THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2013-02501

BETWEEN

TOSL ENGINEERING LTD

Claimant

AND

MINISTER OF LABOUR AND SMALL MICRO ENTERPRISE DEVELOPMENT

Defendant

Before the Honourable Mr. Justice V. Kokaram
Date of Delivery: April 17th 2014
Appearances: Mrs. Deborah Peake S.C. and Mr. Ravi Heffes-Doon instructed by Mr. Romney Thomas for the Claimant
Mr. Seenath Jairam S.C. and Mr. Kelvin Ramkissoon instructed by Ms. Diane Katwaroo for the Defendant

JUDGMENT

Introduction

1. This judicial review claim involves a decision by the Minister of Labour and Small Micro Enterprise Development ("the Minister") to extend the time for the OWTU to report a trade dispute concerning workers employed with TOSL Engineering Limited ("TOSL"), over unpaid allowances and salaries.

2. In around June 2011, TOSL's workers engaged in industrial action which included the shutdown of work on a project which TOSL had undertaken for the Petroleum Company of Trinidad and Tobago ("Petrotrin"). Those works were being performed pursuant to a sub contract with CBI Americas Limited ("CBI"). The workers alleged that since the

commencement of the sub contract in 2009 they were being paid wages and allowances by TOSL which were inferior to the current collective agreement made between Petrotrin and the OWTU. In an attempt to get the workers to return to work, and to avert threats by CBI to terminate TOSL's sub contract as a result of the unrest, TOSL entered into negotiations with the OWTU for an increase in their wages and allowances.

3. The OWTU represented the workers in these negotiations. Eventually on 11th June 2011 the parties entered into a Memorandum of Agreement ("MOA") for TOSL to pay increased wages and allowances to the workers. The workers returned to work and the project was completed later in 2011. However what was left unresolved between TOSL and the OWTU was the issue of retroactive payments of the workers' wages and allowances from the date when the sub contract commenced on 1st April 2009 to the date the parties signed the MOA. The parties dealt with the issue of retroactive payments in the MOA by agreeing that it "would be discussed at a future date"[1]. There continued to exist therefore a trade dispute between TOSL and the OWTU in relation to those retroactive payments to TOSL's workers within the meaning of the Industrial Relations Act Chapter 88:01 (IRA).

4. To trigger the provisions of the disputes procedure of the IRA, a party to the trade dispute must first report the existence of a trade dispute to the Minister. However the party reporting a trade dispute must do so timeously. Trade disputes are not permitted under the IRA to linger indefinitely and there is a "limitation period", a statutory period of six months from the date when the issue giving rise to the dispute first arose within which a party can report the trade dispute to the Minister. By section 51(3) of the IRA, the Minister has the power to extend the time to report a trade dispute when he "considers it just to do so".

5. In this case the OWTU reported the existence of a trade dispute with TOSL over those retroactive payments, by letter dated 14th June 2012, some two years nine months later. The Minister by letter dated March 2013 sought to extend the period of time within which the OWTU could report the said trade dispute. The Minister considered the submissions made to him by the parties in exercising this discretion but unknown to the parties, he also took into

[1] 5 Retroactive Payments: Parties agree that the question of any Retroactive Payments attached is item 1 & 2 above would be discussed at a future date.

account TOSL's previous agreement to extend the time for the OWTU to report a trade dispute in what the Minister considered to be four other comparable cases involving a trade dispute over the terms and conditions of four other workers of TOSL.

6. TOSL in this claim for judicial review seeks to challenge that decision made by the Minister to extend the time to report the trade dispute on the grounds of irrationality, illegality and procedural impropriety[2]. TOSL seeks an order of certiorari to quash this decision as an invalid exercise of a discretion under section 51(3) IRA. The Minister has sought to defend his decision on the basis of the wide ambit of his statutory discretion, the inherent rationality of his decision based on the material before him and the generally fair decision making process.

7. Ultimately I am not satisfied that the decision made by the Minister was irrational in the sense of it being ostensibly illogical or defying comprehensible justification. I am however satisfied on the evidence that with the emphasis placed by the Minister on the four comparable cases, that he fell into error by failing to bring these matters to the attention of parties and in particular TOSL. The substantial unfairness of exercising this discretion "leaps from the pages" where TOSL was blindsided by the Minster's failure to consult it on the four comparative cases which were considered by the Minister of paramount importance.

8. Fairness demands that TOSL be given the opportunity to deal with the question of the extension of time to report a trade dispute to which they had agreed to in the other four "comparable" cases. It is not sufficient in my view in the circumstances of this case to simply point to other material available to the Minister to arrive at a proper conclusion and to waive away this procedural infraction. This consideration formed a formidable plank in arriving at a decision which the Minister thought would have promoted (ironically) the principles of fairness and equity and as such fairness requires that he should have re-opened the round of consultation on that matter.

9. However bearing in mind the context of good industrial relations in which the decision to extend time is made, I am of the view that it is a fitting case not simply to quash the decision

[2] **CCSU v Minister for the Civil Service** [1985] AC 374

but to remit it pursuant to section 21 of the Judicial Review Act to the Minister for his re-consideration in accordance with the findings in this judgment.

The decision

10. The decision of the Minister was made after an exchange of letters between TOSL and the OWTU where both parties were allowed to fully state their respective cases for and against the grant of the extension of time. The exchange of letters began of course with the Union's request for an extension of time. By letter dated 14th June 2012 the Union reported the existence of a trade dispute over the "the non payment and or denial by TOSL of retroactive payment to employees of TOSL over the period 2009 to 2011 under the sub contract #157885 SC-12 Scaffolding at the Petrotrin FCCU Upgrade Project, Petrotrin, Pointe a Pierre between TOSL CBI Americas Limited and Petrotrin effective 28th Feb 2009". It stated that prior to writing to the Company by letter in May 2012 "the Union held discussions with the Company on numerous occasions but talks broke down and the dispute remained outstanding." By that letter they requested an extension of time to report the matter as a trade dispute.

11. The Minister requested TOSL to respond to OWTU's application and there followed an exchange of correspondence between the parties. Eventually by letter dated 14th March 2013 the Minister made his decision to extend the time to report the trade dispute. That decision was made by one Ms. Sabina Gomez, Senior Conciliation and Labour Relations Officer in the Ministry of Labour who discharged the function of the Minister to extend time pursuant to section 51 of the IRA under the Delegation of Function (Industrial Relations) Order 1997. By that decision she extended the period of time up to 14th June 2013 within which the dispute may be reported to the Minister.

12. By letter dated 8th May 2013 in response to a request by TOSL to state its reasons for the decision the Minister replied:

> "I wish to inform you that it was considered reasonable to grant an extension of time under Section 51(3) of the Industrial Relations Act, Chapter 88:01 (IRA) in the matter under reference, primarily on the following grounds:

(i) During the period following the date the issue giving rise to the dispute first arose, there were efforts made by the workers and the Union to pursue a settlement of the dispute.

(ii) In the circumstances the period of delay in the instant was not considered to be excessive."

13. In the affidavit in response filed in the proceedings on behalf of the Minister by Ms. Gomez yet further reasons were provided to justify the extension of time which will be examined later in this judgment. On the face of the stated reasons in her letter dated 8th May 2013 however, the Minister gave as the reasons for the extension the fact that the parties being engaged in discussions for over two years. In the circumstances, the delay in failing to report the trade dispute within six months after the dispute first arose was not excessive. TOSL also takes issue with the Minister's use of the word "reasonable" instead of the statutory word "just". It contends that the Minister applied the wrong statutory formula in the exercise of his discretion as section 51(3) requires the Minister to extend the time if he considers it "just" to do so not whether it was "reasonable" to do so. TOSL contends that the Minister acted unlawfully and abused his statutory power.

14. The main issues that arise for consideration on this claim for judicial review are:

a. Illegality:-whether the decision was made unlawfully and outside of the purpose of section 51(3) of the IRA in determining that it was "reasonable" to extend the time instead of determining that it was "just" to do so.

b. Irrationality:- whether the reason for the decision was so illogical that no reasonable tribunal properly directed could have arrived at the same conclusion.

c. Irrelevant considerations:- whether the Minister considered irrelevant matters in arriving at his decision.

d. Procedural impropriety:-

   i. whether the Minister breached the principles of natural justice in failing to consult TOSL on the four comparable cases.

ii. whether he pre determined or failed to make an objective determination of the application giving rise to an apprehension of bias.

e. Finally if the Court is to find that the decision is procedurally flawed whether it should simply quash the decision or remit it to the Minister for reconsideration pursuant to section 51 of the Judicial Review Act ("JRA").

