REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 3 of 2012

IN THE COURT OF APPEAL

BETWEEN

SCHLUMBERGER TRINIDAD INC.

Appellant

AND

OILFIELD WORKERS' TRADE UNION

Respondent

PANEL: **A. Mendonça, J.A.**
R. Narine, J.A.
P. Moosai, J.A.

Appearances: **For the Appellant Mr. K. Garcia**
For the Respondent Mr. A. Bullock

Date delivered: December 18th, 2014

I agree with the judgment of Mendonca J.A. and have nothing to add.

Narine
Justice of Appeal

I too agree.

Moosai
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. On November 17th 2014 we allowed this appeal and set aside the orders of the Industrial Court. We indicated then that we would give our reasons for so doing at a later date. This we now do.

2. This is an appeal from the Industrial Court in a trade dispute concerning the dismissal of the worker, Mr. Desmond Edwards (the worker). The Court held that the dismissal of the worker was effected in circumstances that were harsh and oppressive and not in accordance with the principles of good industrial relations practice. The appellant company, Schlumberger Trinidad Inc. (the company) challenges that finding. The central issues canvassed before this Court were whether or not in a case where there is no evidence of the primary facts on which the Industrial Court premised its opinion that a worker was dismissed in circumstances that are harsh and oppressive and not in accordance with the principles of good industrial relations practice, section 10(6) of the Industrial Relations Act (the Act) is a bar to the appeal and if not whether this is a case where there is no evidence of the primary facts.

3. I will return to the central issues later but it is first necessary to set out the background to this appeal.

4. The worker was employed by the company which is a service provider to oil and gas operators in the energy industry and he was at all material times a monthly paid worker. He was employed as a grade 4 wireline operator in the wireline segment of the company. The respondent union (the union) was, at all material times, the recognized majority union in respect of monthly paid workers of the company. By letter dated October 13th 2008 from the company to the worker, the company terminated his services for reasons of redundancy. The letter stated:

"Mr. Desmond Edwards

WIRELINE

Dear Desmond,

TERMINATION OF SERVICES

This serves to advise that effective October 14, 2008 your services with Schlumberger Trinidad Inc are being made redundant.

This comes as a result of our current economic downturn which has forced us to reduce our overall staffing costs. Unfortunately, to date we have found no other alternative employment for you and as a result we have no choice but to terminate your services.

Please be advised that you are hereby given 45 days notice, which means for termination benefits, your last day of employment would be considered as November 27, 2008. During this period you will be eligible to all benefits e.g. medical.

Please find attached a spreadsheet detailing your termination benefits.

We thank you for your services to Schlumberger Trinidad Inc. and wish you every success in your future endeavours.

Yours Respectfully

Laurence M Richardson
Personnel Manager
SCHLUMBERGER TRINIDAD INC*"*

5. In the Retrenchment and Severance Benefits Act Chap. 88:13, which by its long title is an Act to prescribe the procedure to be followed in the event of redundancy and to provide for severance payments to retrenched workers, "redundancy" is defined to mean the existence of surplus labour in an undertaking for whatever cause. "Retrenchment" is the termination of the employment of a worker at the initiative of the employer for the reason of redundancy. Where therefore a worker is retrenched or, in other words, where his services are terminated for the reason of redundancy, it is a no fault dismissal. That is to say, the worker is dismissed because he is *"*surplus labour*"* and not because of any fault on his part, such as for some wrong doing or for poor job performance.

6. Where workers have to be retrenched it has been held that the principles of good industrial relations practice require that it be done on the basis of *"last in first out, all other things being equal"*. In other words, the employer, in determining whether one worker should be retrenched before another in order to comply with good industrial relations practice, should apply the principle of *"last in first out all other things being equal"* (see for example Trade Dispute 106 of 1991 **Amalgamated Workers Union v Pan American Standard Brands Incorporated**). This in effect means that when one worker is compared to the other, the one who is last employed by the employer is the one to be retrenched, all things being equal. In deciding whether all things are equal, an employer may distinguish between workers on the basis of certain criteria such as skills, training and job performance. So that an employer may select worker A over worker B for retrenchment, notwithstanding that A is senior to B, on the basis that B possesses skills that are required by the company which A does not have or because B was the better performer of the two. In those circumstances all things would not have been equal but the dismissal would nevertheless be regarded as a retrenchment (see Trade Dispute 11 of 2002 **OWTU v Nestle Trinidad and Tobago Ltd.** and Trade Dispute 142 of 1989 **TIWU v Automotive Components Ltd**).

