REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. P306 of 2014
Industrial Relations Offence No. 23 of 2013 and
Trade Dispute No. 717 of 2013 (Consolidated)

In the matter of the Industrial Relations Act Chap. 88:01

AND

In the matter of an Industrial Relations Offence under the Industrial Relations Act Chap. 88:01

BETWEEN

Trinidad & Tobago National Petroleum Marketing Co. Ltd.

Appellant

AND

Oilfield Workers' Trade Union

Respondent

****

Panel:

A. Mendonca J.A.

N. Bereaux J.A.

R. Narine J.A.

Appearances: Mr. S. Jairam SC, Mr. A. Khan, Mr. D. Ali, Ms. A. Cheeseman instructed by Ms. T. Rojas for the Appellant

Mr. D. Mendes SC, Mr. M. Quamina, Mr. A. Bullock instructed by Mr. I. Ali for the Respondent.

DATE DELIVERED: 24th March, 2016

JUDGMENT

Delivered by R. Narine J.A.

It is my misfortune that I must disagree with my learned brothers. My reasons for so doing appear below.

PROCEDURAL HISTORY:

1. The appellant in this matter is a state owned company (the Company) engaged inter alia, in the sale and distribution of petroleum products in Trinidad and Tobago and within the Caribbean region. The Company has in its employ 450 to 500 workers and has a compound at Sea Lots, Port of Spain and one at Pointe a Pierre. The respondent in this action is a trade union (the Union) representing several groups of workers at the Company.

2. On 20th August 2013 the Company filed a complaint (IRO No. 23 of 2013) at the Industrial Court alleging that the Union took industrial action which was not in conformity with the provisions of the Industrial Relations Act Chapter 88:01 (the Act) and was therefore guilty of an industrial relations offence under Section 63 of the Act. The Company claimed against the Union inter alia, the cancellation of the Union's certificate of recognition and that the Union be fined the maximum penalty.

3. On 24th October 2013 the Union reported a trade dispute (No. 717 of 2013) to the Honourable Minister of Labour and Small and Micro Enterprise Development seeking inter alia, a declaration that the dismissal of sixty eight workers by the Company was harsh, oppressive and contrary to the principles of good industrial relations practice and an order reinstating the workers. That dispute remained unresolved and was referred by the Honourable Minister to the Industrial Court on 11th February 2014.

4. By consent of the parties the industrial relations offence filed by the Company and the trade dispute filed by the Union, were consolidated.

5. The instant matter is an appeal from the decision of the Industrial Court dated 19th November 2014 in which it upheld the Union's no case submission, dismissed the industrial relations offence brought against the Union and found that the dismissal by the Company of the sixty-eight workers in question was harsh, oppressive and not in keeping with the principles of good industrial relations practice. The Industrial Court further ordered the Company to reinstate the workers immediately, and to pay them all salary and pecuniary benefits lost, together with damages in the sum of $40,000.00.

THE FACTS:

6. As a contingency plan in the event of any type of fuel disruption, the Company decided to have senior management staff trained by their juniors in the loading of road tank wagons which deliver fuel to customers

7. On 13th August 2013 the General Manager of Retail and Industrial Fuel, Ms. Deborah Dinnoo-Benjamin and four other senior employees arrived at the Company's fuel bond at the Gantry in Pointe a Pierre to receive the training. Mr. Ricky Ramlochan, an acting Gantry Foreman and Mr. Ramdass Kissoon, an acting Chargehand were approached and requested to conduct the training. They refused on the basis that training of managers was not a part of their job description.

8. Ms. Dinnoo-Benjamin held separate meetings with Mr. Ramlochan and Mr. Kissoon as a consequence of their refusal. Both workers requested the presence of a Union representative at the meeting. These requests were refused on the ground that the situation was not a Union matter. Both workers requested to use the washroom and shortly after returned to the meetings with a Union representative, Mr. Lex Francois. Ms. Dinnoo-Benjamin notified Mr. Francois that the matter at hand was one involving supervisor and employee and not a Union issue. Mr. Francois in turn informed her that the workers were entitled to representation from their Union and that it was not the duty of the workers to train

managers/supervisors. The meeting ended and Ms. Dinnoo-Benjmain informed the two workers that they were relieved of their duties for the day for their refusal to obey a work instruction.

9. Shortly afterwards the road tank wagon drivers and the Gantry workers at the Pointe a Pierre compound stopped work.

10. The work stoppage extended to the Company's Sea Lots compound on 14th August 2013. It continued at both locations up to 15th August 2013. Meetings were held by the Union with the workers on those days.

11. The Company's operations were disrupted. No deliveries left the Pointe a Pierre compound on the 13th August 2013 and road tank wagons filled with product were left idle while production operations in the lube plant were at a standstill on the 14th and 15th August 2013. The situation engaged the attention of the media.

12. A list containing the names of eighty five workers who allegedly assembled at the gate of the Sea Lots compound on the 14th and 15th August 2013 were prepared by senior estate constable Mr. Shyam Mahabir on instructions from the Company.

13. After the three day incident, notices were sent to the eighty five workers suspending them with pay. They were not permitted on the compound nor were they allowed to perform their duties.

