THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 074 of 2018
Trade Dispute No. GSD-TD 059/2016

Between

CARIBBEAN SHIPPING AGENCIES LIMITED

Appellant

And

NATIONAL UNION OF GOVERNMENT AND FEDERATED WORKERS

Respondent

PANEL:
N. BEREAUX J.A.
C. PEMBERTON J.A.
A. DES VIGNES J.A.

Date of delivery: December 7, 2018

APPEARANCES:
Mr. D. Rambally and Ms. K. Singh Attorneys at law for the appellant
Ms. N. Samuel and Ms. E. Benjamin-Ryan Attorneys at law for the respondent

I have read the judgment of Bereaux J.A. I agree with it and have nothing to add.

/s/ C. PEMBERTON J.A.

I have read the judgment of Bereaux J.A. I agree with it and have nothing to add.

/s/ A. des VIGNES J.A.

JUDGMENT

Delivered by Bereaux J.A.

Introduction

[1] This is a procedural appeal from the Industrial Court. The question in this appeal is whether the Industrial Court was plainly wrong in refusing to refer the question as to whether Mr. Stephen Kalicharan is a *"worker"* within the meaning of section 2(3)(e)(i) and (ii) of the Industrial Relations Act (the Act) to the Registration Recognition and Certification Board (the Board). This question was raised as a point *in limine* by the appellant (the Company) in its evidence and arguments filed on 22nd June 2017, one day before the substantive hearing of the trade dispute was scheduled to begin, after multiple adjournments were granted by the court over a period of approximately one year.

[2] Section 2(1) of the Act defines *"worker"* as:

> ***"(a) 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…***
>
> ***(b) any person who by any trade usage or custom or as a result of any established pattern of employment or recruitment of labour in any business or industry is usually employed or usually offers himself for and accepts employment accordingly; or***
>
> ***(c) any person who provides services or performs duties for any employer under a labour only contract…"***

[3] Section 2(3) however expressly excludes certain classes of persons from the definition. The Company alleges that Mr. Kalicharan fell within the exceptions in section 2(3)(e)(i) and (ii) which provide that, 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; or

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

[4] The Company alleges that Mr. Kalicharan was in fact a business partner who was the autonomous manager of a department within the Company and he drew a monthly salary as well as lucrative commissions. As manager/business partner Mr. Kalicharan was directly involved in:

a. The hiring and firing of personnel,
b. The overall management of the day to day running of the brokerage department,
c. Dealing with disciplinary matters on behalf of management,
d. The review of salaries/probation of staff and
e. Direct withdrawals from the Company's brokerage account.

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.**

[5] In its reasons for decision the Industrial Court held that:

(a) It would have been an abuse of the administration of justice and undesirable in the public interest to remit the matter to the Minister under section 10(1)(a) of the Act or to remit to the Board under section 11(c) because of the following:

(i) the fact that the Company had failed to respond to the Union

when the matter was at the level of the firm.

(ii) that it had also failed to respond to the Minister when the matter was at the second stage in the collective bargaining process, that is, conciliation and denied itself the opportunity to raise the question of the status of the aggrieved, that is whether it was a worker before the Minister and

(iii) that it was tardy in its compliance when the matter was at the apex and final stage of the collective bargaining process, that is, for the determination of the court.

(b) Furthermore, the Company did not raise the matter of the status of the aggrieved with the Minister when it had ample time to do so upon the invitation from the Minister to attend conciliatory proceedings about an aggrieved whom it did not consider to be a worker within the meaning of the Act.

The history

[6] As can be seen from the decision, the Company's attendance or non-attendance at the conciliation proceedings at the Ministry of Labour and at the hearings before the court are also at the heart of this appeal. For these reasons it will be necessary to consider the relevant facts and the chronology of events as they unfolded at the court before the proceedings actually began. These are taken from the Union's evidence and arguments which, for the most part, are not disputed by the Company. To the extent that some events are disputed by the Company, we have taken note of those objections. The chronology is as follows:

(i) Pursuant to a resolution, the Union hand delivered a letter dated 30th April, 2015 to the Company, seeking a meeting with the Company concerning what it alleged was Mr. Kalicharan's dismissal. No response or even an acknowledgment was received.