7. It was the company's position as set out in the letter of October 13th 2008 that the worker was retrenched or his services terminated for reason of redundancy although, as will be seen, in selecting the worker over another it resorted to job performance as the distinguishing factor. From the company's perspective as that was a no fault termination there was no question of the worker being given a hearing to defend himself against allegations of wrongdoing prior to his dismissal. The union, however, contended that the worker was dismissed for the reason of poor job performance having nothing to do with retrenchment. In those circumstances it argued that the failure to afford a hearing was contrary to good industrial relations practice and his dismissal harsh and oppressive.

8. The issue before the Industrial Court was whether the worker was dismissed in circumstances that were harsh and oppressive and not in accordance with good industrial relations practice. The parties agreed that the determination of that issue would be dependent on the nature of the worker's dismissal. It was therefore agreed that the nature of his dismissal (i.e. whether a retrenchment or for poor job performance) would be tried as a preliminary issue and would be the determinative factor. The obvious reason for that was that if the dismissal was properly a retrenchment the union had not challenged any aspect of the process adopted by the company for

selecting the worker and could not therefore contend that the dismissal was harsh and oppressive and not in keeping with good industrial relations practice. Likewise, if it were not a retrenchment the company had not advanced any case that could support a conclusion that the dismissal was not contrary to good industrial relations practice and harsh and oppressive.

9. It was further agreed before the Industrial Court that the case would be determined by the Court on the respective statements of evidence and arguments of the parties and their oral and written submissions.

10. In the union's evidence and arguments it acknowledged that the company dismissed the worker by letter dated October 13th 2008, which gave as the reason for so doing that there was a downturn in the current economic condition causing the company to reduce overall staff and costs. The union, however, denied that that was the real reason for the worker's termination and alleged that he was terminated without proper cause. In the particulars in support of that allegation the union stated that sometime after the worker's services were terminated it was supplied with a document that contained the names of all workers who were made redundant and the reasons for the redundancy. The union then discovered that the reasons that the company gave in the letter terminating the worker's services were not the same as contained in the document. That document came to the union's attention when the company wrote to the Board of Inland Revenue on October 31st 2008. The document was an attachment to the letter. The document identified that the worker's services were terminated for poor performance. The union contended that the document contained the genuine reason for the dismissal and in those circumstances the worker's dismissal was harsh and oppressive and not in keeping with good industrial relations practice. The union consequently sought reinstatement of the worker without loss of pay and other benefits.

11. A witness statement of the worker was filed on behalf of the union. It was consistent with the evidence and arguments of the union.

12. Therefore to support its contention that the worker was not dismissed for reasons of redundancy but rather for poor performance the union relied on a document prepared by the company. That document is headed "*List of Schlumberger employees terminated due to Redundancy. This exercise took place during the period October 13 - 31 2008."* The document contained the names of several workers whose services were terminated during that period. There is information relating to each worker under eight columns headed individually, "*Date of*

Employment"; "BIR#"; "Classification"; "Method"; "Salary"; "Payment in Lieu (45 days)"; "*Termination Payment";* and "*Total Payment".* Under the column headed *"Method"* appeared the words "*Poor Performance"* in relation to the worker. The words "*poor performance'* also appeared in the list under the column "*Method"* in relation to some of the other names on the list. In relation to others under the column *"Method"* either the term *"LIFO"* appeared (which the parties agreed meant last in first out) or the words "*Surplus Labour"* appeared.

13. The company in its evidence and arguments stated that the worker was not terminated in circumstances that were harsh and oppressive and contrary to good industrial relations practice but was terminated for reasons of redundancy as provided for in the Retrenchment and Severance Benefits Act. The company stated that the worker was a wireline operator in the wireline segment of the company. Activities in the wireline segment were at all material times directly linked to the amount of drilling carried out and intended to be carried out by oil and gas operators in the energy industry for whom the company did work. There was a general decline in activity in 2008 and as a consequence, there was an overall decline of activity in the company in general and specifically in the company's wireline segment. The reduction of available work resulted in there being a surplus of wireline operators in the wireline segment. As a consequence the company was constrained to conduct retrenchment exercises in relation to the wireline segment.

14. The company further stated that at the date of retrenchment there were five wireline operators in the wireline segment of the company among whom included the worker. Three of the workers were surplus to the requirements of the segment. The company then went on to explain how it selected the three workers for retrenchment. It stated:

> *"The three (3) workers from the Wireline Segment selected for retrenchment were Sherwin Elbourne, James Yorke and the Worker.*
>
> ***PARTICULARS***
>
> *a) The Company's criterion for the selection of these workers for retrenchment was "Last In First Out All Things Being Equal";*
>
> *b) Using this criterion, Mr. Elbourne, whose seniority date was 2006, was selected for retrenchment;*
>
> *c) The next most junior Wireline Operators in the Wireline Department were Rishi Singh, Peter McClean and the Worker;*

d) Rishi Singh was not selected for retrenchment. Although he was more junior to the Worker, he was not a field operator as he had been assigned to the Maintenance section of the Wireline Segment where he had been receiving specialized training as a technician. All things were therefore not equal as concerned Mr. Singh.

e) Although Mr. McClean was junior to the Worker by 11 days, all things were not equal as between him and the Worker, as (among other factors) the Worker had a less favourable job performance history than Mr. McClean;

f) The Worker was therefore selected for retrenchment."