<u>The supervisory jurisdiction of the Judicial Review Court</u>

15. Senior Counsel for both parties are correct to remind this Court that it is exercising a supervisory jurisdiction only and must resist the temptation to reconsider the OWTU's application on its merits by "standing in the shoes of the Minister". Senior Counsel for the Defendant has however used this salutary principle to underscore the "due deference" approach, that is to give deference to the wide discretion conferred on the Minister by statute. Given that his decision is purely administrative in nature and did not impinge on human rights, his decision should not be subjected to "anxious scrutiny". The discretion "should not be taken to require the minister to behave like a judge, even if the discretion is of a kind normally expected by judges." See **Pierson v Secretary of State** [1997] 3 AER 577. This argument calls for an analysis of the supervisory jurisdiction of the judicial review court and this judicial restraint of "not reviewing the merits of a decision".

16. This is not an appeal from the decision of the Minister[3]. See **Reid v Secretary of State for Scotland** [1999] 2 AC 512 and **R v Secretary of State for the Home Department ex p Brind** [1990] 1 All ER 469. The Court cannot substitute its views for the Minister and re consider this matter afresh. It is not part of the exercise of judicial review to substitute the opinion of the judiciary for that of the executive or public authority vested with the power to decide the matter in question. The main reason for this approach is that in judicial review the Court is concerned with the process by which a decision has been made and not the substance or merits of the decision. **R Crown Court at Manchester ex p McDonald** [1999] 1 WLR 841:

[3] Although as a matter of principle I see strong force in commending for consideration the provision in the IRA for such an appeal to lie to the Industrial Court.

> "It is important to remember always that this is judicial review of and not an appeal against the judge's decision. We can only intervene if persuaded that his decision was perverse, or that there was some failure to have regard to material considerations or that account was taken of immaterial consideration…Still less can we be persuaded by arguments that the judge should have reached a different conclusion because he should have attached more weight to one rather than another factor."

17. To the extent however in this jurisdiction where our judicial review jurisprudence is developing at a "galloping pace" there may be some esotericism in such an approach. In some case judicial review courts in determining whether a decision is illogical or irrational, are in reality engaged in a merit based review. To that extent Fordham in his *Judicial Review Handbook 6th ed*. (2012) p 30.1 recognised a "soft" and "hard edged" review.

> "Judicial Review principles demand an understanding of the defendant's body function, to decide questions such as whether its conduct (1) is reviewable at all (2) engages in "soft" or "hard" edged review and (3) involves a public wrong warranting the courts interference. Functional insight is essential to the court's approach complementing the contextualism which is the hallmark of judicial review."

18. Lord Hobhouse in **ex parte Brind** identified the temptation of this invasive review of a decision on the merits but lauded the supervisory nature of the review. There has sparked recent debate in the UK of the adoption of a new head of review of proportionality which is trending towards a merit based review.

> **"Proportionality**
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> In **Council of Civil Service Unions v. Minister for the Civil Service** [1985] A.C. 374, 410, Lord Diplock classified under three heads the grounds upon which administrative action was subject to judicial control. These were illegality, irrationality and procedural impropriety. However, he added:
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> > "That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is

> recognised in the administrative law of several of our fellow members of the European Economic Community; . . ."

Even at that time, the principle that administrative action could be quashed if it was disproportionate to the mischief at which it was aimed had been accepted by the courts, albeit not as a classified ground for judicial review: see **Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook** [1976] 1 W.L.R. 1052, 1057H and 1063B. Encouraged by Lord Diplock's speech, the concept surfaced again in **Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings** (London) Ltd. [1988] 1 W.L.R. 990, where Schiemann J. accepted a submission that it was but an aspect of irrationality and, at p. 1001, asked himself the question: "Is there here such [Wednesbury] total lack of proportionality or lack of reasonableness?:" see **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** [1948] 1 K.B. 223. It also made a fleeting appearance in **Reg. v. Brent London Borough Council, Ex parte Assegai** (unreported), 11 June 1987, where Woolf L.J., with the agreement of McCullough J., sitting as a Divisional Court, said that the council's action was "wholly out of proportion to what Dr. Assegai had done. Where the response is out of proportion with the cause to this extent, this provides a very clear indication of unreasonableness in a Wednesbury sense."….. Watkins L.J. continued:

> "The contention arising from them is that the principle of proportionality in the law of the United Kingdom being one test or tool to be used in resolving the question, was the decision under consideration unreasonable in the sense that the decision was one which no reasonable minister properly directing himself as to the law could have taken? Applying that test, if, for example, a sledge hammer is taken to crack a nut when there are a pair of efficient nut crackers readily available, that is a powerful indication that the decision to use the sledge hammer was absurd - unreasonable. Our response to that is, in our view, the law of the United Kingdom has not developed so that a decision, which is neither perverse nor absurd and which is one which a reasonable minister properly taking into account the relevant law could take, becomes unlawful simply

> because it can be shown that it was not in proportion to the benefit to be obtained or the mischief to be avoided by the taking of the decision. In our opinion the application of such a concept of proportionality would result in the courts substituting their own decisions for that of the minister, and that is something which the courts of this country have consistently declined to do. The court will not arrogate to themselves executive or administrative decisions which should be taken by executive or administrative bodies."

For my part, I think that Lord Diplock's speech in the **Council of Civil Service Unions v. Minister for the Civil Service** [1985] A.C. 374 has been misunderstood. He was providing three chapter headings for a review of the grounds upon which, in the reported cases, judicial review had been granted. He was not; as I think suggesting that there were three separate grounds. Rather he was saying that in due time, and under the influence of European law and lawyers, there might be enough cases in which decisions had been quashed upon the ground that the administrative action was disproportionate to the mischief at which it was aimed, for this to be treated as a separate chapter.

The reality is that judicial review is a jurisdiction which has been developed and is still being developed by the judges. It has many strands and more will be added, but they are and will always be closely interwoven. But however the cloth emerges from the loom, it must never be forgotten that it is a *supervisory* and not an *appellate* jurisdiction. As Watkins L.J. pointed out, acceptance of "proportionality" as a separate ground for seeking judicial review rather than a facet of "irrationality" could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision.
I therefore propose to consider the submission that the directives were disproportionate to the needs of the situation as being an aspect of the submission that the directives were "perverse" or, as I would put it, "Wednesbury unreasonable" or, as Lord Diplock would have put it, "irrational."”

19. The traditional heads of reasonableness and irrationality are viewed as sufficient to advance the purpose of judicial review without engaging in a merit based review. However, there will be cases where the judicial review court must force the issue and adopt a more robust review of a decision which resembles a reconsideration of the merits. Such a hard edged review has been recognised especially in cases where breaches of the Constitution may arise. In **T-Mobile (UK) Ltd v Office of Communications** [2009] Bus. L.R. 794:

> "Traditionally those limits indeed confined the courts to considering things like procedural unfairness or Wednesbury unreasonableness (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223)—various forms of error of law. Judicial review did not allow an attack purely on the merits of the impugned decision. And that is still broadly so, as the cases cited by Lord Pannick demonstrate. He took us to R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 and R (SB) v Governors of Denbigh High School [2007] 1 AC 100. Both were concerned with the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms in judicial review cases. It is sufficient for present purposes to go to what Lord Bingham of Cornhill said in the latter case, at para 30:
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>> "Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in Smith and Grady v United Kingdom (1999) 29 EHRR 493, para 138, and the new approach required under the 1998 Act was described by Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, paras 25–28, in terms which have never to my knowledge been questioned. *There is no shift to a merits review, but the intensity of review is greater than was previously appropriate*, and greater even than the heightened scrutiny test adopted by the Court of Appeal in R v Ministry of Defence, Ex p Smith [1996] QB 517, 554. In the context of human rights, Miss Rose showed us cases where it was held that it was necessary to go into the merits on a judicial review application. Thus in R (Wilkinson) v Broadmoor Special Hospital

> Authority [2002] 1 WLR 419, this was held necessary in the context of a case concerning the human rights of a compulsorily detained convicted mental patient. The issue was whether the patient was mentally capable or not to consent to a treatment regime. The court held that this issue could be investigated in judicial review proceedings, even, if necessary, by the calling of medical witnesses in those very proceedings.""