(ii) The Union reported the matter to the Minister of Labour, in accordance with section 51(1) of the Industrial Relations Act and the letter was received on 9th July, 2015.

(iii) A copy of the Union's referral letter to the Ministry was again hand delivered to the Company and received by Mr. Stefan Taitt of Caribbean Shipping Agencies on 21st July, 2015.

(iv) According to the Union the Company refused to attend the conciliation meeting scheduled at the Ministry of Labour on 8th December, 2015. This is disputed by the Company which alleges that it was not notified.

(v) The Ministry of Labour issued an unresolved certificate on 5th January, 2016.

(vi) The Union referred the matter to the Industrial Court for determination by letter dated 20th January, 2016.

(vii) The Registrar scheduled the date of 21st March, 2016 for submission of evidence and arguments and witness statements.

(viii) The Company failed to submit evidence and arguments and witness statements as directed. (It is unclear whether the Registrar's notice was received by the Company)

(ix) Both the Union and the Company were represented at the case management conference on 4th April, 2016, before Her Honour Mrs. D. Thomas-Felix, President. The Union was represented by Mr. Marlon O'Brien, senior labour relations officer and the company was represented by Ms. S. Ramkissoon, attorney-at-law, holding for Mr. Jagdeo Singh, attorney-at-law. The court granted upon the application by both parties an extension of time for the filing of their evidence and arguments to 29th April, 2016 and directed the Registrar to deliver copies of same to parties on or before 6th May, 2016. It also directed that the parties deliver witness statements to the Registrar by 25th May, 2016; that the Registrar deliver a copy of each party's witness statements to the other on or before 2nd June, 2016 and that the trade dispute be fixed for hearing on 14th July, 2016, 9:30 a.m. (as confirmed

by order dated 19th April, 2016).

(x) The Company did not file evidence and arguments and witness statements and failed to appear on the scheduled date listed for hearing, 14th July, 2016. The Union pressed the court for an ex-parte hearing when the matter was called on 14th July 2016 but the court further accommodated the company with the extended deadline of 22nd August, 2016 to file its arguments and evidence and witness statements and rescheduled the date of the hearing to 10th January and 17th January, 2017 at 1:30 p.m. The court also directed that the trade dispute would be heard ex-parte should the Company fail to file its evidence and arguments and witness statements as directed or fail to appear or be unable to proceed at the hearing thereof.

(xi) The company's representatives, Messrs. Jagdeo Singh and Dinesh Rambally appeared on the afternoon of 10th January, 2017. Immediately upon entering the court on 10th January, 2017 and prior to the entry of the judges, Mr. Jagdeo Singh asked Vernon De Leon for the phone number of Mr. Rudy James (Mr. Kalicharan's attorney), pursuant to their earlier, verbal exchange concerning an out-of-court settlement of the matter. Mr. Dinesh Rambally told the court that the Company had been wondering what had become of the matter, as they were previously unaware of the progress of the dispute. He proceeded to request a further extension of time for the company to file its evidence and arguments and advised the court of his intention to cite four (4) witnesses. The court extended the time for the Company to file its evidence and arguments to 30th March, 2017 and directed that the trade dispute be fixed for hearing on the 12th and 23rd June, 2017 at 1:30 p.m.

(xii) The Union subsequently received a typed order from the Court dated 6th April, 2017 which made reference to an application by letter from the Company, dated 28th March, 2017, which requested yet a further extension of time to file its evidence and arguments. The order

directed, inter alia, that the time for the company to file its evidence and arguments was extended to 21st April, 2017; that the trade dispute remains fixed for hearing on the 12th and 23rd June, 2017 at 1:30 p.m. on both days; that should the Company fail to appear and/or be unable to proceed at the hearing thereof, the trade dispute would be heard ex parte.

(xiii) Following a telephone exchange between Mr. Rudy James and Mr. Jagdeo Singh, a formal offer for settlement of the matter dated 9th March, 2017 was delivered by hand to the office of Mr. Jagdeo Singh on 13th March, 2017. This was received by Ms. Ann-Marie Ramesar. There was no acknowledgment or response to this offer. Ms. Natasha Samuel followed up with Mr. Jagdeo Singh, via a telephone call on 6th June, 2017. He responded that he was no longer representing on this matter, but instead Mr. Dinesh Rambally was. Mr. Rambally promised to revert but never did.

