THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P405 of 2019

Application No. GSD – A009/2019

IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT CHAP 88:01

AND

IN THE MATTER OF THE REGIONAL HEALTH AUTHORITIES ACT 1994

REGIONAL HEALTH AUTHORITIES (CONDUCT) REGULATIONS 2008

BETWEEN

NORTH CENTRAL REGIONAL HEALTH AUTHORITY

Appellant

And

NATIONAL UNION OF GOVERNMENT AND FEDERATED WORKERS

Respondent

PANEL:

A. Mendonça J.A.

V. Kokaram J.A.

M. Wilson J.A.

Appearances:

Mr. K. Wright appeared on behalf of the Appellant

Ms. M. King appeared on behalf of the Respondent

REASONS

Delivered by A. Mendonça J.A.

1. On April 26, 2021 we allowed this appeal and remitted the matter to the Industrial Court. We now reduce to writing our reasons for so doing.

2. This is an appeal from the Industrial Court. The issues raised by the appeal are whether the Industrial Court acted properly, both in terms of the power it had, and if it had the power, whether it exercised it properly, in ordering the reinstatement of the worker's allowances pending the disciplinary proceedings that were brought against her by her employer, the Appellant, the North Central Regional Health Authority.

3. The worker, Coreen Isaac, is an employee of the Appellant and has been so for several years. By letter dated August 30, 2018 the worker was notified that she was placed on administrative leave pending an investigation into allegations of misconduct against her. While on administrative leave, the worker was paid her salary and allowances. In short, she was in receipt of her full pay.

4. By letter dated October 11, 2018 the Respondent, the National Union of Government and Federated Workers (hereinafter referred to as the Union), reported the existence of a trade dispute to the Minister. The Union in its letter stated that the dispute emanated over the harsh, oppressive and unfair placement of the worker on administrative leave.

5. Following the failure by the Appellant to attend a conciliation meeting on November 22, 2018, the trade dispute was referred to the Industrial Court. The certificate of unresolved dispute identified the dispute in the following terms:

> "By letter dated October 11, 2018, the Union reported a trade dispute over, the harsh, oppressive and unfair placement of Coreen Isaac on Administrative Leave on September 03, 2018."

6. On February 14, 2019 the worker received a letter from the Appellant stating that she had been charged with acts of misconduct. The charges were outlined in the letter. The letter further stated that if the worker denied the charges a tribunal would be appointed to hear evidence and determine the matter. The worker by email dated February 18, 2019 denied all charges.

7. By letter dated February 22, 2019 the Appellant notified the worker that pursuant to regulation 28(1) of the Regional Health Authorities (Conduct) Regulations (hereinafter referred to as the "Conduct Regulations") the Board had decided that the public interest required that the worker should forthwith cease to perform the functions of her office pending the determination of the disciplinary charges against the worker. The letter further stated that pursuant to regulation 28(3) of the Conduct Regulations the worker would receive only her basic salary pending the determination of the matter. In other words, she was not to be paid her allowances.

8. On November 1, 2019 the Union made an ex parte application to the Industrial Court for certain relief including an injunction restraining the Appellant from proceeding with the disciplinary proceedings against the worker pending the outcome of the trade dispute. I will refer below to the relief sought by the application and the orders made by the Industrial Court.

9. The application was heard inter partes. The Industrial Court, at the end of the day, made the following orders in relation to the following relief the Union applied for by the application:

   (1) The Union sought an injunction restraining the Appellant from proceeding with the disciplinary proceedings which were set for hearing on November 13, 2019. That order was refused by the Court.

   (2) The Union further sought a declaration that the worker is entitled to remain and/or continue in her employment in accordance with its terms. That also was refused.

(3) The Union also sought an order that the worker be permitted to attend work and perform her duties pending the outcome of the trade dispute. That too was refused.

(4) What the Industrial Court went on to order, which relief the Union also applied for by the application, is that all deductions from the salary and allowances of the worker be restored with immediate effect. It is that order with which this appeal is concerned.

10. The removal of the allowances from the worker pending the disciplinary proceedings was authorised by regulation 28(3) of the Conduct Regulations, which, inter alia, govern the conduct of the disciplinary proceedings and matters incidental thereto. Regulation 28(3) provides that:

> "An employee who has been prohibited under sub regulation (1) [which gives the Board of the Appellant the discretion to prohibit the employee from performing the functions of her office pending the determination of the disciplinary proceedings] shall receive his basic salary in his substantive position until the determination of the matter."

That regulation therefore authorises the non-payment to a worker of his allowances pending the determination of disciplinary proceedings brought against him in circumstances where the Board has decided that the worker should be prohibited from performing the functions of his office pending the determination of the disciplinary proceedings. The non-payment of allowances to a worker, therefore, follows automatically upon the invocation by the Board of regulation 28(1) of the Conduct Regulations in relation to the worker. It is further noted that pursuant to regulation 28(4) of the Conduct Regulations those allowances can be paid to the worker if she is exonerated at the disciplinary proceedings or she can receive such salary as the Board may determine if the result of those proceedings is a punishment other than dismissal.