15. Subsequent to the issuing of termination letters to the workers who were retrenched the company then wrote to the Board of Inland Revenue by letter dated October 31st 2008 in accordance with its standard practice enclosing a list of the names, classifications, severance calculations and the method of selection of the workers who were retrenched and requested confirmation on whether the severance payments made to them were exempt from taxation. That letter to the Board of Inland Revenue was as follows:

"October 31, 2008

The Board of Inland Revenue
PAYE Division
Trinidad House
St. Vincent Street
PORT OF SPAIN

Dear Sir

NOTICE OF RETRENCHMENT

This letter serves to inform your organization that Schlumberger Trinidad Inc has recently undergone a reduction exercise due to a surplus of labour within specific segments in the Company.

This has been due to the current economic downturn which has reduced our capacity to sustain our present levels of employment. Consequently, we have no other alternative which would enable us to continue our operations in Trinidad efficiently and successfully.

As such, we were forced to take the decision to make a number of our employees redundant. Please note that the company recognized the Retrenchment & Severance Benefits Act of 1985 and went beyond in our calculations.

The table attached contains a list of employees, including classification, length of service and other pertinent data required on their behalf and we are kindly asking for tax exemptions, due to Redundancy, on behalf of the employees.

Should you require any additional information please don't hesitate to contact me.

We thank you for your cooperation in this matter.

Yours Respectfully

Laurence M Richardson
PERSONNEL MANAGER
SCHLUMBERGER TRINIDAD INC*"*

16. The table referred to as attached to the letter is the same document on which the union placed reliance to establish that the genuine cause of dismissal was poor performance and not redundancy.

17. A witness statement of Mr. Laurence Richardson, the personnel manager of the company at the time of the retrenchment exercise conducted by the company, was filed on behalf of the company. The statement reflected what was contained in the company's evidence and arguments but Mr. Richardson expanded somewhat on the method used to select the worker. He stated:

> *"27. As between Mr. McClean and the Worker, the Worker had a marginally less favourable performance appraisal report for the year immediately preceding 2008. Prior to that year, Mr. McClean's and the Worker's appraisal grades were virtually identical. There are hereto annexed in a bundle and marked "L.R.4" true copies of the performance appraisal reports of Mr. McClean over the period 2006 and 2007, and there are hereto annexed in a bundle and marked "L.R.5" true copies of the performance appraisal reports of the Worker over the same period.*
>
> *28. As close as it was, the Company made an analysis of measured work performance, as reflected in these workers' respective performance appraisal reports, and selected the Worker for retrenchment over Mr. McClean, as 'All Things Were Not Equal' as between them on that score."*

18. In relation to the letter of October 31st 2008 to the Board of Inland Revenue and the attached table Mr. Richardson stated:

> 31. "*As appears from the table under the heading "Method" (which the Company intended, to refer to the method of selection of a worker), it is stated that the method*

of selection of worker was 'poor performance'. For the reasons set out above, the Worker was selected for retrenchment based on his less favourable performance appraisal as between the Worker and Peter McClean. In hindsight, perhaps the letter should have said 'less favourable' rather than 'poor'. But the letter formed no part of the process of selection for retrenchment - it was created after the retrenchment had been put into effect as purely as an administrative device to assist the affected workers in obtaining their tax exemptions from the BIR."

32. On October 13, 2008, I met with the Worker and explained to him the situation in the wireline segment and the Company's decision ... to retrench him. I also indicated to him that given the severe decline in all areas of the Company's business, the Company could not re-assign him to any other department and that the Company regretted that it had to retrench him. I gave him a letter dated October 13, 2008 together with a breakdown of his severance payment…."

19. The Industrial Court in its judgment stated that an employer who dismissed a worker must give to that worker a valid reason for his dismissal. That, it said, is a principle of good industrial relations practice. It stated that the company gave two reasons to the worker; one to the worker himself and one to the Board of Inland Revenue. Where two reasons are given the worker is entitled to treat as the true reason that which is against the interest of the employer as maker of the statement containing the reasons. Likewise *"the Court would be entitled to interpret the statement contra preferentem, that is to say, any ambiguities arising from the two statements should be construed against the company as drafter of the statements".* The Court then added:

*"In concluding that the real reason for the worker's dismissal was '**poor performance'** the Court regards that reason as being against the interest of the Company in that it would require the Company to follow the usual procedure for the dismissal of a worker on grounds of poor performance: warnings, opportunity to improve, reasonable assistance in improving, inquiry and provision of an opportunity to be heard. All these 'irritants' as well as the requirements of Article 18(3) of the Collective Agreement could be avoided by the Company by substituting for the real reason the claim of redundancy. In that sense, an allegation of redundancy is less burdensome on the Company than an allegation of poor performance.*

In the circumstances, I find that the real reason for the dismissal of the worker was poor performance and that in dismissing him for this reason the Company failed to provide him with an opportunity to defend himself against the allegation. Consequently, I hold that the dismissal of the worker was effected in circumstances that were harsh and oppressive and not in accordance with the principles of good industrial relations practice."

