

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P113 of 2017

Tax Dispute No. GSD-TD 41/2012

Between

TRINIDAD AND TOBAGO BUREAU OF STANDARDS

Appellant/Party No.2

And

THE PUBLIC SERVICES ASSOCIATION OF TRINIDAD AND TOBAGO

Respondent/Party No.1

Panel: V. Kokaram, J.A.

M. Holdip, J.A.

J. Aboud, J.A.

Appearances:

Mr. Ronnie Bissessar instructed by Mr. Varin Gopaul for the Appellant.

Mr. Lloyd Elcock instructed by Ms. Melissa Hanumansingh for the Respondent.

REASONS

Delivered by V. Kokaram, J.A.

1. On 12th March 2021 we allowed this appeal and remitted the matter to the Industrial Court with the direction that the question of whether Mr. Victor Ramsaroop is a “worker”, having regard to the provisions of section 2 (3) (e) of the **Industrial Relations Act** Chapter 88:01 (“the IRA”), be referred to the Registration, Recognition and Certification Board (“the Board”). We now reduce to writing our reasons for so doing.
2. This appeal concerns the Industrial Court’s dismissal of two preliminary objections raised by the Appellant, the Trinidad and Tobago Bureau of Standards (“TTBS”), in a trade dispute¹ reported by the Union² concerning the wrongful dismissal of TTBS’ legal officer, Victor Ramsaroop. Mr. Ramsaroop was dismissed by TTBS on charges of misconduct. The trade dispute concerned, among other things, allegations that TTBS breached the parties’ collective agreement in effecting Mr. Ramsaroop’s dismissal. Unfortunately, Mr. Ramsaroop died on 7th March 2012 after the matter was reported as an unresolved trade dispute to the Industrial Court and before the filing of Evidence and Arguments by the parties. In its Evidence and Arguments, TTBS raised two preliminary objections in relation to the status of the representation of Mr. Ramsaroop subsequent to his death and his status as a “worker” with TTBS:
 - i. **The First Preliminary Objection- The Locus Standi Issue:** TTBS questioned whether the Union had the *locus standi* to represent Mr. Ramsaroop after his death. It contended that the Trade Dispute could not proceed unless an order was first made by the Industrial Court appointing someone to act on behalf of Mr. Ramsaroop’s estate.
 - ii. **The Second Preliminary Objection-The Worker Issue:** TTBS contended

¹ The trade dispute referred to the Industrial Court by Certificate of Unresolved Dispute of the Minister of Labour dated 30th December 2011 concerned the dismissal of Mr. Ramsaroop as the Legal Officer/Secretary of the TTBS.

² The Public Services Association of Trinidad and Tobago

that Mr. Ramsaroop was in charge of TTBS' legal department and was the secretary to its Board of Directors. Accordingly, it submitted that he was not a worker for the purposes of sections 2(3)(e) (i) and (ii) of the IRA, as he had an effective voice in the formulation of TTBS' policy during the period 2005-2010. They submitted that the Industrial Court should therefore not proceed with the hearing of the trade dispute but remit the question as to whether Mr. Ramsaroop is a worker within the meaning of the IRA to the Board for its determination.³

3. TTBS contended that the Industrial Court erred in law in dismissing both preliminary issues.
4. On the *locus standi* issue the thrust of TTBS's argument was that the Industrial Court had in effect upheld their preliminary objection when it recognised that the Legal Personal Representative ("LPR") of the estate of Mr. Ramsaroop would be the recipient of any award of damages.⁴
5. The Industrial Court, however, did not make any formal order with respect to this aspect of the proceedings save to dismiss TTBS's preliminary objection. There was no cross appeal against the Industrial Court's finding that the LPR would have been entitled to any award of damages in the trade dispute.
6. This issue was settled at the hearing of the appeal by the parties entering a consent order setting aside the dismissal of TTBS' preliminary objection and a

³ The preliminary question as framed did not seek a determination of the substantive question as to whether Mr. Ramsaroop was in fact not a worker within the meaning of the IRA but to determine whether that issue should be referred to the RRCB for its determination.

⁴ The Industrial Court opined in its judgment at page 10 that:

"Furthermore it came to the Court's notice that before the hearing of the substantive matter before this Court, the High Court of Justice by Letters of Administration No. L 1973 of 2012, had appointed the Worker's Widow Jeanette Ramsaroop as his beneficiary. For the purposes of this proceeding, it means that any damages awarded to the deceased Worker, the Court would make an Order naming Jeanette Ramsaroop as the beneficiary of his estate."

formal order appointing the LPR was entered before us as follows:

“That the Worker’s lawful widow, Mrs. Jeanette Ramsaroop, in her capacity as Administratrix of the Worker’s estate be responsible for giving instructions, if any, to the Respondent in relation to Trade Dispute No. GSD-TD041/2012 and to receive such or any award that may be made by the Industrial Court in this trade dispute and to distribute same according to law”⁵

7. While this issue was not fully argued by the parties, we are of the view that the parties adopted the correct approach. There is no doubt that the trade union (as distinct from the worker) and the employer are the putative parties in the proceedings.⁶ Even if the Union is considered a statutory agent⁷, whether such an agency expires upon the death of the worker⁸ would, in the context of a trade dispute, depend on the nature of the dispute and the role a trade union discharges as a party to that trade dispute. It is a context specific question.

8. Even though this issue did not fall for our determination, we commend the

⁵ Approximately 3 months after proceedings began in the Industrial Court, Mr. Ramsaroop died intestate on 7th March 2012. On 14th August 2015 his lawful widow, Mrs. Jeanette Ramsaroop obtained a Grant of Letters of Administration as administratrix of his estate. The Union has claimed to have taken instructions to act on behalf of Mr. Ramsaroop from his common law wife Halima Gaspard. In response to the Company’s preliminary objection the Union requested an order appointing Ms. Gaspard to represent the interest of the deceased worker pursuant to Rule 21.7(1).

