[2019] JMSC Civ 53

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2017 HCV 02605

BETWEEN	**MILEX SECURITY SERVICES LIMITED**	**CLAIMANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**DEFENDANT**
AND	**WESLEY GORDON**	**INTERESTED PARTY**

IN OPEN COURT

Messrs. Gavin Goffe and Adrian Cotterell instructed by Myers, Fletcher & Gordon for the Claimant

Miss Althea Jarrett instructed by the Director of State Proceedings for the Defendant

Mr. Nigel Jones instructed by Nigel Jones & Co. for the Interested Party

Heard: December 13, 2018 and April 5, 2019

Judicial review – Statutory interpretation – Whether the industrial disputes tribunal has the statutory authority to replace more than one member of a three-member division after the hearing of a dispute in relation to which it was constituted has begun and before an award is made – Whether the matter should be remitted to the industrial disputes tribunal for the hearing of the dispute to commence de novo – Labour Relations and Industrial Disputes Act, sections 7, 8(4), 10, 11, 12 and 20, Civil Procedure Rules, 2002, rule 56.16 (2)

A. NEMBHARD, J (AG.)

INTRODUCTION

[1] By way of a Fixed Date Claim Form, which was filed on 21 November 2017, the Claimant, Milex Security Services Limited ("Milex") seeks the following Orders against the Defendant, the Industrial Disputes Tribunal ("IDT"): -

(1) An Order of Certiorari to quash the award of the Defendant, The Industrial Disputes Tribunal ("IDT") in Dispute No. IDT 45/2016, published on June 7, 2017;

(2) A declaration that the Industrial Disputes Tribunal must begin hearing an industrial dispute de novo if two or more members of a division have to be replaced after the division begins to deal with the industrial dispute in relation to which it was constituted but before it has made its award;

(3) Costs; and

(4) Further or other relief as the Court deems just.

BACKGROUND

[2] The interested party, Mr. Wesley Gordon, began his service with Milex in December 2000. He was employed as an unarmed industrial security guard. At all material times, Mr. Gordon was stationed at ZEP Products Limited ("ZEP"), a company involved in the business of manufacturing soaps, bleach and other cleaning agents.

[3] In or around February of 2015, Milex received information that its security guards were involved in the theft of certain products from ZEP. As one of the security guards who was working on the night shift, on 12 February 2015, Mr. Gordon was summoned to a meeting with personnel from Milex. These persons included

Mr. Jamie MacMillan, the General Manager, Mr. Fredrick Derby, the Zone Manager and Ms. Shanice McCarthy, the then Human Resources Manager.

[4] During that meeting, Mr. Gordon asserts that he denied that he was involved in the theft of any product(s) from ZEP. Milex, on the other hand, contends that Mr. Gordon subsequently retracted this denial by admitting to the theft of the items from ZEP. Mr. Gordon was later asked to sign a written statement to that effect, which he refused to do, in an effort not to incriminate himself.

[5] By way of a letter dated 12 February 2015, Mr. Gordon's employment was terminated with effect from the same date.

[6] Mr. Gordon made a report to the Ministry of Labour and Social Security, alleging that he was wrongfully dismissed, and the matter was referred to the IDT.

[7] The IDT convened a division consisting of three (3) members, for the purpose of hearing this dispute. After the second of a total of five (5) hearings had been concluded, two (2) members of the three-member division were replaced. This substitution took place after the three (3) members of the originally constituted division had heard the evidence adduced on behalf of Milex and after it had closed its case. The fact of the substitution was communicated in writing to the Attorneys-at-Law representing Milex, as well as to Mr. Gordon, and the consent of each was sought in relation to the continuation of the hearing of the dispute before the newly constituted division. (See – Exhibit "LTG3" of the Affidavit of Lovina Tulloch-Guthrie in support of Fixed Date Claim Form, filed on 21 November 2017.)

[8] Both Milex and Mr. Gordon consented in writing to the hearing being continued before the newly constituted division.

[9] The verbatim notes of the evidence adduced at the first and second hearings were provided to the substituted members of the newly constituted division on 3 February 2017 and 22 January 2018, respectively.

[10] In its findings, the IDT observed that, although Mr. Gordon had been dismissed for stealing, no evidence had been presented, nor had any witnesses been called from ZEP, to establish that items had in fact been stolen. It found that Milex had failed to lead any evidence disclosing the source of the information it had received, that items were being stolen from ZEP, that no evidence had been led as to the nature of the items that were alleged to have been stolen and that no evidence had been adduced that Mr. Gordon had been found with any of the items alleged to have been stolen. Consequently, the IDT accepted Mr. Gordon's evidence that the items that he had taken from his workplace, were items that had been given to him by the Manager of ZEP.

