**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2017 – 00706**

**CV 2017 – 00875**

**Between**

**THE NATIONAL INSURANCE BOARD OF**

**TRINIDAD AND TOBAGO**

**Claimant**

**And**

**THE NATIONAL INSURANCE APPEALS TRIBUNAL**

**Defendant**

**Before the Honourable Mr Justice Ronnie Boodoosingh**

**Appearances:**

**Mr Bryan McCutcheon instructed by Ms Tonya Rowley for the Claimant**

**Mrs Josephina Baptiste-Mohammed and Ms Maria Belmar instructed by Ms Svetlana Dass and Mr Sean Julien for the Defendant**

Date: 23 November 2017

**JUDGMENT**

## Facts

1. This is an application for judicial review of the decisions of the defendant concerning Mr Canuth Johnson, member of the Trinidad and Tobago Coast Guard ("TTCG") and Mr Russel Hamid of the Trinidad and Tobago Fire Service ("TTFS").

2. The matters have been consolidated and heard together. This judgment will address both claims.

*Mr. Canuth Johnson*

3. Mr Johnson is a sailor with the Trinidad and Tobago Coast Guard, employed by the Trinidad and Tobago Defence Force ("TTDF"). **On May 20th 2007**, Mr Johnson suffered an injury while in the course of his duties. He made an application to the claimant for injury benefit on **October 9th 2008**. Along with his application, he provided two pieces of correspondence – one was a letter from the TTDF and the other was from himself, where he indicated that the reason for his late application was as a result of the TTCG injury form 107 taking some time before it was published in the TTDF's C.G.M Orders.

4. On December 08th 2008, the claimant wrote to Mr. Johnson and informed him that his claim for injury benefit had been submitted later than the statutory time limit and as such was disallowed.

5. Mr Johnson filed a Notice of Appeal of the claimant's decision to the defendant on January 30th 2009. The appeal was heard on November 25th 2016 and the defendant arrived at the following decision, that Mr. Johnson:

i. had a good cause for making the late application;
ii. provided sufficient evidence that his hands were tied and that he could do nothing further;
iii. exhibited no negligence with regard to the application;
iv. could do nothing further until he was given his classification by the TTDF and that on that day he filed the application; and
v. the appeal would be allowed.

*Mr. Russel Hamid*

6. Mr Hamid is a fire officer with the TTFS. He too suffered an injury during the course of his duties on **July 5th 2014**. Mr Hamid made an application to the claimant for injury benefit dated **October 1st 2015**. Along with his application he provided a letter dated September 29th 2015, in which he stated that his application was late as a result of the administrative delay by the TTFS in processing the reclassification of his sick leave to injury leave. Mr Hamid also provided letters from the TTFS dated August 5th 2015 and September 30th 2015, which indicated that his leave was reclassified as injury leave.

7. On November 19th 2015, the claimant advised Mr Hamid his claim for injury benefit was disallowed as his claim was not submitted within the statutory time frame.

8. Mr Hamid filed a Notice of Appeal of the claimant's decision to the defendant on January 20th 2016. The appeal was heard on December 13th 2016 and the defendant took the following view, that:

i. the NIB could do nothing until classification is established;

ii. Mr Hamid continued to work and as such could not claim sick leave benefit;
iii. time begins to run from the date of classification; and
iv. the application could only have been made after the August 5th 2015, when the leave was classified.

9. The claimant filed the fixed date claim form relative to Mr Johnson's matter on March 17th 2017, and on March 31st 2017, filed the fixed date claim form relative to Mr Hamid's matter; both seeking the following reliefs:

i. A declaration that the decisions of the defendant are illegal and/or irrational and/or procedurally improper and/or unfair and/or in breach of the principles of natural justice and/or amounts to an irregular or improper exercise of discretion and/or is an abuse of power and/or in breach of legitimate expectation, invalid, null, void and of no effect;
ii. An order of certiorari quashing the decision;
iii. Damages including exemplary and/or aggravated damages;
iv. Such other orders, directions or writs as the Court considers just and as the circumstances warrant pursuant to section 8 of the Judicial Review Act; and
v. Costs.