⁶ See **Texaco Trinidad Inc. And Oilfields Workers Trade Union** TD No. 32 of 1975

⁷ **Oilfield Workers’ Trade Union v Jorsling Pharmacy** No. 9 of 1991, **Basil Read v National Union of Mine Workers et al** JR1501/2009

⁸ See **Halsbury Laws of England 4th Edition Volume 1(2)** paragraph 182:

“Agency may be terminated either by the act of the parties or by operation of law. The act of the parties may be an agreement between them or acts amounting to a revocation by the principal or a renunciation by the agent.

The law terminated the agency (1) on the expiration of the time, if any, agreed upon (2) on complete performance of the undertaking; (3) on frustration of the contract or the happening of an event rendering the continuance of the agency unlawful; (4) where either party becomes incapable of continuing the contract by reason of death, bankruptcy, or unsoundness of mind. The termination of agency by these various events is, however, subject to qualification either defined by law, or due to the facts of the particular case.”

parties for taking a common sense approach with respect to the Union's role as a statutory agent in the context of an industrial dispute brought by it for the benefit of an identified worker concerning his wrongful dismissal.

9. In that context, having reported the trade dispute, and upon a worker's death, an appropriate order can properly be made by the Industrial Court exercising its undoubtedly wide powers under sections 10(3) and 11(c) of the IRA to remove any doubt on the record as to the status and conduct of the dispute and the beneficiary of any award that may be made upon the determination of the trade dispute.
10. The "worker issue" is what remains to be determined on this appeal. The parties' arguments were concise. TTBS contended that the Industrial Court erred in three main respects: (1) that it failed to recognise that the preliminary issue was raised in TTBS's Evidence and Argument in Reply filed 23rd September 2015 ("the September Reply"); (2) that it wrongly adopted a view that such objections should only be made to the Minister of Labour and cannot be made at a later stage after the trade dispute is referred to the Industrial Court; and (3) it failed to consider properly whether TTBS' objection was "justifiably raised".⁹

⁹ TTBS contends that the Industrial Court erred in law in refusing to remit the issue as to whether Mr. Ramsaroop was a worker for the purposes of section 2(3)(e) of the IRA to the Board for its determination notwithstanding that the issue was justifiably raised and the objection was bona fide and meritorious.

TTBS submitted the Worker issue was not raised in the TTBS's witness statement but in its pleading in its Reply to the Respondent's Evidence and Arguments filed 23rd September 2015. The Industrial Court's error in finding that it was only raised in the witness statement "coloured its view" of the merits of the worker issue and the bona fides of the TTBS's objection and treated the issue as an abuse of process without considering its merits.

There was no evidence that there was a conciliation in the proceedings. TTBS further submitted that the Industrial Court did not consider whether the Worker issue was justifiably raised nor did it review the evidence in support of or in opposition to the preliminary objection.

TTBS also contended that Mr. Ramsaroop was excluded from the Bargaining Unit because he was both legal officer and secretary to the Board of Directors and in the Union's Certificate of

11. The Union contended that the Industrial Court was correct to dismiss TTBS' objection. For its part, the Union observed that TTBS consistently treated Mr. Ramsaroop as a worker, referred to him as such during the course of the disciplinary process and his employ, and defended its act of dismissal by reference to the parties' collective agreement. It was therefore estopped from contending that he was not a worker within the meaning of the IRA and he remains a worker unless the Board determines otherwise.

12. There is no dispute that the Board is the only body to determine whether Mr. Ramsaroop is or is not a "worker" within the meaning of the IRA. Pursuant to sections 2(3)(e) (i) and (ii) of the IRA a person is not regarded as a worker within the meaning of the IRA if he/she is:

"e) a person who, **in the opinion of the Board**

(i) is responsible for the formulation of policy in any undertaking or business or **the effective control of the whole or any department** of any undertaking or business; or

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

13. Pursuant to section 23(1) (f) of the IRA:

"23. (1) The Board shall be charged with responsibility for—

.....

(f) such other matters as are referred or assigned to it by the Minister or under this or any written law."

Recognition No 13/78 dated 1st November 1977 it was certified by the Union that TTBS's director and its Secretary were excluded from the Union's Bargaining Unit.

14. It is now well settled that only the Board has the jurisdiction to determine whether a worker, as alleged in this case, has effective control of the whole or any department or an effective voice in the formulation of policy¹⁰. It is also well settled that there is no exclusive procedural gateway for the referral of such questions pursuant to section 23(1) (f)¹¹ of the IRA. So, the question can be referred to the Board by the Minister or the Industrial Court or, in my view, by a direction by the Court of Appeal.

15. The question in this appeal is therefore not to determine the question whether Mr. Ramsraoop was a worker within the meaning of the IRA, but that given the circumstances of this case, whether there was any merit in TTBS's preliminary objection to trigger the jurisdiction of the Board or to properly submit the question to it for its determination. In short, as the relevant case law has established, was the objection by TTBS "justifiably raised", a term which was again explored in the appeal and in this judgment.

16. On this question, the two main issues which arise for our determination on this appeal and our findings are as follows:

- i. Did the Industrial Court ask itself the relevant question to determine this preliminary issue and did it properly consider the relevant factors to determine that question?