(xiv) At 5:03 p.m. on 6th June, 2017, an email was received by Ms. Natasha Samuel, with an attached copy of a letter dated 5th June and penned by Ms. Karina Singh (instructing Mr. Dinesh Rambally). The letter was addressed to the Registrar, seeking, inter alia:

- ***That the trial scheduled for 12th June 2017 be vacated***
- ***An even further extension of time to 12th June, 2017 for the company to file its evidence and arguments and witness statements.***
- ***Facilitation of the exchange of evidence and arguments on or before 16th June, 2017.***
- ***Confirmation of the scheduled trial date of 23rd June, 2017.***

(xv) At around 3:30 p.m. on 9th June, 2017, Mr. Marlon O'Brien of the National Union of Government and Federated Workers received a phone call from Ms. Reyhana Mohammed indicating that Her Honour Mrs. K. George-Marcelle had granted the company the requested extension for filing of evidence and arguments and witness statements.

(xvi) The Company's evidence and arguments were eventually filed on 22nd

June, 2017, one day before the hearing. It was in those submissions that the status of Mr. Kalicharan as a worker was challenged for the first time. The Union did not receive the evidence and arguments until the morning of 23rd June, 2017.

(xvii) By letter dated 4th July, 2017, the Company applied for leave to file further submissions in support of its preliminary point. This was facilitated and granted to be done by 29th September, 2017. The Registry confirmed on 25th October, 2017 that they had not done so.

The facts

The Union's case

[7] The Union in its evidence and arguments alleged that Mr. Kalicharan was employed by the Company since 1990. At the time of his dismissal, he held the position of customs brokerage manager, attached to the brokerage department. He was in receipt of a basic monthly salary of twenty thousand dollars ($20,000.00) per month, a travelling allowance of one thousand dollars ($1,000.00) per month, plus subsidization of his pension policy at one thousand three hundred and thirty-three dollars ($1,333.00) per month. Additionally, he earned yearly commissions which amounted to fifty percent of the net profits that accrued specifically from the brokerage department of Caribbean Shipping Agencies Ltd. and averaged in excess of two hundred and fifty thousand dollars ($250,000.00) per annum. He also earned commissions of fifty percent of the brokerage income of the Company's subsidiary, Caribbean Shipping Agencies. This was paid in United States Currency and averaged between one thousand five hundred United States dollars (US $1,500.00) and three thousand United States dollars (US $3,000.00) per month. The commissions were earned by the worker for his role in assisting the Company to establish and grow its customs brokerage business. These facts were not disputed by the Company.

[8] On Monday 26th January, 2015 Mr. Kalicharan and some friends were arrested and charged by the Venezuelan Guardia Nacional as they were returning to Trinidad and Tobago from a sailing trip. They were detained from Monday 26th January, 2015 to Wednesday 25th February, 2015.

[9] The Union alleges that on his return to work on Tuesday 3rd March, 2015, Mr. Kalicharan was denied access to his job site, as the locks and electronic codes had been changed both at his office, #1 Lawrence Street, San Fernando, and at the company's sub-office (Medway) in Couva. He was told to contact the chairman of the company, Mr. Barry Antoni, for a meeting with him at Caribbean Shipping's Port-of-Spain office, #18 O'Connor Street, Woodbrook. At the meeting held on Tuesday 10th March, 2015, Mr. Antoni, inter alia, accused Mr. Kalicharan of doing private jobs and further stated that a resignation letter had been prepared by the managing director which he would be required to sign.

[10] Mr. Kalicharan enquired about his earned commissions for 2014, which amounted to some three hundred thousand dollars ($300,000.00) and which he had been requested to refrain from withdrawing until April 2015. There was no response from Mr. Antoni. A meeting was held between Mr. Antoni and Mr. Kalicharan on 16th March, 2015. There was no change in the position previously adopted by Mr. Antoni. Mr. Kalicharan never received any written communication from the company concerning this matter. The Union by letter dated 30th April, 2015 sought a meeting with the company to address the issue but received no response. By letter the Union reported the matter to the Minister of Labour in accordance with section 51(1) of the Industrial Relations Act. The stamp on the letter shows that it was received by the Ministry on 9th July, 2015. The Ministry of Labour issued an unresolved certificate on 5th January, 2016. The Union claims:

(i) an order that the Company returns to the worker his pension policy and

(ii) an order that he be paid damages which must take into consideration

(i) his loss of earnings from 3rd March, 2015, including his earned

commission of three hundred thousand dollars ($300,000.00)

(ii) his years of service with the employer

(iii) such other relief as the justice of the case may require.

