<u>REPUBLIC OF TRINIDAD AND TOBAGO</u>

IN THE HIGH COURT OF JUSTICE

CV2018-00255

Between

THE NATIONAL INSURANCE BOARD OF TRINIDAD AND TOBAGO

Claimant

AND

THE NATIONAL INSURANCE APPEALS TRIBUNAL

Defendant

ANCIL CORRIE

Interested Party

<u>Before the Honourable Mr. Justice R. Rahim</u>

Date of delivery: December 12, 2018

Appearances:

Claimant: Mr. B. Mc Cutcheon instructed by Ms. T. Rowley

Defendant: Ms. J. Baptiste-Mohammed instructed by Ms. S. Dass and Ms. C. Pierre

Interested Party: Mr. E.M. James instructed by Mr. T. Boudeth

JUDGMENT

1. This is a claim for judicial review of a decision of the defendant to allow the appeal of a police officer Mr. Ancil Corrie, from the decision of the claimant to disallow a claim for compensation by Corrie under the National Insurance Scheme (NIB claim), he having obtained injury leave from the Trinidad and Tobago Police Service (TTPS) for various periods of absence from work. The basis of the denial of the claim was that Corrie failed to submit the claim within the statutory time limit prescribed for such applications. The defendant allowed the appeal of Corrie on the basis of a finding that time for submission of his application did not begin to run until the nature of the injury leave had been classified (which lay within the purview of the Commissioner of Police) so that in the circumstances (which are set out hereunder), the application by Corrie fell within the relevant time limit. As such the defendant ordered the claimant to pay compensation for the leave. The defendant gave its decision orally on the 10th March 2017 and written reasons on the 17th November 2017.

2. The claimant is a statutory board established and incorporated as a body corporate by section **3(1)** of the ***National Insurance Act of Trinidad and Tobago*** Chap 32:01 (NIB Act). The defendant is a body constituted under section **60** of the NIB Act and is responsible for determining appeals from decisions of the claimant. The **National Insurance (Appeals) Regulations** made under section **62** of the NIB Act governs the appeal process. The applicable statutory framework has been helpfully set out in the submissions of the defendant and they are repeated hereafter.

3. See **Section 29 (1) of the Act** provides that:

"(1) Every employer and subject to subsection (2), every employed person and every unpaid apprentice, shall be registered for the purposes of the system of National Insurance."

4. **Section 37 of the Act** provides for insurance against employment injury:

"37 (1) Every employed person and every unpaid apprentice shall be insured in the manner provided by this Act and the Regulations against personal injury caused on or after the appointed day by accident arising out of and in the course of that person's employment and there shall be payable in the prescribed circumstances to or in respect of every such person the type of benefit (hereinafter called "Employment Injury Benefit") specified in section 46 (3).

(2) The contribution payable in respect of any employed person or any unpaid apprentice towards employment injury benefit shall be payable wholly by the employer of such person."

5. **Section 46 (3) of the Act** provides that employment injury benefit shall be paid to or in respect of persons insured under **Section 37** and goes on to stipulate the nature of such benefit.

6. **Section 62 (1) of the Act** places a limit on the type of appeal that can be heard before the Defendant:

"62 (1) Appeals from decisions of the Board shall lie to the Appeals Tribunals on questions of fact only and to the High Court on questions of law or partly of law and partly of fact and from the High Court to the Court of Appeal."

7. **Regulation 7 of the National Insurance (Benefits) Regulations** deals with the time limit for the submission of claims. **Regulation 7 (1) (e)** prescribes that the time limit for submission of claims for injury benefit as 14 days from the date the insured person is rendered incapable of work as a result of the accident.

8. By **Regulation 7 (2)** a person who fails to submit a claim for injury benefit within the prescribed time shall be disqualified from receiving any benefit in respect of any period more than 3 months before the date on which the claim or subsequent medical certificate is received by the Board.

9. **Regulation 7 (3)** allows for a claimant to not be disqualified, despite being outside of the prescribed time if he shows good cause:

"(3) Notwithstanding sub-regulation (2) in any case where the claimant proves that-
(a) on the date the contingency arose he was entitled to the benefit; and
(b) throughout the period between the date the contingency arose and the date on which the claim was received by the Board good cause is shown as to the reason for the delay in submitting the claim, he shall not be disqualified under this sub regulation from a benefit to which he would have been entitled had he made the claim within the prescribed time."