20. The Industrial Court therefore found that the real reason for the worker's dismissal was poor performance and not retrenchment as the company had contended. In those circumstances the Court held that the worker had been dismissed in circumstances that were harsh and oppressive and not in keeping with good industrial relations practice. As a consequence the Court ordered that the

company pay to the worker $250,000.00 as damages from which was to be deducted the sum of $61,334.14 which had been previously paid to the worker as severance payments.

21. Counsel for the company contends that the finding of primary fact by the Industrial Court, that is to say that the valid reason for the dismissal of the worker is poor job performance and not redundancy, is erroneous in point of law. Consequently, the opinion of the Industrial Court that the worker was dismissed in circumstances that were harsh and oppressive and not in keeping with good industrial relations practice which is based on the finding of primary fact is also erroneous in point of law.

22. To advance this appeal the company must overcome section 10(6) of the Act. That section bars an appeal to this Court from the Industrial Court's opinion that the worker was dismissed in circumstances that are harsh and oppressive and not in keeping with good industrial relations practice. It is the company's contention that the section does not prevent an appeal in circumstances where what is challenged is the finding of primary fact on which the opinion was based and not the opinion itself. The contention of the company is that there is no evidence to support the finding of primary fact made by the Industrial Court. The question therefore in this appeal is whether section 10(6) bars an appeal from the Industrial Court's opinion as to whether a worker was dismissed in circumstances that are harsh and oppressive and not in keeping with good industrial relations practice in circumstances where the opinion is based on a finding of primary fact that is not supported by any evidence.

23. It is necessary to set out section 10(6) as well as sections 18(1) and (2) of the Act which are highly relevant to this appeal:

> *"10 (6) The opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever.*
>
> *18 (1) Subject to subsection (2), the hearing and determination of any proceedings before the Court, and an order or award or any finding or decision of the Court in any matter (including an order or award)-*
>
> *(a) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever; and*

(b) shall not be subject to prohibition, mandamus or injunction in any Court on any account whatever.

(2) Subject to this Act, any party to a matter before the Court is entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no other:

(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."

24. It can be seen that section 18(1) provides that an order or award or any finding or decision of the Industrial Court shall not be challenged, appealed against, reviewed or called in question in any court on any account whatever. Section 18(1) is however made subject to section 18(2). This section gives an entitlement as of right to appeal to the Court of Appeal on certain limited grounds which include that any finding or decision of the Court in any matter is erroneous in point of law. Section 18(2) is however made subject to the Act, which of course includes section 10(6), and that section provides, inter alia, that the opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice shall not be challenged, appealed against etc. In any court on any account whatever.

25. In Civil Appeal 81 of 1978 **Flavourite Foods Ltd. v OWTU** the Court of Appeal (Hyatali, CJ, Kelsick and Bernard, JJA) considered the interplay between sections 18(1) and (2) and section 10(6). Hyatali CJ stated:

"It is of importance to note that the provisions of s. 18(1) are made subject to the provisions of s. 18(2) only, whereas the provisions of s. 18(2) are made subject to the whole of the Act. The use of the expressions 'subject to subsection (2)' occurring in s. 18(1) and 'subject to this Act' occurring in s. 18(2) makes this abundantly clear. The consequences to which they lead are of the utmost significance. In my judgment they are as follows: (a) that

the right of appeal conferred by s. 18(2) on the statutory grounds therein set out and no other, overrides the summary commandments of s. 18(1) that an order or decision of the Court shall not be inquired into, queried, appealed against or quashed or be subject to prohibition, mandamus or injunction in any court on any account whatever and (b) that the right of appeal aforesaid under s. 18(2) being subject to the whole of the Act is subject in the result to s. 10(6) thereof. It follows therefore that s. 10(6) is to be read together with and given effect to as a proviso to s. 18(2). In my opinion this conclusion is fortified by the fact that s. 10(6) occupies a special place in the earlier part of the Act and to all appearances has been deliberately inserted there to put it beyond doubt that appeals will not be allowed against the Court's opinion in what is manifestly a highly specialized area of industrial relations, namely, whether or not a worker has been dismissed in circumstances that offend against the principles of good industrial relations practice or are otherwise harsh and oppressive.

