THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P286 OF 2016
Tax Dispute No. GSD-TD 291/2015

Between

TRINRICO STEEL AND WIRE PRODUCTS LIMITED

Appellant

And

ADVOCATE TRADE UNION

Respondent

Panel: A. Mendonça, J.A.

P. Rajkumar, J.A.

V. Kokaram, J.A.

Appearances:

Mr. Ronnie Bissessar instructed by Mr. Varin Gopaul, Attorneys at Law on behalf of the Appellant.

Mr. Fulton O.J Wilson instructed by Ms. Vanna-Marie Sooklal and Ms. Megan Alleyne, Attorneys on Law on behalf of the Respondent.

REASONS

Delivered by V. Kokaram, J.A.

1. On 6th October, 2020 we allowed this appeal and remitted the matter to the Industrial Court with the direction that the question of whether Mr. Bhola Deo is a "worker" having regard to the provisions of section 2 (3) (e) of the Industrial Relations Act Chapter 88:01 ("the Act") be referred to the Registration, Recognition and Certification Board ("the Board"). We now reduce to writing our reasons for so doing.

2. This appeal concerns the Industrial Court's decision not to refer the question whether Mr. Bhola Deo, the employee of Trinrico, the Appellant[1], was a worker within the meaning of section 2(3)(e) of the Act to the Board. That question arose as a preliminary issue raised by Trinrico at the hearing of a trade dispute between it and the Respondent, Advocate Trade Union, in relation to the dismissal of Mr. Deo.

3. Trinrico contended that the Industrial Court had no jurisdiction to determine that trade dispute as Mr. Deo was not a worker within the meaning of section 2(3)(e) of the Act and such a question could only be determined by the Board. While it is common ground in this case that the Board has the exclusive jurisdiction to determine that question, what falls for determination is whether the Industrial Court properly exercised its discretion in determining that such an issue was not "justifiably raised" by Trinrico and on that basis should not be referred to the Board.

4. The Industrial Court as a superior Court of Record has all powers inherent if such a Court is to prevent its process from being abused. The Industrial Court's mandate by the Act is among other things, to hear trade disputes

[1] Trinrico Steel and Wire Products Limited

expeditiously. They also have the discretion to refer questions as to whether an employee is a "worker" within the meaning of the Act to the Board. Whether and in what circumstances it will do so calls for the judicial exercise of the Industrial Court's case managerial discretion, balancing its duty to hear trade disputes while preserving its process from abuse.

5. Trinrico in this appeal submits that this issue was justifiably raised by it and the Industrial Court ought to have exercised its discretion to permit the reference of that question to the Board. It contends the Industrial Court erred in law in failing to do so.

6. We agree, for the reasons set out in this judgment, that while the Industrial Court properly identified the test to guide the exercise of its discretion, it failed to consider all the relevant factors in the exercise of that discretion to determine whether the issue of the status of the employee as a "worker" was justifiably raised by Trinrico. In particular, it failed to properly assess the reasons for Trinrico's failure to raise the issue earlier, placed undue weight on Trinrico's failure to pursue the issue at a conciliation hearing and did not properly consider the evidence before it as raising a prima facie case that Mr. Deo was not a worker within the meaning of the Act.

<u>Brief Background And Chronology</u>

7. The trade dispute concerned the dismissal of Mr. Deo as the Production Manager/Purchasing Officer of Trinrico. It was referred to the Industrial Court by Certificate of Unresolved Dispute of the Minister of Labour dated 24th July 2015. Trinrico raised the preliminary issue at the hearing of the trial.

8. This preliminary issue was telegraphed in Trinrico's evidence and arguments filed on 4th December 2015[2]. It briefly stated as follows: "The Employer raises

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[2] The Employer raises as a preliminary issue that the Worker is not a worker for the purposes of the of the Industrial Relations Act and ipso facto is not susceptible or amenable to the jurisdiction of the Industrial Court which, as a superior Court of Record, is governed by the Act. In its particulars Trinrico referred to section 2(3) (e) (i) and (ii) of the Act and alleged that the worker as at the date

as a preliminary issue that the Worker is not a Worker for the purposes of the of the Industrial Relations Act and ipso facto is not susceptible or amenable to the jurisdiction of the Industrial Court which, as a superior Court of Record, is governed by the Act."

