IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 00778

BETWEEN	**WENTWORTH GRAHAM**	**APPLICANT**
AND	**THE JAMAICA STOCK EXCHANGE**	**RESPONDENT**

Application for interim declaration and injunctions

Mrs. Georgia Gibson Henlin QC, Ms Nerine Small and Ms Stephanie Williams instructed by Henlin Gibson Henlin for the Applicant.

Mr. Patrick Foster QC, Ms Ayana Thomas and Mr. Jeffery Foreman instructed by Nunes, Scholefield, DeLeon & Co for the Respondent.

Heard: 01st, 03rd and 18th May, 2017.

IN CHAMBERS

COR: V. HARRIS, J

[1] By way of an Amended Notice of Application for Court Orders filed on April 19, 2017 the applicant, Mr. Wentworth Graham, is seeking the following orders:

(1) An interim declaration that the Applicant has been suspended from his employment from the January 16, 2017;

(2) An interim declaration that the Respondent is obliged in this case to comply with the directions of the Ministry of Labour and Social Security to

attend the Industrial Disputes Tribunal for the settlement of the dispute between the Applicant and the Respondent;

(3) An injunction restraining the Respondent from proceeding with disciplinary hearing(s) against the Applicant pending the outcome of the proceedings at the Industrial Disputes Tribunal or further order of this court;

(4) An injunction directing the Respondent to permit the Applicant to attend work and perform his duties pending the outcome of the proceedings at the Industrial Disputes Tribunal and the application for the interim declaration and any claim filed consequent on directions herein;

(5) Costs.

(6) Such further and/or other relief as this Honourable Court deems just including but not limited to directions to the Applicant to file a Claim against the Respondent within such time as this Court may direct.

[2] The court, as agreed by counsel on both sides, will address the orders being sought at 1, 3 and 4 above in its decision.

Background

[3] Mr. Graham is employed to the respondent the Jamaica Stock Exchange ('JSE') as its Chief Regulatory Officer ('CRO'). He is assigned to the respondent's Regulatory and Market Oversight Division ('RMOD'). This division is the operational arm of the Regulatory Market Oversight Committee ('RMOC') at the JSE. He reports directly to the Regulatory Committee of the respondent's board. The chairman of that committee is Mr. Livingstone Morrison. The applicant, by his job description, liaises with Mrs. Marlene Street-Forrest, the respondent's general manager ('the GM'), other executives and senior managers, as well as, staff members of the JSE. He also supervises a number of persons in his department.

[4] On November 16, 2016 the applicant wrote to the GM taking issue with the JSE's consolidated audited financial statements for the quarter ending September 30, 2016. He stated that the shareholding lists for the respondent's directors, senior managers and their connected parties were inaccurate and an amended report was required.

[5] The applicant also indicated the consequences of failing to submit an amended report – that the RMOD would treat the financial statements as non-compliant with "the terms of **JSE rule 407 – Quarterly Financial Statements** which could result in other enforcement actions."

[6] The GM requested clarification from the applicant about this matter. He responded by directing her attention to the relevant rule (JSE rule 407) and indicated that the shareholdings of all directors, senior managers and their connected parties, whether they have zero or 1 share or greater, must be disclosed in JSE's quarterly financial statements.

[7] The GM disagreed with the applicant's interpretation of rule 407 and the matter then escalated. Mr. Morrison, the chairman of the RMOC became involved and he also disagreed with the applicant's interpretation of the rule. He was also concerned about the tone of the correspondence from the applicant to the GM and another senior manager. The applicant was also instructed to revert to him.

[8] A meeting was held between the applicant and Mr. Morrison and it would appear that it was decided at that meeting that there would be no need for the JSE to amend its quarterly financial statements.

[9] However, on December 12, 2016 the applicant circulated the JSE monthly regulatory report which was due for publication on December 15. That report indicated that the JSE was non-compliant with rule 407.

