THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA/P287 OF 2018

In the Matter of the Industrial Relations Act

Chapter 88:01

BETWEEN

COMMUNICATIONS WORKERS' UNION

Appellant

AND

TELECOMMUNICATIONS SERVICES OF

TRINIDAD AND TOBAGO LIMITED

Respondent

Panel:

Mark Mohammed JA

Maria Wilson JA

Ronnie Boodoosingh JA

Appearances:

Ms Gabrielle Gellineau for the Appellant

Mr Elton Prescott SC leading Mr Anderson Modeste instructed by Ms Sashi Indarsingh for the Respondent

Date of Delivery: 29 June 2022

I have read the judgment of R. Boodoosingh, JA and I agree with it.

Mark Mohammed
Justice of Appeal

I too have read the judgment of R. Boodoosingh, JA and I agree with it.

Maria Wilson
Justice of Appeal

Judgment

Delivered by R. Boodoosingh, JA:

1. The appellant is the Communications Workers' Union (CWU), the recognised trade union at the respondent company, Telecommunications Services of Trinidad and Tobago Limited (TSTT). The parties, from time to time, negotiate the terms and conditions of employment for employees who are members of the union. These are contained in collective agreements which are registered at the Industrial Court. There has been a Group Health Plan in place for the benefit of TSTT's employees and retirees for some time. The provision of a Group Health Plan is a benefit contained in the last collective agreement negotiated before September 2010. By a Memorandum of Agreement (the MOA) dated 21 September 2010, a new Group Health

Plan was brought into effect from 1 October 2010 to 30 September 2012 (the health plan). At that time, the last collective agreement negotiated by the parties had covered the period 2003 to 2007. The term of that collective agreement had by 2010 expired.

2. This MOA was quite short consisting of 6 articles. Articles 1 and 5 of the MOA to establish the health plan stated:

> Article 1
> A Self-Funded Group Medical Health Plan with terms and benefits as defined in the schedule attached shall be in effect from October 1st, 2010. Upon expiration of the plan on September 30th, 2012 the terms and benefits of this plan shall continue until a new Group Medical Health Plan is introduced by mutual agreement of both parties.
> Article 2
> The benefits of the Plan shall be as per attached schedule.
>
> Article 3
> Major Medical benefits shall be $500,000.00 for active employees and $200,000.00 for retirees and their spouses where retired spouse option is exercised.
>
> Article 4
> The net total of any surplus funds at the expiration of the Interim Self Fund Group Medical Health Plan inclusive of the initial Company injection of One Million Dollars ($1,000,000.00) shall be transferred to this new Self Funded Group Medical Plan to assist with start up of the plan and continued operations.

Article 5

Any or all deficit arising from the new Self- Funded Group Medical Health Plan will be funded initially by the Company to ensure continuance of the plan followed by premium adjustments as determined by the Administrator of the plan.

Article 6

Premiums for the new Self Funded Group Medical Health Plan effective 1st October 2010 shall be as follows:

…

3. The premiums were set in three categories: for employees only; for employees plus one; and employee plus 2 and over. Retirees did not have to contribute to the plan. The contribution payable by employees to the premium ranged from approximately 21 % in the case of employees only to 35% in the case of employees plus 2 and over. The company had to pay the remainder of the premiums.

4. Article 27 of the last Junior and Senior Staff Collective Agreements 2003-2007 stated:

Article 27

"The Company shall maintain a Group Health Plan for the benefit of its employees. Any alteration in the terms of the Group Health Plan or the introduction of any new group Health Plan shall be by mutual agreement."

5. By letters dated 13 December 2011 and 1 February 2012 changes were made by TSTT to the health plan. Before these letters, there had been some meetings between the CWU and TSTT on new options for funding the health plan. Their discussions were based on evidence of the performance of the health plan provided by the health plan administrator. The discussions had not realised any agreement on these matters up to the time the letters were sent. The 13 December 2011 letter provided for new rate options which included increased employee contributions and introduced contributions to be made by retirees for the first time. Another change was for the sole use of a particular network of health care providers called CARDEA with effect from 1 January 2012. This removed the employee's ability to access medical assistance outside of the CARDEA network. The 1 February 2012 letter removed the employee's ability to commit TSTT to pay 100% of expenses incurred at private hospitals followed by incurring a company loan. It changed what was permitted before to the employee having to pay the full expenses upfront and then to seek reimbursement by submitting a claim to the company. This letter also provided an alternative to using the CARDEA network of providers and paying the difference between the expenses incurred and what the health plan would reimburse.

