THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2016-03524

IN THE MATTER OF THE JUDICIAL REVIEW ACT CHAPTER 7:08 OF THE LAWS OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION DATED 12TH AUGUST 2016 MADE BY THE REGISTRATION RECOGNITION AND CERTIFICATION BOARD TO CERTIFY THE PUBLIC SERVICES ASSOCIATION OF TRINIDAD AND TOBAGO AS THE RECOGNISED MAJORITY UNION FOR THE MONTHLY RATED/PAID WORKERS OF THE TRINIDAD AND TOBAGO CIVIL AVIATION AUTHORITY COMPRISING BARGAINING UNITS 1 TO 5 DESCRIBED IN CERTIFICATE NOS. 8 OF 2016, 9 OF 2016, 10 OF 2016, 11 OF 2016 AND 12 OF 2016 WITH EFFECT FROM 18TH JULY 2016

BETWEEN

TRINIDAD AND TOBAGO AVIATION AUTHORITY

Claimant

AND

REGISTRATION RECOGNITION AND CERTIFICATION BOARD

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. R. Armour S.C., Ms. Gopaul instructed by Ms. Bissessar for the Claimant
2. Mr. Byam for the Defendant
3. Mr. Mendez S. C. instructed by Mr. I. Ali for the Public Services Association

Date of Delivery: February 20, 2017

DECISION

1. Before the Court for its determination was the Claimant's claim for judicial review which was supported by an affidavit of Mr. Ramesh Lutchmedial (the Lutchmedial affidavit). The Claimant challenged the decision made by the Registration Recognition and Certification Board (*the "RRCB" and/or the "Board"*) on 12th August 2016 to certify the Public Services Association of Trinidad and Tobago (*the "PSA" and/or "Union"*) as the recognised majority union for the Claimant's monthly rated/paid workers comprising Bargaining Units 1 to 5 described in Certificate Nos. 8 to 12 of b 2016 with effect from 18th July 2016.

2. The grounds upon which the claim was premised are as follows:

   (a) The RRCB acted without jurisdiction and/or exceeded its jurisdiction and/or erred in law by considering the application dated 28th September, 2010 by the PSA for certification as the recognised majority union of the monthly rated/paid workers of the Authority comprising Bargaining Units 1 to 5 described in Certificate Nos. 8 to 12 of 2016, contrary to section 38(4) of the Industrial Relations Act, Chapter 88:01 of the Laws of Trinidad and Tobago;

   (b) Further and/or in the alternative, the RRCB breached the rules of natural justice by (i) failing to inform the Authority of and/or to disclose to the Authority the information and/or submissions provided to the RRCB by the PSA and/or derived from an examination by the RRCB of the PSA's records in respect of the matters provided for in section 34 of the Industrial Relations Act and, (ii) failing to afford to the Authority the opportunity to respond to such information and/or submissions provided by the PSA and/or derived from the RRCB's examination of the PSA's records; and

   (c) The decision of the RRCB to certify the PSA as the recognised majority union of the monthly rated/paid workers of the Authority comprising Bargaining Units 1 to

5 described in Certificate Nos. 8 to 12 of 2016 is contrary to the policy of the Industrial Relations Act, Chapter 88:01 of the Laws of Trinidad and Tobago.

Procedural History

3. An affidavit of service of Gerard Moore was filed on the 9th November, 2016 and at the first case management conference hearing, the Defendant did not appear and no entry of appearance was filed.

4. In the circumstances the Court proceeded to give directions for the filing of submissions and indicated that it intended to deliver a decision on the 20th February, 2017. An order was generated but same did not express the Court's stated intention that a decision would have been given on the 20th February, 2017. The Claimant complied with the Court's directions and there was no subsequent intervention by or on behalf of RRCB until the morning of the 20th February, 2017, when Mr. Byam appeared on behalf of the Defendant. The Defendant was served with the claim and by letter issued on behalf of the Claimant, was informed of the Court's order which was issued at the first hearing of the Case Management Conference. Having regard to the stage of the matter and the lack of previous participation by the Defendant, the Court formed the view that the Defendant could not be heard in the circumstances. On the 20th February 2017, Mr. Mendez also appeared on behalf of the PSA and sought leave to intervene in the instant matter on the basis that the PSA was an interested party whose rights would be affected by the determination of the instant application.

5. The Claimant filed an affidavit dated 20th February, 2017 and revealed that, as at the 16th January, 2017, Mr. Mendez had a conversation with the Claimant's Junior Counsel, Ms. Gopaul, relative to this matter. Notwithstanding this conversation, no application for leave to intervene was filed. In addition, at the first Case Management Conference hearing, Mr. Amour had informed the Court that persons who had an interest in the matter, including workers of the Civil Aviation Authority and members of the PSA, were present; the Court enquired but no interested party identified themselves. In the circumstances, the Court was satisfied that the PSA had due notice of this matter and

given the delay the Court did not permit the PSA to file evidence but permitted Senior Counsel to address the Court on points of law.

