REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 187 of 2010

BETWEEN

SCOTIABANK TRINIDAD AND TOBAGO LIMITED

APPELLANT

AND

BANK EMPLOYEES UNION

RESPONDENT

APPEARANCES: Mr. K. Garcia and Ms. V. Jaisingh for the Appellant
Mr. S. Jairam, S.C, Mr. D. Ali and Ms. S. Jairam for the Respondent

PANEL: Mendonça, J.A.
Narine, J.A.
Smith, J.A.

DATE OF DELIVERY: June 30th, 2011

I agree with the judgment of Mendonça J.A. and have nothing to add.

R. Narine,
Justice of Appeal

I have also read the judgment of Mendonça, J.A and I agree with it. I however want to add the following and this relates to the Industrial Court's decision to award 75% of the costs claimed by the Respondent. An award of costs based on a percentage of the costs claimed is an unusual order for costs. In cases where such an unusual order for costs is made it is almost incumbent on the Court to give its reasons for this unusual order. The failure to do so justifies the Court of Appeal re-examining the lower Court's discretion to award such costs (see Generally the 1997 White Book at 59/1/59 page 948).

In this case, the Industrial Court Held that in the exercise of its total "freedom" of discretion in the arena of costs, it would award the Respondent 75% of the costs it claimed. No reason was given as to why the specific figure of 75% was chosen. One may well ask, why not 25% (as has been done before, see Trade Dispute 130 of 1994 ATASS v Caroni 1975 Ltd.), or 90% or some other percentage. The specific figure of 75% seems arbitrary and gives the Court of Appeal a further ground to set aside this award of costs. Some rationale ought to be provided in any case when deciding to award a percentage of the costs.

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G. Smith,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This appeal is from the Industrial Court's quantification of costs pursuant to orders as to costs made by it in favour of the Respondent Union.

2. The cost orders were made in five trade disputes in which the Union challenged the dismissal of five of the Appellant Bank's employee on the basis that their dismissals were harsh and oppressive. The five trade disputes were heard together by the Court. In each matter the Industrial Court found the dismissal of the employee to be harsh and oppressive and not in accordance with good industrial relations practice. In each case the Court considered whether it should reinstate the employee but in the end did not do so. Instead, the Court made awards of damages in favour of the dismissed workers in various sums amounting in the aggregate to $2,525,000. In each of the five trade disputes the Court further ordered that the Bank pay the Union's costs.

3. So far as is relevant to the orders as to costs, the Industrial Court remarked at the outset of its judgment in the substantive matters:

> *"By almost any measure, the trial of these five trade disputes can lay claim to the all-comers' record for size and scale in the more than four decades in the history of the Industrial Court. Surely no other trial lasted as long (from commencement of the hearing in July, 2000, until judgment was reserved on April 7th, 2006). The documentation filed initially was Himalayn in scale and was added to in the course of proceedings at the end of which the verbatim record rivaled it in size."*

4. The Court identified six factors that attributed to the length of the hearing and these were as follows:

> *(1) The sheer volume of documentation that had to be examined in order to explain the nature and purpose of transactions in which alleged breaches took place.*

(2) The number of discrete transactions of the same kind that had to be described.

(3) The different kinds of scrutiny required when evidence was led with respect to certain documents:

- *technical - for understanding of the transaction.*
- *forensic - as the Employer used the services of a handwriting expert in support of certain charges.*
- *physical - as the bench was invited to hold up original documents to the light in order to see writing descramble beneath typists' correcting fluid.*

(4) Explanation of the absence of documentation where the alleged breach consisted of failure to use or generate certain documents as required.

(5) The fact that proceedings could not continue from day to day as the members of the bench had other ongoing matters involving other parties which could not simply be left in abeyance to facilitate the hearing of these disputes.

(6) The commitments of eminent counsel on both sides to other Court - including (in the early stages of these proceedings) constitutional matters of national interest.

As is apparent from points 5 and 6 above although these trade disputes spanned a number of years from commencement to the conclusion of the hearing of the disputes, they did not continue from day to day. According to the Appellant up to the date of closing submissions the matter lasted a total of 221.23 hours, which, he submits, using a court day as consisting of five hours, amounts to 44.25 court days.

5. The Court noted that in making the order for costs it was guided by section 10(2) of the Industrial Relations Act (the Act) which provides that the Court shall make no order as to costs in any dispute before it, unless, for exceptional reasons, the Court considers, it proper to order otherwise. The Court stated that it had no difficulty in finding exceptional reasons:

> *"… in a case where proceedings extended over seven years and the nature of the matters litigated required long and detailed exposition of procedures and scrutiny of documents, all with the attendant running costs of the attorneys conducting the process. To represent adequately the interest of the worker concerned in the dispute, the Union would have had no realistic alternative but to meet the cost of retaining Counsel competent to deal with matters of such special character."*

6. The Court therefore concluded that it was "only fair that the normal rule that costs follow the event should apply" and ordered that costs be paid to the Union - such costs to be determined by the Court in default of agreement between the parties.

