[2015] JMSC Civ. 211

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HC04687

BETWEEN	**ATL GROUP PENSION TRUSTEES NOMINEE LTD**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1st RESPONDENT**
AND	**CATHERINE BARBER**	**2ND RESPONDENT**

IN CHAMBERS

Hugh Wildman and Jerome Spence instructed by Patterson Mair Hamilton for the applicant

Susan Reid Jones and Tanya Ralph instructed by the Director of State Proceedings for the first respondent

Gavin Goffe and Jermaine Case instructed by Myers Fletcher and Gordon for the second respondent

October 12, 13, 15, 22 and November 10, 2015

JUDICIAL REVIEW – APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW – WHETHER INDUSTRIAL DISPUTES TRIBUNAL HAD EVIDENCE ON WHICH TO BASE CONCLUSIONS – WHETHER MEMBER OF TRIBUNAL DISQUALIFIED ON GROUNDS OF BIAS – WHETHER AWARD WAS IRRATIONAL

SYKES J

[1] The Industrial Disputes Tribunal's ('IDT') decision that Miss Catherine Barber's dismissal by ATL Group Pensions Trustees Nominee Ltd ('ATL Group Pensions') was unjustifiable is under attack. ATL Group Pensions is alleging that the IDT committed significant errors when it decided in favour of Miss Barber, a former general manager of the company. The company is saying four things: first, there was no evidence to support some of its findings; second, the IDT was wrong when it said that following the labour relations code was mandatory; third, a member of the three-man panel of the IDT was biased, and fourth, the tribunal did not give reasons for the remedy it granted. These errors, Mr Wildman submits, entitles him to succeed in this application for leave to apply for judicial review.

Error of law on the face of the record; error of law within jurisdiction; error of law outside of jurisdiction

[2] During this hearing Mr Wildman and Mrs Reid Jones referred, from time to time, to this expression: 'error law on the face of the record.' Mrs Reid Jones cited cases which suggested that the IDT can only be challenged for an error of law and then only if that error of law appears on the face of the record. Mr Wildman also spoke of error of law within jurisdiction and error of law out of jurisdiction. Does all this sound confusing? It really is, and it is time we abandon this language.

[3] This distinction was bound up with the court's capabilities to grant certiorari to quash decisions of tribunals of limited jurisdiction. The problem was to distinguish those cases which attracted certiorari from those that did not.

[4] In the early years, and right up to the late nineteenth century, much of the jurisprudence involved tribunals presided over by Justices of the Peace because they were not only responsible for local justice but also local government. In many instances the superior court, namely the King's Bench or Queen's Bench was hampered in its ability to correct administrative wrong doing because the record sent to it by the tribunal in response to the writ of certiorari was not very revealing. If the examination of the record, for that is what happened, did not reveal any error of law, the judges concluded that there was no error on the face of the record meaning that when they, quite literally, looked at the material presented, they saw nothing to show that the tribunal made any error of law and therefore there was nothing to quash. If, however, the examination revealed that there was some error of law, then the question arose as to whether it was the kind of error that should be quashed or was the kind of error that the statute under which the tribunal was acting barred the Queen's Bench (to reflect the gender of the present monarch) from intervening. Thus, if the examination showed that the error was one of misunderstanding of the statute and therefore the tribunal did something that it was not empowered to do or make an order that it was not authorised to make then it was said that there was an error of law on the face of the record and that error was an error outside of jurisdiction or the tribunal exceeded its jurisdiction. Those decisions would be quashed. On the other hand, if the alleged error of law was one that did not reveal that tribunal acted in a manner contrary to the statute or made some kind of order it was not authorised to make then it was said, even if the decision unwise, unjust or just plain foolish, that the error was one within jurisdiction and therefore there were no grounds for quashing the decision. If the record was regular and the tribunal had the lawful authority to embark upon the matter and prima facie lawful made decisions then no affidavit evidence was admissible to show that something had gone wrong in the process.

[5] To complete this aspect of the matter attention is directed to Lord Sumner's explanation in **R v Nat Bell Liquors** [1922] 2 AC 128. His Lordship indicated that the admissibility of evidence on certiorari was determined by the issue raised. Thus if it is being said 'that members of the inferior tribunal were unqualified, or were biased, or were interested in the subject' then affidavit evidence was admissible because these things were not apparent on the face of the record unless the record to be produced included the qualifications and appointments of tribunal member (page 159). 'On the other hand, to show error in the conclusion of the Court below by adducing fresh evidence in the superior Court is not even to review the decision: it is to retry the case. If the superior Court confines itself to what appears on the face of the record, evidently the more there is set out on the record the more chance there is that error, if there was error, will appear and be detected' (page 161). In these circumstances evidence was not admissible. Much therefore depended on what constituted the record for certiorari proceedings and generally speaking the statute would give some indication of what comprised the record.

[6] A good example of this kind of reasoning is found in Lord Denman's judgment in **R v Bolton** (1841) 1 Queen's Bench Reports 66, 71 - 74; 113 ER 1054, 1056 – 1057.

[7] The head-note captures the essence of Lord Denman's reasoning:

> *When a conviction or order of justices is returned to this Court, and the proceedings are regular in form and in practice, and the case is one over which the justices had jurisdiction, the Court will not hear affidavits impeaching their decision on the facts, nor, if they return the evidence, will it review their judgment thereupon. The test of jurisdiction under this rule is, whether or not the justices had power to enter upon the inquiry, not whether their conclusions, in the course of it, were true or false. It may be shewn by affidavit that they had no authority to commence an inquiry inasmuch as the question brought before them was not one to which*

> *their jurisdiction extended; and this, although, by mis-statement, they have made the proceedings, on the face of them, regular.*

[8] This view prevailed into the twentieth century. In **R v Nat Bell Liquors** Lord Sumner regarded **R v Bolton** as 'a landmark in the history of certiorari, for it summarises in an impeccable form the principles of its application under the regime created by what are called Jervis's Acts, but it did not change, nor did those Acts change the general law [on certiorari]' (page 159). The point is that Lord Denman's analysis was not restricted to the Summary Jurisdiction Act but was an accurate statement of principle applicable to certiorari.