The Company's case

[11] Mr. Kalicharan began his employment at the Company as a Grade 2 Customs Clerk. Initially, he was charged with the responsibility of handling shipments that would arrive into Trinidad. Because of his relationship with Mr. Antoni and because of representations made by Mr. Kalicharan himself, the Company created a brokerage department. Mr. Kalicharan was appointed the brokerage manager and head of the brokerage department. Mr. Kalicharan was entitled to draw fifty percent of the net profits earned by the brokerage department. In or around 1999 Mr. Kalicharan became fully operational within the newly created brokerage department. He started with one customer and a few employees who were already employed by the Company. Further to the agreement detailed the Company later commenced operations at premises belonging to Exquisite Resort Services, a company established and operated by Mr. Kalicharan. He functioned concurrently as a business partner.

[12] The company asserts that Mr. Kalicharan had the knowledge and specialised skills required to run the brokerage department. Throughout Mr. Kalicharan's tenure, he was involved in the hiring of staff, decisions relating to salary and probation as well as attending the management meetings. He took decisions which affected the running and operations of the Company. These decisions would be made for instance to increase efficiency or productivity in the Company. He had an effective voice in the formulation of policy in the Company. He was responsible for training the employees who came under him. He had the sole responsibility of employing personnel within his department, the customs brokerage department. He had the sole responsibility for the control and direction of the persons within his department in the performance of their

duties. He supervised the employees of that department in the actual performance of their duties.

[13] The Company did not determine the wages/salaries to be paid to employees of Mr. Kalicharan's department nor did the Company determine the length of their contracts. Mr. Kalicharan possessed the authority and autonomy. He had the right to hire and fire; and to discipline the employees within his department. In the year 2015, about 13 persons worked in the brokerage department including his family members.

[14] The Company relied on several specific emails to senior management in which Mr. Kalicharan:

(i) Advised he had hired specific employees.

(ii) Confirmed his employment of employees.

(iii) Warned employees of their tardiness on the job or suspended them from employment.

(iv) Advised of salary adjustments of members of staff.

[15] Further, Mr. Kalicharan regularly drew on the Company's brokerage account. He often emailed or telephoned Mr. Kevin Choo Quan, the business development/human resource manager or the Company's Finance Manager, Ms. Kadisha Rajkumar, who would prepare the necessary documentation for the amount for withdrawal as requested by him. These draw-downs were emoluments payable to persons considered business partners/managers of the Company. No employee was offered any of the Company's net profits. Mr. Kalicharan requested extraordinary amounts on the account for instance three hundred and fifty thousand dollars ($350,000.00), one hundred and thirty-three thousand three hundred and thirty-three dollars and thirty-four cents ($133,333.34), one hundred and twenty-two thousand three hundred and thirty-three dollars and thirty-three cents ($122,333.33), four hundred thousand dollars ($400,000.00), one hundred and thirty-three thousand dollars

($133,000.00) and eighty thousand dollars ($80,000.00). The Company also took out a *"keyman"* insurance policy in the sum of One Million Dollars on Mr. Kalicharan because he was a manager in the Company. This is not otherwise provided to any employee.

[16] Mr. Kalicharan also received payments from the account of the Company's US Corporation known as Caribbean Shipping Agency Incorporated. From the year 2000 to 2015 he received brokerage fees/earnings as was his entitlement in accordance with the agreement.

[17] These are the facts and, as can be seen, even on the Union's case, the question does arise whether Mr. Kalicharan can properly be described as a *"worker"* under the Act. The case law on the issue is governed by the decision of this court in **D & K Investments** which was an appeal from the Industrial Court on the identical issue.