10. The two major issues to be decided are:

(a) Whether the decisions of the defendant to allow the appeals of Mr Johnson and Mr Hamid are invalid, null, void and of no effect because they are prima facie a breach of regulation 7(4) of the National Insurance (Benefits) Regulations; and

(b) Whether the defendant acted unlawfully and outside of section 62 of the NIA by taking into account issues of mixed law and fact.

**The Law**

*Judicial Review*

11. Lord Diplock in the case of **Council of Civil Service Unions & Others v Minister for the Civil Service [1985] AC 374** at page 410 provides well known and useful learning on the grounds for judicial review, and states as follows:

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the

event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

***The National Insurance Act***

12. The claimant is a body corporate established by section 3 of the **National Insurance Act Chap. 32:01** ("NIA"). The provisions relevant to this matter are highlighted below:

> "**37.** (1) Every employed person and every unpaid apprentice shall be insured in the manner provided by this Act and the Regulations against personal injury caused on or after the appointed day by accident arising out of and in the course of that person's employment and there shall be payable in the prescribed circumstances to or in respect of every such person the type of benefit (hereinafter called "Employment Injury Benefit") specified in section 46(3).
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> (2) The contribution payable in respect of any employed person or any unpaid apprentice towards employment injury benefit shall be payable wholly by the employer of such person."
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> "**46. (3)** Subject to this Act, employment injury benefit shall be paid to or in respect of persons insured under section 37 and such benefit may be in the nature of—
> (a) an injury benefit, payable where the insured person is rendered incapable of work;"
>
> "**59.** All claims and questions arising under or in connection with this Act shall be determined by the Board."
>
> "**62.** (1) Appeals from decisions of the Board shall lie to the Appeals Tribunals on questions of fact only and to the High Court on questions of law or partly of law and partly of fact and from the High Court to the Court of Appeal.
>
> (2) The President shall make Regulations relating to appeals generally and may by such Regulations

prescribe the procedures in accordance with which appeals shall be heard and determined.

(3) Provision shall be made by Rules of Court for regulating appeals to the High Court and the Court of Appeal and for limiting the time within which such appeals may be brought."

13. Under **section 55** of the NIA, the claimant relies on the **National Insurance (Benefits) Regulations**. In particular Regulation 3 provides:

> "3. A person claiming benefit under the Act shall submit a claim to the Board in accordance with these Regulations."

14. **Regulation 7** states:

> "7(1) (e) in the case of injury benefit not later than fourteen days from the date the insured person is rendered incapable of work as a result of the accident or development of the prescribed disease;"

> "7(2) (a) A person who fails to submit a claim for benefit within the prescribed time shall be disqualified from receiving—
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> (a) in the case of sickness, injury or maternity benefit in respect of any period more than three months before the date on which the claim or subsequent medical certificate is received by the Board;"

> "7(3) Notwithstanding subregulation (2) in any case where the claimant proves that—
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> (a) on the date the contingency arose he was entitled to the benefit; and
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> (b) throughout the period between the date the contingency arose and the date on which

the claim was received by the Board good cause is shown as to the reason for the delay in submitting the claim, he shall not be disqualified under this subregulation from a benefit to which he would have been entitled had he made the claim within the prescribed time."

"7(4) Notwithstanding subregulation (3), if a person fails to make a claim for sickness benefit, invalidity benefit, maternity benefit, special maternity grant, injury benefit, disablement grant, medical expenses, or funeral grant within twelve months from the date on which the contingency arose, such person shall be disqualified from receiving such benefits."

**Issue One: A breach of regulation 7(4) of the National Insurance (Benefits) Regulations**

15. The claimant contends that based on the time when the claim was submitted, Mr Johnson and Mr Hamid were disqualified from receiving such benefits pursuant to regulation 7(4) of the National Insurance (Benefits) Regulations.

