[2019] JMSC Civ 187

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2019 HCV 00857

IN THE MATTER OF a dispute between the Firearm Licensing Authority and Mr. Milton Reid over the termination of employment

AND

IN THE MATTER OF the Labour Relations & Industrial Disputes Act 1975.

BETWEEN	**FIREARM LICENSE AUTHORITY**	**CLAIMANT**
AND	**MINISTRY OF LABOUR AND SECURITY**	**1ST DEFENDANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**2ND DEFENDANT**
AND	**MILTON REID**	**INTERESTED PARTY**

IN CHAMBERS

Mikhail Jackson, Kathryn Williams instructed by Livingston, Alexander and Levy for the Applicant.

Carla Thomas for the Director of State Proceedings.

Tessa Simpson and Nikour Junor instructed by Knight, Junor & Samuels representing Mr. Milton Reid as an interested party.

Ruthlyn Matthews Legal Officer for IDT.

Application for Leave to apply for Judicial Review - Whether there was delay - Applicant saying Minister acted ultra vires in the referring the matter to the IDT - Whether the Applicant has an arguable case; Rule 56.

HEARD: 10TH JULY AND 19TH SEPTEMBER, 2019

A. THOMAS, J.

INTRODUCTION

[1] This is an application by the Firearm License Authority of Jamaica (FLA) for leave to apply for Judicial Review by way of:

(a) An order of certiorari to quash the 1st Respondent's referral, dated the 6th of December 2018, of a dispute between the Applicant and its former employee Mr. Milton Reid, over the termination of his employment to the 2nd Respondent, as being ultra vires and/or unreasonable and as being a breach of ***S.11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act*** (hereinafter referred to as "LRIDA")

(b) That the grant of leave shall operate as a stay of the 1st Respondent's referral of the dispute and of any proceedings before the 2nd Respondent regarding the dispute between the Applicant and its former employee, Mr. Milton Reid.

[2] The grounds on which the Applicant is seeking the orders are stated as follows: -

(i) There is an error of law on the face of the 1st Respondent's referral as there is no industrial dispute existing between the Applicant and its former employee, in that Mr. Milton Reid voluntarily entered into a separation agreement with the Company dated the 22nd of August, 2017.

(ii) In the alternative, the 1st Respondent's referral is unreasonable, as Mr. Milton Reid has already been paid all the salary and benefits for the unexpired portion of his fixed term contract of employment, as consideration for his voluntary separation from the Company, pursuant to the said separation agreement with the company, dated the 22nd of August, 2017.

THE UNDISPUTED FACTS

[3] It is generally agreed that:

(1) Mr. Reid by a fixed term contract was employed to the Applicant, for a period of three years with effect from the 14th of December 2015. There is in existence a document described as a "Separation Agreement" which was signed by both parties on the 22nd of August 2017. Mr. Reid did receive and accept payment equivalent to 16 months' salary under the "Separation Agreement". A dispute arose over the validity of the Separation Agreement. By letter dated the 6th of December 2018 the matter was referred by the Minister of Labour and Social Security (the Minister) to the Industrial Dispute Tribunal(IDT).

Other Relevant Facts

[4] The Applicant further alleges that:

(i) The payment Mr. Reid received was 16 months' salary plus gratuity in full and final settlement of all claims he may have against the Applicant, equivalent to the unexpired portion of the contract. It was subsequent to the issuing of the pay advice on the 23rd of August, 2017 that Mr. Reid contacted the financial administration director of the Applicant to enquire of further payments to be made pursuant to the separation agreement.

(ii) No dispute was raised as to any aspect of the agreement but instead, Mr. Reid sought to enforce certain entitlements which he believed he had under the agreement.

(iii) It was not until three (3) weeks later on the 13th of September, 2017 that Mr. Reid subsequently sought to raise as a dispute before the Ministry of Labour that he was unjustifiably dismissed. Mr. Reid has not returned any of the sums which were paid to him pursuant to the separation agreement.

[5] The Applicant contends that:

Mr. Reid voluntarily separated from the company and there is no industrial dispute as he was not terminated by the Applicant. Though Mr. Reid contends that the separation agreement was entered into under duress, he has failed to challenge the validity of the said agreement by initiating court proceedings. Mr. Reid has simply stated that this is the basis for his unjustifiable dismissal. In the alternative, in circumstances where an employee has been paid the full value of a fixed term contract, for the 1st Respondent to refer such a matter to the IDT is wholly unreasonable

[6] The evidence of the Respondents to this application is contained in the affidavit evidence of Mr. Michael Kennedy. Mr. Kennedy states that the matter was referred to the Ministry on behalf of Mr. Reid by a letter dated the 20th of September, 2017 requesting the Ministry's intervention. The matter concerned the termination of Mr. Reid's fixed term contract with the Applicant. Based on the information on behalf of Mr. Reid, his employment was brought to an end by a separation agreement

signed on the 22nd August, 2017 between Mr. Reid and the chief executive officer for the Applicant. In an effort to amicably resolve the matter, the Ministry held extensive conciliatory talks with the parties between September 2017 and January 2018. The position of the Applicant, through its legal representative, during these conciliatory meetings was that Mr. Reid had voluntarily entered into the separation agreement and was paid in full all the sums to which he was entitled under his contract of employment. The position of Mr. Reid as advanced by his legal representative was that he signed the agreement by coercion and that prior to signing he had requested to speak to his attorney-at-law. After five attempts at conciliation, the parties still maintained their respective positions.