The law

The D & K Investments decision

[18] The Industrial Court in coming to its decision in this case relied heavily on **D & K Investments** (Mendonça, Jones and Rajkumar, JJA). The employee's contract, in that case, had been terminated on 13th September 2012. On 10th July 2013 after the Union had reported the dispute to the Minister as unresolved, he certified the dispute as unresolved and referred it to the Industrial Court. On 17th October 2014, the Union filed its evidence and arguments and the employer filed its evidence and arguments on 26th June 2015. The Union's report to the Minister had been made on 20th November 2012. There had been conciliation talks at the Ministry and at the court but the employer had not taken the opportunity to raise the issue of the employee's status as a *"worker"* under the Act. The employer, for the first time, raised the

issue on 14th July 2015, almost three years after the dismissal.

[19] The learning is quite clear that whether the employee is a worker or not under the Act is the sole preserve of the Board. The question which arises is whether that issue can be raised before the Industrial Court and if so when. In **D & K Investments**, Mendonça JA and Jones JA gave separate judgments. Rajkumar JA agreed with both judgments. Mendonça and Jones JJA both concluded that the Industrial Court was right to dismiss the preliminary application. Three decided cases of the Industrial Court were considered at paragraphs 92 to 100.

[20] The first decision is **Oilfield Workers' Trade Union v. National Petroleum Company of Trinidad and Tobago**, **TD 43 of 2001**. In that case, the court acknowledged that the Board is the sole authority for determining whether or not a person is excluded from the definition of worker by reason of being a person referred to in section 2(3)(e) of the Act. It held that where a court is seised of a trade dispute, it will only consider the question of the status of the worker under section 2 of the Act where such an issue has been *"justifiably raised"*. Only then should the dispute be referred, in accordance with section 10(1)(a), to the parties or the Minister for further consideration. That holding was followed in **Union of Commercial and Industrial Workers v. Port Authority of Trinidad and Tobago**, **TD 212 of 2003**. In treating with whether the issue had been justifiably raised Her Honour Ms. Bindimattie Mahabir 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 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."

[21] The third decision was the decision in **Banking, Insurance and General Workers' Union v. University of Trinidad and Tobago, TD 428 of 2006** (the UTT decision) in which a majority, following the **OWTU** decision, held that the issue had been justifiably raised. His Honour Mr. Albert Aberdeen, who was in the minority in that case, took a different approach. He opined that the application raised two issues:

(i) Whether the court had the jurisdiction to hear and determine the dispute.

(ii) Whether the employer was justified in requesting the court to refer the matter to the Board.

[22] As to issue (i), he considered that before a party can object to the jurisdiction of the court, it must have evidence of the Board's opinion to the effect that the employee is not a worker. Since the employer had no such evidence that issue did not arise. As to issue (ii), the judge held that to go along with such a course of action would be *"to acquiesce"* and *"to participate in the creation of unjustifiable delay, which would inevitably attend an application to the [Board] at this stage"*. It would be unfair to the employee and prejudicial to the interest of justice. My difficulty with the Aberdeen approach is that it ignores any evidence produced by the employer which may prove that an employee is not in fact a worker. It will not be in every case that the issue may have been considered by the Board. By ignoring the employer's evidence, the court may be assuming a jurisdiction it does not have. Moreover, permitting a manager to utilise the court's dispute resolution process is also an abuse of the court's process. In my judgment, 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). This is an issue to which I shall return at paragraph 31.

[23] The approach of the majority in the **UTT** decision as well as in the unanimous decisions in **Port Authority** and **OWTU** (as to the justifiability of the objection) appears to have been approved by Mendonça JA. I agree. Mendonça JA noted at paragraph 34 that:

> ***"… 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."***

[24] I agree. He also noted at paragraphs 35 and 36 that:

> ***"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.

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."

[25] Mendonça JA at paragraph 38 found that the court came to the correct decision because:

(i) There was no explanation from the employer as to why the challenge was not taken earlier.

(ii) The only suggestion as to the timing was that it was made after the employer had considered the Union's evidence and arguments.

(iii) The Union's evidence and arguments raised nothing that would suggest that the employee fell under section 2(3)(e).

Mendonça JA was also clear that any referral by the Industrial Court to the Board could be made under section 10(1)(a) and 11(c) of the Act.