Brooke LJ referred to the availability of a "full merits review":

> "Super Wednesbury is not enough. The Claimant is entitled to a proper hearing on the merits of whether the statutory grounds for imposing this treatment upon him against his will are made out."

20. The question then is not so much whether the judicial review court should review the merits of a decision, it is rather the intensity of the review, the demands required by the court on the decision making process taking into account all the circumstances. The intensity of the review then as suggested in **T Mobile** varies in the context of the circumstances of the given case, the nature of the decision, the statute conferring the power, the impact of the decision maker on the parties affected. Fordham was more to the point when he commented:

> "Hard edged questions represent an important exception to the rule against the forbidden substitutionary approach. They can be thought of as questions which the public body has to decide but it is not permitted to get wrong. In reviewing such question the Court does precisely what is forbidden on soft review it does "substitute its own view". That is because the role of the reviewing Court here is to ensure objective "correctness"". **See British Telecommunications Plc v Competition Commission** [2012] WL 1555328.

21. In **Judicial Review Principles and Procedure**, Auburn Moffit and Sharland p 3 the authors noted the dichotomy between the hard and soft edged questions of review:

> "The distinction between the lawfulness of decisions and their substantive merits is sometimes a difficult one to discern. For example an irrationality challenge in effect invited the Court to form a view as to the substantive merits of the decision under challenge albeit in order to determine whether a particularly high threshold of challenge is met. Further the substantive merits of the decision under challenge

> inevitably come into play when the Court is considering whether a failure to take a particular step made any difference to the eventual decision. Of course in practice the underlying merits of a claimant's case might also have an influence on the courts approach to the legal grounds of challenge in the sense that the underlying merits may colour the court's approach to those grounds."

22. Eventually as the standard of review evolves in this jurisdiction with the frequency of constitutional issues being infused in judicial review applications, the time will come for the Court to "prune the trees of judicial review and focus on the substance of the decision". In the Commonwealth there is already some discourse on simplifying the heads of review. In **Dunsmuir v New Brunswick** [2008] 1 SCR 190, Bastarache and LeBel J stated that despite efforts to refine and clarify it, the present system of judicial review of administrative decisions in Canada has proved difficult to implement and, in their opinion, the time has come to develop a principled framework that is more coherent and workable. Binnie J similarly stated that "judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features," while Deschamps J expressed the view that "it needs to be cleared of superfluous discussions and processes."

23. Essentially this is a search for consistency in the approach to judicial review with a focus on its purpose. In this way the notion of deference as articulated by the Defendant in this case will be allocated its proper place Bastarache and La Bell JJ in **Dunsmuir v New Brunswick** [2008] 291 DLR (4th) 577 (Sup Ct (Can)) had this to say:

> "What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.
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> What was required was a test that offered guidance, was not formalistic or artificial, and permitted review where justice required it but not otherwise. The concept of reasonableness in judicial review proceedings is concerned primarily

> with the existence of justification, transparency and intelligibility within the decision-making process and also involves asking the question of whether the decision falls within a range of possible acceptable outcomes which are defensible in terms of the facts and the law. A "reasonableness" standard will have to incorporate both the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter* and an assessment of the range of options reasonably open to the decision maker in the circumstances. Deference therefore means respect to pay due attention to the reason offered in support of a decision. It by no way means that the Court will genuflect to the decision maker. It simply recognises that in some areas there will be a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime. Greater deference will also usually be required where an administrative tribunal is interpreting a statute closely connected to its function, or where it has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context."

24. What then should be the approach? There is no reason to depart from the salutary role of the judicial review court as being a court exercising supervisory jurisdiction. It will be wrong in the absence of a statutory requirement to do so for the judicial review court to rise to the status of an appellate court. It is also wrong in principle if there is meaning to the separation of powers. In this context, a degree of deference must be given to the decision of public officers and bodies engaged in specialised areas of expertise. This does not jettison the foundational principles of rationality, procedural impropriety and legality. However in cases where human rights are concerned the Court must be more robust and demanding of the decision maker. This is not such a case. I agree therefore in this context with the submissions of the Minister that deference should be paid to the special knowledge of the Minister of good industrial relations practice. Deference however is no synonym for reverence and where the decision cannot pass judicial review muster on grounds of irrationality or proportionality it would be struck down. The context of the decision paving the way for more robust review where necessary.

25. Jamadar JA succinctly made the point recently in **Gajadhar v Public Service Commission** CA Civ. 170 of 2012:

> "...the primary function of the court is to exercise a supervisory jurisdiction in a context of cooperation, where the common goal of all parties and of the State is to have a court of law ascertain whether the decision under review is justifiable in the public interest and/or is beneficial or detrimental to good public administration. That is, the common aim of the courts and of public authorities is the maintenance of the highest standards of public administration, achieved in part through the process of judicial review.
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> Articulated in a more philosophical way, the underlying purpose and rationale for judicial review is to uphold the rule of law. To the extent that it is evident that judicial review is rooted in the rule of law, it is therefore rooted in the Constitution and as such bestows on the courts a constitutional duty and responsibility to exercise judicial governance over all administrative decisions that are amenable to judicial review."

26. A determination of the legality and reasonableness of the decision must always then require a contextual appreciation of the nature of the power to be exercised by the Minister under the Act:

> "Thus, before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised for reasons relevant to the achievement of that purpose." **R v Tower Hamlets LBC Ex p Chetnick** [1988] AC 858.

27. The context of the discretion would inform the judicial review court of the standard of review, the required lens of accountability, transparency and integrity of the decision making process and the constitutionality of the process adopted marrying the wishes of Parliament with the notion of fairness.

<u>The statutory context/framework of section 51(3) IRA</u>

28. The IRA provides a suite of conciliatory options and interventions for the resolution of disputes either by the Minister of Labour or by the Industrial Court. The ultimate purpose of the IRA is to afford a degree of industrial relations stabilisation and the orderly management of industrial relations disputes.

29. The definition of a trade dispute under the IRA includes disputes between the employer and Union connected to the terms and conditions of the workers employment[4]. The IRA sets out a comprehensive code for the better provision, for the stabilisation, improvement and promotion of industrial relations. Amongst the important pillars of the IRA are the duties of an employer to "meet and treat" with a recognised majority union for the purposes of collective bargaining and to comport with the principles of good industrial relations practice. The Minister and the Industrial Court established under the IRA as a superior court of record, plays a pivotal dual role acting as it were as a "tag team" in the settlement and final determination of trade disputes. One of the Minister's important duties is to seek to achieve the conciliation of trade disputes. The Industrial Court is itself an expert body tasked with fulfilling the intention of Parliament in a specialist area of industrial relations jurisprudence to finally determine those trade disputes if unresolved by the Minister.

30. Trade disputes between employer and worker for the purposes of the IRA must first be reported to the Minister by the union[5] and it is only when he certifies the dispute as being

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[4] "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);

[5] 51. (5) For the purpose of this Act and in particular subsection (1)*(c)*, a trade union other than a recognised majority union, is competent to pursue the following types of trade dispute, but no other, in accordance with this Act:

> (a) any dispute or difference between the employer and the union or between workers and workers of that employer, in each case being on behalf of members of the union, concerning the application to any such worker of existing terms and conditions of employment or the denial of any right applicable to any such worker in respect of the employment; and
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> (b) a dispute between the employer and the union as to dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of a worker or workers.

unresolved after using a conflict resolution technique known as conciliation can it then be reported to the Industrial Court for hearing and determination. At the Ministry the talks are conciliatory in nature and the Minister's role is to effect settlement where he can and if not to frame the trade dispute for the Industrial Court's determination.

31. Some significant time was spent in the Claimant's written submissions to explain the specialist nature of the Industrial Court. There is no gainsaying that the Industrial Court is the recognised expert in industrial relations jurisprudence. The Industrial Court itself is a superior court of record and is recognised as being a specialist court bringing its unique form of industrial relations jurisprudence as to what is "good industrial relations practice". Section 10(3)[6] of the IRA clothes the Industrial Court with its own brand of jurisprudential thought and role in the determination of disputes distinct from the principles espoused in the Supreme Court.

32. The framers of the Act intended the Court to be a court of industrial relations law. See TD 205 of 2003 **Association of Technical Administration and Supervisory Staff v Caroni Limited.** See also **All Trinidad Sugar and General Workers Trade Union v Caroni (1975) Ltd** C.A Civ. 114 of 2000.

