective application impaired existing rights and obligations: **Yew Bon Tew v Kenderaan Bas Mara**, *supra*, page 563. Their Lordships held that an accrued right to plead a time bar is a right undiluted although arising under a procedural statute.

[73] Respectfully, the danger appears to be in making an omnibus classification of the statute as either substantive or procedural without seeing how the provision in question impacts any vested or accrued right. The decision of the Privy Council still rests on the dichotomy of procedural or substantive, though fine tuned. Indeed, **Yew Bon Tew v Kenderaan Bas Mara** echoes the case history. It does so in this way, the road to a retrospective application of a statute goes through

predicate findings of whether substantive rights or adjectival law is at the heart of the issue.

[74] The court arrives at those findings by seeking to discover the underlining rationale of the particular provision, per Lord Nicholls of Birkenhead in **Wilson and others v Secretary for Trade and Industry** [2003] UKHL 40. This approach de-emphasizes a reliance on either the presumption against retrospective operation of statutes or its cousin, the presumption against interference with vested rights. Lord Mustill expressed "reservations about the reliability of generalized presumptions and maxims" when seeking to discover the intention of Parliament: **L'Office Cherifien Des Phosphates and Another v Yamashita-Shinnihon Steamship Co. Ltd** [1994] 1 A.C. 486,524-525. He felt this unduly confined "the court to a perspective which treats all statutes and all situations to which they apply as if they were the same." This he found misleading as the basis of the rule is fairness.

[75] Against that background, the approach Lord Mustill commends is to go directly to the statute to ascertain the intention of Parliament, this he did by reference to a statement of principle attributed to Straughton L.J. in **Secretary of State for Social Security v Tunnicliffe** [1991] 2 All E.R. 712,724. After referring to the observations of Lord Brightman in **Yew Bon Tew v Kenderaan Bas Mara**, *supra*, Straughton L.J. said:

> *"In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."*

BACKGROUND TO THE 2010 AMENDMENT

[76] Against the silhouette of the foregoing, attention is now turned to the background of the **LRIDA 2010**. Authority for this approach is amply provided by **Brown v Brown** [2010] JMCA Civ 12. At para 18 Morrison, J.A. cited with approval **R v Industrial disputes Tribunal, ex parte Seprod Group of Companies** in which the propriety of looking at the state of the law as it existed at the appointed day, as well as the history of the legislation to discover the mischief which Parliament wished to correct, was laid down.

[77] Further, as part of the search for the mischief behind the 2010 Amendment, the court will have resort to the parliamentary reports in **Hansard**. It has long been established that courts may look outside a statute in order to discover the mischief Parliament sought to remedy. One of the safeguards laid down in **Pepper v Hart [1993]** AC 593, is that "the parliamentary statement must be made by the minister or other promoter of the Bill." According to Lord Nicholls of Birkehead:

> *A clear and unambiguous ministerial statement is part of the background to the legislation. In the words of Lord Browne-Wilkinson in Pepper v Hart [1993] AC 593,635, such statements 'are as much background to the enactment of legislation as white papers and Parliamentary reports. But they are no more than part of the background'.*
>
> ***(Wilson and others v Secretary of State for Trade and Industry**, supra, para 58)*

[78] We commence by looking at the original rationale behind the enactment of the section 11A. Section 11A was inserted in the **LRIDA** by Act 13 of 1978. This new provision was put in as a safeguard against the expected flood of unsettled disputes emanating from the imposition of wage guidelines: **Industrial Relations**

Law and Practice in Jamaica, *supra*, page 173. It soon became ministerial practice to refer all unsettled disputes to the IDT whether or not it was expeditious to arrive at a settlement: **Industrial Relations Law and Practice in Jamaica**, *ibid.* It was in this atmosphere of open referral that the law came to be tested in ***ex parte*** **West Indies Yeast Co. Ltd.**

[79] This was the situation that confronted the legislators when the amending Bill received Cabinet approval in 2005. At the time the Bill was tabled in the House of Representatives on the 23rd June, 2009, a new political administration formed the government. The Bill had its passage through the House of Representatives on the 6th October, 2009.

Of the three items listed in the MEMORANDUM OF OBJECTS AND REASONS of the Bill entitled An Act to Amend the Labour Relations and Industrial Disputes Act, only (a) is relevant to the instant enquiry. It reads:

> *A decision has been taken to amend the Labour Relation and Industrial Disputes Act in order to-*
>
> > *(a) facilitate the referral of industrial disputes involving non-unionized workers to the Industrial Disputes Tribunal;...*

[80] The proposer of the Bill in the lower House said that section 11A was being amended to make disputes involving non-unionized workers referable to the IDT, "even if industrial action is not being taken or contemplated, and there is no need for the matter to be settled expeditiously." (**Hansard**, 6th October, 2009) In the Senate, the member piloting the Bill chronicled the industrial situation leading up to **ex parte West Indies Yeast Co. Ltd**.

