REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA No. 2192 of 2004

IN THE MATTER OF AN APPLICATION BY BRISTOW CARIBBEAN LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO ORDER 53 OF THE RULES OF THE SUPREME COURT, 1975 AND/OR THE JUDICIAL REVIEW ACT, 2000

AND

IN THE MATTER OF THE DECISION OF THE REGISTRATION RECOGNITION AND CERTIFICATION BOARD TO PROCEED WITH AND ENTERTAIN THE APPLICATION FOR CERTIFICATION MADE BY THE OILFIELD WORKERS' TRADE UNION (OWTU) PURSUANT TO SECTIONS 33 AND/OR 37 OF THE INDUSTRIAL RELATIONS ACT CHAP. 88:01 AND REGULATIONS TO BE CERTIFIED AS THE RECOGNISED MAJORITY UNION IN RESPECT OF THE MONTHLY RATED AIRCRAFT ENGINEEERS OF BRISTOW CARIBBEAN LIMITED (THE APPLICATION)

AND

IN THE MATTER OF THE DECISION OF THE REGISTRATION RECOGNITION AND CERTIFICATION BOARD IN THE SAID APPLICATION DATED THE 28TH DAY OF MAY, 2004 AND COMMUNICATED TO BRISTOW CARIBBEAN LIMITED BY LETTER DATED 28TH MAY, 2004 (AND RECEIVED BY BRISTOW CARIBBEAN LIMITED ON OR ABOUT THE 8TH DAY OF JUNE, 2004) WHEREBY THE BOARD PURPORTED TO DETERMINE THE APPROPRIATE BARGAINING UNIT FOR THE APPLICATION

BETWEEN

BRISTOW CARIBBEAN LIMITED

APPLICANT

AND

THE REGISTRATION, RECOGNITION AND CERTIFICATION BOARD

RESPONDENT

Before the Honourable Mr. Justice A. des Vignes

Appearances:

Mr. Seenath Jairam, S.C. and Mr. Rishi P.A. Dass
Instructed by Mr. Derek R. Ali for the Applicant

Mr. Elton Prescott S.C. and Ms. Fourniller
Instructed by Ms. Jean Baptiste for the Respondent

JUDGEMENT

The Proceedings

1. On 27th September 2004, leave was granted to the Applicant ("Bristow") by Mr. Justice Narine, (as he then was), to apply for judicial review in respect of the following: (i) the decision of the Respondent ("the Board") to proceed with and entertain the application of the Oilfields Workers Trade Union ("OWTU") for certification as the recognised majority union in respect of the monthly rated aircraft engineers of Bristow; and (ii) the decision of the Board in the said application by letter dated 28th May 2004 (which was received by Bristow on the 8th June 2004) to determine the appropriate bargaining unit for the application.

2. Such leave was granted on the grounds set out in Bristow's Statement and the affidavit of its Operation Manager, Ainsley Boodoosingh, ("the Boodoosingh affidavit") both filed on the 12th August 2004.

3. On the 29th September 2004, Bristow filed a Notice of Motion seeking, inter alia, the following reliefs:

   (i) An order prohibiting the Board from further entertaining, considering or proceeding with Application No. 25 of 2002 for certification of the OWTU as the recognised majority union for the bargaining unit comprising the monthly rated engineers of Bristow;

(ii) Further and/or alternatively, an injunction restraining the Board and each of its members from further entertaining, considering or proceeding with the application pending the hearing and determination of the application for judicial review;

(iii) A declaration that the decision of the Board to entertain and/or consider and/or proceed with the application is illegal and/or unauthorised or contrary to law and/or ultra vires and/or in excess of jurisdiction and/or unreasonable and/or irrational and/or an irregular or improper exercise of discretion and/or an abuse of power and/or contrary to section 5 (3) of the Judicial Review Act 2000 and/or section 38 (4) of the Industrial Relations Act Chap. 88:01 (as amended) ("the IRA");

(iv) An order of mandamus directed toward the Board and/or each of its members compelling it and/or them to refuse the application in accordance with law and specifically the Act and the Regulations made thereunder;

(v) An order of Certiorari to remove into this Honourable Court and quash the decisions of the Board made on 28th May 2004, in the application whereby it purported to determine the appropriate bargaining unit for the application and to continue to further entertain, consider and proceed with the application;

(vi) A declaration that Bristow is a provider of "Civil Aviation Services" within the meaning of that term as used in the Industrial Relations (Amendment of Schedule 1) Order 1972 or the first Schedule of the IRA.

4. On the 21st July 2006, the Board filed an affidavit in the name of Clifford Buffong, its Acting Secretary ("the Buffong affidavit") in opposition to the application.

5. On the 13th April 2010, on the hearing of the application, leave was granted to Bristow to amend its Statement to include an additional ground of the application, namely, that the decision of the Board was arrived at in breach of the rules of natural justice and/or unfairly.