10. ***Regulation 7 (4)*** *provides that notwithstanding sub-regulation (3), if a person fails to make a claim for injury benefit, <u>within 12 months from the date on which the contingency arose, such person shall be disqualified from receiving such benefits.</u>*

11. ***Regulation 3 of the National Insurance (Appeals) Regulations*** *reiterated* ***Section 62 (1) of the Act:***

"Where a person claiming benefit under the Act is aggrieved by the decision of the Board in respect of his claim he may appeal on questions of fact only in accordance with these Regulations."

12. ***Regulation 13*** *of the* **National Insurance (Appeals) Regulations** *states as follows:*

13.(1) Subject to this regulation, notice of appeal given after the expiration of six months from the date of the decision of the Board giving rise to the appeal, shall not be considered by the tribunal.

(2) The limitation referred to in sub-regulation (1) shall not apply to appeals in respect of decisions of the Board prior to the coming into operation of these Regulations.

(3) Where a notice of appeal is received out of time, but within one year from the date of the decision of the Board giving rise to the appeal, it shall be acknowledged by the Registrar who shall request the appellant to furnish reasons for its late submission.

(4) Where an appellant furnishes reasons for the late submission of his appeal the Chairman shall decide whether or not the late appeal shall be considered.

(5) No appeal shall lie against a decision of the Chairman under sub-regulation (4).

FACTS

13. The facts are not in dispute. Corrie suffered an injury on the 5th August 2013 during the course of his employment with the TTPS and made an application to the claimant of injury benefit payments on the 28th July 2014 almost

eleven months after the date of injury. On the said day, the claimant delivered a letter of request for additional information to Corrie informing him that his application was late and provided an undertaking that the application will be treated as if made on the 28th July 2014 if it was returned to the claimant within 30 days. The implication is that Corrie was required to provide the documents requested within 30 days and his application would be accepted for consideration. This appeared to have been a standard form letter. It is also to be noted that a claim number was not assigned to Mr. Corrie's claim on this day and the letter for additional information handed to him contains no such number *(see **A.B.1** attached to first affidavit of Ashook Balroop filed on behalf of the claimant)*.

14. Along with the application submitted by Corrie on the 28th July 2014, was a letter from the TTPS indicating that the application was late due to lateness of classification of the type of leave granted, namely sick leave or injury leave. In Corrie's case the leave was classified by the TTPS as sick leave and so this was brought to his attention. Further, it was pointed out to him by the employees of the claimant that medical reports for the periods 5th August 2013 to 9th August 2013 and 12th August 2013 to 18th August 2013 were not produced by his employer in its letter to the claimant. He was called upon to account for the missing reports and was advised that if it was his position that his employer was unable to locate them then that should be stated in the letter. Finally, the claimant queried what appeared to be changes made on the face of one medical report for the period beginning the 19th August 2013. A change was apparently made as to the date upon which Corrie's incapacity allegedly began but that change was not initialed by the doctor who issued the medical report and the claimant required same to be initialed. These were all the queries made by the claimant to Corrie

who was given thirty days to treat with them and return the application to the claimant.

15. Corrie returned to the claimant on the 9th October 2014, some two months thereafter and submitted another application for benefits. Once again he was provided with a standard form letter of request for additional information. This letter asked him to provide classification from his employer for leave obtained for the period 12th August 2013 to 18th August 2013. It is to be noted that although his first application was made in respect of this period since July 2013, he had never been informed that classification for the period was outstanding. This was the first time the claimant was raising this issue. Classification was also requested for the period 21st July 2014 to 6th August 2014. The letter also contains no claim number *(See exhibit **A.B.2** of Balroop 1 affidavit)*.

16. Subsequently Corrie returned to the claimant and made some nineteen applications for benefits in relation to periods of leave for the years 2013 and 2014. Copies of the applications are contained as exhibit A.B.3 of the first Balroop affidavit. Save for one of those applications the applications all bear the same claim number 801942. On the face of it is a reasonable inference that the claim without a claim number is made based on the same injury as the others having regard to the dates set out therein. No requests for additional information from the claimant in respect of the nineteen other claim applications have been produced to the court either by the claimant or the defendant. Indeed the defendant has not led or relied on any evidence whatsoever.

