[2024] JMFC Full 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2021CV02657

CORAM: THE HONOURABLE MRS JUSTICE S. WINT-BLAIR
THE HONOURABLE MRS JUSTICE T. HUTCHINSON-SHELLY
THE HONOURABLE MRS JUSTICE T. CARR

BETWEEN	**JAMAICA REDEVELOPMENT FOUNDATION, INC**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1st DEFENDANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**2nd DEFENDANT**

IN THE FULL COURT

Messrs. Gavin Goffe, Matthew Royal and Jovan Bowes instructed by Myers, Fletcher & Gordon for the Claimant

Ms. Lisa White instructed by the Director of State Proceedings for the 1st and 2nd Defendants

Constitutional Law – Separation of Powers – Right to due process – Whether breach of the right to a fair hearing – Whether as presently constituted the Industrial Disputes Tribunal is an independent and impartial authority

Constitution of Jamaica (Order in Council), 1962, sections 7(2), 8(2) - Charter of Fundamental Rights and Freedoms, section 16(2) - Labour Relations and Industrial Disputes Act, sections 7(2) and 8 (2)(c), Second Schedule, sections 1, 2, 3, 4 and 7

Heard: February 12 and 13, 2024, and July 19, 2024

WINT-BLAIR, J

[1] I have read the draft decision of my learned sister, and I am in agreement with her reasoning and conclusions, there is nothing that I would wish to add.

HUTCHINSON-SHELLY, J

[2] I have read the draft decision of my learned sister, and I am in agreement with her reasoning and conclusions, there is nothing that I would wish to add.

CARR, J

The Claim

[3] The Claimant, The Jamaica Redevelopment Foundation Inc., filed a fixed date claim form on May 31, 2021, seeking the following:

1. A declaration that sections 7(2) and 8 (2)(c) of the Labour Relations and Industrial Disputes Act and Sections 1, 2 3, 4 and 7 of the Second Schedule to the Labour Relations and Industrial Disputes Act, are in violation of the doctrine of separation of powers and the right to due process under s 16 (2) of the Constitution, and therefore unconstitutional.

2. A declaration that the Industrial Disputes Tribunal, as presently constituted, is not an independent and impartial authority established by law and is therefore unconstitutional.

3. Proceedings in the Dispute between the Jamaican Redevelopment Foundation Inc, and Ms. Margaret Curtis over the Termination of her contract of Employment (IDT Dispute No. 46/ 2019) are stayed until the Industrial Disputes Tribunal is reconstituted in a manner that ensures its independence and impartiality as guaranteed by the Constitution.

4. Costs to the Claimant to be taxed if not agreed.

5. Such further and other relief as this Honourable Court may deem just.

[4] At the commencement of the hearing, Mr. Goffe indicated that the Claimant would not pursue the order sought at paragraph 3 of the fixed date claim form.

Background

[5] The Claimant is a company incorporated in the United States of America and is registered as an overseas company pursuant to the Companies Act. A former employee, Ms. Margaret Curtis, brought a complaint involving the termination of her contract of employment to the Industrial Disputes Tribunal (IDT). The Claimant filed this claim while those proceedings were ongoing.

[6] The challenge to the IDT is premised on two limbs. Firstly, the stated sections of the Labour Relations and Industrial Disputes Act (**LRIDA**) violate the doctrine of separation of powers due to the increased jurisdiction of the IDT, without the corresponding protection being afforded to the members of the tribunal, and secondly, the composition of the members of the tribunal who are appointed by the Minister raises questions as to their independence and thus will prejudice the Claimant's right to a fair hearing.

[7] Prior to engaging in a discussion on these two issues I wish to address a preliminary point raised by Ms. White on behalf of the Attorney General's Chambers (**AG**).

Is the AG a proper party to the claim?

[8] It was submitted that the AG is not a proper party to this claim. Ms. White contended that the claim is not grounded in any civil procedure and is not civil proceedings as defined by the Crown Proceedings Act (**CPA**). The CPA, she argued, only treats with civil proceedings which are private law remedies against the Crown. In referring to the case of **George Neil v The Attorney General of**

Jamaica et al[1] in which the court relied on the authority of **Scott Davidson v Scottish Ministries**[2]**,** Ms. White indicated that constitutional cases are not in the class of claims that were in petitions of right and are also not claims in private law. It was acknowledged that the Civil Procedure Rules (**CPR**), particularly rule 56.11 (2) requires that the AG be served in relation to constitutional matters, however, she noted that it was not a requirement for them to be joined as a party to the proceedings.

[9] Reliance was also placed on Section 18 (2) of the CPA which outlines the nature of civil proceedings which may be brought against the Crown.

> *(2) Subject to the provisions of this section, any reference in this Part to civil proceedings against the Crown shall be construed as a reference to the following proceedings only—*
>
> > *(a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 2 of the First Schedule;*
> >
> > *(b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney-General or any officer of the Crown as such or by proceedings taken by virtue of any of the enactments set out in the Second Schedule; and*
> >
> > *(c) all such proceedings as any person is entitled to bring against the Crown by virtue of this Act,*
> >
> > *and the expression "civil proceedings by or against the Crown" shall be construed accordingly.*

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[1] [2022] JMFC Full 06
[2] (2006) SCLR 249

[10] Paragraph 2 of the first schedule refers to proceedings by way of petition of right and monstrans de droit (a showing or manifestation of right). The claim does not fall within either category. The dicta at paragraph 24 of the judgment in the case of **George Neil**[3] is accepted:

> *"...Constitutional Claims like Judicial Review are unique and do not fall within the general meaning of Civil Proceedings in the CPA. They are dealing with a specialized area of law, the breaches of the fundamental rights afforded citizens by the Constitution. We agree that a constitutional claim is not to be commenced by virtue of the CPA but pursuant to Section 19 of the Constitution. We conclude that the Attorney General would not be a proper party to this constitutional claim."*

[11] The claim as filed raises constitutional issues that touch and concern the legislation itself and are therefore within the realm of public law. There is no allegation that the IDT as an agent of the state has committed any act which engages a private law remedy. I agree with the submissions of Ms. White and I find that the AG is not a proper party to this claim.