The Facts

6. The facts gleaned from the Boodoosingh and the Buffong affidavits are as follows:

A. By an Application dated 26th November 2002, and numbered as No. 25 of 2002, the OWTU applied to the Board for a certificate of recognition as the majority union in respect of the monthly rated /monthly paid aircraft engineers employed by Bristow.

B. Bristow was promptly notified of this application and, after some delay on their part in submitting their response, they submitted their Reply on or about the 30th January 2003.

C. In their Reply, Bristow described the general nature of their business as the "Provision of Aviation/Helicopter services for both public and private sectors." They also stated that the number of workers comprised in the proposed bargaining unit described by the OWTU was 7 and stated that an appropriate bargaining unit should comprise the Company's engineers.

D. Bristow also annexed to its Reply an Appendix A which set out its contentions that the application should be struck out on the grounds that: (i) the employees (Engineers) were not workers within the meaning of the IRA; and (ii) the OWTU's claim for recognition for the engineers of Bristow contravened section 38 (4) of the IRA and was ultra vires since the OWTU was already the recognised majority union for a bargaining unit comprising workers employed with National Helicopter Services Limited ("National Helicopter").

E. By letter dated 11th February 2003, the Board wrote to Bristow requesting a clarification meeting on the 26th February 2003. In this letter, the Board notified Bristow that by section 33 (1) of the IRA the Board was required to determine, in the first instance, the Bargaining Unit it considered appropriate. In this regard, the Board requested Bristow to bring with them certain specific information showing the Company's position as at 27th November 2002, namely:

(i) A list of categories of all employees of the Company showing the number comprised in each category, that is—

(a) Hourly, daily and weekly rated employees;
(b) Monthly rated employees.

(ii) Such information as would show the nature of the employment contract of the employees in the proposed Bargaining Unit, for example, specimen letter of appointment, or, where employment is done orally, a brief written statement to that effect.

(iii) An Organisational Chart of the Company.

(iv) Job description of the categories the Company is seeking to have excluded and grounds for same.

(v) A copy of the Registration Certificate of the Company.

F. On the 26th February 2003, a meeting was held between the Board and Bristow's consultant who indicated that Bristow was not prepared to make any submissions on the matters contained in the Board's letter of 11th February 2003, until it had received a response from the Board to its objections to the said application.

G. By letter dated 7th March 2003, Bristow's consultant wrote to the Board reiterating Bristow's objection to the OWTU's application on the expanded ground that the OWTU was already certified as the recognised majority union in the Electricity Service and the Oil Industry and therefore, was debarred from applying for recognition in another essential industry under No. 12 of the First Schedule of Essential Industries (Civil Aviation Services) by section 38 (4) of the IRA. The letter concluded by requesting that this preliminary point be dealt with before proceeding.

H. The Board met on 10th May 2004, to consider the OWTU's application. In the course of its deliberations, the Board considered the objections raised by Bristow

in its Reply and the letter dated 7th March 2003, as well as a Report No. 31/2004 dated and submitted on the 10th May 2004, prepared by Mrs. Lynette Bhairosingh, Examiner I ("the Examiner's Report"). According to the Buffong affidavit, the Board also had regard to "*previous proceedings before it between the OWTU and the Applicant Company namely—*

(a) Proceedings in relation to the issuance of Certificate No. 2 of 1974 ... and Certificate No. 11 of 1983... in which the issue as to whether the National Helicopter Services Limited could be regarded as an essential service was raised. In both cases, the Board determined that National Helicopter Services could not be considered as a category of essential industry as it did not fall within the meaning of 'civil aviation services' as prescribed by the Industrial Relations (Amendment of Schedule 1) Order 1972, and

(b) Application No. 33/81 between the Applicant Company and the OWTU where the question as to whether the nature of the operation of the Applicant company fell with the category of 'civil aviation services'. The Board in this case determined that that the general nature of the Applicant company's operations did not fall within the meaning of 'civil aviation services' as prescribed under the Industrial Relations (Amendment of Schedule 1) Order 1972.

I. The Examiner's Report contained the following significant information:

(a) the general nature of Bristow's business was described as "Provision of Aviation/Helicopter Services for both public and private sectors";

(b) Bristow was incorporated as a limited liability company on the 14th June 1974, and a certificate of continuance was issued to the company on the 26th March 1998;

(c) by Certificate No. 2/74, issued on the 10th January 1974, the OWTU was certified as the recognised majority union for all monthly paid employees of Bristow Helicopters (International) Limited (and not National Helicopter

Services Limited as stated in the Buffong affidavit) excluding Pilots, Aircraft Engineers, and Aircraft Fitters;

(d) by Certificate No. 11/83, issued on the 21st February 1983, the OWTU was certified as the recognised majority union for the Aircraft Fitters (Local) employed by Bristow (and not National Helicopter Services Limited, as stated in the Buffong affidavit).