The Legislative Framework

6. In its resolution of this matter the Court first considered the provisions of the **Civil Aviation Act Chp. 49:03** (the Act) as well as the provisions of the **Industrial Relations Act Chp. 88:01** (the IR Act) and, in particular, the following sections were reviewed:

The Civil Aviation Act (the Act):

7. The long title of the Act summarises the object of the Act:

> *"An Act to make provision for the establishment of the Trinidad and Tobago Civil Aviation Authority, for the regulation of all civil aviation activities, for the implementation of certain international conventions and for the institution of safety requirements."*

8. Section 4 of the Act establishes the Authority:

> *"There is hereby established a body corporate to be known as 'the Trinidad and Tobago Civil Aviation Authority (hereinafter referred to as 'the Authority')."*

9. The Authority's functions are set out in section 5 of the Act. They include:

> *"(a) to maintain a standard of safety and efficiency in the civil aviation system that is at least equal to the standard of safety prescribed by the Chicago Convention and any other aviation convention, agreement or understanding to which Trinidad and Tobago is a party;*
>
> *(b) to regulate in accordance with the Civil Aviation Act or other written law –*
>
> *(i) Civil aviation operations in Trinidad and Tobago;*
>
> *(ii) The operation of Trinidad and Tobago aircraft; and*

(iii) The operation of maintenance organisations in respect of aircraft on the Trinidad and Tobago register;

(c) to license aerodromes without or without conditions to regulate same;

(d) …….

(e) to issue, renew, vary, extend and amend licences and other aviation documents in respect of Trinidad and Tobago aircraft in any part of the world, and to collect fees in respect thereof;

(f) to provide an adequate system of air traffic services in the Piarco Flight Information Region and such other airspace as may be the subject of a treaty or any other agreement between Trinidad and Tobago and any other State or organisation;

(g) ……..

(h) the development of civil aviation and the maintenance of a civil aviation system that is consistent with national security policy;

(i) to advise the Minister on matters relating to civil aviation;

(j) ……..

(k) ……..”

10. The workforce of the Authority comprises two main categories of workers and Sections 25(1) and 26(b) of the Act provide as follows:

“25(1). The Board may -

(a) employ such staff as is required by the Authority for the proper administration of its functions and,

(b) fix qualifications, terms and conditions of service and salaries for its employees.”

“26. A person who on the commencement of this section is a public officer appointed to an office listed in the Third Schedule either by permanent or temporary appointment in which he has served for at least two continuous years, shall within three

months of the date of commencement of this section exercise one of the following options –

(a) ……;

(b) to transfer to the Authority with the approval of the Public Service Commission on terms and conditions no less favourable than those enjoyed by him in the Public Service;

(c) ……"

11. In relation to the Authority's monthly rated/paid workers, section 26A of the Act provides that:

> *"26A. Subject to the Industrial Relations Act, the Public Services Association of Trinidad and Tobago shall be deemed to be the certified recognised majority union under Part III of the Industrial Relations Act for the bargaining unit comprising monthly paid/monthly rated employees of the Authority."*

The Industrial Relations Act (IR Act):

12. The object of the IR Act is stated in its long title as:

> *"An Act to repeal and replace the Industrial Stabilisation Act 1965, and to make better provision for the stabilisation, improvement and promotion of industrial relations."*

13. Section 2(1) of the IR Act defines the following words:

> *"2(1). In this Act-*
>
> *'recognised majority union' means a trade union certified under Part 3 as the bargaining agent for workers comprised in a bargaining unit.*
>
> *'bargaining unit' means that unit of workers determined by the Board as an appropriate bargaining unit;"*

"Board" means the Registration Recognition and Certification Board established under section 21;

'bargaining agent' means a trade union certified as such by the Board with respect to a bargaining unit for the purpose of collective bargaining;

'collective bargaining' means treating and negotiating with a view to the conclusion of a collective agreement of the revision or renewal thereof or the resolution of disputes;

'collective agreement' means an agreement in writing between an employer and the recognised majority union on behalf of the workers employed by the employer in a bargaining unit for which the union is certified, containing provisions respecting terms and conditions of employment of the workers and the rights, privileges or duties of the employer or of the recognised majority union or of the workers, and for the regulation of the mutual relationship between an employer and the recognised majority union."

14. Section 21(1) of the IR Act, which establishes the RRCB, states as follow:

"21.(1) For the purposes of this Act there is hereby established a Board to be known as the Registration Recognition and Certification Board."

15. The responsibilities of the RRCB are set out in section 23 of the IR Act. They include:

"(a) the determination of all applications, petitions and matters concerning certification of recognition under Part III, including the taking of preferential ballots under section 34(2);
(b) the certification of recognised majority unions;
(c) the recording of the certification of recognised majority unions in a book to be kept by it for the purpose;
(d) ……..
(e) the cancellation of certification of recognition of trade unions; and

(f) ……."

16. The statutory process for the determination of applications of certification is set out in Part III of the IR Act:

> *"32. (1) The Board shall expeditiously determine all applications for certification brought before it in accordance with the following provisions of the Act.*
> *(2) Subject to this Act, all trade unions that desire to obtain certification of recognition under this Part shall apply to the Board in writing in accordance with this Part."*
> *(3) An application under subsection (2) shall –*
> *(a) be in the prescribed form; and*
> *(b) describe the proposed bargaining unit in respect of which the certification is sought,*
>
> *and the union making the application (hereinafter referred to as the 'claimant union') shall serve a copy of the application on the employer and the Minister.*

> *"33.(1) The Board shall on any application under section 32(2) first determine the bargaining unit it considers appropriate in the circumstances (hereinafter referred to as the 'appropriate bargaining unit')……."*