[7] Mr. Kennedy further indicates that he formed the view that there was a dispute existing between the parties as to the termination of Mr. Reid's employment and that this dispute could not be resolved at the conciliation level. Consequently, he recommended to the 1st Respondent that the matter should be referred to the 2nd Respondent for the determination of the dispute. The 1st Respondent agreed with the recommendation for the matter to be referred to the 2nd Respondent and accordingly he wrote a letter to the parties advising them of the referral.

THE ALLEGATIONS OF THE INTERESTED PARTY

[8] Mr. Milton Reid states that;

(1) Prior to the expiration of his fix term contract, Mr. Dalling, the Chief Executive Officer (CEO)for the Applicant, handed him a letter which indicated that his services were immediately terminated on the 22nd of August, 2017. He pointed out to Mr. Dalling, that after ten (10) years his service was being terminated without gratuity. Mr. Dalling gave him an ultimatum by way of another option, which was a letter with a separation agreement. He told Mr. Dalling that he would have to seek legal advice before signing the document. Mr. Dalling took the separation agreement

from him and told him that he is sticking to option one where he will get no more than what it states, 3 months' salary in lieu of notice.

Mr. Reid denies that he voluntarily entered into the separation agreement with the Applicant. He states that he felt forced and intimidated by Mr. Dalling, a person in authority. He admitted that he was paid salary and gratuity.

[9] Mr. Reid further asserts that:

(1) The separation agreement was signed under undue influence. It purported to carry certain entitlements and he had called Mr. Haleem Anderson for clarity and facts as to when the entitlement moneys were to be paid. He raised the dispute first with the CEO on the same day that he had given him the letter.

(2) He states that it is his belief that an industrial dispute arose as he did not voluntarily separate from the FLA. A conflict arose when he was terminated without cause or a hearing. He was given an ultimatum by Mr. Dalling at the time when there were reports of rampant corruption surrounding the FLA, creating contumelious circumstances which acted on his ability to obtain future employment. It is his position that he was constructively dismissed without a fair hearing and that the matter was properly referred to the IDT.

The Issues

[10] The Simple issues for consideration in this Application are:

(i) Whether the Application was filed promptly.

(ii) Whether the Applicant has an arguable case.

WHETHER THE APPLICATION WAS FILED PROMPTLY

The Law

[11] **Rule 56.6**. of the ***Supreme Court of Jamaica Civil Procedure Rules*** (herein after refer to as "the ***rules"***) dictates the time within which an application for leave for Judicial Review should be made. Rule ***56.6. (1***) states:

> *"An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose"*

SUBMISSIONS

For the Applicant

[12] The following is a summary of the submissions made by Mr. Mikhail Jackson on behalf of the Applicant**:**

(i) The application was made on the 5th of March, 2019 within the particular timeline of ***Part 56.1*** of the rules. There was a contention that there was some delay. As seen from the background and Mr. Dalling's evidence, the Applicant invited the Minster to withdraw the referral. There was no response to that letter and in light of the timeline the application was filed within the three (3) months.

(ii) Notwithstanding the date on which the application was filed, the court must consider whether there was any prejudice to Mr. Reid with proceeding with the application at this time. There is no prejudice to Mr. Reid considering that he has found employment.

(iii) It is only in very rare circumstances where the application is filed within the three months that a court rules that an application for leave is not to proceed. Such instances involve the granting of licenses. In those circumstances, though the applications were made within 3 months the court found that the delay was prejudicial to the Respondent. (He refers to

the case of **R *v Independent Commission Exparte TV Northern Ireland Limited:*** CA 30 Dec 1991)

SUBMISSIONS FOR THE INTERESTED PARTY

[13] Ms. Tessa Simpson's submissions on this issue are summarized as follows:

An application for leave for Judicial Review must be made promptly and in any event must be made within three (3) months. The decided cases describe promptly as without delay. Notwithstanding the three (3) months window in which the rule and the authorities allow, the authorities suggest that the application may still fail the promptitude test, especially in circumstances where third (3rd) party's rights are to be affected. This application was filed on March 5th and served on Mr. Reid March 22, 2019. By the Applicant's failure to make the application closer to when the minister referred the matter to the 2nd Respondent, Mr. Reid was put to undue hardship to find gainful employment over a year and damage to his reputation. He had to face the embarrassment of disclosing that he had no reason for his termination. Having been put into this position, it is submitted that the application was not made promptly. (She refers to the cases **Raymond** (**Randean**) **v The Principal Riel Reid and Anor** [2015] JMCA Civ 59; ***Rv Independent Commission Ex parte TV Northern Island LTD*** Times Ca 1991 TLR 806, par 22; ***City of Kingston Coop Credit Union Ltd v The Registrar of Co-operative Societies and Friendly Societies and Yvette Reid*** (2010) HCV0204).

DISCUSSION

[14] It is indeed apparent that on a proper construction of the rules, and a reading of the cases, an application for leave for Judicial Review should be made without delay, and in any event within a maximum period of three (3) months. In this regard therefore, a party should not act on the assumption that filing the application within three months necessarily amounts to filing promptly. (See the cases of George ***Anthony Levy v The General Legal Council (Supra) Raymond*** (**Randean**) **v The Principal Ruel Reid and Anor** [2015] JMCA Civ 5***; Rv Independent***

Commission Ex parte TV Northern Island LTD (Supra) ; ***City of Kingston Coop Credit Union LTD v Registrar of Co-operative Societies and Friendly Societies and Yvette Reid*** (Supra), ***Andrew Finn-Kelcey v Milton Keynes Borough Council*** *[*2008] EWCA Civ 1067). That is, notwithstanding the fact that the rules prescribe a maximum period of three (3) months for the filing of the application the Applicant should not sit idly and do nothing waiting until the final day of the three (3) months to make the application.