(e) the OWTU's application was its first attempt to seek certification of recognition on behalf of Aircraft Engineers of Bristow;

(f) in the processing of Application No. 33/81 between Bristow and the OWTU, the question had arisen as to whether the nature of the operations of Bristow placed the Company within the coverage of the Industrial Relations (Amendment of Schedule 1) Order 1972 which lists "Civil Aviation Services" as a category of Essential Industries. The OWTU was requested to submit its views and its Counsel made submissions, inter alia, to the effect that Bristow did not fall under Civil Aviation Services since that term "only relates to aviation services provided for or accessible to members of the public". (It should be noted that in the Examiner's Report no mention is made of Bristow's views being sought and/or obtained by the Board in the processing of this Application.) After careful consideration of the matter, the Board held the view that the operations of Bristow did not fall within the meaning of "Civil Aviation Services" as prescribed in the Schedule;

(g) the Examiner expressed to the Board the following opinion: "*It is to be noted that the general nature of the Company's operation has not changed since the Board made its previous determination. Bristow Caribbean Limited therefore does not fall under "Civil Aviation Services*".

(h) the Examiner also drew to the Board's attention that the certificates of recognition held by the OWTU in respect of workers in the Oil and

Electricity Industry were respectively issued under section 86 (3) of the IRA;

(i) the Examiner concluded that neither of the grounds put forward by Bristow's consultant was tenable and recommended that the Board uphold its determination made in the previous Application No. 33/81 and determine the appropriate the bargaining unit to comprise the monthly rated Aircraft Engineers of Bristow.

J. According to the Buffong affidavit, "*after consideration of these several matters, the Board took the view that the general nature of the Applicant Company's operations had not changed since its determination on Application No. 33/81 and thereafter determined that the OWTU was the appropriate bargaining unit for monthly rated/monthly paid aircraft engineers employed with the Applicant company."*

K. By Notice dated 10th May 2004 but sent to Bristow under cover of letter dated 28th May 2004, the Board notified Bristow of its determination that the appropriate Bargaining Unit was the monthly rated Aircraft Engineers of Bristow.

L. By letter dated 19th May 2004, the Board requested Bristow to make arrangements for an examination at the Board's offices of the Company's pay records and all other relevant books and documents in respect of the employees in the determined Bargaining Unit on the 9th June 2004.

M. By letter dated 9th June 2004, Bristow's consultant acknowledged receipt of the Board's letter dated 28th May 2004, and notified the Board of its intention to seek a review of its decision.

N. By letter dated 15th July 2004, the Board sent a reminder letter to Bristow requesting the submission of the requested documents on the 27th July 2004, at the Board's offices.

O. On the 12th August 2004, Bristow filed this application for leave to apply for judicial review.

Bristow's Arguments

7. Counsel for Bristow submitted that the narrow issue to be determined in this matter is whether Bristow's business fell within the categories of essential industries set out in the First Schedule of the Industrial Relations Act, (the IRA). If so, then section 38 (4) of the IRA applied to prohibit the OWTU from applying for certification since the OWTU was the recognised majority union in respect of various categories of workers employed in other categories of essential industries, namely the Trinidad and Tobago Electricity Commission (T&TEC) by virtue of Certificate of Recognition No. 107 of 1972 issued on 31st July 1972, and Trinidad and Tobago National Petroleum Marketing Company Limited (NP) by virtue of Certificate of Recognition No. 31 of 1974 dated 29th August 1974. Accordingly, this was a jurisdictional or precedent fact which the Board had wrongly determined and in those circumstances, the Court's jurisdiction to review their decision was not ousted by section 23 (6) of the IRA.

8. Further, Counsel complained that the Board relied on a Report prepared by Mrs. Lynette Bhairosingh, Examiner I in which she referred to previous Rulings of the Board in earlier proceedings without disclosing that Report to the Applicant. In so doing, the Board shackled itself by simply following the earlier decisions of the Board without exercising its own independent judgment on the application before it.

9. Counsel also argued that the Board acted in breach of natural justice by failing to disclose the Report that contained information that was adverse to the interests of Bristow and to give Bristow an opportunity to address the Board on the Report.

10. It was also submitted that there was no alternative remedy available to Bristow to challenge the decision of the Board since section 31 of the IRA, which empowers the Board, either on application or on its own motion, to state a case on the interpretation or application of the IRA for the opinion of the Court, only applies where there is hearing before the Board and does not apply at the stage of a clarification meeting. Since the exercise of an alternative remedy only operates as a bar in judicial review proceedings

after a decision has been made and not before, Bristow is not barred from pursuing this claim for judicial review.

11. Additionally, Counsel submitted that since the application was brought within three months of the decision and just over two months after the decision was received, Bristow was not guilty of undue delay. Further, having regard to section 11 (2) of the Judicial Review Act, the issue of delay should not be considered as a live issue at the substantive hearing of the application since that section empowers the Court to "*refuse to grant leave to apply for judicial review*", if there has been undue delay, and does not refer to the stage of the substantive hearing. Further, by section 11 (2), it must also be established that the grant of any relief would cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration. In this case, there was no evidence adduced by the Board to establish substantial hardship to or substantial prejudice to any person or any detriment to good administration.