9. Trinrico's particulars of this preliminary issue referred to sections 2(3) (e) (i) and (ii) of the Act and alleged that the worker as at the date of his dismissal on 20th July 2015 was the Employer's production manager and was in effective control of the Employer's production department.

10. While it would appear that raising this preliminary point at the trial of the dispute is late, the following chronology of events sets out the context as to why this occurred:

    - The parties attended a conciliation meeting on 16th July 2015. However, at that time no question of a dismissal of the employee had arisen. Trinrico contended that the worker had been suspended and not dismissed at that time and that the parties moved on to another dispute. It alleged that no conciliation meeting was held at the Ministry of Labour in relation to a dismissal of Mr Deo. The Union disputed this and referred to its letter reporting a trade dispute concerning a dismissal of Mr Deo.

    - The Ministry of Labour and Small and Micro Enterprise Development issued the Certificate of Unresolved Dispute on 24th July 2015.

    - The parties attended a case management conference hearing on 9th October 2015 at which the parties were granted directions to inter alia file Evidence and Arguments.

    - The Evidence and Arguments of Trinrico were filed on 4th December

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of his dismissal on 20th July 2015 was the Employer's production manager and was in effective control of the Employer's production department.

2015 in which the preliminary issue was raised.

- On 26th January 2016 the parties were granted an extension of time to file witness statements.
- By letter dated 11th February 2016, 8 days before the trial, Trinrico wrote to the Registrar of the Industrial Court reminding him about the preliminary objection but there was no response.
- Trinrico was only able to formally articulate the preliminary objection on the date of the trial on 19th February 2016.

11. Against this backdrop, the main submissions of Trinrico were:

- The issue of whether the Industrial Court should exercise its discretion to remit the question of whether Mr. Deo was a worker for the purposes of section 2 (3) (e) of the Act to the Board for determination was justifiably raised as a preliminary objection at the earliest opportunity by Trinrico as a preliminary objection in its Evidence and Arguments.
- The issue raised by Trinrico was meritorious and the Industrial Court was plainly wrong in finding that the preliminary objection was or "may amount to an abuse of process."
- There was no conciliation meeting on 16th July 2015 because Trinrico informed the Conciliator that the worker was not dismissed but was merely suspended and that it was premature to convene a conciliation.
- At the date of Mr. Deo's dismissal on 20th July 2015 he was Trinrico's production manager and ipso facto he was in effective control of its entire Production Department.
- Based on the chronology set out above, Trinrico's earliest opportunity to raise the preliminary issue was at the trial on 19th February 2016 since there was no pre-trial review nor was a hearing convened for the

preliminary objection.

12. Conversely, the Respondent submitted that:

- The conciliation meeting on 16th July 2015 was Trinrico's first opportunity to raise the question of whether Mr. Deo was a worker for the determination of the Board.

- Trinrico ought to have known that the Minister's failure to settle the dispute would trigger the issuance of the Certificate of Unresolved Dispute. Therefore, from 16th July 2015 when the parties attended conciliation up to 24th July 2015 when the Minister issued the Certificate of Unresolved Dispute, Trinrico was free to lodge the question with the Minister for the referral to the Board.

- No evidence was adduced by Trinrico to show how Mr. Deo had effective control of the Employer's production department. The worker's job title or position description does not immediately satisfy any legal question as to whether he is a worker under the meaning of the Act. The following documents were not disclosed by Trinrico:

    a) A job description for the position of Production Manager or otherwise a comprehensive enumeration of the job functions associated with the said position;

    b) An employment agreement executed between Mr. Deo and his employer;

    c) A relevant organogram or information about the organisational structure of Trinrico in operation at the material time, to demonstrate the genuineness of the seniority of the position of Production Manager in its corporate configuration.

- As there was no objection or application made by Trinrico on the status of Mr. Deo, there was a presumption that Mr. Deo is a "worker" within

the meaning of the Act.

The Industrial Court's Ruling

13. In its ruling, the Industrial Court correctly observed that the Board is the sole authority for determining whether Mr. Deo is a worker within section 2 (3) (e) of the Act. There is no dispute in this appeal as to the validity of this position. However, the Industrial Court took the view that Trinrico could have referred the matter to the Board well before the hearing and to accede to the application would amount to further delay of the hearing and tantamount to an abuse of its process. The application was dismissed and the hearing proceeded on 19th February 2016. The Industrial Court found that any delay caused by referring the question to the Board at that point in time would unfairly affect the worker's right to an expeditious and just hearing and determination of the dispute. The Court also went on to say that the preliminary question of the worker's status should have been raised by Trinrico before the Minister and nothing prevented Trinrico from raising the preliminary point at those conciliation proceedings which occurred before the Certificate of Unresolved Dispute was issued. The Court found that the trade dispute was properly reported to the Court as a result of the Certificate of Unresolved Dispute and that the Court had jurisdiction to hear and determine the dispute.

