REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-04383

Between

UNION OF COMMERCIAL & INDUSTRIAL WORKERS

(By its Trustees, Michael Bullen,

Lionel Babb & Winston Mayers)

Claimant

AND

THE HONOURABLE MINISTER OF LABOUR AND SMALL

AND MIRCO ENTERPRISE DEVELOPMENT

Defendant

JUDGMENT

Before the Honourable Mr. Justice A. des Vignes

Appearances:

Mr. Dave Cowie instructed by Ms. Veena Badrie-Maharaj for the Claimant

Mr. Addison Khan, Mr. Derek Ali instructed by Ms. Kerri- Ann Oliverie & Ms. Reba Granado for the Defendant

Application for leave

1. On 23rd November 2009, the Claimant (hereinafter referred to as "the Union") filed an application for leave to apply for judicial review in respect of a decision of the Minister of Labour (hereinafter referred to as "the Minister"). By letter dated 6th August 2009, the Minister referred to the Registration, Recognition and Certification Board (hereinafter referred to as "the Board") for its determination the question of whether Brian Jones, the aggrieved subject (hereinafter referred to as "Jones") was a worker within section 2 (3)(c) of the Industrial Relations Act (hereinafter referred to as "the IRA") in Trade Dispute No. 3 of 2006 between the Union and Telecommunications Services of Trinidad and Tobago Limited (hereinafter referred to as "TSTT").

2. This application was supported by an affidavit of Kelvin Gonzalves, President General of the Union also filed on 23rd November 2009.

3. On 6th January 2010 the Union filed an application to seek leave to extend the time for making the said application for leave. This application was supported by an affidavit of Ms. Veena Badrie-Maharaj, instructing Attorney-at-Law for the Union and the said Mr. Gonzalves.

4. On 6th January 2010, the Union's Attorneys filed a summary of submissions in support of the application for the extension of time and on the 11th January 2010 the Minister's Attorneys filed written submissions.

5. On 12th January 2010, on the *inter partes* hearing of the application for leave, I extended the time for the Union to make the application for leave to apply for judicial review and then heard submissions from Attorneys-at-Law for the Union and the Minister and adjourned the application to a date to be fixed.

Grant of leave and triable issues raised

6. On 9th May 2011, I granted leave to the Union to apply for judicial review for the following reasons:

   (i) I was of the opinion that it was arguable that the Minister could not exercise that power unless the matter has been remitted to him by the Industrial Court pursuant to section 10(1)(a).

   (ii) I was also of the opinion that it was arguable that the intervention of the Minister in the trade dispute, at the request of TSTT and without the remittance of the dispute by the Industrial Court, infringed the doctrine of separation of powers and amounted to a usurpation of the inherent and statutory powers of that Court as a superior court of record.

   (iii) Further, I was of the opinion that it was arguable that TSTT ought to have raised the issue of whether or not Jones was a "worker" at the stage of conciliation before the Ministry and not wait until after conciliation had failed and the dispute was referred by the Minister to the Industrial Court for hearing and determination of the trade dispute.

7. I also directed that the grant of leave operate as a stay of the proceedings before the Board pending the hearing and determination of the Claim.

Documents filed in support of application and affidavits in opposition

8. On 23rd May 2011, the Union filed an application for judicial review which was supported by the affidavit of Kelvin Gonzales, the President General of the Union. On 16th September 2011 and 16th January 2012, affidavits in opposition were filed on behalf of the Minister in the name of Lincoln Lee Chee, the Senior Labour Relations Officer in the Ministry of Labour and Small and Micro Enterprise Development (hereinafter referred to as "the Ministry").

9. On 18th July 2011, the Claimant's Attorney undertook to notify Attorneys-at-Law for TSTT of the Orders made and the adjourned date which was 12th December 2011.

However, on the adjourned date and since then, no steps have been taken by TSTT to intervene in these proceedings.

Submissions filed

10. On 14th October 2011, the Union filed submissions in support of its application for judicial review and on 21st November 2011 the Minister filed its submissions. This was followed by a Reply filed by the Union on 8th December 2011, a Rejoinder filed by the Minister on 25th May 2012 and a Response to the Rejoinder filed by the Union on 25th June 2012. By letters dated 28th June 2012 and 18th July 2012, the Union's Attorney submitted further authorities for the consideration of the Court.

Summary of Facts

11. The Union is a duly registered trade union and at all material times represented workers employed at TSTT. By letter dated 13th July 2005 the Union reported a trade dispute to the Minister arising out of "*the constructive dismissal of Brian Jones*" on 15th March, 2005.

12. The Union and TSTT were invited by the Minister for conciliation at the Ministry and during the course of conciliation the parties were invited, in accordance with section 55(2) of the IRA, to sign a written agreement extending the time from 2nd August 2005 to 16th August 2005 for the Minister to take steps to secure a settlement of the dispute by conciliation. This agreement was executed by the Union and TSTT on the 10th August 2005.

13. However, the matter was not settled at conciliation at the Ministry and, by certificate of unresolved dispute dated 24th January 2006, the Minister certified the dispute as an unresolved dispute pursuant to section 59 (1) of the IRA. By letter of even date, the Minister referred the dispute to the Industrial Court pursuant to section 59 (5) of the IRA.

14. By Notice dated 2nd February 2006 in Trade Dispute No. 3 of 2006, the Industrial Court summoned the Union and TSTT to a pre-trial hearing on 24th March 2006 and on that date, directions were given by the Chairman of the Essential Services Division of the Industrial Court for the filing and service of Evidence and Arguments and Replies and the trade dispute was fixed for hearing on 5th October 2006.