12. Finally, Counsel submitted that Bristow's responses to questions 5 and 6 in its Reply must be read together with Appendix A attached thereto and, when so read, Bristow has not acquiesced and/or participated in the process of the application.

The Board's Arguments

13. Counsel for the Board argued that the precedent fact to be determined was whether the Applicant was engaged in an essential industry, namely civil aviation services, and it was within the Board's jurisdiction to determine that precedent fact pursuant to section 23 (7) of the IRA. The Board has specific expertise to determine what is and is not included in "*civil aviation services*" and it disclosed the evidence that it took into account in coming to its decision.

14. However, he argued, that Bristow failed to lead any evidence as to how the Board got it wrong and the issue of whether or not Bristow was providing civil aviation services was within the specific expertise of the Board.

15. Further, the Buffong affidavit disclosed that Bristow had refused to provide information at the clarification meeting in February 2003 and the Board, when it met on the 10th May 2004, took into account the Examiner's Report and the previous proceedings before the Board. Based on this information, the Board came to the conclusion that Bristow was carrying on the same business as they had been in 1981 when the Board had determined that they were not providing civil aviation services.

16. Since, therefore, this was the precedent issue and it was within the Board's powers and expertise to determine that issue, the Court's jurisdiction to review the Board's decision was ousted by section 23 (6) and (7) of the IRA.

17. Counsel for the Board also submitted that the Board's decision to proceed with the application was not based on anything stated by the Examiner in her Report but on the Board's determination of the appropriate bargaining unit. Since both the OWTU and Bristow, in the Application and in the Reply, had stated that the appropriate bargaining unit should comprise the Company's Engineers, Bristow had acquiesced in the process and could not now challenge the Board's decision as to the appropriateness of the bargaining unit, especially on the basis of what the Examiner had stated in her Report. Therefore, insofar as Bristow sought, at relief (v) of their Application, "*an Order of certiorari to remove into this Honourable Court and quash the decision of the Respondent made on the 28 May 2004 in the application whereby it purported to determine the appropriate bargaining unit for the application and to continue to further entertain, consider and proceed with the application*", the Court should refuse to grant such relief.

18. In response to Bristow's submissions based on section 38 (4) of the IRA, Counsel for the Board submitted that Bristow had failed to take advantage of the opportunity to make submissions before the Board at the clarification meeting held on the 26th February 2003, and had conceded that the Board had the jurisdiction to determine the precedent fact of whether Bristow was providing civil aviation services. Since the Court does not have the expertise to make that determination and there was no evidence before the Court that Bristow was providing civil aviation services, the Court should not overturn the Board's decision.

19. On the issue of the Board's alleged breach of natural justice, Counsel for the Board submitted that the Court should ask whether there was fairness in the treatment of Bristow. The Board was entitled to rely on the Examiner's Report which was prepared for the Board as part of its internal arrangements and contained information that was in the possession of the Board. Accordingly, since the Board only took into account information in its possession, which was also within the knowledge of Bristow, and did not rely on information from third party sources, there was no need to disclose the contents of the Examiner's Report to Bristow before making its decision. Accordingly, although it was accepted that the Board failed to disclose the Examiner's Report to Bristow before making its decision, it had not treated Bristow unfairly.

20. Counsel for the Board also submitted that there was undue delay by Bristow in making this application for judicial review and in support of this submission relied on the decision of the Court of Appeal in **Jones v. Solomon**[1]. Further, he submitted that nothing in section 11(2) or (3) of the Judicial Review Act permitted the Court to look at the delinquency of the Board, whose affidavit was not filed until 2006, in determining whether or not there had been undue delay in making the application for judicial review or whether such delay would cause substantial hardship or substantially prejudice the rights of any person or would be detrimental to good administration.

Issues

21. The following issues arise for determination in this matter:

(A) Is Bristow debarred by section 23 (6) and (7) of the Industrial Relations Act from challenging the Board's decision by way of judicial review?

(B) If not, is Bristow debarred from obtaining the reliefs sought on this application by reason of the existence of an alternative remedy or undue delay in making the application?

[1] (1989) 41 W.I.R. 299

(C) Did Bristow acquiesce in the process by its Reply to the question as to the appropriate bargaining unit?

(D) At the clarification meeting held on 26th February 2003, did Bristow refuse to provide information on that issue and/or fail to take advantage of the opportunity to make submissions to the Board and thereby concede that the Board had jurisdiction to determine the precedent fact of whether Bristow was providing civil aviation services?

(E) Did the Board have before it the necessary facts to make its decision to consider the OWTU's application for certification and did it act in accordance with natural justice?

(F) Is Bristow entitled to the reliefs sought?

Is Bristow debarred by section 23 (6) and (7) of the IRA from challenging the Board's decision by way of judicial review?