17. In relation to the periods for which benefits were sought, the claimant has produced five letters from the Commissioner of Police in evidence. These letters were handed to the claimant by Corrie and in total they classify six periods of leave as injury leave. They are 10th August 2013 to 11th August 2013 and 19th August 2013 to 2nd February 2014, approved on the 6th March 20014, 3rd March 2014 to 30th March 2014 approved on the 6th May 2014, 31st March 2014 to 25th May 2014, approved on the 17th June 2014, 26th May 2014 to 22nd June 2014, approved on the 7th July 2014 and 21st July 2014 to 17th August 2014, approved on the 3rd September 2014. It is to be noted that the letters do not answer the query in relation to classification of leave for the period 12th to 18th August 2013, requested by the claimant in its letter to Corrie but they do treat with classification for the period 26th July 2014 to the 6th August 2014, being the last letter for additional information provided to Corrie by the claimant on the 9th October 2014. The letters from the Commissioner were all received by the claimant on the 19th December 2014 as is reflected on the date stamps thereon. It means that that in respect of the application of the 9th October 2014 by Corrie he did not in fact answer the query until one month and ten days thereafter.

18. Five days shy of five months thereafter, the claimant wrote to Corrie on the 14th May 2015 informing him that his claims were denied on the basis of **Regulation 7(4)** set out above, namely that he failed to make the claim within twelve months of the date upon which the contingency first arose namely the 5th August 2013. It is not in dispute that the last claim was made on the 19th December 2014 and there is no evidence which disputes the claimant's assertion that the first claim was made and returned to Corrie on the 28th July 2014. The defendant filed an affidavit in response by Sharon Hassanali Augustus, the Registrar of the defendant. The evidence of the

deponent is but a narration of the process which occurred, and a transcript of the Appeals Tribunal hearing is exhibited.

19. In similar fashion the claim of the 9th October 2014 was made and returned to him. Both claims were returned together with letters for additional information. On the face of those letters it is indicated that the applications are being returned.

20. The jurisdiction of the claimant to return validly made applications on the basis that more information is required was not addressed by the parties before this court and neither was it addressed before the Appeals Tribunal at the hearing of the appeal. In essence the claimant argues that the application was not made until the 19th December 2014 more than twelve months after the injury occurred on the 5th August 2013.

21. By letter of the 31st July 2014, the Commissioner wrote to the claimant indicating that the application was filed late due to what he termed delays in the administration process.

<u>The proceedings elsewhere</u>

22. The transcript of the proceedings before the Appeals Tribunal attached as SHA1 to the Augustus affidavit, although concise, demonstrates that the position of Corrie at the hearing of the appeal was that he ought to have been paid his benefits because his leave was not classified as injury leave until the 18th September 2014. His argument was simply that the 18th September was therefore the date from which time under Regulation 7(4) was to be reckoned and not the date of the injury. The claimant submitted on two matters. Firstly, it was their case that Regulation 7(4) is clear in that

reference to “the date on which the contingency first arose” could only mean the date upon which the injury was sustained. Further, the claimant took the point that Corrie’s submission that the date on which the contingency first arose must be interpreted to mean the date when that the leave was classified as injury leave is a matter of statutory interpretation, making it a question of law. It was the submission that the defendant, being a creature of statute with specific powers, is not vested with the jurisdiction to determine matters of law and must treat with findings of fact only. The record shows that the representative of Corrie failed to treat with or respond to the latter argument.

23. The reasons articulated in the written decision promulgated by the defendant on the 17th March 2017 added no more to the oral decision delivered by the Appeals Tribunal. It was repeated that in the view of the Appeals Tribunal, the claimant could not have made a decision on the application of Corrie until the leave had been classified as injury leave and therefore it followed that time did not begin to run until such classification. The reasons failed to treat with the submission on the issue of jurisdiction of the appeals tribunal to determine matters of law.

ULTRA VIRES and ILLEGALITY

24. The claimant mounts its challenge on two broad principles, namely illegality and ultra vires. The arguments are pinned on two grounds.

Appeal out of time-Regulation 13

25. Firstly, the claimant argues that the Notice of Appeal was filed over one year after the decision of the claimant to reject the claim and therefore the defendant did not have the jurisdiction to entertain the appeal. Regulation

13 sets out that the appeal should be filed within six months of the decision of the board and of not within twelve months thereafter in which case it will be considered so long as good reason is shown for the delay. The present appeal was filed outside of the twelve month period.