[26] Jones JA on the other hand agreed with His Honour Mr. Aberdeen's approach. She considered that in such a case, the issue is whether the court had the jurisdiction to hear and determine the trade dispute, given the application before it and whether the employer was justified in requesting the referral to the Board. She held that any determination as to whether the dispute was within the court's competence ought to be made prior to the court assuming jurisdiction, the logical time being at the stage of mandatory conciliation proceedings. She found that although there had been ample opportunity to do

so at the conciliation hearings, no objection had been taken by the employer to the jurisdiction of the court to hear the dispute. She added that when the application was made in July 2015 to refer the issue to the Board, it was incumbent on the court to look at the evidence and arguments to see if in fact such an issue was raised before it. Nothing in the appellant's evidence and arguments suggested it was. Neither did the respondent's evidence and arguments suggest that the issue was a legitimate one or indeed had been raised at all.

[27] Further, Jones JA found that it was an abuse of process for the issue to be referred to the Board at so late a stage some three years after the dismissal of the employee. She added that the employer had placed no evidence before the court to support the allegation. On the basis of existing case law and the definition of worker under the Act, the allegation was unsupportable. Given that the court had already been seised of the dispute and had a statutory duty to hear, inquire into and investigate every dispute expeditiously (per section 17 of the Act) it cannot be criticised for seeking to ensure that only meritorious questions are referred to the Minister.

[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"*.

[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.

Summary

[30] I shall summarize the relevant principles as I have distilled them from the **D & K Investments Limited** decision as follows:

(i) The question whether the employee falls within or without the definition of worker under the Act is solely for the Board.

(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.

(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.

[31] But there is an additional weapon in the arsenal of the Industrial Court which it can deploy with respect to the protection of its process. It is contained

in section 10(2) 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."***

[32] It gives both the Industrial Court and the Court of Appeal the discretion for exceptional reasons to award costs in any trade dispute before the Industrial Court or in the disposition of an appeal. While the Industrial Court is not bound by rules of evidence or procedure, one would expect that an award of costs in the exceptional case would be made to the winning party so to speak. But 10(2) is broadly worded and does not confine the award of costs to a winning party or to the party who succeeds on the issue before it.

[33] In a case such as this in which there may have been undue delay on the part of the employer in making the application to refer to the Board the court can consider whether, having regard to the facts, it is an exceptional case appropriate for the award of costs against the employer even though the employer succeeds on the preliminary issue before it. The employer of course should be accorded the right to be heard during the hearing or after the decision to refer is made.

[34] The Company only raised the point *in limine* as to Mr. Kalicharan's status on 22nd June 2017 when it filed its evidence and arguments. This was one day before the actual date of hearing, which itself had been much adjourned to accommodate the Company. Ms. Samuels submitted that the Union was

"ambushed" on 23rd June 2017, by the company's sudden challenge to the court's jurisdiction. She contended that the Union had been the victim of repeated adjournments to facilitate extensions of time for filing of evidence and arguments only to be confronted with such a challenge on the day of the eventual hearing. Despite the many applications for adjournments the Company gave no notice of its intention to challenge the jurisdiction of the Industrial Court to hear the matter. She supported the court's decision to strike out the preliminary objection.

Conclusions

[35] Under section 18(2) of the Act, a party has a right of appeal to the Court of Appeal on any of the following grounds:

> ***(a) that the Court had no jurisdiction in the matter, but it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the Court has been formally taken at some time during the progress of the matter before the making of the order or award;***
>
> ***(b) that the Court has exceeded its jurisdiction in the matter;***
>
> ***(c) that the order or award has been obtained by fraud;***
>
> ***(d) that any finding or decision of the Court in any matter is erroneous in point of law; or***
>
> ***(e) that some other specific illegality not mentioned above, and substantially affecting the merits of the matter, has been committed in the course of the proceedings.***

[36] In this case the Industrial Court in its discretion (under section 10) did not refer the matter to the Board. The question is whether the court was plainly wrong such as to bring it within the provisions of section 18(2)(d). In **Civil Appeal No. 79 of 2011, Miguel Regis v. The Attorney General of Trinidad and Tobago** (at paragraph 11) the Court of Appeal held that it must be shown that

the relevant court, in exercising its discretion, disregarded, ignored or failed to take sufficient account of a relevant consideration or took irrelevant considerations into account. The Court of Appeal also held that the decision will be reversed if it is against the weight of the evidence or is otherwise unreasonable or fundamentally wrong. Any of these errors would be an error of law bringing it within section 18(2)(d) of the Act.