15. At the hearing at the Industrial Court on 24th March 2006, TSTT's representative informed the Chairman of the Essential Services Division that during conciliation TSTT had taken issue with the status of Jones as a "worker" and expressed surprise that the Minister had issued a certificate of unresolved dispute and referred the dispute to the Industrial Court. By letter dated 27th March 2006 from the Union to the Registrar of the Industrial Court and copied to TSTT, the Union denied that TSTT had raised that issue during conciliation. Although by letter dated 17th May 2006, TSTT promised to reply to the Union's Attorney on 25th May 2006, no response was sent by that date or at all.

16. Neither party filed their Evidence and Arguments on time and on 5th May 2006 an extension of time was granted by the Industrial Court to 16th June 2006 for the filing of the Evidence and Arguments and to 30th June 2006 for the filing of Replies to each party's Evidence and Arguments. The matter was then adjourned for mention and report to 26th May 2006 but the Trade Dispute remained fixed for hearing on 5th October 2006.

17. The Union filed its Evidence and Arguments on 23rd June 2006 but TSTT failed to comply with the directions of the Industrial Court by the extended deadline or at all. Instead, TSTT requested the Industrial Court to refer the matter of the status of Jones to the Board but the Court declined this request. It is not clear from paragraph 23 of the Gonzales affidavit when this request was made or when it was declined.

18. The hearing of the trade dispute did not proceed in October 2006 as originally scheduled but, by Notice dated 23rd October 2006, was rescheduled to 19th, 20th and 21st March 2007. Thereafter, by Notice dated 11th January 2007, the hearing fixed for 19th March 2007 was rescheduled to 8th March 2007 and then by Notice dated 2nd March 2007, the matter was adjourned for mention and report to 3rd May 2007. Thereafter, the matter was adjourned from time to time for mention and report between May 2007 and November 2009.

19. By letter dated 3rd October 2007, TSTT's Attorneys notified the Board that it wished to raise the issue as to whether Jones is a "worker" as defined by section 2 (3)(e) of the IRA and requested the Board to give directions for the consideration of that issue pursuant to section 23 (1)(f) of the IRA.

20. The Union's Attorney corresponded with the Board in February and April 2008 complaining about the Board's delay in making a decision on TSTT's request and expressing its objection to such a request being entertained by the Board.

21. Eventually, by letter dated 8th May 2008, the Board notified the Union's Attorney-at-Law that the Board had determined that the question as to whether or not Jones was a worker within the meaning of the IRA should be referred to the Board by the Minister and the Board would also entertain a referral by the Industrial Court.

22. By letter dated 18th July 2008, TSTT wrote to the Minister requesting that the issue of whether or not Jones was a worker within the meaning of the IRA at the time of his resignation be referred to the Board for its determination.

23. By letter dated 6th August 2009, the Minister referred to the Board for its determination the question of whether or not Jones was a worker.

24. By letter dated 25th August 2009, the Union's Attorney-at-Law wrote to the Minister protesting his decision and calling upon the Minister to review and/or recall and/or vacate and/or revoke his purported reference to the Board. He also requested of the Minister a statement of his reasons for his reference as well as his reasons for his failure and/or refusal and/or omission to require submissions from the Union.

25. Not having received any response from the Minister, the Union's Attorney-at-Law sent a pre-action protocol letter to the Minister on 20th November 2009 threatening to make an application for judicial review of his decision.

26. By letter dated 20th November 2009, the Board requested the Union's Attorney and TSTT to submit to the Board on or before 4th December 2009 Evidence and Arguments upon which they intended to rely in support of their respective positions on the issue of whether or not Jones was a worker within the meaning of the IRA.

Reliefs sought by Union

27. In its application for judicial review, the Union has sought, *inter alia*, the following reliefs:
    (a) An order of certiorari to quash the decision of the Minister;
    (b) A declaration that the said decision was in derogation or breach of the provisions of sections 10(1)(a) or 23(1)(f) of the IRA and/or in derogation of the constitutional doctrine of separation of powers and/or constituted an unlawful interference with the jurisdiction and/or usurpation of or encroachment upon the powers of the Industrial Court as a superior Court of Record;
    (c) A declaration that the said decision was illegal, null, void, contrary to law, *ultra vires*, in excess of jurisdiction and/or unreasonable, irrational, irregular and improper exercise of ministerial power and authority;
    (d) A declaration that the said decision constituted an unlawful and/or unreasonable exercise of discretion and/or abuse of process and was in breach

of the Union's legitimate expectation and/or contrary to the provisions of the Judicial Review Act. (Since leave was not granted to apply for judicial review on this ground, the Union would not be entitled to such relief);

(e) A declaration that the Minister's failure to furnish reasons for his decision contravened section 16(3) of the Judicial Review Act. (Since leave was not granted to apply for judicial review on this ground, the Union is not entitled to this relief);

(f) A declaration that the said decision contravened section 20 of the Judicial Review Act in that it was not arrived at in accordance with the principles of natural justice or in a fair manner. (Since leave was not granted to apply for judicial review on this ground, the Union is not entitled to this relief.)