6. These changes led to proceedings being brought by the CWU at the Industrial Court. Both sides filed Evidence and Arguments. The CWU adduced evidence from its general secretary, Mr Joseph Remy. He was cross-examined. TSTT did not present any evidence on its behalf but relied on the documents submitted by the CWU.
7.

Evidence and Arguments

8. The evidence and Arguments of CWU stated:

   (i) TSTT is mandated to maintain a Group Health Plan for the benefit of its employees under Article 27 of the Collective Agreement between the CWU and TSTT;

   (ii) The MOA was signed pursuant to Article 27.

   (iii) TSTT engaged CWU regarding various rate options.

   (iv) Before the parties could agree on revisions TSTT unilaterally made changes by letters dated 13 December 2011 and 1 February 2012.

   (v) None of these changes were made with the agreement of the CWU.

   (vi) TSTT, "by altering the Group Health Plan and by implanting new rate options without agreement has breached Article 27 of the Collective Agreement and Article 1 of the MOA which clearly mandate that any changes in the existing Group Health Plan be implemented solely by way of mutual agreement between the Union and the Company".

9. TSTT's Evidence and Arguments asserted:

(i) Article 27 of the Collective Agreement required they maintain a Group Health Plan which they did.

(ii) There was an interim health plan, then the present MOA.

(iii) The health plan fell into deficit.

(iv) During May 2011 the administrator of the health plan, CARDEA Health Solutions Limited (CARDEA) advised the health plan had become insolvent and could not continue in the existing form.

(v) CWU was informed of this advice. TSTT as at May 2011 had injected $3,500,000.00 into the health plan.

(vi) In May 2011 TSTT initiated a series of meetings about the performance of the health pan.

(vii) Article 5 allowed for premium adjustments to be made by TSTT "upon the advice or recommendation of or as determined by the said Administrator of the Plan".

(viii) The changes made were not material alterations of the health plan.

(ix) The implementation of new rate options was an "operational element" of the plan allowing for its continuation and benefits to employees.

(x) The adjustments were reasonable and necessary, were effected after extensive discussions between the parties and consistent with good industrial relations practices.

(xi) After the parties put forward their preferences, TSTT acting in accordance with Article 5 of the MOA invited the Administrator to determine the premium adjustments from among the four rate options proposed.

(xii) The Administrator made its "recommendation and / or determination and TSTT implemented this. TSTT further injected $3.56 million into the health plan.

(xiii) There was an express or implied agreement that in the absence of agreement between the parties that the Administrator's determination would apply.

(xiv) There was an implied agreement as of 14 November 2011 that the determination and implementation of rate options were operational or administrative features of the health plan which did not require the express or further mandate of the CWU to be implemented.

(xv) It is fair and just and in the interests of the employees that the applicable rates should apply.

10. The Industrial Court ruled against the CWU in its claim, reasoning that:

> "When the Memorandum of Agreement for the period 2010 October 1 to 2012 September 30 was executed it was done in accordance with the provisions of Article 27 of the Collective Agreement, in that both parties agreed to the terms and

conditions of the said memorandum. At that point, the Memorandum of Agreement took precedence over Article 27, which was at the time part of the terms and conditions of employment of each individual in the bargaining units. There was no registered Collective Agreement in force, the last one having expired in 2007.

…

At this stage we ask the question "if Article 5 was subject to Article 1 of the Memorandum, why was that not stated clearly?" because if in fact Article 5 was indeed meant to be subject to Article 1 there is really no need for Article 5 to be included in the Memorandum of Agreement…

…

…The Court is of the view that both parties must have known the risk involved in embarking on such a plan. Indeed, we came to the inescapable conclusion that it was the variable cost which was "the proverbial straw that broke the camel's back" resulting in huge deficit funding to the Plan.

…

Article 5 was included to prevent the Company from having to fund any deficits in the Plan 'ad infinitum', regardless of the amount of those deficits.