[9] Lord Sumner himself summed up the matter at page 151 – 156:

> *It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at*

> *all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was coram non judice. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all.*

[10] This distinction continued right up to 1966 (see Browne J, at first instance, in **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 223, who did a masterful job of bringing some kind of intellectual order to the case law in this area). But even his Lordship's effort left intact the distinction. In Browne J's defence he could not effect any change in the law because he is a first instance judge who was bound by higher authority. His Lordship's collection of the authorities and the attempt at systematizing the law enabled the House of Lords to make the necessary corrections to the law

[11] His Lordship stated that there were four classes of cases that permit the High Court in England and Wales (substitute Supreme Court of Jamaica) to interfere. The first is where the inferior tribunal has no jurisdiction to embark upon the hearing of the matter. This type of case is called 'want of jurisdiction.' The second class of case is where the tribunal properly embarks upon hearing the matter but makes an order that it has no authority to make. This second class was called 'excess of jurisdiction.' The third class of case is where the tribunal properly embarks upon the determination of the matter over which it has jurisdiction and the order made is actually within its power to make but during the course of the hearing the tribunal commits an error of law. This class of case was known by the unfortunate name of 'abuse of jurisdiction.' Unfortunate, because it may give the impression that the tribunal set out deliberately to misconstrue the law but that is not what is meant. The expression covers honest mistakes in the interpretation of

the law. The fourth class of case the tribunal is 'guilty of bias, or has acted in bad faith, or has disregarded the principles of natural justice.' No name was developed for this fourth category. Categories one, two and four, if established, usually results in the decision being set aside as a nullity, meaning the decision was invalid from the beginning. In the third category, the decision stands until set aside.

[12] Within the third category, the abuse of jurisdiction, there was a further subdivision. There were errors within jurisdiction and errors out of jurisdiction. In first sub-category the court could not interfere whereas in the second it could. But as Browne J pointed out even the error in his third class had to appear on the face of the record.

[13] When the case got to the House of Lords, the Law Lords were able to dismantle this mighty legal edifice, if not in express words but certainly by necessary implication: **Anisminic v Foreign Compensation Board** [1969] 2 AC 147 HL. The facts will now be stated. In that case the government had established a board to determine who should get compensation out of a pool of funds in respect of property held in Egypt. The statute provided that the decisions of the board 'shall not be called in question in any court of law.' In other words, the commission was given the power to decide both fact and law. The affected party complained that the Board had misinterpreted the legislation and thereby denied them compensation to which it was entitled. The submission was that Parliament wanted the Board to act within jurisdiction and if it made an error in interpreting and applying the law then that was an error which took the Board outside of jurisdiction. For the Board, it was submitted that the legislature gave the tribunal full control over both fact and law which meant that no court shall call into question its decision. In other words, to use the language that existed up to that time, assuming the affected party's submissions to be correct, what happened was an error of law within jurisdiction that was unchallengeable.

[14] The House decided that Parliament wanted the board to act within the limit of its statutory power. In order for it to act within its statutory powers then the Board would need to know where the boundaries of its powers were. The determination

of the boundaries of its powers was eminently a question for the courts because it would be very unusual for an inferior tribunal to have the first and last say on its own jurisdiction.

[15] In **Anisminic** Lord Reid said at page 171:

> *It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.*

[16] If one matches what Lord Reid said against the judgment of Browne J one will

see that the examples given by Lord Reid are from categories 2 to 4 of Browne J's formulation. Lord Reid stated in the passage cited above that his examples were not exhaustive. It is the view of this court that the objective of Lord Reid in not emphasizing the undoubted distinction that existed between errors of law within jurisdiction and errors of law outside of jurisdiction was to make the point that if the errors amounted to an error of law whether within or outside of jurisdiction then the tribunal was susceptible to judicial review. The reason for this was simply that an error of law is an error of law however arising. The other Law Lords delivered judgments to the same effect. Lord Morris dissented on the facts of the case but not the legal principle.

[17] The ground was prepared for a new lexicon to express all that had happened in administrative law up to 1985. Lord Diplock duly obliged in **Council for Civil Service Unions v Minister of the Civil Service** [1985] AC 374 when his Lordship introduced new terminology. The new words were illegality, irrationality and procedural impropriety. His Lordship explained what he meant by each. Illegality meant that the decision maker must understand the law governing his conduct and give effect to it. Irrationality meant Wednesbury unreasonableness which is a decision 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (page 410). Procedural impropriety meant failure to observe the basic rules of natural justice. As can be seen this new classification cuts across Browne J's categories and eliminates the need to speak of error within jurisdiction and error outside jurisdiction. Of course it must be recognised that since this decision the Wednesbury unreasonableness has been refined and one now speaks of narrow and broad Wednesbury. Let us no longer here any submission seeking to resurrect the confusing terminology of the pre-Anisminic era.

[18] Perhaps we should heed this advice from Lord Millett's in **Runa Begum v Tower Hamlets LCB** [2003] 2 AC 430, 462, 663 [99]:

> *A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law. The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court.*

[19] This was in the context of an appeal being granted on a point of law but it was held that there was no practical difference between an appeal on a point of law and judicial review from a decision maker whose decision on the facts were final (Lord Bingham in **Runa Begum** [7]).

[20] Going forward it would be salutary if applicants for judicial review use the relevant term from Lord Diplock's formulation to state the ground on which leave is sought and then particularise under the relevant head what it is that he or she is alleging took place that now gives rise to facts that permit them to apply for leave to apply for judicial review. Having said this though the court is aware that Lord Diplock's definition of irrationality is unfortunate because it connotes some kind of mental incapacity or severe moral impairment. May be the heads should be reduced to just two: unreasonableness and procedural impropriety (see Helen Fenwick (ed), *Judicial Review,* (4th edn Lexis Nexis, London, 2010) ch 8 para 8.4.1).

[21] The test for leave is that stated in **Sharma v Brown-Antoine** (2006) 69 WIR 379 which is an arguable ground with a realistic prospect of success and not subject to any discretionary bar.