7. The parties were unable to agree on the quantum of costs and consequently the matters were referred to the Court for it to quantify the costs that the Appellant should pay. For this purpose, the Union prepared and filed a bill of costs which was subsequently amended. The amended bill totaled twenty-five pages and itemized the costs incurred by the Union. The total bill amounted to $8,534,523.75. This sum included value added tax of $436,098. and a further sum of $67,320. representing attorney's fees for the preparation of the bill of costs and for attending at the hearing in relation to the quantification of costs.

8. The Court in a reserved judgment awarded costs in the sum of 75% of the aggregate amount claimed in the Union's bill of costs; that is to say $6,400,893. The Court was asked by the Union to award costs on an indemnity basis but it declined to do so. The Court however considered the award it made to be "fair and appropriate" and one that met the requirements of justice in this case "exceptional in its duration and complexity."

9. In quantifying the costs the Court was of the opinion that it was not required to follow "the strict rules and procedures of the Supreme Court in assessing costs." It stated that its decision on the assessment of costs "was made in exercise of the powers set out in section 10(3)" of the Act. This section provides as follows:

> *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."*

10. The Court considered that the presentation of the Bank's case on the dismissal of the employees required "the tendering and, frequently, the minute scrutiny of documentation on a

truly Himalayn scale" and that the Bank's evidence was "led and its cross-examination conducted by a team of attorneys, the lead attorney being of a calibre that led to his attainment of the status of a Senior Counsel while the trial was in train." As a consequence the Court opined that for the Union to keep the playing field level it was "incumbent upon it to engage the services of attorneys of a number and calibre capable of matching what the Bank had deployed" and b) the considerations of section 10(3) required the Court to assess costs in a sum such that the judgment of the Court delivered in favour of the Union on the substantive issue regarding the dismissal of the workers "would not turn out to be a Pyrrhic victory for the dismissed workers."

11. The Appellant now appeals from the order of the Industrial Court quantifying the costs payable by it to the Union. There is no objection to the substantive orders as to costs made by the Court. Counsel for the Appellant submitted that in coming to its determination on the quantum of costs the Industrial Court erred in law within the meaning of section 18(2)(d) of the Act. Counsel for the Union on the other hand submitted that there was no error of law but in any event he contended that the Bank did not have a right of appeal on a question of law from the Industrial Court's quantification of costs. I will discuss this point first.

12. Counsel for the Respondent Union argued that in dismissal cases, such as these five trade disputes, where the Industrial Court is of the opinion that the dismissal of the employees had taken place in circumstances that were harsh and oppressive and not in accordance with the principles of good industrial relations practice, the decision of the Court is not subject to appeal on a question of law. Equally, he submitted, an order as to costs, which is dependent on the Court having ruled that the dismissal is harsh and oppressive and not in accordance with the principles of good industrial relations practice, should also not be appealable. He contended that it is illogical and contrary to principle, common sense and the clear meaning of the Act to permit such an appeal.

13. It is clear that the Appellant has a right to appeal from the Industrial Court on a question of law. This is provided for in section 18(2)(d) which is as follows:

> "*18(2) Subject to this Act, any party to a matter before the Court is entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no other:*

(d) that any finding or decision of the Court in any matter is erroneous in point of law;"

This right of appeal however must be read as subject to section 10(6) which provides as follows:

"10(6) The opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever."

14. In **Caroni (1975) Limited v ATASS** (2002) 67 WIR 223 it was held that section 10(6) is the dominant section and restricts the right of appeal on a point of law granted by section 18(2)(d). In that case de la Bastide, C.J. (as he then was) stated (at p. 225):

"The intention of Parliament, clearly expressed in section 10(6), is that the question of whether the dismissal of a worker is in any case harsh and oppressive and contrary to the principles of good industrial relations practice, should be reserved to the Industrial Court. What distinguishes a dismissal that is harsh and oppressive from one that is not, is a matter which the Act clearly regards as grounded not in law, but in industrial relations practice. The practice, which is not codified in our jurisdiction, is to be determined and applied to the facts of each case by the Industrial Court. The policy of the statute is obviously to entrust that function only to judges of the Industrial Court who come equipped with experience of, and familiarity with, industrial relations practice. This is a qualification which judges of the Supreme Court do not necessarily or even ordinarily have."

The Court went on to explain that it is not to say that the decision of the Industrial Court as to whether a dismissal is harsh and oppressive is so sacrosanct that it could never be challenged. de la Bastide, C.J stated (at p. 225) that:

"If, for instance, there has been some procedural irregularity which involves a breach of the rules of natural justice, then clearly an appeal would lie to the Court of Appeal notwithstanding s.10(6). In such a case it would be the process by which the Industrial Court reaches its opinion and not the opinion itself, that was challenged.

15. It is therefore correct to say that the opinion of the Industrial Court that a worker's dismissal was harsh and oppressive and not in accordance with the principles of good industrial relations practice cannot be appealed on the basis that the decision is erroneous in point of law.

Such an appeal is prohibited by section 10(6). This section also prohibits an appeal from any order for compensation or damages including the assessment thereof made pursuant to section 10(5).