…

> It is clear to the Court that the company was not prepared to continue deficit funding beyond a certain point and after that it will be guided by the advice of the Plan Administrator pursuant to Article 5.
>
> …
>
> Article 1 of the Memorandum of Agreement deals exclusively with that which must obtain upon expiration of the Plan on September 30, 2012. The action that the Company took was during the lifespan of the Plan.
>
> Article 5 on the other hand makes provision in the event that the Plan deficits continue after the initial deficit was funded by the Company and the Company decided that it would no longer continue to fund these deficits after receiving advice from the Plan Administrator and the Actuaries. We cannot find the nexus between Articles 1 and 5 to show that Article 5 is subject to Article 1. Additionally, as soon as Article 5 was implemented Article 1 became redundant.

11. In consequence of the above, the Industrial Court found that Article 27 of the collective agreement could not have been breached since both parties agreed to the MOA. Article 5 gave the Company the authority to make adjustments to the health plan with regard to the rates paid by employees. The court therefore dismissed the dispute brought by the CWU.

Appeal Submissions

12. The CWU appealed the substantive findings of fact and law by the Industrial Court.

13. The CWU submitted that based on **sections 9(1) and 10(3)** of the **Industrial Relations Act Chap. 88:01** the court was bound to make a decision that was fair and just in line with principles of good industrial relations practice.

14. They submitted that Article 27 of the Collective Agreement formed part of the employment contracts of the employees and ought to have been given effect to by the Industrial Court. In finding that Article 27 was superseded by the MOA, the court was wrong. They also submitted that the Court arrived at the wrong construction of Articles 1 and 5 of the MOA particularly when it found that Article 5 was not subject to Article 1 and that Article 1 became redundant when Article 5 was triggered. The Court failed to consider carefully and give effect to the evidence of Mr Remy in respect of the custom and usage between the CWU and TSTT. In particular, that it has always been the case that the health plan was subject to the collective agreement and there was need for consultation with the CWU and the agreement of the CWU to effect material or fundamental changes to the health plan. The changes that were made were fundamental and required the agreement of the union. Finally, the CWU submitted that the court in performing its function under sections 9 and 10 of the **Industrial Relations Act** failed

to take account of the negative effects of the changes on the employees of TSTT. The Court therefore gave too narrow a consideration of the MOA and ought to have interpreted it using different "tools" including Article 27 of the Collective Agreement, Article 1, the evidence of Mr Remy and sections 9 and 10 of the **Industrial Relations Act**. By failing to do so, the court erred.

15. TSTT submitted that the court was correct in the decision as changes to the health plan were triggered by:

    a. The health plan being in deficit

    b. TSTT funding the deficit to ensure continuance of the plan

    c. TSTT not being prepared to continue deficit funding

    d. TSTT intending to be guided by the administrator

16. TSTT submitted that the Memorandum of Agreement referred to a Plan for the period 2010 to 2012 and provided that a new regime should apply after September 2012 and until a new plan was introduced upon agreement of the parties. The Industrial Court treated with the evidence of the witness for the appellant and rejected the assertion that "changes to the Plan must be effected by mutual consent".

17. TSTT rejected the assertion by CWU that the changes made were 'fundamental' changes to the plan and/or to the industrial relationship and/or to the terms and conditions of the individual employees in the bargaining units. The Court was correct not to accept that there was reliable or any evidence of past practice on which it could rely.

18. TSTT submitted that the principle of good industrial relations practice as stated by the authority submitted by CWU, ***TIWU v PTSC IRO 16 of 1989***, is not applicable in the circumstances of this case, given the importance of the MOA between the parties, as found by the Court.

Law

19. **Sections 9 (1)** of the **Industrial Relations Act, Chap. 88:01** states as follows:

> 9(1) In the hearing and determination of any matter before it, the Court may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but the Court may inform itself on any matter in such manner as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regards thereto."

20. **Section 10 (3)** provides:

> Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its power shall –
>
> (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
>
> (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.

21. From the early days of application of the forerunner to the **Industrial Relations Act**, which was the **Industrial Stabilisation Act**, the courts of Trinidad and Tobago have accorded substantial weight to the position of collective agreements between a trade union and a company. Phillips JA in **Texaco Trinidad Inc v OWTU (1973) 22 WIR 516 at 522-523** stated:

> "… not only is an industrial agreement not subject to unilateral variation during its term, but also that its existence is a complete bar to the making by the court of an award that is not in conformity with the agreement when properly construed. In other words, while a dispute may arise as to the proper interpretation of an industrial agreement, it is not open to the

parties during its existence to claim anything to which they are not entitled on its true construction.

