REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-271 of 2012

Trade Dispute Nos. 2, 118 & 119 of 2010

Between

CARIBBEAN DEVELOPMENT COMPANY LIMITED

And

CARIB GLASSWORKS LIMITED

Appellants

And

NATIONAL UNION OF GOVERNMENT AND FEDERATED WORKERS

Respondent

PANEL: **A. Mendonça J.A.**
J. Jones J.A.
P. Rajkumar J.A.

APPEARANCES
Mr. Reginald Armour SC, Ms. Vanessa Gopaul instructed by Ms. Tamilee Budhu on behalf of the Appellant
Mr. Anthony Bullock on behalf of the Respondent

Date Delivered: April 25th 2018

I have read the reasons for decision by Justice of Appeal Rajkumar and I agree with them.

A. Mendonça C.J (Ag)
Justice of Appeal

I also agree.

J. Jones J.A
Justice of Appeal

Judgment

Delivered by P. Rajkumar J.A.

Background

1. The appellants, (two related companies), appeal from a decision of the Industrial Court, (IC), which concluded that certain employees of the appellants, who **retired on medical grounds**, were entitled to receive payments calculated in accordance with a formula for severance payments[1], in **addition to** retirement benefits under their pension plan.

2. Articles 43 (b) (and 43(c) in each **2001 - 2004** collective agreement (CA) between the appellants and the union (which were identical)[2] specifically provided that members of the pension

[1] Although the IC used the phrase "severance benefits" it is clear that this is what was actually meant.
[2] hereinafter referred to interchangeably as Article 43 - 2001- 4 CA

plan will be entitled to **no other** superannuation or retirement benefits except as provided for under the said Plan. However, Article 44 of each CA provided for benefits calculated in accordance with a formula for severance payments in respect of early retirement, retirement on medical grounds and death in service payments to beneficiaries.

3. Article 43(b) (and 43 (c)) of each **2001- 2004** collective agreement between the appellants and the union were **not included** in the **2004 – 2007** collective agreements between the appellants, CDC and CGL, and the respondent union for 2004 – 2007 (the 2004 - 2007 CDC and CGL collective agreements). The 2004 - 2007 CDC and CGL collective agreements both simply provided that the company and the union had agreed to **continue discussions** pursuant to the **memorandum of agreement** executed by them on **July 20th 2004**.

4. Though expired, the terms of the 2004 -2007 CDC and CGL collective agreements had been incorporated into the individual contracts of employment of the employees[3]. See **Bank Employees Union –v- Republic Bank Limited, Civil Appeal No. 9 of 1995** and section **47(2)** of the Act**.**

Issues

5. At issue before the IC was the interpretation and application of Article 44 in the 2004-2007 Collective Agreement between CDC and the union (and its equivalent in the 2004-2007 Collective Agreement between CGL and the union). Specifically, whether or not the benefit for retirement

[3] 2007 – 2010 collective agreements between the appellants, CDC and CGL, and the respondent union were never registered and were therefor unenforceable. In any event they were in similar terms to the 2004 - 7 collective agreements - see page 3 of the judgement of the IC.

on, inter alia, medical grounds, described in Articles 44 (c) and (d) of the CDC and CGL 2004 - 2007 Agreements, was to be **in addition to** pension benefits payable to employees upon retirement under their Pension plan[4].

6. The issues before this court are slightly different, involving also preliminary issues of jurisdiction, as follows:-

i. Whether the decision of the Industrial Court involved an interpretation and application of the collective agreements between the union and the appellants**.**

ii. Whether the IC failed to exercise jurisdiction to rectify the relevant collective agreement.

iii. Whether there was any basis **in fact** for the IC to have exercised any jurisdiction under s. 50 of the IRA to **rectify** the 2004 – 2007 collective agreements, (so as to incorporate therein a term equivalent to the original article 43(b) (in the case of CDC) and 43(c) (in the case of CGL) from the 2001 – 2004 collective agreements, and Memorandum of Agreement dated May 4th 2004)[5].

iv. Further, whether, upon the expiration of the 2001 – 2004 collective agreements Article 43(b), and 43 (c) thereof would have been incorporated into the workers' individual contracts of employment.

v. If so whether the court of appeal has jurisdiction to entertain this appeal, or whether s. 16 (3) of the IRA precludes the jurisdiction of the court of appeal to inquire into a decision of the IC on the interpretation and application of the 2004 – 2007 collective agreements.

[4] pages 2, 5, 10 of the judgment of the IC
[5] see paragraph 22 of the appellants'' written submissions

vi. Even if s.16(3) of the Industrial Relations Act (IRA) is inapplicable to **exclude** the jurisdiction of the court of appeal, whether any of the grounds in s. 18 of the IRA applied, to **enable** the jurisdiction of the court of appeal.

