REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 124 of 2016
GSD-TD 409 of 2013

BETWEEN

D & K INVESTMENTS LIMITED

Appellant

AND

BANKING, INSURANCE AND GENERAL WORKERS UNION

Respondent

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

APPEARANCES:
Mr. B. Mc Cutcheon for the Appellant
Mr. A. Bullock for the Respondent

DATE: 31st March 2017

JUDGMENT

Delivered by: A. Mendonça, JA

1. The issue in this appeal is whether the Industrial Court erred when it dismissed the appellant's application to refer the issue whether the employee in question is a worker within the meaning of the Industrial Relations Act (the Act) to the Registration Recognition and Certification Board (the Board) and that in the meantime the hearing of the trade dispute before the Court be stayed. I have read in draft the judgment of Jones, JA, and I agree with the conclusion at which she has arrived. I have done so for somewhat different reasons which I set out in this judgment.

2. By letter dated July 12th 2012, Ms Anmolsingh (the employee) was offered employment with the appellant, D & K Investments Limited (the employer) in the position of "Manager for" the employer. The offer was accepted by the employee on July 13th 2012 and her employment commenced on August 15th 2012. There was a written agreement evidencing the terms of employment.

3. By letter dated September 13th 2012, the employee's employment was terminated by the employer on the payment of two weeks' salary in lieu of notice. The respondent Union (The Union) contends that the dismissal was harsh and oppressive and not in keeping with the principles of good industrial relations practice.

4. On November 20th 2012, the dismissal of the employee was reported by the Union to the Minister as an unresolved trade dispute pursuant to section 51 of the Act. Following conciliation proceedings the dispute remained unresolved and on July 10th 2013, the dispute was certified by the Minister as an unresolved trade dispute and referred to the Industrial Court for the determination of the dispute pursuant to sections 59(1) and (2) of the Act.

5. On October 17th 2014, the Union filed its evidence and arguments and the employer filed its evidence and arguments on June 26th 2015. A date was fixed for the hearing of the trade dispute.

6. On July 24th 2015, attorneys-at-law for the employer, wrote to the Union stating that having read the Union's evidence and arguments there may be an issue with the jurisdiction of the Industrial Court to hear the matter in that they were of the view that the employee was not a worker within the meaning of the Act. They further indicated that in those circumstances their client felt compelled to make the necessary application to the Industrial Court to refer the matter to the Board to determine the "jurisdiction in this matter".

7. By letter dated July 15 2015 the Union responded to the letter from the employer's attorneys-at-law. The Union indicated that it did not agree with the employer's proposed application. It was of the view that there was no merit to the claim that the employee was not a worker within the meaning of the Act. The Union also pointed out that the dispute was reported to the Minister since November 20, 2012 and was subject to conciliation both at the Ministry and the Court but the opportunity to raise the issue was not utilised. Instead the employer was

seeking to raise the claim that the employee is not a worker almost three years after her dismissal and after a date had been fixed for the hearing of the trade dispute before the Industrial Court. The Union further stated that the employer's intended application was an abuse of process.

8. By letter of July 20th 2015, the employer's attorneys-at-law applied to the Industrial Court requesting that the matter be referred to the Board for its opinion whether the employee is a worker within the Act and that in the meantime the trade dispute be stayed.

9. By letter of the same date the employer's attorneys-at-law also notified the Board that it was of the respectful view that the employee was not a worker within the Act and they had requested the Industrial Court to refer the issue to the Board.

10. The employer's application is of course, premised on the basis, so far as is relevant to this appeal that it is within the jurisdiction of the Industrial Court to hear and determine trade disputes. A trade dispute is defined to mean any dispute between an employer and workers of that employer or a trade union on behalf of such workers connected with the dismissal of any such workers (see section 2(1) of the Act). If, therefore, the employee is not a worker within the meaning of the Act, then the dispute is not a trade dispute and the Industrial Court has no jurisdiction to hear and determine it.

11. Worker is defined in the Act at section 2(1), as including "any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, technical,

clerical or other work for hire or reward". In **Civ. App. No 37 of 2000, Claude Albert v Alstons Building Enterprises Limited**, de la Bastide CJ, described this as "the primary test" of a worker. There is no dispute in this appeal that the employee fell within that definition. However, notwithstanding that an employee may fall within that definition, the Act provides at section 2(3) that persons who fall within certain categories are not to be regarded as workers. One of these categories is set out at section 2(3)(e) and this provides:

> "For the purposes of the Act, no person shall be regarded as a worker, if he is –
>
> (e) a person who, in the opinion of the Board –
>
> (i) is responsible for the formulation of policy in any undertaking or business or the effective control of the whole or any department of any undertaking or business;
>
> (ii) has an effective voice in the formulation of policy in any undertaking or business".

As will be seen later, this section has been interpreted to mean that the Board is the only authority to determine whether a person falls within this category and so is not to be regarded as a worker. It is in this setting that the employer made its application to the Industrial Court.

12. The employer's application was determined by the Industrial Court on April 21st 2016, when it was dismissed. Unfortunately, the Industrial Court did not provide any written reasons for its decision. However, there is on the Record of Appeal before this Court, a note prepared by counsel for the employer of what was said at the time the Industrial Court gave its decision. There is no dispute as to the accuracy of this note. According to that note, the Industrial

Court essentially said that in coming to its decision it followed three decisions of the Industrial Court, namely, **TD 212 of 2003, Union of Commercial Industrial Workers v The Port Authority of Trinidad and Tobago**; **TD 428 of 2006, Banking Insurance General Workers Union v UTT**; and **TD 181 of 2005, Banking Insurance General Workers Union v Land Settlement Agency**.

13. In the **Port Authority** case (**TD 212 of 2003**), a trade dispute arose concerning the dismissal of an employee of the Port Authority. The trade dispute was reported to the Minister and subsequently certified by him as unresolved and referred to the Industrial Court. Before the Industrial Court, the objection was raised by the Port Authority that the employee was not a worker within the Act and as a consequence, the dismissal of the employee did not qualify as a trade dispute. It is contended that the employee was not a worker because he fell within section 2(3)(e) of the Act. The Port Authority argued that that section makes the decision of the Board a *sine qua non,* for the determination that a person is excluded from the definition of worker. That issue should therefore be referred by the Court to the Board for its determination prior to the hearing of the trade dispute.

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".