Are Sections 7(2) and 8 (2)(c) of the LRIDA and Sections 1, 2 3, 4 and 7 of the Second Schedule to the LRIDA, in violation of the doctrine of separation of powers.

Submissions on behalf of the Claimant

[12] Mr. Goffe argued that the evolution of the IDT has resulted in the widening of their power to now include the settlement of any dispute concerning any matter affecting the rights and duties of any employer or organisation,[4] to adjudicate on labour disputes and make final determinations on labour relations, obligations and rights between employers and employees,[5] to remedy the failure to make a redundancy payment under the Employment (Termination & Redundancy Payments) Act, to settle wrongful dismissal claims, and to vary a binding contract. It was also submitted that there has been a shift from voluntary arbitration to mandatory

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[3] Supra, paragraph 21
[4] Advanced Farm Technologies Jamaica Limited v The Minister of Labour & Social Security [2019] JMSC Civ .192
[5] CXC v The Industrial Disputes Tribunal and Gerard Phillip [2015] JSC Civ 44

arbitration as the Minister of Labour and Social Security ("The Minister") now has the authority to refer matters to the IDT without the joint request of the parties and on his own initiative.

[13] The IDT, he argued by virtue of the increasing remit afforded to it by the various decisions of the Court, has appropriated a jurisdiction that is akin to that of the Supreme Court. Despite the widening power of the IDT, the qualifications have not changed, and its members do not enjoy the protection afforded to Supreme Court Judges. The LRIDA provides no analogous protection for the members of the panel. It was contended that without that protection the IDT was not independent and was therefore unconstitutional.

[14] He relied on the judgment of Lord Diplock in the case of **Hinds et al v The Queen**[6]. Lord Diplock outlined the test to be applied in determining whether the doctrine of separation of powers has been violated. That test he argued, was expounded upon by Baroness Hale in the authority of **Surrat v Attorney General of Trinidad and Tobago**[7].

[15] In furtherance of his argument, Mr. Goffe went on to examine the method of appointment of the members of the IDT. He submitted that the members were selected by the Minister, the very Minister who can unilaterally refer matters to them for consideration. It was also pointed out that there was no minimum term of office under the LRIDA and that the members could be terminated on the recommendation of the Chairman. All of this could lead a court to conclude that the protections afforded to the members of the IDT by the legislation were insufficient. In support of this argument, he referred to the case of **General Workers' Union v Attorney General**[8], where the Constitutional Court of Malta determined that the Industrial Tribunal was unconstitutional.

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[6] [1976] 1 All ER 353
[7] [2008] 2 WLR 262
[8] (Case N0.19/08AF)

[16] Mr. Goffe also raised the fact that the IDT is empowered to make an award in settlement of a dispute. This award he contended has no monetary limit. He compared this with the jurisdictional limitations placed on the Parish Court whose Judges enjoy security of tenure under the Constitution in contrast to the members of the IDT.

[17] In applying the case of **Surrat**, Mr. Goffe asked the court to find that the extent to which the jurisdiction of the IDT has been expanded has not been met with the appropriate protection and insulation for its chairman and members, therefore it breaches the doctrine of the separation of powers and ought to be found to be unconstitutional.

The 1st and 2nd Defendants submissions

[18] Ms. White in her submissions indicated that the cases of **Hinds** and **Surrat** are distinguishable from the instant claim. In **Hinds,** she argued that part of the ratio of the court was focused on the transfer of power from one branch of government to another. In that case, the Legislature sought to give a review board the discretion to alter a criminal sentence where the members of that board were not all judicial officers. It was contended that in that case there was a clear conflict between the two arms of government, which is distinct from the present claim. She posited that there is no issue of separation of powers as it concerns the Minister and that of the IDT.

[19] In distinguishing the case of **Surrat**, it was submitted that the Parliament of Trinidad passed the Equal Opportunities Act and the tribunal was referred to as a 'Superior Court of Record', whose chairman was to be a High Court Judge. Although there were provisions for security of tenure and removal of the chairman, this was not entrenched in the Constitution and therefore rendered the chairman open to interference. It was submitted that the judgment did not support the contention that an arbitral division of the IDT must have the same protection as judges. The Act was not found to be unconstitutional, and she referred to the dicta of Baroness Hale as being instructive.

[20] In the round Ms. White submitted that there is no evidence before this court to suggest that the members of the IDT have been given an expanded remit like that of a judicial officer. She referred to the **Director of State Proceedings v IDT ex parte Juici Beef**[9]**,** where the court opined that the IDT is a body established as a specialist institution to resolve disputes at the workplace. Specifically, Ms. White relied on the ratio of Parnell, J in the matter **of R v IDT ex parte Esso**[10], in which it was stated that when Parliament set up the IDT it indicated that the settlements of disputes should be removed as far away as possible from the procedure of the courts of the land. The IDT therefore is an arbitral tribunal and not a court.