33. Rees JA commented that:

> "The peculiarity of the IRA that the Court in making an order or award should be unfettered by legal technicalities but concerned primarily with fair play and justness in the settling of labour disputes is a new concept in legislation affecting industrial relations and is fast becoming an essential part of the legal code of the most forward thinking communities".

34. The IRA therefore sets up a unique framework for the resolution of industrial relations disputes starting with the powers exercised by the Minister of Labour and ending with a

[6] 10. (3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall—

> (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
> (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.

superior court of record in the Industrial Court whose decisions in some instances are final and not subject to an appeal.

35. Against this backdrop the reporting of a trade dispute is a fundamental first step. Section 51(3) of the IRA provides that a trade dispute may not be reported to the Minister if more than six months have elapsed since the issue giving rise to the dispute first arose, save that the Minister may, in any case where he considers it just, extend the time during which a dispute may be so reported to him. I will return to deal with the views of the Industrial Court on this ministerial discretion. However it is important first to understand how the statute sets out a process by which this discretion is to be exercised.

36. First the Minister may for purpose of the exercise of his discretion to extend the time during which a dispute may be reported to him, refer to the Industrial Court any question arising on the exercise of such discretion for its recommendation and advice. A classic example is 70/81 **BGWU v Citibank NA** in which the Minister referred to the Industrial Court the question whether section 51(3) applies to interests disputes and if so how should those provisions apply in that particular case. The Industrial Court in that reference engaged in a thorough examination of the facts and made a recommendation to the Minister to extend the time for the report of the trade dispute.

37. Second section 52(1) IRA sets out the form by which the report is to be made in very simple terms. Of course one must understand that in the arena of industrial relations, the unions are represented by lay persons and the Industrial Court itself eschew technicalities of legal form to the extent that "The Act must be construed in a broad and reasonable away so that legal technicalities "must not prevail against industrial technicalities and commons sense."" See Lord Reid in **Post Office v Union of Post Office Workers and Another** [1974] ICR 378.

38. Third there is no statutory procedure setting out the requirements for a request for an extension of time under 51(3) IRA. The statutory particulars are set out for the making of a report of a trade dispute which shall specify the following matters: (a)the parties to the dispute; (b) the address of the principal place of business of each of the parties; (c) particulars of the dispute stating in general terms the nature and scope of the dispute; and (d) what steps, if any, have been taken for the settlement of the dispute either in accordance with a collective

agreement registered under Part IV, or otherwise. The reporting party should furnish the other party a copy of the report. S 52(2) IRA.

39. Fourth there is no statutory requirement by the Minister to request further particulars of an application for an extension of time. Where a dispute is reported to the Minister under section 51, the Minister may in writing request further particulars[7]; of any of the matters to be specified under section 52(1). There is no specific mention of particulars for a request for an extension of time. It would appear therefore that no emphasis has been placed by the statute on the form of a request to the Minister to extend the time for the reporting of a trade dispute.

40. Finally the statute provides for the various approaches to be adopted by the Minister when a trade dispute is reported to him. He may also refer the dispute back to the parties for such procedures to be followed where suitable procedures for settling disputes exist between the parties and have not been followed. The Minister may also refer to the Industrial Court questions as to the nature of the dispute pursuant to section 54(1) IRA. The decision of the Court on any question before it on that matter shall be binding on the parties to the question and is final. See section 10(3).

41. After the trade dispute is reported to him, the Minister then pursuant to section 55(1) IRA 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. See section 55 (2). The parties may agree in writing to extend the time for the conciliation. However where the Minister is satisfied that no useful purpose would be served by continuing to conciliate under this section, he may certify that the dispute is an unresolved dispute under section 59 and refer the matter to the Court under section 59 (2). Interestingly notwithstanding parties may not have reported a trade dispute, the Minister by section 56(2)

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[7] (2) Particulars supplied in pursuance of a request by the Minister under subsection (1)*(a)* shall be subject to section 52(2) and shall be read as one with the matters reported under section. 53.
(3) Where the Minister makes a request for further particulars under subsection (1)*(a),* the dispute shall be treated as reported to the Minister only on the date on which such particulars were supplied to the Minister. 53. (4) A dispute referred to the parties in pursuance of subsection (1)*(b)* shall be deemed not to have been reported to the Minister, and shall be treated as reported to the Minister only on the date when the parties or either of them report that the dispute still exists and the Minister is satisfied that, subject to subsection (5), such suitable procedures as may exist for settling disputes have been followed.

can intervene in a dispute and he shall so advise the parties to the dispute expressly in writing and such a dispute shall be deemed to have been reported pursuant to section 51(1), notwithstanding section 51(3)[8].

42. The dispute that is certified as unresolved is any dispute, which is reported pursuant to section 51(1) or deemed to have been so reported under this Part, that remains unresolved after the time within which the Minister may take steps by means of conciliation to secure its settlement, including any extension of such time under section 55(2), has expired. The Minister may refer that dispute to the Court for determination or either or both of the parties may take action by way of strike or lockout. See section 59 (3) (b).

43. From an examination of the statutory context of the exercise of the Minister's discretion, it appears that the procedures generally provide the Minister a great degree of latitude and discretion in the management of trade disputes that are reported to him. Indeed when one re-examines section 51(3) IRA the obligation is on the reporting party to report the matter within the six months time bar. There is no statutory provision which provides for a formal application for an extension of time by the reporting party. It is a free standing power granted to the Minister to extend the time "in any case where he considers it just". The underlying theme in the exercise of those powers of course would be the promotion of good industrial relations practices and indeed to that extent the Courts have viewed the Minister and the Industrial Court as performing that dual role enmeshed in a tag team to promote the objects of the Act.

<u>The six month's time bar</u>

44. Against this backdrop the time bar of six months to report the trade dispute is directed to the parties. The Minster is given a discretion to extend that time only where he considers it just

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[8] Of course any dispute that has been determined or resolved (either before or after conciliation by the Minister), the parties will prepare a memorandum of agreement setting out the terms upon which the agreement was reached and either party may present the memorandum to the Minister with a request that it be forwarded to the Court who shall forward it to the Court and the Registrar shall enter the memorandum of agreement as if it was an order or award of the Court. When so entered the memorandum shall have the same force and effect and all proceedings may be taken thereon as upon an order or award of the Court.

to do so. The difference between the submissions made by the parties in this case in their approach to the exercise of the Minister's discretion is based on a standard of review. On the one part it is argued by TOSL that the review should anxiously scrutinise this discretion while on the other part the Minister calls for a deferential approach intervening only where the discretion exercised is wholly illogical and unsustainable.

45. One must first appreciate the time bar for what it is. A limitation period in the field of industrial relations law against the backcloth of industrial relations realities and jurisprudence. Certainly not all disputes of whatever vintage can be referred to the Minister. To do so would promote a state of industrial relations uncertainty if stale claims are resurrected or miraculously resuscitated after years of lying dormant. Limitation periods are recognised as balancing the interest of the right to pursue claims and the right not to be harassed by stale claims. They infrequently may work unjust results. As Georges JA observed in **Texaco Trinidad v Oilfield Workers** [1973] 22 WIR 516:

> "Not infrequently statutes of limitation appear to work injustices in individual cases by barring meritorious claims. Since the workman must act through a trade union there is a not unnatural desire to protect him from the consequences of delay on his part or on the part of his trade union by fixing the point from which the six months period begins to run from a time when the union is already on the scene negotiating. I am satisfied that this can only be done by introducing uncertainty into a plain enactment. Workmen need not suffer if they are prompt in taking up their grievances with their trade unions and they must be educated to do this. Efficient trade unions will be aware of the law and should not fail to take the steps required of them."

46. In that case the Court of Appeal noted that having regard to the time bar, the Union need not wait for the outcome of collateral proceedings so long as the issue giving rise to the dispute have arisen they must act within time. The effect to the worker having missed the time bar would be that he has forever lost his right to seek redress of that particular violation of this right. See **BGWU v Citibank** p4. Such a conclusion of a dispute by the effluxion of time can have practical difficulties and in that case a distinction was drawn between the reporting of

rights and interests disputes and the industrial relations realities of the continued obligations to meet and treat.