> *"34.(1) Subject to this Act, the Board shall certify as the recognised majority union that trade union which it is satisfied has, on the relevant date, more than fifty per cent of the workers comprised in the appropriate bargaining unit as members in good standing.*
> *(2) .....*
> *(3) All questions as to membership in good standing shall be determined by the Board, but a worker shall not be held to be a member in good standing, unless the Board is satisfied that –*
>
> *(a) the union of which it is alleged the worker is a member in good standing has followed sound accounting procedures and practices;*
>
> *(b) the particular worker has –*

(i) become a member of the union after having paid a reasonable sum by way of entrance fee and has actually paid reasonable sums by way of contributions for a continuous period of eight weeks immediately before the application was made or deemed to have been made; or

(ii) actually paid reasonable sums by way of contributions for a continuous period of not less than two years immediately before the application was made or deemed to have been made;

(c) no part of the funds of the union of which it is alleged the worker is a member in good standing has been applied directly or indirectly in the payment of the entrance fee or contributions referred to in paragraph (b); and

(d) the worker should be considered a member in good standing having regard to industrial relations practice."

17. The IR Act further outlines the provisions that have to be followed for certification of a union as a recognised majority union and the RRCB is required to issue a certificate under its seal to the union and to the employer: Section 37 of the IR Act provides as follows:

> *"37.(1) The Board shall issue a certificate under its seal to the union and to the employer in every case in which it certifies a trade union as the recognised majority union.*
> *(2) A certificate under subsection (1) shall contain a statement as to the following particulars –*
>
> *(a) the name of the employer and of the trade union thereby certified;*
>
> *(b) the category or categories, if any, of workers comprised in the bargaining unit;*
>
> *(c) the number of workers comprised in the bargaining unit at the relevant date;*
>
> *(d) such matters other than the foregoing as are prescribed."*

18. The RRCB is also required to keep a record of the particulars of certification and which record constitutes conclusive evidence of the matters stated therein:

> *"41.(1) Where a trade union is certified by the Board as the recognised majority union, the particulars referred to in section 37(2) shall be entered in a record of such trade unions to be kept for that purpose by the Board in the prescribed form for the purposes of this Act; and the production of the record or of the copy of the relevant portion thereof, certified by the Secretary of the Board, shall be admissible in all courts and shall be conclusive proof of the matters therein stated."*

19. The jurisdiction of the RRCB to certify a trade union as a recognised majority union under section 34 is, however, circumscribed by section 38(4) of the IR Act which provides as follows:

> *"38.(4) Subject to this Act, and in particular to sections 85 and 86, no application for certification of recognition under this Part shall be considered where the application relates to workers comprised in a bargaining unit in one category of essential industries and the claimant union is already certified as the recognised majority union for workers comprised in a bargaining unit in another category of essential industries.*
>
> *Where, however, the claimant union is, under or by virtue of sections 85 and 86, already certified as the recognised majority union for workers comprised in bargaining units in more than one category of essential industries, nothing in this subsection shall apply to any application for certification of recognition under this Part, if the application relates to workers comprised in a bargaining unit in any of those categories of essential industries for which the claimant union is already so certified."*

20. "Essential Industry" is defined in the IR Act as *"an industry specified in the First Schedule".*

21. Sections 85 and 86 of the IR Act form part of the application and transitional provisions of the IR Act respectively.

22. Pursuant to sections 23(6), 23(7) and 32(4) of the IR Act, decisions of the RRCB are final and are subject to an ouster clause. These sections provide as follows:

> *"23.(6)No decision, order, direction, declaration, ruling or other determination of the Board shall be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatever; and no order shall be made or process entered or proceeding taken by or in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise to question, review, prohibit, restrain or otherwise interfere with the Board or any proceedings before it."*
>
> *"23.(7) Subject to this Act, and in particular to section 31, the Board shall be the sole authority competent to expound upon any matter touching the interpretation and application of this Act relating to functions and responsibilities with which the Board is charged by the Act or any other written law; and accordingly, no cause, application, action, suit or other proceedings shall lie in any court of law concerning any matter touching the interpretation or application of this Act."*
>
> *"32.(4) Subject to this Act, all determinations of applications for certification of recognition under this Part as well as determinations as to appropriateness of a bargaining unit under section 33 and as to variations thereof under section 39 shall be final for all purposes."*

23. Having regard to the statutory framework as outlined, the Court first considered whether or not it had the requisite jurisdiction to entertain the matter.

24. In **Aviation Communication and Allied Workers Union –v- The Registration Recognition and Certification Board, Civ Appeal No. 35 of 1995**. Justice of Appeal Ibrahim stated that:

> *"The language used in sec 23(6) of the Act is clear. It is drafted in the widest possible terms. It prohibits the order of certiorari on any account whatsoever and states that no proceedings shall be taken in any court to question, review, prohibit, restrain or*

otherwise interfere with the Board or any proceedings before it. Certiorari is, therefore, ousted.

Sec 23(7) excludes any court from expounding on any matter touching the interpretation and application of the Act relating to the Board's functions and responsibilities and prohibits any legal proceedings concerning any matter touching the interpretation and application of the Act. It makes the Board the sole authority competent to deal with such matters. Once therefore it is a matter that falls within the functions and responsibilities of the Board then the Board can interpret and apply the Act in any way it thinks fit in relation to those functions and responsibilities. It may do so correctly or incorrectly and, if incorrectly, it is immune from being put right by any court. If, however, the error made does affect jurisdiction of the Board then it may be put right, as for example, if it seeks to deal with a matter outside of its functions and responsibilities (South East Asia Fire Bricks SdnBhd v Non Metallic Mineral Products Manufacturing Employees Union and others [1980] 2 All ER 689). Also, if it violates the rules of natural justice as for example if it makes orders against a party without hearing that party or if one of its members has a real interest in the matter before it.