[10] The GM objected to the report and questioned the "efficacy" of the applicant in his capacity as CRO. The applicant responded demanding an apology from her

as he felt that this remark was damning to his office as CRO and his image. These correspondence were by way of email and the emails between the applicant and GM were copied to a number of persons including the Manager of Human Resources (who is supervised by the GM).

[11] On December 20 Mr. Morrison emailed the applicant and directed him "to cease and desist" from engaging in any further communications on the subject and that he (the applicant) was to immediately contact his office so that they could discuss the matter.

[12] On January 13, 2017 the GM, on behalf of the respondent, penned a letter to the applicant which contained a number of concerns about his relationship with staff, performance and other issues relating to the discharge of his duties. It was alleged that those factors had led to a loss of confidence in him and the erosion of their relationship as employer/employee.

[13] The GM in the letter advised the applicant that the JSE would be guided in the circumstances by the provisions of section 22 of the Labour Relations Code ("the Code"). This section of the Code makes provision for disciplinary procedures. However, prior to this procedure taking place, he was invited to a meeting to determine if a "mutually agreeable settlement", could be arrived at between the parties.

[14] The applicant was also advised that if he did not engage in the discussions or if it was not successfully concluded, the JSE would commence disciplinary proceedings against him. He was also told that either of these two options would result in his "non-attendance at work with pay until the discussions or hearing process have been completed."

[15] On January 17 the applicant responded indicating his willingness to participate in the discussions provided that the settlement involved the retention of his position and job at the JSE. In other words, the applicant made it clear that he was not willing to agree to the termination of his employment. He also indicated that he

did not understand the phrase/term “authorised leave” and that since he had not applied for leave he would return to work on January 19.

[16] When he showed up for work on January 19, the applicant was prevented from accessing the JSE’s offices by the security guard. He was also advised by a letter from the GM on the same day that the JSE would be embarking upon the disciplinary hearing. That letter provided details of what would happen next in light of the decision taken by the respondent.

[17] The applicant sought legal advice on January 19. His Attorneys-at-Law wrote to the Ministry of Labour requesting that the ‘dispute’ that had arisen between the applicant and respondent be referred to the Minister of Labour (‘the Minister).

[18] The abridged version of events that followed was that at first there was some reluctance on the part of the Minister to refer the matter to the Industrial Disputes Tribunal (IDT). This was on the basis of prematurity (the attorneys had indicated that the applicant was suspended which amounted to a constructive dismissal, while a disciplinary hearing was pending), as well as, other reasons.

[19] This stance did not find favour with the applicant and his attorneys and led to an action being filed against the Minister, the Attorney General of Jamaica and the respondent. However, on March 21, 2017 the Minister referred the matter to the IDT. The terms of reference to the IDT is:

> *“To determine and settle the dispute between the Jamaica Stock Exchange on the one hand and Mr. Wentworth Graham on the other hand, over the suspension of his employment.”*

[20] The action against the Minister and the Attorney General was discontinued on April 12 and the applicant thereafter amended his application (which was referred to in paragraph 1 above). He also obtained the court’s permission to file and serve his claim form and particulars of claim. Mrs. Street-Forrest is a party to the claim but is not party to the present application as no interim relief is being sought against her.

[21] On April 24, 2017 the applicant filed a claim in the following terms:

> *"1. A declaration that the Claimant is entitled to the benefits and rights conferred by his contract of employment including the statutory procedures and rights conferred on him under the Labour Relations & Industrial Disputes Act, Regulations and the Labour Relations Code.*
>
> *2. A Declaration that the Defendant is required to comply with and/or exhaust the proceedings and procedures provided under the Labour Relations & Industrial Disputes Act and its regulations for dealing with disputes which include the Claimant's suspension.*
>
> *3. A Declaration that the Defendant is required to comply with and/or exhaust the proceedings and procedures provided for under the Labour Relations & Industrial Disputes Act and its regulations for dealing with disputes including the Claimant's suspension prior to embarking on disciplinary proceedings arising from the same facts.*
>
> *4. A declaration that the Claimant is entitled to remain and/or continue in his employment in accordance with its terms.*
>
> *5. An injunction restraining the Defendant from proceeding with or otherwise convening disciplinary hearing(s) against the Claimant pending the outcome of the proceedings relating to the Claimant's suspension at the Industrial Disputes Tribunal;*
>
> *6. Damages for breach of contract of employment;*
>
> *7. Damages for libel;*
>
> *8. Damages for loss of investment income since 2008 to date;*
>
> *9. Alternatively, damages being retroactive salary from 2008 to date;*
>
> *10. Interest pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) Act;*
>
> *11. Costs;*
>
> *12. Such further and/or other relief as this Honourable Court deems just.*

[22] Although the applicant's 'suspension' had been referred to the IDT and the hearing has been set for September 19, 2017, the respondent has been proceeding with the arrangements for the disciplinary hearing. Dates were chosen and canvassed, the venue decided and members of the panel engaged.

It became quite evident to the applicant, that the referral to the IDT had not arrested the disciplinary proceedings. It is within this context that he is seeking the intervention of the court.

Discussion

[23] I wish at this stage to express gratitude to the attorneys in this matter for their industry and assistance to the court. I have considered carefully all their submissions and the authorities that they have relied on. I do not intend to regurgitate them. However, during the course of the decision as I seek to address the issues that have been highlighted, I will make references to them as necessary.

Interim declaration that the Applicant has been suspended from his employment

[24] I indicated at the end of submissions to learned counsel Ms. Nerine Small that the applicant's request for an interim declaration that he has been suspended from his employment since January 16, 2017 will be refused.

[25] Learned counsel Mr. Patrick Foster QC submitted that this issue is now before the IDT and it is for the IDT to make this determination. He further submitted that the respondent has always maintained that the applicant was placed on administrative leave or not required to attend work until the matters concerning his employment were aired whether through discussions or a formal disciplinary hearing. This is now an issue of fact for the IDT to decide, that is, whether or not the applicant was suspended and if so whether the suspension was justified in all the circumstances.

[26] Mr. Foster posited that the applicant having invoked the jurisdiction of the IDT the court cannot at the same time in concurrent proceedings determine this question. This could lead to the anomaly of the court ruling one way and the IDT another. This could ultimately result in inconsistent or contradictory decisions.

[27] I agree. The applicant having elected to have this issue placed before the IDT, it is for the Tribunal to determine whether he has been suspended or not. There are two positions being put forward, one from the applicant and the other from the respondent. It is for the IDT to resolve the factual conflicts that have arisen between the parties in order to determine if the applicant has been suspended or not. If I were to embark upon this exercise, it would require by necessity that I trespass upon the terrain of the IDT. Any decision that I make would effectively interfere with the Tribunal's discrete and specialized jurisdiction to settle disputes referred to it (as has been done in this case).

[28] I am guided, in arriving at my decision, by Rattray P in **Village Resorts Limited v The Industrial Dispute Tribunal and Others** (1998) 35 J.L.R. 292 at pages 299 paragraphs E to F and 302 paragraph H:

> *[Page 299] "It [the Labour Relations and Industrial Disputes Act (LRIDA)] establishes too, the Industrial Disputes Tribunal ("The Tribunal") to which industrial disputes are referred for settlement and whose decisions "shall be final and conclusive and no proceedings shall be brought in any Court to impeach the validity thereof, except on a point of law."*
>
> *The Act, the [Labour Relations] Code and Regulations therefore provide the comprehensive and discrete regime for the settlement of industrial disputes in Jamaica..."*
>
> *[Page 302] "That issue of fact is of course for the Tribunal."*

[29] I also find as instructive the dicta of my learned brother Sykes J in **National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal and Peter Jennings** [2015] JMSC Civ 105 at paragraphs 49, 53, 55 and 57 of the judgment:

> *"[49] The findings of fact, their interpretation and analysis are for the statutory functionary [the IDT] and not the court...*
>
> *[53]...It [the IDT] must look and is duty bound to examine all the relevant circumstances, find facts, interpret them, draw conclusions and apply the statute...*
>
> *[55]...That is why the statute [LRIDA] gives IDT full control over fact finding...*

[57] The IDT's job is to say what is made of the material before it..."