> "In an interests dispute therefore the event giving rise to the dispute is the submission by one party to the other of proposals for the conclusion, revision or renewal of a collective agreement or for a supplementary agreement. It may well be true as stated in the Minister's referral that negotiations over a collective agreement often take more than six months. This no doubt is the main reason why a discretion has been given to the Minister to extend the time within which the dispute may be reported to him. If he is satisfied that the negotiations have been actively pursued during that longer time he should approve an application to extend the time accordingly. If on the other hand he is satisfied that the party that submitted the proposals has been dilatory to the extent of being reasonably considered to have abandoned its claims, then he should reject a report by that party as invalid."

47. The Claimant placed heavy reliance on a ruling on a preliminary point by the Industrial Court in **All Trinidad General Workers Trade Union v Petrotrin** TD 28 of 2009. In that case a point was taken in limine in the Industrial Court that the issue giving rise to the trade dispute arose more than six months before the matter was reported to the Minster and there was no extension of time granted by the Minister to report the trade dispute. The case is distinguishable as in that case the Minister failed to exercise his discretion at all as no application was made by the Union to apply to extend the time. However TOSL contends that the obiter remarks by the President of the Court in that case should fetter the exercise of the Minister's discretion in granting an extension of time. I see no warrant for so holding. First it is an obiter observation made by the Court without reference to the facts of this application. Second it would be strange for the Act to provide a specific statutory resort to the Court under section 51(4) to obtain guidance in the exercise of a discretion to then be told that the guidance is to be found without reference to that mechanism but to case law. Third the guidance offered is simply a matter of common sense. However this is not to say that a failure to observe strictly those remarks renders the exercise of the Minister's discretion unlawful. Finally if one is to pay due regard to industrial relations jurisprudence, equally His

Honour Bernard recognised in an earlier judgment in ST 18 of 2003 in a preliminary ruling the wide discretion granted to the Minister:

> "That part of the subsection is addressed to the minister, empowering him without limit as to time, to grant an extension, the only statutory requirement for the exercise of his discretion being that he considers it just to do so."

48. In that case, in the absence of reasons given for the extension of time, the Court held there was no warrant to suggest that the Minister exercised his discretion in circumstances that he did not consider just, that "leads to the suspicion that the Minister exceeded, abused or perverted his power the presumption of regularity avails him."

49. In examining the case relied on by TOSL the Minister clearly did not exercise his discretion at all when he should have. The Court pointed out the thrust of section 51(3) IRA:

> "A trade dispute may not be reported to the Minister if more than six months have elapsed since the issue giving rise to the dispute first arose, save that the Minister may, in any case where he considers it just, extend the time during which a dispute may be so reported to him".

50. The Learned President after referring to A6 and differentiating between rights and interests disputes went further to state:

> "It is obvious from careful reading of the Advice of the learned President that (a) an extension, particularly in the case of a rights dispute must not be granted by the Minister without serious examination of the merits of the application (b) that there must be an application for the extension and (c) that such application must move from the party in default. Here there was no application at all."

51. Unlike that case, in the circumstances of the Minister's decision in this case, the Minister did make a decision to extend time. It was made based upon an application which moved from the party in default. There are no statutory pre conditions nor requirements which govern the form of such an application. The nature of such an application is construed against the backdrop of the realities of industrial relations practice and an Act which eschew legal technicalities. There is no statutory mandate of considerations that must be taken into account by the Minister, nor threshold, nor sliding rule of factors. Hardship and prejudice of the

innocent party no doubt is a factor that plays a part in the Minister's determination but it by no means prescribes a box ticking exercise. The discretion must "rest on the foundation of justice which the applicant is under a duty to establish".

52. The real question therefore in this review of the Minister's decision is his exercise of a discretion which comports with the fundamental principles recognised in judicial review of rationality, legality and procedural fairness. The only restriction on the exercise of that discretion is the duty to act reasonably and within the law.

53. This leads to the enquiry did the Minster act rationally, reasonably and fairly?

<u>The exchange of letters</u>

54. A bit of background is necessary to appreciate the exchange of correspondence that ensued after the OWTU's request for an extension of time. The dispute between TOSL and the workers first arose from the commencement of TOSL's sub contract where it was contended that the workers were being paid at less than the rates set out in the collective agreement with the OWTU and Petrotrin. It is noted that the work was being executed for the benefit of Petrotrin's workers and the workers were agitating for terms and conditions no less than that enjoyed by Petrotrin's workers.

55. The Memorandum of Agreement that was made by the parties did not settle the issue of retroactive payments but the parties agreed to it being "discussed at a future date". No date was mentioned when the dispute would be resolved. There was however an obligation by both parties by this term to meet and treat on the issue. It remained an outstanding claim by the workers and there was no agreement by TOSL to pay the said sums. It was submitted that there was a time frame for these discussions to come to an end which is referred to in clause 7: "On completion of the audit being carried out by Petrotrin on the CBI contract between CBI and Petrotrin parties shall review this agreement". There is nothing to suggest however that this is a specific end date for the "discussions" on retroactive payments.

56. By a letter dated 17th October 2011 to OWTU, TOSL appeared to have confirmed the following: (a) that the outstanding retroactive payments were computed (b) that TOSL had made this claim on CBI and Petrotrin with no response and (c) TOSL will "treat" with the said retroactive payments once they receive the payments from CBI/Petrotrin and (d) they

continue to pursue "settlement of the claim for the retroactive payments". The letter in terms was as follows:

> "Ref: Memorandum of Agreement between TOSL Engineering Limited and O.W.T.U for CB&I Subcontract #157885 SC-12 Scaffolding
>
> Further to our correspondence of 2011, August 24 and with reference to the captioned matter, specifically item (5) "Retroactive Payments", we are to advise as follows:
>
> TOSL Engineering Limited (TOSL) computed the outstanding retroactive payments consistent with the terms outlined in the Memorandum of Agreement (MOA) which is attached, and submitted same to both CB&I and Petrotrin in 2011, June. The said claim for retroactive payments was the subject of two (2) audits by Petrotrin, the last audit ended 2011, July 30. To date we have not heard anything from CB&I or Petrotrin with respect to our claim, nor have we been paid any of the retroactive sums.
>
> As you will note from the MOA between TOSL and the Oilfields' Workers Trade Union (O.W.T.U.) it was indicated that the retroactive settlement would be discussed at a future date. In subsequent meetings between the O.W.T.U and TOSL we indicated quite clearly to your Mr. Harrington and TOSL can only honour any retroactive payment when this is settled by CB&I/Petrotrin. As such while we are prepared to treat with the retroactive payment this is dependent on the prior receipt of funds from CB&I/Petrotrin which to date we have not received.
>
> We continue to pursue settlement of the claim for the retroactive payment and will keep you informed of any progress. We trust that this letter now fully updates you on this matter."

57. In its letter reporting the trade dispute and requesting the extension of time the OWTU wrote:

> "Prior to writing the Company by letter dated May 2, 2012 the Union held discussions with the Company on numerous occasions, but talks broke down and the dispute remained outstanding. Further to that, the Union made arrangements

(in the said letter) to meet the Company on Tuesday 8th May 2012, which did not materialize, as the scheduling was tentative.

Given the facts mentioned hereinbefore, in the interest of time and in accordance with the provisions of Section 51 (3) of the Industrial Relations Act, Chapter 88:01, as amended, we hereby request an extension of the time available to properly report this matter to your Ministry as a trade dispute."

58. Ms. Gomes' affidavit outlined the process by which the decision was arrived at:

- A request is received from the reporting party (a union or an employer) pursuant to section 51(3) of the IRA.

- The Ministry then determines if the letter of request contains the names and principal place(s) of business of the parties to the dispute, the date on which the issue giving rise to the dispute first arose and the reason(s) for the delay in reporting the matter.

- If all information is properly included, the Ministry writes to the other party (the union or the employer) and forward a copy of the letter of request. The Ministry further requests such affected party to provide comments and to say whether such party has any objection to the request.

- If there are objections, the Ministry informs the reporting party by letter and attaches a copy of the letter of objection. The Ministry then requests a response to same.

- When the union (reporting party) responds to the employer's objection and if it proffers new information, the same is forwarded to the employer so that such employer can be given an opportunity to respond and comment upon it.

- If no new information is received, the documents are then examined and processed by the relevant officer of the Ministry.

- A note is then prepared by the office in which he or she makes a recommendation regarding the request for the extension of time. The officer

then forwards this Note with the recommendation to the Senior Conciliation and Labour Relations Officer. The Senior Conciliation and Labour Relations Officer then makes a determination as to whether the request for extension would be granted after considering the recommendation."

59. By letter dated 22nd June 2012 the Minister invited comment from TOSL "in order to assist it with the processing of this application."