Conclusion

7.

i. The decision of the industrial court involved an **interpretation and application** of the collective agreements between the union and the appellants.

ii. The IC did not err in failing to exercise its jurisdiction to rectify the 2004 – 2007 collective agreements as contended because there was no factual basis for such an exercise.

iii. There is no basis for contending that after the expiration of the 2001-2004 collective agreements, Articles 43 (b) or 43(c) from those collective agreements were incorporated into the workers' individual contracts of employment. This is because specific **inconsistent** provisions were incorporated by Articles 43 in the respective subsequent 2004-2007 collective agreements.[6]

iv. Therefore the court of appeal has no jurisdiction to entertain this appeal as the ouster clause at s. 16(3) of the IRA was applicable in the circumstances of this case, there being no breach of natural justice or lack of jurisdiction[7].

[6] These specifically made reference to and incorporated the memorandum of understanding dated July 20th 2004 , and **not** a preceding memorandum of agreement dated May 2004 which mirrored Article 43 b and c of the 2001-2004 collective agreements

[7] **SWUUT v CIL 1998 55WIR 478**

v. The ouster clause is applicable to **exclude** the jurisdiction of the court of appeal Even if it were not none of the grounds of s. 18 (d) or (e) of the IRA applied, so as to **enable** the jurisdiction of the court of appeal.

Disposition and order

8. The appeal is dismissed.

Analysis

9. The appellants contend:-

i. That s. 16(3) the Industrial Relations Act (IRA) would not apply to oust the jurisdiction of the court of appeal as no issue of **interpretation and application** of a collective agreement had been referred to the industrial court.

ii. That a **May 4th 2004** memorandum of agreement (MoA) made it clear that there was agreement on incorporation of Article 43 from the 2001-2004 collective agreements. Therefore there was no unresolved dispute on this issue and the Industrial Court had no jurisdiction to determine a matter that was not an unresolved dispute.

iii. That the Industrial Court erred in failing to exercise its jurisdiction under s. 50 of the Industrial Relations Act (IRA) **to rectify** the 2004 -2007 collective agreements to correct a patent error in the collective agreements (namely, the unintended duplication of benefits payable under the pension plan), so as to make clear that Article 43 in the 2001 – 2004 collective agreements,[8] also contained in MoA dated

[8] *that members of the pension plan shall receive no other superannuation or* ***retirement benefits*** *except provided for under the said (*pension*) Plan*

May 4th 2004, were incorporated therein. If so, upon expiration of the 2004 - 7 collective agreements, that clause would in turn have been incorporated into the workers' individual contracts of employment.

iv. That the decision of the Industrial Court in its exercise of interpretation of the collective agreements, was **erroneous in law** under s.18 of the IRA, in not taking into account (a) relevant background information available to or known to the parties at the time of the agreements, such as the May 2004 memorandum of agreement, (b) the contextual meaning of the terms and conditions of employment, and (c) custom and practice by which neither the companies nor the union had hitherto construed article 44 as entitling workers to double benefits – (benefits under the pension plan as well as benefits for early retirement).

The Industrial Court therefore erred **in law** by not applying those principles of construction in arriving at its conclusion that **both** retirement benefits under the pension plan, **in addition to** payments calculated under the severance formula, were payable to workers who retired early on medical grounds.

v. That the Industrial Court erred in law in failing to pay regard to the fact that the respondent was **estopped** from invoking terms of Article 44 (c) and (d) of the 2004 - 2007 collective agreements, never having previously claimed to be entitled to benefits under both the Pension plan and for retirement on medical grounds .

vi. That, as the Industrial Court erred in law in its application of the principles of contractual interpretation, the court of appeal has jurisdiction under s. 18 (d) and (e) of the IRA.

10. The respondent union contends:-

Jurisdiction

i. that the issue as to whether **only** retirement benefits under the pension plan are payable to workers who are entitled to early retirement on medical grounds, involves an interpretation and application of the collective agreements. Accordingly, the Court of Appeal would have **no jurisdiction**, such being specifically excluded by s. 16(3) the Industrial Relations Act (IRA). Section 16(3) of the IRA provides that "*the decision of the court in any matter before it under Sub Section 2 shall be binding on the parties thereto and is final"*.

ii. A decision under Section 16 (2) can be challenged on the basis of a lack of jurisdiction or breach of natural justice. However even assuming, but not accepting, that the Industrial Court made an error of law in its interpretation of Articles 44 (c) and (d) of the 2004-7 collective agreements, the decision would not be challengeable on the basis of an error of law on a matter within its jurisdiction.

iii. Further the Industrial Court did not err in law in not exercising a jurisdiction to rectify the collective agreements under s. 50 of the IRA[9], as there was no basis for exercising any such jurisdiction to rectify in this manner. The evidence revealed a sequence of events leading to:-

a. the deliberate non-incorporation of Article 43 of the 2001-4 collective agreements, and

b. the deliberate incorporation of a different provision into Article 43 of the 2004-2007 collective agreements – (that found in memorandum of agreement (MoA) dated July 20th 2004, and **not** that found in memorandum of agreement (MoA) executed on May 4th 2004).