[21] In commenting on the submission that the IDT has evolved, Ms. White stated that as a creature of statute, the IDT is confined to the statutory provisions, otherwise they would be acting ultra vires the rule of law. The IDT therefore in her view, has not shifted from the mandate of being an arbitral body and Parliament has not by any law expanded its remit to include anything else.

[22] Ms. White submitted that any argument to the contrary is a misstatement of the law and ought to be disregarded. She relied on the authorities of **Village Resorts Limited v. The Industrial Disputes Tribunal and Uton Green**[11] and **University of Technology, Jamaica v. Industrial Disputes Tribunal and others (Jamaica)**[12]. She stated that these cases support the position that the IDT's focus is on the settlement of disputes and not the determination of a claim.

[23] In reference to the power of the Minister to make referrals, it was submitted that the LRIDA carefully outlined the scope of the referral. The Minister is authorised to act only in the public or national interest or in the interest of industrial peace. Any referral made by the Minister to the IDT is therefore governed by Section 11 of the LRIDA.

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[9] [2014] JMSC 125 prgh 5
[10] (1977-1979) 16 JLR 73
[11] SCCA 66/97 dd June 30, 1998
[12] [2017] UKPC 22

[24] In summary, it was argued that the Claimant has not presented any evidence to support the contention that the IDT has the jurisdiction to hear any matters outside of that established under the LRIDA which would give rise to a finding that they are now clothed with the jurisdiction of that of the Judiciary. Ms White argued that it is a matter of settled law that the IDT is an arbitral tribunal and is not a court nor was it established, as a quasi-judicial court.

[25] Further, it was submitted, that the constitution of the arbitral panel under a tripartite system insulates the panel from abuse. She explained that when there is a hearing made up of an uneven number of persons the aggrieved worker can choose to nominate members, that they find suitable to settle matters and employers are afforded the same opportunity. In these circumstances it is clear from the Second Schedule of the Act, that the Minister does not decide the members who will constitute the panel and as such it is not fair to say that the Minister takes part in the process.

Analysis

[26] The three arms of government, that is, the Parliament, the Executive and the Judicature are separated under the Constitution in Parts V, VI, and VII respectively. The doctrine of the separation of powers although not specifically referenced in the Constitution is based on this delineation. The authority, responsibilities and overall power assigned to each arm is clearly defined and the intention is that each arm of government is to carry out its functions without interference from the other to ensure that the rule of law is maintained. It provides checks and balances against the use of power by each branch. In so far as any law is inconsistent with the Constitution it is void.

[27] It is the Claimant who has the burden of establishing that the impugned sections of the LRIDA are in breach of the Constitution.

[28] The gravamen of Mr. Goffe's submission is that the specified provisions of the LRIDA have given the IDT powers that are wider than that of a Parish Court Judge

and that by virtue of its evolution, it has transcended the parameters imposed on it by the legislation and is now elevated to a body which is in nature like that of the Judiciary. He argued that this is where the conflict between the three arms of government arises. Counsel relied heavily on the cases of **Hinds** and **Surrat,** a closer examination of the facts and findings of the cases is therefore required.

[29] In **Hinds,** the government of the day sought to establish by legislation a court of record to be called the 'Gun Court'. The court was to be presided over by members of the Resident Magistrate's Court as well as the Supreme Court. A review board was to be constituted with the power to, at the direction of the Governor-General, discharge an individual who had been convicted and sentenced to a mandatory term of life imprisonment for an offence under Section 20 of the Firearms Act of 1967. The court found, inter alia, that the transfer of the criminal jurisdiction as it relates to sentence to that of a review board in circumstances where the members of the review board were not members of the Judiciary and not specifically appointed as such pursuant to the Constitution, was ultra vires the Constitution and therefore void. It was held that this was a breach of the doctrine of separation of powers because the jurisdiction which was conferred specifically on Judicial Officers would be exercised by members of the Executive.

[30] Lord Diplock in delivering his judgment considered the background to the development of the Constitution in a post-colonial era. He pointed out that a court already in existence prior to the effective date of the Constitution was saved and that the expression 'court' extended to the Judges entitled to exercise jurisdiction by that court. At page 360-361 of the judgment, he stated:

> *"Thus, where a constitution on the Westminster model speaks of a particular 'court' already in existence when the constitution comes into force, it uses this expression as a collective description of all those individual judges who, whether sitting alone or with other judges or with a jury, are entitled to exercise the jurisdiction exercised by that court before the constitution came into force. Any express provision in the constitution for the appointment or security of tenure of judges of the court will apply to all individual judges subsequently appointed to exercise an analogous*

jurisdiction, whatever other name may be given to the 'court' in which they sit. (Attorney- General for Ontario v Attorney – General for Canada)"

[31] It is in this context that the passage quoted by Mr. Goffe from the judgment was raised. Counsel asked the court to interpret the dicta as suggesting that a determination as to whether a body is in fact a court should be made based on an assessment as to whether the body performs similar functions and not the name given to it. He argued that it is the substance and not the form that is important. This statement as to the law enunciated in **Hinds** is accurate in so far as the facts of the case. The intention of Parliament at the time was to create a court. The creation of a court would therefore require the necessary protections being afforded to court officers. Lord Diplock outlined immediately following the previous extract as follows:

*"Where, under a constitution on the Westminster model, a law is made by the Parliament which purports to confer jurisdiction on **a court** described by a new name, the question whether the law conflicts with the provisions of the constitution dealing with the exercise of the judicial power does not depend on the label (in the instant case 'The Gun Court') which the Parliament attaches to **the judges** when exercising the jurisdiction conferred on them by the law whose constitutionality is impugned. It is the substance of the law that must be regarded, not the form. What is the nature of the jurisdiction to be exercised by **the judges** who are to compose the court to which the new label is attached? Does the method of their appointment and the security of their tenure conform to the requirements of the constitution applicable to judges who, at the time the constitution came into force, exercised jurisdiction of that nature?"*