Undisputed Facts

28. The following matters are not in dispute between the parties:

(i) The Board, and not the Industrial Court, is the sole authority under the IRA to determine whether a person is to be regarded as a worker or not. **Caroni (1975) Limited v. Association of Technical, Administrative & Supervisory Staff**[1];

(ii) The IRA is silent as to person or procedure to be utilized to bring such an issue before the Board. **Registration Recognition and Certification Board v. Bank Employees Union and Republic Bank Limited**[2];

(iii) Section 23(1)(f) of the IRA empowers the Minister to refer to the Board for its determination any matter, including the issue of whether a person is a worker within the meaning of the Act or not and, upon any such referral, the Board would then have the responsibility of determining that issue. **Registration, Recognition and Certification Board v. Bank Employees Union and Republic Bank Limited**[3];

[1] (2002) 67 WIR 223
[2] Civ. App. 183 and 184 of 1994
[3] (ibid)

(iv) According to the Ministry's practice and procedure, where an employer is notified of a report of a trade dispute, the employer can raise the question of the employee's status as a worker either before or at conciliation. Where the question is raised during conciliation, the Minister refers it to the Board for its determination and terminates the conciliation since the Minister has no authority to deal with the report where the employee is not a worker;

(v) The Industrial Court is a superior court of record and is mandated by Section 17 of the IRA to expeditiously hear, inquire into and investigate every dispute and all matters affecting the merits of such dispute before it.

Issues

29. Having regard to the arguable issues for which I granted leave to the Union to apply for judicial review, the following issues fall for determination in this matter:

(i) Can the issue of whether or not Jones was a worker within the meaning of Section 2(3)(e) of the IRA (hereinafter referred to as "the worker issue") be raised by TSTT with the Minister after conciliation has failed and the Minister has issued a certificate of unresolved dispute and referred the dispute to the Industrial Court for hearing and determination and can the Minister exercise his power under section 23 (1)(f) to refer the worker issue to the Board when the dispute has not been remitted to him by the Industrial Court pursuant to section 10(1)(a) of the IRA or in the exercise of its inherent jurisdiction?

(ii) Did the Minister infringe the doctrine of separation of powers when he acted on the request of TSTT and referred the worker issue to the Board?

The Union's submissions on arguable issues

30. The Union argued that the Minister was not empowered under the IRA to refer the worker issue to the Board at the request of TSTT since he had already issued a certificate of unresolved dispute and referred the dispute to the Industrial Court which

remained seised of the matter. The parties had been summoned before the Minister to conciliate a dispute and since they agreed to extend the time for conciliation TSTT was estopped from contending that there was not a duly constituted dispute before the Industrial Court. The worker issue ought to have been raised before the Minister at the stage of conciliation and it was not. Since the dispute was not resolved at conciliation, the Minister issued a certificate of unresolved dispute and referred the dispute to the Industrial Court for its determination. Thereafter, the Minister became *functus officio* unless the Industrial Court referred the matter back to him under section 10 (1)(a) of the IRA or in the exercise of its inherent jurisdiction, which it had not. Accordingly, the Union submitted that there was no worker issue in existence that could properly be referred by the Minister to the Board.

31. Further, the Minister could not circumvent the powers of the Industrial Court to adjudicate on the substantive dispute. The Industrial Court had not referred the worker issue to the Board and the Minister had no authority under the IRA to intervene in the matter unless the dispute was remitted to him pursuant to section 10 (1)(a) of the IRA. The Minister had no power to cause the Industrial Court to refrain from further hearing or determination of the dispute before it or to derail or disrupt the judicial process or subvert the powers of the Court as a superior court of record. His action amounted to a usurpation or pre-emption of the function of the Industrial Court which was impermissible.

The Respondent's submissions

32. The Respondent made the following preliminary objections and substantive submissions in reply on the arguable issues:

Preliminary Objections

33. The Union has not established a sufficient interest for bringing its application for judicial review as required by Section 6 (2) of the IRA. Insofar as the Union relied on Section 51(1) of the IRA to give it *locus standi* for making the application, the

affidavit of Mr. Gonzalves did not state that it is the recognised majority union in respect of any bargaining unit in TSTT. Further, it has not established that Jones was a member in good standing of the Union to bring itself within either section 51(1) (b) or (c) of the IRA.

34. The evidence of Mr. Gonzales did not allege any dissatisfaction or complaint by Jones with the Minister's decision and Jones should have been the proper applicant for judicial review of the Minister's decision since it is his interests that could be affected if the Minister's decision is held to be wrong.

35. The application for judicial review is an abuse of process because the Union is not adversely affected by the Minister's decision to refer the issue of whether or not Jones was a worker to the Board.

36. The application for judicial review is premature since no final decision has been taken by the Minister by referring the worker issue to the Board. Only the Board can determine the worker issue and the Minister has not and cannot interfere with the trade dispute over which the Court continues to have jurisdiction. The Minister's referral had no adverse consequences for the Union and was done in the interests of justice.

37. The Union failed to disclose that there was an alternative remedy available before the Industrial Court which has the jurisdiction to hear and determine any questions or submissions concerning the validity of the Minister's decision to refer the worker issue to the Board. The Industrial Court continues to retain jurisdiction in the trade dispute which it can proceed to hear and determine regardless of the Minister's reference of the worker issue to the Board. Further, the Union produced no evidence to show that there were any exceptional circumstances to rebut the availability of the alternative remedy. Accordingly, the Industrial Court was the appropriate forum for providing the remedy sought by the Union.

Substantive submissions on arguable issues

Minister's jurisdiction to entertain request and to refer the worker issue to the Board.

38. The Minister had the requisite jurisdiction to entertain the request of TSTT and to refer the worker issue to the Board pursuant to Section 23 (1)(f) of the IRA. The IRA does not impose upon the Minister any time limit or any occasion for him to exercise his discretion and he is not bound by any settled practice in respect thereof. On each occasion, the Minister must consider whether or not it is just for him to utilise the section. The Minister was not *functus officio* when he issued his unresolved certificate and he was entitled to act as he did when the issue was raised after conciliation in order to achieve the objects of the IRA.