[9] by not incorporating Article 43 b and 43c of the 2001 -2004 collective agreements in the 2004 -2007 collective agreements

v. That even if the appellants were correct and s. 18 of the IRA applied so as to permit an appeal on an error of law, the Industrial Court **would not have** committed an error of law. This was because:

(a) it properly applied principles of contractual interpretation,

(b) it found Article 44 in each collective agreement to have been unambiguously drafted ,

(c) it dismissed the argument that the Union was estopped from contending that both benefits were payable,

(d) in addition to Article 44 it considered Article 43[10] and specifically referred to the agreement to continue discussions pursuant to the MoA executed on July 20th 2004.

Its conclusion, based on that analysis, was that by the clear terms of Article 44 (of the 2004 -2007 collective agreements), **both** pension benefits, **and benefits** calculated on the severance benefit formula, were payable to workers who retired on medical grounds. There was no ambiguity which could have justified "*an extraneous search for meaning"*.

Jurisdiction

11. **Section 16 of the IRA provides:-**

> ***16.*** *(1) Where any question arises as to the interpretation of any order or award of the Court, the Minister or any party to the matter may apply to the Court for a decision on such question and*
> *the Court shall decide the matter either after hearing the parties or, without such hearing, where the consent of the parties has first been obtained. The decision of the Court shall be notified to the parties and shall be binding in the same manner as the decision on the original order or award.*
> *(2) Where there is any question or difference as to the interpretation or application of the provisions of a registered collective agreement (within the meaning of Part IV) any employer or trade union having an interest in the matter or the Minister may make application to the Court for the determination of such question or difference.*

[10] at pages 4 and 5

(3) The decision of the Court on any matter before it under subsection (2) shall be binding on the parties thereto and is final.

12. Previous decisions of this court have established that (all emphasis added)

a. When a collective agreement expires its terms and conditions *survive, not as terms of a registered collective agreement but as the terms and conditions of the individual contract of employment of the workers.* In fact it has even been suggested that **"***They continue on until those terms are replaced, amended or confirmed by the new collective agreement"*[11].
b. That, pursuant to s. 16(3) of the IRA, the decision of the Industrial Court as to the interpretation or application of the provisions of a registered collective agreement shall be binding on the parties thereto and is final. *That while section **18 (2)** creates a right of appeal that section is **subject to** the provisions of the IRA and therefore of **section 16(3)**.* **Neal and Massy Industries Limited v TIWU Civ. App. 21 of 1975** delivered December 5th 1977 per Rees JA. See also **Republic Bank Limited v Bank Employees Union Civ. App. No 96 of 1994** delivered November 13th 1998 **per Hosein JA** "*On a matter of interpretation or application of a term in a registered collective agreement, there can be no right of appeal to the Court of appeal under section 18(2) because the right of appeal thereunder is expressly granted subject to the provisions of section 16(3)".*
c. That the route by which a dispute reaches the Industrial Court is not material to the issue of the applicability of s. 16(3), once such dispute involves interpretation or application of the provisions of a registered collective agreement. **Republic Bank Limited v Bank Employees Union Civ. App. No 96 of 1994**
d. The fact that a registered collective agreement has expired does not detract from the applicability of section 16(3) if the industrial court is called upon to interpret or apply the provisions of a registered collective agreement which, though expired, have become terms of workers' individual contracts of employment. **Republic Bank Limited v Bank Employees Union.** [12].
e. *That it is arguable that s. 16(3) would not apply in cases where it is contended that the Industrial Court has acted without jurisdiction or in breach of natural justice*[13].

[11] Bank Employees Union –v- Republic Bank Limited, Civil Appeal No. 9 of 1995 [Tab 4] per L. Jones J.A

[12] Republic Bank Limited v Bank Employees Union Civ. App. No 96 of 1994 delivered November 13th 1998 per Hosein JA. (Although it was suggested otherwise obiter in the previous decision of **SWUUT v CIL 1998 55 WIR 478** delivered March 24th 1998 the former decision now reflects the law and this was accepted to be so by both parties.