22. This issue requires the Court to consider the effect of Section 23 (6) and (7) of the IRA, which provide as follows:

> *"23. (6) No decision, order, direction, declaration, ruling or other determination of the Board shall be challenged, appealed against, reviewed, quashed, or called in question in any court on any account whatever; and no order shall be made or process entered or proceeding taken by or in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise to question, review, prohibit, restrain or otherwise interfere with the Board or any proceedings before it.*
>
> *(7) Subject to this Act, and in particular to section 31, the Board shall be the sole authority competent to expound upon any matter touching the interpretation and application of this Act relating to functions and duties with which the Board is charged by the Act or any other written law; and accordingly, no cause, application, action, suit or other proceeding shall*

lie in any court of law concerning any matter touching the interpretation and application of the Act. "

23. In the unreported decision of **Trinidad and Tobago Petroleum Marketing Company Limited v The Registration, Recognition and Certification Board[2],** Myers J. helpfully reviewed the authorities on this issue and quoted extensively from the judgment of Ibrahim J.A. in **Aviation Communication and Allied Workers Union v The Registration, Recognition and Certification Board[3],** at pp. 8-10 in which the learned Judge stated:

"The language used in sec. 23 (6) of the Act is clear. It is drafted in the widest possible terms. It prohibits the order of certiorari on any account whatever and states that no proceedings shall be taken in any court to question, review, prohibit, restrain or otherwise interfere with the Board or any proceedings before it. Certiorari is, therefore, ousted.

Sec. 23 (7) excludes any court from expounding on any matter touching the interpretation and application of the Act relating to the Board's functions and responsibilities and prohibits any legal proceedings concerning any matter touching the interpretation and application of the Act. It makes the Board the sole authority competent to deal with such matters. Once, therefore, it is a matter that falls within the functions and responsibilities of the Board then the Board can interpret and apply the Act in any way it thinks fit in relation to those functions and responsibilities. It may do so correctly or incorrectly and, if incorrectly, it is immune from being put right by any court. If, however, the error made does affect the jurisdiction of the Board then it may be put right, as for example, if it seeks to deal with a matter outside of its functions and responsibilities.....Also, if it violates the rules of natural justice as for example, if it makes orders against a party without hearing that party or if one of its members has a real interest in the matter before it. .....All this Court is to be concerned about is that the

[2] H.C.A. No. 3078 of 2004

[3] Cv. App. No. 35 of 1995

Board is acting within its duties and functions and not contrary to the rules of natural justice."

24. Based on this authority and in agreement with the approach taken by Justice Myers in the **National Petroleum** case, I am of the opinion that, in the light of these ouster clauses, all that I am permitted to do is to determine whether or not the Board was acting within its duties and functions and whether or not it acted contrary to the rules of natural justice.

25. Section 23 (1) of the IRA defines and limits the duties and functions of the Board and this includes: "*(a) the determination of all applications, petitions and matters concerning certification of recognition under Part III...."* and *"(b) the certification of recognised majority unions".*

26. Section 33 (1), *"the Board shall on any application under section 32 (2)*[4] *first determine the bargaining unit it considers appropriate in the circumstances..."*. Upon the application for certification made by the OWTU on the 26th November 2002, therefore, the IRA imposed upon the Board the duty to first of all determine the bargaining unit it considered appropriate.

27. However, section 38 (4) of the IRA provides as follows:

> *"38. (4) Subject to this Act, and in particular to sections 85 and 86, no application for certification under this Part shall be considered where the application relates to workers comprised in a bargaining unit in one category of essential industries and the claimant union is already certified as the recognised majority union for workers comprised in a bargaining unit in another category of essential industries.*
>
> *Where, however, the claimant union is under or by virtue of sections 85 and 86, already certified as the recognised majority union for workers comprised in*

[4] 32(2): "Subject to this Act, all trade unions that desire to obtain certification of recognition under this Part shall apply to the Board in writing in accordance with this Part."

bargaining units in more than one category of essential industries, nothing in this section shall apply to any application for certification of recognition under this Part, if the application relates to workers comprised in a bargaining unit in any of those categories of essential industries for which the claimant union is already certified."

28. Bristow has objected to the jurisdiction of the Board to entertain the OWTU's application on the grounds that: (i) the engineers were not workers within the meaning of the IRA; and (ii) the OWTU was already the recognised majority union for bargaining units comprising workers employed with National Helicopter Services Limited ("National Helicopter"), T&TEC and NP and therefore, having regard to section 38 (4) of the IRA, the Board could not consider the application,.

29. In my opinion, Bristow having raised this preliminary objection, the Board was required, before it could lawfully embark on the consideration of the OWTU's application, to consider and determine the following facts:

(a) Did Bristow fall within one of the categories of essential industries described in the First Schedule to the IRA?

(b) If so, was the OWTU already certified as the recognised majority union for workers comprised in a bargaining unit in another category of essential industries?

(c) Was the OWTU already certified under and by virtue of sections 85 and 86 as the recognised majority union for workers comprised in bargaining units in more than one category of essential industries?