Findings: In our opinion the Industrial Court failed to ask the relevant question which was whether TTBS' preliminary objection on the

¹⁰ See **Claude Albert v Alstons Building Enterprises Ltd** CVA No. 37 of 2000

¹¹In **Claude Albert v Alstons Building Enterprises Ltd** CA No. 37 of 2000 de la Bastide CJ noted:

"The problem is that it is by no means clear how the opinion of the Board as to the application of paragraph (e) is to be obtained unless the question arises in the context of a claim for recognition. Regardless of how, when or whether an opinion can be obtained from the Board that an employee falls within section 2 (3) (e), no one can be excluded under that paragraph without it. The opinion of the Board not having been obtained in relation to the appellant, severance benefits in accordance with the scale prescribed by the 1985 Act are prima facie payable to him.

worker issue was “justifiably raised”. To determine that question the Industrial Court must consider all the circumstances including the following factors which are not exhaustive nor a closed list:

- (i) Whether *prima facie* there is any merit to the assertion that the person is not a worker for the purposes of section 2(3) (e) of the IRA;
- (ii) The bona fides of the objection;
- (iii) Whether there are any circumstances that justified the objection not being raised earlier and before the trade dispute was referred to the Industrial Court;
- (iv) Whether the issue was raised in a manner likely to be overly prejudicial to the interest of the other party and to the community as a whole.

In failing to consider this question and these factors, the Industrial Court therefore erred in the exercise of its discretion.

ii. Is TTBS estopped from raising the worker issue?

Findings: TTBS is not estopped from contending that the worker was a worker within the meaning of the IRA. There was no evidence to support such an estoppel nor can such an estoppel arise in the circumstances of this case.

17. In this judgment, I will set out briefly the relevant factual background, the Industrial Court’s ruling on these issues, the relevant law and analysis of the parties’ arguments and the basis for the findings set out above.

Brief Background and Chronology

18. Mr. Ramsaroop was contracted by TTBS as its Legal Officer with effect from 1st November 2002 later obtaining permanent employment with effect from 20th April 2005¹². The events leading up to Mr. Ramsaroop's dismissal can be briefly summarised.
19. TTBS alleged that he co-signed several cheques for substantial sums of money without any authority to do so. By letter dated 4th May 2010 he was requested by TTBS' Head, Strategic Human Resource Management to provide any document evidencing his authority/approval to sign as co-signatory on behalf of TTBS' 4 cheques drawn on its account dated 27th May 2007 totalling \$427,765.44. TTBS was not satisfied with the explanations he provided and he was suspended in accordance with Article 13(3) of the Collective Agreement pending investigations into his conduct¹³. Following the said investigation, the disciplinary charge of misconduct in signing the cheques without approval/authority was proffered against him¹⁴. TTBS subsequently convened a disciplinary enquiry into the said charge and the disciplinary tribunal recommended Mr. Ramsaroop's dismissal.¹⁵ He was dismissed from his employment with immediate effect from his position as Legal Officer on 8th November 2010.¹⁶
20. The Union's main contention was that TTBS failed to observe key requirements in the disciplinary process as prescribed by the parties' collective agreement¹⁷.

¹² See Letter of Appointment dated 29th April 2005.

¹³ See letter dated 7th June 2010

¹⁴ See letter dated 18th June 2010

¹⁵ See exhibit "NS12" of the witness statement of Nicole Smith filed 23rd September 2015, page 323 of the Record of Appeal

¹⁶ See Letter of Dismissal dated 8th November 2010

¹⁷ Collective Agreement between the Public Services Association and Trinidad and Tobago Bureau of Standards on behalf of Monthly Paid Employees for the period January 1, 1993 to December 31 1998.

Those breaches were:

- i. In breach of Clause 9 of Article 14, TTBS failed and neglected to call upon the worker to make a final statement before deciding to take disciplinary action against him.
- ii. In breach of Clause 11 of Article 14, TTBS failed and neglected to consult the Union about its contemplated dismissal of the deceased worker and terminated his employment with effect from 8th November, 2010.

21. The Union sought compensation for the dismissal which it characterised as harsh, oppressive and contrary to good industrial relations practice.

The Industrial Court's Ruling

22. The worker issue first surfaced in the Evidence and Arguments of TTBS. It is important to note the chronology of the exchange of Evidence and Arguments and the state of the proceedings before the Industrial Court when it gave its ruling:

- 30th January 2014- Evidence and Arguments filed on behalf of TTBS.
- 3rd February 2015- Evidence and Arguments filed on behalf of the Union.
- 13th February 2015-Supplemental Evidence and Arguments filed on behalf of TTBS.
- 13th May 2015- Union's Reply to TTBS' Principal and Supplemental Evidence and Arguments.
- 23rd September 2015- TTBS' Reply to the Union's Evidence and

Arguments in which the Worker issue was first raised¹⁸.

- 10th May 2016- TTBS' Supplemental Reply.¹⁹
- Witness statements of Christopher Joefield filed 18th February on behalf of the Union and the witness statement of Nicole Smith filed on 23rd September 2015 on behalf of TTBS.
- The witness statement of Nicole Smith at paragraphs 3(ii), 6 and 7 dealt with the status of Mr. Rasmraoop as a worker. The witness statement of Christopher Joefield was silent on this issue.
- Hearing convened on 17th March 2017 where the Court entertained the parties' oral submissions on the two preliminary issues²⁰.
- 17th March 2017- Oral Ruling dismissing the preliminary objections.
- 20th July 2017- Written decision of the Industrial Court was delivered.

23. The Industrial Court exercised its discretion dismissing the worker issue on the following basis:

- That such a preliminary issue should have been raised with the Minister of Labour to evoke a referral to the Board which is charged with the determination as to who is a worker under the IRA.
- TTBS should not have taken the decision to introduce the issue in a witness statement when there was no reference of it in the Evidence and Arguments and where TTBS failed to raise the issue of the worker's status with the Minister of Labour. The witness statement is no place to raise a preliminary issue and the Union was unable to respond to the

¹⁸See Paragraphs 2(b), 18-24, 32(ii)

¹⁹ This dealt with the Locus Standi issue.

²⁰ See page 9 of the Record of Appeal

issue in its Reply to the Evidence and Arguments filed by TTBS.