25. In the penultimate paragraph of the aforesaid judgment, Ibrahim JA went on to say as follows:

"...It is unclear precisely what the judge meant by saying that 'the Board is a creature of statute and should it exercise its functions granted therein in a manner other than as laid down therein it is my view that the Court can question the decision made in this purported exercise of its powers.' If what the learned judge said is to be taken to mean that this Court can interpret the provisions of the Act and determined whether the Board has exercised its functions in accordance with these provisions as interpreted by this Court, then I do not agree with this finding. It is not for this Court to say what its view is with respect to the manner in which the Board should exercise its functions. It is for the Board to interpret the provisions of the Act and to apply its interpretation to its functions and responsibilities. If however, it is to be construed to mean that this Court can interpret the provisions of the Act to determine whether the Board has acted outside its jurisdiction or contrary to the rules of natural justice then I agree with that view."

26. The thrust of the Claimant's case was that the RRCB acted without jurisdiction and contrary to the rules of natural justice. The Claimant contended inter alia that the RRCB acted contrary to the policy of the IR Act and that this amounted to a circumstance where the RRCB acted outside its jurisdiction. The Court can interpret the provisions of the Act and make an assessment as to whether the RRCB acted outside the scope of its jurisdiction or whether it acted in a manner that ran afoul of the rules of natural justice.

The Evidence

27. The evidence before the Court was contained in the uncontested Lutchmedial affidavit and the relevant aspects of the said affidavit can be summarized as follows:

    i. *Mr. Lutchmedial was the Chief Executive Officer and Director General of Civil Aviation and was charged with the responsibility of ensuring the general administration of the Claimant.*

    ii. *On 28th September 2010 the PSA applied to the RRCB for certification as the recognised majority union in respect of the bargaining unit comprising the Claimant's monthly rated/paid employees ("the Certification Application"). In the Certification Application, the Union listed the approximate total number of workers in the proposed bargaining unit as 147. In response to the question whether there was any existing or recently expired Collective Agreement pertaining to any or all of the workers covered by the Certification Application, the Union referred to the fact that there was "negotiation for the 2005 to 2007 bargaining period (ongoing matter)." These negotiations resulted in a letter of understanding and a memorandum of agreement dated 2nd November 2007. There was, however, no collective agreement (existing or expired) between the Claimant and the Union in respect of the workers because the Union was not yet certified as the recognised majority union in accordance with Part III of the IR Act.*

    iii. *On 1st November 2010 the RRCB notified the Claimant that it had received the Certification Application and requested that the Claimant submit a Statement in*

the prescribed Form B no later than 7 days from the date of its Notice. The Claimant submitted the completed Form B to the RRCB on 3rd December 2010 and in that form, the Claimant listed the approximate total number of workers in the proposed bargaining units as 191.

iv. *In accordance with section 33(1) of the IR Act, the RRCB embarked on determining the bargaining unit which it considered appropriate in the circumstances. In this regard, it corresponded and met with the representatives of the Claimant during the months of November and December 2010. The Claimant, on the advice of the Chief Personnel Officer, submitted that there should be three bargaining units: Supervisory/Confidential; Technical/Profession and Clerical/Manipulative.*

v. *Thereafter there was a lull in the communication between the RRCB and the Claimant for approximately one year. The next communication on the record available to the Claimant was a letter dated 16th November, 2011 from the RRCB requesting a clarification meeting on 24th November, 2011 and the Claimant requested a rescheduling of the clarification meeting and, the RRCB agreed to reschedule same to 24th January, 2012.*

vi. *A notice dated 8th August, 2012 issued by the RRCB advised that the appropriate bargaining units should comprise five bargaining units. On 16th August, 2012 the RRCB wrote to the Claimant to make arrangements on 27th August, 2012 for the examination of its pay records and all other relevant books, accounts and documents in respect of the employees in the determined bargaining units. Both the notice dated 8th August, 2012 and the letter dated 16th August, 2012 were received by the Claimant on 23rd August, 2012.*

vii. *The Claimant responded on 17th September, 2012 and informed the RRCB that having received its request for examination of its records on 27th August 2012, it retained Legal Counsel in the person of Mr. Derek Ali and as a result it was unable to accede to the RRCB's request in the short time frame. The Claimant*

also expressed its concern that due process had not been followed in the determination of the bargaining units and requested that the RRCB revisit its determination of the bargaining units in light of extenuating circumstances which prevented the Claimant from meeting with the RRCB. These extenuating circumstances were that:

(a) In December 2011 a Job Evaluation Exercise done in conjunction with the PSA and the CPO was completed and implemented;

(b) Between January and March 2012 the Authority's Executive Managers and their staff were required to effect calculations with respect to new salaries and backpay and to highlight anomalous situations;

(c) Between the 5th to 24th March 2012, the Authority moved offices to its new location at Caroni North Bank Road. The relocation exercise was accomplished in-house;

(d) In February 2012 the former Administrator, Corporate Services, Mr. Rodney Batchasingh, who led discussions on behalf of the Authority, completed his contractual term and;

(e) The same team of personnel spearheaded the activities at (a), (b) and (c) above.