(d) If so, was the OWTU's application related to workers comprised in a bargaining unit in any of those categories of essential industries for which OWTU was already certified?

30. Further, I am of the opinion that these facts were jurisdictional or precedent facts since they were conditions precedent to the exercise of the Board's powers under sections 32

and 33 of the IRA. Accordingly, notwithstanding section 23 (6) and (7) of the IRA, this Court is entitled to inquire into the existence of those facts since it is the duty of the Court to ensure that the conditions precedent had been met.

31. Further, I am of the opinion that based on the admitted failure of the Board to disclose the Examiner's Report to Bristow and the allegation that this Report contained information that was adverse to the interests of Bristow which it was not afforded an opportunity to respond to, this Court is entitled to inquire whether such action amounted to a breach of natural justice.

32. Accordingly, I have come to the conclusion that Bristow is not debarred by sections 23 (6) and (7) of the IRA from challenging the Board's decision by way of judicial review.

Is Bristow debarred from obtaining the reliefs sought by reason of the existence of an alternative remedy or undue delay in making the application?

Alternative Remedy

33. Although the Board, in its Statement of Issues of Fact and Law filed on the 6th June 2007, signalled its intention to submit that section 31 of the IRA provided an alternative procedure available to Bristow to question or review the decision of the Board and that no exceptional circumstances had been disclosed in the application to warrant the grant of leave to apply for judicial review, this argument was not pursued at the hearing of the application by Counsel for the Board.

34. In my opinion, the submission made by Counsel for Bristow that section 31 of the IRA does not provide Bristow with an alternative remedy to address the matters raised on this application is sound. That section provides as follows:

> *"31 (1) During the hearing of any matter before the Board, the Board may, in its discretion, on the application of any party to such matter or on its own motion without such application, state a case on any point as to the interpretation or application of this Act or any other written law or rule of law, for the opinion of the Court."*

35. To my mind, therefore, this section clearly contemplates that such an application to the Board to state a case can only be made "*during the hearing of any matter before the Board*". Accordingly, since there was no hearing of the matter before the Board at the time that Bristow sought to challenge the Board's decision, Bristow could not invoke section 31 and had no alternative remedy available to it.

Undue delay

36. The facts as recited above indicate that the Board notified Bristow of its determination of the appropriate bargaining unit by letter dated 28th May 2004. Bristow filed this application for judicial review on the 12th August 2004. Therefore, Bristow's application was filed within three months of the date of notification of the Board's determination.

37. Nonetheless, Counsel for the Board argued that the application was not made promptly and relied on the decision of the Court of Appeal in **Jones v. Solomon**[5].

38. Section 11 (2) of the Judicial Review Act gives the Court the discretion to refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application and the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

39. The short point on this issue is that section 11 (1) requires an application for judicial review to be made promptly and in any event within three months of the date when the grounds for the application first arose. The date of the Notice of determination by the Board is the 10th May 2004, but this Notice was not dispatched to Bristow until the 28th May 2004. Accordingly, based on the time that had elapsed between the date of receipt of the Board's letter and the date of Bristow's application for leave, I consider that the application was made promptly and I do not consider that there was undue delay in making the application. Accordingly, the decision of the Court of Appeal in **Jones v. Solomon** does not assist the Board in its argument that by reason of Bristow's undue delay, the Court should not grant the reliefs sought.

[5] Ibid

Did Bristow acquiesce in the process by its Reply to the question as to the appropriate bargaining unit?

40. In its Reply filed on the 30th January 2003, Bristow, when asked at paragraph 5 to provide a "*Detailed description of what the Employer considers to be the appropriate bargaining unit that should be established in pursuance of this Application*" provided the following response:

> "*AN APPROPRIATE BARGAINING UNIT SHOULD COMPRISE THE COMPANY'S ENGINEERS"*

41. On the basis of this response, it was argued by Counsel for the Board that Bristow acquiesced in the process and could not now challenge the Board's decision as to the appropriateness of the bargaining unit.

42. I am not persuaded by this argument since in my opinion I cannot take that answer in isolation from the remainder of the Reply. In Appendix A, which was incorporated into the Reply by reference, Bristow made clear its objection to jurisdiction of the Board to entertain the OWTU's application. Having made reference to its contention that the Engineers were not workers within the meaning of the IRA and that the OWTU's application contravened section 38 (4) of the IRA, Bristow concluded its Reply in the following terms:

> *"The Company contend that the Recognition Board has no power and/or authority to hear the Union's claim and determine the matter for reasons above, as it is "ultra vires" Section 38 (4). The Employer humbly requests that the matter be struck out."*

43. Further, in its subsequent correspondence dated 7th March 2003, Bristow's consultant repeated the objection on the expanded ground already referred to and requested the Board to deal with the objection as a preliminary point before proceeding.

44. In those circumstances, I find that Bristow did not acquiesce in the process of determining the bargaining unit by the Board. They took a preliminary objection to the jurisdiction of the Board to entertain the OWTU's application and they did not at any time resile from and/or waive that objection.