The IDT

[22] The IDT was established by the Labour Relations and Industrial Disputes Act ('LRIDA'). It is a tribunal of limited jurisdiction meaning that what it can do is set out by the LRIDA. Its job is to resolve disputes referred to it by the Minister of Labour. The practice is that once the referral is made the parties prepare written briefs which are exchanged and submitted to the tribunal. Before 2010, trade unions and employers were the ones appearing before the tribunal. Since 2010, the statute was amended to permit non-unionised persons to resolve their disputes with their employers before the tribunal. One of the striking results of this amendment has been a gradual increase in the number of persons in senior management positions who have taken their case to the tribunal. This case is one of them.

[23] The IDT is a statutory body and is therefore subject to the supervisory jurisdiction of the Supreme Court. The key word is 'supervisory.' A challenge to the decisions of the IDT is not an appeal. The court is not concerned with whether the IDT made the correct decision on the facts but rather with the process of decision making. Within the last few years a number of decisions from the Court of Appeal of Jamaica have developed the jurisprudence relating to the IDT.

[24] One of the latest cases on the IDT is **Branch Developments Ltd trading as Iberostar v IDT** [2015] JMCA Civ 48. Morrison JA stated the following:

a. section 12 (4) (c) is reflecting the long established principle that a tribunal can be challenged if it makes an error of law;
b. the courts can intervene if the tribunal took into account irrelevant matters or excluded relevant considerations;
c. there is a wider power to intervene despite the tribunal basing its decision on relevant matters only if the decision was so unreasonable that no reasonable tribunal could have made the decision in fact made.

[25] What this means is that when it comes to what weight to give evidence and who is to be believed those are matters for the tribunal. Provided there is evidence to support its decision and provided it does not commit any of the cardinal sins of

excluding from consideration all relevant matters, or excluding some relevant matter, bias, bad faith.

[26] The **Iberostar** case had something to say about the Labour Relations Code ('LRC') that was made pursuant to the LRIDA. Even though the jurisprudence is that the LRC is not law in the sense of a statute or a judicial decision from our highest court, the reality is that ignoring its provisions is quite foolhardy. While it is not statute law the LRIDA itself states that in determining whether any dismissal is unjustifiable the IDT must take account of the Code.

[27] Morrison JA in **Iberostar** reminded that the Judicial Committee of the Privy Council, in the case of **Jamaica Flour Mills Limited v IDT and National Workers Union** has endorsed the view expressed by the Court of Appeal of Jamaica which was approving the view expressed by IDT itself in **Jamaica Flour Mills v IDT** that the Code was 'as near to law as one can get.' The IDT made this remark in the **Flour Mills** case in response to the submission that the Code was no more than a set of guidelines and was not legally binding.

[28] His Lordship also reaffirmed that the LRIDA, the LRC and regulations are a comprehensive regime for the settlement of industrial disputes in Jamaica. The final point is that the IDT, once it determines that the dismissal is unjustifiable then it may make orders in accordance with section 12 (5) (c) of the LRIDA.

[29] An important point to bear in mind is that the word used in the statute is 'unjustifiable.' As Rattray P observed in **Village Resorts Ltd v IDT** SCCA No 66/97 (unreported) (delivered June 30, 1998), the statute deliberately refrained from using the word 'wrongful' or 'illegal' in order to make it clear that the LRIDA regime represented a clean break from the common law concept of 'wrongful dismissal.' The LRIDA is not a consolidation of the common law. It created new rights, obligations and remedies. Rattray P was very strong on the view that 'unjustifiable' does not equate with wrongful or unlawful 'the well-known common law concepts which confer on the employer the right of summary dismissal' (page 13). The President built on the foundations laid by Kenneth Smith CJ in **R v Minister of Labour and Employment, IDT** [1985] 22 JLR 407, 409. The learned

Chief Justice held that unjustifiable meant unfair. Unfair connotes unjust; not in accordance with justice and fairness.

[30] The reasoning of Rattray P was approved by the Privy Council in **Flour Mills**. What this means is that it is now clear law that under the concept of unjustifiable dismissal the IDT can take account of matters which the common law could not even begin to contemplate.

[31] In order to show the breadth of matters, the IDT can take into account, Rattray P observed at page 16 that the IDT had before it the 'lack of care with which the management considered the workers' case in arriving at its decision for the wholesale dismissal of its work force.' What this means is that a finding that the decision made by the employer was in accordance with the common law is not the end of the enquiry. A decision to dismiss an employee can be made in conformity with the common law but still be unjustifiable when all the facts and circumstances are taken into account. With this background the court now turns to the evidence before the IDT.

The case for ATL Group Pensions

[32] Mr Wildman submitted that the IDT exceeded its jurisdiction by making an error within jurisdiction which took the IDT out of jurisdiction. The error was that it asked itself wrong questions and took irrelevant matters into consideration and excluded relevant matters it ought to have taken into account. What does all of this mean? It simply means that the IDT is being accused to taking irrelevant matters into account and excluded irrelevant matters. This amounts to an error of law. This is illegality according to Lord Diplock's categorization.

[33] Miss Barber was said to have been dismissed because of her conduct regarding (a) the disposition of an apartment and (b) the back dating of letters giving approval for the distribution of pension fund surplus. The court will deal with them in the order stated.

The disposition of the apartment

[34] In 2007 the issue of the sale of an apartment owned by the ATL Group Pensions arose. Miss Barber communicated with the board of trustees that a related party was interested in purchasing the apartment. She did not say who that person was. Only one member of the board asked who was the person who wanted to purchase the property and Miss Barber disclosed who the person was. That related party was Mr Lynch. As an indication of his interest in purchasing the property, Mr Lynch had submitted a deposit and a sale agreement signed by him.

[35] ATL Group Pensions says that this was a collusive agreement between Miss Barber and Mr Lynch to purchase the property at an undervalue since there was no recent valuation. At the time of the communication to the board no valuation had been done.