… In the case however, of a registered industrial agreement not only does the Act preserve its binding force as a common law contract, but for the express purpose of the regulation of industrial relations confers upon it a special statutory validity and effect, which it seeks to maintain by stipulating penalties for the breach thereof…
…The resulting legal position, in my judgment, is that the terms of a registered industrial agreement are intended to operate as a statutory code in relation to the rights and obligations of the parties and, accordingly, cannot be varied by the court during its continuance."

22. The Court of Appeal has also considered the status of the collective agreement and the terms and conditions negotiated in such agreements after the expiration of the collective agreement. In **Bank Employees Union v Republic Bank Limited, Civil Appeal No. 9 of 1995** Jones JA at page 11 stated:

"What Parliament has done specifically by section 48 (2) is to permit the parties to use the dispute resolution procedures contained in the agreement after the agreement has expired. The specific reference to section 43 (1) is significant since it is that subsection which determines the life span of a collective agreement. When the prescribed period expires what is left of the collective agreement are the provisions relating to the procedure for the resolution of disputes. **The remainder of the collective agreement dies, but the terms and conditions of the individual contracts of the workers do not die with the expiration of the collective agreement. They continue on until**

> **those terms are replaced, amended or confirmed by the new collective agreement. They survive, not as terms of a registered collective agreement but as the terms and conditions of the individual contract of employment of the workers.** The dispute resolution procedures are preserved by section 43 (2) and these may be invoked in dealing with any dispute that may arise." (Emphasis supplied)

23. The terms and conditions contained in the agreement accordingly survive as terms and conditions of the individual contracts of employment until such time as a new collective agreement comes into being. This case was later applied by the Court of Appeal in **Arcelormittal Point Lisas Limited v Steel Workers Union of Trinidad and Tobago, Civil Appeal No: 211 of 2009, delivered 9 December 2011** (Mendonca JA, Bereaux JA, judgment of Narine JA).

24. CWU referred us to **Chitty on Contracts, 32nd edition, Volume 1 at para 14 – 021** on terms of a contract which can be implied from usage or custom:

> If there is an invariable, certain and general usage or custom of a particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom, provided there is no inconsistency between the usage and the terms of the contract. To be binding, however, the usage must be notorious, certain and reasonable, and not contrary to law and it must also be something more than a mere

trade practice. But when such usage is proved, it will form the basis of the contract between the parties, and

> "…their respective rights and liabilities are precisely the same as if without any usage they had entered into a special agreement to the like effect."

These usages are incorporated on the presumption that:

> "…the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to these known usages"

or on the ground that "the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. However, even in cases where the party alleged to be liable upon an implied promise, arising solely from the usage of a particular trade, is not shown to have been cognisant of the usage, he can still be held to be liable by virtue of it."

Analysis and Conclusion

25. The Industrial Court in its judgment was clearly alive to the practical difficulties of the operation of the health plan. It had to be funded. TSTT appeared to be unwilling to continue to have responsibility for funding it exclusively and to continue to inject funds. There had been discussions with the CWU on options to continue the health plan before the letters of 13 December 2011 and 1 February 2012 were sent by

TSTT to CWU. By letter of 17 May 2011, TSTT had written to the CWU indicating that the performance of the health plan was dismal; the plan was in deficit and the company had injected further funds; after two further injections of funds, the plan was in deficit and the actuary had advised that the health plan was now "insolvent" and "cannot continue in its present form" (letter of VP Edghill Messiah to Secretary General John Julien). A meeting to discuss this further was proposed. The actuaries Bacon, Woodrow and de Souza had by letter dated 8 June 2011 recommended changes to the health plan. On 25 November 2011 TSTT wrote to the plan administrator, Cardea Health Solutions Limited, referring to a meeting held with the CWU convened to continue discussions on the health plan. In this letter reference was made to preferred options put forward by the CWU. TSTT, however, put forward to the administrator that its preferred option was to have retirees pay 100% of a monthly contribution to the health plan. They asked that the administrator "determine" which of the four rate options would be "most suitable for TSTT, having regard to the several issues/concerns that were raised by both parties".

26. What is clear from these pieces of correspondence is that there had been no agreement between CWU and TSTT on the way forward on health plan up to the time of the 13 December 2011 TSTT letter. The question was whether TSTT could have sought the determination by the administrator of which of the rate options was most suitable for TSTT having regard to the issues/concerns raised by both parties. It is clear that TSTT could seek to have a recommendation made by the administrator. But could premiums be changed and other changes be

made without the agreement of the CWU? That was the central issue before the Industrial Court and on which CWU has appealed.