At the clarification meeting held on 26th February 2003, did Bristow refuse to provide information and/or fail to take advantage of the opportunity to make submissions to the Board and thereby concede that the Board had jurisdiction to determine the precedent fact of whether Bristow was providing civil aviation services?

45. By its letter dated 11th February 2003, the Board requested Bristow to attend a clarification meeting on the 26th February 2003. When I consider the requests for information made in that letter, it is clear that the Board was seeking information that was relevant to its determination of the appropriate bargaining unit. The entire tone of the letter suggested that the Board was proceeding apace to consider the OWTU's application and to determine in the first instance the Bargaining Unit it considered appropriate in accordance with section 33 (1) of the IRA.

46. Not surprisingly, when Bristow's consultant attended the meeting he took the position that he was not prepared to make any submission on the matters contained in the Board's letter until Bristow had received a response on its preliminary objection.

47. In my opinion, this stance was quite in order because to have participated in that process may surely have been interpreted as a submission to the jurisdiction of the Board to determine the appropriateness of the bargaining unit which could then have been relied on by the Board to refute any further objection to their jurisdiction.

48. There is no doubt in my mind that the only reasonable interpretation of the Board's request for a clarification meeting was to gather information to enable the Board to determine the appropriate bargaining unit and there was no opportunity given to Bristow to make any submissions on its objection. The letter did not seek any clarification relative to the information contained in Appendix A to the Reply. Further, Mr. Buffong, at paragraph 13 of his affidavit, makes no mention of any questions asked or clarification sought by the Board in relation to the nature of Bristow's business which had been

described in the Reply as "Provision of Aviation/Helicopter Services for both public and private sectors" or about the OWTU's recognition status in another essential industry.

49. Accordingly, I do not agree with Counsel for the Board's submission that Bristow, by failing to provide the information requested in the Board's letter at the clarification meeting, did not take advantage of the opportunity to make submissions on the issue of the Board's jurisdiction to entertain the OWTU's application. Neither do I agree that Bristow, by adopting the position it did at that meeting, conceded that the Board had jurisdiction to determine the precedent fact of whether Bristow was providing civil aviation services. That issue did not come up at all because the Board had made it clear from its letter that it intended to proceed with what it considered to be its statutory duty in the first instance to determine the appropriate bargaining unit. It is in that context, therefore, that Bristow's objection was simply not addressed at that meeting.

Did the Board have before it the necessary facts to make its decision to consider the OWTU's application for certification?

50. According to the Buffong affidavit, the Board, in its deliberations on the 10th May 2004, took into account the following:

(a) The objections raised by Bristow in its Reply;

(b) The letter dated 7th March 2003 from Bristow's consultant;

(c) The Examiner's Report;

(d) Previous proceedings before it between OWTU and Bristow in relation to Certificate No. 2 of 1974 and Certificate No. 11 of 1983 in which the Board had determined that National Helicopter Services could not be considered as a category of essential industry as it did not fall within the meaning of 'civil aviation services';

(e) Application No 33 of 1981 between the OWTU and Bristow where the Board determined that the general nature of Bristow's operations did not fall within the meaning of 'civil aviation services'.

51. As earlier stated, the first jurisdictional fact that the Board was required to consider and determine was whether Bristow fell within one of the categories of essential industries described in the First Schedule to the IRA. It is apparent from the Buffong affidavit that the Board took into account the previous decision made by the Board in relation to Application No 33/ 81 that Bristow did not fall within the meaning of 'civil aviation services' as prescribed in the Schedule as well as the Examiner's opinion that "*the general nature of the Company's operations has not changed since the Board made its previous determination. Bristow Caribbean Limited does not fall under 'civil aviation services'*"

52. However, it is not evident from the Buffong affidavit or from the Examiner's Report on what basis the Examiner was able to express any opinion as to the general nature of Bristow's operations as at the date of the OWTU's application on 26th November 2002 and that they had not changed since on or about 1981. Certainly, in its Reply, Bristow had described the general nature of its business as the "*Provision of Aviation/Helicopter services for both public and private sectors*" and there is nothing to suggest that the Examiner made any enquiries into the Company's operations as at the date of the OWTU's application. In fact, the Examiner appears to have relied on the determination of the Board in Application No. 33/81 and baldly asserted, without any facts to support her opinion, that the Company's operations had not changed since then.

53. In my opinion, therefore, as at 10th May 2004, the Board did not have any facts on which it could determine whether or not Bristow fell within one of the categories of essential industries described in the First Schedule to the IRA or to justify its view that the general nature of Bristow's operations had not changed since the Board's determination on Application No. 33/81. All that the Board had before it was the Examiner's opinion which was expressed without any factual foundation and no opportunity was given to Bristow by the Examiner or the Board to submit any facts or submissions on the nature of its operations as at the date of the OWTU's application.

54. The second, third and fourth jurisdictional facts that the Board was required to consider and determine all relate to the issue of whether or not the OWTU was certified as recognised majority union for workers comprised in other categories of essential industries.