[32] The passage is specific to the circumstances with which the Board was asked to adjudicate upon. In that case, they were dealing with a court and judicial officers as legislated by Parliament. The purpose of the Gun Court Act of 1974 was to provide for the establishment of a Court to deal particularly with firearm offences. The IDT was established by an Act of Parliament pursuant to the LRIDA[13]. The

[13] Section 7 (1) of the LRIDA.

gist of Part III of the Act is that the IDT's purpose is to settle industrial disputes between one or more employers or organizations representing employers and one or more workers or organizations representing workers, that has been referred to it[14].

[33] In this case, the legislation has not mentioned the word 'court', nor has it referred to the tribunal as 'judicial officers'. A detailed review of the impugned sections of the LRIDA will bear this out.

[34] Section 7 (1) of the LRIDA outlines the establishment of a tribunal for the purposes of the Act to be called the IDT. Section 8 of the LRIDA outlines the divisions of the IDT and the scope of the disputes to be determined by them as set out below:

> *"(l) The Tribunal shall sit in such number of divisions as may from time to time be necessary.*
>
> *(2) A division of the Tribunal shall-*
>
> > *(a) where the Tribunal proposes to deal with an industrial dispute which, in the opinion of the chairman, arises from the interpretation. application. administration or alleged violation of a collective agreement, consist of-*
> >
> > > *(i) one member of the Tribunal, who shall be either the chairman or one of the deputy chairmen selected by the chairman; or*
> > >
> > > *(ii) three of the members of the Tribunal selected in the manner specified in paragraph (c), if all the parties inform the chairman in writing that they wish the matter to be dealt with by a division consisting of three members;*
> >
> > *(b) where the Tribunal proposes to deal with an industrial dispute referred to it under section 10 and three special members are appointed in*

[14] Section 2 of the LRIDA "industrial dispute"

accordance with the provisions of that section for the purpose, consist of those members;

(c) in any other case consist of-

(i) either the chairman or one of the deputy chairmen; and

(ii) one of the members of the Tribunal who was appointed by the Minister from the panel supplied to him by organizations representing employers, or from a panel constituted by him in lieu thereof, in accordance with the Second Schedule; and

(iii) one of the members of the Tribunal who was appointed by the Minister from the panel supplied to him by organizations representing workers, or from a panel constituted by him in lieu thereof, in accordance with the said Schedule, who shall be selected by the chairman to constitute the division.

(3) Where three of the members are selected under subsection (2) to constitute a division of the Tribunal and the chairman is one of those members, he shall preside over that division, and where the chairman is not one of those members, a deputy chairman shall preside."

[35] The tribunal is tasked under this section with determining disputes involving collective agreements and industrial disputes referred to it under Section 10. Section 10 outlines the circumstances under which the Minister can make a referral to the IDT as follows:

"Where it appears to the Minister that-

a) an industrial dispute exists in any undertaking other than an undertaking which provides an essential service. and

(b) any industrial action in contemplation or furtherance of that dispute has begun or is likely to begin; and

(c) the condition specified in subsection (2) is fulfilled, the Minister may by order, which shall be subject to negative resolution of the House of Representatives, declare that any industrial action taken in contemplation or furtherance of that dispute is likely to be gravely injurious to the national interest.

(2) The condition referred to in paragraph (c) of subsection (1) is that the industrial action referred to in paragraph (h) of that subsection has caused, or (as the case may be) would cause, an interruption in the supply of goods or in provisions of services of such a nature, or on such a scale, as to be likely to be gravely injurious to the national interest.

(3) Where the Minister decides to make an order under this section he shall, on or before the date of publication of the order, cause to be served on the parties to the dispute-

(a)a copy of the order; and

(b) directions in writing requiring the parties to refrain from taking or continuing any industrial action in contemplation or furtherance of the dispute and to adopt such means as are available to them for the settlement of the dispute within thirty days from the date of service of such directions."

[36] Where the parties have not been able to resolve the dispute, they are advised that they can nominate a person for appointment as a special member of the Tribunal.

"(4) If any of the parties referred to in subsection (3) informs the Minister in writing that all the means available to them for the settlement of the dispute were adopted, without success during the period specified in paragraph (b) of subsection (3), the Minister shall, subject to the provisions of subsection (7), as soon as may be after he receives such information invite-

(a) all the parties to meet and jointly nominate a person for appointment as a special member of the Tribunal to preside, over the division of the Tribunal which is to deal with that dispute; and

(b) the employer, or an organization representing the employer, who is a party to the dispute to nominate a person for appointment as one of the other two special members of the Tribunal; and,

(c) the organization representing workers which is the other party to the dispute to nominate a person for appointment as the third special member of the Tribunal.

(5) If the Minister does not receive nomination for all the special members of the Tribunal within seven days (or such longer period as he may in any special circumstances allow) after the invitations for such nominations were issued to the parties he may, without further consultations with the parties, refer the dispute to the Tribunal for settlement.

(6) If the Minister receives nominations for all the special members of the Tribunal within the period referred to in subsection (5) he shall appoint the persons nominated as special members of the Tribunal for the purpose of dealing with the dispute in relation to which they were nominated and shall thereupon-

(a) refer the dispute to the Tribunal for settlement-

(b) inform the chairman of the Tribunal that the division thereof which is to deal with that dispute shall consist of those special members and indicate which of them shall preside over that division.