[13] De la Bastide CJ SWUUT v CIL 1998 55 WIR 478 delivered March 24th 1998

Whether the IC acted within jurisdiction

13. The appellants contended that the IC acted without jurisdiction in so far as:-

a. **No referral** had been made to the IC for it to **interpret and apply** any provision of a collective agreement;

b. It failed to pay regard to the fact that there was **no unresolved dispute** in relation to Article 43 of the 2001 – 2004 collective agreements, as (i) this had been expressly incorporated into a memorandum of agreement dated May 2004, or alternatively, (ii) had been carried over and incorporated into the workers' individual contracts of employment upon expiration of the 2001-2004 collective agreements. This contention was made notwithstanding the new replacement Article 43 incorporated into the 2004 - 2007 collective agreements, which instead provided that the parties had agreed to **continue discussions**.

c. It **failed to exercise its jurisdiction** under s. 50 of the IRA **to rectify** a clear omission in the 2004 – 2007 collective agreements, given that the parties had already agreed by memorandum of agreement dated May 4th 2004, that workers would be entitled to benefits under the Pension plan only, (and not double benefits if they retired early on medical grounds).

14. However, for reasons set out hereunder:-

(i) there is **no basis for contending** that **no referral** was made to the IC for interpretation and application of a collective agreement as alleged;

(ii) there was **clearly an unresolved dispute** in existence in relation to the issue of whether benefits payable on early retirement on medical grounds were **in addition to** those payable under the Pension Plan;

(iii) there was **no factual basis** for the IC to exercise jurisdiction under s. 50 of the IRA to rectify the 2004- 2007 collective agreements.

15. Accordingly the IC acted **within jurisdiction**. Therefore, the decision of the IC in this matter on the interpretation and application of the collective agreements is final and binding by reason of s. 16(3) of the IRA.

Whether any referral had been made to the IC for it to interpret and apply any provision of a collective agreement

16. It has already been decided by the court of appeal, and accepted by attorney for the appellant, that **the route by** which a dispute reaches the Industrial Court **is not material** to the issue of the applicability of s. 16(3), once such dispute involves interpretation or application of the provisions of a registered collective agreement. **Republic Bank Limited v Bank Employees Union Civ. App. No 96 of 1994** delivered November 13th 1998 per Hosein JA at page 3

> "*I can see no reason in logic or industrial relations why the same question of interpretation involving the same parties, and involving a provision which (apart from nomenclature) has not changed, would not be caught by the provision for finality under section 16(3),* ***simply because the route by which the issue has reached the Court is section 59(2)****. In my view, the Respondents are entitled to rely on any provision of the act relevant to the question raised and there* ***is no reason why the application of section 16(3) should depend on the route by which the Minister chose to place the matter before the Court.*** *The effect of contrary submissions is to place greater importance on the form or method by which the matter came before the Court than on the actual substance of the matter itself.*

17. The issue which had been referred by the union to the Minister in the instant case was the alleged failure of the employer to pay to the workers retirement benefits in accordance with Article 44 (c) and 44 (d) of their respective collective agreements[14]. The certificate of unresolved dispute omitted the reference to the Articles of the collective agreements. However, the Industrial Court fully appreciated that the resolution of the dispute involved interpretation and application of Article 44 and consideration of Article 43 of the collective agreements for 2004 – 2007[15].

18. In fact in order for the Industrial Court to determine whether workers were entitled to double benefits it **had to interpret Article 44** of the 2004 - 7 collective agreements[16]. In so doing it also had to consider Article 43 of the 2001-4 collective agreements and the Memorandum of agreement dated May 4th 2004 to determine whether those could have been applicable. (See also for example paragraphs 14 and 16 of evidence and arguments of CDC filed in the IC).

19. It is clear therefore that a referral had been made to the Industrial Court which required it to specifically interpret and apply provisions of a collective agreement, and the decision of the Industrial Court involved an interpretation and application of the collective agreements between the union and the appellants.

[14] pages 241 and 244 RoA
[15] see page 4 of the judgement
[16] pages 8,9, 10 of the judgement

Whether the Industrial Court **(IC) failed to have regard to the fact that there was no unresolved dispute in relation to article 43 of the 2001 – 2004 collective agreements**

20. If there was no such unresolved dispute then it contended (at paragraphs 57 -60 of its submissions) that the IC would have had no jurisdiction. It is necessary therefore to consider whether there was any unresolved dispute with respect to article 43 of the expired 2001-2004 collective agreement.

21. The appellants contend that:

(i) Article 43 of the 2001-2004 collective agreements had been expressly incorporated into a memo of agreement dated May 4th 2004, or alternatively

(ii) was carried over and incorporated into the workers' individual contracts of employment upon expiration of the 2001-2004 collective agreements.

However article 43 of the 2001-2004 collective agreements had been **replaced** by the new article 43, which provided that the parties had agreed to continue discussions.

22. As it is important to understand the context and evolution of article 43, and the status of the May 2004 memorandum upon which such reliance is placed, the relevant provisions are set out hereunder as extracted from the written submissions of the appellants.