14. The eighty five workers were subsequently informed by correspondence dated 30th September 2013 that they were each charged for refusal to perform job functions, participating in an illegal work stoppage and absence from their workstations without authorisation. They were requested to attend a disciplinary hearing in respect thereof.

15. The disciplinary hearings were conducted by a management team of fifteen persons which comprised the Company's Chief Executive Officer, all General Managers and the Industrial Relations Manager. The hearings took place on 7th, 8th, 9th and 10th October 2013. At the hearings the charges were read and each

worker was given an opportunity to respond. Some workers opted to remain silent while others furnished explanations relating to health and safety issues.

16. On 21st October 2013 sixty eight workers were dismissed from the Company following the disciplinary hearings. They were dismissed pursuant to section 63(1)(c) of the Act for participating in industrial action not in accordance with Part V of the Act. Fifteen workers were exonerated as the management team accepted that those workers were not present on the compound on the specified days. Two workers received a two week suspension without pay.

FINDINGS OF THE INDUSTRIAL COURT:

17. By consent of the parties the industrial relations offence and the trade dispute were heard together. The Company raised a preliminary point on the jurisdiction of the Court under Part V of the Act to hear and determine the trade dispute. The Union made a no case submission after the Company had closed its case.

18. On 19th November 2014 the Court ruled that it had jurisdiction to hear the trade dispute and upheld the Union's no case submission. The Court found that the dismissal of the sixty eight workers by the Company was harsh, oppressive and contrary to the principles and practices of good industrial relations. It also ordered inter alia, that the sixty eight workers be immediately reinstated to their respective positions without loss of seniority and benefits. In its reasons for the decision, the Industrial Court made the following findings:

    (i) There was no evidence that the Union made a demand on the Company.

    (ii) There was no evidence that the Union was involved in industrial action which was not in conformity with the Act.

    (iii) The workers were dismissed for taking illegal industrial action.

(iv) The genesis of the incidents which occurred on the three days and disrupted the Company's operation was because of the Company's arrogance and lack of regard for the rights of its workers.

(v) The evidence of Ms. Dinnoo-Benjamin was not accepted as the truth of what transpired on the 13th August 2013.

(vi) The Company denied the workers (Ramlochan and Kissoon) of their rights of representation by their recognised majority union.

(vii) That the list of the names of the eighty five workers which was prepared by Mr. Mahabir was not an accurate list of workers who were on the compound on the days in question. The Company conceded that fifteen workers from that said list who were suspended, were not on the compound on the days in question and they were therefore exonerated.

(viii) The disciplinary hearing did not meet the minimum standards of natural justice in significant respects and it was therefore not conducted in accordance with the principles and practice of good industrial relations.

GROUNDS OF APPEAL:

19. The Company filed several grounds of appeal, inter alia:

(a) The Industrial Court exceeded its jurisdiction and/or erred in law in making the said orders in that it purported to exercise a jurisdiction which it did not have in hearing the trade dispute and making the said orders despite the Union's failure to apply to the court for an order within fourteen days of the workers' termination pursuant to section 64(1) of the Act.

(b) The said orders were made without hearing the Union's evidence contrary to its duty under Section 17 of the Act.

(c) It considered and made adverse findings or comments regarding the disciplinary hearings which were otiose or completely unnecessary having regard to the provisions of Sections 63 and 64 of the Act.

(d) It took irrelevant and extraneous matters into account and omitted to take into account relevant and material matters.

(e) The President's interventions and/or excessive interventions deprived the Company of its right to a fair hearing contrary to the principles of natural justice as the conduct gave rise to the appearance of bias.

(f) It failed to give the Company an opportunity to apply for a stay of execution immediately upon the oral delivery of the judgment.

(g) It failed to accept the evidence of Ms. Dinnoo-Benjmain as the truth of what transpired on the 13th August 2013 when no other evidence to the contrary was provided.

(h) The said orders were made without affording the Company an opportunity to be heard on what remedy or remedies should be granted in favour of the Union and the workers.

(i) The workers were properly informed of the charges they had to answer as the letters of suspension and the letters of hearing clearly stated with sufficient particularity the illegality complained of.

(j) It did not appreciate the difference between a trade union being guilty of taking illegal industrial action and workers taking part in such action and that the guilt or innocence of one does not necessarily mean that the other is guilty or innocent.

(k) It struck out the statements of demand allegedly made by Mr. Wayne Leacock, Branch President of the Union and one of the dismissed workers.

ISSUES:

20. Having regard to the written and oral submissions of counsel the issues for determination in this appeal are:

(i) Whether the Industrial Court had the jurisdiction under Section 51(1) of the Act to hear the trade dispute.

(ii) Whether the Company had sufficient evidence to establish a prima facie case that the Union took industrial action contrary to Part V of the Act.

(iii) Whether there was evidence of any acts of demand made by the Union on the Company.

(iv) Whether the Company was justified in dismissing the workers.

(v) Whether the workers were afforded a fair disciplinary hearing.

(vi) Whether there was evidence of any acts of demand on the part of the workers.

LAW AND ANALYSIS:

THE FIRST ISSUE: JURISDICTION

21. Mr. Jairam has devoted a substantial part of his written and oral submissions to the issue of jurisdiction. In essence, his contention is that, where a worker is dismissed under section 63(1)(c) for taking part in industrial action outside of the procedure laid down in Part V of the Act, the worker's remedy is limited to the

procedure set out in section 64 of the Act. Since the workers had not made any application under section 64, the Industrial Court did not have jurisdiction to entertain a trade dispute challenging the dismissal.