[15] There is no challenge to the fact that this application was made within the three months. That is, the maximum period specified in the rules. However, counsel for the interested party Mr. Reid, is urging this court to find that there was delay in making the application. Therefore, the issue that the court is now faced with, is what approach should be taken in relation to promptitude with applications that are filed within the stipulated maximum period, that is the three months. I note that in the case of ***City of Kingston Coop Credit Union LTD v Registrar of Co-operative Societies and Friendly Societies and Yvette Reid*** (supra), Sykes J, as he then was, did make the observation that most of the cases he reviewed where the court found that the applications were not made promptly, despite the fact that these applications were made within the three months, were planning permission cases, “which of themselves suggest a rather strict approach to the question of promptness”.

[16] Additionally, in the case of **Andrew *Finn-Kelcey v Milton Keynes Borough Council*** *(Supra)* the court stated that the importance of acting promptly applied with particular force in cases where a claimant sought to challenge the grant of planning permission. This was due to the fact that there were time limits on the validity of a planning permission. Consequently, a developer was entitled to proceed to carry out developments by the permission without delay.

[17] It is therefore my view that once the application is made within three months the question of promptitude is dependent on the nature and circumstances of the case,

such as whether the decision will affect the rights of third parties. (See also ***R v Independent Commission Exparte TV Northern Island LTD*** *Supra****)***

[18] In urging the court to hold that the application was not made promptly, the reasons advanced by counsel for Mr. Reid are that: Mr. Reid suffered damage to his reputation, embarrassment of disclosing that he had no reason for his termination and hardships finding gainful employment for one year.

[19] However on the face of it, there was a separation agreement. Therefore, what would have been in the public sphere would be that there was a mutual arrangement between the parties. The suggestion or assertion that there was a termination came from Mr. Reid himself. In this regard, there would be no basis to find that embarrassment was caused by the Applicant.

[20] Additionally, I cannot envisage how the time within which the application was filed could have affected Mr. Reid's financial status visa vie him gaining employment. There is no challenge to the evidence of Mr. Shane Dalling for the Applicant that Mr. Reid has been employed since November 2018. The date of the referral was the 6th of December, 2018. Therefore, it is apparent that Mr. Reid was in fact employed at the time when the grounds for the Application arose. He has been employed since the grounds for the application arose and the time that this Application was made.

[21] In the circumstances, I find that neither detriment nor prejudice was occasioned to Mr. Reid between the time that the grounds for the application arose and the filing of the application. The evidence of the Applicant is that between the period of the receipt of the Minister's decision and the filing of the application some of the time was spent trying to convince the Minister to withdraw the referral. This evidence has not been challenged The Applicant could not have made this application prior to the decision of the Minister. In any event it is my view that the failure to file immediately after the decision of the Minister was not egregious, and as I previously stated neither was there any prejudice caused to Mr. Reid.

Consequently**,** I find that in the circumstances this application has been made promptly in compliance with **Rule 56**.

WHETHER THE APPLICANT HAS AN ARGUABLE CASE

The Law

[22] The principle applicable to the granting of leave for Judicial Review is stated in the well-known case of ***Sharma v Brown-Antoine et al*** (2006) 69 W.I.R. 369. In that case the Privy Council stated that;

> ***"****the ordinary rule now is that the Court will refuse leave to a claim for judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. …But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application … It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which is hoped the interlocutory processes of the court may strengthen"*

SUBMISSIONS

[23] I will now summarize the submissions of counsel for the parties on this issue. Mr. Mikhail Jackson's submissions are as follows:

(1) In order to obtain leave for Judicial Review it is accepted that the Applicant must satisfy the court that there are arguable grounds with a realistic prospect of success and the claim is not subject to a discretionary bar such as delay and an alternative remedy. The judge ought to be satisfied that there is a case fit for further investigation at a full hearing of a substantive claim for Judicial Review. (He refers to the case of ***Sharma v Brown - Antoine and Others*** (Supra) The Applicant meets this threshold.

(2) There is an error of law as there is no industrial dispute between the parties. There is a separation agreement which would have been binding on the parties. Mr. Reid voluntarily entered into a separation agreement. He was

paid the equivalent of 16months' salary. The affidavit of Mr. Dalling shows that that is true. Mr. Reid voluntary separated from the company and he was not terminated under the Act. The substance of the Separation Agreement is wholly different from a dispute that the Act contemplates. Mr. Reid has been employed since November 2018. He would have gained employment after his fixed date contract would have expired had it not been for the Separation Agreement.

(3) Mr. Reid is calling into question the validity of the Separation Agreement. The proper course to determine the validity of the contract is for the matter to be considered by the Court. The IDT is a creature of statute specifically created to hear certain matters, that being industrial disputes; not specific to employee-employer issues but industrial disputes.

(4) Industrial Dispute is defined under ***Section 2*** of ***The Labour Relations and Industrial Dispute Act (LRIDA***). The Act speaks to the termination of an employee. The definition contemplates an act of termination or suspension of a worker by an employer. Under ***Section 11A***, an industrial dispute must exist in order for the Minister to make a referral to the Industrial Dispute Tribunal (IDT). A referral under this section remains a matter of last resort. In circumstances where there has been no act of dismissal by the employer an industrial dispute cannot be said to exist. It is not just any dispute between parties that gives rise to this jurisdiction (He refers to the case of ***Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security*** [2018] JMSC Civ 103).