General Propositions

14. The following uncontroversial propositions are important in determining this appeal.

15. First, the Industrial Court is a Specialised Court tasked with its own specialist expertise on matters of good industrial relations practice. See **Caroni (1975) Limited and Association of Technical Administrative Supervisory Staffing** Civil

Appeal No. 87 of 1999.[3]

16. The Court also exercises a wide, though not unlimited, discretion and makes such orders or awards "in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole; (b) act[s] in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations."[4]

17. Second, the question of whether a matter is to be referred to the Board concerns the Court's exercise of its discretion in the management of its process. The Court of Appeal's view on the exercise of such a discretion was aptly stated by Mendonça JA in **D & K Investments Limited v. Banking**

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[3] In **Caroni (1975) Limited and Association of Technical Administrative Supervisory Staffing** Civil Appeal No. 87 of 1999 de la Bastide CJ noted at page 3:

> "The intention of Parliament, clearly expressed in section 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. This 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 section 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."

[4] See section 10 (3) of the Industrial Relations Act. See also **Carib Brewery Limited v National Union of Government and Federated Workers** Civil Appeal No. P213 of 2015 delivered 19th February 2020 where it held that the jurisdiction under s. 10 (3) is wider than and independent of that conferred by ss. 10 (4)2 and (5) 3. Although the jurisdiction is wide it is not unlimited. (See **Caribbean Printers Limited v Union of Commercial and Industrial Workers** Civil Appeal No. 30 of 1972). The jurisdiction is one created by statute and the statute provides the parameters within which the wide jurisdiction that it confers must be exercised. The Industrial Court has, by and large, recognized that the way in which the jurisdiction conferred upon it must be exercised requires that it must pay regard to the specific factors set out in section 10 (3). (See for example **Estate Police Association v Airports Authority** ST No. 1 of 1999 and TD 43 of 1994, **OWTU v National Petroleum Marketing Company**).

Insurance and General Workers Union Civil Appeal No. 124 of 2016:

> "32…. Indeed in so far as the Court is given a discretion to refer the matter, its discretion must be exercised judicially and not whimsically. In that regard it is to be expected that it would set for itself the parameters within which the discretion should be exercised. The Court of Appeal, of course, maintains the jurisdiction to review the exercise of the Court's discretion and will interfere if the Industrial Court was plainly wrong to exercise its decision in the manner that it did. What that means is that before this Court will interfere with the exercise of the Industrial Court's discretion it must be shown that the Industrial Court erred in law or principle, or its decision is against the weight of evidence or cannot be supported having regard to the evidence, or that the Court was influenced by considerations which it ought not to have taken into account, or gave no weight or no sufficient weight to considerations that the Court should have taken into account, or that the decision is outside the ambit within which reasonable disagreement is possible."

18. The simple point for this Court to determine is whether the Industrial Court was plainly wrong in the exercise of its discretion in proceeding with the hearing of the trial without referring the question of whether Mr. Deo is a "worker" within the meaning of the Act to the Board.

19. Third, on the facts of this case it is not disputed that, unless it is determined by the Board that in its opinion section 2 (3) (e) is applicable to Mr. Deo, he is to be treated as a worker within the meaning of the Act and effectively, without such a ruling from the Board, the Industrial Court has jurisdiction to hear a trade dispute concerning his dismissal. See **Claude Albert v Alstons Building Enterprises Ltd** CvA No. 37 of 2000 at page 7:[5]

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[5] "It is fairly clear from the evidence that the appellant as General Manager of the Concrete and Clay Division was responsible for the effective control of that Division and almost certainly had an

20. Finally, the Court of Appeal in several recent decisions has affirmed the Industrial Court's test of "justifiably raised" to determine whether a reference ought to be made, that is, and it is accepted by the parties, that the Industrial Court in determining this preliminary issue must ask itself the question whether the issue was "justifiably raised" by the Employer.