17. In **TD 428 of 2006, Banking and Insurance General Workers Union v UTT**, there was a dissenting judgment to which the Industrial Court in giving its decision in this matter made specific reference. In that judgment the dissenting judge noted that the trade dispute was certified unresolved and referred to the Court on September 21st 2005. The parties had filed their evidence and arguments by March 8th 2006. At the hearing of the trade dispute on June

27th 2007, the employer raised objection as to the Court's jurisdiction contending that the employee was not a worker as he fell within section 2(3)(e) of the Act and requesting that the matter be referred to the Board. The dissenting judge acknowledged that it was the Board alone that could determine whether a person fell within the exclusion at section 2(3)(e) of the Act and so was not a worker. The employer's application, however, according to the judge had raised two issues, namely; (i) whether the court possessed the jurisdiction to hear and determine the trade dispute; and (ii) whether the employer was justified in requesting the Court at that stage to refer the matter to the Board. The judge was of the view that before a party can object to the jurisdiction of the court on the basis that the employee fell within section 2(3)(e) and was not a worker, it must be in possession of evidence of an opinion of the Board to that effect. As the issue had not been previously referred to the Board, the employer had no such evidence. This left the second issue whether the employer was justified to make the request that the matter should at that stage be referred to the Board. The judge concluded that it was not so justified. He stated:

> "Attorney for the [employer] has acknowledged the long delay (2 to 4 years) that has been involved in similar proceedings before the [Board] which he has suggested that this Court may take judicial notice of. Therefore in the face of this, for the Court to go along with such a course of action, would be to acquiesce in an unconscionable abuse of its own process and to participate in the creation of unjustifiable delay, which would inevitably attend an application to the [Board] at this stage and which would be unfair to the [employee] and prejudicial to the interest of justice. Further, this Court will be acting in contravention of its obligation under Section 17 of the Act, to act expeditiously and to its general obligation as a Superior Court of Record to protect its jurisdiction and guard against abuse of its processes."

18. The majority, it is relevant to note, was of the view that the issue should be referred. The majority reached a different conclusion on the assessment of the evidence before the Court but accepted the approach in the **Port Authority** case to be correct and that is to say that the Industrial Court should refer the issue to the board only where it is justifiably raised.

19. **TD 181 of 2005, Banking Insurance and General Workers' Union v Land Settlement Agency**, which according to the note prepared by counsel for the employer was also referred to by the Industrial Court, seems to have no relevance to this issue. It seems to have been cited in error. I do not think anything turns on that and I will therefore make no further reference to this case.

20. In view of the **Port Authority** and the **UTT** cases, it would appear therefore, that the Industrial Court in dismissing the application of the employer was of the view that before the issue as to whether the employee was a worker within the Act should be referred to the Board and the trade dispute stayed, the issue had to be justifiably raised but that it was not. What factors they took into account at arriving at its decision are unfortunately not known as the Court gave no explanation how it applied the principles in the **Port Authority** and the **UTT** cases.

21. The employer has appealed the decision of the Industrial Court not to refer the issue to the Board. The employer relies on three grounds which it has set out in its notice of appeal. Counsel for the employer has filed written submissions and has made oral submissions

before this Court in support of the grounds of the appeal. The employer's case may be summarised as follows:

(1) The only body with the jurisdiction to determine whether the employee falls within section 2(3)(e) of the Act and so is not a worker within the meaning of the Act is the Board;

(2) The issue whether an employee is a worker because he or she falls within section 2(3)(e) of the Act is one that can be raised at any time by any party to a trade dispute;

(3) Once the issue has been raised, the Industrial Court does not have the jurisdiction to determine the issue and it must be referred to the Board by the Court or to the Minister with a recommendation that it be remitted by him to the Board;

(4) The dismissal of the employer's application to refer the issue to the Board amounts to a determination by the Industrial Court that the employee is a worker and as such it has acted out-with its jurisdiction;

(5) In dismissing the employer's application, the Industrial Court applied its own decisions to which reference has been made earlier and failed to follow decisions of this Court by which it is bound;

(6) The test propounded by the Industrial Court that the issue must be justifiably raised or that there must be *prima facie* evidence before the Court that the person falls within section 2(3)(e) before the issue is referred to the Board is not supported by any rule of law or the Act and therefore in establishing that test the Court fell into error.

22. Counsel for the respondent supported the Industrial Court's decision. He submitted that the decision of the Industrial Court not to refer the issue and to dismiss the employer's application is an exercise of the Court's discretion and it must be shown that it was plainly wrong to do so. He argued that it cannot be that an employer can raise the issue as to whether an employee is a worker at any time after the trade dispute has been referred to the Industrial Court and without any evidential basis and the Court is obligated to remit the issue to the Board. He submitted that the Industrial Court is entitled to take into account the factors outlined in its decisions referred to above and on a proper consideration of those factors in this case, it cannot be said that the Industrial Court was plainly wrong to dismiss the employer's application.

23. There are limited grounds on which an appellant may appeal to the Court of Appeal from any decision of the Industrial Court. These grounds include that the Industrial Court has exceeded its jurisdiction or its decision is erroneous in point of law (see section 18(2)(b) and (d) of the Act). I think it is fair to say that this appeal raises questions touching on these grounds.

24. The most appropriate place to start in considering the appellant's submissions is with the submission that the Industrial Court has failed to follow decisions of this Court that are binding on it. The decisions to which reference is made are **Civ. App. 183 and 184 of 1994 The Registration, Recognition and Certification Board v Bank Employees Union and Republic Bank Ltd; Civ. App. 37 of 200**; **Claude Albert v Alstons Building Enterprises**

Limited; and Civ. App 87 of 1999, Caroni (1975) Ltd v Association of Technical Administrative Supervisory Staff.

25. These cases decide that the Board "is the sole authority under the Act charged with the responsibility of determining whether an employee is a worker under the provisions of the Act" (per Ibrahim JA in the **Bank Employees Union** case **(Civ. App. 183 and 184 of 1994)**). In the **Albert** case (**Civ. App. 37 of 2007**), it was put this way by de la Bastide CJ:

> "The way in which paragraph (e) [of section 2(3)] 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."

26. In the **Caroni** case (Civ App. 87 of 1999) Jones and Warner, JJA in a joint judgment after referring to the **Bank Employees** and **Albert** cases stated that "it cannot be disputed that the sole authority for determining whether or not an employee is excluded by paragraph (e) [section 2(3)] from the definition of "worker" is the Board".

27. The cases decided by this Court therefore clearly establish that the Board is the sole authority for determining whether the employee falls within section 2(3)(e) of the Act and is therefore excluded from the definition of worker. It is clear from the Industrial Court's decisions which the Industrial Court followed in this case that the Industrial Court was very much

aware that the Board is the sole authority for determining that issue. In so far as the Industrial Court in this case applied those decisions, it cannot be said that it did not follow the decisions of the Court of Appeal and the submission of counsel for the appellant to that effect is erroneous.

28. It is worth noting too, what the cases of this Court did not decide because that is equally relevant to the appellant's submissions. The cases do not decide that whenever the issue is raised as to whether the employee is not to be regarded as a worker because he or she fell within section 2(3)(e) of the Act that the Industrial Court had no option but to refer the matter to the Board. That was not an issue before the Court of Appeal in any of the cases referred to and the dicta in the various judgments of this Court are not capable of supporting that proposition. Indeed if it is possible to determine anything from the judgments that relate to that proposition, it does not support it. In the **Albert** case, after noting that the procedure for obtaining the opinion of the Board was not clear, de la Bastide CJ noted "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". That is a recognition that in some cases the opinion of the Board may not be obtained and seems to be to be against the proposition that whenever the issue is raised before the Industrial Court it must be referred to the Board for its opinion. The submission of counsel for the appellant that once the issue is raised it must be referred to the Board by the Court therefore does not find support in the authorities and if anything, the **Albert** case is against that submission.