[30] Similarly Brooks JA in **The Industrial Dispute Tribunal v University of Technology and another** [2012] JMCA Civ 46 made it abundantly clear that, as Sykes J in his usual eloquent style stated it in the **Peter Jennings** case:

> *"[45] c. the IDT is a tribunal with its own original jurisdiction where it is a finder of fact;"*

[31] Learned Queen's Counsel Mrs. Georgia Gibson Henlin QC made it very clear during her submissions that a suspension is an industrial dispute as provided for in section 2 of the LRIDA and that this dispute is now before the IDT to be determined. Therefore, the court would fall into error if it were to declare, at this stage, that the applicant has been suspended from his employment. This is for the IDT.

An injunction directing the Respondent to permit the Applicant to attend work pending the outcome of the proceedings at the IDT

[32] This issue again is entirely in the remit of the IDT. I am again constrained to agree with Mr. Foster, that it is the prerogative of the IDT to determine whether or not the applicant has been suspended and whether his suspension was justified or not. Depending on its decision it is the IDT's duty to decide if the applicant is to return to work or not, or it may make any order that it deems appropriate in all the circumstances.

[33] Rattray P in **Village Resorts Ltd** at page 304 paragraph E of the judgment stated that the IDT is:

> *"...vested with a jurisdiction relating to the settlement of disputes completely at variance with basic common law concepts, with remedies including reinstatement for unjustifiable dismissal which were never available at common law and within a statutory regime constructed with concepts of fairness, reasonableness, co-operation and human relationships never contemplated by the common law."*

[34] Although the learned President made reference to the jurisdiction of the IDT to reinstate an employee on the grounds of unjustifiable dismissal, this principle is also applicable, in my view, where the IDT finds that the suspension of a worker is not justified.

[35] In passing, it was my observation that Mrs. Gibson Henlin did not concentrate her submissions on these two aspects of the application, that is, the applications for interim declaration that the applicant was suspended and interim injunction directing the respondent to allow the applicant to return to work. I formed the view that she would have been aware that these are issues to be addressed by the IDT and not the court. I have absolutely no intention of encroaching upon the IDT's jurisdiction which is to settle industrial disputes referred to it and prescribe remedies, including reinstatement for an unjustifiable suspension, if it finds that this is the appropriate redress in all the circumstances.

An injunction restraining the respondent from proceeding with disciplinary hearing(s) against the applicant pending the outcome of the proceedings at the IDT or further order of this court

[36] This was, in my opinion, the main feature of the application in light of the detailed submissions made on the subject by both attorneys for the parties.

[37] Mrs. Gibson Henlin submitted that the respondent's insistence on commencing and dealing with a disciplinary hearing notwithstanding that the applicant's suspension was still pending before the IDT was an attempt to circumvent the LRIDA and act in complete disregard of the applicant's rights and interests. The applicant, she said, is entitled to the benefits conferred on him for dealing with industrial disputes which include a suspension as provided in section 2 of the LRIDA.

[38] The serious question that is to be tried, she further submitted, was whether the applicant is entitled to the benefit of the LRIDA and the Code in relation to the industrial dispute relating to his suspension. To put it another way, learned

Queen's Counsel posed the following question: Is the applicant entitled to have his dispute heard by the IDT prior to disciplinary proceedings being instituted against him on the basis of the same facts that gave rise to the suspension? The outcome of the disciplinary hearing (where the applicant is terminated), she said, could render nugatory the rights that have been conferred by the LRIDA in relation to his suspension. The seriousness of the matter is evidenced by the objectives of the LRIDA and the Code, she advanced.