39. It would be unjust and contrary to justice for an employee to be regarded as a worker merely because, at conciliation before the Minister, the worker issue was not raised by the employer. It is for this reason that the Industrial Court has itself remitted trade disputes to the Minister in other similar cases in the past in the interest of fairness, notwithstanding the issue of the Minister's unresolved certificate or the pendency of the trade dispute before the Industrial Court.[4]

40. The memorandum of agreement dated 10th August 2005 executed by the Union and TSTT at conciliation proceedings at the Ministry of Labour merely evidenced an agreement, in accordance with section 55 (2) of the IRA, to an extension of time for conciliation. Conciliation is entered into by the parties without prejudice to their legal rights and does not deprive a party of subsequently raising points of jurisdiction or law before the Industrial Court. The memorandum was not entered as an Order of the Industrial Court and is not of an enforceable character and its effectiveness was spent upon the expiration of the time stated therein. It is therefore irrelevant to these

[4] T.D. 43 of 2001, OWTU v. National Petroleum Company of Trinidad and Tobago Limited; T.D. No. 428 of 2006, Banking Insurance and General Workers' Union v. U.T.T. (where the Industrial Court remitted the matters to the Minister for further consideration pursuant to section 10 (1)(a) of the IRA)

proceedings. Accordingly, since the Minister does not and cannot determine matters of law, the question whether or not a trade dispute exists or a person is a worker within the meaning of the IRA could only be determined by the Industrial Court on the previous finding of the Board. The Union's contention would result in an adverse and deleterious effect on conciliation proceedings at the Ministry of Labour.

41. The Union cannot rely on the memorandum of agreement to support its argument of estoppel since it failed to prove that there was an unambiguous representation by anyone at the stage of the execution of the memorandum of agreement.

42. There was no error of law on the part of the Minister and he properly exercised a jurisdiction that Parliament expressly conferred on him. The Minister is entitled to the benefit of the presumption of regularity and is not obliged to adduce evidence to establish that he took only the correct factors into account.

43. The Minister's referral of the matter to the Board vested the Board with jurisdiction to determine the issue. Section 23(6) and (7) of the IRA completely ousts the jurisdiction of the Court over proceedings before the Board[5] and the Court will not usually grant a declaration unless it has some current or future value and is not simply a comment on past events.

44. The Union failed to advance any plausible reason why the Minister's decision was unreasonable, irregular and/or an improper exercise of discretion and/or irrational and/or an abuse of power. The Minister's decision could not be described as defiant of logic or accepted moral standards.

45. The issue of an employee's status is of fundamental importance because, if the employee is not a worker within the meaning of the IRA, it goes to the root of the

[5] HCA No. 1916 of 1983, AG of Trinidad and Tobago and J.E.M. Adams and Ors v. Trinidad and Tobago Postmen's Union

jurisdiction of the Court to hear and determine the dispute. Therefore, a determination by the Board is critical before the Court determines the dispute.

Separation of powers

46. The Minister, by referring the "worker issue" to the Board, did not breach the doctrine of separation of powers. The Minister acted in accordance with the IRA and the Industrial Court is not affected in any way by the referral since as a superior court of record it has the full authority to proceed with the hearing and determination of the trade dispute, regardless of the Minister's referral;

47. The Minister was not under any duty to consult with the Industrial Court before making the referral to the Board. In fact, it would have been improper for him to have done so. Further, the Minister did not delist the matter from the Court's roster but the Court adjourned the trade dispute in its own deliberate judgment.

48. The Industrial Court in its own deliberate judgment can determine whether the question of an employee's status is justifiably raised at the hearing of the dispute. TSTT or the Union could take objections and make submissions in relation to any point of law at the hearing of the trade dispute before the Industrial Court. TSTT can raise the issue of a referral to the Board before the Industrial Court at the hearing of the trade dispute and it is for the Court to determine whether the issue is justifiably raised, notwithstanding the unresolved certificate and the referral.

49. It is open to TSTT, if it makes an application for remittal of the dispute to the Minister to convince the Industrial Court that the question of the employee's status, if raised, is justifiably raised. This can only be done at the hearing of the dispute. Therefore, even if the Court were to hold that the Minister was wrong in referring the question to the Board pursuant to section 23(1)(f), TSTT can still apply to the Industrial Court at the hearing to remit the dispute to the Minister under section

10(1)(a). If the Industrial Court remits the dispute to the Minister, then the Minister will utilise section 23(1)(f) to refer the question again to the Board.

Analysis

The Respondent's preliminary objections

50. Having regard to the preliminary objections raised by the Respondent, I must first address these issues.

Union's insufficiency of interest

51. Section 5(2) of the Judicial Review Act provides that the Court may, on an application for judicial review, grant relief to a person whose interests are adversely affected by a decision. Section 6(2) provides that the Court shall not grant relief unless it is satisfied that the applicant has a sufficient interest in the matter to which the application relates.

52. In my opinion, when I granted leave to the Union to apply for judicial review, I was satisfied that it had a sufficient interest in the matter for the reason that the Union was a proper party to the trade dispute before the Industrial Court. In addition, it had been summoned by the Board to appear before it for directions pursuant to the referral direction made by the Minister pursuant to the request of TSTT. Further, I did not consider it necessary for the Union to satisfy this Court that it was the recognised majority union in respect of any bargaining unit at TSTT or to establish that Jones was a member in good standing of the Union. Those are matters which may have been relevant to the locus of the Union to report the dispute to the Minister and to pursue the matter in the Industrial Court and could have been raised by TSTT either at the stage of conciliation at the Ministry of Labour or before the Industrial Court. However, the fact is that after the matter was not resolved at the Ministry, the Minister referred the trade dispute to the Industrial Court as an unresolved dispute without any issue having been raised by TSTT as to the Union's entitlement to report the dispute or to represent Jones at the Industrial Court. Accordingly, in my opinion,

this objection is without merit and the Union has a sufficient interest in this matter to entitle it to apply to this Court for judicial review of the decision of the Minister to refer the worker issue to the Board.