Consequently, if an appellant is unable to rely on any of the statutory grounds of appeal specified in s. 18(2) then he is barred from appealing altogether since the Act prohibits him from relying on any other ground. If however he is able to rely on one or other of those statutory grounds he will nevertheless be barred from appealing if the only ground of appeal on which he relies involves a challenge against an opinion of the Court given in pursuance of s.10(6).

26. Bernard, J.A. as he then was, agreed with Hyatali, C.J. He stated:

"*In my judgment, the conjoint effect of S. 10(6) and 18(2) of the Act is that where the sole issue is whether the dismissal of a worker is harsh or oppressive or not in accordance with the principles of good industrial relations practice, the opinion of the Court either way on this cannot be subject as a reinvestigation by the process of appeal…"*

27. Kelsick, J.A. as he then was, agreed that in the case before him section 10(6) barred the Court of Appeal from calling into question the opinion of the Industrial Court that the dismissal of the worker was harsh and oppressive and not in keeping with the principles of good industrial relations practice. He however left open the question, which was not relevant to the case before him, whether section 10(6) would bar an appeal where the opinion of the Court was formed on a non-existing factual basis. He said:

"T*he question remains whether the particular ouster clause in s. 10(6) alters the legal position by rendering absolutely immune from inquiry (i) such an opinion formed on no, or a patently insufficient, factual base which makes it erroneous in point of law - s. 18(2)(d), or (ii) an opinion arrived at without, or in excess of, jurisdiction or by fraud - (s. 18(2)(a), (b), (c)."*

28. The decision in the Court of Appeal in the **Flavourite** case was delivered on January 26th 1983.

29. In Civil Appeal 2 of 1983 **Eric Miller Company Ltd. v OWTU** Davis, J.A, in giving the judgment of the Court (which was delivered on December 21st 1990) stated that it was *"well settled that this Court will interfere and indeed set aside a decision of the Industrial Court that in its opinion, a dismissal is harsh and oppressive where that decision is founded on no evidence."* He distinguished that case from a case where although there is some evidence the objection is to the Court's assessment of the evidence. That he said would be a different case.

30. In Civil Appeal 114 of 2000 **All Sugar and General Workers Trade Union v Caroni (1975) Ltd**. the question again arose whether the appeal in that matter was barred by section 10(6) of the Act. The Court held that it was. In that case the Industrial Court had found that the worker's dismissal was not harsh and oppressive and not contrary to the principles of good relations practice in circumstances where he was pilfering petrol from his employer's vehicle. The Court of Appeal was of the view that there was clear evidence to support that finding and in those circumstances what the appeal sought to challenge was the Industrial Court's assessment of the evidence. Section 10(6) did not permit an appeal in those circumstances. De la Bastide, C.J, as he then was, who gave the judgment of the Court, said:

> *"I would nevertheless express the view without going so far as to rule out the possibility of an appeal ever lying from the Industrial Court in a matter in which the dismissal of a worker is challenged, that where the ground of appeal is that there was an absence of evidence to support the conclusion of the Court that the dismissal either did or did not have the character mentioned in Section 10(6), then the effect of Section 10(6) is to bar the appeal.*
>
> *It seems that that is clearly the minimum effect which one would have to give to Section 10(6). In other words, once the ground of appeal involves considering the potential of the evidence to justify the finding that the dismissal either was or was not harsh or oppressive or in accordance with the principles of good industrial relations practice, then the appeal could not be brought. Whether or not there is a possibility of appeal if there is alleged to be an absence of evidence to support some primary finding on which the opinion of the Court as to the character of the dismissal was based - whether or not that will provide an exception to Section 10(6) is a matter which we need not go into this case."*

31. The Court of Appeal in the **Caroni** case therefore, as had Kelsick, J.A. in the **Flavourite** case, did not rule out the possibility of an appeal ever lying against the Industrial Court's opinion under section 10(6). It however left open, as Kelsick, J.A had also done the question whether an appeal would lie where what is challenged is that the primary facts on which the Court based its opinion was not supported by any evidence.

32. It should be noted that the Court in the **Caroni** case did not refer to the **Eric Miller** case.

33. In **Caroni (1975) Ltd. v Association of Technical Administrative and Supervisory Staff** (ATASS) (2002) 67 WIR 223 this Court again referred to the restriction imposed by section 10(6) on the right of appeal granted by section 18(2). In that case the Court of Appeal (De la Bastide, C.J. and Jones and Warner, JJA) held that the appeal was barred by section 10(6). The Court found that there was no merit in the submission by the appellant that there was no evidence to support the Industrial Court's decision. Jones and Warner, JJA, who delivered a joint judgment, cited with approval the dicta of de la Bastide, C.J. in the earlier **Caroni** case referred to above.