21. To that extent, the judgments of Mendonça JA and Bereaux JA are worth examination.

The Considerations of "Justifiably Raised"

22. Mendonça JA recently settled the law in this area in **D&K Investments** in that in exercising its discretion to remit a matter to the Board, the Industrial Court should ask itself whether the issue was justifiably raised. The learned judge referenced **Union of Commercial Industrial Workers v The Port Authority of Trinidad and Tobago** TD 212 of 2003[6] and noted:

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effective voice in the formulation of policy in the respondent's undertaking or business. The way in which paragraph (e) is structured, however, makes the 'opinion of the Board' a 'sine qua non' for the exclusion of anyone from the definition of "worker" under that paragraph. To be excluded a person must fit the description contained in that paragraph in the opinion of the Board, and no one else. Therefore, until and unless the opinion of the Board to that effect is obtained, the exclusion cannot operate. That seems to me to be the inevitable result of giving paragraph (e) its normal meaning. It is to be noted that the opinion of the Board is given special protection by the IRA. Firstly, section 23 (7) reserves to the Board the exclusive right "to expound upon any matter touching the interpretation and application of this Act relating to the functions and responsibilities with which the Board is charged …". Secondly, section 23 (6) forbids any decision of the Board being "challenged, appealed against, reviewed, quashed, or called in question in any court on any account whatever …". The problem is that it is by no means clear how the opinion of the Board as to the application of paragraph (e) is to be obtained unless the question arises in the context of a claim for recognition. Regardless of how, when or whether an opinion can be obtained from the Board that an employee falls within section 2 (3) (e), no one can be excluded under that paragraph without it. The opinion of the Board not having been obtained in relation to the appellant, severance benefits in accordance with the scale prescribed by the 1985 Act are prima facie payable to him."

[6] In **Union of Commercial Industrial Workers v The Port Authority of Trinidad and Tobago TD 212 of 2003** Her Honour Donaldson-Honeywell (as she then was) noted that:

> "Matters relevant to the consideration whether the issue has been justifiably raised must include whether prima facie there is any merit to the assertion that the person is not a worker. It should also include consideration as to the *bona fides* of the objection being raised and as to whether it was raised in a manner likely to be overly prejudicial to the interests of the other party and the community as a whole. This approach accords with

“14. The Industrial Court accepted that it had no jurisdiction to determine whether an employee is not a worker within the meaning of the Act because he or she fell within section 2(3)(e). The Court, however, indicated that when faced with an assertion that the employee is not a worker, the court must determine whether or not the issue has been “justifiably raised”. The Court said, in its judgment:

> “It is not in every case where an employer seeks to avoid the Court’s jurisdiction by asserting that there is no “worker” in the Trade Dispute that the court will automatically relinquish its jurisdiction. Such action may only be considered where the issue has been justifiably raised”.

15. The Court went on to say that matters relevant to determining whether the issue has been justifiably raised include; (i) whether prima facie there is any merit to the assertion that the person is not a worker; (ii) the bona fides of the objection; (iii) whether the issue was raised in a manner likely to be overly prejudicial to the interest of the other party and to the community as a whole; and (iv) whether there are any circumstances that justified the objection not being raised earlier and before the trade dispute was referred to the Industrial Court.

16. It is relevant to note that in the **Port Authority** case, the Industrial Court followed its decision in TD 43 of 2001 OWTU v NP, where the Court expressed the opinion “that once an issue is justifiably raised before the court, that a person or persons are not workers within the meaning of section 2(3)(e) of the Act, the Court does not possess the jurisdiction to deal with that issue.”

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the status of the Court having all the powers inherent in a Superior Court of Record. Perhaps the most essential of these powers in that of preserving the Court’s jurisdiction and guarding against potential abuse of its processes.”

23. In considering the test of justifiably raised Mendonça JA highlighted the following factors:

    - The Industrial Court is a superior Court of record. It has all the powers inherent in it as such a court (see section 7(1) of the Act). Among those powers is the power to prevent its process from being abused;
    - The Industrial Court is mandated to hear, inquire into and investigate every dispute and all matters affecting the merits of the dispute before it expeditiously (see section 17);
    - Among the factors that the Industrial Court has indicated it should take into account are, whether the assertion that the employee is not a worker is made bona fide; whether there is any merit to the assertion that the employee is not a worker; and whether there are any circumstances that justified the objection not being raised earlier and before the trade dispute was referred to the Industrial Court
    - These factors are best seen through the lenses of the Court's power to prevent an abuse of its own process and its mandate to hear matters expeditiously.