16. I find that section 10(6) does not apply to an order for costs. An order for costs is not "an order for compensation or damages". There was really no dispute on this. Counsel for the Respondent, however, argued that as the order for costs is dependent on the opinion of the Court as to whether or not the dismissal of the worker was oppressive and contrary to good industrial relations practice it would be illogical and contrary to principle and common sense not to include such an order within section 10(6).

17. I do not agree. The section, on its plain meaning, does not include orders as to cost. When it was the intention of Parliament to prohibit appeals other than in relation to the Court's opinion as to the character of the dismissal this was specifically included in section 10(6) - hence the reference to compensation and damages including the assessment thereof. The intention of Parliament is that the question whether the worker was dismissed in circumstances that were harsh and oppressive or not in accordance with the principles of good industrial relations practice should be reserved to the Industrial Court. The policy of the statute, as explained by the Court of Appeal in **Caroni**, supra, in the passage of the judgment of de la Bastide, C.J. quoted above is that that question should be determined by Judges of the Industrial Court who come equipped with experience and familiarity of industrial relations practice. Judges of the Supreme Court do not ordinarily have such a qualification. Such a qualification, however, is not relevant to the making of an order as to costs. What the Industrial Court has to find before it makes an order as to costs is that there are exceptional reasons to do so. In those circumstances it is understandable that Parliament would not have included orders as to costs in section 10(6).

18. In two cases to which reference was made by Counsel for both parties in this appeal it was never doubted by this Court that there was a right of appeal on the question of costs.

19. The first case is Civil Appeal No. 15 of 1996 **Caroni (1975) Limited v ATASS**. This case concerned the dismissal of a worker. The Industrial Court found that the dismissal was

harsh and oppressive and ordered the reinstatement of the worker and that the company pay the union's costs. The company did not appeal within the time allowed for so doing but applied for an extension of time to appeal from the order as to costs. The Court of Appeal refused the application on the basis that the appeal had no prospect of success as it would "inevitably be held that there was no right of appeal from that order, since the order was not based on any error of law and excess of jurisdiction." It was never doubted by the Court of Appeal that there was a right of appeal on a question of law, or any of the other grounds set out in section 18(2), from an order as to costs. Indeed, the judgment of the Court clearly suggests that there is such a right of appeal.

20. The other case is **Caroni (1975) Limited v ATASS** (2002) 67 WIR 223 to which reference has already been made. This matter also involved the dismissal of a worker which the Court found to be harsh and oppressive and not in accordance with the principles of good industrial relations practice. The Court awarded damages in favour of the worker and ordered the company to pay, inter alia, the costs of the trade dispute. The company did not appeal from the order as to costs but in the course of the appeal sought an extension of time to appeal the quantification of costs by the Industrial Court. The Court of Appeal refused the application on the ground that there was no reason advanced for the failure to file the appeal within the time allowed and in any event none of the matters, which the company proposed to raise on the appeal, had any hope of success. In this case also it was not doubted that there was a right of appeal to the Court of Appeal on the issue of costs. Indeed the Court of Appeal acknowledged that a party had such a right of appeal. Jones, J.A. in his judgment, with which the other Judges of the Court agreed, stated (at p.236):

> *"…; that is not to say that the quantification of costs by the Court can never be subjected to review."*
>
> *If it is apparent, for instance, from the amount awarded that the award of costs has been used for some improper purpose, such as to punish the party against whom the order is made, that would be a ground, in my view, on which this court might interfere. There are all sorts of other circumstances in which it might appear that the court had not directed its mind to certain essential matters to be considered in the quantification of costs in order to arrive at a fair and just result."*

The Court of Appeal therefore acknowledged that a party has a right of appeal where, inter alia, it can be said the Court did not direct its mind to certain essential matters. That is a common ground on which the exercise of the discretion of a court may be challenged on appeal and amounts to an appeal on a question of law.

21. In my judgment therefore the Appellant has a right to appeal the quantum of costs awarded by the Industrial Court on the ground that the decision was erroneous in point of law. Such an appeal is not barred by section 10(6) of the Act. I therefore reject the submissions of Counsel for the Union to the contrary.

22. In submitting that the Industrial Court erred in law, Counsel for the Appellant focused on two factors that the Court took into account and to which I have referred earlier in assessing costs, namely; that it was incumbent on the Union to retain attorneys of the number and calibre capable of matching what the Appellant had employed and that the quantum of costs should be such as to ensure that the award of costs in favour of the workers did not turn out to be a Pyrrhic victory. With respect to the first factor it was submitted that there was no evidence that the attorneys retained by the Union were a response to the number and calibre of attorneys that the Appellant had engaged. As there was no evidence to support that consideration it was submitted that the Court erred in law. Further, to the extent that it took into account an unproven fact, Counsel argued that the Court took into account an irrelevant consideration and so again erred in law. With respect to the second factor, Counsel submitted that there was no evidence that the workers had paid the legal costs incurred by the Union. The finding therefore that if costs were quantified in a lesser sum that that would result in the judgment of the Court turning out to be a Pyrrhic victory was wrong in law for similar reasons as with respect to the first factor. In any event, it was submitted, the approach taken by the Industrial Court that costs should be awarded in an amount to ensure that the damages reached the workers in tact, or substantially so, was a wrong approach in law. It was therefore submitted that in those circumstances this Court should set aside the award of costs as quantified by the Industrial Court and exercise its own discretion as to the amount of costs. In doing so it was submitted that costs should be limited in a manner that is more pronounced than in the civil jurisdiction. The Court had to consider the impact of the costs award on the industrial relations climate and should therefore aim to award costs in the