[39] Mrs. Gibson Henlin indicated that in the case at bar a reference has been made to the IDT and a date has been set for the hearing. If the JSE proceeds with the disciplinary hearing and the applicant's employment is terminated the respondent would have effectively circumvented and defeated the objects of the LRIDA and the Code. The court, therefore, should halt any process that intends to achieve this result.

[40] On the issue of the balance of convenience, counsel for the applicant put forward that "the overriding consideration under this head is the adequacy of damages." She submitted that the applicant's interest in his job is akin to a property right. The right to his job and the deprivation of it without reference to the specially created regime of the IDT cannot be adequately compensated in damages. The IDT is required to and should be given the opportunity to examine and apply the provisions of LRIDA and the Code to decide whether in all the circumstances the applicant was justifiably suspended or not.

[41] She also submitted that given the public law and interest element of this case the court should not order that the applicant give the usual undertaking as to damages. In the alternative, he should be given the opportunity to fortify the undertaking. It was also advanced that in all the circumstances the balance of convenience lies with granting the injunction because if this was not done, the status quo would not be preserved and it was highly possible he would lose his job when the disciplinary proceedings are concluded. If this happened, he would be deprived of his rights under LRIDA in relation to his suspension.

[42] Learned counsel for the JSE, Mr. Patrick Foster QC submitted that the application for interim declaration and injunctions ought to be refused for the following reasons:

(1) there is no serious question or issue to be tried; and in any event the causes of action raised in the substantive claim do not form a basis for the interim reliefs being claimed;

(2) even if there was a serious question to be tried, damages would be an adequate remedy;

(3) the balance of convenience does not favour the grant of the interim injunction; and

(4) the interim remedies being sought are an abuse of the process of the court as the "dispute" regarding the suspension has been referred to the jurisdiction of the IDT which is a statutory body with powers to manage its own process.

[43] Mr. Foster amplified his submissions by examining the substantive claim that has been filed by the applicant. He put forward that the causes of action being pursued are breach of contract of employment, libel, and in the alternative retroactive salary from 2008 and loss of investment income. The applicant has sought the remedy of an injunction restraining the respondent from proceeding with a disciplinary hearing pending the outcome of the IDT's decision and mandating the respondent to permit the applicant to return to work. However, Mr. Foster submitted, there was no substantive cause of action against the respondent to ground the remedies being sought.

[44] Mr. Foster further submitted that the applicant had failed to show that there was a serious issue to be tried. The claim for breach of contract, loss of investment income and retroactive salary was statute barred. The respondent also has a good defence to the claim for libel on the grounds of fair comment and qualified

privilege. In the circumstances, the applicant had not demonstrated that his claim has a real prospect of success, Mr. Foster posited.

[45] It was also Mr. Foster's contention that the dispute regarding the alleged suspension was separate from the disciplinary hearings. He pointed out that the matter that was before the IDT was an allegation of the suspension of the applicant's employment. However, the matters that will be ventilated at the disciplinary hearing concern issues that the respondent thought best to be addressed in that forum. The outcome of those proceedings is unknown. The terms of reference to the IDT, therefore, does not and cannot extend to the disciplinary hearing which has not yet taken place. Mr. Foster continued that the affidavit evidence of the respondent's GM made it abundantly clear that no decision was made about those issues when the applicant was told not to attend work and this was also communicated to him. The purpose of his non-attendance at work was to facilitate the disciplinary hearings, Mr. Foster said

[46] Learned counsel for the respondent also commented that if the result of the disciplinary proceedings was adverse to the applicant, he would, in any event, still have the right to approach the IDT or the court on that score.