24. Mendonça JA further observed that:

    > "34….It would seem to me to be an abuse of the Court's process if a frivolous claim were permitted to proceed or one that lacks bona fides and is motivated by some ulterior motive inimical to the justice of the case. Similarly as the Court is mandated to hear disputes expeditiously, of concern to it must be why the objection that the person is not a worker was not taken earlier and before the matter was referred to the Court when there may have been ample time to do so. In my view, there should be an explanation for the delay that would excite the Court to exercise its discretion in favour of granting the application."

25. In **Caribbean Shipping Agencies Ltd v National Union of Government and**

Federated Workers Civil Appeal No. P074/2018 Bereaux JA, noted:

> "4… At the heart of the appeal is whether there is any justification for the Company's preliminary objection. That is to say, was the objection "justifiably raised" as per the decided cases of the Industrial Court. That question comes down to whether there was any factual basis to justify the objection being raised and for its consideration by the Industrial Court. The jurisprudence of the Industrial Court on this question is relevant, as is the decision of this court in **D & K Investments Limited v. Banking, Insurance and General Workers Union** Civil Appeal No. 124 of 2016.
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> ………………
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> [28] I can discern no substantive difference between the approaches of Mendonça and Jones JJA. Mendonça JA accepted that the considerations set out in UTT, OWTU and Port Authority were appropriate. He opined that the factors to be considered in coming to the conclusion that the objection had been justifiably raised were "best seen through the lenses of the Court's power to prevent an abuse of its own process".
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> [29] Jones JA on the other hand considered whether the court had the jurisdiction to hear the dispute and whether the employer was justified in requesting the referral to the Board. Any justification for the employer requesting the referral must turn on the evidence. In this regard, Jones JA appears to differ from the decision of His Honour Mr. Aberdeen since she considered that when an application is made to refer the matter to the Board, it is incumbent on the court to look at the evidence and arguments filed to see whether this issue arose in the trade dispute. As to the question of abuse of process which Jones JA held to have occurred in that case, her analysis accords with the same considerations approved by Mendonça JA.."

26. Bereaux JA went on to summarise the relevant principles of **D&K Investments**

Limited as follows:

> "[30]… (i) The question whether the employee falls within or without the definition of worker under the Act is solely for the Board.
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> (ii) The Industrial Court has a discretion to refer the issue to the Board, pursuant to sections 10(1)(a) and 11(c) of the Act. The court will only do so if the issue has been justifiably raised or if it appears the court has no jurisdiction to hear the dispute because the employer has brought evidence which suggests that the employee's status is in question. Any determination as to whether the dispute is within the court's jurisdiction ought properly to be made prior to the courts assuming jurisdiction, logically at the conciliation proceedings.
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> (iii) When made at the court hearing, the court in order to protect its process from abuse and in pursuance of its section 17 mandate to hear disputes expeditiously, will not entertain frivolous or vexatious applications. It will also consider the bona fides of the objection and whether it was raised in a manner likely to be overly prejudicial to the interests of the other party and the community as a whole.
>
> (iv) There should be a sufficient explanation for the delay in order to cause the court to exercise its discretion in favour of granting the application."

27. Bereaux JA further held that "when the worker's status has been justifiably questioned any issue as to delay by the employer can be addressed by an award of costs under Section 10(2)[of the Act]."[7]

28. Recently, in **First Citizens Bank of Trinidad and Tobago Limited v Graduate Professionals' Association of Trinidad and Tobago** Civ App No P128/2020, the issue before the Court was whether the Industrial Court was correct to dismiss an application to refer to the Board the question whether a Mr. Pennie was a

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[7] **Caribbean Shipping Agencies Ltd v National Union of Government and Federated Workers** Civil Appeal No. P074/2018, paragraph 22

worker within the meaning of the Act. Mendonça JA emphasised that the criteria on which the Industrial Court relies to determine whether a matter has been justifiably raised:

> "….is not a closed list. That there are other factors that may be relevant in any given matter. And in determining this issue, as to whether the matter should be referred to the Board, the Industrial Court is not determining the issue, but is simply deciding whether it is appropriate, in the exercise of its discretion, to refer the matter at that stage, and we suggested in **D&K** that the Court's discretion can best be seen through the lenses of its power to prevent abuse of its own process and its duty to hear matters with expedition……"

29. Mendonça JA quite correctly observed, however, that the question of costs suggested in **Caribbean Shipping** as criteria is not a "panacea for any delay on the part of the employer. It would not, for example, compensate the other side where a material witness has died or has left the jurisdiction and cannot then be located or, for example, where the delay is such that it would impact on the duties of the Court to hear the matter expeditiously. We believe that the factors are to be considered by the Tribunal. Weight is a matter for the tribunal and it must balance the factors. But in doing that, the Court must show that it has a full appreciation of the factors that inform these various factors."