minimum amount consistent with preserving and promoting industrial peace. It was therefore argued that the costs awarded should be lower than the damages awarded and must be a proportionate part of the damages. It was submitted that the appropriate proportion should be 25%. Alternatively, Counsel submitted that as exceptional reasons are relevant to the making of an order as to costs under section 10(2) of the Act, the quantum of costs should be limited to those costs which had been incurred in consequence of the exceptional reasons. This the Industrial Court did not do and it erred in law in failing so to do.

23. Counsel for the Union on the other hand defended the assessment of costs by the Industrial Court. He argued that the award was fair and appropriate and met the requirements of justice in this case. He submitted that in exercising its powers to assess costs the Industrial Court must be guided by section 10(3) of the Act and given the expansiveness of this section, this Court is entitled to come to the conclusion that the Industrial Court came to a fair, appropriate and just conclusion. With respect to the Appellant's alternative submission that the award of costs should be limited to those costs which had been incurred in consequence of the exceptional reasons, Counsel for the Union did not agree. He submitted that the Industrial Court in determining the quantum of costs was not required to limit its award to the matters that were considered exceptional for the purposes of making the order as to costs.

24. I will first consider the submission of Counsel for the Appellant that the costs awarded by the Industrial Court should have been limited to only those costs which have been incurred in consequence of the exceptional reasons which the Court found in making the order as to costs.

25. It is true, as has been indicated earlier in this judgment, that under section 10(2) the Court may make an order as to costs only where it considered that there are exceptional reasons to do so. In the Industrial Court, therefore, unlike in the civil jurisdiction of the Supreme Court an order that a party pay the costs of the other is the exception rather than the rule. There is however nothing in section 10(2) that would lead to the conclusion that where the Court finds that there are exceptional reasons and makes an order as to costs, the costs must be limited to those factors of the case that made it exceptional.

26. To support his submission, Counsel for the Appellant referred to the case of **Health Development Agency v Parish** Appeal No. EAT/0543/03 LA. This is an appeal from the Employment Appeal Tribunal in England. In that case the Tribunal considered rule 14 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, which provides that the order of the Tribunal may contain an award against a party in respect of the costs incurred by the other party, where, in the opinion of the Tribunal, a party has, in bringing the proceedings, or a party or party's representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived. The Tribunal held that there had to be a causal relationship between the conduct of the party in bringing or conducting the proceedings and the costs which are awarded under rule 14. Therefore, where a Tribunal found that a party had conducted proceedings unreasonably, it should award costs which were attributable to that unreasonable conduct.

27. Rule 14 however, which the Tribunal considered in the **Parish** case, is very differently worded than section 10(2) of the Act. In my judgment it can offer no assistance as to the interpretation of section 10(2). In any event the **Parish** decision was not followed in the later case of **Mc Pherson v BNP Paribas** [2004] ICR 1398. In that case the Court of Appeal held that rule 14 did not impose any causal requirement so that it was not necessary for a party to show that specific unreasonable conduct caused particular costs to be incurred. The Court however stated that "the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order."

28. In this jurisdiction similar considerations are relevant to section 10(2). The existence of exceptional reasons is clearly a precondition to the exercise of the Court's power to make an order for costs. Unless the Industrial Court finds that there are exceptional reasons it has no power to order costs. But having found exceptional reasons, there is no need for it to be proven that the factors that made the case exceptional caused costs to be incurred and there is no requirement that the costs are to be limited to those features of the case that make it exceptional. However, what in the Court's opinion may have made the case exceptional may also influence

the form of the order, and the Court is free to limit its order by reference to those matters it found exceptional. In this case however the Court did not so limit its order and it was not required to do so. I therefore do not agree with this submission by the Appellant.

29. In assessing costs, the Industrial Court is exercising a discretion. The other submissions made by Counsel for the Appellant raise the question whether in exercising its discretion the Court did so on wrong considerations or on wrong grounds. If it did, the Court erred in law and this Court can interfere with the Industrial Court's decision.

30. Before the Industrial Court the parties were ad idem that section 10(3) of the Act is relevant to the assessment of costs. Before this Court, Counsel for the Appellant however took a different view. He submitted that section 10(3) is not relevant. The relevant section is section 10(2). He argued that to apply section 10(3) would be to introduce unwarranted cloudiness in the threshold for the making of an order as to costs. Unnecessary doubt, he submitted, would exist over whether the threshold for an award of costs is what the Industrial Court considers to be exceptional reasons within section 10(2) or what the Court considers to be fair and just under section 10(3). Counsel submitted that Civil Appeal No. 13 of 2002 **Airports Authority of Trinidad and Tobago v Estate Police Association** supported his submission where Sharma, C.J. stated that:

"The question of costs has to be disposed of in accordance with section 10(2)."