- There is a 3-stage dispute resolution process by which disputes eventually reach the Industrial Court. The first stage is at the level of the Company, the negotiations between the parties to the dispute for avoiding and settling disputes. Second, should the negotiations fall apart, the dispute is reported to the Minister under section 51(1) of the IRA. If the dispute fails to be settled, then the Minister is required to certify that the dispute is unresolved, and the matter is referred to the Industrial Court for determination. There is a presumption of regularity that the Minister in certifying a matter as an unresolved dispute would not have done so had the necessary elements for a trade dispute not been established.
- TTBS' decision to raise the preliminary issue of the status of the worker in a witness statement was therefore not in accordance with the principles and practice of the Industrial Court.

24. In my view, with respect to the worker issue, the Industrial Court plainly fell into error and failed to ask itself the relevant question whether the issue was “justifiably raised”. It further failed to consider the relevant principles which would judicially guide its exercise of this case management discretion to determine that question. I now explore this matter in more detail below.

The Relevant Question: Was the Worker Issue “Justifiably raised”

25. In dealing with the proper approach to be adopted by the Industrial Court on the worker issue we recognise the special nature of the Court under review. The Industrial Court is a Specialised Court tasked with its own specialist expertise on matters of good industrial relations practice. See **Caroni (1975) Limited v Association of Technical Administrative Supervisory Staffing Civil**

Appeal No. 87 of 1999.²¹ It exercises a wide, though not unlimited, discretion and makes such orders or awards “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[s] 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.”²²

26. However, having such expertise and wide powers does not insulate it from observing matters of fundamental fairness. While it is recognised that the Industrial Court as a superior Court of Record would legitimately be concerned with any abuse of its process and should scrupulously guard against unmeritorious objections to its jurisdiction, the Industrial Court’s mandate to

²¹ In **Caroni (1975) Limited and Association of Technical Administrative Supervisory Staffing** Civil Appeal No. 87 of 1999 de la Bastide CJ noted at page 3:

“The intention of Parliament, clearly expressed in section 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. This 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 section 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.”

²² See section 10 (3) of the Industrial Relations Act. See also **Carib Brewery Limited v National Union of Government and Federated Workers** Civil Appeal No. P213 of 2015 delivered 19th February 2020 where it held that the jurisdiction under s. 10 (3) is wider than and independent of that conferred by ss. 10 (4)2 and (5) 3. Although the jurisdiction is wide it is not unlimited. (See **Caribbean Printers Limited v Union of Commercial and Industrial Workers** Civil Appeal No. 30 of 1972). The jurisdiction is one created by statute and the statute provides the parameters within which the wide jurisdiction that it confers must be exercised. The Industrial Court has, by and large, recognized that the way in which the jurisdiction conferred upon it must be exercised requires that it must pay regard to the specific factors set out in section 10 (3). (See for example **Estate Police Association v Airports Authority** ST No. 1 of 1999 and TD 43 of 1994, **OWTU v National Petroleum Marketing Company**).

hear trade disputes expeditiously must not come at the expense of substantive or procedural fairness.

27. It is not disputed that, unless it is determined by the Board that in its opinion section 2 (3) (e) of the IRA is applicable to Mr. Ramsaroop, he is to be treated as a worker within the meaning of the IRA and effectively, without such a ruling from the Board, the Industrial Court has jurisdiction to hear a trade dispute concerning his dismissal. See **Claude Albert v Alstons Building Enterprises Ltd** CvA No. 37 of 2000 at page 7²³.

28. Equally, however, the Industrial Court undoubtedly has the discretion to refer questions as to whether an employee is a “worker” within the meaning of the IRA to the Board for its determination before embarking upon the hearing of a trade dispute. See **Caroni (1975) Limited and Association of Technical Administrative Supervisory Staffing** Civil Appeal No. 87 of 1999. Nothing in that judgment circumscribes the Industrial Court’s power to refer the question to the Board at **any** stage of the proceedings.

²³ “It is fairly clear from the evidence that the appellant as General Manager of the Concrete and Clay Division was responsible for the effective control of that Division and almost certainly had an effective voice in the formulation of policy in the respondent’s undertaking or business. The way in which paragraph (e) is structured, however, makes the ‘opinion of the Board’ a ‘sine qua non’ for the exclusion of anyone from the definition of “worker” under that paragraph. To be excluded a person must fit the description contained in that paragraph in the opinion of the Board, and no one else. Therefore, until and unless the opinion of the Board to that effect is obtained, the exclusion cannot operate. That seems to me to be the inevitable result of giving paragraph (e) its normal meaning. It is to be noted that the opinion of the Board is given special protection by the IRA. Firstly, section 23 (7) reserves to the Board the exclusive right “to expound upon any matter touching the interpretation and application of this Act relating to the functions and responsibilities with which the Board is charged ...”. Secondly, section 23 (6) forbids any decision of the Board being “challenged, appealed against, reviewed, quashed, or called in question in any court on any account whatever ...”. The problem is that it is by no means clear how the opinion of the Board as to the application of paragraph (e) is to be obtained unless the question arises in the context of a claim for recognition. Regardless of how, when or whether an opinion can be obtained from the Board that an employee falls within section 2 (3) (e), no one can be excluded under that paragraph without it. The opinion of the Board not having been obtained in relation to the appellant, severance benefits in accordance with the scale prescribed by the 1985 Act are prima facie payable to him.”

29. The question as to whether and in what circumstances it will do so calls for the judicial and not arbitrary exercise of the Industrial Court's case managerial discretion. It must, in doing so, finely balance its duty to hear trade disputes while preserving its process from abuse and being alive to legitimate questions in relation to its jurisdiction. To say that the Industrial Court exercises its own brand of industrial relations jurisprudence does not mean that it can depart from recognized standards of fairness or established principles in the exercise its undoubtedly wide powers.