(5) The dispute as to what is an appropriate consideration for a separation agreement does not fall within the definition of industrial dispute. Mr. Reid's actions are indicative of the fact that there was no industrial dispute. He accepted payment of the settlement sum pursuant to the agreement and has not refunded any of the sums. The Minister has no jurisdiction to look behind the allegations of duress and coercion (He refers to the cases ***of R***

v Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett et al ex parte West Indies Yeast Co. Ltd. (1985)22JLR 407).

(6) There is a binding agreement which only the court would have the grounds to interpret whether it is valid.

(7) Mr. Reid having accepted payment under the separation agreement and now being employed as the Dean of Discipline at the Caribbean Maritime University, the referral by the Minister is unreasonable. Counsel is aware that the IDT has the jurisdiction to award payment/remuneration and reinstatement. However in the instant case, where Mr. Reid has been paid and is now employed, there is no point of bringing the matter to the IDT. (He refers to the case of ***Wednesbury*** 1948] 1 K.B. 223)

SUBMISSIONS FOR THE RESPONDENTS

[24] Ms. Carla Thomas' submissions are as follows:

(1) The separation agreement forms the crux of this dispute. Industrial dispute under the Act is not only limited to dispute relating to termination or suspension but it also includes the rights of any employee.

(2) (ii) There is no definition of dispute in the LRIDA. However, it is accepted that the ordinary meaning of the word should be applied which is "*to contend with opposing arguments or assertions, to discuss, argue, hold disputations, often to debate with heat, to altercate"*. There must be in existence some matter in relation to disagreements and the termination of an employee for the matter to fall under the Act, giving the Minister power to refer the matter to IDT. (She refers to ***R v The Industrial Dispute Tribunal and ORS (ex parte National workers Union***) (1981) 18JLR 293.

(3) In making its decision the court is invited to look at circumstances in which the IDT can review the matter. The true test as to whether the Minster's

discretion can be interfered with is that the court must look to see if there was a foundation of fact on which the Minister could exercise his discretion in the way she did. Once this court finds that there was a foundation of fact on which the Minister could have exercised her powers under the Act, no leave should be granted. (She refers to ***R v IDT ex parte National workers Union, Supra)***

(4) Mr. Michael Kennedy, in his affidavit, indicates the position of the parties at the conciliatory talks. On the one hand there was a separation agreement that ended the employment of Mr. Reid. Mr. Reid's position was that prior to that he had been handed a letter of termination by Mr. Dalling and was forced into signing the Separation Agreement. It is clear from the respective positions of the parties that there were strong differences of opinion. The differences involve dispute of fact which require a resolution in order to determine whether the Separation Agreement was voluntary or whether Mr. Reid was dismissed. It was at that point the matter was referred to the IDT as a dispute, as to the circumstances surrounding the Separation Agreement and the termination of the Applicant.

(5) It is not for the Minister to resolve these disputes. These require subjecting the parties to cross examination while observing their demeanour. This function is left to the IDT. If the true position was that he was handed the letter of termination, Mr. Reid would have then been in fact dismissed by the Applicant. The Minister being faced with those decisions would find that there was a dispute. It is in making a determination as to what the circumstances were, in the termination of Mr. Reid's employment that the IDT will determine whether the dismissal was justified or not justified.

[25] In relation to the issue of waiver she states that;

There is insufficient evidence to lead to the conclusion that Mr. Reid waived his rights to have the matter referred to the IDT. The mere failure to return the sums that were paid to Mr. Reid cannot amount to a waiver, nor would the fact that Mr.

Reid obtained employment one (1) month before the fix term contract expired. The Applicant has not said that the cheques were cashed. In any evident, that would not be sufficient. Even if assuming the cashing of cheques would be considered as Mr. Reid waiving his rights to have the matter referred, there would have to be evidence that the Applicant believed that Mr. Reid had waived his right to have his matter considered by the IDT. There was no act on the part of Mr. Reid which unequivocally amounted to waiver. (She refers to the case of ***Jamaica Flour Mills V Industrial Dispute Tribunal and the National Workers Union*** [2005] UKPC 16).

[26] As to whether Mr Reid would have received all the benefits he was entitled to under the contract, she submits that:

Mr. Reid certainly received salary and gratuity but based on the contract Mr. Reid was also entitled to travelling allowances and there was no indication that he was granted a payment in lieu. Mr. Reid could have been entitled to vacation leave which would have been existing to his credit. That information would have only been revealed before a hearing at the IDT. The IDT has a wide discretion of what compensation should be paid to Mr. Reid based on the information that would be revealed to it. It has a wide and extensive discretion where it is free to consider what compensation is being granted.

[27] She concluded that in the circumstances there was a foundation of fact on which the minister could have found and did so find that there was an industrial dispute existing. There is no ground put forward by the Applicant that has a realistic prospect of success on which it could obtain a certiorari to quash the decision by the Minister and as such the application should be dismissed.