30. The question of costs in any event is only exceptionally made in proceedings in the Industrial Court.[8]

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[8] See section 10(2) of the Industrial Relations Act Chapter 88:01 which provides:

> "(2) The Court shall make no order as to costs in any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise and, notwithstanding anything to the contrary in the Supreme Court of Judicature Act, relating to the award of costs, the Court of Appeal shall in disposing of any appeal brought to it from the Court make no order as to costs, unless for exceptional reasons the Court of Appeal considers it proper to order otherwise."

Errors in the Exercise of its Discretion

31. The Industrial Court therefore, only asked itself two matters: whether the preliminary issue could have been raised earlier and whether this was an abuse of its process. At page 7 of its judgment it stated:

    "Effectively, the substance of the Employer's preliminary point amounts to asking this Court to decline its jurisdiction in this matter to allow the Employer the opportunity to acquire the evidence it needs to substantiate its assertion that the Court does not have jurisdiction to hear and determine this dispute. **Such an approach must amount to an abuse of process.** Further, any delays caused by such an approach would unfairly affect the Workers' right to the expeditious and just hearing and determination of the dispute pursuant to section 11(c) of the Act."

32. It then emphasised that it was within the Employers' power and their responsibility to raise this issue at the conciliation hearing or while the matter was before the Minister. We agree with Trinrico that the Court created the wrong impression that in failing to raise the matter before the Minister they are barred from doing so at a later stage.

33. The Court failed to ask itself the relevant question whether the issue of the referral was justifiably raised by the Employer and failed to assess all the relevant circumstances involved in an examination of that question as discussed in **D&K Investments**. While those factors are certainly not closed, they are relevant to the exercise of the Court's discretion to determine whether or not Trinrico's preliminary issue was justifiably raised. Failing to examine all the relevant factors will amount to demonstrable error in the Court's exercise of its discretion.

34. Further, the Industrial Court appeared to place undue emphasis on delay. It cannot be harshly criticised for doing so. Having read the transcript and the written submissions, heavy emphasis in the exchanges was placed on the

question of delay and indeed whether the Employer was prevented from raising the issue at a later stage, a submission which the Industrial Court seemed to favour. It also did not have the benefit of the Appellate Court's judgments in **D&K Investments** and **Caribbean Shipping.** However, delay is not the only relevant factor in the exercise of its discretion.

35. In placing undue emphasis on delay without regard to other relevant factors, the Industrial Court erred in law. Whether this would have resulted in a different outcome warrants this panel examining the matter afresh as invited to do so by Counsel for both parties.

A Bona Fide Question

36. We are of the view that Trinrico had raised a bona fide question of whether Mr. Deo was a worker within the meaning of the Act. It did not act in bad faith. Trinrico acted on the misapprehension that the conciliation meeting in relation to Mr. Deo was abandoned after the Conciliator was informed that the employee was not dismissed but suspended and accordingly, there was no genuine dispute connected with a dismissal. Trinrico raised the point in its evidence and arguments, approximately four months later. Although it did not write to the Minister nor did it telegraph this submission to the Industrial Court at the directions hearing, in the absence of any interrogation into this matter, it cannot be said that Trinrico acted in bad faith. This is consistent with its letter written to the Registrar after taking the preliminary objection. What ought to have occurred was the convening of a case management conference to manage Trinrico's preliminary issue, whether to be dealt with either at the date of hearing of the trade dispute or at a preliminary hearing to determine whether a referral to the Board was necessary or not.

Delay

37. There were indeed many opportunities when this issue could have been raised prior to the filing of the Trinrico's Evidence and Arguments. Apart from the

conciliation meeting, there was the case management conference on 9th October 2015 where directions were given to the parties to file their Evidence and Arguments and the Mention and Report Proceedings on 26th January 2016 (subsequent to when Trinrico would have filed its Evidence and Arguments on 4th December 2015). However, one must take this period of delay in context. The overall period accounted for a mere matter of approximately 4 months from the conciliation proceedings and 2 months after the case management conference when compared to the 3 years that elapsed in **D&K Investments Limited** and 4 years in **Port Authority.** However, while the delay in this case is not egregious, it is no licence to parties to not use their case management conferences before the Industrial Court more proactively.