26. In the court's view this argument can be summarily be disposed of. The transcript of proceedings annexed as AB9 to the affidavit filed in support of the claim demonstrates that the jurisdiction point was not taken by the claimant before the Appeals Tribunal. In fact, the clear inference in the absence of the point being taken is that the claimant surrendered to the jurisdiction and waived any entitlement to take the point. The transcript shows that the claimant went on to reply to the submissions made by Corrie but never raised the jurisdiction point although the opportunity was available so to do. In those circumstances the court finds that the claimant cannot and ought not to be allowed at this stage to raise the argument on jurisdiction of the Appeals Tribunal to hear the appeal. Points on jurisdiction ought properly to be taken before the tribunal whose jurisdiction is being challenged as a precursor to the point being taken before a court of superior record. In that context it would be unfair to permit the point to be raised here for the first time or at all when in fact the issue was waived by the claimant.

27. The applicable principle is an old common law principle. **Halsbury's Laws of England, Volume 19 (2011)**, para **365** provides as follows;

"An application to challenge the jurisdiction of the court must be made at the outset of the proceedings, for if the defendant takes any step in the proceedings other than a step to challenge the jurisdiction, he will be taken to have waived any opportunity for challenge which he might otherwise have had, and to have submitted to the jurisdiction of the court."

28. This ground is therefore devoid of merit and will be dismissed.

Decision on mixed fact and law Section 62(1) of the NIB ACT

29. Secondly, the claimant argues that the decision was made by the defendant without jurisdiction outside the ambit of section **62** of the **NIB** Act in that the defendant purported to make a determination on a matter of law in circumstances where the section restricts the defendant solely to matters of fact.

30. The defendant submitted that it did not make a decision involving a matter of law in that the transcript reflects the decision of the Chairman as being that the issue of the date of application is a matter of fact. He reasoned that the NIB could not make a decision and Corrie could not have benefited from an application unless his leave was classified as injury leave and that this was outside the purview of either party in that such a decision could only have been made by the Commissioner of Police. In the circumstance, the Chairman was of the view that factually, time could have only begun to run from the date of such classification. The inference being that the leave was not injury leave before that date.

31. The Interested Party was invited to and did file submissions after having sight of all the documents and submissions filed in this claim by both claimant and defendant but in so doing has failed to submit of this point.

32. The claimant has relied heavily on the decision of Boodoosingh J in two former claims by the very parties to the present claim. They are CV2017-00706 and CV2017-00875. The facts and issues in those claims which were consolidated by the Learned Judge were very similar to the present claim in

that Boodoosingh J was essentially called upon to determine the very issue that this court has to determine in relation to ultra vires. In that case, His Lordship came to the conclusion that the members of the defendant would have injected their own interpretation of the section and arrived at a decision. His Lordship had this to say at paragraphs 34, 35 and 36;

> *34. "Then, on behalf of Mr. Hamid the defendant concluded when they allowed his appeal the NIB was in no position to process a claim without the classification of the leave and that time would only start to run from the date of classification.*
>
> *35. The defendant's members injected their interpretation of the statute and arrived at a decision. This interpretation was a matter of law and fell outside of the ambit of the legislation, more specifically, the power that section 62(1) of the NIA confers on the defendant. Section 62 merely allows the defendant to hear appeals on matters of fact only. Matters of law or mixed fact and law should be referred to the High Court. To construe or interpret the legislation is a matter for the courts. The defendant went further to identify a list of persons, which included employees of the Ministry of National Security, who must first have their leave classified before they are able to apply for injury benefit, then attempted to create an exception for said persons.*
>
> *36. While this may be true, the legislation does not make a distinction between those officers and all the other employees in this country who may need to make such claims from time to time. So that where the legislation makes no such distinction, it is not the duty or function of the defendant to attempt such a feat. Further, by allowing the appeal, this served to extend time stipulated for the filing of claims beyond 12 months.*

This is also not contemplated by the statute and falls outside of the powers conferred on the defendant."

33. This court agrees with the reasoning set out by my brother Boodoosingh J. Quite simply the first port of call is the application of the literal rule of statutory interpretation, namely an examination of the natural and ordinary meaning attributable to the words set out in section 62. It is only if the natural and ordinary meaning of those words leads to an absurdity will the golden rule be applied. The intention of the Act while relevant, is not a panacea for the literal interpretation so long as that interpretation does not lead to an absurdity.