[47] In light of the decisions arrived at in paragraphs 24 to 35 above I need not address the issue of abuse of the process of the court. It is the IDT who is now charged with determining all the facts in this matter, in the context of the dispute that has been referred to them.

[48] Mr. Foster also submitted that if the court finds that there is a serious question to be tried damages would be an adequate remedy to compensate the applicant. He pointed out that the applicant has also claimed damages in respect of his causes of action of breach of contract and libel, as well as, retroactive salary and loss of investment income. As a consequence, the injunction is to be refused.

[49] It was Mr. Foster's contention that if the court disagrees that damages would be an adequate remedy, the balance of convenience does not favour the grant of an injunction because of the following:

i) the applicant though not at work is still being paid his full salary and emoluments pending the outcome of the disciplinary hearing. It is more prejudicial to the respondent to continue paying full salary while awaiting the decision of the IDT on the dispute in regard to the purported suspension, a procedure that could take months;

ii) it was also more prejudicial to the respondent to have the applicant return to work in circumstances where its trust and confidence in him and his ability to perform his duties have been eroded;

iii) the applicant, on the other hand, suffers no prejudice in proceeding with the disciplinary hearing that may well result in his vindication and return to work;

iv) the balance of convenience in terms of time, costs and balancing the right of the employer to protect his business interests by conducting disciplinary hearings when necessary, as well as, the right and desirability of the employee to have allegations against him determined as quickly as possible, tips the balance of convenience in the respondent's favour.

[50] Additionally, the applicant has not given evidence that he is willing to abide by any undertaking as to damages that the court may require and that he would be in a position to honour that undertaking.

The Law

[51] When contemplating whether or not to grant an interim injunction, the court should bear certain considerations in mind. Although the highly regarded judgment of Lord Diplock in **American Cyanamid Co v Ethicon Ltd** [1975] 1 All E.R. 504 remains the leading case on this area of the law, the central principles enunciated in that case were recently reiterated in **National Commercial Bank Jamaica Ltd v. Olint Corporation Ltd [2009]** 1 WLR 1405, a decision of the Judicial Committee of the Privy Council.

[52] The approach that is to be taken by the court when considering an application of this nature was succinctly captured by McIntosh JA in **Heather Montaque (Executrix of the Estate of Seaton Montaque) v GM and Associates and George Gordon** [2013] JMCA App 7 at paragraph 16 of the judgment:

> *"[16]... Indeed, there is no dispute between the parties as to the applicable law in this area and I need do no more than refer to the leading case of **American Cyanamid and Co v Ethicon** [1975] 1 All ER 504 approved and applied in **National Commercial Bank v Olint**, for a clear exposition of the principles which must guide the court in determining whether or not injunctive relief is to be granted or withheld. Applying those principles I must first determine whether the applicant has shown that there is a serious issue to be tried. If that requirement is not met then the application fails in limine. If it is determined that there is a serious issue to be tried I must go on to determine whether damages would be an adequate remedy as in that event and if so, the injunction should not be granted. However, if an award of damages would not be an adequate remedy then I must consider the application on a determination of where the balance of convenience lies in relation to the respective positions of the parties."*

[53] Lord Hoffmann, who delivered the opinion of the Board in **NCB v Olint,** clarified the approach in this manner:

> *"[16] ...The purpose of such an [interlocutory] injunction is to improve the chances of the court being able to do justice after a determination on the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding the injunction is likely to produce a just result. As the House of Lords pointed out in **American Cyanamid***

> ***Co v Ethicon Ltd*** *[1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*
>
> *[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether the granting or withholding of an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause least irremediable prejudice to one party or the other...*
>
> *[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.*
>
> *[19]... What is required in each case [whether the application is for a mandatory or prohibitory injunction] is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in* ***Shepherd Homes Ltd v Sandham*** *[1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted".*
>
> *[20]... What matters is what the practical consequences of the actual injunction are likely to be..."*

[54] Learned Queen's Counsel Mrs. Gibson Henlin encapsulates the approach by referring to the dicta of Chadwick J in **Nottingham Building Society v Eurodynamics Systems Plc** [1993] F.S.R. 468 at 474 that the general principle that is to be taken from **NCB v Olint** and other cases that have since applied it is that "the overriding consideration for the court is to take the course that is likely to

involve the least risk of injustice if it [the granting or withholding of the injunction] turns out to be wrong."