22. The relevant provisions of the Act are:

> "*Section **63(1)*** Where any industrial action is taken otherwise than in conformity with this Part—
>
> *(a) . . .*
>
> *(b) . . .*
>
> *(c) subject to sections 64 and 65(2)(b), where a worker takes part in such action the employer may treat the action as a fundamental breach of contract going to the root of the contract of employment of the worker.*
>
> *Section **64 (1)*** *Where a worker is, pursuant to section 63(1)(c), dismissed by his employer, or his contract of employment is determined, the recognised majority union or, in the absence of such a union, any trade union, of which the worker is a member, may within fourteen days apply to the Court for an order that the worker is to be treated as having been excused from the consequences of such action as is referred to in section 63(1)(c) and from the operation of section 63(1)(c) and accordingly that exercise of the power of dismissal or the termination of the contract of employment shall be set aside.* (emphasis added)
>
> ***(2)*** *The Court may upon such application make the order, if it is satisfied that the industrial action by the worker was*

caused by exceptional circumstances and that it is otherwise fair and just to excuse the worker from the consequences of such action and from the operation of section 63(1)(c)." (emphasis added)

23. It is clear from the express words in section 64(1) that the procedure set out therein, contemplates a situation where the worker accepts that he has participated in industrial action not in conformity with Part V. Why else would he apply to the court for an order that he "is to be treated as having been excused from the consequences of such action". In addition under section 64(2), the court has a discretion to make the order if it is satisfied that the industrial action was caused by exceptional circumstances and that it would be otherwise fair and just to excuse him from the consequences of such action and from the operation of section 63(1)(c). Clearly, if the worker's position is that he has not taken part in industrial action, then there is no basis for the exercise of the court's discretion under section 64(2), or indeed for the invocation of the court's jurisdiction by way of an application under section 64 in the first place.

24. It follows that where a worker challenges the dismissal on the basis that he did not take part in industrial action contrary to the provisions of Part V, it is open to him to pursue his remedy by bringing a trade dispute under the disputes procedure set out in section 51 of the Act. Under this procedure he is entitled to ask the Industrial Court to exercise its powers under section 10(4) and 10(5) and to find that his dismissal was harsh and oppressive and not in accordance with the principles of good industrial relations practice. He is also entitled to ask for compensation or damages. These remedies would not be available to him on an application under section 64, since that section contemplates a situation where he admits to taking unlawful industrial action, and he is asking the court to excuse him from the consequences of such action.

25. It follows that the Industrial Court was correct in finding that it had jurisdiction to hear the trade dispute in the absence of an application pursuant to section 64 of the Act. However, the Industrial Court appears to have misinterpreted the provisions of section 64 in paragraph 22 of its judgment:

> *"22. The confusion comes from the failure of the provision to clearly state when the 14 days within which to make the application to the Court starts to run. However, the omission may be explained by the obvious. Only the Industrial Court has jurisdiction to find that an IRO has been committed and the 14 days can only be triggered from the date of that finding. If it were otherwise, the provision would not make sense, since it is the proceeding to resolve the reported or referred Trade Dispute which gives this Court jurisdiction to consider whether in the circumstances the dismissal of a worker is harsh and oppressive and not in accordance with the principles and practice of good industrial relations. It would be inconsistent with the provisions of s. 84 to start computing the time from the date of the incident, since s. 84 gives the employer or the recognised majority union three months from the time when the IRO allegedly took place to file IRO proceedings before the Court. In the instant case, for example, the IRO is alleged by the Company to have taken place from 13-15 August 2013 and the Company filed the IRO proceedings on 20 August 2013. The Company purported to dismiss the workers pursuant to s. 63(1)(c) on 21 October 2013 while the IRO was pending before this Court and no determination had been made on whether there was "any industrial action … taken otherwise than in conformity with … Part V [of the Act]". It would not be logical to require the worker to apply to the Court for a s. 64 order when this Court has heard no evidence that anyone had taken illegal industrial action."*

26. The misinterpretation of section 64 stems from the misapplication by the court of section 64 (which deals with the dismissal of a worker pursuant to section 63(1)(c)) to the prosecution of an employer (under section 63(1)(a)) or a trade union (under section 63(1)(b)) for an industrial relations offence. It is significant that the language of Section 63(1)(c) does not purport to create an industrial relations offence as against a worker who takes such action. Instead, it gives the right to the employer to treat such action as a fundamental breach of contract for which he may dismiss the worker.

27. Section 64(1) provides that the worker may within fourteen days apply to the court for an order that the worker is to be treated as having been excused from the consequences of such action. In my view, on a proper and reasonable interpretation of the language of the provision, the fourteen days will run from the date of dismissal. There is no question of the date running from a finding by the court of an industrial relations offence being committed, since section 63(1)(c) does not create such an offence in respect of a worker. Hence there will be no application for an order under section 84 before the court. In fact, if that was the law, it would detract from the effectiveness of the statutory right of summary dismissal afforded to the employer by section 63(1)(c).