29. The appellant's submissions are built around two main propositions. One is that where the Industrial Court refuses to refer the issue for the opinion of the Board, it amounts to the determination by the Industrial Court that the employee is not a worker, which it has no jurisdiction to do. The other is that by asking the question whether the issue is justifiably raised, the Court has wrongly imposed a threshold since there is no principle of law that requires it. In my view this is to misunderstand the approach of the Industrial Court in these matters and to take a very myopic view of the powers and jurisdiction of the Court.

30. By asking itself the question whether the issue is justifiably raised, the Industrial Court is not deciding the issue whether the employee is excluded by section 2(3)(e) of the Act. The Industrial Court is aware that the Board is the sole authority to determine the issue. What it seeks to do is to determine whether at the time the issue is raised before it, it is in the circumstances right and proper for it to refer the issue to the Board and stay the trade dispute that has been referred to the Court for its determination.

31. The application by the employer to refer the issue after the trade dispute has been referred to the Industrial Court by the Minister for its determination is an appeal to the court to exercise its discretion in favour of the referring the issue. It is an appeal to the discretionary judgment of the court. In **TD 43 of 2001, OWTU V NP**, where the Industrial Court referred the issue to the Board, it acted under section 10(1)(a). This section provides that the Court, in relation to any matter before it, may remit the dispute, subject to such condition as it may determine, to the parties or the Minister for further consideration by them with a view to settling or disputing the several issues in dispute. Acting under that section, the Industrial Court

referred the matter to the Minister with a recommendation that he obtain the Board's opinion on the question as early as possible. I see no problem with this approach. The Court, it seems to me, may also act under section 11(c) of the Act and refer the matter directly to the Board. The point, however, is that these sections clearly require the Industrial Court to exercise its discretion. In this regard, it should be noted that by section 13(1) the Industrial Court may make rules to regulate its practice and procedure for the hearing and determination of all matters before it. The Industrial Court has never published any such rules but that does not stultify it in the exercise of its jurisdiction. In doing so, however, it must bear in mind the objects of the Act and of course, not infringe the provisions of the Act or any other principle of law applicable to it.

32. While Counsel for the appellant is correct to say that there is no principle of law that provides explicitly for the enquiry by the Industrial Court whether the issue is justifiably raised, by the same token there is nothing that prevents it. 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.

33. It is material in considering the test of justifiably raised that 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. It is also relevant to note that the 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).

34. As I mentioned earlier, among the factors that the Industrial Court has indicated that should be taken into account to determine whether the issue is justifiably raised 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 as, I think, was recognised by the Court in its decisions referred to above. 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.

35. No point is taken as to any of the other factors mentioned in decisions of the Industrial Court that it will take into account in determining whether the issue was justifiably raised, such as prejudice to the other parties before the Court and the interests of the community as a whole. I think counsel was right not to do so as they are clearly relevant factors.

36. In view of the above, I can see no objection to the Industrial Court asking itself whether the issue was justifiably raised. The factors taken into account by the Industrial Court summarised in this judgment are clearly relevant to the determination of that issue. That list of factors, however, as indicated in the decisions themselves, should not be regarded as closed.

37. I mentioned that the Industrial Court has not provided written reasons in this matter for dismissing the employer's application. The effect of that is that although the principles the Court applied are clear because of the reference it made to the Industrial Court decisions, it is not known how they were applied in this case. In those circumstances I think it is appropriate to look at the matter afresh and consider whether on a proper application of the principles, the issue whether the employee fell within section 2(3)(e) was justifiably raised and so determine whether the Industrial Court was plainly wrong to dismiss the employer's application.

38. In this case I have no doubt that the Court came to the correct decision. There is no explanation from the employer why the assertion that the employee is not a worker was not made earlier. There was indeed ample time to do so. Almost three years had elapsed from the date the dispute arose before the assertion was eventually made before the Industrial Court. And the dispute arose almost a year before it was referred to the Industrial Court and spent approximately seven months in conciliation before the Minister. The only suggestion as to the timing of the assertion was that it was made by the employer after considering the Union's evidence and arguments. However, the evidence and arguments raised nothing that would suggest the employee fell within section 2(3)(e) and everything to point to the fact that employee is a worker within the Act.

39. I have already set out section 2(3)(e) of the Act and it can be seen from that section that a person is not to be regarded as a worker if she is responsible for the formulation of policy in any undertaking or business or the effective control of the whole or any department of any undertaking or business or has an effective voice in the formulation of policy in any undertaking or business. There is not anything in the Union's evidence or arguments that comes close to suggesting that the employee satisfied any of the criteria in these sections. According to the Union's evidence and arguments, the employee was instructed to perform tasks of an accounting nature and her main duties, which she was told to perform, involved recording sales figures given to her by "lotto booth workers and double checking of the correctness of the balances of the [employer's] funds at the end of each day." None of these allegations is denied by the employer. In fact the employer in its evidence and arguments refers to the employee as the worker, seeks to justify her dismissal on proper grounds and

avers that it at all times exhibited good industrial relations practice and good faith in handling of "the worker's employment and termination". The contract of employment does not assist the employer's position that the worker was excluded by section 2(3)(e). In those circumstances, there is therefore no merit in the assertion that the employee is a worker and no explanation for the delay in raising the issue. I agree with Jones, JA that in those circumstances to grant the employer's application would be to permit an abuse of the process of the court and would be manifestly unfair to the employee. It would also be tantamount to an abdication by the Industrial Court of its duty that is owed, not just to the parties before it but to the community as a whole, to hear every dispute expeditiously.

40. In all the circumstances, in my judgment, the issue whether the employee fell within section 2(3)(e) was not justifiably raised and the Industrial Court in the exercise of its discretion was right to dismiss the application of the employer.

41. The appeal is therefore dismissed with no order to costs.

A. Mendonça,
Justice of Appeal

Delivered by Jones, J.A.

42. On 21st April 2016 the Industrial Court dismissed an application by the appellant, D&K Investments Ltd., by which it sought to have the question of whether Ms. Reshma

Anmolsingh ("the employee") was a worker under the Industrial Relations Act Chap 88:01 ("the Act") referred to the Registration, Recognition and Certification Board ("the Board") for its determination. This is an appeal from that decision.

43. The position taken by the appellant on the application before the Industrial Court, and before us, was that the Industrial Court had no jurisdiction to hear and determine the trade dispute pending a determination from the Board on the question of whether the employee was a worker under the Act. In dismissing the application the Court held that it had the jurisdiction to hear and determine the trade dispute.

44. The application was made to the Industrial Court by way of a letter dated 20th July 2015 in trade dispute, TD No. GSD-TD 409 of 2013, between the appellant and the Banking, Insurance and General Workers Union, the respondent herein. The effect of the request by the appellant, if successful, would have been to stay the hearing of the trade dispute fixed for the 1st October 2015 until the determination of the question by the Board.

45. The trade dispute had been referred to the Court by way of a certificate of unresolved dispute from the Minister of Labour and Small and Micro Enterprise Development ("the Minister"). The dispute, as identified by the certificate, concerned: "the unfair dismissal, effective September 13 2012, by way of letter of the same date, of Reshma Anmolsingh, Manager".