23. **Provisions of the collective agreements**

The Collective Agreements -weekly paid workers of CDC:

- **Collective Agreement for the period 2001 to 2004 A** executed on 12th April 2002 (all emphasis added)

ARTICLE 43 – PENSION PLAN

(a) All permanent employees hired by the Company from 4th June 1990 shall be required to join the McEnearney Alstons Pension Plan as a condition of service.

(b) Members of the Pension Plan will be entitled to no other super annuation or retirement benefits except as provided for under the said Plan.

ARTICLE 44- RETIREMENT

(a) The retirement age for all employees shall be sixty (60) years.

*(b) Employees who are fifty (50) years of age and over and/or have twenty years of more effective years of service, may **retire** at any point before their retirement age and upon retirement will be **paid** a sum calculated to their date of retirement **in accordance with the severance formula** in Article 26. The granting of the **early retirement facility** shall be at the discretion of the Company and the Company shall not normally approve of more than eight (8) such terminations in a calendar year.*

*(c) The **retirement benefit** described in (c) (*sic*) above shall also be paid to those employees upon **retirement on medical grounds** and to their beneficiary upon **death in service**.*

Memoranda of Agreement executed on 4th May 2004 – *pg 84 of RA*:

"ARTICLE 43 – PENSION PLAN

(a) All permanent employees hired by the Company from 4th June 1990 shall be required to join the Mc Enearney Alstons Pension Plan as a condition of service.
(b) Members of the Pension Plan will be entitled to no other super annuation or retirement benefits except as provided for under the said Plan.

Memoranda of Understanding executed on 20th July 2004 – (*pg 171 of RA):*

*"2. The parties have **agreed in principle to continue discussions** on all **Pension** and **Medical Plans**. Within 2 weeks."*

Collective Agreement for the period 2004 to 2007 executed on 14th April 2005 – :

ARTICLE 43 – PENSION PLAN

*The Company and the Union have **agreed to continue discussions** pursuant to the **Memorandum of Agreement** executed by the parties on **20th July 2004***

ARTICLE 44- RETIREMENT
(a) The retirement age for all employees shall be sixty (60) years.

(b) Employees who are fifty (50) years of age and over and/or have twenty years of more effective years of service, may retire at any point before their retirement age and upon retirement will be paid a sum calculated to their date of retirement in accordance with the severance formula in Article 26. The granting of the early retirement facility shall be at the discretion of the Company and the Company shall not normally approve of more than eight (8) such terminations in a calendar year.

(c) The retirement benefit described in (b) above shall also be paid to those employees upon retirement on medical grounds and to their beneficiary upon death in service.

24. The background to the 2004-2007 collective agreements is also set out in the written submissions of the appellant set out hereunder (all emphasis added). The following are not in dispute:-

i. Article 43(b) in the 2001-2004 CDC collective Agreement is identical to Article 43(c) of the 2001-2004 CGL Collective Agreement. Together they are referred to hereafter as Article 43.

Article 43 (b) of the 2001-2004 CDC Collective Agreement specifically provided that "*members of the Pension Plan will be entitled to no other superannuation or retirement benefits except as provided for under the said Plan*.

ii. A similar provision was incorporated into a memorandum of agreement dated **May 4th 2004.**

iii. The appellant accepts that the parties (CDC and the Union and, CGL and the Union) were unable to agree on certain articles and as a result, they reported a trade dispute in respect of the unagreed articles. Among the unresolved articles was Article 43 and Article 44 of the 2004-7 CDC and CGL Collective Agreements (See paragraph 46(h) et seq of the appellants' written submissions);

iv. Thereafter lockout action was taken by CDC and CGL against the Workers (46(1) ibid);

v. The lockout action came to an end upon the parties executing a Memorandum of Understanding (sic) dated **20th July 2004** by which they agreed, inter alia, that the parties would **continue discussions** on all Pension and Medical Plans and that the unresolved articles would be referred to the Industrial Court for its determination (paragraph 46(j) ibid);

vi. On January 24th 2005 the Industrial Court held in respect of Article 43 of the CDC and CGL Collective Agreements that the parties should incorporate their agreement contained in the Memorandum of Understanding **dated 20th July 2004** that they would continue discussions in respect of the Pension and Medical Plans: (46(k) ibid);

vii. The Industrial Court also held in respect of Article 44 of the CGL Agreement that it should be retained save and except the sub-article dealing with a Provident Fund which was no longer in existence: (46(l) ibid);

25. The appellant CDC's case was *inter alia* that i. by Memorandum of Agreement dated 4th May 2004 the parties agreed to the incorporation of Article 43 in the 2004-2007 Collective Agreement but that it had been omitted from the Collective Agreement in error. Instead, the parties recorded an agreement to continue discussions in respect of the Pension and Medical Plans.