27. In looking at the terms of Article 5 of the MOA, a strictly literal reading of it allowed for premium adjustments as determined by the administrator. This is what the Industrial Court construed it to mean.

28. However, before this is examined further, it is significant to note that changes were made to other aspects of the health plan. The question that follows is whether those changes could have been made without the agreement of the CWU or by extension the individual employees.

Fundamental Term or Operational Matter

29. Mr Prescott SC has argued that the premium is not a material or fundamental term of the plan and there was no requirement for the agreement of the CWU to any adjustments. He suggested it was merely an "operational matter". He submitted that Article 5 contemplated constant changes being made to the premiums. The Industrial Court agreed with this analysis. I am unable to agree.

30. Any health plan essentially is divided into at least three important aspects: (i) Who is to have access to the plan? (ii) What is the price or premium and who is to fund those premiums? (iii) What are the benefits to be derived based on those premiums paid? Each of these

aspects are material or fundamental terms of the plan. A person who seeks to access a health plan has to determine what contribution he or she is willing to make and for what benefit. It is the consideration paid for the promise of a benefit. An employer has to be concerned with what contribution it is willing to make to the plan. The plan provider has to consider the risk that it is willing to take for what premium or benefit. From whichever perspective the plan is looked at, the premium to be paid must be a material or fundamental term. From every perspective it affects the willingness of a party to be a member of the plan and the viability of the plan.

31. We were not provided with any authority by Mr Prescott on this point but contrary to his submission support for the conclusion at para 29 above can be had from considering the law on what a premium represents. In the leading text **Mac Gillvaray on Insurance Law, 14th edition, 2018,** the learned authors state at para 2-002 to 2-003:

> **The material terms of a contract of insurance are: the definition of the risk to be covered, the duration of the insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of a loss. As to all these there must be a consensus ad idem, that is to say, there must either be an express agreement or the circumstances must be such as to admit of a reasonable inference that the parties were tacitly agreed.** Without such agreement, it would be impossible for the courts to give effect to the parties' contract except by virtually writing the contract for them, which it is not the function of the courts to do.[4] (Footnote: *Scammell Ltd v Ouston [1941] A.C. 251*; *Charter Reinsurance Co v Fagan [1997] A.C. 313* at 388)
>
> Agreement on these and other less essential terms of the proposed insurance may be achieved either at once, or only after a process of

> lengthy negotiations as is common in the case of large commercial risks. When negotiations become protracted, and there is subsequently a dispute concerning the existence of a binding contract or its terms, it is necessary to review the whole course of the negotiations in order to see if there was at any stage full agreement on the material terms of the insurance or, as the case may be, agreement that a particular term was agreed. In carrying out this exercise a tribunal should have regard to subsequent events which bear upon the question at issue. (Footnote: *Container Transport International v Oceanus Mutual Underwriting Association [1984] 1 Lloyd's Rep. 476* at 505; *Great North Eastern Railway Ltd v Avon Insurance Plc [2001] 2 All E.R. (Comm) 526* at 534; *Mulchrone v Swiss Life Plc [2006] Lloyd's Rep. I.R. 339*.) (Emphasis supplied).

This extract identifies the amount of the premium and the mode of its payment as being among the material terms of the contract. It is necessary for there to be full agreement in the sense of consensus ad idem for the contract to be enforceable. The amount of the premium must be stated or ascertainable with certainty.

32. Further, in the text**, Insurance Law Doctrines and Principles, 3rd edition, Lowry J, Rawlins, P and Merkin, R, Hart Publishing, 2011** it is stated:

> "Each party to an insurance contract must provide consideration: normally, the insured agrees to pay a premium and the insurers promise to provide a benefit in the event of a loss arising that falls within the terms of the policy. The premium will be set by the insurers at a level that attracts business, but that also both reflects the risk of a claim by this insured and, across the business as a whole, is likely to result in a profit. The premium will be payable either in a single sum or,

more typically in consumer cases, by instalments on credit terms. Even where the premium is payable by instalments, it is still a single premium for the entire period, so that if the risk is terminated the outstanding instalments will still have to be paid on the principle that the risk is not divisible unless the parties have agreed to the contrary.