viii. The Claimant and the RRCB thereafter arranged to meet and a meeting was held on 8th November 2012.

ix. The Claimant's position was formally communicated to the RRCB via letter dated 22nd April 2013. Its position was that there was no union which held recognition for any of the Claimant's workers, there was no collective agreement between the Claimant and the PSA and therefore none of the Claimant's workers belonged to a bargaining unit.

x. Thereafter, there was a lull in the communication between the parties and the Claimant wrote to the RRCB on 19th September 2014 expressing its concern that it had received no feedback from the RRCB with the information requested by its letter dated 8th August 2010. The Authority also pointed out to the RRCB that the

Authority was not privy to any information at the second stage of the processing of the Certification Application concerning the numbers obtained through the validation of records of the parties involved. The Claimant therefore communicated its expectation that the RRCB would exchange the information obtained during the second stage of the process as regards numbers and how they were derived before making a determination.

xi. *At paragraph 28 of his affidavit, Mr. Lutchmedial explained that the information at the second stage of the process was necessary for the RRCB to determine whether the PSA had, on the relevant date, more than 51% of the workers comprised in the appropriate bargaining unit as members in good standing in accordance with section 34(1) of the IR Act.*

xii. *The Claimant did not, however, receive any further information from the RRCB concerning any information submitted by the PSA concerning the standing of its members. The Claimant received a letter dated 23rd July, 2015 from the RRCB in which it reminded the Claimant of its determination (as to the appropriate bargaining units) by letter dated 16th August, 2012 and stated further that the exercise of examining the records of the parties was still ongoing. The RRCB also informed the Claimant that the PSA requested an interpretation of section 26A of the Civil Aviation Act and requested that the Claimant attend a meeting with the RRCB to discuss the PSA's application in relation to the Act.*

xiii. *On 11th September, 2015 the Claimant's then Legal Counsel, Mr. Derek Ali, met with the RRCB and requested further information in order to fully understand the exact issue at hand. A second meeting was scheduled between the RRCB and Mr. Ali on 21st March 2016 and at this second meeting, Mr. Ali requested leave to make written submissions on a preliminary issue. On 4th April 2016 the RRCB granted permission to the Authority to file written submissions by 5th May 2016.*

xiv. Mr. Ali submitted written submissions on behalf of the Claimant on 6th April 2016 and in the submissions took issue with the jurisdiction of the RRCB to consider the PSA's application on the grounds that:

(a) The Authority was categorised as an essential industry under the IR Act;

(b) Section 38(4) of the Civil Aviation Act circumscribed the jurisdiction of the RRCB to hear a claimant union's application for certification of recognition for workers comprised in a bargaining unit in one category of essential industry where the claimant union is already certified as the recognised majority union for workers comprised in a bargaining unit in another category of essential industry;

(c) The PSA was already certified as the recognised majority union for the monthly paid workers employed at the Water and Sewerage Authority ("WASA") pursuant to Recognition Certificate No. 43/79 issued by the RRCB on 26th March 1979;

(d) WASA was also categorised as an essential industry in the Industrial Relations Act;

(e) It followed that the RRCB had no jurisdiction to consider the PSA's application for certification of recognition for the Authority's monthly paid/rated workers;

(f) Also, the RRCB's purported determination of the bargaining units was illegal, null and of no effect; and,

(g) Further and/or alternatively, the RRCB breached the rules of natural justice by depriving the Authority of the opportunity to be heard in respect of its determination of the bargaining units.

xv. The Claimant was invited by the RRCB on 29th April 2016 to respond to the PSA's submissions in response by 11th May 2016. In its submissions, the PSA stated inter alia that:

(a) *By section 26A of the Civil Aviation Act as amended, it was the statutorily recognised majority union for the Claimant's monthly paid/rated workers and as such, it should be allowed certification as the recognised majority union;*

(b) *It did not dispute that the Authority was an essential industry as defined in the IR Act and relied on the fact that it was already certified as the recognised majority union for workers in two other essential industries, WASA and the Public Transportation Service Corporation ("PTSC").*

(c) *By section 23(1)(a) of the IR Act, the RRCB is charged with responsibility for determining all applications, petitions and matters concerning certification of recognition under Part II. There was however insufficient evidence to conclude that the RRCB did or failed to do anything which would lead to its decision being held null and void. The RRCB therefore did not act outside of its inherent jurisdiction by entertaining the PSA's application and,*

(d) *The Claimant was aware since August 2012 that the PSA had applied to become the recognised majority union for five bargaining units and it (the Authority) had over three years to participate in the proceedings before the RRCB. As such, any claim of breach of natural justice was specious and unfounded.*

xvi. *The Claimant elected not to file a reply and instead relied solely on the submissions dated 4th April 2016 filed on its behalf by Mr. Ali.*

xvii. *On 12th August 2016 the RRCB issued its decision and reasons to certify the PSA as the recognised majority union for the Claimant's monthly paid/rated workers comprising bargaining units 1 to 5 described in Certificate Nos. 8 to 12 of 2016 with effect from 18th July 2016. In summary, its reasons for rejecting the Authority's submissions were that:*

(a) *"In its view", in 1972 when the IR Act became law, the PSA was the recognised majority union for the Public Service which included the Department of Civil Aviation. The Applicant's citation of section 38(4) of the IR Act was therefore misconceived since it is the second paragraph of that section which was relevant.*

(b) *Section 26A of the Civil Aviation Act as amended reinforces the PSA's case for representational rights.*