34. De la Bastide, C.J. in a short judgment dealt again with the restriction imposed by section 10(6) on the right of appeal granted by section 18(2). He stated:

> *"The wording of s 10(6) is very explicit. However reluctant this court may be to accept that its jurisdiction has been ousted by an Act of Parliament and that it is thereby denied the opportunity of investigating an alleged injustice and correcting it, if found to exist, the intention of Parliament is too clear in this instance to be deflected by any presumption of law or canon of construction. It is clearly the duty of this court to give effect to it. We must not be tempted to do otherwise by pictures painted of the gross injustices which may be perpetrated if we recognize and accept the restriction which Parliament has imposed on our right to interfere. In any case, s 10(6) does not oust any pre-existing jurisdiction of the Court of Appeal. The Industrial Court is a comparatively recent creation of statute, and so is the right given to appeal from it to the Court of appeal. The intention of Parliament, clearly expressed in s 10(6), is that the question whether the dismissal of a worker is in any case harsh and oppressive and contrary to the principles of good industrial relations practice, should be reserved to the Industrial Court. What distinguishes a dismissal that is harsh and oppressive from one that is not, is a matter which the Act clearly regards as grounded not in law, but in industrial relations practice. The practice, which is not codified in our jurisdiction, is to be determined and applied to the facts of each case by the Industrial Court. The policy of the statute is obviously to entrust that function only to judges of the Industrial Court who come equipped with experience of, and familiarity with, industrial relations practice. This is a qualification which judges of the Supreme Court do not necessarily or even ordinarily have. It is considerations like these which presumably underlie the prohibition in s 10(6) against the Court of Appeal reviewing the decision of the Industrial Court that the dismissal of a particular worker does, or does not, have the quality which triggers the grant of the remedies of compensation and reinstatement.*
>
> *A harsh and oppressive dismissal is something which, according to the Act, may be identified only by the Industrial Court.*
>
> *It does not matter whether the party challenging the decision of the Industrial Court on this issue claims, not merely that the decision was against the weight of the evidence, but goes further and claims that no reasonable judge properly directed could have come to the same*

conclusion, having regard to the evidence. In the latter case, the ground of appeal has graduated from a question of fact to a question of law; but it is nonetheless barred by the prohibition contained in s 10(6). This is not to say that a decision of the Industrial Court as to whether a dismissal is harsh and oppressive is so sacrosanct that it can never be challenged on any ground whatever. If, for instance, there has been some procedural irregularity which involves a breach of the rules of natural justice, then clearly an appeal would lie to the court of Appeal, notwithstanding s 10(6). In such a case it would be the process by which the Industrial Court reached its opinion and not the opinion itself, that was challenged.

It is unnecessary and indeed dangerous to try to enumerate all the circumstances in which an appeal would lie to the Court of Appeal against the decision of the Industrial Court in a trade dispute over the dismissal of a worker. The answer in broad terms is whenever the appellant can rely on any of the grounds mentioned in s 18(2) without running foul of the prohibition contained in s 10(6). What this means in practice will have to be determined on a case-by-case basis."

The **Eric Miller** case was again not referred to.

35. The decided cases clearly show that section 10(6) bars an appeal from the Industrial Court's opinion whether the dismissal of the worker is harsh and oppressive and not in accordance with good industrial relations practice where the ground of appeal involves considering the potential of the evidence to justify the Court's opinion. They however do not go so far as to say that an appeal would never lie. They do not exclude the possibility that section 10(6) will not bar an appeal, where what is challenged is not the opinion of the Industrial Court itself but the finding of primary fact on which the opinion is based. Of course the challenge to the primary finding of fact must be on one of the grounds permitted under section 18(2), which as I have mentioned, includes challenge on a point of law.

36. The **Miller** case, as I have mentioned, was not referred to in the **Caroni** cases mentioned above and I have not been able to discover any subsequent case which considered the **Miller** case. Unfortunately, although Davis, J.A. stated it was *"well settled"* that an appeal would lie to this Court from the opinion of the Industrial Court where the decision is founded on no evidence, the judgment of the Court identified no cases where that position was adopted and I have not been able to discover any written decision where the Court held that was so. In **Miller,** the Court found that there was evidence to support the finding that the dismissal was harsh and oppressive. That case is therefore not an example of a case where an appeal would lie where there is no evidence to support the Industrial Court's decision and is therefore not binding authority for that proposition. However

to the extent that the **Miller** case says that an appeal will lie from the opinion of the Industrial Court where there is no evidence to support it, it is consistent with the cases above referred to as they do not rule out that possibility.

37. It should be noted that the **Miller** case was cited by Counsel for the union. In his written submissions he argued that if on a consideration of the grounds of appeal advanced by the company and the record of appeal it is revealed that what the company is actually asking this Court to do is to disagree with the Industrial Court's assessment of the evidence in support of its primary findings of fact, as opposed to a case where there is absolutely no evidence to support the primary findings, then it is submitted that this Court has no jurisdiction. He therefore agreed with the submissions of Counsel for the Appellant that an appeal would lie where what is being challenged is the finding of primary fact on which the opinion was based as opposed to the opinion itself.