[36] Miss Barber's response is that the process was a two-stage process. The first was to find out whether the board was interested in disposing of the property. If the board answered yes, then the next stage would be to let the board know who the interested purchaser was. In this case, the board did not pursue the matter and so the matter ended there. No further action was taken by her regarding this property. No action was taken against Miss Barber. Indeed, nothing more was heard about it until it was mentioned in late 2010 to early 2011 when the issue of the 2007 distribution came up.

[37] On the question of the sale of the real estate the IDT had this evidence before it:

a. Mr Lynch submitted a signed sale agreement and a cheque as deposit;
b. when Mr Lynch submitted his documents there was no current valuation;
c. Miss Barber told the board of trustees that a related party was interested in purchasing the property but did not reveal that it was Mr Lynch;
d. Miss Barber told the only member of the board of trustees who asked who the person was;
e. Miss Barber said that the sale process involved two stages, namely, a decision on whether the board of trustees would be interested in selling

the property and, if they were, then the name of the person would be revealed;

f. this event took place in 2007 and no action was taken against her for nearly four years;

[38] The IDT found that the allegation of clandestine behaviour had not been established. The tribunal was concerned that the incident took place in 2007 and no action was taken but it was used against Miss Barber in 2011. The conclusion of the IDT on this score is not vulnerable to judicial review because it was a matter of analysis of, interpretation of and what weight should be given to the evidence.

ATL Group Pensions case on the backdated founder's consent

[39] A pension fund was established which had a board of trustees. The administrator of the fund was and is ATL Group Pensions. The founder of the fund was Gorstew a company of which Mr Stewart was the chairman and Dr Jeffery Pyne a senior officer. There is a Mr Patrick Lynch who was chairman of ATL Group Pensions. Miss Catherine Barber was the general manager of ATL Group Pensions and thus the pension fund fell under her even though she was not a trustee for the fund.

[40] It is said that every three years there is a valuation of the fund and if there is a surplus, allocations (called distributions) may be made to the pension account of members. For this to happen lawfully two things were necessary: a decision by the board of trustees and consent of the founder. The problem was that the trust deed establishing the pension fund did not clearly state what the precise procedure should be for securing the founder's consent.

[41] The best that some of the witnesses before the tribunal could offer was that it was expected to be in writing since Gorstew was a company and could only manifest its decisions in writing. This was the effect of the testimony of Mr Dmitri Singh and Miss McLeish. On the other hand, Mr Patrick Lynch said there was a

detailed procedure for securing consent of the founder. Miss Barber spoke of a modus operandi.

[42] What started the train of event that resulted in Miss Barber's dismissal was advice from Miss Linda Mair, attorney at law, of the firm Patterson Mair Hamilton. Counsel advised, in 2007, that unless the founder's consent was given the distribution of the pension fund surplus was open to challenge. It is important to note that crucial period of December 2010 was still three years away.

[43] ATL Group Pensions case is that Miss Barber was part of a scheme to procure backdated approvals for the distribution of pension surplus after valuations done in 1998, 2001, 2004 and 2007 in order to make it appear that Gorstew had approved, in writing, the distribution of the surplus. Miss Barber is saying that these approvals were on file before 2010.

[44] In 2010 an issue arose as to whether Gorstew consented to the 2007 distribution. When the issue arose the previous distributions were not under scrutiny.

[45] This is sufficiently clear from the testimony of Mr Trevor Patterson who is a partner in the firm of Patterson Mair Hamilton. Mr Patterson said that on December 15, 2010 he was part of a telephone conference with Mr Lynch of ATL Group Pensions and Miss Barber. According to counsel, Mr Lynch told him that JA$350m was paid out without the founder's consent and Mr Stewart found out about it and was insisting that the funds be repaid. The court will observe that, having regard to the rest of the evidence placed before this court, Mr Patterson must have been speaking about the 2007 distribution and not those from earlier years.

[46] During this telephone conference Mr Lynch proposed a number of solutions each of which Mr Patterson indicated would be fraught with difficulties. Eventually none of the options proposed by Mr Patterson was acted upon. That meeting ended. During this meeting Miss Barber never said she had the consent for the 2007 distribution. This omission, said Mr Wildman, was a factor that should have caused the IDT to say that the letters were not in fact in place from before 2010.

[47] According to Mr Patterson, there was another meeting the following day on December 16, 2010 at Mr Gordon Stewart's office. However, before going to Mr Stewart's office, he conversed with Mr Lynch who told him that the consent was in place. Mr Patterson said he was taken aback because the day before Mr Lynch told him that there was no consent. At the meeting in Mr Stewart's office Mr Patterson said he outlined difficulties in resolving the matter. Miss Barber was not present initially. The issue of the consent came up during this meeting. Mr Lynch disclosed that the consents were in place. Miss Barber was called and asked to produce the consent which she did. The meeting ended shortly after the consent was produce. Up to the end of this meeting only the 2007 consent was in issue.

[48] After the consents were produced, Mr Stewart asked Mr Lynch if he knew about the consent to which he said yes. When asked further why he had not said anything the response was that it was signed by Dr Jeffrey Pyne. Apparently, Dr Pyne and Mr Stewart were not having the best of relationships at that time. It was said that Mr Lynch thought it to prudent not to raise the temperature further by mentioning Dr Pyne's name.

[49] At the risk of repetition, Mr Patterson was very clear that as far as he was concerned no questions were asked about any year other than the 2007 distribution.

[50] It is appropriate to refer to the two reports of Mr Speckin who was said to be a forensic document examiner. He was given four letters dated June 10, 1998, June 7, 2002, May 12, 2005 and July 18, 2008. The 1998, 2002 and 2005 letters were not in issue during the telephone conference of December 15 and the meeting on December 16. It is not clear what caused the other distributions to be queried. It appears that that an examination was done of the other distributions in order to determine whether Gorstew's consent was obtained.

[51] The first report states that the three letters showing Gorstew consented, that is, the letters dated June 10, 1998, June 7, 2002, May 12, 2005, were signed in a stack one atop the other. Mr Speckin also stated in his report that from his ink analysis of the signatures, they were all signed with the same pen or near the

same time. His ultimate conclusion was that those letters were not signed on their purported dates and were likely to have been written around the same time.