60. The Company responded to this request by letter dated 2nd July 2012 in the following strong terms:

> "We are of the view that this application for an extension of time is extremely prejudicial and disadvantageous to our client for the following reasons:
>
> The issue giving rise to the dispute first arose on 28th February, 2009 (as indicated by the Union). Had the Union raised this issue with TOSL when it arose, TOSL (even though it was under no obligation to do so) may have been able to agitate with its CB&I and seek some form of resolution. Now that the sub-contract is at an end it can no longer do so.
>
> The sub-contract #157885 SC-12 to which the Union refers was dated 4th June, 2009 and made between TOSL and CB&I of Texas, USA for the provision of Scaffolding Services and ended in October 2011 some eight months ago. Further the party with whom our client contracted, that is CB&I, is no longer in this jurisdiction and as such if any additional payment is due to the workers under that sub-contract (which our client denies) it will be impossible for our client to seek reimbursement for same.
>
> The contractual amount paid to our client contemplated specifies rates being paid to the workers. Our client will be out of pocket for a substantial sum if this claim were successful and would have no recourse to anyone under the sub-contract.
>
> The rates paid are in accordance with: -
>
> a. The quantum agreed with the workers, TOSL does not have a recognized bargaining unit.

b. The schedule supplied to our client by CB&I of the rates agreed between OWTU and Petrotrin in their Collective Agreement (to which TOSL is not a party).

c. The sub-contract between TOSL and CB&I.

Petrotrin the ultimate employer under this sub-contract (that is the party that engaged CB&I) has indicated, inter alia, that it is not a party to this sub-contract and as such has accepted no liability for any retroactive payments. CB&I has also denied any liability for same."

61. It is noted by this letter TOSL made out a case for the extension not to be granted on the ground that it would be extremely prejudicial and disadvantageous to TOSL. There was no statement denying that the parties had continued to meet on the matter. However it is made clear that there was no obligation to pay.

62. OWTU also forcefully contended in its letter in response to the Minster dated 30th July 2012 addressing the Company's allegation of prejudice and hardship. The OWTU relied upon the following factors that made it in the interest of justice and equity to grant the extension, (a) the substantial number of employees affected (b) the MOA entered on 17th June 2011 "binding itself to the regularisation of wages and salaries." (c) by its letter dated 17th October 2011 it signalled its intention to compute the payments and "undertook to settle same". (d) TOSL is bound by the terms of the OWTUs collective agreement with Petrotrin. Copies of the MOA and letter were supplied to the Minister.

63. The ensuing correspondence did not alter these fundamental positions of the parties. TOSL responded to the Union on 8th August 2012. The Union also submitted a response on 8th August 2012 to the Minister. TOSL replied on 11th October 2012. This time the letter provides a legal test to the Minister to guide it in the exercise of his discretion by reference to the judgment of His Honour Bernard that the Minister cannot extend time "on a whim, capriciously and without sufficient information as to satisfy him as to the justice of an extension." It must be accepted however that at that stage the Minister was being given sufficient information of the parties' respective submissions on the question whether it is just to extend the time to report the trade dispute.

64. The Union also responded by letter dated 17th October 2012. By way of a side note the Minister also requested of CBI and Petrotrin to respond to the Union's claims. Petrotrin responded but CBI did not.

65. The OWTU consistently submitted to the Minister that there was no prejudice nor hardship as a result of the late report of the trade dispute and that the parties were continuously engaged in discussions. One of the material results of such discussions was the MOA in March 2011 and the letter the following year. One of the criticisms levelled against the Minister is that conceding that the time for reporting the dispute was postponed to the end of that meeting there is no material to justify the delay from that time to the date of OWTU's request. Having said that however there was absolute silence by TOSL in the face of the Union's assertion that there "continued to be discussions between the parties". It is true there are no particulars nor evidence of these discussions. However equally true is there is no issue taken by the employer about it.

The reasons

66. The reason for making the decision is set out in the Minister's letter and later expounded in the affidavit of Ms. Gomez. It is important here to note that:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such

applications. Decision letters must be read in a straightforward manner, recognizing that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision." Per Lord Brown, **South Bucks DC v Porte**r [2004] 1 WLR 1964.

67. The evidence of Ms. Gomes reveals the following facts and considerations being taken into account by the Minister:-

"The submissions of all parties were taken into consideration and my recommendation is based on the following:

i. The Union has submitted that numerous discussions have been held with TOSL with the most recent being scheduled as recently as 2nd May 2012.

ii. Despite a lengthy submission from TOSL, the company (TOSL) appears to confirm that a dispute subsists by since by its own admission "Had the Union raised this issue with TOSL when it first arose, TOSL (even though it was under no obligation to do so) may have been able to agitate with CBI and seek some form of resolution."

iii. The company (TOSL), in admitting to signing the Memorandum of Agreement dated 17th August 2011, has validated the Union's claim that numerous discussions were held and in fact where ongoing at the time of the Union's request for an extension of time. In stating that: "The company agreed that the question of any retroactive payment would be discussed at further date," the company has unwittingly aided the Union's claim of talks being ongoing despite the date of the issue giving rise to the dispute.

iv. While on the one hand TOSL has admitted to meeting with the Union and signing a Memorandum of Agreement pertaining to the issue in question, it seemingly attempts to distance itself from the responsibility for payment when it states that "TOSL can only honour any retroactive payment when

this is settled by CB&I/Petrotrin." This apparent attempt at 'passing the buck' is somewhat perturbing since the company in question had, prior to this statement, quite clearly indicated in its letter dated 17th October, 2011 that it had computed the outstanding regarding the aggrieved workers.

v. When called upon to submit its comments, CB&I Americas Limited chose to object on the basis that, in its opinion, the Minister had no basis to report a trade dispute to which it might be party since it should not be considered the employer of the aggrieved workers. CB&I further indicated its abstention from submitting any further comments since it felt that it would be inappropriate for it to participate in any proceedings concerning the processing of an extension of time.

vi. Having had several opportunities to submit its comments, the Petroleum Company of Trinidad and Tobago failed to do so.

vii. Upon perusing its own records, it has come to the Minister's attention that the Union had requested extensions of time with regard to four other workers, namely: Learie Quamina, Kerwin Ramsaroop, Shedrock Luke and Allen Leben (EXT (SF) 23, 24, 25, 26 of 2012) over "Improper rates of pay; inaccurate cost of living allowance; denial of meal allowance; denial of proper height and shift bonus payment". The effective dates for these matters were 5th November 2009 (nine (9) months after the issue being discussed) and the Union submitted that the workers were protected from inferior wages due to the existence of a fair wages clause. These requests for extensions of time were granted primarily because TOSL had no objections to the Minister's granting of an extension of time in those matters. The Minister is forced to question the motive behind company's rather vocal objections to the Union's current request over strikingly similar (if not identical) matters in the case of these ninety-five (95) workers. Fairness and equity of treatment are of paramount importance in the Minister's deliberation as to whether or not he considers it just in granting an extension of time in this matter."

68. Further on in her affidavit Ms. Gomes stated that:

> "i. A review of the submissions revealed that the union and the workers took prompt action in pursuing this matter. It was not refuted, that parties engaged in numerous discussions with respect to outstanding payments as it relates to Petrotrin Fair Wages clause, and in fact signed a Memorandum of Agreement two (2) years after the date the issue giving rise to the dispute first arose.
>
> ii. The period of delay (two years and nine months from the end of the statutory six month period) in this instant was not considered to be excessive taking into consideration (i) above.
>
> iii. This particular dispute involves over ninety-five (95) workers. These workers may be dis-enfranchised from pursuing their matter under the Industrial Relations Act.
>
> iv. There are four (4) other disputes of similar nature with dates of issue preceding 2009 presently engaging the attention of the Minister. However, the Employer had on objections to the Minister granting Extensions of Time under Section 51(3) in these matters."
>
> I determined that "in the interest of fairness and equity and also based on the nature and scope of this dispute it was considered just by the Minister to have this matter ventilated through the conciliatory process.""

69. The following points were also made by the Gomez affidavit:

- The Ministry's role was not to get into the substantive issues of the matter. It was to look at the facts and decide if an extension of time should be granted having regard particularly to: whether the parties were having discussions/negotiations; when was the first and last time any discussion were held; the reason for the delay; and whether there was a likelihood of any agreement being reached if further discussions were allowed to take place.