31. In the **Estate Police Association** case however, the Court of Appeal was dealing with the question of whether an order as to costs was justified. It is clear that in those circumstances the relevant provision is section 10(2). The question whether to make an order as to costs depends on whether there are exceptional reasons within section 10(2) so as to empower the Court to make an order as to costs. The Court of Appeal in that case was not dealing with an assessment of costs. The case therefore does not stand as authority for the proposition advanced by Counsel. It clearly supports the proposition, if support were needed, that in determining whether an order for costs should be made, section 10(2) is the relevant section. But, having made the order as to costs, section 10(3) is the relevant section. Looked at in that way there is no cloudiness or doubt,

as contended by Counsel, when it comes to the quantification of costs pursuant to an order as to costs made by the Industrial Court. Under section 10(3) the Court is required to make such an award of costs as it considers fair and just having regard to the interests of the persons immediately concerned and the community as a whole and the Court must 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.

32. In applying section 10(3) there is however no clear indication from the Industrial Court as to the factors that it should have regard to in determining the quantum of costs. The approaches of the Industrial Court to the quantification of costs have differed widely from placing a cap on the costs linked to a percentage of the damages, to a substantial consideration of the factors that are relevant to a taxation of a bill costs in the High Court, to cases where it was not detectable how costs were assessed.

33. The first of these approaches is evident in the case of Trade Dispute 130 of 1994 **ATASS v Caroni (1975) Limited**. In this case, which dealt with the dismissal of a worker, the Court ordered the company to pay the union's costs and ordered that such costs shall in no event exceed 25% of the total amount of the damages paid to the worker. The Court however gave no indication as to the factors it took into account in coming to the conclusion that a sum of up to 25% of the damages awarded was an appropriate figure for the Union's costs in the matter. An example of the approach where the Court considered many of the factors as would be relevant to the bill of costs in the civil jurisdiction is Trade Dispute 351 of 1997 **ATASS v Caroni (1975) Limited** where the Court considered the award it made as "reasonable, fair and appropriate." It stated that it was not obliged to follow the rules of taxation of the High Court but may use them as a guide. The Court then proceeded to consider the following factors that are relevant to a taxation of costs in the High Court: the complexity, difficulty and novelty of the issues raised in the case, the skill, specialized knowledge and responsibility required of and the time and labour expended by the attorney, the number and importance of the documents prepared and/or perused by attorneys for the receiving party, the importance of the matter to the receiving party and the monetary value of the case. At the time of this decision the Rules of the Supreme Court 1975 applied to the taxation of costs in the High Court and many of these factors were specifically

mentioned at O. 62 Part X as factors to be considered in the exercise of the Court's discretion on a taxation of costs. The Court also considered and applied the case of **Simpsons Motor Sales (London) Limited v Hendon Corporation (No.2)** [1964] 3 ALL E.R. 833 as to the proper measure of Counsel's fee, which is still good law in the civil jurisdiction.

34. There are of course cases where neither approach was evident, and in these it is not evident how the costs were quantified. In RSBD No. 4 of 1998 **Mary Mathlin Sue v Valley View Hotel [1986] Limited [In Receivership] and another,** the Court awarded the worker $4,447.00 in severance pay and assessed costs in the sum of $25,000.00. There is no indication of how that sum for costs was arrived at. In Trade Dispute 233-235 of 1999 **ATASS v Caroni (1975) Limited** the Court awarded the sum of $150,000.00 as costs but however gave no indication as to the factors it took into account in assessing costs in that amount.

35. Two of the cases decided by the Industrial Court mentioned above came before the Court of Appeal. One is in Trade Dispute 130 of 1994. In that matter the company sought an extension of time within which to appeal from the order as to costs made by the Industrial Court but this application was refused (see **Civil Appeal 15 of 1996 Caroni v ATASS** to which reference has already been made). However, in the course of the hearing before the Court of Appeal, criticism was made of that part of the Court's order which limited the costs to 25% of the damages. The Court of Appeal saw no warrant for that criticism. It was of the view that it was an "eminently sensible order which the Industrial Court has the freedom to make." The Court stated that "obviously it is right that there should be some proportionality between the amount of the award in terms of damages and the amount of costs for which the losing party is liable…."

36. The other case is trade dispute TD 351 of 1997. The appellant's application to extend the time within which to appeal the quantification of costs by the Industrial Court was refused. (See **(Caroni (1975) Limited v ATASS** (2002) 67 WIR 223). The Court of Appeal noted that there were provisions in the Act which freed the Industrial Court from the necessity of "adhering to the practice and procedures in the High Court for the taxation of costs." It also reaffirmed its position as to proportionality by saying (at p. 237) that:

> *"In **Caroni Ltd. v Association of Technical, Administration and Supervisory Staff** (unreported),* [see *Civil Appeal 15 of 1996] this court stated that there must be some proportion between the amount of the award and the amount of the costs; there must be some relation, however loose, between them."*

37. What may be seen from these two cases before the Court of Appeal, is, as the Industrial Court has stated, that in quantifying costs pursuant to an order as to costs made by it, it is not obligated to adhere to the practices and procedures of the High Court for the taxation of costs and that there must be some measure of proportionality.