30. The Court of Appeal's view on the Industrial Court's exercise of the discretion of managing its proceedings was aptly stated by Mendonça JA in **D & K Investments Limited v. Banking Insurance and General Workers Union** Civil Appeal No. 124 of 2016:

“32.... Indeed in so far as the Court is given a discretion to refer the matter, its discretion must be exercised judicially and not whimsically. In that regard it is to be expected that it would set for itself the parameters within which the discretion should be exercised. The Court of Appeal, of course, maintains the jurisdiction to review the exercise of the Court's discretion and will interfere if the Industrial Court was plainly wrong to exercise its decision in the manner that it did. What that means is that before this Court will interfere with the exercise of the Industrial Court's discretion it must be shown that the Industrial Court erred in law or principle, or its decision is against the weight of evidence or cannot be supported having regard to the evidence, or that the Court was influenced by considerations which it ought not to have taken into account, or gave no weight or no sufficient weight to considerations that the Court should have taken into account, or that the decision is outside the ambit within which reasonable disagreement is possible.”

31. The Court of Appeal in several recent decisions has affirmed a fundamental

principle to guide the exercise of the Industrial Court's discretion to determine preliminary issues such as whether a reference to the Board ought to be made. The question to be answered is whether the preliminary issue was "justifiably raised" by the Employer.

32. While the Industrial Court made passing mention in its judgment to the question that the objection should be justifiably raised,²⁴ it failed to appreciate that this was the central question to be determined by it in the exercise of its discretion and failed to properly weigh the relevant factors that would inform the judicial exercise of such a discretion.

33. The Court of Appeal recently settled the law in this area in **D&K Investments Limited v Banking, Insurance and General Workers Union** Civil Appeal No. 124 of 2016. In exercising its discretion to remit a matter to the Board, the Industrial Court should ask itself whether the issue was "justifiably raised". Mendonça JA in his judgment referenced **Union of Commercial Industrial Workers v The Port Authority of Trinidad and Tobago** TD 212 of 2003²⁵ and noted:

"14. The Industrial Court accepted that it had no jurisdiction to determine whether an employee is not a worker within the meaning of the Act because he or she fell within section 2(3)(e). The Court, however, indicated

²⁴ See page 18 of the Industrial Court's decision in reference to **Trade Dispute No. 212 of 2003 Port Authority of Trinidad and Tobago v Union of Commercial and Industrial Workers**.

²⁵ In **Union of Commercial Industrial Workers v The Port Authority of Trinidad and Tobago** TD 212 of 2003 Her Honour Donaldson-Honeywell (as she then was) noted that:

"Matters relevant to the consideration whether the issue has been justifiably raised must include whether prima facie there is any merit to the assertion that the person is not a worker. It should also include consideration as to the *bona fides* of the objection being raised and as to whether it was raised in a manner likely to be overly prejudicial to the interests of the other party and the community as a whole. This approach accords with the status of the Court having all the powers inherent in a Superior Court of Record. Perhaps the most essential of these powers is that of preserving the Court's jurisdiction and guarding against potential abuse of its processes."

that when faced with an assertion that the employee is not a worker, the court must determine whether or not the issue has been “justifiably raised”. The Court said, in its judgment:

“It is not in every case where an employer seeks to avoid the Court’s jurisdiction by asserting that there is no “worker” in the Trade Dispute that the court will automatically relinquish its jurisdiction. Such action may only be considered where the issue has been justifiably raised”.

15. The Court went on to say that matters relevant to determining whether the issue has been justifiably raised include; (i) whether prima facie there is any merit to the assertion that the person is not a worker; (ii) the bona fides of the objection; (iii) whether the issue was raised in a manner likely to be overly prejudicial to the interest of the other party and to the community as a whole; and (iv) whether there are any circumstances that justified the objection not being raised earlier and before the trade dispute was referred to the Industrial Court.

16. It is relevant to note that in the **Port Authority** case, the Industrial Court followed its decision in **TD 43 of 2001 OWTU v NP**, where the Court expressed the opinion “that once an issue is justifiably raised before the court, that a person or persons are not workers within the meaning of section 2(3)(e) of the Act, the Court does not possess the jurisdiction to deal with that issue.”

34. In considering the test of whether such an objection has been “justifiably raised”, Mendonça JA highlighted the following factors as legitimate factors to be weighed in the balance:

- Among the factors that the Industrial Court has indicated it should take into account are, whether the assertion that the employee is not a

worker is made bona fide; whether there is any merit to the assertion that the employee is not a worker; and whether there are any circumstances that justified the objection not being raised earlier and before the trade dispute was referred to the Industrial Court.

- These factors are best seen through the lenses of the Court's power to prevent an abuse of its own process and its mandate to hear matters expeditiously.

35. Mendonça JA further observed that:

"34 . . . It would seem to me to be an abuse of the Court's process if a frivolous claim were permitted to proceed or one that lacks bona fides and is motivated by some ulterior motive inimical to the justice of the case. Similarly, as the Court is mandated to hear disputes expeditiously, of concern to it must be why the objection that the person is not a worker was not taken earlier and before the matter was referred to the Court when there may have been ample time to do so. In my view, there should be an explanation for the delay that would excite the Court to exercise its discretion in favour of granting the application."

36. Jones JA in **D&K Investments** also observed:

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

114. Like the Industrial Court we are of the opinion that there is merit in

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

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

37. Subsequently, in **Caribbean Shipping Agencies Ltd v National Union of Government and Federated Workers** Civil Appeal No. P074/2018 the Court of Appeal observed that the Industrial Court failed to deal with this central issue of whether the objection was “justifiably raised”. Bereaux JA, reconciled both the judgments of Jones JA and Mendonça JA in **D&K Investments** on the question whether the Company’s preliminary objection was “justifiably raised”:

“[28] I can discern no substantive difference between the approaches of Mendonça and Jones JJA. Mendonça JA accepted that the considerations set out in UTT, OWTU and Port Authority were appropriate. He opined that the factors to be considered in coming to the conclusion that the objection had been justifiably raised were “best seen through the lenses of the Court’s power to prevent an abuse of its own process”.