28. As noted earlier, the parties agreed to the industrial relations offence and the trade dispute being heard together. From a reading of the judgement of the court, it appears that the matter proceeded on the basis that once the Company failed to prove that the Union committed an industrial relations offence, then the dismissal of the workers was without legal basis and harsh and oppressive: (see paragraphs 18 and 42 of the judgment).

29. In my view the reasoning was fundamentally flawed, since it ignored the possibility that the workers could have participated in illegal industrial action which was not instigated by the Union. Again, the Industrial Court seems to have conflated the commission of an industrial relations offence by the Union under section 63(1)(b)

and participation by a worker in illegal industrial action under section 63(1)(c). I will consider the consequences of this confusion on the trade dispute later in this judgment.

THE SECOND & THIRD ISSUES: THE INDUSTRIAL RELATIONS OFFENCE

30. At the close of the Company's case the Union submitted that the Company had failed to make out a prima facie case of an industrial relations offence committed by the Union. The basis of the submission was that the Company had adduced no evidence to prove that the Union had called out the workers to do anything or that the Union had made a demand of the Company or had attempted to compel the Company to comply with such a demand, so as to constitute "industrial action" as defined in the Act.

31. The test to be applied by a trial court in deciding whether there is a case to answer was authoritatively settled by Lord Lane CJ in **Galbraith** [1981] 1 WLR 1039 at 1042 B-D, in the context of a jury trial. The test consisted of two limbs:

    (1) Where the judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty upon a submission being made, to stop the case.

    (2) Where the strength or weakness of the prosecution evidence depends on the view taken of a witnesses' reliability, or other matters which generally are within the province of the jury, then the judge should allow the matter to be tried by the jury.

32. Of course, the Industrial Court acts without a jury and is a tribunal of both law and fact. It follows that the **Galbraith** test must be applied with the appropriate modifications. The test to be applied in this case will amount to this: Was the

evidence adduced by the Company, taken at its highest, such that the court could not properly convict on it?

33. Before the Industrial Court , reliance was placed on the earlier decision of the court in **Public Services Credit Union Cooperative Society Ltd v. Banking Insurance and General Workers Union** IRO No. 29 of 2000, in which it was held inter alia, that:

(i) An industrial relations offence is a criminal offence and it was essential that the party who makes the allegation must prove all the required ingredients of the offence.

(ii) An offence under section 63 is one which requires proof of a specific intent, so that it must be established by appropriate evidence that the Union called out the workers and/or that the workers stopped their work to compel the employer to agree to terms of employment or to comply with any demands made by the Union or by the workers.

(iii) In a proper case and on appropriate evidence, the court is entitled to draw certain inferences. However, on the evidence the court was unable to infer that the work stoppage was to compel the employer to agree to terms of employment or to comply with any demand made by the Union or the workers.

34. It was submitted by the Union that in this case the Company had not adduced any evidence to prove that the Union called out the workers to do anything, or that the Union made a demand of the Company or attempted to compel the Company to comply with any demand. The court went on to make a finding that there was no evidence that the Union made a demand on the Company.

35. Section 63(1)(b) of the Act creates an industrial relations offence where a Trade Union engages in "industrial action" otherwise than in conformity with Part V of the Act which sets out the framework for the resolution of trade disputes. Section 2(1) of the Act defines "industrial action" as follows:

> *"..."industrial action" means strikes and lockouts, and any action, including sympathy strikes and secondary boycotts (whether or not done in contemplation of, or in furtherance of, a trade dispute), by an employer or a trade union or other organisation or by any number of workers or other persons to compel any worker, trade union or other organisation, employer or any other person, as the case may be, to agree to terms of employment, or to comply with any demands made by the employer or the trade union or other organisation or by those workers or other persons,..."* (emphasis added).

36. It follows from the definition of "industrial action" that an essential ingredient of the industrial relations offence is that the industrial action taken must be taken with the intention of compelling another party to agree to terms of employment, or to comply with any demands made by the party taking the action.

37. The issue is whether or not there was any direct evidence of a demand made by the Union, or any direct evidence that the Union called out the workers, or whether there was any evidence before the court from which a reasonable inference could be drawn that the Union called out the workers, or made a demand of the Company.

38. The Act does not stipulate any particular form in which a demand may be made. At the end of the cross-examination of the witness Ms. Geeta Ragoonath, General Manager (Human Resources) of the Company by Mr. Mendes, the President of the Court questioned the witness on a number of issues. One of the issues she raised was the question of whether or not the Union had written formally to the Company

to make any demand. The witness responded that she could not remember any such correspondence.

39. This court was not referred to any authority for the proposition that a demand must be a formal document in writing addressed to the other party to a dispute. I do however, agree, that whatever form the demand takes, it must be effectively communicated to the party whom it is intended to compel. Mr. Jairam submitted orally that it may take the form of a placard. I can think of no reason why a demand cannot be effectively communicated in such a form, once the circumstances are such that the Company would have notice of it. Likewise, there is no reason why a demand cannot be made orally, once it is established that the Company would have notice of it. Oral statements made on a picket line in the presence of or within hearing of company officials would be sufficient evidence of a demand.