26. Further Article 43 was contained in the previous Collective Agreement for the period 2001-2004 and, was therefore incorporated into the Workers' terms and conditions upon the expiration of that agreement. As such, in the absence of an agreement between the parties to vary or remove

Article 43 from the 2004-2007 Collective Agreement, Article 43 remained intact as a term and condition of the Workers' contracts of employment.

27. However, although the 2004-2007- collective agreements were signed in July 2005, neither Article 43(b) nor 43 (c) of the 2001-4 collective agreements nor the May 4th 2004 MoA was incorporated therein. Instead, the July 2004 memorandum of agreement was incorporated as Article 43 in both the 2004 - 7 CDC and the 2004 - 7 CGL collective agreements. Article 43 of the Collective Agreements for CDC and CGL -2004 to 2007- provided "*the company and the union have agreed to **continue discussions** pursuant to the Memorandum of Agreement executed by the parties on the **20th July 2004***."

28. The 2004 to 2007 Collective Agreements for CDC and CGL therefore specifically deleted Article 43 from the previous Collective Agreements and replaced it with a new Article 43 in each collective agreement.

29. Unlike Article 43 from the previous Collective Agreements the new Article 43 did **not** specifically provide that "*members of the Pension plan will be entitled to no other superannuation benefits except as provided for under the said Plan*[17].

30. The conclusive status of the May 2004 MoA, alleged by the appellants was clearly not accepted by the Union. The union contended that there was no factual basis for asserting that an inadvertent omission of Article 43 b from the 2001-2004 collective agreement, in the 2004- 2007

[17] Article 43 of the 2004- 2007 CDC collective agreement was identical to article 43 of the 2004- 7 CGL collective agreement.

collective agreement had occurred, as the replacement Article 43 in those collective agreements had specifically addressed the issue of benefits under the Pension Plan, leaving it for further discussions. There was no agreement therefore for 2004- 2007 that **only** pension benefits would be payable to workers who retired on medical grounds as contended.

31. Objectively, although memorandum of agreement had been executed on May 4th 2004 (which was in the same terms as Article 43 b and 43 (c) of the 2001-2004 collective agreements)[18], a further memorandum of agreement was executed in **July 2004** which provided otherwise, namely that parties had ***agreed in principle to continue discussions*** *on all* ***Pension*** *and* ***Medical Plans***.

32. Further, even if the background facts had been taken into account, rather than simply the language of articles 44 of the 2004- 2007 collective agreements, the IC had before it evidence that after the execution of that May 4th 2004 memorandum of agreement , lock out action had occurred and a trade dispute had been referred to the industrial court. That had resulted in an order on January 24th 2005 that the clause in the **July 2004** Memorandum of agreement be incorporated into the 2004- 2007 collective agreements, (and not that from the May 2004 MoA).

33. Pursuant to that order the 2004 -2007 collective agreements which were then executed both **omitted Article 43 and incorporated the clause** that the parties would continue discussions **pursuant to MoA dated July 20th 2005**.

[18] which provided for pension benefits **only** for members of the Pension Plan

34. Article 43, as incorporated into the 2004-2007 Collective agreements, was in quite different terms from that in the original Article 43 in the 2001- 2004 collective agreements which it replaced after industrial action, and an order of the IC.

35. There is therefore no basis in fact for contending that there was no unresolved dispute in relation to Article 43, as a. there was a MoA subsequent to the May 2004 MoA, and b. a replacement Article 43 in quite different terms incorporated into the 2004- 2007 collective agreements. Further Article 43 from the 2001- 2004 collective agreements was not carried over and incorporated into the workers' individual contracts of employment upon expiration of the 2001-2004 collective agreements. It was clearly superseded by the July 2004 memo and the 2004 – 2007 collective agreements

36. Accordingly there was clearly an unresolved dispute as to the content, meaning, and effect if any, of the new Article 43 in the 2004-7 collective agreements in relation to Article 44. Therefore any contention that the IC lacked jurisdiction on the basis that no unresolved dispute existed must fail as the May 4th 2004 MoA did **not** settle the issue of double benefits as contended.

37. The appellant's arguments turn upon an alleged ambiguity between the former Article 43 b and 43 c of the **2001 -2004** collective agreements for CDC and CGL, and Article 44 of those agreements. The alleged error of the IC lay in failing to consider that alleged ambiguity and construing the terms and conditions of the workers' employment appropriately. However, Articles 43 (b) and (c) of those **2001 -2004** collective agreements were not repeated in the subsequent 2004-2007 collective agreements.

38. The issue of whether, and if so how Article 43 from those **2001 -2004** collective agreements can be read into the **2004 – 2007** collective agreements does not arise, as it was replaced entirely by an inconsistent provision.