[29] Jones JA on the other hand considered whether the court had the jurisdiction to hear the dispute and whether the employer was justified in requesting the referral to the Board. Any justification for the employer

requesting the referral must turn on the evidence. In this regard, Jones JA appears to differ from the decision of His Honour Mr. Aberdeen since she considered that when an application is made to refer the matter to the Board, **it is incumbent on the court to look at the evidence and arguments filed to see whether this issue arose in the trade dispute.** As to the question of abuse of process which Jones JA held to have occurred in that case, her analysis accords with the same considerations approved by Mendonça JA..”

38. Bereaux JA went on to summarise the relevant principles of **D&K Investments Limited** as follows which deserve repeating:

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

(ii) The Industrial Court has a discretion to refer the issue to the Board, pursuant to sections 10(1)(a) and 11(c) of the Act. The court will only do so if the issue has been justifiably raised or if it appears the court has no jurisdiction to hear the dispute because the employer has brought evidence which suggests that the employee’s status is in question. Any determination as to whether the dispute is within the court’s jurisdiction ought properly to be made prior to the courts assuming jurisdiction, logically at the conciliation proceedings.

(iii) When made at the court hearing, the court in order to protect its process from abuse and in pursuance of its section 17 mandate to hear disputes expeditiously, will not entertain frivolous or vexatious applications. It will also consider the bona fides of the objection and whether it was raised in a manner likely to be overly prejudicial to the interests of the other party and the community as a whole.

(iv) There should be a sufficient explanation for the delay in order to cause

the court to exercise its discretion in favour of granting the application.”

39. While Bereaux JA further held that “when the worker’s status has been justifiably questioned any issue as to delay by the employer can be addressed by an award of costs under Section 10(2)[of the Act]”²⁶, this approach was doubted in **First Citizens Bank of Trinidad and Tobago Limited v Graduate Professionals’ Association of Trinidad and Tobago** Civ App No P128/2020.

40. In **First Citizens Bank**, Mendonça JA emphasised that the criteria on which the Industrial Court relies to determine whether a matter has been justifiably raised:

“....is not a closed list. That there are other factors that may be relevant in any given matter. And in determining this issue, as to whether the matter should be referred to the Board, the Industrial Court is not determining the issue, but is simply deciding whether it is appropriate, in the exercise of its discretion, to refer the matter at that stage, and we suggested in **D&K** that the Court’s discretion can best be seen through the lenses of its power to prevent abuse of its own process and its duty to hear matters with expedition.....”

41. Recently, in **Trinrico Steel and Wire Products Limited v Advocate Trade Union** Civil Appeal No. P286/2016 it was again noted that the Industrial Court would fall into demonstrable error if it failed to address the central question whether the preliminary issue was justifiably raised. It must address that question through the lens of its power to prevent an abuse of its own process and its duty to hear matters with expedition. It can only do so by a proper consideration of all the circumstances which includes the facts before it and the Evidence and Arguments filed:

²⁶ **Caribbean Shipping Agencies Ltd v National Union of Government and Federated Workers** Civil Appeal No. P074/2018, paragraph 22

“33. The Court failed to ask itself the relevant question whether the issue of the referral was justifiably raised by the Employer and failed to assess all the relevant circumstances involved in an examination of that question as discussed in **D&K Investments**. While those factors are certainly not closed, they are relevant to the exercise of the Court’s discretion to determine whether or not Trinrico’s preliminary issue was justifiably raised. Failing to examine all the relevant factors will amount to demonstrable error in the Court’s exercise of its discretion.”

42. Importantly in **Trinrico**, the Court grappled with the state of the evidence that was before the Industrial Court to determine whether it sufficiently raised the question of whether a referral ought to be made. While the evidence in that case with respect to the allegation that the worker was not a worker within the meaning of the Act was not detailed, it was on the face of the proceedings uncontroverted and left just enough to raise the legitimate question for a referral to be made. Importantly, a distinction must be made between the Industrial Court determining the question itself as distinct from determining if a legitimate question has arisen to trigger a referral to the Board. The legitimacy of the question or merits of the issue is but only one factor to be taken into account.

43. However, in this case, the Industrial Court erred in law not only in failing to ask itself the relevant question as to whether the preliminary issue was **justifiably raised** but in failing to properly weigh all the relevant factors to determine that question. It also made a serious error in assessing the state of the evidence.

44. At pages 17-18 of its decision, the Industrial Court stated:

“The Court is of the opinion that the Bureau’s decision to raise the preliminary issue of the status of the Worker in a witness statement is not in accordance with the principles and practice of the Court....

The Bureau having failed to raise the issue of the Worker’s status with the Minister of Labour should never have taken the decision to introduce that issue in a witness statement to which there was no reference in the Evidence and Arguments. The Court took serious objection to such an approach in view of the fact that a witness statement is no place to raise a preliminary issue and secondly by so doing the Union was unable to respond to the issue in its Reply to the Evidence and Arguments filed by the Bureau. In any event as stated before such an issue should have been raised with the Minister before the commencement of Conciliation.”

45. The Court clearly acted on the erroneous factual premise that TTBS failed to raise the question, (as commended by Jones JA in **D&K Investments**), in its Evidence and Arguments. The witness statement of TTBS was not the first time that the worker issue was raised. TTBS clearly did raise this issue in its Evidence and Arguments but the Industrial Court failed to take into account TTBS’ September Reply. While there may have been a reason for this, it does not appear on the record and in the absence of this, the inescapable conclusion is that the Industrial Court fell into error. It was patently wrong to criticise TTBS for raising the worker issue in its witness statement as it simply was adducing evidence in support of its September Reply. The Industrial Court in erroneously taking the view that as there was no mention of the worker issue in TTBS’ Evidence and Arguments drew the incorrect conclusion that the objection took the Union by surprise.