Interest of Parties

38. The Court must take into account whether the issue was raised in a manner likely to be overly prejudicial to the interest of the other party and to the community as a whole. While the Industrial Court is interested in the expeditious resolution of disputes,[9] it must also be concerned with the just resolution of them. In this case, the issues raised and the manner in which it was raised should have justifiably caused the Court to consider the issue on its merits and to take a holistic view of the bona fides of this preliminary objection.

Merits

39. In this case, even though the evidence submitted by Trinrico was not detailed and not supported by the type of evidence as set out in **Caribbean Shipping**, there is merit in the issue raised that Mr. Deo is not a worker. In the witness statement of Daniel Ramoutarsingh[10], the Chairman and Marketing Director of Trinrico stated:

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[9] See section 32 of the Industrial Relations Act

[10] Filed 10th February 2016, page 94 of the Core Bundle

"4. Trinrico's principal business is the fabrication and sale of steel and steel related products and for these purposes Trinrico manufactures and sells drawn wire, annealed wire, welded wire mesh, mild steel rods, rebars, chain link fencing, barbed wire and nails from its factory at 1a Cottage Road, Reform Village, Gasparillo.

5. The Worker was first employed by Trinrico with effect from 20th April 1975 and held various positions including Purchasing Manager and with effect from 13th April 1992 he was appointed Trinrico's Production Manager at a then monthly salary of $3500.00. At the date of his dismissal with effect 23rd February 2015 he was being paid $7,510.74 per month.

6. In his capacity as Production Manager, the Worker was in effective control of the whole of Trinrico's Production Department which is a separate unit or division in Trinrico's business dealing specifically with the manufacture and fabrication of steel and steel related products. Moreover, the Worker as Production Manager was responsible for every aspect of production including (but not limited to) the oversight of workers in his department, equipment maintenance and repair, procurement, transportation, delivery, inventory control and security.

7. The Worker's duties and functions were not merely in relation to his department because as a long standing and highly valued and trusted employee, Trinrico reposed great trust and confidence in him that he would not only be loyal to and secure Trinrico's best interest but equally, not do anything that would destroy this confidence or participate in, facilitate or encourage illegal or fraudulent practices at Trinrico. The Worker's seniority was underscored by the fact that he answered directly to Agile Bahadursingh."

40. Further, at paragraph 4 of the Respondent's Evidence and Arguments, it is stated at paragraph 4:

"The Worker was employed with the Company on April 23 1975 as the Production Manager/Purchasing Officer."

41. The Respondent did not file a Reply to deny any of the matters set out in Trinrico's Evidence and Arguments. Further, having seen the Evidence and Arguments, the Respondent's witness statement failed to address the question whether Mr. Deo was a worker.

42. There were no other relevant factors to be considered. This is not to say that one of these factors would outweigh the other. They all must be considered in the round with the Court attributing to these factors the relevant weight. Clearly, however, an overemphasis on delay without balancing that with considerations of the merits and the bona fides of the objection would lead to error. It is the omission of the Industrial Court to properly consider all the relevant factors in this case that permitted this issue to be revisited on appeal.

43. In this case the Industrial Court arrived at a decision, which was plainly an exercise of its discretion on an erroneous premise, and this Court can reverse such a finding.

Conclusion

44. Accordingly, in placing undue emphasis on delay without considering all the other factors relevant to the issue whether the matter was justifiably raised by Trinrico, the Industrial Court fell into error. When considering all the relevant factors in the round, the question of whether Mr. Deo was a worker was justifiably raised by Trinrico and ought to have been referred by the Industrial Court to the Board.

45. For the above reasons the appeal was allowed and the matter was remitted to the Industrial Court with the direction that the question of whether Mr. Deo is a worker, having regard to the provisions of section 2 (3) (e) of the Industrial Relations Act, be referred to the Registration, Recognition and Certification Board. We made no order as to costs.

Dated this 18th day of January, 2021

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Allan Mendonça
Justice of Appeal

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Peter Rajkumar
Justice of Appeal

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Vasheist Kokaram
Justice of Appeal