46. The relevant facts are not in dispute. By letter dated 12th July 2012 the employee was employed by the appellant as an "H.R. Manager". She was subsequently dismissed on 13th

September 2012. On 20th November 2012 the respondent reported the dismissal as a trade dispute to the Minister. In accordance with the Act conciliation was conducted under the auspices of the Minister. The dispute being unresolved by the conciliation a certificate in that regard was issued by the Minister on 10th July 2013.

47. Pursuant to section 8(5) of the Act, by order of the Court, the evidence in the trade dispute was directed to be by way of written evidence and arguments to be filed and exchanged by both parties to the dispute. The respondent filed its evidence and arguments on 17th October 2014 and the appellant on 26th June 2015.

48. Upon receipt of the respondent's evidence and arguments, by letter dated 14th July 2015, the appellant, through its attorneys, wrote to the respondent's representative raising the question of whether the Court had the jurisdiction to hear the matter. The position taken by the appellant in its letter was that the employee was not a worker under the Act as she had been employed in the position of Manager in the Human Resource Department.

49. In that regard the appellant in the letter referred to section 2(3)(e)(i) of the Act; indicated its intention to apply to the Court to have the question referred to the Board for its determination and sought the respondent's approval with respect to the course of action proposed. This was not a stance taken by the appellant in its evidence and arguments. That document did not in any way raise the question of whether the employee was a worker under the Act nor did it seek to challenge the jurisdiction of the Court to hear the trade dispute.

50. In response, by letter of 15th July, the respondent referred to paragraph 3.3 of its evidence and arguments and took the position that there was no merit in the appellant's position as the employee was not responsible for the formulation of policy nor did the employee have effective control over the whole of any department or undertaking or business. In addition the Union advised that, this position being taken for the first time almost 3 years after the dismissal and never raised in conciliation undertaken before the Minister or the Court, it was of the view that to raise it at this stage after a date had been set to hear and adjudicate on the matter was an abuse of process.

51. By letter dated 20th July 2015 the appellant applied to the Court to have the question of whether the employee was a worker referred to the Board for its determination. By that letter the appellant again relied on section 2(3)(e)(i) of the Act. As well, by letter of even date, the appellant advised the Board that it was of the opinion that the employee was not a worker under the Act and of its intention to have the Court refer the question of whether the employee was a worker under the Act to the Board for its determination. No application was made directly to the Board for a determination of the question.

52. The trade dispute came up for hearing on 1st October 2012 and the application dealt with on that date as a preliminary point. At the time of the hearing of the application the only evidence before the Court was that contained in the evidence and arguments filed by both parties.

53. In both of these documents the employee was consistently referred to as "the worker". Placed before the Court, by the evidence and arguments of both parties, was the employment agreement between the parties and, by paragraph 3.3 of the respondent's evidence and arguments, evidence with respect to the duties of the employee. The appellant's evidence and arguments did not treat with the employee's duties. Nor was there any reply filed by it to the evidence and arguments of the respondent. The respondent's evidence, on this point therefore, was undisputed.

54. Insofar as the employment agreement was concerned the agreement provided that the employee report to a departmental head for the purpose of absences from work and was subject to an annual performance appraisal from her departmental head. With respect to the duties of the employee it was asserted by the respondent that the employee was initially employed to develop systems and procedures to manage employees and their leave. Upon the commencement of her employment, however, her main duties were the recording of sales figures advised by the lotto booth cashiers; double-checking the accuracy of their balancing of the company's funds at the end of the day and ensuring that the lotto booths had proper supplies.

55. In dismissing the application the Court gave no reasoned decision. However from the appellant's typed notes of the oral reasons given, and accepted as accurate, it would seem that the Court merely indicated that it relied on three cases all decisions of the Industrial Court: **TD 212 of 2003 Union of Commercial and Industrial Workers v the Port Authority of Trinidad and Tobago**; a dissenting judgment in **TD 248 of 2006 Banking,**

Insurance and General Workers' Union v University of the West Indies and **TD 181 of 2005 Banking Insurance and General Workers**. The last case referred to however does not seem to have any relevance to the issues for our determination. Accordingly we shall not treat with this case.

56. By way of a procedural appeal the appellant appealed the decision. Essentially the grounds of appeal are:

    (i) in dismissing the application the Court made a determination that the employee was a worker in circumstances where it had no jurisdiction to do so;

    (ii) the court erred in law in not considering or following its previous decisions in: **The Registration, Recognition & Certification Board & Bank Employees Union Civ. Apps No. 183 and 184 of 1994 ; Albert v Alstons Building Enterprises Limited Civ. App. No 37 of 2000** and **Caroni (1975) Limited v Association of Technical Administrative Supervisors Staff Civ. App 87 of 1999** and preferring or relying on the decisions in referred to in its oral reasons.

57. This appeal proceeded on the basis that the Industrial Court does not have the jurisdiction to determine whether an employee is a worker under the Act. This was a position accepted by the respondent. Indeed the Act and the authorities all speak with one voice on this point.

58. **Section 2(3)(e)** of the Act provides that no person shall be regarded as a worker, if he is:

> "(e) a person who, in the opinion of the Board-
>
> (i) is responsible for the formulation of policy in any undertaking or business or the effective control of the

whole or any department of any undertaking or business[1]; or

(ii) has an effective voice in the formulation of policy in any undertaking or business"

59. This section has been interpreted to make the Board "the sole authority under the Act charged with the responsibility of determining whether an employee is a worker under the provisions of the Act": per **Ibrahim JA** in **The Registration, Recognition and Certification Board and Bank Employees Union v Republic Bank Ltd. Cv.A 183 and 184 of 1994** at page 3**.**

60. The position taken by the appellant before us is simply that the point that an employee is not a worker under the Act can be taken at any time and that any procedure can be adopted to place the issue before the Board. According to the appellant once the point is taken the Court has no discretion it must refer the matter to the Board. By failing to do so the Court is in effect (a) making a decision that the employee is a worker under the Act which it has no jurisdiction to do and (b) not following authorities which are binding upon it.

61. The respondent on the other hand advances the position that, in dismissing the application, the Board was not determining the question of whether the employee was a worker it was merely exercising a discretion open to it under section 10(1)(a) of the Act, that is, whether or not to refer the dispute to the parties or the Minister for further consideration. According to the respondent given the fact that the Court was already seized of the dispute and had a statutory duty to hear, inquire into and investigate every dispute expeditiously it cannot be criticized for seeking to ensure that only meritorious questions are referred to the Minister.

[1] The appellant here relies on this subsection

62. The real issue for our determination on this appeal therefore is not whether the Court had the jurisdiction to determine whether the employee was a worker under the Act but rather whether the Court had the jurisdiction to deal with the trade dispute given the application before it. In dismissing the application the Court in effect determined that it had such a jurisdiction.