(c) *The Desalination case cited by the Applicant was apposite since that company was a completely new one, coming into existence more than two decades after the passing of the IR Act. The Civil Aviation Department (as part of the Public Service prior to 1972) predated the IR Act and is provided for by sections 85 and 86 of the IR Act.*

(d) *On the record of correspondence, the Applicant was provided with an adequate opportunity to be heard on the issue of bargaining units.*

28. Having considered the evidence as aforementioned the Court determined that the relevant issues were as follows:

    i. Whether, on a proper interpretation of the relevant law the RRCB had the jurisdiction to consider the Certification Application; and

    ii. Whether the RRCB breached the rules of natural justice by (i) failing to inform the Claimant of and/or to disclose to the Claimant the information provided to the RRCB by the PSA and/or derived from an examination by the RRCB of the PSA's records in respect of the matters provided for in section 34 of the Industrial Relations Act and, (ii) failing to afford to the Claimant the opportunity to respond to such information.

<u>Resolution of the issues</u>

29. In accordance with sections 35 and 40 of the IR Act, the recognised majority union has exclusive authority to bargain collectively on behalf of the workers in the bargaining unit and to bind them by a collective agreement as long as its certification remains in force.

30. The Claimant in its written submissions invited the Court to consider the purport and effect of the words *"subject to the Industrial Relations Act"* which were included in Section 26A of the Civil Aviation Act and relied on **Lucky v. Inland Revenue Commissioner, (1960) 2 W.I.R. 56** where the Court of Appeal construed the phrase "*subject to any arrangement made under section 4*" in section 6(2) of Cinematograph Entertainment Tax Ordinance, as follows:

> *"In accordance with express powers conferred by s.5 of the Ordinance, the arrangements made under s.4 in this case validly contain provisions which, inter alia, impose two obligations on the appellant, namely, (i) to render a daily return of all cinematograph entertainment on a prescribed form and (ii) to pay the duty payable from the whole of any one month together with the rendering of the final daily return for that month; but section 6(2) also imposes an obligation in respect of the time when any duty payable should be paid and the provisions imposing this obligation are expressly stated to be 'subject to any arrangements made under section 4'. It seems to me that the natural meaning to be ascribed to the words 'subject to' in this context is 'conditional upon'. They are words of restriction and limitation and as Lord McDermott stated in the case of Smith v. London Transport Executive (2) ([1951] 1 All E.R. at p.676) in reference to the phrase 'subject to the provisions of this Act', it is an 'expression commonly used to avoid conflict between one part of an enactment and another.'*

31. The Claimant also referred to **Bennion on Statutory Interpretation, 5th Edition** where at page 306 it is stated that:

> *"Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."*

32. The Claimant submitted that the IR Act contains specific provisions that relate to the certification and that the phrase "subject to the Industrial Relations Act" in section 26 A of the Civil Aviation Act must be construed to mean that the PSA's certification as the recognised majority union is contingent upon compliance with the provisions of the IR Act and all requirements therein stated must be met. Consequently, the Claimant argued that the certification of the PSA as the recognized majority union of the Claimant's monthly rated/paid workers is not automatically conferred by virtue of section 26A of the Civil Aviation Act and such certification should be issued only when there is compliance with the relevant provisions of the IR Act.

33. It is evident, that the Claimant falls within the classification of an essential service and the RRCB's jurisdiction to certify a union that has applied for certification to be a recognized as the majority union, for workers comprised in a bargaining unit in an essential industry, is circumscribed by section 38(4) of the IR Act. The wording of the said section is clear and unequivocal. The RRCB's jurisdiction can be exercised provided that:

    i. The union is not already certified as the recognised majority union for workers comprised in a bargaining unit in another category of essential industries; or,

    ii. Where the union is already certified as a recognised majority union for workers comprised in bargaining units in more than one category of essential industries by virtue of sections 85 and 86 of the IR Act and the application for certification relates to workers comprised in a bargaining unit in any of those categories of essential industries for which the union is already certified.

34. Section 38(4) of the IR Act imposes mandatory conditions that must be satisfied before the RRCB can duly exercise its jurisdiction and consider an application of certification for recognition with respect to workers in an essential industry.

35. With respect to the interpretation of Section 26 A of the Act Counsel for the PSA submitted inter alia that the said section is a deeming section and the phrase 'subject to

the provisions of the Industrial Relations Act' had to be interpreted in such a way so as not to frustrate Parliament's intention, which was to deem the PSA as the certified recognised majority union under Part 11 of the Industrial Relations Act.

36. Mr. Mendez also submitted that the Civil Service Act Chapter 23:01 previously governed all employees that worked in Civil Aviation and that pursuant to Section 24, a statutory right of representation was established and the PSA represented the public officers working in Civil Aviation who were civil servants.