[52] His first report did not address the letter dated July 18, 2008 date. He did a follow up report where, as with the first report, he claimed that he was asked to determine whether all four letters were created contemporaneously with the dates on them. His conclusion was that the four letters were written at or around the same time.

[53] The case against Miss Barber before the IDT was that all the letters were done between the meeting of December 15, 2010 spoken of by Mr Patterson and the meeting with Mr Stewart held on December 16, 2010. The argument against Miss Barber is that she did not say at any time before, during or immediately after the December 15, 2010 meeting that the founder's consent were in place and since she only spoke up, after being asked to produce the letters at the December 16 meeting then the inference was that the letters had to have been created in that interregnum between the two meetings. In addition, ATL Group Pensions relied on Mr Lynch's conversation with Mr Patterson that the consents were not in place.

[54] ATL Group Pensions also relies on a letter written by Miss Barber to Miss Lynda Mair attorney at law, dated August 03, 2007 which stated that: *We hereby confirm that following a review of the Company's records, Gorstew Limited* ***did not*** *give consent to the bonus allocation recommendations for 1992 and 1995.* (bold and underline in original).

[55] Reliance is also placed on letter dated December 24, 2010 from Mr Lynch to Mr David Davies, Chief Financial Officer, Sandals Group in which Mr Lynch states that he does not know who prepared the 1998, 2002, 2005 and 2008 Gorstew letters providing approval for the distribution of surpluses. He said that they were not prepared in his office.

Miss Barber's case on the backdating of letters

[56] According to Mr Goffe when Miss Barber was engaged as the general manager of ATL Group Pensions in June 2000, she came into a situation in which a valuation and distribution of pension benefits had already taken place from 1998. The practice was to conduct an audit and valuation of the pension fund every three years and if there was a surplus it would be distributed to the members and they would be notified in writing of this fact.

[57] Mr Goffe also said that the board of trustees gave approval before any distribution could take place. This approval was noted in the minutes of the meeting of the board of trustees but there was not stand-alone document such as a resolution capturing the approval. Even though the trust deed stated that the consent of the founder, in this case Gorstew, was necessary there was no established procedure for this consent to be obtained. Indeed, learned counsel said that there was no evidence before the IDT that the 1998, 2001 and 2004 distributions ever had a stand-alone document showing that Gorstew consented. Crucially, though, even though there was not this stand-alone document from Gorstew no one, prior to 2007, made an issue of it because the trustees, in the period 1998 to 2007 were appointed by Gorstew. In this context once the Gorstew appointed trustees approved the distribution the view seemed to have been that it was as if Gorstew had approved the distribution despite the absence of any specific stand-alone document capturing Gorstew's approval.

[58] Regarding the preparation of the letters examined by Mr Speckin there is this evidence. A draft sent was either by Miss Barber's secretary or by Miss Barber to Miss Lynda Mair. The draft has the following on it: 'Lynda, is this letter appropriate?' Under this question is the name Karen Wilmott along with a telephone number. Miss Wilmott was Miss Barber's secretary. The draft has the handwritten corrections made by Miss Mair and it was faxed back to Miss Barber on July 18, 2007.The draft also had on it the section for Dr Pyne's signature. The covering fax page was actually addressed to 'Ms Catherine Barber' and 'Ms Karen Wilmott' and it was from Lynda Mair.

[59] A careful narrative is important here. There is no evidence on this application that Miss Mair told Miss Barber to back date the consents. The evidence from Miss Barber is that she made the decision to backdate the letters on her own. Miss Barber said that she did the drafts with the back dates of June 10, 1998, June 7, 2002 and May 12, 2005 and sent them to Mr Lynch, the chairman of ATL Group Pensions. The plan was to get them signed by Gorstew. The letters came back signed by Dr Jeffrey Pyne of Gorstew. This meant as far as Miss Barber was concerned the consent from Gorstew the founder was now in place and all was well.

[60] Miss Barber says that in addition to these three letters a fourth letter in relation to the 2007 valuation and distribution was signed by Dr Pyne. It is vital to note that when Miss Barber sent the three letters to Mr Lynch it had a complimentary slip the following handwritten note in Miss Barber's handwriting:

> *Attached are the three letters to be reproduced on Gorstew Limited letter head and signed by Dr Pyne.*

[61] Crucially, the slip bore the date July 18, 2007. Miss Barber says that when these three letters were returned they were placed on the relevant files.

[62] The court wishes to point out that on the issue of the communication between Miss Barber and Miss Mair, Miss Mair was not called as a witness. Mr Trevor Patterson, attorney at law, from Miss Mair's firm did not give any evidence to say that what Miss Barber said about the dialogue between herself and Miss Mair was inaccurate. What this meant was that the only direct evidence on this aspect of the case came from Miss Barber. However, she never said that Miss Mair advised her to do what she did, that is getting backdated letters to place on the file.

[63] Miss Barber is saying that between 2007 and 2010 no one raised any concerns about the letters. From her standpoint these letters were on file from 2007 (the first three) and 2008 (the fourth letter). There is no evidence that anyone was querying the existence of these letters until 2010.

[64] Miss Barber said that in December 2010 an issue arose regarding Gorstew's consent to the distributions. According to ATL Group Pension's brief, in 2010 a review of the fund was conducted by PriceWaterhouseCoopers because of the pending retirement of Mr Lynch. That audit revealed in 2007 the pension fund had a surplus and from that surplus some JA$351.6 was distributed. Mr Gordon Stewart indicated that he did not know about this distribution. According to the brief it was this discovery that led to two meetings in December 2010.