40. The question is whether there is direct evidence in this case, or evidence from which inferences can reasonably be drawn that the Union made a demand of the Company. In my view, the following bits of evidence fall to be considered:

- The refusal of Ramlochan and Kissoon when approached by management to train senior management staff.
- The identical reason given by each worker for the refusal.
- The work stoppage by all workers at the Pointe-a-Pierre compound shortly after Ramlochan and Kissoon were relieved of their duties for the day.
- The sounding of the alarm at the Sea Lots compound around the same time that the workers at Pointe-a-Pierre stopped working.
- The stoppage of work on both compounds between 13-15th August, 2013.
- The subsequent statements of officers of the Union including its President made to the press and widely disseminated through the national news media. In particular, there was a statement by the President of the Union that workers would not be allowed, whether they wanted to or not, to train persons to take away their jobs.

41. From the evidence outlined above, it is open to an industrial tribunal to make the following inferences:

- There was an element of pre-planning in the actions taken by the workers.
- The actions taken show an unmistakable level of organization and unity of intention by the workers.
- The statement of the President that the workers would not be allowed, whether they wanted to or not to train other persons to do their jobs, clearly evinces an intention, held quite independently of the workers, by the Union, that the Company would not be permitted to have managers trained by the workers to carry out their functions.
- The workers and/or the Union were taking industrial action, to wit a work stoppage at both plants for three days to compel the Company to comply with a demand that the Company should desist from pursuing their plan to train managers and/or contractors to fill road tank wagons.

42. Mr. Mendes argued that the action and statements of union branch officials cannot be attributed to the Union because Rule 24 of the Union's Rule Book does not regard branch officials as members of the executive of the union. He relied on **Caribbean Tyre Company Ltd. v. OWTU** Civ. App. No. 106 of 1986 in which Warner J.A. expressly agreed with the Industrial Court that for the purpose of negotiations, the proper party that the Company should have engaged was the executive of the Union and not its branch representatives.

43. In my view, the **Caribbean Tyre** case is clearly distinguishable on the facts. There were no negotiations taking place between the Company and the Union, and so no issue as to whether the branch officials had the authority to represent the Union, arises. In this case, the clearest statement of the intention of the Union emanated from the President of the Union himself. The fact that the Company did not make available to the court the full text of the President's statement, in my view, does not detract from the clarity of the statement. If, in fact, the statement was taken out of context, or did not accurately reflect the tenor and meaning of the full text, then it was for the Union to demonstrate this. There was no attempt to do so.

44. It must be borne in mind that the Act was intended to regulate industrial relations between workers and employers in a working environment so as to promote sound industrial relations practices and to preserve stable and harmonious relations between workers and employers. The courts must adopt a purposive, practical and commonsense approach in interpreting and applying the provisions of the Act. This approach was articulated by their Lordships in **Heatons Transport (St. Helens) Limited v. Transport and General Workers Union and ors.** [1973] AC 15 at 23:

> ***"The National Industrial Relations Court is a court, but a court with a difference. All courts exist to uphold the rule of law. So does this court. All courts are concerned with people. So is this court. .***
>
> ***. . . . . .***
>
> ***Why, then, is this court different? It is different in its composition, in its objects and in its procedures. It is a court of law, but not a court of lawyers. Only the chairman is a judge. All the other members are appointed for their knowledge or experience of industrial relations. These industrial members are not advisers; they are full members of the court. In reaching decisions each has a vote, as does the judge. There are at least two of them and only one judge.***
>
> ***The intention of Parliament was that this court. should not only interpret and apply the law, but should do so with knowledge of industrial life from every angle. The judges benefit from the industrial knowledge of the appointed members. The appointed members benefit from the judges' knowledge and experience of the law. . .***
>
> ***. . . . . .***

The Industrial Court is more than a court of law: it is a court of industrial common sense.

The court's procedure is different. It is designed to be quick, informal and suited to the needs of those who are not lawyers."

45. In deciding whether or not there is evidence of a demand in this case, the court must be guided by "industrial common sense". It must consider the action taken by the workers in the context of the factual situation, in which the company issued instructions to the gantry workers. It must also consider the public statements made by officers of the Union, which were widely disseminated in the national media, and would in the normal course of things be communicated to the Company. These statements must be viewed in the context of the actions taken by the workers over a period of three days in which the workers withheld their labour.

46. In paragraph 60 of its judgment, the court purported to make "findings of fact" that:

    "(1) There is no evidence that the Union made a demand on the Company.

    (2) There is no evidence that the Union was involved in industrial action which was not in conformity with the Act."

47. It must be noted that the court did not find as a fact that no demand was made by the Union on the Company. The court found that <u>there was no evidence</u> that the Union made a demand. The question is whether there was <u>evidence</u> before the court, which properly considered was capable of supporting a finding of fact that there was a demand by the Union. In my view, that would be a question of law, not one of fact. In addition, it seems from the questions posed by the court to Ms. Ragoonath, that the court may have been under the misapprehension that a demand should be contained in a formal document in writing directly communicated to the employer. In my view, that would be an error of law.

48. It is apparent that the second "finding of fact", was partly or wholly based on the first finding. For the reasons already stated, this finding cannot stand. It must also be borne in mind that the court made its decision on a submission of no case, based on the evidence adduced by one party to the proceedings. It may not be appropriate for a court to come to final findings of fact in such a scenario. The issue for the court is whether there is evidence before it of the essential ingredients of the offence. If there is, it would be an error of law, not of fact, for the court to dismiss the offence, in the face of admissible evidence.