55. For ease of reference, the Board was required to consider and determine (a) whether the OWTU was already certified as the recognised majority union for workers comprised in a bargaining unit in another category of essential industries; (b) was the OWTU already so certified pursuant to section 85 or 86 of the IRA; and (c) if so, was the OWTU's application related to workers comprised in a bargaining unit in any of those categories of essential industries for which the OWTU was already certified.

56. It was the contention of Bristow that the OWTU was already certified as the recognised majority union in the Electricity Service, the Oil Industry and Civil Aviation Services, all of which fell within the categories of Essential Industries set out in the First Schedule to the IRA.

57. In this regard, the Examiner in her Report, expressed the opinion that the certificates of recognition held by the OWTU in the Oil and Electricity Industries were issued under section 86 (3) of the IRA. Section 86 (3) mandates the Board to issue a certificate of recognition to a Union which presents to the Board a certificate issued by the Minister certifying that the Union was the recognised union immediately before the commencement of the Act.

58. However, the documentary evidence produced by Bristow and annexed to the Boodoosingh affidavit and marked "AB 4" and "AB 5" respectively has contradicted this assertion. "AB 4" is a Certificate No. 107 of 1972 issued by the Board on the 31st July 1972, the date of commencement of the IRA, pursuant to section 86 (1) (and not section 86(3) of the IRA) certifying the OWTU as the recognised majority union in respect of workers employed by the Trinidad and Tobago Electricity Commission (T&TEC) comprising in a bargaining unit as described therein. Further, "AB 5" is a Certificate No. 31/74 issued by the Board on the 28th August 1974 pursuant to section 37 of the IRA certifying the OWTU as the recognised majority union in respect of workers employed by the Trinidad and Tobago National Petroleum Marketing Company Limited (NP) comprised in a bargaining unit as therein described. That certificate was effective from the 4th June 1974.

59. Further, annexure "AB 8" exhibits two certificates of recognition Nos. 13 and 14 of 2000 issued by the Board pursuant to section 37 of the IRA certifying OWTU as the

recognised majority union in respect of worker employed by National Helicopter Services Limited comprised in bargaining units described therein with effect from 22nd May 2000. Although this was raised by Bristow in Appendix A to their Reply, in support of their objection, this was not addressed by the Examiner in her Report.

60. Accordingly, based on the information contained in the Examiner's Report, the Board did not have before it the relevant facts to enable it to consider and determine the second, third and fourth jurisdictional facts and were misled by the Examiner insofar as she stated erroneously that the OWTU's certification in respect of workers in the Oil and Electricity Industries were issued under section 86 (3) of the IRA.

61. Therefore, since at its meeting on the 10th May 2004, the Board either did not have accurate or any facts with respect to the jurisdictional facts as earlier recited, it could not lawfully reject Bristow's objection to its jurisdiction and proceed to consider the OWTU's application and determine the appropriate bargaining unit.

62. Further, I am of the opinion that the Board, by failing to disclose the Examiner's Report to Bristow and to give to Bristow an opportunity to be heard with respect to the jurisdictional facts, violated the rules of natural justice.

Is Bristow entitled to the reliefs sought on its application?

63. In the light of my findings, I am of the opinion that Bristow is entitled to succeed on its application to quash the decision of the Board whereby it purported to determine that Bristow did not fall within the meaning of "Civil Aviation Services" as prescribed in the First Schedule to the IRA and to determine, pursuant to section 33 of the IRA the appropriate bargaining unit to be the monthly rated Aircraft Engineers of Bristow.

64. However, I am not prepared to grant the reliefs sought at paragraph (i), (iv) or (vi) of the Notice of Motion since, in my opinion, the Board, and not the Court, is obliged to consider and determine, in accordance with the principles of natural justice and the guidance provided herein, Bristow's preliminary objection to its jurisdiction to entertain the OWTU's application.

65. Accordingly, I will make the following Orders:

(a) A declaration that the decision of the Respondent to entertain and/or consider and/or proceed with Application No. 25 of 2002 by the OWTU for certification of recognition as the recognised majority union for the bargaining unit comprising the monthly rated engineers of Bristow Caribbean Limited was contrary to law, unreasonable and in breach of natural justice;

(b) An Order of certiorari removing into this Court and quashing the decision of the Respondent dated 10th May 2004 whereby it purported to determine on the OWTU's said Application that Bristow Caribbean Limited did not fall within the meaning of "Civil Aviation Services" as prescribed in the First Schedule to the Industrial Relations Act and to determine the appropriate bargaining unit as comprising the monthly rated Aircraft Engineers of Bristow Caribbean Limited;

(c) An order that the OWTU's Application be remitted to the Board to consider and determine Bristow's preliminary objection in accordance with the principles of natural justice and the guidance provided herein;

(d) An order that the costs of this action be taxed and paid by the Board to Bristow, certified fit for two Counsel, in default of agreement.

Dated this 27th day of June, 2012

André des Vignes
Judge