Is there a serious issue to be tried?

[55] The claim as a whole, as distinct from the reliefs/remedies being sought, is for breach of contract of employment, libel, loss of investment income and retroactive salary. It is stated in the particulars of claim and the applicant's affidavit that in addition to his contract of employment, the terms and conditions of his employment are governed by the respondent's employment handbook which specifically incorporates the labour laws of Jamaica which includes the LRIDA and the Code.

[56] The applicant is alleging that the respondent, being well aware that the dispute between them concerning his suspension is pending before the IDT, has breached his contract of employment by:

(1) refusing to attend conciliation proceedings;

(2) convening a disciplinary panel and is proceeding with the disciplinary hearing against the applicant while the referral to the IDT regarding his suspension is pending;

(3) failing or refusing to submit to the jurisdiction of the Minister of Labour in keeping with the LRIDA and Code which provides the procedure for dealing with the dispute regarding the applicant's suspension;

(4) acting in a manner designed to frustrate and circumvent the objective of the LRIDA and Code by seeking to deprive the applicant of the benefits conferred by them in relation to the determination of his suspension which is before the IDT;

(5) preventing the applicant from adjudicating or pursuing his dispute at the IDT as contemplated by and provided for in his contract of employment;

(6) acting in a manner that is calculated or is likely to destroy or seriously damage the relationship of trust and confidence existing between the applicant and respondent;

(7) failing to deal fairly with the claimant and provide for his economic security by carrying out its obligations under the employment contract in good faith;

(8) making unsubstantiated allegations against the applicant which jeopardise the employment relationship between the parties; and

(9) acting in bad faith when it suspended the applicant without reference to his employment contract or the Code and acting in a manner to deny the applicant access to the IDT.

[57] The other aspects of the particulars of claim are concerned with the claim for libel, loss of investment income and retroactive salary that have no nexus to the interim relief that is being sought. However, these are the issues that will be ventilated at trial. The applicant sought the same relief in his particulars of claim as he did in the claim form.

[58] The applicant's affidavits in support of the application for interim relief confirmed the matters that were raised in his particulars of claim. He has deponed that the disciplinary hearing is based on the same facts that gave rise to his suspension (see paragraph 4 of the applicant's third affidavit in support of the application filed on April 19, 2017).

[59] Mrs. Street-Forrest in her affidavit filed on April 28, 2017 indicated that the reason the applicant was asked not to attend work was to facilitate either the discussions with him or a disciplinary hearing (see letter dated January 13, 2017) and not because he was suspended. He was placed on administrative leave pending the outcome of either those discussions or the disciplinary proceedings

and not because there has been any determination of the issues that will be ventilated at the disciplinary hearing.

[60] She also averred that the JSE has complied with the requirements of the Code as he was informed of the issues giving rise to the hearing, he will be able to state his case before an independent panel and to be represented by a person of his choice. If the decision of the panel is adverse to the applicant, he is entitled to an appeal and if still dissatisfied, he can approach the Ministry of Labour or the courts for redress.