63. Essentially this case treats with the jurisdiction of the Court. **Section 7 of the Act** sets out this jurisdiction. This jurisdiction includes the jurisdiction to hear and determine trade disputes[2]. It is this aspect of the Court's jurisdiction that is called into question by this appeal. Insofar as it is relevant to the issues for determination in this appeal, under the Act, a trade dispute is defined as:

> "any dispute between an employer and workers of that employer or a trade union on behalf of such workers….."[3]

64. Simply put therefore one of the core functions of the Court is to hear and determine trade disputes between employers and workers or trade unions acting on behalf of workers[4]. By definition a trade dispute does not include a dispute concerning an employee who is not a worker under the Act.

[2] Section 7(1)(a).
[3] section 2 of the Act.
[4] By section 51 of the Act however access to the Court is limited ti trade unions acting on behalf of workers.

The Authorities

65. In support of its position the appellant relies on three cases that it says require the Court to refer the question to the Board. The first, and arguably the most important, of these cases is **The Registration, Recognition and Certification Board and the Bank Employees Trade Union v Republic Bank Limited** referred to earlier. In particular the appellant relies on a statement by Ibrahim JA, as to the manner of making such an application, in support of its submission that it was entitled to bring the application at any time and in any manner.

66. According to Ibrahim JA in that case:

> "Whilst the duty is placed on the Board to make such a determination the person and the procedure for bringing such a question is not spelled out in the Act. It is therefore open to anyone who can raise such a question before the Board to approach the Board in any manner in which the Board can be approached."[5]

It is necessary for the purposes of this appeal to place this statement in its proper context.

67. The appeal in that case arose out of two trade disputes concerning the dismissal of persons who had been employed by the bank as operation managers. The position taken by the bank prior to and during the conciliation proceedings at the Ministry was that these persons were not workers under the Act.

68. In the first trade dispute two questions were referred by the Minister to the Board for its determination: (i) whether the employee was a worker under the Act and (ii) whether as a board appointed official he was a member of the bargaining unit for which the Union was a

[5] page 9 of the judgment.

majority member. In the second trade dispute only one of these questions was referred to the Board. The common question in both trade disputes was whether the employees were workers under the Act.

69. The questions referred to it by the Minister in both trade disputes were heard together by the Board. These consolidated proceedings were interrupted by an application for judicial review by the bank in which orders for certiorari and prohibition were made against the Board. These orders effectively halted the proceedings before it. The appeal before the Court of Appeal was with respect to the orders made in the judicial review proceedings.

70. In both trade disputes the bank's position was the same. It contended that the Board had no jurisdiction to hear either question. With respect to the first question its position was that the Board had in earlier proceedings before it concluded that board appointed officials[6] were not members of any bargaining unit for which the union was the recognized majority union. The Board therefore lacked the jurisdiction to entertain this question except by way of an application made to it under section 39 of the Act to vary the bargaining unit.

71. Further, since the Board had expressly stated in those proceedings that such officials were not workers within the meaning of the Act, it also lacked the jurisdiction to entertain that question. The bank maintained that in those circumstances these questions could not be referred to the Board by way of referral from the Minister. The short point on appeal

[6] in this context 'board appointed officials' refers to officials appointed by the board of the bank

therefore, as recognized by Ibrahim JA, was whether the questions raised by the Minister in the referrals had been determined by the Board.[7]

72. It is in answering this point that Ibrahim JA concluded that the Board was the sole authority under the Act for determining: (a) whether an employee was a worker under the Act; and (b) the appropriate bargaining unit in any workplace; and that accordingly the questions referred by the Minister to the Board fell within the competence and jurisdiction of the Board. On the facts of the case, however, since the post of operations manager had not been in existence at the time of the first determination by the Board the Court held that it was open to the Minister to refer the question of whether the employees were workers under the Act to the Board. However it held that the other question posed could only be determined by an application to the Board made pursuant to section 39 of the Act.

73. It therefore allowed the appeal insofar as the referral of the question of whether the employees were workers under the Act was concerned and accordingly that question was remitted to the Board for determination. In remitting that question to the Board for its determination what the Court of Appeal did was simply to remove the prohibition placed on the Board by the judicial review proceedings thereby effectively allowing the Board to continue to treat with the Minister's referral of the question of whether the employees were workers under the Act. There was therefore no actual referral of the question to the Board by the Court of Appeal.

[7] per Ibrahim J.A. at page 8

74. It is in coming to its determination that the Minister was not excluded by the Act from referring the question of whether the employees were workers under the Act to the Board that the statement of Ibrahim JA relied on by the appellant was made. More particularly it was made in the context of section 23(1)(f) of the Act, which charges the Board with the responsibility for "such other matters as are referred or assigned to it by the Minister or under this or any written law" and Ibrahim JA's conclusion that "such other matters" included those matters contained in section 2(3)(e) of the Act.

75. Following upon such a conclusion, later in the judgment, he says:

> "Whilst the duty is placed on the Board to make such a determination the person and the procedure for bringing such a question is not spelled out in the Act. It is, therefore, open to anyone who can raise such a question before the Board to approach the Board in any manner in which the Board can be approached. The Minister is not excluded by the Act from raising the question with the Board. Therefore, in my opinion, it is open to the Board to entertain an application from the Minister under sec. 23(1)(f) of the Act to determine whether a person is a worker within the meaning of the Act or not. The Board, therefore, would have jurisdiction at any time to determine such a referral from the Minister. There is, therefore, no merit to the objection taken".

76. The statement relied by the appellant was made by the way and in the process of arriving at the conclusion that by sections 23(1)(f) of the Act the Minister was permitted to bring such an application before the Board. It was therefore was a statement made by way of obiter dictum and not binding on future courts.

77. In any event it is clear from the context of the statement that the judge was not intending to give a blanket approval to anyone to approach the Board in any manner whatsoever in order to raise the question but rather suggesting, as he himself did, that it be considered within the context of the Act. It is clear therefore that, contrary to the submission of the appellant, this case does not support the contention that it is open to a party to a trade dispute to seek to refer to the Board the question of whether an employee is a worker under the Act at anytime during the continuance of that trade dispute or that any procedure can be adopted to place the question before the Board.

78. The second of the decisions relied on by the appellant is found in the case of **Albert v Alstons Building Enterprises Ltd. Civ. App. No 37 of 2000**. In that case the issue of who was a worker under the Act was raised in the context of the Retrenchment and Severance Benefits Act. Like the trade dispute jurisdiction of the Industrial Court the Retrenchment Act did not apply to persons who were not workers in accordance with the Act[8].

79. The issue was treated by de la Bastide CJ in this manner:

> "In section 2(1) of the IRA "worker" is defined as including " any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, technical, clerical or other work for hire or reward…."
>
> This is the primary test of a 'worker' which as I have said, the appellant clearly satisfied by virtue of his contract of employment with the respondent. Sub-section (3) of the same section provides that no person shall be regarded as a "worker' if he falls into a number of different categories. One of these categories is defined in paragraph (e) in the following way:

[8] the Act here being the Industrial Relations Act

> " A person who in the opinion of the Board-
> is responsible for the formulation of policy in any undertaking or business or the effective control of the whole or any department of any undertaking or business; or
> has an effective voice in the formulation of policy in any undertaking or business".
>
> …….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……The opinion of the Board not having been obtained in relation to the appellant, severance benefits in accordance with the 1985 Act are payable to him."[9]

80. In addition to confirming the position that it is for the Board and the Board alone to make a determination as to who is a worker under the Act this case treats with the question of on whom does the burden lie to prove that an employee is excluded from the definition of worker under the Act. It concludes that once there is evidence that satisfies the primary test established by the Act then it is for the person seeking to rely on the exclusion to satisfy the court that the exclusion applies.