11. The Industrial Court in coming to its decision that the allowances should be restored did so without specific reference to section 10(3) of the Industrial Relations Act, which we will come to shortly. But it seems to have done so on the following basis and in pursuance of that section. The worker had been prohibited from performing her functions under regulation 28(1) in February 2019. However, by the time the matter had come before the Industrial Court in November 2019, the hearing of the disciplinary proceedings were yet to begin. The Court found that delay to be inordinate. At the hearing of the Union's application, the Industrial Court interrogated counsel appearing for the Appellant as to the reasons for the delay. The Court was not impressed by the explanation and said (at paragraph 11 of its ruling) that "the [Appellant] has a duty to convene an investigative or disciplinary hearing into the conduct of a worker with alacrity, to do otherwise will result in a breach of the principles and practice of good industrial relations." At paragraphs 12-15 of its ruling, the Court further stated:

> "12. We find that the inordinate delay by the [Appellant] to convene a panel to hear the allegations made against the Worker to be harsh, oppressive and contrary to the principles and practice of good industrial relations. The delay to have a hearing and to bring the disciplinary process to an end, is tantamount to a punitive measure in circumstances where there are no findings of wrongdoing against the Worker.
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> 13. We further find, that it is harsh and oppressive and not in accord with the principles of good industrial relations, to remove the Worker's allowances while she is awaiting a hearing to determine whether or not she is guilty of any wrongdoing, especially in circumstances, where no date has been fixed for a final determination of the charges in the foreseeable future…

14. It is the ruling of this Court that it is unjust, unfair and contrary to the principles of equity, good conscience and the principles and practice of good industrial relations, for the Worker who has not been found guilty of any workplace infractions, to be subjected to a very prolonged period of disciplinary leave and to be deprived of the allowances which form part of her monthly benefits.

15. We further rule that the suspension of the Worker's allowances are contrary to the principles and practice of good industrial relations and to the provisions of Section 10 of the Industrial Relations Act."

12. The gist of the Court's decision seems to us to be that it was contrary to the principles and practice of good industrial relations to withhold payment of the worker's allowances in circumstances where the worker was not found guilty of any disciplinary charge and where there was an inordinate delay in the determination of the disciplinary proceedings. It was fair and just in those circumstances for the allowances to be restored. The questions before us are did the Industrial Court have the power to make such an order, and if so, did it exercise that power correctly in the circumstances of this case.

13. Mr. Wright for the Appellant advanced two propositions. He submitted that the Industrial Court does not have the jurisdiction, i.e. the power, to make such an order under the Industrial Relations Act or any other law. His main submission was that the Conduct Regulations are subsidiary legislation and have the force of law. They provide that once a worker was prohibited from performing her functions pending the determination of disciplinary proceedings she was not to be paid her allowances. That was the law as laid down in the Conduct Regulations and the Industrial Court could not order otherwise. Alternatively, Mr. Wright argued that if the Industrial Court had the

power to order the payment of the allowances notwithstanding the Conduct Regulations, it did not exercise its power properly.

14. In terms of the power of the Industrial Court to make the order that it did, we think that there is an abundance of authority that is against Mr. Wright. Section 10(3) of the Industrial Relations Act gives the Industrial Court the power to make such an order even though it is inconsistent with the Conduct Regulations.

15. Section 10(3) provides as follows:

> "10. (3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers 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."

It is relevant to note that section 10 (3) operates "notwithstanding anything in this Act or in any other rule of law to the contrary". The section has been considered in several cases decided by the Industrial Court and also in cases decided by the Court of Appeal. Perhaps one of the best ways it is put is in the judgment of the Industrial Court in the matter of the **Estate Police Association v Airports Authority** ST No. 1 of 1999. There the Court said:

> "Having considered the respective arguments carefully, the Tribunal holds that the true intention of the Legislature in enacting s.10 (3) can be expressed thus:
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> The section directs (the court/Tribunal) at all times to act in the manner set out at subsection (b) and to make its orders in the manner set out at subsection (a) notwithstanding anything in the [Industrial Relations

Act] or in any rule of law to the contrary. So that where the application of a true interpretation of a rule of law or a statute in a dispute before the Industrial Court would produce a result which conflicts with a result derived from a true application to the facts of the dispute of the factors set out at s. 10(3)(a) and (b); the court may having regard to the considerations set out in s. 10(3)(a) and (b) make in an appropriate case, ('appropriate' meaning a case where the court considers it fair and just to make such order or award having regard to the interests of the persons concerned and the community as a whole, and the principles of equity, good conscience substantial merits of the case and the principles and practice of good industrial relations) an order or award derived from application of those considerations notwithstanding the true interpretation (and consequent effect) of such rule of law or statute applied to the facts of the dispute. "Dispute" in this context refers to any dispute before the court whether it is what is commonly referred to as an "interests" dispute or a "rights" dispute [see s. 51 of the IRA]. The intention is not to permit parties to act in a manner inconsistent with relevant legislation and seek to have their actions "sanitised" by the court/Tribunal applying s. 10(3).