[65] Mr Goffe pointed out that this development is crucial to how the IDT approached the matter. When Mr Stewart raised his queries, in the very brief submitted by ATL Group Pensions, the trigger was the 2007 valuation and subsequent distribution and not the distributions for 1998, 2002 and 2005. This, he said, explains why no one thought of looking at the files for those valuations and consequently would not have seen the letters that were on file from 2007. This, he said, was the state of the evidence before the IDT. Mr Goffe pointed out that before the IDT when Miss Catherine Lyn testified she was talking about the 2007 actuarial audit and not the audits done for the 1998, 2002 and 2005 distributions. Therefore, Mr Goffe said, she would have no reason to be looking at those files and had no reason to know about the letters which Miss Barber said where on file from 2007. Miss Lyn was a ATL Group Pensions witness and the examination in chief of Mr Wildman made it plain that both he and Miss Lynn were talking about the 2007 audit.

[66] Miss Lyn said that she had email communication with Miss Barber asking whether the resolutions or minutes including the founder's consent were on file. Miss Barber responded that she can confirm that the resolutions were on file to substantiate the founder's consent and a copy of the resolution was sent to Miss Lyn under cover letter dated March 28, 2008. The purpose of this evidence from ATL Group Pension's perspective was to show that there was no consent from the Gorstew. In cross examination, Miss Lyn stated that after this email exchange she did not contact Miss Barber again indicating that the wrong document was sent or that there was no permission from the Gorstew. What the cross examiner was doing here was to lay the foundation for the submission that since Miss

Barber told Miss Lyn that the requisite resolution was sent to her already under the March 28, 2008 cover letter; had that not been the case then one would have expected Miss Lyn, the auditor, to say, 'No, no Miss Barber I have checked and there is nothing here showing the founder's consent.' Since that did not happen then may be the information from Miss Barber had indeed satisfied Miss Lyn that the consent was place. That was the evidence before the IDT and it was for them to say what they made of it.

The IDT's response to the evidence

[67] The IDT reviewed the evidence and made findings. In coming to its decision the IDT posed the question, '[w]as it possibly Miss Lynda Mair who had advised Miss Barber as to the course adopted?' Also in relation to Miss Mair the IDT asked, '[c]ould this advice have been that for each year a letter should be prepared and dated appropriately?' The material presented so far does not suggest that Miss Mair gave this advice. Miss Barber's evidence was that Miss Mair told her that without the consents the validity of the distributions may be called into question. There is no evidence that Miss Mair told her the specific methodology to be used to rectify the situation. There is no evidence that Miss Mair told her that she was to prepare a separate letter for each year and have that letter dated. Does the presence of these two questions raise the issue of the IDT taking into account irrelevant matters or may have misunderstood the evidence? The answer is yes and thus leave to apply for judicial review is granted in relation to these questions. At the end of this judgment to precise ground in the application will be indicated.

[68] The IDT also said that observance of the LRC was mandatory. Unfortunately, the case law has not elevated the LRC to that statute and neither has the LRIDA. The true position is that the LRC where relevant its provisions have to be taken into account but that is not the same thing as saying that its observance is mandatory. Does this mean that there may be an error of law for which judicial review should be granted? The answer is yes, because the reasoning of the IDT

suggests that it is treating the LRC as a strict legal code breach of which makes the dismissal unjustifiable. If this is what it did then it may well be that the IDT misled itself by treating a breach of the LRC as incurably bad when the jurisprudence is that the breach is a factor to be taken into account.

[69] In analysing the evidence the IDT took the view that the backdating of the letters was done to appease Mr Stewart. ATL Group Pension's case theory is that the backdated letters were done between the telephone conference of December 15, 2010 and the meeting with Mr Stewart on December 16, 2010. It appears that ATL Group Pensions had no direct evidence of the time when the letters were done. It relies on an inference. The proposition seems to be that since Miss Barber said nothing about the letters during the teleconference with Mr Patterson on December 15, 2010 then it should be inferred that they were done after this meeting and before the December 16, 2010. Miss Barber's case is that the letters were on the file before 2010. If this is so then it is unlikely that she would have been doing this to appease Mr Stewart because there is no evidence to suggest that Mr Stewart had any issues with previous allocations before December 15, 2010. It is not entirely clear how the IDT arrived at its factual finding that the backdating was done to appease Mr Stewart. If there was no evidence to support this finding it is possible to argue that the IDT may have misled itself on this issue. This means that leave should be granted on this issue. A full hearing will determine what becomes of this when the full transcript is available.

[70] The IDT also found that there was no proper hearing before Miss Barber was dismissed. Mr Wildman sought to suggest otherwise but in this court's view there was ample evidence to support the finding of the IDT. Mr Wildman suggested that there was correspondence going back and forth indicating the nature of the complaint against Miss Barber. However, as Mr Goffe pointed it was not until the letter of dismissal that Miss Barber knew that the incident regarding the apartment was being resurrected to be used against her. If nothing else the submissions by Mr Wildman when viewed along with Mr Goffe's submission show why a formal hearing is desirable. The accusations can be properly

formulated and laid against the affected party. The party has an opportunity to respond. In this case Miss Barber did not have any opportunity to respond to the apartment incident and may have felt that it was behind her.

[71] In light of what has been said there was evidence for the tribunal to conclude that there was a breach of the LRC and could properly take the breach into account in determining whether Miss Barber's dismissal was unjustifiable.

[72] Mr Wildman submitted that the circumstances of this case were such that even if there was a breach of the LRC the dismissal was justifiable. The court expresses no view on this except to observe that the **Iberostar** case reaffirmed that the manner of dismissal is a matter that the IDT can consider. In other words, even if the IDT concluded ATL Pensions Group Ltd had good reason at common law to dispense with the services of Miss Barber that is not the end of the matter. The IDT can take account of the manner of dismissal including, where applicable, any breach of the LRC. There is no carve out or exception under the LRIDA and LRC regime. That is to say there is no principle that says that some cases are exceptional and therefore the IDT regime does not apply to it with full rigour. Once the case comes into the IDT system then it falls to be considered in light of the principles laid down by the statute, the LRC and the decided cases. The proceedings before the IDT are not a common law action for wrongful dismissal but an enquiry into whether the dismissal was unjustifiable. In conducting this enquiry the IDT is not to embark upon any question of whether this or that case is exceptional but simply to apply the law taking into account all relevant facts.