Jones the proper applicant, not the Union

53. I also disagree that it was necessary for the Union to allege that Jones was dissatisfied with the Minister's decision or that Jones should have been the proper applicant for judicial review. On the face of the record before this Court, the entitlement of the Union to report the dispute to the Minister pursuant to section 51 (1) (c) was not challenged by TSTT at any time. Thereafter, the Minister took steps to secure a settlement by means of conciliation and when these efforts failed, the Minister certified the dispute as unresolved and referred the dispute to the Industrial Court. Up to that stage, the locus standi of the Union to represent Jones had not been the subject of challenge. When, therefore, the Minister, acting upon the request of TSTT, made his decision to refer the worker issue to the Board, I do not consider that it would at all have been appropriate or correct for Jones to apply to this Court for judicial review of the Minister's decision. The Union, as the Union representing Jones in relation to the trade dispute before the Industrial Court is entitled to apply to this Court on the basis that its interests have been adversely affected by the Minister's decision.

54. In any event, I am satisfied that this application is justifiable in the public interest since this application raises important issues concerning the entitlement of an employer to directly invoke the discretion of the Minister to refer to the Board an issue of whether or not an employee is a "worker" within the definition of the IRA at any stage of the dispute procedure, especially after the Minister has referred the dispute to the Industrial Court as an unresolved dispute. Further, it also raises the issue of whether the Minister, without the remittal of the matter to him by the Industrial Court, has the jurisdiction to act on the request of an employer at the stage at which the Minister did, to refer such an issue to the Board. Accordingly, I am

satisfied that the Union was entitled to make this application and to pursue same for the reliefs sought.

Abuse of process

55. For the reasons already set out, I also disagree with the Respondent's submission that this application is an abuse of process since the Union has satisfied this Court that it has been adversely affected by the Minister's decision.

Application premature

56. With respect to the Respondent's submission that the application for judicial review is premature, I am of the view that it does not matter that the Board has not yet determined whether or not Jones is a worker. It is not in dispute that the Board, acting on this referral, has already summoned TSTT and the Union before it to give directions for the hearing and determination of that issue before the Board. The Union's complaint is that the Minister acted without jurisdiction to make the referral to the Board when he did and that he infringed the doctrine of separation of powers and usurped the inherent and statutory powers of the Industrial Court as a superior Court of record. Further, the Union complained that TSTT ought to have raised the worker issue at the stage of conciliation before the Ministry and was not entitled to raise that issue with the Minister after he had already issued a certificate of unresolved dispute and referred the matter to the Industrial Court. Once the matter was referred to the Industrial Court by the Minister, that Court assumed jurisdiction over the matter by giving directions for the hearing and determination of the dispute. In the light of these complaints, which this Court considered to be arguable, I consider that the Union's application for judicial review was not in any manner premature.

Availability of alternative remedy

57. With respect to the Respondent's contention that there was an alternative remedy available to the Union before the Industrial Court, this Court also disagrees that the

Industrial Court is vested with the jurisdiction and power to hear and determine the validity of the Minister's decision. While it is true to say that the trade dispute remains before the Industrial Court pursuant to the Minister's referral as an unresolved dispute, the decision to refer the worker issue to the Board purports to vest the Board with jurisdiction to determine an issue that goes to the root of whether or not there is a "trade dispute" properly before the Industrial Court. By section 7 of the IRA, the Industrial Court is vested with jurisdiction "to hear and determine trade disputes" but it has no jurisdiction to judicially review the Minister's decision and to grant the reliefs provided for in section 8 of the Judicial Review Act. Accordingly, at the time when I granted leave to the Union to apply for judicial review I was of the view, and I still am of that view, that the IRA does not contain an alternative procedure to question, review or appeal the Minister's decision to refer the worker issue to the Board.

Minister's jurisdiction to entertain request and to refer "worker issue" to the Board

58. The Minister argued that Section 23 (1) (f) of the IRA conferred upon the Minister the requisite jurisdiction to refer the worker issue to the Board, without the imposition of any limit of time or occasion.

59. Section 23(1) of the IRA sets out the responsibilities with which the Board is charged which include "*(f) such other matters as are referred or assigned to it by the Minister or under this or any written law".* The question raised here, however, is whether by virtue of this subsection the Minister is given a wide and unfettered power and jurisdiction to refer or assign matters to the Board whenever he sees fit. The answer to that question lies, in my opinion, in a careful consideration and understanding of the procedures set out in the IRA for the resolution of disputes between a union and an employer.

The IRA

60. Section 51 of the IRA provides that an employer, a recognised majority union or any trade union of which a worker or workers are parties to the dispute are members in good standing may report any trade dispute to the Minister who shall acknowledge receipt of any such report and deal with it in accordance with the IRA and the regulations made thereunder.

61. What is a "trade dispute" and or who is a "worker"? Section 2 of the IRA contains the following definitions:

"trade dispute" or "dispute", subject to subsection (2), means any dispute between an employer and workers of that employer or a trade union on behalf of such workers, connected with the dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of any such workers, including a dispute connected with the terms and conditions of the employment or labour of any such workers, and the expression also includes a dispute between workers and workers or trade unions on their behalf as to the representation of a worker (not being a question or difference as to certification of recognition under Part 3)"

"worker", subject to subsection (3), means--

(a) any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, technical, clerical or other work for hire or reward, whether the contract is expressed or implied, oral or in writing, or partly oral and partly in writing, and whether it is a contract of service or apprenticeship or a contract personally to execute any work or labour;

(b) any person who by trade usage or custom or as a result of any established pattern of employment or recruitment of labour in any business or industry is

usually employed or usually offers himself for and accepts employment accordingly; or

(c) any person who provides services or performs duties for an employer under a labour only contract, within the meaning of subsection (4)(b);

and includes

(d) any such person who--

(i) has been dismissed, discharged, retrenched, refused employment, or not employed, whether or not in connection with, or in consequence of, a dispute; or

(ii) whose dismissal, discharge, retrenchment or refusal of employment has led to a dispute; or

(e) any such person who has ceased to work as a result of a lockout or of a strike, whether or not in contravention of Part 5,

as the case may be.