16. The claimant submits that according to **De Smith's Judicial Review, 6th Edition (2007)**, at paragraphs 5-002 - 3, an administrative decision is flawed if it is illegal. Paragraph 5-002 states that a decision is illegal if it:

"(a) contravenes or exceeds the terms of the power which authorizes the making of the decision;

(b) pursues an objective other than that for which the power to make the decision was conferred;

(c) is not authorised by any power;

(d) contravenes or fails to implement a public duty."

17. Further, paragraph 5-003 states:

> "The task for the court in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the 'four corners' of their powers and duties."

18. It is also instructive to review the relevant provisions of the NIA in order to consider whether the wording used is of a mandatory or directory nature. The claimant submits that considering the position as explained by **De Smith's Judicial Review, 6th Edition (2007)** at paragraph 5-050, statutory words that require that something 'shall' be done, raises an inference that this requirement is mandatory and as such a failure to perform said acts becomes unlawful.

19. On this issue, the defendant submits that regulation 7(4) is expressed in imperative terms. However, the modern approach to the question of whether the breach of a command results in an invalidity is not simply to ask whether the statutory command is to be treated as mandatory or directory, but rather whether it was the legislature's intention that the failure to comply with the statutory mandate would result in an outright invalidity.

20. The defendant directs the court to consider the authority of **R v Secretary of State for the Home Department, Ex Parte Jeyeanthan [2000] 1 WLR 354**, where Lord Woolf urged the analysis of any statutory command to go beyond mandatory and discretionary, to also assess the consequences of non-compliance. He states as follows:

"Bearing in mind Lord Hailsham's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows:

(a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question).

(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question). I treat the grant of an extension of time for compliance as a waiver.

(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question).

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

21. The defendant also relies on the Canadian case of **R v Harbour (1986) CanLII 3935 (FCA)**, where the court considered the effect of not meeting a deadline for submitting

a claim for unemployment insurance benefits. The relevant provision which was considered was section 55 of the Canadian Unemployment Insurance Act which provides:

> "55(4) A claim for benefit for a week of unemployment in a benefit period shall be made within such time as prescribed"

The court noted that treating this provision as mandatory would be inconsistent with the provisions elsewhere in the Act which clearly contemplated the payment of late claims; that the purpose of section 55 was to set out procedural directives rather than substantive requirements; a claimant who fulfils all the substantive prerequisites for receiving a statutory benefit has acquired a right and this right is not to be lost by failing to observe a procedural direction; and unfairness would result to claimants if the delay in submitting their claim was due to circumstances beyond their control.

22. It is noteworthy that section 55(1) of the Canadian Unemployment Insurance Act, provides that a claimant who fails to fulfil or comply with a condition or requirement under that section is not entitled to benefit for as long as the condition or requirement is not fulfilled. This is critical to the manner in which section 55(4) was construed. There is no consequence for a failure to submit. This allows for the submission of claims outside of the prescribed period. This is substantially different to the provisions of Regulation 7(4) of the NIA.

23. I therefore disagree with the contentions of the defendant that regulation 7(4) set out mere procedural directives. This was a substantial requirement, which a failure to comply would result in the claim being disallowed.

24. I agree that construing regulation 7(4) as mandatory results in consequences which are undesirable for both Mr Johnson and Mr Hamid, but the authorities the defendant relies on to persuade this court to conclude that the regulation is directory, do not lend to that interpretation.

**Issue Two: Ultra Vires**

25. The claimant contends that the decisions of defendant were ultra vires as the defendant did not have the power to deliberate and decide on these appeals since they involved matters of mixed law and fact, which then placed these matters in the jurisdiction of the High Court.