39. Similarly, the applicability of Article 43, from those **2001 -2004** collective agreements, to the **terms and conditions of the individual contracts of employment** of the affected workers after the expiration of those agreements, despite the incorporation of a new Article 43 in quite different terms, in the subsequent 2004-2007 collective agreement which replaced it, also would not arise.

40. The fact that a registered collective agreement has expired does not detract from the applicability of section 16(3) if the industrial court is called upon to interpret or apply the provisions of a registered collective agreement which, though expired, have become terms of workers individual contracts of employment[19].

41. In **Republic Bank Limited v Bank Employees Union Civ. App. No 96 of 1994** delivered November 13th 1998 per Hosein JA at page 3 (all emphasis added)-

> *It is not in dispute that if the registered collective agreement were extant then the finality of the Industrial Court's decision on such a matter could not be questioned. The controversy between the parties clearly involves a "question or difference as to the interpretation or application" of the workers individual contracts which, where applicable, are in precisely the same terms as the relevant expired collective agreement within the meaning of Part 4."*

He concluded that

[19] **Republic Bank Limited v Bank Employees Union Civ. App. No 96 of 1994** delivered November 13th 1998 **per Hosein JA –**

> "*the provision as to finality under Section 16(3) therefore is aimed at confining questions or differences of "interpretation or application to the Industrial Court and* ***the fact that the collective agreement has expired, is not relevant to the nature of the question or difference on matters of interpretation or application***. *The fact that it had expired does not mean that it has ceased to be a registered collective agreement*.

42. Therefore, even assuming that there may have been ambiguity between Article 43 in the 2001- 4 collective agreements for CDC and CGL, as to whether **only** benefits under the pension plan were payable[20], and Article 44 – (the immediately following express provision for early retirement benefits based on the severance formula),[21] there is no such ambiguity in collective agreements from 2004 – 2007 and onwards. The provisions equivalent to the original Articles 43 b or 43 (c) are not found in those collective agreements.

43. Further the appellant accepts that without the original Article 43 b (or c) from the 2001 – 2004 collective agreement having been expressly incorporated, the provision which actually was incorporated in each, namely the new Article 44, was not on its face, ambiguous[22]. It is when read alongside the original article 43 that the alleged conflict appears. However for the reasons set out above there is absolutely no basis for contending that the original Article 43 survived the expiration of the 2001 – 2004 collective agreement after being replaced by a different Article 43 in the subsequent collective agreement.

[20] because of a possible conflict between that provision in 43 (b) (and 43 (c)

[21] to workers who took early retirement, or retired on medical grounds, or to beneficiaries of workers who had died in service

[22] ***It is accepted that ex facie Article 44 of the 2004-2007 Collective Agreement appears unambiguous***. *However, when read alongside Article 43 of the* ***2001-2004*** *Collective Agreement, there is an obvious conflict between the two articles in that Article 43 restricts retirement benefits to* ***only*** *those payable under the Pension Plan whereas Article 44 allows retirement benefits in cases of retirement on medical grounds*. (all emphasis added)

Rectification

44. There was no allegation of a breach of natural justice. Whether the IC acted without jurisdiction so that the ouster clause in s. 16 (3) of the IRA was inapplicable depends on whether the appellants' arguments can be accepted that the IC erred in not exercising its jurisdiction under s. 50 of the IRA to rectify a clear omission in the 2004 - 2007 collective agreement[23].

45. The appellant's contention was that the workers could not, on early retirement on medical grounds, get both severance benefits as well as benefits under the Pension Plan and the Industrial Court's decision was without jurisdiction in that it declined to exercise jurisdiction to rectify the Collective Agreement 2004 to 2007 by incorporating therein the MoA of May 4th 2004.

46. The issue is whether there was sufficient material placed before the IC to justify rectification, or did the material that was before it justify the apparent dismissal of this as an issue. Article 43 in the 2001 to 2004 Collective Agreement which may permit such a contention is notably and noticeably missing from the 2004 to 2007 Collective Agreements between the unions and the appellants.

Whether any factual basis for rectification

47. Further the context in which Article 43 came to be included in the 2004-2007 Collective agreements as set out above precludes any suggestion that the omission to re incorporate the

[23] ***Section 50***

An application may be made to the Court by either of the parties to a registered agreement to amend such an agreement for the following purposes only –

(a) The correction of any patent error or ambiguity occurring in the registered agreement;

(b) The inclusion of any matter, agreed upon at the time of the negotiation of the agreement, but inadvertently omitted therefrom;

(c) *The deletion of any matter contained in the agreement, not agreed to at the time of the negotiations of the registered agreement, but inadvertently included therein."*

original Article 43 could have been in error. There was simply no basis for rectification to incorporate the terms of the May 2004 memo of agreement, given the context of that memo and the fact that it had been superseded by both the subsequent inconsistent July 2004 MoA, and the 2004 -7 collective agreements, which expressly incorporated that inconsistent July 2004 MoA.