Bias

[73] Mr Wildman submitted that Mr Rion Hall, a member of the IDT panel was disqualified from sitting because he had an interest that as not disclosed. It is said that after the IDT delivered its award it was found out that Mr Rion Hall is a director and shareholder in Caribbean Assurance Brokers Company Limited. Mr Norman Minott and his wife are directors of the same company. Mrs Minott is

also a shareholder. Mr Minott is a senior partner in the firm of Myers Fletcher and Gordon and that firm represented Miss Barber at the IDT. The submission was that Mr Hall was automatically disqualified because he was a director of a company of which Mr Minott was also a director. Learned counsel also submitted that the apparent bias principle also applied.

[74] Mr Wildman relied on the cases of **R v Bow Street Metropolitan Stipendiary Magistrate** [1999] 1 All ER 577. The case is commonly known is **Pinochet (No 2)**. In that case the facts were that Lord Hoffman was part of the panel of judges who heard an appeal involving the extradition of Senator Pinochet from the United Kingdom. Lord Hoffman was a director and chairman of Amnesty International Charity Limited which was a subsidiary of Amnesty International. Lord Hoffman was not a member of Amnesty International but did help with fundraising at some time in the past. Lord Hoffman's wife was employed in administrative positions with Amnesty International. Amnesty International had appeared before the House of Lords on the extradition hearing urging the court to extradite the Senator.

[75] The House decided that the rule against pecuniary bias extended to the facts of that case because the judge's decision would lead to the promotion of a cause in which the judge was involved along with one of the persons making submissions before the court.

[76] Mr Wildman also relied on the case of **R v Gough** [1993] 2 All ER 724. That case laid down a test for apparent bias in the following terms: 'whether having regard to the relevant circumstances, there was a real danger of bias on the part of [person].' This test was abandoned by the House of Lords in **Porter v Magill** [2002] 1 All ER 465.The test became 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'

[77] The cases of **Pinochet (No 2)**, **Gough** and **Magill** were considered by the Privy Council in **Meerabux v Attorney General** (2005} 66 WIR 113. In **Meerabux** the chairman of the council that heard the complaints against a judge and recommended his removal from office was a member of the Bar Association of

Belize. It was the Bar Association and other others who made the complaints against the judge. Thus the presiding panelist was a member of the very association which made some of the complaints. The submission was that the chairman was automatically disqualified from taking part in the proceeding by virtue of being a member of the Bar Association which had a stake in the successful prosecution of the matter. It was also argued that the membership of the Bar Association would give rise to reasonable suspicion that he was biased. Thus the Board had to decide whether **Pinochet (No 2)** applied with full rigour and whether **Magill** applied as well.

[78] In analysing **Pinochet (No 2)**, Lord Hope noted that the decision was highly technical because in that case, the charity of which Lord Hoffman was a member was not a party to the appeal and neither had it done anything to associate itself with the proceedings. The fact of the matter was the charity was controlled by Amnesty International. Lord Hope held that rule against being a judge in one's own case extends to cases where the person has a personal or pecuniary interest in the outcome.

[79] Lord Hope noted that the chairman of the panel was a member of the Bar Association by being an attorney at law. Apparently membership of the Bar Association compulsory. His Lordship did not stop there. He went further and noted that the chairman took no part in the decision that led to the making of the complaint, he had no influence over whether the decision to remove the judge should be brought. He was not connected with the decision to complain about the judge in any substantial or meaningful way. The Board affirmed the apparent bias test as that which was stated in **Magill**.

[80] All these cases were reviewed by the Court of Appeal of Jamaica in **Roald Henriques v Hon Shirley Tyndall OJ and others** [2012] JMCA Civ 18. At paragraph 63 Harris JA stated that 'in imputing actual bias, it must be shown that the decision-maker has a financial or proprietary interest in the outcome of the inquiry.' In that case a Commission of Enquiry was established to enquire into, among other things, the failure of financial institutions during the late 1990s. One of the Commissioners was a debtor to one of the institutions which would be

under examination by the Commission. It was held that he had an indirect interest by virtue of being a debtor to one of the institutions to be examined and that interest was sufficient to disqualify him. In addition the Commissioner fell within the class of persons whom the Commission would inquire into.

[81] Hibbert JA (Ag) accepted the proposition that interest is not limited to pecuniary interest but extended to cases where there was an indirect interest.

[82] The last case to be cited here is that of **Lawal v Northern Spirit Ltd** [2003] IRLR. In that case the appellant brought a claim before the employment tribunal. It turned out that counsel for the defendant had sat with two members of the tribunal before which the appellant appeared. Counsel for the defendant was a part-time judge for the employment tribunal. The House of Lords held that in the circumstances of that case there was a real possibility of subconscious bias. The reason was that counsel was a silk and was quite likely seen as a person of authority. It was the case that the panel of the tribunal comprised a legally qualified person and two laymen. It was felt that the laymen would look to the legally qualified person for advice on the law and in that sense counsel who appeared against Mr Lawal was a person who would of influence while sitting as a member of the panel. If the same legally qualified person appeared now as counsel where the two laymen with whom he had sat were on the panel the fair-minded observer might perceive that the appellant would be at a disadvantage in those circumstances.

[83] The present case is nowhere near **Lawal**. In this present case, the company of which Mr Hall and Mr Minott are co-directors are not part of this case. The company is not associated with any cause being promoted by any of the parties to this case. There is no pecuniary interest or proprietary interest that Mr Hall has in the outcome of this case. Neither is there any personal interest. Thus the automatic disqualification rule does not apply.

[84] According to the case law, when the automatic bias principle does not apply the court has to go on to consider the real possibility of bias. The fair minded and informed observer in this case would take into account that Mr Minott has not been involved in any aspect of Miss Barber's case. The company is not

connected with the matter that was before the IDT. Mr Minott was not connected to the matter before the IDT save by being a member of the law firm representing Miss Barber. When all the facts are known the fair minded observer would have to decide whether there is real possibility that Mr Hall would be biased in favour of Miss Barber purely on the basis that she is represented by a law firm in which his fellow director is a partner in that firm. Taking all matters into account this court is of the view that this ground for judicial review has no real prospect of success. Leave to apply for judicial review on the ground of bias is refused.