81. To do so the party seeking to rely on the exclusion is required to adduce evidence sufficient to discharge the prima facie or primary case established. In that case therefore, in the absence of evidence supporting the exclusion, the prima facie case as established by the evidence of the contract of employment could not be displaced.

[9]pages 6-7 of the judgment

82. The final of the cases relied on by the appellant in its grounds of appeal is: **Caroni (1975) Ltd. v Association of Technical Administrative Supervisory Staff (2002) 67 WIR 223**. This was an appeal from the decision of the Industrial Court when it embarked on a hearing on the question of whether the employee was a worker under the Act.

83. During the course of the hearing of the trade dispute the issue of whether the Court had the jurisdiction to hear the trade dispute was raised. This required a determination as to whether the employee was in fact a worker under the Act. The evidence in support of the employer's position had been placed before the Court very early in the case, and prior to the issue of the unresolved certificate by the Minister, in affidavits presented by the employer in opposition to an injunction.

84. The Industrial Court, perhaps misunderstanding the decision in the Registration, Recognition and Certification Board and the Bank Employees Trade Union v Republic Bank Limited case, dealing with the jurisdiction point determined that the words "in the opinion of the Board" in section 2(3) of the Act referred solely to a situation where the Board was treating with an application for the recognition, registration and certification of a trade union. It concluded therefore that in the absence of such an application it was the proper forum to adjudicate on the issue of whether the employee was a worker under the Act. The Industrial Court then went on deal with the question; determined that the employee was a worker under the Act and heard and determined the trade dispute.

85. Understandably the Court of Appeal did not agree with the position taken by the Industrial Court. Applying the principle established by the Registration, Recognition and Certification Board v Republic Bank and followed in Albert v Alstons Building Enterprises case it determined that the Industrial Court was wrong to assume it had the jurisdiction to treat with the question of who was a worker under the Act.

86. In answer to the question what was the proper course for it to follow in the circumstances the Court of Appeal stated:

> "We do not think it right that in a trade dispute this Court should be deterred by any technicality from doing what is necessary in order to ensure that a matter in dispute of such fundamental importance to the case is determined by the body competent to decide it. "[10]

87. The technicality it would seem was the fact that the matter had not been referred to the Board by the Minister for the resolution of that question pursuant to section 23 (1) (f) of the Act. The Court of Appeal therefore invoked its power under section 18(3) of the Act which permitted it to order that a new hearing be held and remitted the question of whether the employee was excluded by paragraph (e) from the definition of 'worker' to the Board for its consideration and determination.

88. It is not in dispute that these cases, being decisions of the Court of Appeal, are binding on the Industrial Court. The main thrust of these cases however merely supports the position, undisputed in this appeal, that it is the Board that is given the jurisdiction under the Act to

[10] page 232 paragraph a

treat with the question of who is a worker under the Act. In addition the Registration, Recognition and Certification Board v Republic Bank and the Caroni (1975) cases provide some limited guidance on the manner by which the Act allows for such matters to be referred to the Court.

89. In the Registration, Recognition and Certification Board v Republic Bank case Ibrahim concluded that, in accordance with the Act, such approach could be by the Minister pursuant to section 23(1) (f) of the Act. In that case however because the Court of Appeal had been approached via the Board there was no need for the Court of Appeal to find a method by which it could, under the Act, remit the matter to the Board.

90. In the Caroni case the Court was not so fortunate. The dilemma of the Court there was how to remit the issue for hearing before the Board. Accordingly, with some obvious reservation[11], they employed section 18(3) as the vehicle for remitting the matter to the Board. This was necessary because an examination of the Act reveals that, apart from the applications mentioned in sections 23 and 32 of the Act neither of which deal with applications to determine whether a person is a worker under the Act, the only means of referring any other question to the Board was to employ section 23(1)(f) of the Act.

.

91. Where the Industrial Court cases differ from the Court of Appeal cases is with respect to the manner of referral to the Board. Where this was deemed necessary those courts employed section 10(1)(a) of the Act as the vehicle for referral. **Section 10(1)(a)** provides that the

[11] at page 232

Court may in relation to any matter before it "remit the dispute to the parties or the Minister for further consideration by them with a view to settling or reducing the several issues in dispute." This was not a section considered by the Court of Appeal in the Caroni case.

92. The first of the cases is **Oilfields Workers Trade Union v National Petroleum Company of Trinidad and Tobago, TD 43 of 2001**. While acknowledging that it was for the Board to determine whether the employee was a worker under the Act the court here determined that (a) where the court is seized of a trade dispute for the question of whether an employee is a worker to be considered the issue must be "justifiably raised" in the trade dispute and (b) once such an issue is justifiably raised then in accordance with section 10(1)(a) of the Act the dispute ought to be referred to the parties or the Minister for further consideration.

93. The position in this case therefore accords with the stance taken by the respondent in the appeal before us that the issue was whether the Court should, on the facts of the case, exercise its discretion to refer the matter to the Minister and the parties in accordance with section 10(1)(a) of the Act.

94. On the facts of that case the court was of the view that the issue had been justifiably raised. Accordingly it remitted the trade dispute to the Minister and the parties for further consideration by them with a view to settling this particular issue.

95. The position taken in **Oilfields Workers Trade Union v National Petroleum Company of Trinidad and Tobago** was followed in the two other cases relied on by the Court. In the case of **The Union of Commercial and Industrial Workers v The Port Authority of Trinidad and Tobago TD 212 of 2003** the court determined that that the issue of whether the employee was a worker under the Act had not been justifiably raised and, in the circumstances, it was open to it to proceed with the trade dispute. In the case of **Banking Insurance and General Workers' Union v University of Trinidad and Tobago (U.T.T.) TD 428 of 2006**, by majority decision, the court took the opposite view.

96. In **The Union of Commercial and Industrial Workers v the Port Authority of Trinidad and Tobago** the court found that the parties had participated in what it termed 'trade dispute resolution mechanism' prior to the termination of the employee's services. At that time the issue was the legal representation of the employee at an inquiry into his alleged misconduct. By this 'trade dispute resolution mechanism' the attention of the court had been engaged since 22nd January 2001. Despite this the issue of whether the employee was a worker under the Act was only raised on 9th July 2004.

97. In treating whether that issue had been justifiably raised the court stated:

> "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 considerations 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 the status of the Court having all the powers inherent in a Superior Court of Record. Perhaps the most essential of these powers

is that of preserving the Court's jurisdiction and guarding against potential abuse of its processes."[12]

98. The final case considered by the Court was that of **Banking Insurance and General Workers' Union v University of Trinidad and Tobago (U.T.T.) TD 428 0f 2006**. This was another case of dismissal. Here the report was made to the Minister on 6th July 2006. The parties engaged in conciliation proceedings before the Minister. The Minister's certificate that the dispute was unresolved was issued on 21st September 2006 and the dispute referred to the court. On 4th December 2006 the employer wrote to the court giving notice that at the hearing of the trade dispute it intended to take an objection to the court's jurisdiction to hear the matter on the ground that the worker was not a worker within the meaning of the Act.