38. In this case the Industrial Court did not seek to apply the rules relating to taxation in the High Court. It was not required to do so. The Court stated that its determination of the quantum of costs was made in the exercise of the powers set out in section 10(3) of the Act. Section 10(3) is indeed the relevant section. But the Court went on to consider two factors which had been referred to earlier. One of them is that the costs should be assessed in an amount so as to ensure the judgment determined by the Court in favour of the workers is not rendered a Pyrrhic victory. This was very material to the Court's determination of the quantum. I think that the Court erred when it took this into account.

39. The point made by Counsel for the Appellant is well taken. By saying that the costs should be quantified in such an amount so as to ensure that the Court's judgment would not turn out to be Pyrrhic victory, the Court obviously was of the view that the workers bore the cost of the proceedings. But the proceedings are brought in the name of the Union and there was no evidence that the workers were required to meet the costs of the trade disputes. I agree with the Appellant that as the Court took into account a matter of which there was no evidence it took into account an irrelevant consideration and one that it was wrong to consider and so erred in law.

40. But more importantly, I think that by taking into consideration that factor the Court lost sight of the principles outlined in section 10(3). The effect of what the Court said is that no matter how exorbitant, unreasonable or unnecessary the expenditure by way of costs was to achieve the result, the Court will reimburse the successful litigant in costs to ensure he recovers his damages and is not out of pocket. Such an approach is not authorized by section 10(3). It cannot be considered fair or just having regard to the interests of both parties immediately

concerned and the community as a whole. That approach may result in costs being allowed which may be quite excessive, unreasonable, unnecessary or disproportionate and is insensitive to good industrial relations. It is one that can defeat the very object of the Act, which is for the improvement and promotion of good industrial relations.

41. In the taxation of costs in the High Court it is an established principle that costs are not awarded so as to ensure that the successful party is not out of pocket. I think that this is just as relevant and perhaps more so in disputes before the Industrial Court. To quantify costs on the basis that a lesser sum would defeat the recovery of one of the parties to the dispute is to adopt an approach which may result in an entirely unreasonable and disproportionate award as to costs and is not an approach that promotes the considerations of section 10(3).

42. The Industrial Court in quantifying the costs in this matter also stated, correctly in my judgment, that it was required to give effect to "the consideration recognized by the Industrial Court Judges in the making of costs - the idea of proportion."However having said that the Court went on to award 75% of the amount of costs claimed by the Union. It seems to me that the Court did not give proper effect to the issue of proportionality. I will return to this later in this judgment.

43. In view of the above in my judgment the Industrial Court erred in law in arriving at the quantum of costs. How then should the Court approach the quantification of costs in a case such as this- by which I mean, where costs are to allowed to one party and paid by the other to the dispute (and not on an indemnity basis, or not where costs are to be paid by a client to his own attorney) and the parties are represented by attorneys-at–law. It is clear that the Court in quantifying costs must apply section 10(3). However, as I have said earlier, there has been no consistency by the Industrial Court as to the factors that ought to be considered in giving effect to section 10(3). In Trade Dispute 351 of 1997 **ATASS v Caroni (1975) Limited** the Industrial Court used as a guide to the quantification of costs what it identified as the standard basis of taxation in the High Court. The Court stated that using the standard basis all costs incidental to and reasonably incurred by the receiving party, but not excessive or unreasonable in amount, would be allowed with the benefit of any doubt being given to the paying party.

44. At the time of that decision, however, the usual basis of taxation of costs in the High Court was on a party and party basis. The test then, was not whether the costs were reasonably incurred. At the time that trade dispute was decided by the Industrial Court, the High Court, on a taxation of costs on a party and party basis, allowed costs which were necessary or proper for the attainment of justice or for the enforcement or defending the rights of the party whose costs were being taxed (see RSC O. 62 r. 28(2)). However with the advent of the Civil Proceedings Rules 1998 (CPR) the basis of quantification of costs has been altered. The necessity test in O. 62 r. 28(2) has been replaced with a reasonable and fairness standard. It is of course true that the Industrial Court need not follow the rules of quantification of costs in the High Court, but I think that the standard of reasonableness and fairness that now obtains under the CPR (see rule 67.2(1)) properly gives effect to section 10(3). I, therefore, think that the Industrial Court's approach in Trade Dispute 351 of 1991 in allowing costs reasonably incurred and not unreasonable in amount is to be followed. However, it is also necessary for the Court to consider the issue of proportionality.

45. In the context of section 10(3) what has to be considered is a reasonable and fairness standard so that in the ascertainment of the quantum of costs in a case such as this before the Industrial Court, the costs that are allowed must be both reasonably incurred and reasonable in amount.

46. In determining reasonableness, the Court should take into account all the circumstances of the case. The following are specifically mentioned in the CPR as circumstances which should be taken into account in determining reasonableness (see rule 67.2(3)) and there are in my judgment also relevant to costs in disputes in the Industrial Court:

- any orders that have already been made -
- the conduct of the parties before as well as during proceedings;
- the importance of the matter to the parties;
- the time reasonably spent on the case;
- the degree of responsibility accepted by the attorney-at-law;
- the care, speed and economy with which the case was prepared;
- the novelty, weight and complexity of the case.