[37] The court committed two errors:

(i) It found that the Company had been notified, by the Minister of Labour, of the conciliation proceedings but did not attend. It held that the Company had had ample time to raise the issue *"upon the invitation from the Minister to attend conciliation proceedings"*. By not attending the conciliation proceedings it had *"denied itself"* the opportunity to raise the question of the status of the worker before the Minister.

However there was no proper evidence that the Company had in fact been invited by the Minister to attend conciliation proceedings. The finding had no evidential basis.

(ii) More significantly, it failed to consider the evidence put forward by the Company in support of its contention that Mr. Kalicharan was not a *"worker"*. This evidence was highly relevant to whether the objection has been justifiably raised.

Conciliation proceedings

[38] The court sought, rightly, to apply the **D & K Investments** considerations. Primarily, it considered whether the Company's objection had been justifiably raised. It considered the history of the Company's attendance over the period of the dispute. It found that:

(i) The Union had brought the existence of the dispute to the Company's

attention hoping for a resolution out of court.

(ii) Not having received a response the Union reported the matter to the Minister on 6th July, 2015. On 21st July, 2015, a copy of the Union's referral letter was hand delivered to the Company and received by one Stefan Taitt.

(iii) Both parties having been notified by the Minister of the existence of the dispute, the Company did not avail itself of the opportunity to raise any objection with the Minister either before the conciliation process or at the conciliation process.

[39] The finding that the Company was notified of conciliation proceedings was disputed by the Company. Mr. Rambally stated that the Company was never notified by the Ministry of Labour of the date of conciliation proceedings and it was for this reason that the Company's representatives did not attend the conciliation proceedings. It is accepted by the parties that there were no conciliation proceedings. Before us Ms. Samuel could produce no evidence that the Ministry's notice of conciliation proceedings had in fact been served on the company, albeit I accept that it is not her client's document and it was for the Ministry and not the Union to ensure its service on the Company. Be that as it may, she sought to rely on the Court's finding but could provide no evidence (in the face of Mr. Rambally's denials) from the record of appeal or otherwise, to show the basis upon which the court could have made so positive a finding.

[40] Ms. Samuel pointed to the endorsement, dated 21st July, 2015, of one Stefan Taitt, on the 6th July letter acknowledging receipt by the Company, of the Union's notification of a trade dispute to the Minister of Labour, as evidence that the Company should have been aware of the existence of conciliation proceedings. But the letter of 6th July, 2015 (it is erroneously dated 6th July, 2014) merely reported the matter as a trade dispute and gave no date when conciliation proceedings would begin. No document was produced to show that the Company had been notified of conciliation proceedings. In the absence of

such evidence, the Company could not be held to account for not attending the conciliation hearings.

[41] The court also stated that the Company *"was tardy in its compliance"* when the matter came up for determination before the court. There is certainly a basis for criticism of the Company's conduct of the matter before the court. Mr. Rambally's explanation for his non-attendance at the earlier Industrial Court hearings was that the Company was not informed of dates of hearing of the earlier proceedings, a fact which seemed to be verified by the presiding member's own comments at the hearing of 10th January, 2017 that the court's orders did not appear to have been received by the Company. I refer to the transcript of 10th January 2017 and to the following statement by the presiding member:

> ***"The Chairman: All right. Thank you, Sir. But unfortunately, prior to coming down to court this afternoon, we did indeed, check the records of the court and there was no evidence that the Company received our orders; so that, from here, we do not know what happened – if it is that they didn't find it or as to what was the issue; so under these circumstances and bearing in mind the issue of natural justice, we indeed, Sir, have no alternative but to grant the adjournment and to extend the dates for the submission and exchange of documents, and to give a date for a new hearing".***

[42] But an examination of the chronology set out at paragraph 6 shows that the Company missed only one court appearance between 4th April, 2016 and 23rd June, 2017, when it raised its objection to Mr. Kalicharan's status. That omission was on 14th July, 2016 when no one appeared on its behalf. It cannot complain that it was not informed of the hearing because the 14th July, 2016 fixture was made at a case management hearing before Her Honour Mrs. D. Thomas-Felix at which the Company was represented and at which directions were given to file

evidence and arguments by 25th May. It appears that that direction was confirmed by a written order of 19th April, 2016 of the Registrar. But if the President's comments are correct, it may be that that confirming order did not reach the company. That cannot excuse the Company given that it was present at the case management hearing when the directions were given.