26. The claimant relied on the authority of **Collector of Customs v Agfa Gervaert Limited [1996] HCA 36**, which discusses the distinctions between matters of law and matters of fact, and states as follows:

> "The distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated. In Hayes v FCT , Fullagar J emphasised the distinction between the factum probandum (the ultimate fact in issue) and the facta probantia (the facts adduced to prove or disprove that ultimate fact). His Honour said:
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> Where the factum probandum involves a term used in a statute, the question whether the accepted facta probantia establish that factum probandum will generally — so far as I can see, always — be a question of law.

In Collector of Customs v Pozzolanic Enterprises Ltd, the Full Federal Court spoke of the distinction between law and fact in a statutory context as resting upon "value judgement[s] about the range of [an] Act" which, the court said, necessarily raised questions of law.

Some recent Federal Court decisions have attempted to distil the numerous authorities on the problem into a number of general propositions. Thus in Pozzolanic, after referring to many cases, the court identified five general propositions:

> 1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.
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> 2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.
>
> 3. The meaning of a technical legal term is a question of law.
>
> 4. The effect or construction of a term whose meaning or interpretation is established is a question of law.
>
> 5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law."

27. According to **Bennion on Statutory Interpretation 6th Edition (2006)** at Division 1 Part I, section 10:

> "Where a requirement is imposed by statute, the court charged with the task of enforcing the statute needs to decide what consequence Parliament intended should follow from failure to implement the requirement. This is an area where legislative drafting has been deficient. Drafters find it easy to

use the language of command. They say that a thing 'shall' be done. Too often they fail to consider the consequence when it is not done. Millett LJ echoed this statement when he said of the difficulty in deciding whether a statutory requirement is mandatory or directory:

"The difficulty arises from the common practice of the legislature of stating that something “shall” be done (which means that it “must” be done) without stating what are to be the consequences if it is not done'.

Blackstone said 'it is but lost labour to say, “do this, or avoid that,” unless we also declare, “this shall be the consequence of your non-compliance”.

What is not thought of by the drafter is not expressed in the statute. Yet the courts are forced to reach a decision. It would be draconian to hold that in every case failure to comply with the relevant requirement invalidates the thing done. So the courts' present answer, where the consequences of breach are not spelt out in the statute, is to divine the legislative intention.

**The legislative intention**

There is no rule of thumb in this matter. 'No universal rule can be laid down … It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed'.[173] Lord Penzance supported this in a later case:

> "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory … I have been very carefully through all the principal cases,

but upon reading them all the conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases. “

**Conclusions**

28. It is necessary to consider whether the decisions of the defendant contravened or exceeded the terms of the power from which it derives its power.

29. The defendant contends that in coming to its decision it considered the fact that Mr Johnson is a member of the TTCG and that, similar to persons employed within the fire, prison and police services, Mr Johnson had to await classification before the claimant could attend to his claim. The defendant noted there was no negligence on Mr Johnson’s part. Mr Johnson’s classification of his leave only occurred on October 9th 2008 and the date of classification was the relevant date from which Mr Johnson was in a position to make a claim for injury benefit. Mr Hamid experienced similar factual circumstances. The defendant then relied on the authority of **R v Northern District Council ex p Smith (1994) 2 AC 402**, but upon reviewing this authority, I found that it was neither helpful nor did it aid to advance the Defendant’s case.

30. Additionally, the defendant suggests that in deciding whether the apparent breach of regulation 7(4) by the decisions of the defendant to allow the appeals of Mr Johnson and Mr Hamid, this court ought to construe the legislation to give effect to the Legislature’s primary intention, reflected in the NIA. The defendant does not assist the court any further as to the nature of this primary intention.

31. Regulation 7 requires in the first instance that claims for injury benefit should be submitted no later than 14 days from the date the injured person is rendered incapable of work as a result of the accident. It goes further to state that claims outside of this time frame will be accepted, if good cause is shown as to the reason for the delay in submitting the claim. Regulation 7(4) then adds that a failure to make a claim for injury benefit within twelve months disqualifies a person from receiving such benefits. Construing regulation 7(4), I note that this regulation does use the word 'shall' which raises the presumption that it is mandatory, but then goes further to state the penalty for a failure to comply.