47. When faced with the question whether the costs were reasonably incurred, therefore, all the circumstances should be considered including those specifically mentioned. So for example, the complexity and importance of the matter may determine whether it was reasonable to take a particular step and so whether it was reasonable to incur the costs of so doing. Also, Zukerman on **Civil Procedure** (at para. 26.61) gives the following example which is instructive:

> *"….if a certain number of hours is claimed in respect of attendance and communication with witnesses, the paying party may question whether it was necessary to interview ten witnesses and to produce ten witness statements, when they all told the same story. The court may decide that it was unreasonable to interview more than three witnesses and thus disallow the hours claimed in respect of the remaining seven witnesses."*

Similarly, if costs are claimed for multiple conferences with an attorney and his client it may be questioned whether any or all were reasonable, and it would be for the Court to decide that issue taking into account all the circumstances of the case including those factors specifically mentioned at paragraph 46 above. So too, whether it was reasonable to have retained more than one attorney is to be determined by reference to the same criteria. While therefore the number of attorneys retained by the paying party is a factor to be considered as one of the circumstances of the case, the question whether it was reasonable for the receiving party to retain an equal number of attorneys should not be determined by reference only to that fact as the Industrial Court in this case seemed to have thought.

48. Whether the sum claimed as the fee for an attorney-at-law is reasonable would usually depend on whether it was reasonable to engage an attorney-at-law of the particular expertise or seniority as the one engaged and if so whether his fee was reasonable. As regards the first question what is being asked is what is the appropriate calibre of attorney or fee-earner capable of effectively conducting the matter. If the case could be effectively conducted by a relatively junior attorney, it would not be reasonable to retain senior counsel of high calibre and so what should be allowed is the fee of a junior attorney capable of conducting the case effectively. Having determined the calibre of attorney required, it is then necessary to determine what would be the reasonable fee for such attorney. This is determined by market forces. In other words it is necessary to look at the market and determine what is usual for such an attorney to charge. After

December 2007 this task has been made simpler by the Practice Guide to the Assessment of Costs that was issued by the Chief Justice. This guide details the hourly rates for attorneys having regard to their number of years as an attorney. As regards fees prior to that, the guide may still may useful as it would not be reasonable to expect that prior to the date of the Practice Guide that attorneys fees would have been higher. The guide may therefore be useful in establishing that prior to 2007 the fee for the particular Counsel should not be higher than what is mentioned in the guide. It should be noted that the guide was produced after consultation with Judges and Registrars of the Supreme Court, key members of the legal profession with long and established experience in the taxation of costs and after a survey was conducted by the Monitoring Committee of the CPR of a wide cross-section of the legal profession in relation to the hourly rates charged by attorneys-at-law.

49. However, costs must not only be reasonably incurred and reasonable in amount but should also be proportionate. What proportionality seeks to do is to impose a sensible correlation between the costs a party may recover and the claim. It acts as a counter-weight to disproportionately high costs. In the two **Caroni** cases referred to earlier that were decided by the Court of Appeal, it was considered that there should be some proportionality between the amount of the award in terms of the award of damages and the costs for which the losing party is liable. While the amount of damages may be taken into account in determining whether the costs incurred are proportionate it may not be a reliable guide. It would not be unusual, for example, in small claims with some difficulty for costs to be a significant proportion of the damages and may well equal or exceed the award. Indeed in some cases where costs may be ordered there may be no damages awarded. Other factors should also, therefore, be relevant. I think that the other factors specifically referred to earlier in determining reasonableness, particularly complexity and the importance of the claim, are also material considerations in determining whether costs are proportionate.

50. Questions of how the Court should give effect to proportionality in the civil jurisdiction in England and whether proportionality takes precedence over reasonableness were considered in the case of **Lownds v Home Office Practice Note** [2002] EWCA Civ. 365. There the English Court of Appeal was of the view that the key to how Judges in assessing costs should give effect to proportionality is to determine whether the costs incurred were necessary. Proportionality

therefore in the assessment of costs was equated to necessity. Such costs which were not necessarily incurred would be considered disproportionate.

51. That however does not mean that in assessing the quantum of costs the receiving party is always subject to the necessity test. To determine the manner of assessment, the Court in **Lownds** recommended a two stage approach - a global approach and an item by item approach. In the global approach the judge is required to make a preliminary judgment of the proportionality of the claim for costs as a whole. The second stage is an item by item approach. If the costs as a whole appear not to be disproportionate then the test which the Court need apply is one of reasonableness - were the costs reasonably incurred and is the amount claimed reasonable in amount. If the costs were disproportionate, however, the Court should allow the item only if it was necessarily incurred and if so should allow a reasonable amount in respect of it.