The award

[85] In this case the IDT's award stated that Miss Barber should be reinstated or paid 260 weeks total emolument at the current rate. This was understood to mean that she should be paid 260 weeks' salary. Mr Wildman contended that the IDT did not take into account the fact that Miss Barber was working during the period between her dismissal and the time the award was made. Counsel seems to be suggesting that the tribunal should have deducted the money earned by her from the amount she would have earned had she not been dismissed.

[86] Mr Wildman submitted, relying on paragraph 60 of the **Iberostar** case which stated 'an award of compensation, without explanation, and purely reflective of the actual wages which the workers would have earned during the period when the hotel was closed and for part of which at least, on the unions own case, there should have been a further extension of the lay-off period, was irrational.' From this Mr Wildman submitted that this is saying that an award without reasons is irrational.

[87] Mrs Reid Jones and Mr Goffe submitted that the statute confers a discretion on the IDT to order compensation or grant such relief as appears to be appropriate in the circumstances. This was the identical argument put forward on behalf of the IDT and the union in **Iberostar**. The argument was not accepted by Morrison JA.

[88] It must be remembered that the award is not one arising from a claim for wrongful dismissal. Mr Wildman' submissions come dangerously close to reading into the statute principles such as duty to mitigate and the like. The statute does not say any of these things and neither is there any judicial decision suggesting this. Nonetheless the Court of Appeal is now saying that reasons need to be given for awards. It appears that none was given in this case and so leave to apply for judicial review is granted on this ground.

The court's conclusion on the application for leave

[89] The court concludes that the applicant has made out enough for leave to apply for judicial review to be granted but only in respect of the remedies which will be specified in the succeeding paragraphs.

[90] Three declarations are sought at paragraph 1 (i), (ii) and (iii) of the application. Paragraph I (i) is seeking a declaration that 'the decision of the [IDT], that the termination of the employment of [Miss Barber] by the applicant is improper, is so unreasonable that no tribunal having considered all the relevant evidence could have arrived at the said conclusion, amounting to a jurisdictional error, rendering the said decision null and void and of no effect.'

[91] Paragraph 1 (ii) seeks a 'declaration that the finding of the [IDT] that the applicant improperly terminated the contract of [Miss Barber], the [IDT]

a. failed to consider the relevant evidence that was led before it;
b. misconceived relevant evidence;
c. asked itself the wrong question

rendering the decision null and void and of no effect'

[92] Paragraph 1 (iii) is seeking a declaration that the IDT 'failed to consider that the termination of the employment of [Miss Barber] arose in special circumstances which warranted the 1st respondent to depart from the strict language of the Labour Relations Code.' Also when the submissions by Mr Wildman are taken into account there is no doubt that paragraphs (i), (ii) and (iii) are all directed at

the conclusion of the IDT that the dismissal was unjustifiable in light of all the circumstances.

[93] Paragraph 1 (i) is what is described as Wednesbury unreasonableness from the famous case of **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223. This case has been the subject of examination by the Court of Appeal in **Iberostar**. Morrison JA identified two grounds coming out of Wednesbury on which a court can intervene. The first is where a tribunal takes irrelevant matters into account or fails to consider relevant matters. The second is wider ground, namely, 'although based on appropriate considerations, is so unreasonable that no reasonable body could have reached it' (para 33 of **Iberostar**). Wednesbury unreasonableness was explained by Lord Diplock in **Council for Civil Service Unions** as a 'decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it' (page 410). This kind of unreasonableness is really a very, very high one and the lingering criticism of Wednesbury is that it permits unreasonableness but it is only to challenge if it reaches the level of 'defiance of logic or of accepted moral standards.' The decision of the IDT does not fall in this category.

[94] Even if Miss Barber is guilty of dishonesty that is not the end of the matter. The IDT can and must look at all the circumstances. If this court were to hold otherwise nearly every employer would be seeking to argue that his dismissal of the employee took place in exceptional circumstances. This court respectfully agrees with and adopts explicitly the reasoning of Batts J in **R v IDT ex parte Juici Beef [2014] JMSC Civ. 125** at paragraphs 10 and 18. That case did not accept that there were exceptional cases that would justify departure from the regime once the case came into the IDT system.

[95] The law has enough experience to know that embarking upon the development of 'exceptional circumstances' jurisprudence often leads to an intellectual cul de sac because the effort would be directed at proving or disproving that this or that circumstance makes the case exceptional. This must be resisted. Thus leave to apply for judicial review under paragraph 1 (i) and (iii) is refused.

[96] Having said all this, the court is of the view that leave should be granted in respect of the questions posed by the IDT in its reasons. The questions the IDT asked itself were (a) whether Miss Mair advised Miss Barber as to the course to adopt and (b) whether Miss Mair advised Miss Barber that a letter should be prepared for each year. These questions raise the possibility that the IDT may have asked itself a wrong question. The IDT's treatment of the LRC has mandatory is questionable in light of the current state of the law.

[97] This means that leave can be granted under paragraph 1 (ii). ATL Group Pensions is also asking for certiorari to quash the decision of the IDT. The certiorari is a natural follow up to the declaration sought. A declaration does not quash the decision. It leaves it intact. Certiorari, if granted, means that the decision no longer exists and to the extent that the certiorari is connected to the ground dealing with the declaration they can be sought in the hearing and so leave is granted in respect of those grounds seeking certiorari paragraph 1 (vi). The issue of the award is raised under paragraph 1 (v) and the connected certiorari remedy is found in paragraph 1 (vii). Leave to apply for judicial review should be granted on this aspect of the decision as well.

Disposition

[98] Leave to apply for judicial review is granted to seek the remedies at paragraphs 1 (ii), (v), (vi) and (vii) of the notice of application for court orders dated September 30, 2015. Leave is refused in respect of paragraph 1 (i), (iii), (iv). Cost of this application to be costs in the claim.