[61] In deciding whether or not there is a serious issue to be tried I am mindful of the guidance provided by Lord Diplock in **American Cyanamid** that:

> *'It is no part of the court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend or to decide difficult questions of law which call for detailed argument and mature considerations. These are matters, to be dealt with at trial.*

[62] Having examined the claim, particulars of claim and the evidence I find that the following issues arise:

i) whether or not to proceed with the disciplinary hearing while the dispute concerning the applicant's alleged suspension is still pending would be in breach of the terms and conditions of his employment in light of the incorporation of the provisions of the LRIDA and the Code in his contract of employment;

ii) whether by taking steps to proceed with the disciplinary proceedings, the JSE is acting in a manner designed to frustrate and circumvent the objective of the LRIDA and Code by seeking to deprive the applicant of the benefits conferred by them in relation to the determination of his suspension which is before the IDT in breach of the terms and conditions of his employment;

iii) whether the disciplinary hearing (and in particular an adverse outcome) would prevent the applicant from adjudicating or pursuing the dispute relating to his suspension at the IDT as contemplated and provided for in his contract of employment.

[63] I have considered that these could be classified as serious issues to be tried and so find. Having found that there are serious issues to be tried I will now consider whether an award of damages is adequate.

Will damages be an adequate remedy?

[64] The substantive claim in this matter is for breach of contract, libel, retroactive salary and loss of investment income. The applicant is himself seeking damages as the redress for these purported ills. I am inclined to agree with learned Counsel Mr. Foster that it does appear that damages would be an adequate remedy.

[65] Learned counsel Mrs. Gibson Henlin submitted that damages could not adequately compensate the applicant because as she said, “his interest in his job is akin to a property right and his right to this property interest and deprivation without reference to the specially created regime cannot be adequately compensated in damages.”

[66] As attractive as this submission may seem, and I will admit that it did at first cause the court some anxiety, I must disagree. Firstly, the evidence does not support that he has been deprived of his job without any reference to the “specially created regime”. Secondly, in the context of the substantive claim, if liability is ascribed to the respondent in respect to all the causes of action pleaded, damages would still be the appropriate and adequate remedy to compensate him for any loss he suffers.

[67] I have noted that there is no evidence before the court that the JSE is not a viable organisation and therefore would not be in a position to meet an award of damages if one should be made against it.

[68] On this limb the application for interim injunction would fail. However, if I am wrong I have gone on to consider the balance of convenience.

In whose favour does the balance of convenience lies?

[69] In weighing the balance of convenience I remind myself that I may take into account the prejudice which the plaintiff may suffer if no injunction is granted; the prejudice to the defendant if it is; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking and the likelihood of either party being able to satisfy such an award. The fundamental principle is that the court should take "whichever course seems likely to cause the least irremediable prejudice to one party or the other."

[70] The course, in my view, that would result in the least irremediable harm would favour the respondent and the withholding of the injunction for the following reasons:

i) The injunction would require that the respondent continue to pay the applicant his full salary and emoluments until the outcome of the dispute regarding his alleged suspension and more likely than not until the outcome of the disciplinary proceedings. The court is not unmindful that after the IDT's determination, there may well be an appeal. This may take several months or even years. In practical terms this could result in significant costs to the JSE which will not be recoverable in any event.

ii) The injunction would require that the disciplinary hearing to resolve the allegations made against the applicant be halted, and for how long this would be anyone's guess, in light of my observations above. This would affect not only the rights of the JSE as an employer, to conduct disciplinary proceedings

but also those of the applicant to have the allegations against him resolved in a timely manner. This is an essential factor in a healthy industrial relations landscape.

iii) There is no evidence that the applicant would be in a position to satisfy a claim under the cross-undertaking in damages.

iv) The applicant would suffer less prejudice proceeding to the disciplinary hearing. From the evidence it would appear that the hearing will be conducted by persons who are unconnected to the JSE and the parties involved and who are experienced in the field of industrial relations. The result of those proceedings is unknown. It could well be that the allegations are not made out against the applicant and he retains his job. However, should that not be the case and he is dissatisfied with the decision, he is not without a remedy. He could seek redress at the Ministry of Labour or before the courts.

[71] In light of the above, the application for interim declaration and injunctions is refused. Costs to the respondent to be agreed or taxed.