SUBMISSION ON BEHALF OF THE INTERESTED PARTY

[28] The Submissions of Ms. Tessa Simpson are as follows:

(1) Mr. Reid was placed in an invidious position of make a decision. Two (2) options were imposed on him; termination with three (3) months and salary in lieu or Separation Agreement which provided more benefits. The applicant ought to show the court that the minister's decision is ultra vires. There is in fact an industrial dispute. Mr. Reid signed the agreement in circumstances that he felt that he was coerced and at no time entered into a voluntary agreement. He inquired into the reason for his termination. There was no reason given. He was given an ultimatum to sign the agreement and he tried to get legal counsel. Mr. Reid had a legitimate expectation that once he performed his contract it would have been renewed and this is stated in the terms and conditions of the contract. He found that though the renewal was not certain he had this benefit. Because there was a contract does not mean that there can be no industrial dispute.

(2) An industrial dispute arose when Mr. Reid was forced to choose between two options, either to sign the contract or to be terminated. This was in circumstances where there were no negotiations, without counsel, and without a hearing, and no reason given to Mr. Reid for his termination, and when he expressed his objections he was forced to sign a termination agreement. If an employer gives an employee an option to resign, or be dismissed, there is a dismissal in law. The causation is a threat. Therefore, the ultimatum of resigning or signing a contract of separation instead is a dismissal (She refers to the case of ***Sheffield v Oxford Controls Company Ltd*** (1979 ICR396). The employees in that case acted without any protest. In that judgment, the court said that the respondents could have brought themselves under the Act if they had intimated to the Applicant on receipt of the letter of the dismissal, their dissatisfaction and or rejection of the letter thus initiating a dispute while the relationship of the employee/employer

exist**.** Mr. Reid had lodged his dissatisfaction with Mr. Dalling. The minister's reference was made at the time of widespread new of corruption.

(3) She sought to distinguish the ***Spur Tree Spices*** case stating that the Minister could not properly have referred the matter to the IDT as the employees were reinstated with no loss to them. There was no longer any existing terminations as the terminations were fully cured by the reinstatements. The conditions present were already satisfied before the Minister's referral. She argues that in the instant case the Applicant does not have an arguable case, with a good prospect of success.

DISCUSSION

[29] The real issue for consideration at this stage is whether there is an arguable case that there was no industrial dispute and as a corollary whether it is arguable that in referring the matter to the IDT the Minister acted ultra vires her powers. I will state from the outset that I am grateful for the submissions and the plethora of authorities provided by the parties on this issue. However, having read and considered these in light of my role at this stage, I will delve into the discussion referring only to those that relate to the issue under consideration, bearing in mind that I am restrained from conducting a mini trial.

[30] In the case of ***Milton Llewellyn Baker v The Commissioner of Finsac Commission of Enquiry***, ***Warwick Bogle and Anor***, [2013] JMSC Civil 137, Mc Donald-Bishop, J as she then was stated at paragraph 41 that:

> *"The relevant authorities are clear beyond question that the Court's function at the application for leave stage is to eliminate claims which are hopeless, frivolous, and vexatious. A claim should only proceed to a substantive hearing upon the Court being satisfied that there is a case fit for consideration. The evidence relied on must disclose that an arguable case with the realistic prospect of success of a ground on which the claim is based. Such a case would then be such as to merit full investigation at a substantive hearing".*

[31] In the case of ***R v Secretary of State for the Home Department ex parte Swati*** [1986] I WLR 477, at page 485 the court stated that:

> *"An applicant must show more than that it is not impossible that grounds for judicial review exists. To say that he must show that a prima facie case that such grounds do in fact exist may be putting it too high, but he must at least show that it is a real as opposed to a theoretical possibility. In other words, he must have an arguable case."*

[32] I will now examine the relevant provisions of the statute that give the Minister the power of referral. The aim is not to determine whether her actions were ultra vires, but rather to determine whether there is an arguable case that they were.

[33] ***Section 11 of the LRIDA*** gives the Minister the power to refer matters on a request in writing of all of the parties to any industrial dispute, to the IDT for settlement. However, the applicable section to this application is ***Section 11A*** It gives the Minister the power to refer matters to the IDT on her own initiative once certain conditions exist. It reads;

> *11A.- (1) Notwithstanding the provisions of sections 9, 10, and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative-*
>
> *(a) refer the dispute to the Tribunal for settlement-*
>
> *(i) if he is satisfied that attempts were made without success, to settle the dispute by such other means as were available to the parties; or*
>
> *(ii) if, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do;*
>
> *((b) give directions in writing to the parties to pursue such means as he shall specify to settle the dispute within such period as he may specify if he is not satisfied that all attempts were made to*

settle the dispute by all such means as were available to the parties.

(2) If any of the parties to whom the Minister gave directions under paragraph (b) of subsection (1) to pursue a means of settlement reports to him in writing that such means. has been pursued without success, the Minister may, upon the receipt of the report, or if he has not received any report at the end of any period specified in those directions, he may then, refer the dispute to the Tribunal for settlement".

[34] It is clear that one of the preconditions that must exist before the Minister's power under the statute is activated is that an Industrial Dispute must exist. ***Section 2*** of the LRIDA provides a definition for industrial disputes in relation to workers who are not members of any trade union having bargaining rights. It states:

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

[35] It is not my role at this stage to review the Ministers action. However, if it is clear on the allegations that an industrial dispute exists, then I would have to find that the Applicant has no arguable case, and thereby not entitled to leave for judicial review. Counsel for the Applicant has argued that, in light of the fact that there was a separation agreement there can be no industrial dispute.