37. By virtue of Act No. 11 of 2011 the Civil Aviation Authority was established and upon the creation of this new authority, various options were offered to public officers who worked in Civil Aviation and who were civil servants under the Civil Service Act. Counsel further directed the Court to the case of **Marth Perch & Others v. the Attorney General of Trinidad and Tobago Privy Council Appeal No. 57 of 2001**, where the Board held that with the establishment of the Trinidad and Tobago Postal Corporation, former civil servants who elected to work with the Postal Corporation ceased holding the office of postal officers within the public service and were no longer employed in the service of the Government in a civil capacity within the meaning of Section 3 (1) of the Constitution. This decision was delivered on the 20th February, 2003 and Act No. 17 of 2003, which introduced Section 26 A, was laid in the House on the 9th May, 2003. Counsel submitted that this amendment must have been enacted, having regard to the Perch decision (supra), so as to ensure that workers of the Civil Aviation Authority were not left without representation by a recognized majority union. Counsel further submitted that the phrase "subject to the Industrial Relations Act" applied in relation to Section 26 B and 26 C of Act No. 17 of 2003, by virtue of which an application for certification of recognition could not be made except with leave of the Court for 2 years after the date on which the Act came into force and where leave was duly granted or the specified time period elapsed and that the provisions as set out in Section 38 (2) and (3) of the IR Act applied in relation to applications for certification of any other union to be recognised as the majority union for workers comprised in a bargaining unit.

38. In response, Mr. Armour submitted that the IR Act was enacted in 1972 and was enacted by way of special majority and that the exclusive jurisdiction for certification rested with the RRCB and Parliament could not, by Act No. 17 of 2003, which was enacted by simple majority, curtail or fetter the jurisdiction of the RRCB. Counsel further submitted that if the section was treated as deeming provision then the rights to freedom of association of workers may have been infringed.

39. The arguments advanced by either side are not devoid of merit and a careful and considered approach as to the proper interpretation of Section 26 A of the Act has to be adopted but before any such determination can be made, the Court should have before it all the interested parties including the Attorney General. Further, access to the Hansard for the period when the Act No. 17 of 2003 was debated would also be of assistance. The application before this Court is one to review a particular decision of the RRCB in relation to certification. If Mr. Mendez is correct that the application of certification was not necessary and that 26A of the Act is not the deeming provision, then by virtue of Section 38 (4) of the IR Act, the application that was made should not have been entertained by the RRCB.

40. **In the circumstances the Court is of the view that the instant matter can be resolved without having to undertake an interpretation of Section 26 A of the Act. That exercise is of paramount importance but needs to be undertaken in a circumstance where the Court's jurisdiction to do so is properly invoked and all the arguments and requisite evidence is properly articulated and adduced.**

41. On the evidence before this Court, the PSA was certified as the recognised majority union for the monthly rated/paid workers of WASA and the monthly rated/paid workers of PTSC, both of which fall within the category of an essential industry and this circumstance was known to the RRCB.

42. In its consideration of the application for certification which was before it, a proper exercise of the RRCB's jurisdiction would have required satisfaction of the second

condition as outlined under section 38(4) IR Act. This second condition has two limbs: (a) that the PSA's prior certification as a recognised majority union for the monthly rated/paid workers of WASA and PTSC must have been done pursuant to sections 85 and 86 of the IR Act and, (b) the PSA's Certification Application before the RRCB had to relate to the workers comprised in a bargaining unit in any of the categories of essential industries for which the PSA was already certified.

43. On the uncontroverted evidence adduced before this Court, it is apparent that neither party produced the PSA's Certificate of Recognition for the monthly rated/paid workers of WASA or PTSC nor did the RRCB refer to the particulars in its records relating to these Certificates of Recognition. Consequently, the only reasonable inference that can be drawn was that there was no material before the RRCB to establish that the PSA's Certificates of Recognition for the monthly rated/paid workers of WASA and PTSC were issued pursuant to sections 85 and 86 of the Act.

44. The Court considered paragraph 6 of the RRCB's decision and found that the view expressed by the RRCB therein cannot be construed as evidence of the objective fact that the PSA was the recognized majority union for workers comprised in a bargaining unit of an essential industry. In its reasons, it is apparent that the RRCB did not address its mind to either of the certificates of recognition relied upon by the PSA and the Court therefore found that the objective fact of the PSA's certificates of recognition in relation to two categories of essential industries pursuant to Sections 85 and 86 of the IR Act was not established.

45. In addition, the PSA's Certification Application concerned the recognition for workers in an entirely different essential industry (civil aviation services) from that in respect of which the PSA was already certified as the recognised majority union. Consequently, the PSA was unable to overcome both limbs of the second condition as outlined under section 38 (4) of the IR Act. Accordingly, the RRCB had no jurisdiction to consider the PSA's Certification Application and if Section 26 A is in fact a deeming provision as outlined by the PSA then there was no need for any application for certification.

46. **Having considered the uncontested evidence as contained in the Lutchmedial affidavit and the purport and effect of section 38(4) of the IR Act, the Claimant successfully established on a balance of probabilities that the RRCB did not have the requisite jurisdiction to confer the requested certification which was granted pursuant to the PSA's application for certification and the RRCB therefore acted outside the ambit of its jurisdiction when it proceeded to determine the PSA's application for certification.**

47. The Court also considered the law in relation to Natural Justice and the requirement to abide by the rules of natural justice and/or to act fairly is outlined at **Section 20 of the Judicial Review Act, Chapter 7:08** which provides that:

> *"An inferior court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner."*

48. In the case of **Naraynsingh v The Commissioner of Police, [2003] UKPC 20 ,** the Privy Council cited with approval the decision of the House of Lords in **R v Secretary of State for the Home Department, ex parte Doody, [1994] 1 AC 531** where it was stated:

> *"16. As for the demands of fairness in any particular case, their Lordships, not for the first time, are assisted by the following passage from Lord Mustill's speech in R v Secretary of State for the Home Secretary, ex parte Doody [1994] 1 AC 531, 560:*
>
> > *'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that:*
> > *(1) where an Act of Parliament confers an administrative power there is a presumption*

that it will be exercised in a manner which is fair in all the circumstances.
(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

49. The uncontested evidence before the Court established that, following its determination as to the appropriate bargaining units, the RRCB embarked on the process of examining the records of both the PSA and the Claimant. The purpose of such examination was to determine whether the PSA had, on the relevant date, more than 51% of the workers comprised in the appropriate bargaining unit as members in good standing in accordance with section 34(1) of the Act.