32. I find that the provisions of regulation 7(4) are mandatory in nature. The regulation is clear and direct, and although this results in unfortunate consequences, the legislation requires claims to be dealt with within a specified time frame. As such, the questions of substantial compliance, or whether the requirement is capable of being waived are not applicable in these factual circumstances.

33. Additionally, the defendant reasoned that Mr Johnson had good cause for making the late application; he provided sufficient evidence that his hands were tied; and could do nothing further until he received the classification of his leave by the TTDF. This would all be acceptable had the claim been submitted within the 12 month period.

34. Then, on behalf of Mr Hamid the defendant concluded when they allowed his appeal the NIB was in no position to process a claim without the classification of the leave and that time would only start to run from the date of classification.

35. The defendant's members injected their interpretation of the statute and arrived at a decision. This interpretation was a matter of law and fell outside of the ambit of the legislation,

more specifically, the power that section 62(1) of the NIA confers on the defendant. Section 62 merely allows the defendant to hear appeals on matters of fact only. Matters of law or mixed fact and law should be referred to the High Court. To construe or interpret the legislation is a matter for the courts. The defendant went further to identify a list of persons, which included employees of the Ministry of National Security, who must first have their leave classified before they are able to apply for injury benefit, then attempted to create an exception for said persons.

36. While this may be true, the legislation does not make a distinction between those officers and all the other employees in this country who may need to make such claims from time to time. So that where the legislation makes no such distinction, it is not the duty or function of the defendant to attempt such a feat. Further, by allowing the appeal, this served to extend time stipulated for the filing of claims beyond 12 months. This is also not contemplated by the statute and falls outside of the powers conferred on the defendant.

37. In these circumstances I find that both decisions were illegal and ultra vires.

38. I must add that it is perplexing to me why it should take more than 12 months to have a person's leave classified as injury leave. This must be a simple verification process. The failure by their respective departments has resulted in dreadful consequences to both Mr Johnson and Mr Hamid. They may yet have their own remedy against their departments. This system of classification of leave is patently inefficient. However, it cannot be that both the claimant and defendant have to bend and twist the application and interpretation of the provisions of the National Insurance Act to accommodate late claims. However, well intentioned the Tribunal was, it

could not interpret the clear wording of the statute in the way they did.

39. It is also grossly unfair that a person would suffer such a disadvantage for something entirely outside of their control. I urge these services to revisit their procedures concerning leave classification in order that they may be completed within the shortest possible time, so that claims to being made to the claimant can be submitted in a timely manner.

**Damages**

40. The claimant seeks aggravated and exemplary damages as one of its reliefs. **Section 8(4)** of the **Judicial Review Act Chap. 7:08** provides:

> "(4) On an application for judicial review, the Court may award damages to the applicant if—
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> (a) the applicant has included in the application a claim for damages arising from any matter to which the application relates; and
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> (b) the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making the application, the applicant could have been awarded damages.

41. A claimant who claims damages, must provide the court with evidence to support the claim. The claimant here has not provided any details on damages sought. Further, I do not agree that this is the type of matter which attracts aggravated and/or exemplary damages. In these circumstances, I make no award of damages.

**Order**

42. It is declared that the decision of the defendant following the determination of the Appeal of Mr Johnson is ultra vires, invalid, null, void, and of no effect.

43. It is declared that the decision of the defendant following the determination of the Appeal of Mr Hamid is ultra vires, invalid, null, void, and of no effect.

44. An order of certiorari is issued quashing the decisions of the defendant concerning Mr Johnson and Mr Hamid.

45. The defendant is to pay to the claimant the costs of the claim to be assessed by a Registrar in default of agreement. I am grateful to the attorneys and to my JRC, Mrs Berkley-Biggart, for their assistance in this matter.

Ronnie Boodoosingh
Judge