(7) Where the Minister is satisfied that the dispute relates to the appointment of any person to a public office or to removal of, or disciplinary action taken against, any person holding or acting in a public office, the Minister shall not refer the matter of that appointment, or removal than one the Minister shall appoint one of them to be the served on the parties directions in writing requiring them to follow, in respect of that matter, the procedure provided by or under the Constitution of Jamaica.

(8) Where directions are served pursuant to this section in respect of an industrial dispute, any industrial action which-

(a) is taken after the time of service of those directions; or

(b) having begun before the time of service of those directions, continues for more than forty-eight hours after that time,

is an unlawful industrial action."

[37] The Second Schedule of the LRIDA goes into further details as to the people who may be eligible to sit on the Tribunal:

"(1) The Tribunal shall consist of-

(a) a chairman, and not less than two deputy chairmen, all of whom shall be appointed by the Minister, after consultation with organizations representing employers and organizations representing workers, and shall be persons appearing to the Minister to have sufficient knowledge of, or experience in relation to, labour relations; and

(b) not less than 'two members appointed by the Minister from a panel supplied to him by organizations representing employers and an equal number of members appointed by him from a panel supplied to him by organizations representing workers; and

(c) such special members as may for the time being be appointed under section 10 of the Act for the purposes of any industrial dispute referred to the Tribunal under that section.

(2) If no panel for the purposes of subparagraph (1) (b) is supplied to the Minister in response to an invitation to organizations representing employers or to organizations representing workers so to do, the Minister may, in lieu of the panel which should have been supplied to him for those purposes, constitute a panel in such manner and consisting of such persons as he thinks fit.

(3) Whenever the Minister thinks it necessary to increase the number of members of the Tribunal temporarily by reason of the fact that the number

of industrial disputes which have been referred to the Tribunal is for the time being too large for the existing members to settle expeditiously he may appoint such number of additional members, for such period as he thinks necessary for the purpose of dealing with the temporary increase in the work of the Tribunal.

(4) The members of the Tribunal shall be appointed by the Minister by instrument in writing.

(5) Subject to the provisions of this Schedule the members of the Tribunal referred to in sub-paragraph (1) (a) and (b) shall hold office for such period, not exceeding five years: as the Minister may determine, and such members shall be eligible for reappointment, and the additional members referred to in sub-paragraph (3) shall hold office until the Minister revokes their appointments

2. (1) If the chairman of the Tribunal is absent or unable to act, one of the deputy chairman thereunto authorized by the Minister shall exercise the appointed functions of the Chairman.

(2) If a deputy chairman of the Tribunal is absent or unable to act or is performing the functions of the chairman under sub-paragraph (1), the Minister may appoint a person to act temporarily in the place of that deputy chairman.

(3) If any other member of the Tribunal is absent or unable to act, the Minister may appoint a person to act temporarily in the place of that member.

(4) The Minister shall, in appointing any person to act pursuant to subparagraph (2) or sub-paragraph (3), select that person from the category of persons from which the deputy chairman or other member in whose place he is to act was appointed.

3. (1) Any member of the Tribunal, other than the chairman, may at any may at any time resign his office by instrument in writing addressed to the Minister and transmitted through the chairman, and from the date of the

receipt by the Minister of such instrument such member shall cease to be a member of the Tribunal.

(2) The chairman may at any time resign his office by instrument in writing addressed to the Minister and such resignation shall take effect as from the date of the receipt by the Minister of such instrument.

4. The Minister may at any time revoke the appointment of any member of the Tribunal.

...

7. The Minister shall make such arrangements in relation to the provision and remuneration of officers and servants of the Tribunal as may from time to time be necessary."

[38] The impugned sections of the LRIDA merely outline the method of appointment of the Chairman and members. The tribunal does not have the power to hear matters involving persons holding public office[15], they also do not have the power to deal with matters within the category of wrongful dismissal. Parties appearing before the tribunal need not have an Attorney-at-Law present as he or she may appear in person[16]. There is no designation of a court in any of these provisions, neither is there any reference to the members of the tribunal being given the powers of the judiciary to carry out their functions. The IDT is therefore a creature of statute and unlike in the case of **Hinds,** there was no intention on the part of the Parliament to enact legislation which gives the IDT the classification as a 'court'.

[39] It is also noted that the case of **Hinds** did not address the question as to whether the review board was a court, the ratio decidendi on the separation of powers was limited to the involvement of the Executive with the work of the Judiciary. There

[15] Section 9 (7) of the LRIDA.
[16] Section 16 LRIDA.

was therefore on the face of it a conflict between the two arms of government which could not be condoned.

[40] In **Surrat**, the Government of Trinidad and Tobago passed The Equal Opportunity Act 2000. Part VI of the Act created an Equal Opportunity Commission with the power to refer complaints to a new body termed the Equal Opportunity Tribunal. This body was to be a superior court of record which was chaired by a judge who was given the same status as that of a High Court judge. Baroness Hale in delivering the majority judgment of the Board summarized the issue in contention in this way:

> *"The creation of the tribunal is not inconsistent with any express provision in the Constitution…Rather, it is suggested that the constitution of the tribunal, and some of its powers, are inconsistent with the fundamental principle of the separation of powers. It is implicit in all Constitutions on the Westminster model that the judicial power of the state be exercised by a judiciary whose 'independence from all local pressure by Parliament or by the executive' is guaranteed in the manner contemplated by the Constitution in question[17]."*