46. The Industrial Court also failed to ask itself the relevant question whether the issue of the referral was “justifiably raised” by the employer and it failed to assess all the relevant circumstances involved in an examination of that question as discussed in **D&K Investments**.

47. While those factors are certainly not closed, they are relevant to the exercise of the Industrial Court’s discretion to determine whether TTBS’ preliminary

issue was justifiably raised. Failing to examine all the relevant factors will amount to demonstrable error in the Industrial Court's exercise of its discretion.

48. The Court also took the erroneous view that the objection must be taken at the conciliation stage. It would appear from its judgment at page 17 that if the objection is not taken before the Minister, the door is closed to an employer's ability to raise this issue at a later stage before the Industrial Court. There is no such limitation and delay is but only one factor to be weighed in the balance in determining the main question whether the objection was "justifiably raised". The Industrial Court placed a disproportionate emphasis on the question of delay and bona fides without a proper consideration of those issues together with other factors relevant to the exercise of its discretion. The Industrial Court appeared to have shut the door on TTBS without analysing all the relevant factors.

49. We will now analyse each of the relevant factors of bona fides, delay, merit and interest of parties with a view to identifying not only the errors by the Industrial Court but the legitimate approach that should have been adopted in the circumstances of this case.

A Bona Fide Question

50. As pointed out above, TTBS legitimately raised the issue in its Evidence and Arguments. It had raised a bona fide question of whether Mr. Ramsaroop was a worker within the meaning of the IRA.

51. It was made in the first opportunity to reply to the Union's Evidence and Arguments²⁷.

52. The fact that the objection was not raised in conciliation hearings is no bar to

²⁷ See TTBS' September Reply paragraphs 2(B), 18-24, 32(ii).

the Employer making this objection at a later stage. In **Caribbean Shipping**, Bereaux JA noted:

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

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

its non-attendance of the conciliation proceedings. While the Company was tardy in its compliance with the court's orders, its non-attendance at conciliation was not the Company's fault and the evidence it provided raises a genuine issue as to Mr. Kalicharan's status as a worker under the Act."

53. The criticism by the Industrial Court that TTBS surreptitiously introduced this objection in the witness statement is unsupported by the record of the proceedings. The Union had an opportunity to respond the TTBS' Reply.

54. At paragraph 2(b) of TTBS' September Reply filed 23rd September 2015 to the Union's Evidence and Arguments, it raised the question "whether the Worker is a *worker* for the purposes of section 2(3)(e)(i) and (ii) of the Industrial Relations Act Chapter 88:01 ("the Act") ("the Worker Issue")". It also identified the basis for that contention at paragraphs 18-24.

55. Seen in its proper context the Union simply failed to deal with this aspect of TTBS case. The Union was not caught by surprise by the objection. It was a legitimate issue which was addressed in TTBS' witness statement. It was therefore an error to hold that the objection lacked *bona fides*.

Delay

56. TTBS has submitted that there was no evidence of any conciliation, neither party gave evidence of it, what date it was convened, who attended or the outcome to indicate that the issue should have been raised with the Minister before the commencement of conciliation. The only mention of the conciliation proceedings, of course, is in the Certificate of Unresolved Dispute: "Following conciliation proceedings at the Ministry of Labour and Small Enterprises Development, the dispute remained unresolved."²⁸

²⁸ See Certificate of Unresolved Dispute, page 155 of the Core Bundle

57. The Industrial Court failed to investigate this issue of TTBS' lack of participation at the conciliation hearings. Nonetheless, even if TTBS were notified and failed to attend the conciliation hearings, the fact remains that TTBS raised the worker issue in its September Reply approximately 18 months before the Industrial Court heard the preliminary objections. There was no reason advanced and nothing on the record before this Court to demonstrate that there were any other hearings where the point could have been articulated. In any event, the Industrial Court properly dealt with the preliminary issue at the hearing and reserved its judgment before embarking upon the trade dispute. In these circumstances, there was no inordinate delay by TTBS in raising the preliminary objection.

Merits

58. In this case, even though the evidence submitted by TTBS was not as detailed as that set out in **Caribbean Shipping**, we are of the view that it was sufficient. At paragraphs 20 and 21 of TTBS' September Reply, it was noted:

"20. The Worker was the Bureau's Legal Officer and in that capacity and for the purposes of section 2(3)(e)(i) of the Act was in control of the Bureau's Legal Department.

21. In his capacity as the Bureau's Legal Officer, the Worker was Secretary to the Bureau's board of directors and by virtue of this role was an effective voice in the formulation of the Bureau's policy during the period of 2005 to 2010."

59. In the witness statement of Nicole Smith, it is stated at paragraphs 6 and 7:

"6. The Worker was employed on a three (3) year contract with the Bureau in the post of Legal Officer with effect from 1st November 2002 and in that capacity provided general legal counsel to the Bureau and its board of

directors and was responsible for the overall supervision of the Bureau's Legal Department. The Worker, as Legal Officer, was also the Secretary to the Bureau's board of directors and was responsible for the formulation of policy in that he advised and guided the Bureau's board of directors in respect of its oversight of all operational matters relating to the Bureau. Copies of the Bureau's offer, the Worker's acceptance and his contract of employment are attached in a bundle as "NS2".

7. On 20th April 2005, the Worker was offered (and he accepted) permanent employment as the Bureau's Legal Officer and Secretary to its board of directors. Copies of the offer, acceptance and letter of appointment certifying his employment with effect from 20th April 2005 are attached in a bundle as "NS3".

60. We also note the following matters which add further strings to TTBS' bow that there is a legitimate question to be answered: Mr. Ramsaroop was a signatory to TTBS's cheques²⁹. This, taken with the other facts, strongly suggests that he performed a significant managerial role in the employer's chain of command.