49. For these reasons, in my view the court was wrong to uphold the no case submission, and to dismiss the industrial relations offence. Accordingly the industrial relations offence must be remitted to the court for a re-hearing of the matter.

<u>THE THIRD, FOURTH AND FIFTH ISSUES</u>: **THE TRADE DISPUTE**

50. As noted earlier, the court heard the industrial relations offence and the trade dispute together. The court proceeded on the basis that once the Company failed to prove that the Union had committed an industrial relations offence, then it followed that the dismissal of the workers was without legal basis and harsh and oppressive. This approach was clearly wrong, since the issue as to whether the Union was guilty of an industrial relations offence under section 63(1)(b) was a separate and distinct issue from whether the workers had participated in industrial action contrary to the provisions of Part V of the Act, thus entitling the employer to treat such action as going to the root of the contract of employment.

51. Unsurprisingly, since the court failed to make the distinction between section 63(1)(b) and section 63(1)(c), it also failed to make any findings as to whether the workers made any demand of the company, so as to make the work stoppage "industrial action" as defined in section 2(1) of the Act. In failing to consider this issue, as a matter of law, the court failed to consider a matter which went to the heart of the trade dispute, and so cannot be said to have properly adjudicated on

the matter. For this reason alone, this matter must be remitted to the court for a proper adjudication of the trade dispute.

52. However, the court has rested its decision on the trade dispute on another basis. It has found that the disciplinary hearing afforded to the workers did not meet the minimum standards of natural justice in significant respects, and so was not conducted in accordance with the principles and practice of good industrial relations. It also went on to rule that the dismissal of the workers was harsh and oppressive and contrary to the principles and practice of good industrial relations.

53. Mr. Mendes has relied on section 10 (6) of the Act for his submission that the finding of the court that the dismissal of the workers was harsh and oppressive and not in accordance with the principles and practice of good industrial relations, is not appealable. Section 10 (6) provides:

> *"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".*

54. The section has been the subject of close judicial scrutiny. In **Caroni (1975) Limited v. Association of Technical Administrative and Supervisory Staff** [2002] 67 WIR 223 at 225-226 de la Bastide CJ considered the rationale for the prohibition against appellate review of the opinion of the Industrial Court as to what is or is not in accordance with the principles and practice of good industrial relations:

> ***"The Industrial Court is a comparatively recent creation of statute, and so is the right given to appeal from it to the Court of Appeal. The intention of Parliament, clearly expressed in s 10(6), is that the question 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. It is considerations like these which presumably underlie the prohibition in s 10(6) against the Court of Appeal reviewing the decision of the Industrial Court that the dismissal of a particular worker does, or does not, have the quality which triggers the grant of the remedies of compensation and reinstatement.

A harsh and oppressive dismissal is something which, according to the Act, may be identified only by the Industrial Court".

55. In the same case the learned Chief Justice recognised that the opinion of the Industrial Court as to whether a dismissal is harsh and oppressive, is not so sacrosanct that it could never be challenged. He went on at page 226 to give an example of a situation in which such a challenge may be permitted:

"...<u>If, for instance, there has been some procedural irregularity which involves a breach of the rules of natural justice</u>, then clearly an appeal would lie to the Court of Appeal, notwithstanding s 10(6). In such a case it would be the <u>process</u> by which the Industrial Court

reached its opinion <u>and not the opinion itself</u>, that was challenged. (emphasis added)

It is unnecessary and indeed dangerous to try to enumerate all the circumstances in which an appeal would lie to the Court of Appeal against the decision of the Industrial Court in a trade dispute over the dismissal of a worker. The answer in broad terms is whenever the appellant can rely on any of the grounds mentioned in s 18(2) without running foul of the prohibition contained in s 10(6). What this means in practice will have to be determined on a case-by-case basis."

56. In the earlier case of **<u>All Trinidad Sugar & General Workers Trade Union v. Caroni (1975) Ltd</u>** Civil Appeal No. 114 of 2000 in which the opinion of the Industrial Court was challenged on the basis that the evidence did not support the opinion, in dismissing the appeal, de la Bastide CJ drew a distinction between a situation where there was some evidence on which the Industrial Court could make its finding of primary fact on which its' opinion was based, as opposed to one where there was an absence of evidence. While the court found that in the first scenario an appeal was barred by section 10(6), it expressly left open the possibility that in the second an appeal may not be barred.

57. In **<u>Schlumberger Trinidad Inc. v. Oilfield Workers' Trade Union</u>** Civ. App. No. 3 of 2012, this court set aside the opinion of the Industrial Court that a dismissal was harsh and oppressive on the basis that there was no evidence to support the primary finding of fact on which the opinion was based.

58. It is clear from the cases considered above, that in spite of the prohibition contained in section 10(6) of the Act, an appellate court is entitled to examine the process by which the Industrial Court arrived at its opinion, and the evidential basis for its opinion. It cannot be that section 10(6) permits the court to form an opinion that is not supported by the evidence and is wrong as a matter of law. If that were the case, then however arbitrary or unfounded an opinion might be, it

would not be subject to examination by an appellate court. Clearly this could not have been intended by the framers of the legislation.