[43] Further from 10th January, 2017 onwards the Company applied for and obtained three further extensions of time for filing of its evidence and arguments, all of which were granted. A hearing fixed for 12th June, 2017 was also vacated. Those extensions and the additional adjournment were granted even after the company's non-appearance on 14th July, 2016 had been indulged. Indeed, the hearing of 14th July was adjourned despite the Union's strong objection and its insistence that the hearing proceed in the Company's absence. Mr. Rambally's contention that the Company did not receive the court's orders (in so far as the dates of hearing are concerned) cannot justify the multiple applications made by the Company for extensions of time to file its evidence and arguments after 10th January, 2017. Further, even if the Company was not in receipt of the court's orders it appears to have missed only one hearing, of which it had prior notice.

[44] The court's criticism of the company's non-compliance with its direction was fully justified from 19th April, 2016 onwards (sufficient enough to justify the award of costs against the Company had the court seen it fit to refer the issue to the Board). Nor do I accept that notice of objection to Mr. Kalicharan's status could not have been communicated to the Union and to the court much earlier than 22nd June, 2017. But the Company's tardy compliance was only one consideration. It had to be taken into account along with all other relevant factors before coming to a decision on the application.

Non-consideration of the evidence

[45] But however egregious the tardy compliance, it was outweighed by the second and most fundamental error made by the Court. This was its failure to consider the evidence put forward by the Company to support its contention that Mr. Kalicharan fell within the exception set out in section 2(3)(e)(i) and (ii) of the Act. This was an extremely relevant consideration to whether the objection had been justifiably raised. In **D & K Investments** the evidence provided by the employer in that case ultimately did not justify the objection to the worker's status. Both the Industrial Court and the Court of Appeal came to that conclusion after examining the evidence.

[46] In this case however, the Industrial Court looked only at the history of the Company's attendance at the conciliation proceedings and its tardy compliance with its orders for filing of evidence and arguments. Certainly that was a relevant consideration (if in fact tardiness and non-attendance were borne out by the evidence). But it was not the only consideration. In addition to the explanation given by the Company (that it had not been informed of conciliation proceedings) the evidence produced by the Company as to the employee's status under the Act was also relevant. In this case the court did not consider the evidence neither did it consider Mr. Rambally's explanation for not attending conciliation or its own statement that the Company was not receiving its orders. I well understand the court's frustration about the Company's late application given the many indulgences given to the Company by the court, but in arriving at its decision it must act judicially. This requires an examination of the case in the round by considering the evidence produced by the employer as well as the facts and circumstances which may have affected its non-attendance of the conciliation proceedings. While the Company was tardy in its compliance with the court's orders, its non-attendance at conciliation was not the Company's fault and the evidence it provided raises a genuine issue as to Mr. Kalicharan's status as a worker under the Act.

[47] The errors to which I have referred are errors of law within the meaning of section 18(2)(d). Given the errors made, it is now open to the Court of Appeal to consider the matter afresh. The **D & K Investments** principles as summarised at paragraph 30 are relevant. Having regard to the evidence the Company has adduced it is arguable that Mr. Kalicharan may well fall within the exception to the definition of *"worker"* set out in section 2(3)(e)(i) and (ii). It produced evidence, including emails, to show that Mr. Kalicharan:

(a) was responsible for the formulation of policy, or had an effective voice in policy formulation within the brokerage department;

(b) had effective control of the policy and direction of the brokerage department.

Indeed, this is arguable even on the Union's evidence and arguments. In my judgment therefore, the issue was justifiably raised. The appeal is allowed.

Order

[48] Pursuant to the provisions of section 18(3) of the Act, the decision of the Industrial Court is set aside. The matter is remitted to the Industrial Court with the direction that the question whether Mr. Kalicharan is a worker having regard to the provisions of section 2(3)(e) of the Act be referred to the Board.

Nolan P.G. Bereaux
Justice of Appeal