61. The evidence reveals that he was the Secretary to the Board of TTBS. In the memo to the Executive Director of TTBS from the Disciplinary Tribunal, at page 325 of the Record of Appeal, the recommendations of the tribunal stated: "Mindful that the Legal Officer functions as Secretary to the Board of Directors and also serves as Secretary of Board Committees his proven misconduct warrants dismissal." In TTBS' letter to Mr. Ramsaroop dated 8th November 2010 it was noted³⁰:

"(iii) the matters in (i) and (ii) are exacerbated by the fact that at all

²⁹ See letter dated 21st February 2007, page 114 of the Record of Appeal.

³⁰ See page 334 of the Record of Appeal

material times you were the Secretary of the Board of Directors and its various committees and therefore the Board reposed considerable trust in you and had a reasonable expectation that you act competently, responsibly; by your misconduct aforesaid you have irrevocably damaged the trust reposed in you and you have caused the Bureau an unauthorised expenditure of \$427,765.44.”

62. As Secretary to the Board, he falls outside of the bargaining unit.³¹ Article 1 (vii) of the Collective Agreement, Management is defined as:

“Management includes the Director, the Secretary and such other officers of the Bureau designated by Council from time to time who have the authority to carry out the functions and duties of management.”

63. A proper consideration of these factors together with the absence of any evidence from the Union on this issue, when evenly weighed points to a conclusion that there is a prima facie case made out on the worker issue to be determined by the Board.

No Estoppel Can Arise

64. While the Industrial Court did not rule that TTBS was estopped from raising the issue, it certainly implied as much by its emphasis on TTBS’s duty to make this preliminary objection at the conciliation stage. The Union went further to contend that TTBS in fact treated Mr. Ramsaroop in his employ as a worker. Both contentions appear to me to be erroneous.

65. Both parties agree that until the Board has determined this question, the employee is treated as a worker within the meaning of the IRA. However, there would be characteristics of his functions in the chain of command that would genuinely bring this status into question. Neither the employer nor the

³¹ See Certificate Issued to Recognised Majority Union, page 220 of the Record of Appeal.

Union cannot arrogate unto themselves the power to make any such determination. We agree with TTBS that the fact that it followed the collective agreement with respect to Mr. Ramsaroop's dismissal does not necessarily mean that it was ambivalent on the issue of whether he was a worker within the meaning of the IRA. The decision to follow the termination process can also be explained by the employer's desire to comply with industrial relations best practices.

66. The Industrial Court's reliance on the presumption of regularity in relation to the Minister's Certificate of Unresolved Dispute certificate is misplaced and inapplicable in these circumstances. The Certification by the Minister of an unresolved dispute does not debar a Court from examining the worker issue once it is justifiably raised. While the Industrial Court is entitled to view its three stage processes as requiring different obligations from parties, it cannot shut out a meritorious objection which is what the principle of "justifiably raised" seeks to achieve.

67. Indeed, an examination of the worker issue does not mean that the Minister's referral is irregular. There is no statutory bar or restriction for the referral of the question to the Board pursuant to section 23 of the IRA. It is not an issue whether the certificate was irregular, it is a question of directing the proper tribunal to determine a fundamental preliminary matter. While the Industrial Court can be critical of the late application or delay in making such preliminary objections, the issue of delay will have to be considered amongst the other factors in determining whether the matter is "justifiably raised".

Conclusion

68. The Industrial Court plainly fell into error. We agree with Counsel for TTBS that this Court can determine the worker issue based upon the material that was available before the Industrial Court rather than remit it to the Industrial Court

for re-consideration. See **Petroleum Company of Trinidad and Tobago Limited v Oilfield Workers' Trade Union** CA P320 of 2018 at para 28. For the reasons set out in this judgment we have allowed the appeal and made the following directions:

IT IS HEREBY ORDERED BY CONSENT THAT:

1. The decision of the Industrial Court dismissing the Appellant's preliminary objection on whether or not the Respondent can pursue the Trade Dispute without an order of the Industrial Court appointing someone to act on behalf of the Worker's estate (the "Locus Standi" Issue) is set aside.
2. It is hereby ordered and directed that the Worker's lawful widow, Mrs. Jeanette Ramsaroop, in her capacity as Administratrix of the Worker's estate be responsible for giving instructions, if any, to the Respondent in relation to Trade Dispute No. GSD-TD041/2012 and to receive such or any award that may be made by the Industrial Court in this trade dispute and to distribute same according to law.

IT IS ALSO HEREBY ORDERED THAT:

3. The Appellant's appeal with respect to the decision of the Industrial Court dismissing the Appellant's preliminary objection as to whether the worker was a worker for the purposes of sections 2(3) (e) (i) and (ii) of the Industrial Relations Act Chapter 88:01 (the "Worker Issue") is allowed and that decision is set aside.
4. The matter is remitted to the Industrial Court with the direction that the Industrial Court pursuant to its discretionary powers at section 10(1) (a) and 11(c) of the Industrial Relations Act 88:01 do remit, as soon as possible, the question as to whether Mr. Victor Ramsaroop is

a Worker, having regard to the provisions of Section 2 (3) (e) (i) and (ii) of the Industrial Relations Act Chapter 88:01, to the Registration Recognition and Certification Board for its determination.

Costs

69. On the question of costs, section 10(2) of the IRA provides that the Court of Appeal shall in disposing an appeal brought before it make no order as to costs unless for exceptional reasons. Both parties agreed that this appeal did not take it outside the norm and there was anything exceptional that required an order for costs.

70. There shall be no order as to costs.

Dated this 2nd day of November 2021

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Vasheist Kokaram
Justice of Appeal

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Malcolm Holdip
Justice of Appeal

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James Aboud
Justice of Appeal