99. In the evidence and arguments filed by the employer it merely stated that the dispute was not maintainable on the basis that the employee was not a worker under the Act and as such the court should decline jurisdiction. Despite the requirement that the parties file their evidence and arguments no evidence was placed before the court however with respect to this argument.

100. Here, accepting the position taken in the case of **Oilfields Workers' Trade Union v National Petroleum Company of Trinidad and Tobago** that once the issue has been justifiably raised before it the Court does not possess the jurisdiction to deal with the issue, the majority of the judges determined that the issue had been justifiably raised and, in

[12] page 7 of the ruling

accordance with what was done in the earlier case, the trade dispute was referred to the Minister and the parties pursuant to section 10(1)(a) of the Act.

101. In the appeal before us the Court however preferred the minority decision of His Honour Aberdeen who held a different view. In his minority ruling the judge determined that the correct question was not whether the court had the jurisdiction to treat with the question of whether the employee was a worker under the Act but rather the questions for the court's determination were: (i) whether the court possessed the jurisdiction to hear and determine the trade dispute and (ii) whether the employer was justified in requesting the court at this stage to refer the question of whether the employee was a worker under the Act to the Board.

102. According to the judge it was for the court to determine the first question at the moment it was raised and on the basis of the facts and evidence placed before it by the party raising the question. On the facts of the case he concluded that the employer had failed to substantiate its objection to the court's jurisdiction to hear and determine the trade dispute. In this regard therefore, put another way and in the context of the Oilfields Workers' Trade Union v National Petroleum Company of Trinidad and Tobago case, he was of the view that the question of whether the employee was a worker under the Act had not been justifiably raised and therefore could not properly oust the court's undoubted jurisdiction to hear and determine the trade dispute before it.

103. In arriving at his answer to his first question the judge was also acting in accordance with the position taken by the Court of Appeal in **Albert v Alstons Building Enterprises Ltd** that it was for the court at the time of the application to determine whether there was evidence that justified the position taken. In Albert's case the evidence before the court pointed to the employee being a worker under the Act and there was nothing that suggested a contrary position.

104. With respect to the second question the judge was of the opinion that for the court to accede to the employer's request would cause it to:

> "acquiesce in an unconscionable abuse of its own process and to participate in the creation of unjustifiable delay, which would inevitably attend an application to the [Board] at this stage and which would be unfair to the [employee] and prejudicial to the interest of justice. Further this Court would be acting in contravention of its obligation under section 17 of the Act, to act expeditiously and to its general obligation as a Superior Court of Record, to protect its jurisdiction and guard against abuse of its processes."[13]

105. In this regard he was following the lead taken in the **Union of Commercial and Industrial Workers v the Port Authority of Trinidad and Tobago** case with respect to the duty of a Superior Court of Record to protect its processes from abuse. In the circumstances he held that the request that the court should delay hearing of the trade dispute was unjustified in all the circumstances.

[13] paragraph 29 page 10

106. Despite the lack of reasons the Court indicated its reliance on the three decisions emanating from the Industrial Court referred to above. In each of these cases all three of the Court of Appeal decisions were referred to and applied. In none of these decisions was the determination by Ibrahim JA that the Board was "the sole authority under the Act charged with the responsibility of determining whether an employee is a worker under the provisions of the Act" disputed or challenged in any way. In fact all three cases relied on by the Court proceeded upon this premise.

107. In two of those cases the trade dispute was remitted to the Minister and the parties in accordance with section 10(1)(a) of the Act for a determination of how to deal with the issue. This it would seem was on the basis that under the Act this was the only means by which such a question could be referred to the Board at this stage.

108. This position seems to accord with the position taken by Ibrahim JA in the Registration, Recognition and Certification Board v Republic Bank case that since nowhere in the Act is the procedure or method of approaching the Board for a determination of whether an employee is or is not a worker under the Act the method of approach could be through the Minister pursuant to section 23(1)(f).

109. Given the scheme of the Act this approach makes sense since the jurisdiction of the Court with respect to trade disputes is only with respect to persons who are workers under the Act. Therefore for any determination as to whether the resolution of the dispute is within the competence of the Court ought to be determined prior to the Court assuming jurisdiction. The

logical time being at the stage of the mandatory conciliation proceedings before the Minister. In the usual course of things therefore this is where the objection should be raised. It would then be for the Minister to refer this issue to the Board in accordance with section 23(1)(f) of the Act.

110. In any event, as recognized by Ibrahim J.A. and the Industrial Court in the decisions referred to earlier, the Act contains no procedure for referring the question to the Board. In those circumstances the Industrial Court sought to go the route of a referral back to the Minister and the parties under section 10(1)(a).

111. Insofar as the appellant submits that the Court did not consider or follow binding Court of Appeal decisions there is no merit in this ground of appeal. It is clear that in the decisions relied by the Court all proceeded on the basis that the Court did not have the jurisdiction to determine whether or not a person was a worker under the Act. Since the Court indicated its reliance on these cases we must assume that, as in those cases, the Court accepted that it did not have the jurisdiction to determine whether an employee was a worker under the Act.

112. The position taken by the appellant that the Court failed to consider or follow the previous decisions in: The Registration, Recognition & Certification Board & Bank Employees Union Civ. Apps No. 183 and 184 of 1994; Albert v Alstons Building Enterprises Limited Civ. App. No 37 of 2000 and Caroni (1975) Limited v Association of Technical Administrative Supervisors Staff Civ. App 87 of 1999 is therefore not maintainable.

113. What the decisions emanating from the Industrial Court did however was to go a step further and leave it to the Court to determine whether the question was an issue before it or had at least been justifiably raised in the trade dispute. If it was not an issue or had not been justifiably raised then there was no question of the exclusion as established by section 2(3)(e) having any application and the Court's jurisdiction to hear and determine the trade dispute remained untouched.

114. Like the Industrial Court we are of the opinion that there is merit in this position and the stance taken in the dissenting ruling in Banking Insurance and General Workers' Union. In that case, as in this one, the issue was not whether the Court had the jurisdiction to treat with the question of whether the employee was a worker under the Act but whether the Court had the jurisdiction to hear and determine the trade dispute given the application before it.

115. Up to the point when the issue was raised the Court was properly seized of the trade dispute. Although there was ample opportunity to do so, at the conciliation hearings before the Minister and the Court or in their evidence and arguments filed, no objection had been taken by the appellant to the jurisdiction of the Court to hear the trade dispute.

116. The application before the Court made in July 2015 was to have the Court refer the question of whether the employee was a worker under the Act to the Board for its determination. In those circumstances it was incumbent on the Court to look at the evidence and arguments filed to see whether this was an issue in the trade dispute before it. Nothing on the appellant's pleaded case suggested that it was an issue for the Court's determination.

There was no evidence relating to the point neither was this an argument raised by the appellant.