38. I agree with the view expressed by de la Baside, C.J. in the later **Caroni** case that the answer to the question whether an appeal would lie in the circumstances of this case appears to be whether the company can rely on any of the grounds mentioned in section 18(2) without running foul of the prohibition in section 10(6). This seems to me to be such a case.

39. In determining whether an appeal offends section 10(6), it is appropriate to have regard to the intention and policy of the Act. The intention of the Act, as its long title indicates, is an Act to make better provision for the stabilization, improvement and promotion of industrial relations. It would indeed be surprising that in the light of that stated objective the intention would be to bar an appeal where the very facts on which it is based are unsupported by any evidence. The intention could not be to treat an appeal in those circumstances as sacrosanct.

40. In **Caroni (1975) Ltd v Association of Technical Administrative and Supervisory Staff**, supra, de la Bastide C.J. referred to the policy of the Act. He said it is to entrust the decision whether a worker is dismissed in circumstances that are harsh an oppressive and not in keeping with the principles of good industrial relations practice only to judges of the Industrial Court. They come equipped with the experience of and familiarity with industrial relations practice which is a qualification that judges of the Supreme Court do not necessarily or ordinarily have. This echoed the earlier observations of Hyatali, C.J in the **Flavourite** case where he said:

> "*This is an unusual provision [section 10(6)] by which to bind the Court of Appeal; but it is manifestly a sensible and logical one since members of the court are normally selected for appointment thereto by reason of their specialized knowledge and experience in industrial relations and related matters. It is only right therefore that their opinion, duly formed on a question arising in such a specialized area of human relations should be final and not subject to review or recall by members of the Court of Appeal who would normally have no such knowledge or experience."*

In those circumstances section 10(6) clearly bars an appeal, as is clear from the **Flavourite** and the two **Caroni** cases themselves, where the ground of appeal seeks to challenge the potential of the evidence to justify the finding. The challenge in such a case is to the opinion itself of the Industrial Court and the Court of Appeal is being asked by the appellant to say that the opinion itself is wrong. That offends and is inconsistent with the policy of the Act. The position it seems to me is quite different where the challenge is to a finding of primary fact on which the opinion is based. Even though the challenge, if successful, may result in the opinion of the Industrial Court being set aside, the challenge is nevertheless not to the opinion of the Court per se. Such an appeal in those circumstances is not inconsistent with the underlying policy of the Act to entrust the opinion as to what constitutes good industrial relations practice to the Industrial Court and it seems to falls outside of section 10(6). Of course the appeal must be on a ground permitted by section 18(2). There is however no doubt that the challenge to a finding of fact made by the Industrial Court on the ground that there is no evidence to support a finding of fact raises an objection on a point of law which is permitted by section 18(2).

41. In my judgment therefore section 10(6) does not operate so as to bar the challenge in this appeal to the opinion of the Industrial Court on the ground that there is no evidence to support the primary fact as found by the Court on which its opinion was based; namely that the reason for the dismissal of the worker was poor performance and not redundancy. The question that therefore now arises is whether there is any evidence to support that finding.

42. The Industrial Court came to the conclusion that there were two different reasons given by the company for the dismissal of the worker. One reason was contained in the letter of dismissal and the other in the table that was prepared by the company and sent with its letter dated October 31st 2008 to the Board of Inland Revenue. The Court stated that where two reasons are given a worker is entitled to treat as the true reason that which is against the interest of the employer as the maker of

the statement containing the reason. Further, the Court is entitled to interpret the statement *contra proferentem.*

43. Counsel for the Appellant took issue with the principles asserted by the Industrial Court, that is to say, that the worker could treat as true the reason given by the employer that it is against its interest. Further, it was argued that the *contra proferentem* rule had no application. In any event Counsel submitted that there was only one reason given by the company and not two.

44. Counsel for the Respondent did not attempt to argue that the principles applied by the Industrial Court were correct. He however submitted that there was evidence on which the Court could come to the conclusion that the real reason for the dismissal of the worker was poor performance as opposed to redundancy. He argued that in those circumstances this appeal did not lie because what the challenge amounted to was a challenge to the Court's assessment of the evidence which was not a ground of appeal permitted under section 18(2). This Court therefore had no option but to dismiss the appeal.

45. There appears to be two steps to the Industrial Court's reasoning. First, it found that there is evidence that the company gave two reasons for the dismissal of the worker. Secondly, it then applied the principles identified above to treat as true the reason given by the company that the worker was dismissed for poor performance. It is therefore necessary first to consider whether there is any evidence that the company gave two reasons for the dismissal of the worker. It is only if there is such evidence does it become necessary to consider the next step in the reasoning of the Court.