52. The item by item approach referred to in **Lownds** is of course a reference to the items contained in a bill of costs. Many of cases to which this Court was referred in this appeal that involved the quantification of costs before the Industrial Court made reference to a bill of costs. A bill of costs is therefore well known to the Industrial Court. The use of a bill of costs has been challenged by the Appellant but I see no merit in that challenge. A properly drawn bill of costs should itemize the work done in the matter and give details of it and state the costs incurred therefor. The bill should also calculate the total costs incurred. The bill of costs is therefore a useful tool by which the receiving party can set out what he claims he has incurred in costs and the work in respect of which it was done. It facilitates the consideration of his claim by the Court. Its use should be encouraged and is important for the approach suggested hereunder to be used by the Industrial Court.

53. As in **Lownds** I suggest a similar two stage approach. The first stage is the global approach and the second an item by item approach. In the first stage the Court is required to form a preliminary opinion whether the total costs claimed were proportionate having regard to the considerations referred to earlier. The next stage is an item by item approach. If the Court is of the opinion that the costs are not disproportionate, all that is required is for the Court to

determine whether each item claimed was reasonably incurred and whether the amount claimed for it is reasonable. If however the Court at the global stage were to find the costs disproportional the manner of assessment is more rigorous. Then the receiving party will be required at the item by item stage to satisfy the Court that each item of costs was necessarily incurred and, if so, the amount charged therefor is reasonable.

54. I may mention that even though the Court may have a preliminary opinion that the total bill is not disproportionate, this does not debar the Court from finding on a review of each item of the bill that any particular item is disproportionate.

55. In **Lownds** it was noted (at para. 37) that in determining what is necessary a sensible standard has to be adopted. "This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided." I agree with that and adopt that as an appropriate standard for determining what is necessary.

56. It should be apparent from the above that the finding of proportionality determines the manner of the detailed assessment of the costs. It does not determine the final sum payable to the receiving party, nor does it mean that if the Court were to find the bill was disproportionate that no costs are recoverable. Such costs would be allowed as are necessary and reasonable in amount.

57. In the event that the Court is unable at the global stage to say that the bill viewed as a whole is proportionate or disproportionate, it will be obliged to carry out a detailed assessment of each item applying both the reasonable and necessary test. (See **Giambrone v JMC Holidays Limited** [2002] EWHC 2932 (at para. 33)). Further, if the Court is in any doubt whether any item is unreasonable or disproportionate that doubt should be resolved in favour of the paying party.

58. The reasonable and proportionate tests outlined above, in my judgment, will give effect to the provisions of section 10(3). They will also introduce consistency to the quantification of costs in the Industrial Court and will eliminate approaches that might do no more than inflame industrial relations.

59. In suggesting the approach mentioned above, I am of course aware that not all Judges of the Industrial Court are legally trained. I, however, do not think that those who are not should have any difficulty with the approaches suggested herein. In the unlikely event that they do, it is relevant to note that the Industrial Court has the power to appoint assessors to assist it in the determination of any matter over which it has jurisdiction (see section 8(6) of the Act). The Court is also free to make rules to regulate its practice and procedures for the hearing and determination of all matters before it (see section 13(1)).

60. It is my intention to remit this matter to the Industrial Court for the Court to determine the quantum of costs in accordance with the principles outlined in this judgment. However before leaving this appeal there are a few specific matters, which are relevant to the bills of costs in this matter, to which I would like to refer.

61. In the bill of costs there are items relating to Counsel's fee on brief as well as for the preparation of closing arguments and arguments relating to a no case submission. It is of course the case that Counsel is only to charge for the work that he has been instructed to do. The instructions to Counsel are usually contained on his brief and Counsel's fee would relate to those instructions. It therefore follows that Counsel's fee on brief should cover what he has been instructed to do. However, in the absence of a special agreement, it is accepted that there are certain matters that Counsel's fee on brief should cover (see **Loveday v Renton and another (No.2)** [1992] 3 ALL ER 184). Counsel's fee on brief on the trial of the trade dispute would usually cover all work by way of preparation for representation at the trial and attendance on the first day. It will therefore include the preparation of closing submissions. While no case submissions are not par for the course, I would think that Counsel's fee on brief would cover that as well. The fee on brief would also ordinarily take into account the need for Counsel to have meetings with each other during the course of the trial.

62. There is also contained in the bill of costs an item "instructing fee on brief." This item is not one usually seen on a bill of costs expressed in those terms. Normally, the work covered by the fee for instructing attorneys is carefully itemized in the bill of costs so that the Court knows to what the fee relates and what work in assessing instructing attorney's fee it should take into account. Care must therefore be taken to ascertain what work the fee covers and to bear in mind how that fee would impact on other items attributed to instructing attorney so as to ensure that the same work is not remunerated twice over. Indeed care should always be taken when assessing any fee to avoid double remuneration.

63. A number of items in the bill refer to "appearances" or what may also be referred to as refreshers. They should be calculated by reference to the time during which the hearing proceeded and should not be allowed for the days the Court did not sit and Counsel did not appear.

64. In view of the above the appeal is allowed, the award of costs is set aside and the question of the quantum of the costs payable to the Respondent Union is remitted to the Industrial Court for its determination. There being no exceptional circumstances in this appeal within the meaning of section 10(2) of the Act, there shall be no order as to costs.

Dated the 30th day of June, 2011

Allan Mendonça
Justice of Appeal