The above statement is our answer to the question "when and in what circumstances can section 10 (3) be invoked" posed by the authority. It is in our judgment the only reasoned purport of the "notwithstanding" provision. It (sic) presupposes a true and correct interpretation of a rule or law or statute and permits the making of an order or award not in keeping with that interpretation where to do otherwise would conflict with the principles and practices of good industrial relations and other factors set out in section 10 (3). It does not import as the authority asserts the interpretation of the provision contrary to its expressed true and correct tenor.

So even if the tribunal could be said to have erred in its interpretation of sections 38 (2) and 41 supra and those sections mean what they say at face value, the tribunal is still entitled under section 10 (3) to hold that notwithstanding what those sections say on their faces, good industrial relations practice as set out in section 43 of the IRA [amongst the other factors set out in section 10 (3)] requires that agreements in the nature of collective agreements contain adequate provisions for the avoidance and settlement of disputes, and order the inclusion of those provisions in the agreement, notwithstanding the face value interpretations of sections 38 (2) and 41.

Simply put, in response to an argument that "the law says that 'two plus two equals four' (of anything, dollars, hours off work) therefore the Tribunal (or the court) may award four" the Tribunal cannot use s.

> 10(3) to say "the law which says 'two plus two equals four' really means 'two plus two equals six' so we award six". It must say, "the law says that 'two plus two equals four' and under that law we may award four. But having regard to the factors set out in s.10 (3) we find that an award of six is merited and we award six, notwithstanding the statement of the law".

16. That statement of the law was cited with approval in the case of **Carib Brewery Limited v National Union of Government and Federated Workers** Civil Appeal No. P213 of 2015, a decision of this Court, and it underlines the wide powers of the Industrial Court given to it by section 10(3) of the Industrial Relations Act. So we do not accept Mr. Wright's submission that the Court does not have the power to do what it did. Just as the court can say two plus two equals four but it may order six having regard to the factors in section 10(3), the Court can say, in relation to this case, that although the Conduct Regulations provide that the allowances are not payable to the worker while she is prohibited from performing the functions of her office pending the determination of the disciplinary hearing, having regard to the factors in section 10(3) of the Industrial Relations Act, it is appropriate in the circumstances of this case to restore the allowances to the worker. In our view, that is what the Industrial Court did and it had the power to do so.

17. Mr. Wright in his submissions referred to the case of **Texaco Trinidad Inc v Oilfield Workers Trade Union** (1973) 22 WIR 516 in which the Court of Appeal held 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. Mr. Wright argued that insofar as that is so, then the Conduct Regulations, which are ancillary or subsidiary legislation, should have a similar effect. We do not agree. Section 10(3) makes it clear that it operates "notwithstanding anything in this Act or in any other rule of law to the contrary" which would include the Conduct Regulations. That is patently clear. Further, in this case

neither party relied on any provision of a registered collective agreement. So the principle derived from the **Texaco Trinidad Inc** case referred to above is of no relevance to this appeal.

18. But whether the **Texaco Trinidad Inc** case would be decided in the same way today, remains to be seen. That case was decided under Section 13(2) of the Industrial Stabilisation Act. That section was the forerunner to section 10(3) of the Industrial Relations Act. Section 13(2) was not as expansive in its language as section 10(3) is. Section 13(2) provided:

> "Notwithstanding any other law, and in addition to its power in subsection (1), the Court in the exercise of its jurisdiction shall have power –
>
> > (a) to make such order in relation to a trade 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) to 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."

The opening words of section 10(3) are somewhat broader and provide "Notwithstanding anything in this Act or in any other rule of law to the contrary". It seems to us to be a moot question whether that case might be decided the same today. However, as we mentioned above, we do not have to consider the effect of a registered collective agreement on section 10(3) in this case, so we can put the **Texaco Trinidad Inc** case to one side.

19. We are firm in our conclusion that section 10(3) gives the Industrial Court the power to say that, notwithstanding the Conduct Regulations say that a worker's allowances are not to be paid while disciplinary proceedings are pending if she is prohibited from performing her functions under regulation 28(1), the Industrial Court has the power, after giving due consideration to

section 10(3), to say that the allowances should be restored.