The premium is an important aspect of the agreement, and if one has not been agreed by the parties this may indicate that they have not concluded a contract. Where an 'agreement for insurance on building work specified 'a reasonable premium', it was held that there was no contract since 'it cannot be said that there is a sum which can be defined and described as being undisputed'. Yet the failure to set the amount of the premium may not be fatal. In the case of a normal risk, such as involved in burglary insurance or motor vehicle liability, the amount of the premium is set according to the insurer's usual tariff." (Emphasis supplied).

The text notes that in marine insurance contracts under the Marine Insurance Act, 1906 in England, the premium may be to be agreed (TBA). What this extract shows is that the premium forms the consideration, which is important or fundamental to the contract. The premium also must be agreed or determinable by some industry tariff. Agreement on the premium must necessarily include agreement on an increase in the amount of the premium payable by a party. If the premium had been increased, but the increase was not being passed on to the employees, it may have been arguable, that as far as the employees were concerned, this was an "operational" matter. But

here, the change would directly affect what the employees had to pay and would place an obligation on the retired employees, not previously incurred.

33. Further support on the significance of the premium comes from **Mac Gillvaray on Insurance Law** under the rubric 'incapacity to pay premium' when the consequence of not paying it is considered:

> "The obligation to pay the premium according to the terms of the contract is prima facie absolute, and no sickness or infirmity will be accepted as an excuse for non-payment so as to avoid a forfeiture. Even where the insured becomes insane, and is incapable of attending to any business, the incapacity is no excuse.
>
> The conditions of the policy, however, may be such as to prevent the insurers insisting on a forfeiture, where non-payment was due to ill health."

Construing the MOA

34. The Industrial Court could not simply construe the MOA by itself in the absence of the background knowledge reasonably available to the parties: See **Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 All ER 98 at 114** per Lord Hoffman. First, it is well established that terms contained in a collective agreement form part of the individual contracts of the employees. In this case these terms provided for TSTT having to maintain a Group Health Plan for the benefit of the employees. Alterations or changes to

the terms had to be by mutual agreement. Once the health plan was put into effect, changes had to be by agreement. If the parties were unable to agree, the collective agreement provided a grievance procedure for the resolution of any disagreement. That grievance procedure survived the end of the collective agreement. Second, the MOA could not replace the terms of the collective agreement which became part of the individual contracts of employees. The MOA may have been a framework for giving effect to the terms of the employees' contracts incorporated after the collective agreement. Third, the Court was obliged to take account of the uncontradicted evidence of Mr Remy. Mr Remy gave evidence at paragraph 5 of his witness statement as follows: "The principles set out in these agreements simply formalised the custom as between TSTT and the Union whereby the Plan Administrator will state their opinion on the Health Plan in place at the time and the Union and TSTT would meet to discuss this opinion and any suggested changes. After a period of discussion the parties would then mutually agree to any fundamental changes in the plan including in particular changes in the contribution to be made by the employee. This is even more important in circumstances where the change would be more onerous than that which is currently in place. This process was carried out on several occasions in the past and was the custom and practice when the MOA and the Collective Agreement were duly finalised." In cross-examination by Mr Prescott SC, Mr Remy maintained this position. He spoke about the need for consultation, mutual agreement and that all terms of the health plan had to be agreed. This evidence was supported by the fact that discussions took place between TSTT and the CWU to try to agree on changes to the health plan. TSTT accepted discussions took place in their Evidence and

Arguments. This was also consistent with TSTT forwarding to the administrator the options which were considered and discussed by TSTT and CWU.

35. As noted, only Mr Remy gave evidence and was cross-examined. There was nothing on behalf of TSTT to contradict what he said on the custom in the organisation. Faced with this, the Court, while in theory it was not obliged to accept the evidence entirely, was entitled to consider that his evidence was not contradicted and therefore stood unchallenged. Mr Remy had a long history with the CWU and in dealing with the company. He was ostensibly a credible witness. Further, in an appropriate case a tribunal can draw adverse inferences from the failure to call a material witness on an issue: **Phipson on Evidence, 11 edition, 11 – 17**. Given Mr Remy's evidence, the court ought to have expressed some proper rationale for not considering this evidence to be acceptable. The judgment of the Industrial court did not address this matter frontally.