[41] The facts of **Surrat** are distinguishable from the present claim. Mr. Goffe held firm to his position and quoted from the judgment as follows:

> *"The question, therefore, is whether it is implicit in the Constitution that the powers to be exercised by the Tribunal can only be exercised by people enjoying exactly the same protection as High Court judges. As Lord Diplock put it in Hinds, at 222, 'the question whether the jurisdiction vested in the **new court** is wide enough to constitute so significant a part of the jurisdiction that is characteristic of a Supreme Court as to fall within the constitutional prohibition is one of degree'. However, even if the answer to that question is 'no', there is still the question whether the protection given to the Tribunal in this case is sufficient.[18]"*

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[17] Page 13, Paragraph 38
[18] page 14, paragraph 41

[42] The context of this extract is also significant. It was preceded by a discussion as to the fact that under the Constitution of Trinidad and Tobago the judicial power of the state could be exercised by persons other than High Court Judges. It is for this reason that the Board went on to consider the question as to whether the tribunal would be exercising the powers like that of a High Court Judge. The judgment did not therefore address the issue as Mr. Goffe has framed it. The Board did not consider the role of a tribunal which was not designated as a court. Counsel's reference to the many decisions of the Supreme Court and the Court of Appeal of Jamaica does not change the intention of Parliament as set out in the LRIDA. Simply put, the authorities of **Hinds** and **Surrat** are referring to the establishment of a new court by legislative authority, which is not the case here. In the circumstances, I am not of the view that the cases assist the Claimant in establishing the proposition that the LRIDA is in breach of the doctrine of separation of powers.

[43] To buttress this finding, I refer to the judgment of Baroness Hale at paragraph 49 where the definition of courts was considered as per the definition set out in Jowitt's Dictionary of English Law:

> *"Courts are of two principal classes – of record and not of record. A court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has the power to fine and imprison for contempt of its authority…Courts are also divided into superior and inferior, superior courts being those which are not subject to the control of any other courts, except by way of appeal."*

[44] The IDT as defined by the LRIDA is neither a superior nor inferior court. Despite the arguments of Counsel for the Claimant, it does not have unlimited jurisdiction, it does not hear and determine claims, and it does not have the power to fine or imprison for contempt of its authority. It is also subject to the supervisory jurisdiction of the Supreme Court by way of judicial review. The IDT being a creature of statute is limited to its statutory role of being a dispute tribunal. Nothing on the face of the legislation suggests that the intention of Parliament was to give

the IDT the powers of a court and it does not function as such. The role and function of the Minister throughout the legislation is purely administrative in nature. Although he has the power to appoint members of the tribunal, this can only be done after consultation with various organizations. The Minister does not sit on any of the IDT panels, and he does not render any decisions. There is therefore no conflation of the Executive with the IDT.

[45] In summary, the IDT does not fall under any of the arms of government as characterized by the Constitution and the doctrine of separation of powers is not relevant to these proceedings.

Has the Claimant's Constitutional right to a fair hearing been breached due to the lack of independence and impartiality of the IDT.

Submissions on behalf of the Claimant

[46] Mr. Goffe correctly outlined the test to be employed when examining Section 16 (2) of the Charter:- a) the burden of proof is on a balance of probabilities but at the lower end as this would enable the Claimant to have the full and best possible protection guaranteed by the right, b) the rights are to be given a generous interpretation and c) the Claimant has the burden of establishing prima facie the infringement of the right and it is only in doing so that the burden shifts to the State to show that it is demonstrably justified.

[47] It was submitted that there was no distinction between the proceedings that occurred in a court and that which took place before an administrative tribunal. The principles applicable to a right to a fair hearing, Counsel argued, were the same in either jurisdiction. He referred to the case of **Sheldon Roberts v. The Attorney General of Jamaica et al**[19] in support of this point.

[19] [2023] JMSC Civ. 122

[48] In citing the case of **Findlay v The United Kingdom**[20], it was argued that in assessing the question of independence of a tribunal, regard must be had to the manner of appointment of its members, their term of office, the existence of guarantees against outside pressure and whether there is an appearance of independence. With respect to impartiality, the dicta in the judgment outlined that there are two aspects to this, first the tribunal must be subjectively free of personal prejudice or bias and secondly it must also be impartial from an objective viewpoint. Reference was also made to the cases of **Flux (No. 2) v. Moldova**[21] and **Ivanovski v The Former Yugoslav Republic of Macedonia**[22]. In **Ivanovski** the Prime Minister had no direct role in the appointment, remuneration or tenure of the members of the commission, yet his statements were deemed to affect their right to a fair hearing.

[49] In addressing the test of apparent bias, Mr. Goffe drew the attention of the court to the case of **Porter v Magill**[23] which outlined that the question to be posed is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The Full Court in **Kevin Simmonds** it was argued, went further to say that "*a mechanism must exist in the enabling statute which guarantees the independence and impartiality of the decision maker*[24]*."*

[50] In applying the authorities to the present case, Mr. Goffe asked the court to accept that the IDT is not an independent body and that a fair-minded informed observer would conclude that it is not impartial since its enabling legislation provides insufficient protection from executive influence. He contends that there is evidence to show that senior cabinet-level members, former and present members of

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[20] Application No. 22107/93
[21] Application No. 31001/03
[22] (Application No. 29908/11)
[23] [2002] 1 All ER 465
[24] paragraph 319

Government have held and publicly sent a message of what he termed as animus toward the Claimant.