[81] According to the senator, it was a notorious fact that before 1985 (the year in which **ex parte West Indies Yeast Co. Ltd**. was decided) disputes involving non-unionized workers which the Ministry of Labour failed to settle, were referred to the IDT. After making reference to the facts leading up to the dispute in the

case, the senator quoted the following passage from the judgment of the Chief Justice:

> *"Assuming that it can be said that an industrial dispute existed between the dismissed employees and their former employers, the dispute did not exist in the applicant company's undertaking. In my judgment, for this reason and others previously stated, the conditions precedent to the exercise of the Minister's powers under section 11 (a) were not satisfied and he was therefore not authorized to make the reference."*

[82] In the understanding of the proposer of the Bill in the Senate, **ex parte West Indies Yeast Co. Ltd.** established three things. First, the Minister's intervention could only be requested where an industrial dispute exists. Secondly, for the Minister to have authority to act, the dismissal of the ex-employees must threaten industrial peace. Thirdly, the scheme of the **LRIDA** did not contemplate disputes between an employer and a non-unionized employee where that dispute did not threaten industrial peace. (**Hansard**, 26th February, 2010)

[83] It was said that only between 10 and 15 percent of the Jamaican labour force is unionized. Further, for the year 2008/2009, complaints from workers to the Ministry of Labour amounted to 6,272. On the other hand, the unions referred 193 industrial disputes to the Conciliation section of the Ministry of Labour for the same period. Additionally, the impecuniosity of the individual worker to prosecute his claim through the courts was noted. (**Hansard**, 26th February, 2010)

[84] So then, before **ex parte West Indies Yeast Co. Ltd**. those who had the responsibility to implement the **LRIDA** understood the Act to apply to disputes involving non-unionized workers which did not threaten industrial peace. That is evidenced by the references of those disputes to the IDT. After the decision in **ex parte West Indies Yeast Co. Ltd,** the individual non-unionized worker was effectively and for all practical purposes shut out of the primary and most cost

effective mechanism for the settlement of industrial disputes, although the statute recognised that an industrial dispute could involve a dispute between an individual worker and his employer.

[85] The impotence of the individual worker to inaugurate or precipitate the conditions precedent to a referral to the IDT was most eloquently articulated by the Senate proposer of the Bill. First, it is highly improbable that the individual non-unionized worker with an unresolved grievance could bring about a virtual shutdown of an essential service. Secondly, it is equally improbable that an individual non-unionized worker could wield sufficient industrial power to threaten the public interest. Lastly, but no less improbable, is the assumption that the individual non-unionized worker would have the leverage to get the employer to agree to have the matter referred to the IDT. (**Hansard,** 26th February, 2010)

INTERPRETING THE AMENDED SECTION 11

[86] So, it is clear that the mischief at which the 2010 Amendment was aimed was the constraints placed on referrals to the IDT arising from the interpretation placed on the **LRIDA** by the courts. The legislature wished to remove the disadvantageous effects of the labour law upon the individual non-unionized worker. That is, there was the recognition that those workers who could not marshal the industrial muscle to effectuate industrial action were forever without standing before the IDT. And by so doing, the legislature threw open the pearly gates to the remainder, and vast majority of the Jamaican work force, to the only body which can most cost effectively address the question of their unjustifiable dismissal. To put the position bluntly, the legislature intended to overrule the effects of **ex parte West Indies Yeast Co. Ltd.**, reverting the industrial practice to its pre 1985 status.

[87] Under section 11A of the **LRIDA** in the post 2010 era, it is no longer a condition precedent that the Minister 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."

[88] Consequently, it could not be said today that because a dismissed worker's dismissal failed to give rise to a dispute which threatens industrial peace, the Minister lacks authority to refer it to the IDT: **ex parte West Indies Yeast Co. Ltd**, *supra*. Neither can it be seriously maintained that the scheme of the Act does not contemplate a dispute between an employer and the non-unionized worker in a dispute "which does not in any way threaten industrial peace."(See **ex parte Kaiser Bauxite Co**., *supra*) Nor is it of any relevance that the dispute is no more that a "one-on-one" dispute between the parties: **ex parte Cremo Ltd**, *supra*.

[89] How then should the Act be applied in the new dispensation? The starting point is to consider whether the new law affects any rights existing anterior to its coming into effect. Section 4 of the **LRIDA** speaks to the right to join and participate in trade union activities or not to join a trade union. That right has not been impacted by the 2010 Amendment, neither has the 2010 Amendment taken away or impaired any vested right acquired by the employer under the existing law.