36. Article 1 of the health plan provided for a different circumstance to Article 5. Article 1 merely provided that the health plan was to run for 2 years. On its expiration, the terms and benefits were to continue until a **new** Group Medical Health Plan was agreed. Article 1 did not provide for the need for agreement within the terms of this health plan. It did not need to since the overarching framework for this health plan was the previous Collective Agreement which had become part of the individual contracts of the employees. Article 1 provided for what would occur after the health plan expired. Article 1 was, however, very

much consistent with the proposition that "terms and benefits" were matters to be mutually agreed upon. All of the surrounding circumstances pointed to the need for there to be agreement on the terms and benefits of the health plan, the provision of this health plan being made an obligation on TSTT under the last Collective Agreement.

37. The Industrial Court also erred in its approach having regard to section 1 (3) of the IRA. The court was required to make an order that was fair and just "having regard to the interests of the persons immediately concerned and the community as a whole". Who were the persons immediately concerned? In this case, it was primarily the employees who had benefitted from the negotiation of a Group Health Plan in their last collective agreement which became incorporated into their individual contracts. No consideration was given to the negative impact on the employees in being required to pay higher premiums with new restrictions on their benefits. No consideration was given to the fact that retirees were now being required to pay the full premium on their own when previously they received a benefit without the need for a contribution. Furthermore, a Group Health Plan is a benefit for the employees. The company contributes to the funding of this benefit. The employees, through the CWU, had a critical stake in the health plan continuing. In those circumstances, it was in their interests to ensure that the health plan did not collapse and this ought to have been a motivating factor for some agreement to be reached. The Court weighed the impact on TSTT but it gave priority to TSTT's interests without balancing the interests of the employees.

38. Additionally, the Industrial Court did not take account of the fact that the health plan was for a two year period. It was not for an indefinite period. TSTT had the option of negotiating a health plan on its expiration where it could advance the position that greater contributions were required by the employees and retirees. Whatever deficits the Plan had, the position of having to fund it entirely was not cast in stone for all time. In addition, TSTT could have sought to negotiate a position which capped the contributions it was required to make so that its obligation to fund any deficit in the health plan could be limited. It did not do so in the previous agreement.

39. Under the MOA, the administrator could provide information or, to use the word of Article 5, "determine" what premiums were needed to keep the health plan going. Article 5 did not provide for who was to make these contributions. That was a different matter. In the absence of a specific provision on this and with the Article 27 obligation of the Collective Agreement for TSTT to maintain the health plan for the benefit of its employees, the requirement for the payment of the premiums to keep the plan going fell on TSTT in the absence of an agreement on higher premiums to be paid by the employees.

40. Article 27 was clear in its wording. TSTT was required to have a Group Health Plan in place. Any alteration to the Group Health Plan was to be by mutual agreement. This must be construed to mean any health plan in existence at any point in time. Any new health plan also had to be by mutual agreement. The MOA did not make Article 27 redundant as Article 27 was now part of the employees' contracts of employment.

41. Further, section 10 (3) (b) of the Act requires the Industrial Court to act as a court of equity "having regard to the principles and practices of good industrial relations". Based on the evidence before the Court it does not appear that there was a stalemate between TSTT and CWU which could not have been further discussed. TSTT did not put such evidence before the court. Options were advanced by CWU and by TSTT. There was no evidence of an ultimatum being given by TSTT to the CWU for a decision on the future of the health plan. TSTT had, in any event, the obligation to maintain a health plan. TSTT could not unilaterally ask the administrator in those circumstances to adjust the premiums, without more. But even if Article 5 permitted a premium adjustment by the administrator, TSTT certainly could not make changes to the other terms and benefits without mutual agreement. Changes were made to where medical services could be sought by limiting these to the CARDEA network and to the process for accessing those services. Retirees were being required to pay a premium when previously they did not have to. Article 5, at its highest, was limited to possible adjustments to the premiums.

42. In consequence I am of the view that the Industrial Court was wrong to dismiss the CWU's claim. Ms Gellineau, in her oral submissions, indicated that she has specific instructions not to pursue the remedy of a refund of premiums already paid after 13 December 2011 as it was not the CWU's intention that any order be made which could have the effect of "crashing" the health plan. The relief being granted shall accordingly be limited to the following. The appeal is allowed. The order of the Industrial Court dated 18 July 2018 is set aside. It is declared that Article 27 of the relevant Collective Agreement, as having

been incorporated in the individual contracts of employment of the employees of TSTT, was breached by TSTT.

43. We will hear the parties on the appropriate costs order in light of **section 10 (2)** of the **Industrial Relations Act, Chap 88:01**.

Ronnie Boodoosingh

Justice of Appeal