- Due to my position as the Senior Officer at San Fernando Office, I was aware that the Union had made other requests for extensions of time concerning 4

other employees of the Claimant and that the Claimant had not objected to that request. The Claimant was now objecting to this request which concerned 95 employees. The matters and issues were the same, save that the employees were different. In the interests of equity, as the extension was granted concerning the 4 employees, it would have been unfair to not grant the extension of time which affected 95 employees.

- The Memorandum of Agreement between the Claimant and the employees made provisions for the issue to be discussed at a later date thereby indicating that there was some expectation of the parties' intention to have further dialogue to resolve the matter."

70. Ultimately there appeared on the Minute sheet the contemporaneous reasons of the decision maker to exercise her discretion.

"Minute Sheet (Extension 45/2012 SF)

I support the recommendation made by Mrs. Gabriel-Hinds CLRO I for the granting of an Extension of Time in matter. The request for an extension of time is supported and recommended based on the following:

(i) A review of the submissions revealed that the union and the workers took prompt action in pursuing this matter. It was not refuted, that parties engaged in numerous discussions with respect to outstanding payments as it relates to Petrotrin Fair Wages clause, and in fact signed a Memorandum of Agreement two (2) years after the date the issue giving rise to the dispute first arose.

(ii) The period of delay (two years and nine months from the end of statutory six month period) in this instant was not considered to be excessive taking into consideration (i) above.

(iii) This particular dispute involves over ninety-five (95) workers. These workers may be dis-enfranchised from pursuing their matter under the Industrial Relations Act.

(iv) There are four (4) other disputes of similar nature with dates of issue preceding 2009 presently engaging the attention of the Minister. However, the Employer had no objections to the Minister granting Extensions of Time under Section 51(3) in these matters. (see attached)

Therefore in the interest of fairness and equity and also based on the nature and scope of this dispute it was considered just by the Minister to have this matter ventilated through the conciliatory process."

Submissions

71. TOSL's complaint is that the decision is illegal and/or in excess of jurisdiction and/or irrational and/or procedural impropriety and/or unfair and/or in breach of the principles of natural justice and/or is an abuse of power and/or in breach of legitimate expectations, invalid null void and of no effect. It seeks to quash not only that decision but also the decision to acknowledge by letter dated 16th May 2013 the OWTU's report of the trade dispute.

72. The main contention of TOSL was that there is no basis in the statute for the Minister to make a decision that is "reasonable" as to opposed to what was "just". Therefore, he asked himself the wrong question and erred in law. The decision was made in the absence of any evidence that there were meetings. The Minister ignored whether it would cause hardship to the Claimant even if there was hardship to the Union. There was breach of legitimate expectation that the Minister would follow his own guidelines. There was bias in considering the motive of TOSL in objecting to the extension.

73. The Defendant made the following submissions: that he is not under a duty to explain his whole reasoning process in deciding under section 51(3) of the Act. The issue of whether the grant of the extension would result in hardship or prejudice is of obligatory importance. There is no prescription in section 51(3) of the factors that the Defendant should consider. The need for the Defendant to take into account issues relating to the promotion of good industrial relations means that he should be accorded a wide margin of appreciation and that consequently, notwithstanding the plain illogicality of his conclusions, the Claimant cannot establish that the decision was irrational. The failure to comply with the rules of fairness

caused no harm because: The Claimant's alleged conduct in relation to the four other cases was only a minor factor in the decision-making process and cannot be viewed as a deviation from the Defendant's established procedure in considering the application for extensions of time. The remarks in the recommendatory note of Ms. Gabriel-Hinds that "the Minister is forced to question the motive behind the company's … objections" were only of an "observational character" and therefore not capable of raising an apprehension of bias or predetermination.

Illegality and purpose

74. It is true that the contemporaneous reasons offered by the Minister were brief and tersely stated. Significantly the Minister stated that the fact that the parties were engaged in continuous discussions was a primary reason. He also stated that in his view it was "reasonable" to extend the time. Terse answers do not on its face make them unreasonable. In the **Westminster** [1985] AC661, 673 Lord Scarman commented that there must be something 'substantially wrong or inadequate' in the reasons given. In **South Somerset District Council v Secretary of State for the Environment** [1993] 1 PLR 80, 83, Hoffmann LF, noted that – "Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument…The inspector is not writing an examination paper… One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy…"

75. In my view it is overly pedantic to criticise the Minister's decision as an unlawful exercise of power by reference to the word "reasonable" and to submit that he acted outside of his statutory remit. I accept the Minister is not writing an examination paper. His determination of what is reasonable certainly falls within the ambit of what is "just".

76. Further it is clear from his logic and reasoning revealed in his affidavit that he was mindful of the test in section 51(3) that he must consider it just to extend the time. Indeed he began the exchange of correspondence by asking TOSL to address him on the question whether it is "just" to extend the time from the reporting of the trade dispute.

77. Finally in his review of the facts it is shown in the Gomes affidavit that he did consider his statutory duty under section 51(3) as to what is just. Further he referred to the Industrial Court's judgment and was mindful that he could not make a decision on a whim.

78. I can also find no criticism on traditional judicial review grounds of the Minister's reference in his reasons to the fact that the parties were continuing to meet as a reason to extend the time. Firstly there was no evidence before the Minister from TOSL that the parties did not meet on the issue. Second there was evidence before the Minister that the parties did meet after 2009. Third there was evidence that TOSL had been engaging other parties for the payment of the said sum. Fourth the Minister never in its logic stated that TOSL had agreed to pay the said retroactive sums. What was of concern to the Minister was whether the issue was kept alive over that period of delay. He thought the parties did so. If the logic is analysed in this way there can be no fault that this was a legitimate factor to be considered in arriving at a decision of what is just.

79. However, this alone may not have been a decisive factor to justify an extension. Indeed the fact that parties were meeting does not address the issue as stated by Georges JA of the obligation of the Union to move within the six month period and address the question, why did not the Union approach the Court earlier? In my view the fact that the parties had been meeting is a legitimate consideration and could not be the tipping point as alleged by the Defendant to quash the exercise of his discretion.

80. The argument of illegality necessarily encompasses therefore TOSL's grounds of irrelevant consideration, unreasonableness and irrationality of the decision.

Relevant considerations

79. TOSL contends that the Minister disregarded a very relevant and potentially decisive consideration that he was required to take into account namely the prejudice and hardship to TOSL if the extension of time is granted. Senior Counsel for the Defendant concedes that this is a relevant consideration. However he also contends and with which I agree that there is no specific mandate that such a consideration must be paramount or ascribed any level of importance in the decision making process. The ambit of his discretion is plain what in his view is "just".

80. In my view whereas the prejudice to both parties is a relevant factor, a failure to consider it is not necessarily fatal to the decision so long as there is material to support the decision that it is just to extend the time. Again the lack of the magical words of considering the prejudice to both parties is absent from the reasons for the decision but this is not necessarily fatal. The main inquiry is whether it can be discerned from the reasoning and logic that it took into account TOSL's allegation of prejudice. Importantly it is not for this Court to say whether the Minister came to the right conclusion in balancing the competing prejudice of the workers and TOSL so long as he had given due regard to it.

81. In my view even though the Minister's decision can be criticised for giving preference to the prejudice of the workers, this does not necessarily mean that the Minister did not consider TOSL's submission that it was prejudiced. In the note of Gabriel Hinds with which Ms. Gomes considered and supported the submissions of TOSL's inability to pay at this stage was considered and rejected. TOSL's real complaint is not and could not be that its claim of prejudice was not considered. Clearly in the narrative of the parties' submissions TOSL's claim of prejudice and the Union's reply to that issue was noted. TOSL's real complaint is that the Minister came to the wrong conclusion that the workers would be more prejudiced or that TOSL's claim of prejudice was not genuine. The Minister criticised it as "passing the buck". Far from the challenge to this decision being one on the ground of failing to consider the relevant considerations, it is more an examination of the logic of the Minister's reasoning and the rationality of the decision in dismissing TOSL's claim of prejudice.

82. It cannot be said therefore in this case that the Minister failed to take into account a very relevant and potentially decisive consideration. There is no warrant in the statute to make prejudice a paramount or potentially decisive consideration. As I observed earlier the observation of the Industrial Court on the matter was obiter and that a proper reading of the decision justified the view that the Minister must act reasonably and rationally and not on a whim when he considers it just to exercise his discretion. The real complaint by TOSL is not that the Minister failed to take the consideration of prejudice into account; it is that he gave that consideration very little weight. To impugn the decision on that ground now forces the Court into the impermissible area of review of saying to the Minister you came to the wrong conclusion you should have given the factor more weight or more favourable consideration.