[90] In point of fact, the Minister's role has not changed under s.11A as amended. All the legislature has done is to remove the conditions precedent articulated by the courts. The law as it stands now has removed the disabilities, if you will, that came to be attached to the referral of disputes involving individual non-unionized workers. It therefore cannot be advanced in any seriousness that the 2010 Amendment creates any new obligation, imposes a new duty or attaches a new disability, in respect of past events: **Yew Bon Tew v Kanderaan Bas Mara**, *supra*.

[91] Notwithstanding s.4, it would not be stating the position too strongly to describe the **LRIDA** as essentially an adjectival statute. Its scheme and focus is to set up a regime with the accompanying procedural machinery to regulate the industrial climate in Jamaica. That much, it is hoped, is evident from the preceding review of the main provisions of the **LRIDA**. Therefore, while accepting that the task at hand is not simply or simplistically to classify the statute as either substantive or procedural (**Yew Bon Tew v Kanderaan Bas Mara**, *supra*), this classification is transparency epitomized. Even if the classification of the **LRIDA** is too wide, it is patent that section 11A is procedural.

[92] From there it is a short step to applying the learning in **Blyth v Blyth**, *supra*. That is, the section is to be construed as governing the procedure to be followed in all requests for referrals coming to the Minister's desk after the 2010 Amendment came into effect, irrespective of the date of the events giving rise to the industrial dispute, to which the referral is to be directed. This court joins with Willmer L.J. in saying that the section looks prospectively to the considerations the Minister ought to bear in mind in making referrals after the 2010 Amendment came into force. And, looking forward as it does, there can be no question of retrospectivity. That the section may depend for its application on events occurring in the past does not offend the presumption against retrospectivity: **Wilson and others v Secretary of State for Trade and Industry**, *supra*, para 98.

[93] Going a step further, the amendment contains no transitional provisions. Perhaps the reason for that lies in the character of the statute, namely that it is procedural. And being procedural, the draftsman understood such a provision would have been otiose. Otiose because, as was succinctly expressed by Wilde B in **Wright v Hale** (1860) 6 H&N 227,232:

> "*Where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.*"

[94] As was said in **Bennion on Statutory Interpretation**, *supra*, a change in procedural provision being of general benefit to litigants and others, it is presumed to apply to pending as well as future proceedings. This is so because no litigant has any vested interest in the course of procedure: **Republic of Costa Rica v Erlanger** (1876) 3Ch D 62, 69. (See also R v **Makanjoula R v Easton**, *supra)*

[95] It is an undeniable fact that the claimants' disputes were wending their way through the conciliatory machinery when the 2010 Amendment came into force, as they were during the amendment's gestation. Therefore, the claimants' disputes were pending when the 2010 Amendment became law. The change wrought by that amendment only affected the procedure by which the claimants' disputes should be dealt with by removing the impediments laying in the path to their ultimate resolution. Applying **Wright v Hale**, *supra,* the change in procedure clearly applies to their dispute. That the events giving rise to the disputes arose before the passage of the 2010 Amendment is of no moment: **Wilson and others v Secretary of Trade and Industry**, *supra*.

[96] The only question that remains is, will any injustice be occasioned if the court gives breath to this interpretation of the provision? The only person or entity who could possibly claim any preexisting right under the old law would be the claimants' former employer, the NSWMA. But could the NSWMA advance a sustainable claim that it had an accrued right in the conditions precedent, previously held applicable before the Minister could make a referral? Such a claim would be so patently preposterous, warranting nothing but derision and the sternest rebuke.

[97] If the endeavour to show that the question of retrospectivity does not arise has succeeded, then it is obvious that the submissions of learned counsel for the defendant on the point must be rejected. Respectfully, the reliance on the use of the word 'retrospective' in s. 12 of the **LRIDA** is misconceived. All the legislature

did here was set the temporal boundaries within which the IDT can make its awards take effect. The Parliament, by the use of the word 'retrospective', did not say that the provision itself is to operate at a time earlier than when it became law.

[98] Similarly, **The Colombo Apothecaries Company Ltd v E.A. Wijesooriya**, *supra*, does not advance the cause of the defendant. In that case the Privy Council was asked to say whether a change in the legal definition of 'workman', applied to the case before it. That change was effected after the hearing of the application but expressed to come into operation before the petition was filed. The question whether to give effect to the law turned on the impact of s. 6(3) of the **Interpretation Ordinance** of Ceylon:

> *whenever any written law repeals either in whole or in part a former written law, such repeal shall not, in the absence of an express provision to that effect, affect or be deemed to have affected*
>
> > *(c) any action, proceeding, or thing pending or incomplete when the repealing written law comes into operation …*

The Privy Council held that the section did not apply as the law was expressly brought into operation on a date antecedent to any on which the present proceedings could have been said to have been pending or incomplete.