[36] In the case of ***Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security (Supra)***, certain workers were suspected of stealing from the Claimant Company. Consequently, they were summarily dismissed. The union representing the employees wrote to the company indicating their position that the dismissal amounted to a breach of the Labour Relations Code (LRC) and the rules of natural justice. An appeal, re-hearing was requested seeking reinstatement within five days without loss of pay, or that the matter would be referred to the

Ministry. The Company then allowed the employees to return to work. They were issued with undated letters which indicated that the Company unconditionally withdrew the letters of dismissal and that they were reinstated, the effective date being December 24, 2014.

[37] The employees were also advised that they would be paid all their outstanding emoluments from December 24, 2014 to January 16, 2015, minus the notice pay which they received upon termination. However, between January 19th and 20th, 2015 they were given undated letters inviting them to disciplinary hearings on either January 20th or 21st, 2015. They were directed to proceed on leave of absence until the decision of the disciplinary hearing was communicated to them. They were also advised that they could have representatives attend the disciplinary hearings with them. Following the advice of their union, the employees refused to participate in the scheduled disciplinary hearings.

[38] A letter was written to the Minister by the union stating that the workers were being prevented from working, and requesting his intervention to settle the dispute. The Minister referred the matter to the IDT, "*to determine and settle the dispute between the claimant and the former employees over,"* their termination of employment. The employees having failed to attend the scheduled hearings the company considered their cases in their absence and formally terminated their services by letters dated March 5, 2015. They were given their final payment inclusive of any notice and vacation pay due to them

[39] One of the issues that the court had to consider was "whether there was in law, an existing industrial dispute in relation to the dismissals of December 24, 2014, thereby justifying the Minister's referral of the matter to the IDT". Frazer J found that the dispute that existed did not fall within the definition of industrial dispute contained in ***section 2*** of the ***LIRDA***. In light of the fact that the employees had been reinstated, he found that the dispute did not relate to their termination or suspension but to their objection to attendance and participation in disciplinary

proceedings. He therefore held that the Minister acted ultra vires in referring the matter to the IDT over termination of employment.

[40] In the case of ***R v The Industrial Dispute Tribunal and ORS (ex parte National workers Union, Supra)***, the respondent companies met with the unions in order to renegotiate salary agreement for employees. When they met on the 28th of January 1981, there was disagreement over retroactivity and as a result, the threat of a strike. This was averted as the parties agreed to refer the matter to the Minister of Labour. The dispute as to retroactivity was settled on the 3rd of February 1981. Nevertheless, the unions had a twenty-eight (28), points claim which was not settled. They were trying to negotiate a total package to cover all companies.

[41] On the 22nd of January 1984, the companies offered an omnibus figure to cover all items. However, the union wanted the matter to be dealt with in greater details. This led to arguments and a lack of trust between the parties. On the 25th of March 1981, the companies tabled a revised proposal. The union agreed to table its own revised proposal on the 30th of March 1981 but failed to do so. After a total of 17 meetings the parties failed to arrive at an agreement. The matter was referred by the Minister to the IDT.

[42] The union challenged the referral arguing that since there was no deadlock there was no industrial dispute and the fact that the parties were still negotiating meant that there was no dispute. The court found that there were outstanding issues on which parties had not agreed. March J. stated that: It is a:

> *"Question of fact, the resolution of which is as much aided by the application of logic and common sense as by anything else."* *(See page 313 of that judgment)*

[43] He further stated that in the "Shorter Oxford Dictionary one meaning is given to the word dispute. That is,

"To contend with opposing argument or assertions, to discuss, argue, hold disputations often to debate with heat, to altercate. (See page 314 of the judgment.)

[44] In the aforementioned case, it was apparent on the facts that there was no final agreement between the parties as there were outstanding issues. In the instant case what the Minister had before her was a signed agreement between the parties which one party is seeking to invalidate. Therefore, despite the assertions of counsel for the Respondent and counsel for the Interested Party that there was an industrial dispute, it is my view that a court is obliged to examine the context in which the dispute arose in order to decide whether there was in fact an industrial dispute.

[45] In the case of ***Noranda Bauxite Limited v Minister of Labour and Social Security*** [2017] JMSC Civ 117, by letter dated October 31st, 2012, the Claimant Company terminated the employment contract of an employee, effective the October 31st of October 2012. The employee was offered wages up to the date of the letter; pay in lieu of notice and an ex gratia payment. However, his union negotiated a settlement package for him. Consistent with the terms of the settlement package, he was paid by way of a cheque on the 17th of July, 2013 which he cashed without any objections.

[46] By letter dated September 5th, 2013 the attorney-at-law for the employee wrote to the Conciliation Unit of the Ministry of Labour and Social Security (the Ministry) seeking its intervention. The letter stated that the employee, Mr. Gayle was wrongfully and unjustifiably dismissed and that he would like to be reinstated and compensated. Conciliation meetings were held and the matter was eventually referred to the IDT. In the Claim for Judicial Review the Claimant Company sought inter alia, an Order of Certiorari quashing the decision of the Minister of Labour, and Social Security to refer a dispute to the IDT; *"To determine and settle the dispute between Noranda Bauxite Limited on the one hand and Mr. Nigel Gayle on the other hand over the termination of his contract of employment*."