This certainly is not my role in the context of this dispute. So long as I am satisfied that the issue of prejudice was considered no matter what the Minister concluded on that issue, his decision cannot be defeated on this basis of failing to take into account irrelevant considerations. It can however, if it was irrational.

Irrationality

86. The test of irrationality is a high one. As it should be. It is a borderline merit review and engages the academics in the debate of the purpose of judicial review which was discussed earlier in this judgment. However if due deference is to be afforded to the Minister to arrive at a decision which he considers just I would have to be satisfied that the decision is so outrageous as to defy logic for it to be struck down as irrational. I adopt the observation of Lawton LJ in **Laker Airways Ltd v Department of Trade** [1977] QB 643. "In a case such as this I regard myself as a referee I can blow my judicial whistle when the ball goes out of play but when the game restarts I must neither take part in it nor tell the players how to play".

87. In my view the decision is not outrageous so as to defy logic. The Minister considered the period of delay. He considered the reasons for the delay being continuing discussions. He considered the fact that the parties had agreed to defer the discussions on this dispute to a later time. He considered the fact that the workers will be disenfranchised if the time is not extended from pursuing the dispute. He also considered TOSL's argument that it will be prejudiced and discounted it by reference to the fact that TOSL had computed the payments due to the workers. It is plain the Minister was not impressed with the fact that TOSL could not pay because other entities namely CBI and Petrotrin were unable to pay it. It is plain that TOSL's argument was to "pass the buck". I can see no illogicality in that conclusion. TOSL admits the workers are due their payments. They have calculated it. They gave no commitment that they will pay it, but they can pay it only if CBI or Petrotrin honours the claim. The fact that TOSL does not agree with the Minister's conclusion is no warrant for saying the decision was illogical.

Natural justice: duty to consult

88. In my view the Minister failed to follow due process: the fundamental requirement of fairness of allowing both sides to be heard before arriving at his decision. What is egregious in this case is that the Minister took into account what in his view was important evidence

without consulting either party on their view of that evidence. This is not a pedantic and overly anxious level of scrutiny of the Minister's decision. The Minister failed to pass the basic test of fairness.

89. There is no exact definition of fairness as the demands of fairness is contextual and varies with the circumstances and nature of the hearing. The common denominator of what fairness demands is determined on a case by case basis along broadly intuitive lines of responsible action that serves the ends of justice and fair play. There are minimum requirements which include having notice of charges and being placed in a position where one can defend oneself. In other words, at the very least, it cannot be a hearing by ambush, it cannot be a "beauty contest conducted in secret", the parties cannot be blindsided.

90. In **Ramda v Secretary of State for the Home Department** [2002] EWHC 1278 the claimant had applied for judicial review of the decision of the Secretary of State (the Secretary) to extradite him. The claimant then submitted new material to the Secretary and the Secretary decided to reconsider the claimant's case. The Secretary then considered some new critical material which had not been disclosed to the claimant and decided that his original decision to extradite the claimant would stand. The claimant successfully applied for judicial review.

91. Sedley LJ in that case commented that the decision maker:

> "must not rely on potentially influential material which is withheld from the individual affected ... once it is seen that the [decision maker] made use, in reconsidering the case, of materials which were and in at least one critical respect still are unknown to the claimant, in our judgment the principle of fairness is breached".

92. In **Gajadhar v Public Service Commission** Civ. App. P170 of 2012 at para 44:

> "Fulfilling natural justice and fairness requirements is not always a one-off affair. The circumstances of a case may make it a process, in which the demands of natural justice and fundamental fairness require ongoing disclosure and invitations to reply before a final decision can legitimately be made... Such a further step of disclosure and invitation to reply would have provided the

appellant with a reasonable opportunity to learn what was alleged against her and what information the Commission held the issues in dispute and to answer them."

93. *Supperstone and Goudie, Judicial Review,* 4th ed., state that "the court should resist the temptation to speculate as to the outcome if a hearing had been given (at para 11.60.3 page 414)... it is insufficient for the decision-maker to show that the decision would probably have been the same (at11.60.5)" had the opportunity to be heard been afforded to the complainant.

94. Justice Jones observed in **Nizam Mohammed v PSC** CV 2011-04918 that the facts must be examined objectively to determine whether the Claimant was given a fair opportunity to meet and treat with the allegations made against him and the conclusion drawn for the allegation. The Claimant in that case could not in any real sense be placed in a position to defend himself if he was not given in advance proper information in relation to the charges made against him, and the forensic report for him to meaningfully contain advice and to participate in the hearing.

95. It is clear from the Minister's own evidence that the decisive factor in making his decision was the evidence of the four other comparator cases. But were they genuinely comparative? What were the reasons for the extension in these cases? What were the views of the parties of the relevance of those disputes to these four cases? Indeed without obtaining answers to these questions, it was wrong for the Minister to draw an adverse inference against TOSL by questioning their motive in refusing to agree to the extension in this dispute. The Minister simply got it wrong in his process.

96. The failure to consult impeaches the integrity and transparency of the process and legitimately opens the entire decision making process to the criticism of bias, pre determination and breach of legitimate expectations. By his own procedure set out in his affidavit and by the fact that adverse inferences can be drawn against TOSL by this evidence the Minister was obliged to consult. By his own evidence when he repeatedly stated that this was a paramount concern it triggered a duty to bring these facts to the attention of TOSL.

97. The exercise of the discretion was therefore procedurally flawed.

Power of remittal

96. **Section** 21 of the JRA gives the Court the power for remittal: It states:

> "If, on an application for judicial review seeking an order of certiorari, the Court quashes the decision to which the application relates, the Court may remit the matter to the court, tribunal, public body, public authority or person concerned, with a directive to reconsider it and reach a decision in accordance with the findings of the Court".

97. In my view this is a fitting case to remit the question to the Minister with the guidance that he must solicit the views of TOSL on the four comparator cases. In the exercise of his discretion it is certainly open to him to avail himself of the salutary power to ask the Industrial Court whether and in what manner the discretion is to be exercised having regard to the responses received by the parties.

Conclusion

98. The main reason for the grant of the extension was that there were efforts made by the parties to resolve the dispute. This is factually correct. It constitutes in my view a reasonable consideration to be taken into account in the context of good industrial relations practice where the parties are obliged to meet and treat to settle their disputes. This was not the only reason for granting the extension, the flaw in the Minister's analysis and what in my view really constituted a paramount factor in arriving at this decision however is the consideration of an important factor on which TOSL was not given an opportunity to be heard. The Minister fell into error in taking that factor into account in his final analysis and it cannot be said that it did not weigh heavily in arriving at the decision. The decision is therefore procedurally improper and made in breach of the principles of natural justice.

99. In reviewing the exercise of the Minister's undoubtedly wide discretion under section 51(3) IRA, I have not descended into reviewing the merits of the Minister's decision but trained the light of inquiry on his process by which he arrived at his conclusion. The role of the judicial review court is to ensure that those administrative bodies vested with such a wide and generous discretion crafted by Parliament exercise it responsibly with the signposts of procedural propriety, legality and rationality being the guide to responsible decision making. In this way the supervisory jurisdiction of the Court does not muddle the lines of the

separation of powers but merely preserves the integrity, accountability and transparency of the administrative decision making process of the Executive. The Court cannot therefore wish away this procedural flaw in deference to a speculative attempt to read into the mind of the Minster to determine how he would or ought to have ruled had he not taken the consideration of those four comparable cases into account. To do so would be to step into the shoes of the Minister or become his avatar in a field of industrial relations is not a permissible field of inquiry in the context of this judicial review claim.

100. However it would equally be wrong for the Court to simply quash the decision without more. It is a fitting case for the Court to also remit the matter to the Minister for his re consideration and with the direction to permit TOSL the opportunity to be heard on those comparative cases. Further it is open to the Minister upon receiving such information to obtain assistance in the exercise of his discretion by the avenue of sections 4(4) IRA which is a salutary rule permitting a specialised court of industrial relations to assist him in determining any question of law that may arise in his deliberation.

101. The decision is therefore quashed and remitted to the Minister of Labour for further consideration of the guidelines prescribed in this judgment.

102. I invite the parties to address me on the incidence and assessment of costs.

Vasheist Kokaram
Judge