[99] In that case the law was clearly expressed to have a retrospective effect. The question was whether its operation was limited by the Interpretation Ordinance. The provision in the instant case was not similarly expressed. Equally, the provision in the Ceylon statute does not find like expression in the Jamaican **Interpretation Act**. In any event, the court having found that the case at bar does not turn on the question of retrospectivity, **The Colombo Apothecaries Company Ltd** does not offer any assistance.

[100] The last case cited by learned counsel for the defendant is equally of no assistance. A reference to the head note in **K. Ram Bandon v The Three River Valleys Development Board**, *supra*, will suffice:

> *The appellant had no right of access to a Labour Tribunal because his services were terminated prior in point of time to the date on which Part IV A of the Industrial Disputes Act creating Labour Tribunals came into operation. In such a case, there is no requirement of the existence of an industrial dispute as a pre-requisite to a workman's application. Part IV A of the Industrial Disputes Act, though nominally an amendment, brought in for the first time a now (sic) scheme of tribunals empowered to grant relief of a kind not envisaged before. The Statute cannot apply retroactively to the termination of a contract of service which occurred prior to the introduction of the Act, for this would involve an interference with vested rights (as distinct from existing rights) for which there is neither express provision nor necessary implication in the Act.*

[101] The following points can be made to demonstrate the contrast with the instant case. First, the 2010 Amendment did not establish a new tribunal. Consequently, the NSWMA could not be heard to complain that at the time it dismissed the claimants from its service they had only common law remedies open to them. And, having only common law remedies, their transaction was conducted according to the law then in existence. If that had been the case a vested, or at least an existing, right would have been interfered with. However, the 2010 Amendment was entirely procedural and interfered with no right, vested or existing.

[102] Likewise, the contention for a retroactive application of the provision advanced by counsel for the claimants must also be rejected. With all due deference, the

reliance placed on the judgment of Cooke, J.A. in **Brown v Brown**, *supra*, results from a misunderstanding. The gravamen of the judgment of Cooke, J.A. is that retrospectivity was merely collateral to the issue before him. Cooke, J.A. found that **PROSA** represents a dramatic break with the past and, in section 4 directions are given to "the court as to the approach irrespective of when the divorce or termination of the relationship took place." In this Cooke, J.A. followed the learning in **Carson v Carson and Stoyek**, *supra*. Therefore, Cooke, J.A. is not to be understood as having decided that **PROSA** has retrospective effect. He said he would so conclude if he were to put retroactivity at the forefront but in parenthesis he said he did not. So clearly, his decision was otherwise premised.

[103] So then, applying **Brown v Brown** to the instant case, all that the new section 11A does is to give the Minister directions concerning matters which need not be established in making a reference to the IDT in disputes involving the non-unionized individual worker, as of the date the amendment took effect. As Cooke, J.A. observed, this may involve an element of retrospectivity but retrospectivity is not the focal point. The Minister is to treat with all requests for referral as directed by the law as amended, irrespective of when the events giving rise to the dispute arose. To do otherwise is to deny the claimants the benefit of a law Parliament clearly intended them to have. Adopting and adapting the language of Cooke, J.A., such a denial would be both unfair and rob the provision of its efficacy.

[104] Turning now to the Minister's decision, it is clear he felt that to consider the claimants' request for a referral to the IDT under the 2010 Amendment would be to give the provision forbidden retrospective effect. To that end, the Minister constrained himself to have regard to the preconditions laid down **in ex parte West Indies Yeast Co. Ltd.** To the extent that that was his understanding, respectfully, the Minister did not understand correctly the law regulating his decision-making power and consequently failed to give effect to it. Accordingly, the Minister's decision not to refer the claimants' dispute to the IDT was illegal.

[105] The court is therefore constrained to quash the Minister's decision not to refer the claimants' dispute to the IDT, which decision was communicated by letter dated 6th June, 2012. The matter is therefore remitted to the Minister for him to exercise his discretion in accordance with the provisions of the **LRIDA** as amended. The court accepts the submission of learned counsel for the defendant that the application for mandamus became spent once the Minister made a decision.

[106] The court therefore makes the following orders:

i. Certiorari issued to quash the decision of the Minister contained in letter dated 6th June, 2012 refusing to refer the claimants' disputes to the IDT.

ii. The matter is remitted to the Minister for him to exercise his discretion in accordance with the provisions of the **LRIDA** as amended.

iii. No order as to costs.