[51] It is the Minister, he argued, who has the power to determine matters involving the Chairman and its members. It was further submitted that there is a total want of mechanisms in the statute to provide for the security of tenure and protection of remuneration. In summary, Counsel referred to the affidavits filed in support of the claim and submitted that the evidence proved that the IDT was not independent or impartial.

Submissions on behalf of the 1st and 2nd Defendants

[52] Ms. White submitted that the Claimant has failed to provide evidence of the engagement of the right to a fair hearing as set out in Section 16 (2) of the Charter. The mere assertion that the IDT is not independent or impartial based on the animus of present or former cabinet members is insufficient to substantiate any such finding by the court.

[53] The Claimant, it was argued must go further to demonstrate a nexus between the right in question and the defaulting party. Counsel relied on the dictum of Barnaby, J in the **Kevin Simmonds** case. Ms. White posited that the appropriate remedy available to the Claimant was that of judicial review and not Constitutional redress.

[54] It was further submitted that Section 16 (2) of the Constitution does not apply to legal proceedings where an entity is not a court or authority established by law; the words, it was argued, have different meanings. She submitted that there is no definition of the word ‘authority’ within the Constitution and that it is clear that the IDT is not an authority as it is an arbitral tribunal.

[55] In closing Ms. White rested on the submission that the Claimant has not satisfied the court by way of evidence that their right to a fair hearing under the Charter has been engaged.

Analysis

[56] Section 19 of The Charter reads, in part, as follows: -

> *"(1) If any person, alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to same matter which is lawfully available, that person may apply to the Supreme Court for redress."*

[57] In the case of **The Jamaican Bar Association v The Attorney General and The General Legal Council**[25], McDonald Bishop JA discussed the starting point in matters of constitutionality and addressed the standard and burden of proof which ought to be satisfied in such a claim. She stated at paragraph 122 of the judgment:

> *"The starting point…the Charter guarantees the rights and freedoms, which it seeks to protect and…they should not be abrogated, abridged, or infringed, unless it can be demonstrated (not merely asserted) that such abrogation, abridgment, or infringement is justified in a free and democratic society. The state, therefore, has the burden to bring justification, upon proof by the appellant of abrogation, abridgment, or infringement of a Charter right. "*

[58] Section 16 (2) of the Constitution states:

> *"(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."*

[59] What is the evidence that is before this court to ground the claim for constitutional redress? Mr. Jahmar Clarke filed the sole affidavit in support of this claim. The sum of which focused on what I would consider to be opinion evidence. He spoke to the angst associated with the Claimant company which has been the subject of negative comments and political discourse from present and past members of the

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[25] [2020] JMCA Civ. 37

Cabinet. In his opinion, these comments have severely prejudiced the Claimant with respect to the matter before the IDT.

[60] In treating with the issue of bias, it was stated that the IDT does not have a separate identity from the Ministry which is evidenced by its email domain "@mlss.gov.jm" and the fact that the IDT is identified on the official website of the Ministry as a unit or department of the Labour Division of the Ministry. Mr. Clarke further gave evidence as to the internal workings of the IDT which he said would lead to the conclusion that they were not independent of the Ministry. He also spoke to the concern amongst other Counsel as to the machinations of the IDT in the settlement of disputes and his own personal interaction with the body.

[61] It is accepted that Section 16(2) creates three discrete rights:

a. the right to a fair hearing,

b. the right to a fair hearing within a reasonable time, and

c. the right to a fair hearing by an independent and impartial court or authority established by law.

[62] The right to a fair hearing is inextricably linked to the basic principle of fairness established under the rules of natural justice. Jackson Haisley, J in delivering her judgment in the **Kevin Simmonds** case, quoted from the text of Albert Fiadjoe[26] where he sought to establish the essential elements of a right to a fair hearing:

> *"Fair hearing does not mean a hearing according to what would be required in a court of law. Basically, it means an opportunity to put one's side of a case before a decision is reached. Accordingly, the legal requirement on the adjudicator is nothing more than a basic duty of fairness. Of course, in deciding what is fair, the courts have to balance several interests, such as those of the State, principles of good administration, speed, efficiency in decision making and the level of injustice*

[26] Commonwealth Caribbean Public Law page 239

suffered by the individual in having been denied the opportunity to present their case."

[63] The evidence presented by the Claimant does not on a balance of probabilities establish a breach of the right to a fair hearing. In fact, there is no evidence from the Claimant outlining the circumstances of the actual hearing before the IDT. Instead, the evidence outlines a peremptory strike at the IDT for what it anticipates would be the breach of a fair hearing by an independent and impartial court or authority established by law. The argument therefore is that this right is likely to be infringed.

[64] Ms. White has asked the court to find that the IDT is not an authority or court and that the proceedings held there are not legal proceedings, as such the Claimant cannot rely on the protection afforded under section 16 (2). Mr. Goffe argued that the Claimant need not enter the gate to constitutional redress through that limb as that is secondary to the first limb which permits access through the determination of civil rights and obligations.

[65] I accept his argument in that regard. Section 16 (2) provides redress if the Claimant can show that there is to be a determination of a person's civil rights and obligations of any legal proceedings. The right to be determined in this case is that of the employer to dismiss an employee in furtherance of a contract of employment, there is therefore a dispute within private law that is to be determined by the IDT.

[66] Having entered the gate as Mr. Goffe puts it in his submissions, the Claimant must now prove the likelihood of a breach of their rights. It has previously been accepted that the IDT is not a court. The question therefore is whether it is an authority established by law. The Constitution has not defined the word 'authority'; however, it has been accepted that in interpreting the provisions of the Constitution, it is to be given a wide and purposive approach to ensure the protection of the rights of the individual and not to unreasonably prevent the enforcement of those rights. The Oxford Dictionary defines authority as the power or right to give orders, make

decisions, and enforce obedience. The Cambridge Dictionary defines authority as a group of people with official responsibility for a particular area or activity. The term 'law' is defined to include *any instrument having the force of law and any unwritten rule of law*.