[47] At paragraph 36 of that judgment Lindo J stated:

> *"It is clear that the Minister's referral in this case was prompted by the letter from attorney at law, Nadine Lawson. Mr. Gayle, by this time was no longer an employee of NBL having been separated as at October 31, 2012 and having accepted his separation package as negotiated on his behalf by the UAWU, a Trade Union having bargaining rights, and of which he was a member".*

[48] At paragraph 41 she further stated*:*

> *"There is correspondence from which it is seen that the issue relating to Mr. Gayle's separation from the claimant company was addressed to the point where he accepted a negotiated package. It was therefore appropriate for the Minister to consider the fact that Mr. Gayle had received a negotiated package in his capacity as a former employee for whom the union had negotiated in determining whether there was a dispute capable of being referred to the IDT. The Minister therefore erred in failing to consider that the matter which gave rise to the dispute had been addressed by the union on behalf of Mr Gayle and the employer, or former employer NBL, and that in referring the matter to the IDT it would allow him to now benefit as a non-unionized employee."*

[49] She continued at paragraph *42:*

> *It is an undeniable principle of law that a discretionary power conferred by statute must be exercised for proper purposes. Where a decision maker, such as the Minister, acting by virtue of his statutory powers, has failed to take into account relevant considerations or has taken account of irrelevant considerations his decision may be quashed as he will be deemed to have failed to exercise his jurisdiction or to have exceeded his jurisdiction".*

[50] Despite the fact that in the instant case, Mr. Reid was a non-unionized employee there is evidence on which a court could hold that he received a package that he negotiated on his own behalf. This is in light of fact that on his allegation the concern he expressed to Dalling when he was told that he was being terminated was addressed in the separation agreement. That is, he expressed the concern that he was being terminated without gratuity, as initial the terms for termination did not include gratuity. This item was eventually included in the payment he received.

[51] Consequently, it is arguable that his objection, and the issue of duress is being raised after the issues were already settled by the Separation Agreement, dispelling any notion of an industrial dispute. The position put forward by counsel for the Interested Party is that the existence of a contract does not mean that there can be no industrial dispute. An industrial dispute arose when Mr. Reid was forced to choose between two options, either to sign the contract or be terminated.

[52] The position of the Respondent is that "The Minister being faced with, the fact of the separation agreement that ended Mr. Reid's employment and Mr. Reid's complaints that he was forced into signing the separation agreement, the Minister would have to find that there was a dispute. The decision as to what were the true circumstances at the time of the signing of the agreement would be for the IDT to determine".

[53] However, in the case of ***Sheffield v Oxford Controls Co. Ltd, (supra)*** the court stated that in spite of the existence of a threat the true test was what was the real cause of the resignation. In that case, Sheffield was a co-founder and equal shareholder of Oxford Controls. His relative share slipped to less than half when further capital was subscribed by a new shareholder. Mr Raison the other co-founder wanted to assume control of the firm. One afternoon, Mr Raison asked Mr Sheffield how much he required "to go". Mr. Sheffield replied, "£10,000". An agreement was later drawn up. The agreement was preceded by a letter on Mr Raison's behalf threatening "If you do not resign now I feel it is in the company's interests that I take steps to reconstitute the board. If we cannot agree upon the terms of your resignation, I must give you notice of my intention to use my votes to remove you from the board…". Mr Sheffield signed the agreement but later claimed he was wrongfully dismissed.

[54] The court found that the relevant question was "What caused the resignation?". If it was directly caused by threats of dismissal, then the employee was to be treated as having been dismissed. If, however, the willingness to resign is brought about by something else, for instance a negotiation of satisfactory terms, then the threats

can no longer be said to have caused the resignation. In such cases there has not been a dismissal. The court agreed with the decision of the Tribunal that Mr Sheffield had agreed to terms to terminate his employment with the company which were satisfactory to him. Consequently, he was not dismissed. (See the Judgment of Arnold J)

[55] In light of the aforementioned decisions, I take the view that the Applicant has an arguable case that Mr. Reid was not dismissed and as a consequence that there was no industrial dispute to be referred to the IDT. Therefore, it is my view that I cannot conclude at this stage that there was a foundation of facts on which the minister could rely. The position of the Applicant is that the issue between the parties, that is, the validity and enforceability of a contract does not fall within the jurisdiction of the IDT.

[56] When I examine the powers of the IDT, whereas it is clear that they have jurisdiction to hear matters involving an industrial dispute surrounding the interpretation of a collective agreements, there appears to be no express power given to the IDT to declare a separation agreement invalid. (See section 8 of the LRIDA). Therefore, the Applicant appears to have an arguable case on this issue. That is, apart from "interpretation, application, administration and alleged breach" whether the IDT has the power to pronounce on the validity of a contract.

[57] Counsel for the Applicant further argues that in any event Mr. Reid is estopped from having the matter referred to the IDT. He postulates that Mr. Reid's acceptance of payment under the separation agreement is an indication that he waived his rights to have the matter so referred to the IDT. The respondents have placed reliance on ***Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and National Workers Union, (Supra)*** to make the point that Mr. Reid's conduct cannot amount to a waiver of his rights for the matter to be referred to the IDT. In that case some employees' posts were made redundant. They were given letters immediately terminating their employment along with payment cheques. Consequently, the union referred the matter to the IDT. Arrangements were made

for a hearing. After the matter had been referred to the IDT and before the hearing two of the employees encashed their cheques. On those facts, the Privy Council rejected the argument of the company that waiver could be established from the act of the encashment of the cheques.