46. I can find no evidence that the company gave two reasons for the dismissal of the worker.

47. The letter of termination of October 13th 2008 clearly stated that the worker was made redundant. The letter explained that the company was in a current downturn and was *"forced"* to reduce its overall staffing. The letter was accompanied by a spreadsheet which set out the worker's payments as a consequence of his retrenchment and provided for forty-five days' notice which is the period of notice required under the Retrenchment and Severance Benefits Act. There was a note to the spreadsheet which explained that *"severance payment will be made upon approval from the Board of Inland Revenue which can take at least one month."* Again, the reference to severance payment makes it very clear that the worker was receiving benefits pursuant to a retrenchment. This letter was therefore clear as to the reason for termination. There could be no doubt that according to

that letter the worker was being retrenched or in other words his services were being terminated for reasons of redundancy.

48. The letter of October 31st 2008 is also clear. The letter was written by the company, as it has signaled in the note to the spreadsheet, in an attempt to get the Board of Inland Revenue (the BIR) to exempt the severance payments of the worker from taxes. The table referred to in the letter is, as I have mentioned before, the document on which the union placed reliance. The letter says what the table contains. It contains a list of employees including their classification and length of service and other pertinent data relating to the workers required on their behalf. Why the data was required is I think clear from the letter. It was required because the company was asking the BIR to grant a tax exemption due to redundancy. Redundancy, as I have mentioned, is a term of art and means the existence of surplus labour in an undertaking for whatever cause. The letter was therefore asking for exemption from taxes made to workers who were terminated due to redundancy or in other words who were retrenched. There is no issue that this request was made pursuant to section 5(6) of the Income Tax Act which provides, inter alia, a complete exemption from income taxes on severance payments of up to $300,000.

49. The table was therefore prepared to provide data to the BIR to obtain tax exemptions for the workers who were dismissed for reasons of redundancy. It cannot reasonably be interpreted as saying that the workers were dismissed for poor performance as opposed to redundancy and provides no evidence of their dismissal on the basis of poor performance.

50. So far I have referred to the table when read together with the letter. I think they ought to be read together. It is relevant to note here that the contention of the union before the Industrial Court was that the table came to its attention when the company wrote the BIR. When read together it is clear, as I have explained above, that the table cannot be construed as providing any evidence of a dismissal for poor performance as opposed to redundancy. The company's evidence is clear as to the purpose of the table and cannot be construed as supporting any other interpretation that the worker was retrenched and not dismissed for poor performance. But even if the table can be looked at in isolation it does not provide any evidence that the worker was dismissed because of poor performance.

51. The table is headed, as I have mentioned earlier but it is worth repeating here, *"List of Schlumberger employees terminated due to Redundancy. This exercise took place during the period*

October 13 - 31 2008". The table is therefore telling the reader that it contains a list of employees whose services were terminated due to redundancy. In other words it is saying the workers were retrenched. This does not mean that they were dismissed for cause be it poor performance or some other cause but rather that their services were terminated for reasons of redundancy.

52. What led the Industrial Court to the conclusion that the table stated poor performance as a reason for the dismissal of the workers is that that term appears under the column *"Method"*. But *"Method"* is not a reason. The meaning of the word *"method"* is a particular procedure for accomplishing or approaching something. It is distinct from the reason for accomplishing or approaching the thing which would be the cause for accomplishing or approaching the task. "Method", does not purport to state the reason for termination. What states the reason is the heading of the table which is to say that it is a list of employees terminated due to redundancy.

53. Counsel for the Respondent submitted that to say poor performance in relation to some workers but "LIFO" and "surplus labour" in relation to others can convey that some workers were dismissed for reasons other than surplus labour which is the crux of a retrenchment. I however do not agree.

54. There is nothing in the Method column that is inconsistent with a redundancy where the process of selecting workers for termination does not begin and end with last in first out but is subject to proviso that all other things being equal. Further, what is stated in the *Method* column is not the reason for the dismissal. It should not be read as saying something that it does not.

55. In the circumstances there is in my judgment no evidence that two reasons were given by the company for the dismissal of the worker. The evidence is of only one reason namely that the worker was dismissed for reasons of redundancy. In the circumstances there is no need to consider the principles the Court applied having erroneously found the company gave two reasons for the worker's dismissal.

56. It follows therefore that there is no evidence to support the primary finding of fact on which the Industrial Court based its opinion as to whether the worker's dismissal was harsh and oppressive and not in keeping with good industrial relations practice. In the circumstances the opinion of the Court must be set aside.

57. For the above reasons the appeal was allowed and the orders made by the Industrial Court were set aside.

A. Mendonça,
Justice of Appeal