20. The question that now arises is whether the Industrial Court properly exercised that power. In that regard **Carib Brewery Limited v National Union of Government and Federated Workers** (supra) is relevant. In that case the Court stated (at para 29):

> "29. It is not in dispute that the Court of Appeal would decline to interfere or re-evaluate any findings or decision of the Industrial Court as to what constitutes "good industrial relations practice". In the instant matter there is no issue whatsoever as to the findings of fact by the Industrial Court. The challenge to its award is exclusively on the basis of law. While in the instant case it would not be appropriate to look behind the Industrial Court's statement that the decision being challenged was in keeping with good industrial relations principles, that assertion by itself would not absolve it from its obligation to expressly take into account the matters that it is mandated to consider under section 10 (3) (a). In fact this has been recognized by the Industrial Court in the careful decisions on the exercise of its section 10 (3) jurisdiction in the cases cited above."

And further at paragraphs 45 and 46:

> "45. In the instant case, ex gratia payments had been made in respect of each worker to take into account the length of their respective periods of service. The workers having already received some compensation to take into account their equity in their years of service, it was therefore all the more necessary for the Industrial Court to explain its award if it were purporting to exercise its jurisdiction under Section 10 (3) to increase that award and effectively treat them as if they had been terminated by reason of redundancy rather than properly dismissed for breach of company policy. While as explained previously it had the jurisdiction to do so, it was required, in the context of its express findings that the workers had been properly dismissed for breach of the employer's policy, to exercise that jurisdiction in terms of having regard to the factors specifically identified in section 10 (3) namely, a) what it considered fair and just b) having regard to the interests of the persons immediately concerned and c) the community as a whole, and d) acting in

accordance with equity and good conscience and e) the substantial merits of the case before it, and f) having regard to the principles and practices of good industrial relations.

46. It was not sufficient to simply refer to its award as "in keeping with good industrial relations principles" when a. that is but one of the matters that it was required to have regard to if it were exercising that jurisdiction and b. there was nothing, save for the mention of that phrase, to indicate which principles were being applied and how in the context of the case before it the application of those unspecified principles justified the awards. The Section 10 (3) jurisdiction, which it is alleged that the court was purporting to exercise, is not unlimited or arbitrary. Like any other jurisdiction conferred by statute, it is exercisable within the statutory parameters that confer and create it."

21. We think it is clear from the above that while section 10(3) of the Industrial Relations Act gives the Industrial Court an extremely wide power, it is not an unlimited one. The power given to the Court by the section must be exercised within the parameters of the section. The Industrial Court in exercising the power given to it by the section must therefore have regard to the considerations specifically identified in the section. It must also in its judgment or reasons demonstrate or at least reflect that it has done so. So the question is, did the Industrial Court act within the parameters of section 10(3) of the Industrial Relations Act and give due consideration to those factors that it ought to have considered.

22. It is clear that the Industrial Court considered the principles and practice of good industrial relations. We had, however, during the course of the argument, asked Ms. King for the Respondent to identify for us where did the Court take into account other considerations required by section 10(3) to be taken into account, such as the interests of the persons immediately concerned and the community as a whole. We are satisfied that the Court did take into account the interests of the worker. Ms. King submitted that insofar as the interests of the Appellant are concerned, the Court pointed out that the

Conduct Regulations were not in keeping with good industrial relations practice and principles. We, however, do not read the judgment as going that far. If that is what the Court intended to say, that required a very clear statement which is not present in the Court's judgment. That, in our view, was not its intent. It would be surprising if it were as no submission was made to that effect to the Court.

23. The reality is there is no indication from the reasons of the Industrial Court that it considered the interests of the Appellant as it was required to do under section 10(3). Similarly, there would be matters that affect the interests of the community as a whole which we do not see expressed or reflected in the judgment of the Court. We mention these two considerations as only two of the considerations to which section 10(3) refers.

24. In our judgment therefore, the Industrial Court had the power under section 10(3) to order the payment to the worker of her allowances notwithstanding regulation 28(3) of the Conduct Regulations. Although that section gives the Industrial Court a wide power, it is not an unlimited power. The Industrial Court must act within the parameters of the section. It must take into account and apply the considerations set out therein in relation to the facts of the case before it and demonstrate or at least reflect in its reasons that it has done so. It is not apparent from the reasons of the Industrial Court in this case that it has given due consideration to the section 10(3) considerations. Accordingly, we consider it appropriate to remit the matter to the Court for that to be done.

25. For these reasons, we allowed the appeal, set aside the Order of the Industrial Court dated the 4th day of November 2019 and remitted this matter to the Industrial Court before a differently constituted Panel for reconsideration by the Court of the proper exercise of its jurisdiction under section 10(3) of the Industrial Relations Act within its statutory context taking into account all of the relevant statutory factors and applying them to the relevant facts of this

case. In relation to costs, we ordered that there be no order as to costs.

Dated the 25th day of May, 2021.

A. Mendonça J.A.

V. Kokaram J.A.

M. Wilson J.A.