[58] The court stated that:

> *"Waiver, as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the alleged waiver. If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present. An objectively ascertained intention to waive is the first requirement. JFM's case falls at this hurdle. The cashing of the cheques took place after the dispute was referred to the IDT. In these circumstances, the cashing of the cheques could not be taken to be any clear indication that the employees were intending to abandon their statutory rights under S12(5)(c) of the Act. Nor is there any indication, or at least no indication to which their Lordships have been referred, that JFM or any representative of JFM thought that the two employees were intending to relinquish their statutory rights. Even assuming that the cashing of the cheques could be regarded as a sufficiently unequivocal indication of the employees' intention to waive their statutory rights, the waiver would, in their Lordships' opinion, only become established if JFM had believed that that was their intention and altered its position accordingly. There is no evidence that JFM did so believe, or that it altered its position as a consequence. The ingredients of a waiver are absent. Their Lordships would add that they do not see this as a case where the employees were put to an election between inconsistent remedies, i.e. cashing the cheques or pursuing their statutory remedy (see* ***Scarf v Jardine*** *7 App Case 345 at 351, 51 LJQB 612). Mr.*

> *Scharschmidt did not advance any argument to the contrary but based his waiver contention on estoppel by conduct." (See paragraph 20)*

[59] It is apparent, on a reading of the judgment, that their Lordships in the ***Flour Mills case*** have not indicated that conduct can never amount to waiver. What they have clearly said is that, the court has to examine the circumstances of the case to see whether there is conduct, when objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question. While I will refrain from arriving at a conclusion on this issue, my view is that the circumstances in this case are very different from those that exist in the ***Flour Mills* case**. In the ***Flour Mills case***, there was no separation agreement. In the instant case, payment was made pursuant to the agreement. In the ***Flour Mills*** case, the conduct that was being assessed was conduct subsequent to the referral to the IDT. In the instant case, the conduct that is in question is the conduct of the party before the matter was referred to the IDT. Therefore, there is evidence on which a court can find the ***Flour Mills case*** distinguishable from the instant case. That is as much as I will say on this point.

WHETHER THERE IS AN ARGUABLE CASE THAT THE REFERRAL IS UNREASONABLE

[60] The Applicant has also argued that in light of the fact that Mr. Reid was paid for the unexpired portion of his employment contract, and that he was employed at the time that the matter was referred by the Minister, it was unreasonable for the referral to be made in those circumstances. In the case of ***Associated Picture Houses v Wednesbury Corporation*** [1948] 1 K.B. 22. The court stated that:

> *"a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."*

[61] It is my view that the Applicant has an arguable case on this issue. It can be reasonably argued that there may have been matters that the Minister should have considered that she did not. That is, that under the settlement agreement the salary and emolument Mr. Reid would have been entitled to had he remained until contractual term expired by effluxion of time were paid and the fact that re-instatement was not being sought. Then in light of those factors, the question would be whether the Minister was unreasonable in the exercise of her discretion where it is found that she failed to take these factors into consideration in the exercise of her discretion.

[62] Suffice it to say I cannot make a decision as to whether or not the Minister's referral to the IDT was ultra vires, as I am not conducting a hearing of the substantive matter, (See Sykes J, as he then was, in the case of ***The Industrial Disputes*** (***Exparte J. Wray and Nephew*** **Limited** 2009 HCV 04798 (unreported) paragraph 63). However, I will venture to say at this stage, that this is neither a case that has no merit nor one that is bound to fail.

[63] The Applicant has raised an arguable case which merits investigation by a tribunal. The substance of the investigation can be summed up as follows. (i) Whether a separation agreement amounts to a termination of employment for the purposes of the Act. (ii) Whether a dispute regarding the validity of a separation agreement is an industrial dispute within the terms of the Act. (iii) Whether the IDT has the power to strike down or pronounce on the validity of a separation agreement.

[64] A relevant question also is when did the dispute arise. In the case of ***R v Industrial Dispute Tribunal and the Honourable Minister of Labour; Ex parte Wonards Radio Engineering Ltd***, (1985) 22 JLR 67 Vanderpump J noted at page 76C that the relevant date to determine if there was an industrial dispute was at the date of dismissal and not the date of reference to the Tribunal. The argument of Counsel for the Applicant is that there was no dispute over the separation agreement at the time of the signing of the agreement. The evidence of Mr. Dalling is that Mr. Reid appeared to be satisfied and accepted payment under the agreement. The dispute

arose later over a belief of an entitlement to travelling allowance. It is my view that these are matters for investigations that a review court should resolve.

[65] If the court finds that Mr. Reid agreed to terms of the separation agreement but later realized that he could have gotten more than he agreed to, the real question in those circumstances is whether there was industrial dispute that the Minister could properly have referred to the IDT; or whether there was a dispute that arose after the termination of the employment.

CONCLUSION

[66] In all the circumstances I am satisfied that the Applicant has demonstrated that there is an arguable case that the Minister acted ultra vires in referring the matter to the IDT. Consequently, I find that the Applicant has satisfied the conditions for leave for Judicial Review. Therefore I make the following orders;

ORDERS

[67] (i) Leave is granted to the Applicant to apply for Judicial Review by way of:

> An Order of Certiorari to quash the referral of the Minister of Labour and Social Security dated the 6th of December, 2018 to the IDT.

(ii) This grant of leave shall operate as a stay of the referral of the dispute of the Minister of Labour and Social Security dated 6th of December, 2018 and of any proceedings by the Industrial Disputes Tribunal relating to the termination of the employment of Mr. Milton Reid.

(iii) The Claim is to be filed within 14 days of the date hereof.

(iv) Costs of the application to be costs in the Judicial Review proceedings.