59. In this case, the opinion of the Industrial Court that the dismissals were harsh and oppressive was based on two premises:

    (1) the premise that once the Company failed to prove that the Union had committed an industrial relations offence, then the dismissal of the sixty-eight (68) workers was without legal basis and thus harsh and oppressive, and

    (2) the disciplinary hearing did not meet the minimum standards of natural justice in significant respects.

60. As discussed earlier in this judgment the first premise is fundamentally wrong as a matter of law. In my view, the second premise is also demonstrably wrong as a matter of law and is not supported by the evidence.

61. Perhaps the conclusion drawn by the Industrial Court as to what the minimum standard of natural justice required, was influenced by what it perceived to be the nature of the proceeding. This was not the hearing of an industrial relations offence. It was not in the nature of a criminal proceeding. The proof required was the civil standard of a balance of probabilities. The employer was seeking to exercise his right to treat the workers' action as a fundamental breach of contract going to the root of the contract of employment pursuant to section 63(1)(c). The employer was not seeking to prosecute an industrial relations offence pursuant to section 63(1)(b). That was the proceeding which it brought against the Union in the Industrial Court. It was the conflation of these two sets of proceedings as reflected in paragraph 18 of the Industrial Court's judgment, which has led the court into error.

62. It is clear from the judgment of the court, that in considering the fairness of the disciplinary procedure it imposed a standard on the Company that was more consistent with the prosecution of an industrial relations offence under section

63(1)(b) than the exercise by the Company of a right to treat the workers' action as a fundamental breach of contract going to the root of the contract under section 63(1)(c).

63. The courts have long recognised that natural justice is not a rigid and inflexible concept. The requirements of fairness may vary according to the particular circumstances of the case. In **Lloyd v. Mc Mahon** [1987] AC 625 at 702 H, Lord Bridge explained:

> ***"My Lords the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates".***

64. The essential issue is always one of fairness. In any given context, the court must consider what the minimum standard of fairness requires. In **Doody v. Secretary of State** (1993) 3 AER 92 at 106 D, Lord Mustill considered the requirements of fairness:

> ***"The only issue is whether the way in which the scheme is administered falls below the minimum standard of fairness.***
>
> ***What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair***

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

65. A few days after the work stoppage, the workers were served with a formal letter in identical terms, as set out below.

"***Dear .....***

<u>Re: Suspension with Pay</u>

We refer to your refusal to report for work and carry out duties on 14/08/2013 and 15/08/2013 along with other employees, whilst on the Plant. This constitutes an illegal withholding of your labour and violation of the terms and

conditions of your employment, possibly going to the root of the contract of your employment.

In this regard, you are suspended with full pay with effect from 16/08/2013 pending completion of our investigations. We will communicate with you during the course of which you will be expected to be available to assist with such investigations".

66. Subsequently, the workers were served with another letter advising them to attend a disciplinary hearing, as set out below:

"Dear .....

<u>DISCIPLINARY HEARING</u>

Reference is made to our letter dated 2013 August 16.

The Company has concluded its investigations and in this regard you are required to attend a Disciplinary Hearing on 2013 September 11 Wednesday commencing from 3.30 p.m. at Employers' Consultative Association, #17 Samaroo Road, Aranguez Roundabout North, Aranguez.

The purpose of this Hearing is to afford you the opportunity to provide your explanation to the following disciplinary allegations against you.

1. ***Refusal to perform job functions on 2013 August 14 & 15***
2. ***Participating along with others in an illegal work stoppage on 2013 August 14 & 15***
3. ***Absence from workstation without authorization on 2013 August 14 & 15***

Please be advised that if you unable to attend this Hearing the Company may proceed in your absence if an acceptable and reasonable excuse is not provided. In light of the circumstances, you are further advised that the Company considers these allegations to be sufficiently serious that if established, may go to the root of your contract of employment.

In keeping with the provisions of the Collective Agreement, you are allowed to be accompanied by a Shop Steward/Union Official at this Hearing".

67. It is apparent from the correspondence that:

    (1) The workers were afforded an opportunity to make representations by themselves and through their union representatives who were present at the hearings.

    (2) The workers were informed of the gist of the case they had to answer.

68. Mr. Mendes has argued quite strenuously that the second letter set out above did not adequately inform the workers of the "charge", since it did not bring to the workers' attention that they had to answer "a charge of illegal industrial action". In the first place, there was no "charge" against any of the workers. The industrial relations offence was brought against the Union, not the workers. There was no requirement to prove an actus reus or mens rea against any of the workers. Even if it is argued that the definition of "industrial action" requires proof that such action was taken to compel the Company to comply with a demand, there was evidence before the court from which that inference could have been made. Even so, the court made no finding as to whether the workers were or were not making any demand of the employer, precisely because the court conflated the industrial relations offence against the Union, with the issue as to whether the employer was

entitled to treat the workers' action as a fundamental breach of contract going to the root of the contract of employment.