[67] The IDT is a body which was created by an enactment of Parliament by virtue of the LRIDA which is an instrument which has the force of law. The tribunal has the power to make decisions, settle industrial disputes between parties and to make awards. I do not find favour with Ms. White's submission that it is not a body which is subject to the obligations as set out in section 16 (2).

[68] The Claimant still has a burden to establish by evidence that there is a likely infringement of this right. The evidence contained in the affidavit in support of the claim does not aver actual bias. Instead, the claim is based on apparent bias. Counsel referred to the case of **Porter v. Magill**. That case was considered by our very own Court of Appeal in **Carrol Ann Lawrence-Austin v The Director of Public Prosecutions**[27]. The judgment of Morrison P is instructive:

> *"The law is well settled with regard to the test for apparent bias. It has moved away somewhat from the approach laid down in R v Gough [1993] AC 646 in the speech of Lord Goff of Chieveley, where the test was formulated in the headnote as "whether, in all the circumstances of the case, there appeared to be a real danger of bias". The current test is found in the well-known statement of Lord Hope of Craighead in Porter and v Magill [2002] 1 All ER 465, where he stated that the reference to "real danger" should be deleted as it no longer served any useful purpose, and that the question should now be "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

[69] The fair-minded and informed observer has been described in the following terms:

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[27] [2020] JMCA Civ. 47

(1) … a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.

(2) The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

(3) Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.[28]

[70] The statements made by public officials past and present as to the status of the Claimant are not attributable to any member of the IDT. The essence of the

[28] Helow v. Secretary of State for the Home Department and another [2008] 1 WLR 2416

averments of Mr. Goffe is that the independence of the IDT is questionable based on its association with the Minister.

[71] Referring to the case of **General Workers Union,** it was suggested that the court in that case made a finding that the method of appointment of the members of the tribunal was such that it lent itself to a finding of a lack of impartiality. In that case, which originated in Malta, there was a constitutional challenge to the Industrial Tribunal. It is to be noted that the case brief provided did not give a fulsome summary or outline of the purpose or establishment of the Industrial Tribunal in Malta. Additionally, the sections which were under consideration in that case involved the appointment of a chairperson, a member chosen by the chairperson from the list of trade union nominees and a member who shall represent the interest of the Government. There is no comparable provision in the LRIDA.

[72] Further, under another provision the decision of the Tribunal should consider the social policy of government, the requirements of any national plan and economic policies of the Government and ensure that the decision or advice will assist in the implementation of any such policies and plans. Again, there is no such provision in the LRIDA.

[73] What was useful was the opening statement of the decision which referred to the judgment of the European Court in the case of **Ringeisen v Austria**[29] which stated:

> ` *"The various characteristics of the notion of independence will fall into three categories. Firstly, the tribunal must function independently of the executive (and the legislature) and base its decisions on its own free opinion on facts and legal grounds. Secondly, there must be guarantees to enable the court to function independently. As far as the latter requirement is concerned, it is necessary for the judges to have been appointed for life, provided that they are not discharged at will or on improper grounds by the authorities. The absence of a formal recognition of*

[29] ECHR 16 July 1971

the irremovability of judges during the terms of office does not imply a lack of independence as long as it is recognised in fact and the other necessary guarantees are present. Thirdly even a semblance of dependence must be avoided."

[74] The case can be distinguished from this one on several bases. The IDT in Jamaica is not a court and is not presided over by a judge. The conditions attached to judicial officers therefore do not apply. The provisions referred to in the case are not similar to the LRIDA. The case is therefore unhelpful in determining this issue.

[75] I am therefore guided by the test as set out in **Porter v. Magill** which has been restated in **Carroll Ann Lawrence Austin**. The Claimant having not established actual bias must show that the fair-minded and informed observer having considered all the facts would hold that the tribunal was biased. To establish this, a panel of members to hear the matter would have to be determined and evidence presented as to their status. Mr. Goffe has obliquely sought to raise the issue of undue influence or subconscious bias which has not been proven.

[76] Although the members of the IDT are appointed by the Minister, this does not by itself demonstrate bias on the part of the chairperson or its members. The fact that persons are appointed by the Minister does not equate to a finding that in any matter involving government and government officials, the members are unable to be impartial. There is therefore no basis to find that the members of the IDT would have any reason to be biased in favour of the employee.

[77] There is nothing on the evidence of the Claimant to connect the comments made or the methods employed in the resolution of disputes to a finding of bias on the part of a tribunal that has not been identified and whose members are from a wide range of persons including persons who are selected with the input of the parties.

[78] In conclusion, the Claimant has failed to establish on a balance of probabilities that his right under section 16 (2) of the Charter is likely to be breached. The orders sought on the fixed date claim form are therefore refused.

WINT-BLAIR, J

[79] Orders:

1. The orders sought on the fixed date claim form filed on May 31, 2021, are refused.

2. The parties are at liberty to make written submissions as to the proper costs order which should be made in this claim. Each should file and serve on the other, within seven days of the delivery of this judgment, written submissions setting out the form of order sought and brief reasons therefor; a party may file and serve a response to the submissions of the other within fourteen days thereafter. The issue of costs will be determined on paper.

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Wint-Blair, J

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Hutchinson-Shelly, J

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Carr, J