.....

(3) For the purposes of this Act, no person shall be regarded as a worker, if he is---

.....

(e) a person who, in the opinion of the Board---

(i) is responsible for the formulation of policy in any undertaking or business or the effective control of the whole or any department of any undertaking or business; or

(ii) has an effective voice in the formulation of policy in any undertaking or business;

.....

62. Applying those definitions to the facts of this matter, therefore, when the Union, pursuant to section 51 of the IRA, reported to the Minister that there existed a trade dispute between the Union and TSTT, arising out of the dismissal of Jones, that report implied that:

(a) the Union was entitled to make such a report on behalf of a worker who was a member in good standing;

(b) Jones fell within the definition of "worker" within the meaning of the IRA and that he was not excluded from being so regarded by section 2(3)(e); and

(c) there existed a "trade dispute" within the meaning of the IRA between the Union and TSTT as the employer of Jones.

63. Upon receipt of this Report from the Union, the Minister, in pursuance of the power vested in him by section 55 (1) of the IRA, took steps to secure a settlement of the dispute by means of conciliation.

64. Section 55 provides as follows:

"*(1) The Minister shall as soon as possible after a trade dispute has been reported or deemed to have been reported to him take such steps as he may consider advisable to secure within fourteen days next after the date of the report, a settlement of the dispute by means of conciliation.*

(2) The parties to a dispute that has been reported to the Minister may agree in writing to extend the time, specified in subsection (1) (including any further extension of time under this subsection), within which the Minister may take steps to secure a settlement of the dispute by means of conciliation.

(3) Where in pursuance of subsection (2) the parties to a dispute agree to extend the time within which the Minister may take steps to secure by means of conciliation a settlement of the dispute, the Minister may continue to take steps so as to secure a settlement of the dispute.(emphasis mine)

65. The evidence is that, pursuant to section 55 (2), the parties agreed to an extension of time within which the Minister could take steps to secure a settlement of the dispute by means of conciliation. At that stage, there is no evidence before me that TSTT had raised the issue that the Union was not entitled to report the trade dispute to the Minister because Jones was not a member of the Union in good standing or that Jones was not a "worker" or that the "trade dispute" reported by the Union did not fall

within the definition of "trade dispute" or "dispute" contained in section 2 of the IRA. In fact, in its letter to the Registrar of the Industrial Court, the Union categorically denied that the worker issue was raised by TSTT during conciliation and TSTT did respond to this letter.

66. As it turns out, conciliation did not result in the settlement of the dispute within the extended time agreed to by the parties and the Minister did two things. He certified the dispute as an unresolved dispute pursuant to section 59 (1) and he referred the unresolved dispute to the Industrial Court for settlement pursuant to section 59 (5).

67. Section 59 (1) provides as follows:

> *"A dispute, reported to section 51(1) .... that remains unresolved after the time within which the Minister may take steps by means of conciliation to secure a settlement thereof, including any extension of such time under section 55(2), has expired, shall be so certified in writing by the Minister (referred to in this Part as an "unresolved dispute") and notice thereof served on the parties to the dispute and the Minister may also state any reasons which in his opinion have prevented a settlement.*

68. Section 59 (5) provides as follows:

> *"Nothing in subsection (2) to (4) shall apply in the case of an unresolved dispute in an essential service between an employer and any trade union, and every such unresolved dispute shall be referred by the Minister to the Court for settlement." (emphasis mine)*

69. Section 7(1) of the IRA enumerates the jurisdiction of the Industrial Court, in addition to the powers inherent in it as a superior court of record, which includes "*to hear and determine trade disputes".*

70. Section 10 then sets out the powers of the Court in relation to any matter before it:

"*(1) The Court may in relation to any matter before it--*

(a) remit the dispute, subject to such condition as it may determine, to the parties or the Minister for further consideration by them with a view to settling or reducing the several issue in dispute;

(b) make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction in pursuance of the hearing or determination;

.....

71. Section 11 then sets out additional powers of the Court.

"In addition to the powers conferred on it under the foregoing provisions of this Part, the Court may---

(a) proceed to hear and determine a trade dispute in the absence of any party who has been duly summoned to appear before the Court and has failed to do so;

.....

(c) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the trade dispute or any other matter before it."

72. Section 17 also provides as follows:

"*The Court shall expeditiously hear, inquire into and investigate every dispute and all matters affecting the merits of such dispute before it and, without limiting the generality of the foregoing, shall in particular hear, receive and consider submissions, arguments and evidence made, presented or tendered (whether orally or in writing) --*

(a) by or on behalf of the employer concerned;

(b) by the trade union concerned on behalf of the workers involved in the dispute;

(c) in the name of the Attorney General, if he has intervened under section 20.

73. On the evidence, by virtue of the referral by the Minister of the unresolved dispute to the Court, the Industrial Court was vested with jurisdiction to "*hear and determine*" that trade dispute and to exercise its powers under the IRA. Although it was empowered by Section 10 (1) (a) to remit the dispute to the parties or the Minister for further consideration by them "*with a view to settling or reducing the several issues in dispute*", the Court did not exercise that power and the dispute remained before, and subject to the jurisdiction of, the Industrial Court up to the date when TSTT wrote to the Minister requesting him to refer the worker issue to the Board.