34. Section **62(1)** of the NIB Act is in the court's view, pellucid in its conferral of the statutory power to the Appeals Tribunal to treat with appeals in relation to questions of fact only. This is so because the very section proceeds to provide for questions of law to be heard by the High Court. Further, it specifically provides for the circumstances in which the questions that arise on appeal consists partly of fact and partly of law. Those similarly must be brought before the High Court of Justice. Thus the provisions of section 62 (1) are clear when the words are given their natural and ordinary meaning and there is no requirement to apply the golden rule.

35. The question then becomes that of whether the issue before the Appeals Tribunal was a mixed one partly of fact and partly of law. Once again it is pellucid that the issue was one of mixed fact and law. The question of fact was that of ascertaining the date or dates upon which the applications for benefits were submitted and whether the application fell within the dates prescribed by the statute. The question of law was that of whether the statute could be interpreted in such a

manner as to import a secondary meaning into the definition of the date of “the date upon which the contingency arose”. The parties have taken issue with the meaning of the word contingency. Suffice it to say that the statutory interpretation of the word “contingency” at Regulation 7(4) is itself a matter of law and ought not to have been interpreted by the Appeals Tribunal.

36. It follows that in determining the matter in the way which they did the Appeals Tribunal was in fact applying the golden rule and so had averred unto themselves the power to interpret the statute. Such a power is ultra vires the provisions of section 62(1) and the Appeals Tribunal ought properly to have dismissed the appeal on that basis. In that event the court is of the considered view that the Appeals Tribunal was clearly wrong so to do.

37. In so saying this court is not insensitive to the fact that the Appeals Tribunal may have well been correct in stating that the application could not have been determined until the classification was determined but this did not entitle the defendant to step out of its remit and jurisdiction and provide a legal interpret to Regulation 7(4).

38. On this basis alone this court would set aside the decision of the Appeals Tribunal as the error is fundamental, but there is one other issue to treat with. There is no need in the circumstances for the court to consider the other arguments having regard to the consequences to the appeal of the fundamental error.

Regulation 7(3)

39. Regulation 7(3) allows for a claimant to not be disqualified, despite being outside of the prescribed time if he shows good cause.

"(3) Notwithstanding sub-regulation (2) in any case where the claimant proves that-

(a) on the date the contingency arose he was entitled to the benefit; and

(b) throughout the period between the date the contingency arose and the date on which the claim was received by the Board good cause is shown as to the reason for the delay in submitting the claim,

he shall not be disqualified under this sub regulation from a benefit to which he would have been entitled had he made the claim within the prescribed time."

40. It is to be noted that the Appeals Tribunal did not purport to make its decision pursuant to the provisions of **Regulation 7(3)** which is understandable in the context of the grounds of appeals argued before it. Further, there is no evidence that the explanations for delay provided in writing by Corrie were considered in the context of the said regulation. The claimant was under a duty to specifically consider whether good cause was shown by Corrie for the delay in submitting his claim under the said regulation. He was therefore on the evidence deprived of the benefit of such a consideration which is manifestly unfair. The decision of the Appeals Tribunal will therefore be set aside and the claims for injury benefits remitted to the claimant for consideration of the application of **Regulation 7(3)**.

COSTS

41. This claim dealt with matters which contained a very high public interest element and the parties (save for the Interested party) were both ultimately subject to overall control by the state. In those

circumstances and considering the fact that both the claimant and the defendant (and by extension the Interest Party) have been partially successful the court is of the view that each party should bear its own costs and shall so order.

Disposition

42. The court orders as follows;

(1) It is declared that the decision of the Appeals Tribunal issued on the 7th November 2017 to allow the appeal of Ancil Corrie (the said decision) is illegal and ultra vires.
(2) The said decision is moved into the high court and quashed.
(3) The claim of Ancil Corrie for injury benefits made by way of several applications in the years 2013 and 2014 is remitted to the National Insurance Board for its consideration as to whether the provisions on **Regulation 7(3)** of the National Insurance (Benefits) Regulations apply to Ancil Corrie and whether he should be afforded his benefits as a consequence.
(4) Each party is to bear its own costs.

Ricky Rahim

Judge