117. Further and perhaps of greater importance was the fact that, as disclosed in the letter, the sole basis for the application was the fact that the employee had been employed as a HR Manager. The appellant submits that this was sufficient, at least prima facie, to place the employee within the definition of manager in the context of section 2(3)(i). We disagree. The case of the **Electric Ice Company v Federated Workers' Trade Union (1967) 12 WIR 362** is instrumental to this determination**.**

118. This was a case brought under the provisions of the Industrial Stablisation Act ('the ISA") the precursor to the Act. Indeed it was, in part, as a result of the decision in this case that the definition of worker under the Act was formulated in this manner.

119. Under the ISA "worker' was defined to mean:

> "any person who has entered into or works under a contract with an employer, whether the contract be by the way of manual labour, clerical work or otherwise, be expressed or implied, oral or in writing and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour and includes an employee of the Government other than a public officer as defined by section 105 of the Constitution, but does not include any person comprised in or responsible for the management of any undertaking".

120. The issue in the Electric Ice Company case was whether a person who held the post of branch manager was a worker under the Act. The Court of Appeal, led by Wooding CJ, held "(i) that in order to ascertain whether an employee is a worker as defined in the Act the critical test is what function he performs and not by what title he is designated; and (ii) that the words "any person comprised in or responsible for the management of any undertaking" mean a person to whom is committed principally the direction and control of the undertaking."

121. It is clear therefore that, given the case law and the definition of worker under the Act, there was nothing before the Court to suggest that there was an issue as to whether the employee was a worker under that Act. The mere fact that the employee was called a manager was not sufficient to bring her within the exception. The only evidence before the Court of the functions performed by the employee was the evidence of the respondent as to her main duties and the employment agreement.

122. This evidence confirmed that under her terms and conditions of employment the employee was required to report to a department head with respect to time off and was subject to performance appraisals by the department head. Further it is clear on the evidence of her actual duties that the employee could not in any way be considered to be responsible for the formulation of policy or in the effective control of the whole or any department in the appellant's business.

123. In the circumstances, unlike the situation in the Caroni case, there was no evidence before the Court that suggested that the issue of whether the employee was a worker under the Act was a valid and legitimate issue or indeed had been raised, far less justifiably raised, as an issue for determination. Neither did the Court embark on a determination of the question as was done in the Caroni case.

124. In dismissing the application the Court was in fact acting in accordance with its power to:

> "dismiss any matter or part of a matter or refrain from further hearing or from determining the matter if it appears that the matter or part thereof is trivial, or that further proceedings are unnecessary or undesirable in the public interest": **Section 10(10)(d) of the Act.**

125. This section certainly provides a statutory basis for the court in **Oilfields Workers' Trade Union v National Petroleum Company of Trinidad and Tobago** coining the phrase "justifiably raised" and the identification of the matters relevant to this consideration in the case of **Union of Commercial and Industrial Workers v Port Authority of Trinidad and Tobago.**

126. In our opinion the Court was correct in dismissing the application. It was clear from the evidence before it that the issue was trivial and unmeritorious and that further proceedings, to determine whether the employee was a worker, were unnecessary.

127. There is however another aspect of this case. It arises from statements made in two of the decisions relied on by the Court and was raised by the respondent in its letter in response to

the appellant's letter raising the issue for the first time. It concerns the duty of a court to protect its processes from abuse. It is a power:

> "which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people":

per Lord Diplock in **Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at page 536.**

128. It is this principle that both Her Honour Donaldson-Honeywell, as she then was, in the Union of Commercial and Industrial Workers v the Port Authority of Trinidad and Tobago case and His Honour Aberdeen in the Banking Insurance and General Workers' Union v University of Trinidad and Tobago (U.T.T.) referred to when they spoke about obligation of the Court, as a Superior Court of Record, to protect or preserve its jurisdiction and guard against abuse of its processes.

129. On the facts of this case we are satisfied that it is an abuse of the process of the Court for this issue to be referred to the Board at this late stage. **Section 17 of the Act,** requires the court to expeditiously hear, inquire into and investigate every dispute and all matters affecting the merits of a dispute before it…". This injunction is repeated at section 11(c) which mandates the Court to:

> "do all such things as are necessary or expedient for the expeditious and just hearing and determination of the trade dispute or any matter before it."

130. These sections accord with other provisions of the Act that provide time limits for taking various steps under the Act. So for example with respect to matters which fall to be determined by the Essential Services Division of the Court the Act provides that those matters as far as possible be heard from day to day until completed and that, save in exceptional circumstances, judgments be delivered within 30 days from the date of completion. In exceptional circumstances the Act provides for an extension of a further 21 days.

131. The disputes procedure under the Act puts strict time limits on the reporting of a trade dispute: **section 51 of the Act** and the referral of such trade dispute to the Court by the Minister: **section 55 of the Act**. Expedition therefore is one of the hallmarks of proceedings before the Industrial Court. Understandably so since the purpose of the Act establishing the Court was to make better provision for the stabilization, improvement and promotion of industrial relations.

132. In this appeal the employee had been dismissed in September 2012. The union had reported the trade dispute to the Minister on the 20th November 2012. Thereafter the parties engaged in conciliation before the Minister. The trade dispute was referred to the Court on the 10th July 2013 as an unresolved dispute. No issue as to the validity of the trade dispute procedure was taken before the Minister or the Court until 14th July 2015 when for the first time the appellant alleged that the employee was not a worker under the Act.

133. The appellant placed no evidence before the Court to support the allegation and indeed on the basis of the existing case law binding on the Court and the definition of worker in the Act the allegation was unsupportable. In this regard therefore we accept the submission of the respondent that given the fact that the Court was already seized of the dispute and had a statutory duty to hear, inquire into and investigate every dispute expeditiously it cannot be criticized for seeking to ensure that only meritorious questions are referred to the Minister.

134. In our opinion, in these circumstances, the decision of the Court to dismiss the application on the basis of the three cases referred to by it was a reasonable exercise of its discretion and accords with the statutory framework of the Act. The first indication that the appellant was alleging that the employee was not a worker was in the letter of the 14th July written almost three years after the dispute had been reported to the Minister as a trade dispute and some two years after the trade dispute was referred to the Court by the Minister.

135. The application was made in the absence of any earlier challenge to the Court's jurisdiction to treat with the trade dispute and in circumstances where the appellant adduced no evidence or argument that could support such a position. The position taken by the appellant flies in the face of sections 17 and 11(c) of the Act. To allow the appellant to pursue such an application before the Board at this stage and in these circumstances would be manifestly unfair to the respondent. Further to allow the appellant to institute further proceedings before the Board is not only unnecessary but to adopt the words of section 10 (1) (d) "undesirable in the public interest".

136. Put another way in our view to seek to have the question of whether the employee was a worker under the Act ventilated at this late stage and with no evidential basis would not only be manifestly unfair to the respondent but bring the administration of justice into dispute among right thinking people. In the circumstances this constitutes an abuse of the process of the Court.

137. In the circumstances the appeal is dismissed and the decision of the Industrial Court affirmed.

J. Jones
Justice of Appeal

138. **I have read the Judgments of Mendonça and Jones, JJA, and I agree with them and have nothing to add**.

P. Rajkumar
Justice of Appeal