74. The first question to be determined, therefore, is whether the worker issue could properly be addressed to the Minister by TSTT at the stage at which it did so. The IRA does not contain any express provision that enables a party, after a trade dispute has been referred to the Industrial Court and the Industrial Court has already given directions for the filing of Evidence and Arguments, to call upon the Minister to take any steps in relation to the dispute.

75. Section 56 of the IRA authorises the Minister to intervene in any dispute at any time before a report is made or deemed to have been made for the purposes of advising the parties thereto and of conciliation with a view to the settlement thereof. Section 65 also empowers the Minister, in the national interest, to make an application to the Industrial Court for an injunction where industrial action is threatened or taken. However, neither of these provisions enables the Minister to entertain a request from a party to a dispute that is properly before the Industrial Court and which has not been remitted to him by the Court to intervene in the trade dispute for any reason whatsoever.

76. Save for the situation contemplated by Section 56, the Minister is vested with jurisdiction in relation to a dispute after a report has been made to him pursuant to section 55(1). Thereafter, the powers of the Minister are governed by Sections 53 to 59 of the IRA. It is evident from the facts that the Minister exercised his power to

take steps to secure the settlement of the dispute by conciliation, including obtaining the agreement in writing of the parties to an extension of time to conciliate. When such efforts did not result in the settlement of the dispute, the Minister took the next steps of certifying the dispute as an unresolved dispute and referring the dispute to the Industrial Court to hear and determine the dispute.

77. To my mind, the Minister having referred the dispute to the Court, there was no other statutory function or responsibility imposed or power conferred upon him relative to the dispute unless the Court remitted the dispute to him or industrial action was threatened or taken thereby justifying him making an application to the Court for an injunction.

78. Therefore, although section 23(1)(f) imposes upon the Board the responsibility for "*such other matters as are referred or assigned to it by the Minister",* the Minister's power to refer the worker issue to the Board, based on the request of TSTT, without the dispute being remitted to him by the Court either pursuant to section 10(1)(a) or at all, is without statutory foundation.

79. In my opinion, once the Minister referred the dispute to the Court, his statutory jurisdiction in relation to the dispute ceased unless and until the matter was remitted to him. He did not have any residual statutory or inherent jurisdiction over the dispute that allowed him to take any action in relation thereto.

80. I am reinforced in this view by several provisions of the IRA.

    (i) Section 10(1)(a) empowers the Court "*in relation to any matter before it"* to remit the dispute, subject to such condition as it may determine, to the Minister. In other words, the Court, in the exercise of its jurisdiction over the dispute is vested with a discretion to remit the dispute to the Minister. The Minister is not given any power or

discretion to take any action in relation to the dispute. If the Court decides to remit the dispute to the Minister, he will then be empowered to give further consideration to the dispute "*with a view to settling or reducing the several issues in dispute"* and the cases cited by the Minister demonstrate that the Courts have been willing to remit disputes to the Minister in appropriate cases. However, this has not occurred in this case.

(ii) Section 65 is also premised on the fact that the Court is vested exclusively with jurisdiction over the dispute since, in the event that industrial action is threatened or taken, the Minister can apply to the Court for an injunction *ex parte* to restrain the parties from commencing or from continuing the action. Upon such an application, the Court "*may make such order thereon as it considers fit having regard to the national interest."*

(iii) Section 18 of the IRA expressly provides that, subject to the right conferred on any party to a matter to appeal to the Court of Appeal on the grounds set out in subsection (2), *"the hearing and determination of any proceedings before the Court, and an order or award or any finding or decision of the Court in any matter (including an order or award) (a) shall not be challenged, appealed against reviewed, quashed or called in question in any court on any account whatever; and (b) shall not be subject to prohibition, mandamus, or injunction in any court on any account whatever."* In my opinion, this section makes it clear that the jurisdiction of the Industrial Court over a trade dispute must be respected and cannot be interfered with or called into question on any account whatever.

81. Accordingly, I find that the Minister was not entitled to entertain and act upon the request of TSTT at the stage when he did. If TSTT had raised the worker issue at the stage of conciliation and before the Minister had issued his certificate of unresolved dispute and referred the dispute to the Court, such a challenge would have been appropriate since, at that stage, the Minister had jurisdiction over the dispute. He could then have exercised his power under Section 23 (1)(f) to refer the issue to the Board which has the sole jurisdiction to determine whether Jones was or was not a worker. TSTT not having challenged the status of Jones as a "worker" before the Minister, the dispute proceeded on the basis that there was a valid trade dispute properly reported to the Minister and properly referred by him to the Court for hearing and determination.

82. This is not to say that Jones is to be regarded conclusively as a worker because of TSTT's failure to take issue with his status at the stage of conciliation. Their recourse may still be to make such submissions as it deems fit before the Industrial Court which remains vested with exclusive jurisdiction over the dispute. It could, for example, seek to persuade the Industrial Court to remit the dispute to the Minister or to refer the worker issue directly to the Board. However, what it could not do was ignore the fact that the dispute was under the jurisdiction of the Court and seek the intervention of the Minister who had no statutory power in respect of the dispute at that stage.

83. Accordingly, when the Minister referred the worker issue to the Board, he acted unlawfully and consequently the Board was not lawfully vested with jurisdiction to determine the worker issue. The fact that the Minister has already purported to refer that issue to the Board does not oust the jurisdiction of this Court to declare that the Minister's decision was illegal, null and void as being in excess of jurisdiction and that the proceedings before the Board are a nullity.

Did the Minister infringe the doctrine of separation of powers when he acted on the request of TSTT and referred the "worker issue" to the Board?