48. The effect of:

i. that May 2004 memo of agreement, promptly superseded by

ii. the July 2004 memo of agreement,

iii. the subsequent execution of the 2004-2007 collective agreements, and

iv. even the unregistered 2007-2010 collective agreements,

all pointed to the deliberate exclusion of Article 43 of the 2001- 2004 collective agreements in subsequent collective agreements.

49. The IC could hardly be faulted for not discerning a basis for reading into the 2004 -7 collective agreements a provision – (Article 43 of the 2001- 2004 collective agreements), which was simply not there, and instead giving effect to the terms of Article 44 from the 2004 -2007, a provision which was there[24].

50. The IC would have been fully entitled to consider that the May 2004 memo did not have the effect of settling the issue and that no basis for rectification had been established. The IC did consider article 43 and 44, and considered that article 44 in its opinion clearly permitted, and in

[24] upon expiration of the 2004 -2007 collective agreements their terms became incorporated as terms of the individual workers contracts of employment

fact required, **both** benefits under the Pension Plan and benefits provided for in the collective agreement under Article 44, were to be paid. In fact it expressly found that Article 44 on interpretation "*unambiguously conveys the intention of parties to provide severance benefits in addition to pension benefits for workers retiring on medical grounds"*

51. Further, it had before it evidence:-

a. that there was a subsequent July 2004 memo of understanding (MoU), contradictory to the May 2004 MoA, and,

b. that, after lock out action and referral to the IC, the IC had made an order that the terms of the July 2004 MoU, and not the terms of the May 2004 MoA, be incorporated into the 2004-2007 collective agreements, and,

c. that in fact it was terms of that memo and not the terms of the May 2004 MoA relied upon by the appellant that were actually incorporated into the 2004 -7 collective agreements.

The IC could therefore hardly be faulted for not exercising any jurisdiction to rectify those 2004 - 2007 collective agreements in the terms suggested.

Conclusion

52. Given:

a. That the **referral** to the IC required it to **interpret** the terms of the 2004 - 2007 collective agreements and apply them, in order to determine which term governed the issue of benefits payable on retirement on medical grounds;

b. That there was an **unresolved dispute** in existence in relation to that issue;

c. That the IC was exercising jurisdiction to **interpret and apply** the terms of collective agreements,

d. that it did interpret and apply Article 44 of the 2004 - 7 collective agreements as it had to, given that this was incorporated into the terms of the individual contracts of employment of workers[25].

e. that the IC did not err in failing to exercise its jurisdiction to rectify the 2004 – 2007 collective agreement as contended, because there was no factual basis to justify such an exercise,

f. that there is no error of jurisdiction demonstrated on these facts,

the jurisdiction of the court of appeal would be excluded by the clear terms of s. 16 (3) of the IRA. As Section 18(2) of the IRA is expressly subject to the Act, the specific exclusion of jurisdiction in s. 16 (3) applies[26][27][28]. That would be sufficient to dispose of the matter.

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[25] when a collective agreement expires its terms and conditions *survive, not as terms of a registered collective agreement but as the terms and conditions of the individual contract of employment of the workers.* ***They continue on until those terms are replaced, amended or confirmed by the new collective agreement.[25]***

[26] Section 18(2) of the IRA provides:

> *"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:*
>
> *(a) ……..;*
> *(b) ……..;*
> *(c) ……..;*
> *(d) that any finding or decision of the Court in any matter is erroneous in point of law; or*
> *(e) that some other specific illegality not mentioned above, and substantially altering the merits of the matter, has been committed in the course of the proceedings."*

*Section **47(2)***

> *The terms and conditions of a registered agreement shall, where applicable, be deemed to be terms and conditions of the individual contract of employment for the workers comprised from time to time in the bargaining unit to which the registered agreement relates."*

[27] ***While** section 18 (2) creates a right of appeal that section is subject to the provisions of the IRA and therefore of section 16(3).* **Neal and Massy Industries Limited v TIWU Civ. App. 21 of 1975**

[28] In **Republic Bank Limited v Bank Employees Union Civ. App. No 96 of 1994** delivered November 13th 1998 per Hosein JA at page 6 – *Section 16(3) is of general application and its provision applies so long as a question arises as to the interpretation or application of a registered collective agreement in whatever circumstances. It is true that **section 18 (2) creates a right of appeal but that section is subject to the provisions of the Act and therefore of section 16(3)**. Thus on a matter of interpretation or application of a term in a registered collective agreement , there can be no right of appeal to the Court of appeal under section 18(2) because the right of appeal thereunder is expressly granted subject to the provisions of section 16(3).*

Conclusion

Disposition and order

53. The appeal is dismissed. We will hear the parties on costs.

Peter A. Rajkumar

Justice of Appeal