69. In my view the letter of 4th September 2013 sufficiently identified the conduct of the worker, for which the employer was asking for an explanation and was giving the worker an opportunity to provide one. This was not a criminal proceeding before the Magistrates Court or the Assizes which required a statement of the elements of the offence. This was a disciplinary hearing convened by an employer. As noted earlier, the court must apply "industrial commonsense" in considering the evidence. It must consider the factual context in which the events unfolded, and whether the workers would have been in any doubt as to the conduct which was being targeted by the employer, given the proximity of the first letter to the actual events. The language of both letters, in particular, the reference to illegal withholding of labour and serious allegations "going to the root of your contract of employment", should have left the workers in little doubt as to the seriousness of the matter and the possible consequences for their jobs. Indeed, the language of the letters mirrors that of Section 63(1)(c) of the Industrial Relations Act, and this would not have been lost on the Union or its legal advisers.

70. The Industrial Court also commented that there was no evidence that the workers had been provided with an email which the company had in its possession about the workers' activities on the days in question, and a list which the security guard had compiled of workers who had assembled at the gate on those days. There is also no evidence that any request was made by the workers or their union representatives for these documents.

71. There is no requirement that an employer must provide a worker facing disciplinary charges with every document or piece of evidence in his possession. If a document is relevant, fairness requires that it be disclosed to the worker upon request. In this case, having conducted the hearings, of the eighty-five workers whose names appeared on the list, sixty-eight workers were dismissed, fifteen were exonerated and two were suspended without pay. It does not follow from this

exercise that the workers were somehow prejudiced by the non-disclosure of the list. They were provided with a reasonable opportunity either to explain their absence on the days in question, or challenge any evidence that they were present outside the gate on those days. The fact that fifteen workers were in fact exonerated demonstrates that the list was subjected to scrutiny and successfully challenged by fifteen workers at the hearings. In addition, there is no evidence that the failure of the company to disclose the email or the list has resulted in any prejudice to any of the workers concerned in the preparation of their defence. See: **Ferguson (Herbert) v. The Attorney General** (1999) 57 WIR 403 in which de la Bastide CJ, explained the underlying rationale for the common law duty of disclosure at page 421:

> ***"The rationale for the requirement of disclosure is that an accused person ought not to suffer prejudice by being kept in ignorance of documentary material which may assist him in his defence."***

72. For the Company, Mr. Jairam contended that the Company would have been entitled under section 63(1)(c) to dismiss the workers without holding an inquiry. As authority for this proposition Mr. Jairam relied on the House of Lords decision in **Ridge v. Baldwin & ors** (1964) AC 40, in which the House recognised the old common law position that a master can terminate the contract of his servant at any time and for any reason, without providing the servant an opportunity to be heard.

73. Section 63(1)(c) expressly states that the employer may treat the action of the worker as a fundamental breach of contract going to the root of the contract of employment of the worker. Applying the ordinary principles of the law of contract, it follows that the employer would be entitled to accept the worker's action as a repudiation of the contract of employment, thus bringing the contract to an end. In such circumstances, summary dismissal will follow as a logical consequence of the acceptance by the employer of the worker's repudiation of the contract. However, while it appears that strictly speaking, the employer would be legally entitled to sever the relationship by summary dismissal, the question arises as to

whether the principles and practice of good industrial relations, would require him to provide the employee with a reasonable opportunity to provide an explanation for his actions and to make representations as to why he should not be dismissed.

74. Mr. Mendes has submitted that it was for the Industrial Court to determine what natural justice required in the context of good industrial relations practice, and even if this court held a different view as to what natural justice required in this case, it should not interfere with the opinion of the Industrial Court, having regard to Section 10(6). While I agree with Mr. Mendes' submission as a statement of principle, as I have indicated earlier in this judgment, the opinion of the Industrial Court is based on a premise that is fundamentally flawed, and it is the conflation of the industrial relations offence and the trade dispute, that has influenced the conclusion of the Industrial Court that the disciplinary hearings did not meet the minimum standards of natural justice.

75. For these reasons, these matters must be remitted to the Industrial Court for rehearing. However, Mr. Jairam has complained that the learned President of the Industrial Court intervened so excessively during the hearing, such as to give rise to a reasonable apprehension of bias, and to deprive the Company of its right to a fair hearing. While the record reveals that there were frequent and sometimes prolonged interventions by the President, I do not agree that the Company was deprived of a fair hearing, or that there are reasonable grounds for the apprehension of actual or apparent bias. However, the court has expressed certain strong views on its impression of one witness in particular and has arrived at certain findings on the evidence, which may render a rehearing before the same panel an exercise in futility. Accordingly, I find merit in the appellant's request for a rehearing before a differently constituted panel.

76. Finally, the appellant has made certain submissions in relation to the reliefs granted by the court. Specifically, complaint is made that the parties were not heard on the issue of reinstatement, and there was no evidence to support the

award of $40,000.00 as damages to each worker in addition to the award of all pecuniary benefits lost.

77. Section 10(6) of the Act provides that any order for compensation or damages including the assessment thereof pursuant to section 10(5) “shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatsoever”. Section 10(5) provides that in making an order for compensation or damages, the court shall not be bound to follow any rule of law.

78. As discussed earlier in this judgment orders made under section 10(6) are open to review in cases where the process is flawed by reason of a breach of the rules of natural justice or where there is no evidential basis to support the order.

DISPOSITION:

79. For the reasons give I would allow this appeal, quash the orders of the Industrial Court and remit the industrial relations offence and the trade dispute to the Industrial Court for rehearing before a differently constituted panel. I would make no order as to costs.

Dated the 24th day of March, 2016.

R. Narine,
Justice of Appeal.