84. In **Director of Personnel Administration & Police Service Commission v Eusebio Cooper, Clifford Balbosa, and Derek Junior Birjah**[6] Sharma C.J., as he then was, commented on the separation of powers doctrine as follows:

> *[28] In all Constitutions, based on the Westminster system of government, there is in operation the doctrine of the separation of powers. By this doctrine, the autonomy of each branch of government is presumed to be immune from undue encroachment from any others. Thus, the Legislature, Executive and Judiciary operate in an environment which is presumed free from influence from each other's sphere.*
>
> *[29] While in the popular sense it may be convenient to divide the powers of government into three (3) spheres, in practical reality such rigid classification is neither desirable nor possible. On the basis of the doctrine as initially formulated by French jurist Montesquie*u, *what is desired is not that the different organs such as the Legislature and Executive should have no influence or control over the acts of each other but rather that neither should exercise the whole power of the other. In essence: "Its value lies in the emphasis placed upon those checks and balances which are essential to prevent an abuse of the enormous powers which are in the hands of rulers."*

85. There is no one test for identifying the powers which, pursuant to the Constitution, should be exercised by the respective arms of the state. The Claimant is alleging that the Minister's decision to refer to the Board for its determination, the question whether Jones was a worker within section 2 (3) (c) of the IRA, amounts to a breach

[6] Civ. App. No. 10 of 2004

of the doctrine of separation of powers because the Minister is exercising a judicial function.

86. In **De Smith's Judicial Review**[7] the learned authors offered guidance on the various tests that may be applied in identifying judicial functions. The first test turns on "*whether the performance of the function terminates in an order that has conclusive effect*." The second test "*turns primarily on the presence or absence of certain formal and procedural attributes*." The author explained that court proceedings are distinguished by a number of special characteristics which include in most cases public hearings, the power of the court to compel the attendance of witnesses who may be examined on oath. Courts are also required to follow rules of evidence and are entitled to impose sanctions and to enforce compliance with its orders. These tests act as a guide and may support the conclusion that a body is vested with judicial function albeit the presence of all characteristics does not conclusively prove that a body is vested with judicial power. The author further explained that a body that is not empowered to give a binding decision in a dispute between parties will not normally be held to be acting in a judicial capacity.

87. In the Privy Council decision of **Hinds and others v The Queen**[8] at page 360 Lord Diplock observed:

> "*What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution.*"

88. In **Stone Street Capital Limited v the Attorney General of Trinidad and Tobago**[9]**,** the Honourable Justice Boodoosingh referred to the dicta of Lord Bingham

[7] 7th Edition B-21 - B-28
[8] 1976 1 All ER 353

of Cornhill who examined the separation of powers doctrine under the Jamaican Constitution in the case of **Director of Public Prosecutions of Jamaica v Mollison**[10]:

> "*Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as a 'characteristic feature of democracies': R (Anderson) v Secretary of State for the Home Department [2003] 1AC 837, 890-891, para 50. In essence therefore the separation of powers doctrine dictates that there should be a separation between the three arms of the state, that is, the executive, the legislative and the judicial arms of the State. The principle of separation of powers between the various arms of government is given effect by the written terms of our Constitution."*

89. Justice Boodoosingh in his interpretation of the doctrine of separation of powers opined at paragraph 46 as follows:

> *"What is critical from these observations is the acute separation of powers between the judiciary on the one hand as against the executive/legislature on the other. The executive and legislature cannot exercise core judicial powers and the judiciary must be careful not to overstep the mark to exercise executive/legislative powers, although part of the judiciary's responsibility is to review, in appropriate cases, the manner and exercise of executive and legislative powers. It tests the exercise of those powers against the*

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[9] CV 2012 – 04383
[10] [2003] UKPC 6, [2003] 2 AC 411

Constitution and judicial review criteria such as fairness and reasonableness."

90. In this case, one of the grounds on which this Court granted the Union leave to apply for judicial review of the decision of the Minister was that it was arguable that the Minister's action in referring the worker issue to the Board without the remittance of the dispute to him by the Industrial Court infringed the doctrine of separation of powers and amounted to an usurpation of the inherent and statutory powers of the Industrial Court as a superior court of record.

91. However, as is evident from the facts as earlier recited, the Industrial Court has continued to maintain jurisdiction over the trade dispute and has, in the exercise of its own discretion, adjourned the hearing and determination thereof pending the outcome of the efforts by TSTT to have the Board consider and determine the worker issue. Applying the guidelines set out in **De Smith's Judicial Review**, the decision of the Minister to refer the worker issue to the Board did not terminate in an order that has conclusive effect on the trade dispute that is before the Industrial Court and there was an absence of the formal and procedural attributes usually associated with the exercise of a judicial function. In my opinion, the Minister's decision to refer the worker issue to the Board was purely administrative.

92. As such I am of the opinion that the Minister's decision to refer the worker issue to the Board did not circumvent the power of the Industrial Court or cause it to refrain from further hearing or determination of the trade dispute. Any disruption to the judicial process was brought about by the decision of the Court in its own deliberate judgement to adjourn the proceedings from time to time. I find therefore that the Minister did not infringe the doctrine of separation of powers when he referred the worker to the Board.

Orders

93. Accordingly, I will grant the following reliefs sought by the Union:

(i) An order of certiorari quashing the decision of the Minister dated 6th August 2009 to refer the question of whether or not Brian Jones was a worker within the meaning of Section 2(3)(e) of the IRA;

(ii) A declaration that the said decision was ultra vires and null and void.

Costs

94. I will invite Counsel for the Union and the Minister to address me on the appropriate Order for costs to be made in the circumstances.

Dated this 28th day of January 2014.

André des Vignes

Judge