50. On 19th September, 2014 the Claimant informed the RRCB in writing that (a) the Claimant was not privy to any information from the PSA regarding the numbers obtained

through the validation of the records of the parties involved and, (b) the Claimant expected that such information would be forthcoming before a determination was made by the RRCB. On 23rd July, 2015 the RRCB responded in writing and advised the Claimant that the exercise of examining the records of the PSA and the Claimant was still ongoing.

51. The record of correspondence between the RRCB and the Claimant revealed that the next communication from the RRCB was its 12th August, 2016 notification of its decision and reasons for certifying the PSA as the recognised majority union for the Claimant's monthly paid/rated workers. The RRCB therefore completed its examination of the records of the parties and proceeded to make its decision without informing the Claimant of the information received from the PSA in respect of the standing of its members.

52. **In the circumstances, the requirement for procedural fairness imposed upon the RRCB an obligation to inform the Claimant of the information and/or submissions made by the PSA which satisfied it that 51% of the workers in each bargaining unit were members in good standing in accordance with section 34(3) of the IR Act. As a result of its failure to provide the Claimant with such information and/or the submissions which were made by the PSA, the Claimant was deprived of the opportunity to verify and/or to comment and/or to respond to such information and/or submissions, before the RRCB made its decision.**

53. Another aspect of the flawed procedure adopted by the RRCB, was its decision to engage in closed hearings with each party in the absence of the other. The procedure adopted was not consistent with the decision of Madam Justice Gobin in the case of **Desalination Company of Trinidad and Tobago (Desalcott) v. Registration Recognition and Certification Board and others, CV2013-00039,** where the Judge commented on the practice of the RRCB to hold close hearings and stated at paragraphs 51 and 52 as follows:

> *"51. By adopting this practice the Board has ignored the rules of procedure made under the Act which, while they*

allow a fairly wide discretion as to how to deal with certain matters, clearly contemplate proper service, notifications and substantive inter partes hearings where necessary before the Board. The rules notwithstanding, private communications between each side and the Board's representatives appear to have become the order of the day. It appears that even now, the Board does not believe that it is under a duty to notify the absent party as to what transpired in its absence, so as to afford that party the opportunity to make appropriate representations. If 'Clarification Meetings' which are closed, have become to be the only actual hearing that are afforded the parties, and that is the impression I got, I do not think that this is what the legislation contemplated.

52. The fairness of 'closed hearings' generally was considered in the case of Bank Mellat v Her Majesty's Treasury (HOL) 2013 UKSC 38:

> *"Even more fundamental to any justice system in a modern democratic society is the principle of natural justice whose most important aspect is that every party has a right to know the full case against him, and the right to challenge that case fully.*
>
> ***A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said of itself to give rise to inequality or even unfairness as between the parties. But that cannot be said of an***

arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party (the excluded party) knowing or being able to test the contents of that evidence and those arguments (the closed materials) or even being able to see all the reasons why the court reached its conclusion."

54. Attorneys for the Claimant candidly drew the Court's attention to Rule 17 of the RRCB rules which provides that :

> *"The records of a trade union relating to its membership and any records that may disclose whether a person is or is not a member of a trade union which are produced in a proceedings shall be for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed to any person."*

55. **This Court is resolute in its view that the RRCB, even in the face of the instructive decision of Gobin J in Desalcott (supra), failed and/or refused to apply the rules of natural justice when having elected not to disclose to the Claimant the information that had been derived from the PSA records and the PSA's submissions that related to section 34 of the IR Act. The RRCB also further disregarded the rules of Natural Justice when it proceeded to carry out closed hearings with each party in the absence of the other.**

56. **For the reasons that have been outlined the Court finds that RRCB acted improperly and erroneously entertained and determined the PSA's certification application and it acted in violation of the principles of natural justice. Accordingly, the Court hereby declares and grants the following reliefs:**

a) **It is hereby declared that the decision dated 12th August 2016 made by the Registration Recognition and Certification Board to certify the Public Services Association of Trinidad and Tobago as the recognised majority union for the monthly paid/rated workers of the Trinidad and Tobago Civil Aviation Authority comprising Bargaining Units 1 to 5 described in Certificate Nos. 8 to 12 of 2016 with effect from 18th July 2016, was made in breach of the rules of natural justice and/or was procedurally improper.**

b) **The Court hereby issues an order of certiorari to remove into this Honourable Court and to quash the decision dated 12th August 2016 made by the Registration Recognition and Certification Board to approve the Public Services Association application for certification as the recognised majority union for the monthly paid/rated workers of the Trinidad and Tobago Civil Aviation Authority comprising Bargaining Units 1 to 5 described in Certificate Nos. 8 to 12 of 2016, with effect from 18th July 2016.**

c) **The Defendant shall pay the Claimant's costs of this action certified fit for Senior Counsel and Junior Counsel which is to be assessed by the Registrar in default of agreement.**

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FRANK SEEPERSAD

JUDGE