[11] The IDT concluded its findings with its pronouncement that Milex had failed to comply with the procedure outlined in the Labour Relations Code, relative to the dismissal of employees, and that its dismissal of Mr. Gordon was in breach of the rules of natural justice. It ruled that Mr. Gordon had been unjustifiably dismissed and that, accordingly, Milex should compensate him with fifty-two weeks' basic salary.

[12] On 11 August 2017, Milex filed an Application for Leave to Apply for Judicial Review. On 7 November 2017, leave was granted for Milex to apply for an Order of Certiorari to quash the decision of the IDT in Dispute No. IDT 45/2016, which was published on 7 June 2017. Subsequent to that, Mr. Gordon applied to intervene in the matter as an interested party and his application was also granted.

[13] The matter came before the Court for judicial review on 13 December 2018, at which time Learned Counsel for the Defendant conceded that an Order of Certiorari should properly be granted, to quash the decision of the IDT in Dispute No. IDT 45/2016. Consequently, the Court granted an Order of Certiorari, quashing the said decision of the IDT.

[14] At that time the Court was asked to make a declaration as to the proper interpretation to be applied to section 8(4) of the Labour Relations and Industrial

Disputes Act ("LRIDA") and to address its mind to the issue of costs. The Court was also urged to remit the matter to the IDT for the hearing of the dispute to be commenced de novo.

[15] This judgment therefore addresses the proper interpretation to be applied to section 8(4) of the LRIDA, as well as, the propriety of remitting the matter to the IDT. It is not intended, for the purpose of this analysis, to address the conduct of the IDT in the exercise of its functions in the instant matter or the legal requirements for the grant of an Order of Certiorari.

SUBMISSIONS

[16] It was submitted on behalf of Milex that the IDT acted in contravention of section 8(4) of the LRIDA. In an effort to ground this assertion, it was submitted that the section does not give the IDT the authority to replace more than one (1) member of a three-member division. Consequently, the IDT lacked the requisite jurisdiction to hear the dispute by virtue of the replacement of two (2) members of the three-member division, without having commenced the hearing de novo before the newly constituted division.

[17] It was further submitted that, even if the Court finds that the IDT had the requisite jurisdiction to proceed as it did, it fell into error, procedurally, because the two (2) substituted members of the division did not have the benefit of the verbatim notes of the evidence that had been adduced, prior to the continuation of the hearing and/or before the award was made.

[18] Finally, it was submitted that the words used in section 8(4) of the LRIDA should be given their ordinary, grammatical meaning. Consequently, where one (1) member of a three-member division is replaced before an award is made, such a hearing should be commenced de novo, unless the parties give their written consent to continuing the hearing of the matter before the newly constituted division. By replacing two (2) members of the three-member division, the IDT

acted ultra vires its authority and as a consequence, the award by the newly constituted division is null and void and cannot be cured by the parties' consent.

The interested party's reply

[19] It was submitted on behalf of Mr. Gordon, that, section 12(4)(c) of the LRIDA provides that an award of the IDT shall be final and conclusive and that no proceedings can be brought in any Court except where an issue of Law is raised. It was submitted that Milex's contention regarding a jurisdictional error is a factual finding, as it was arrived at based on facts and evidence.

[20] It was further submitted that the IDT is not required to commence the hearing de novo, notwithstanding the replacement of two (2) members of the three-member division before an award was made. It was submitted that section 8(4) of the LRIDA provides for the replacement of a member of the division if any one (1) of them dies or is incapacitated or ceases to be a member. The procedure observed by the IDT in the instant case could not be said to be unlawful in circumstances where there are two (2) members of the division who have ceased to constitute that division.

[21] It was asserted that the IDT followed the procedure established by section 8(4) of the LRIDA, by seeking the written consent of the parties to the hearing of the dispute being continued before the newly constituted division.

The defendant's response

[22] Learned Counsel for the Defendant submitted that section 8(4) of the LRIDA refers to those situations where only one (1) member of a three-member division is replaced because of death, incapacity or for some other reason, after that division has embarked on a hearing of a dispute, in respect of which it has been constituted and before an award is made. In the instant case, two (2) members of the three-member division were replaced after the second hearing had been concluded. It was further submitted, that, in such a case, there was no jurisdiction in the newly constituted division to seek the consent of the parties to the hearing

of the dispute being continued before it. The hearing ought properly to have commenced de novo. It was accepted that the IDT erred in Law in misinterpreting section 8(4) of the LRIDA.

ISSUES

[23] The following issues arise for the Court's consideration: -

a. What is the proper interpretation to be applied to section 8(4) of the LRIDA?

b. Does the IDT have the statutory authority to replace more than one (1) member of a three-member division after the hearing of a dispute, in respect of which that division was constituted, has begun and before an award is made?

c. Should the matter be remitted to the IDT for the hearing of the dispute to be commenced de novo?

THE LAW

The relevant legislation

[24] The relevant provision, about which the issue of interpretation turns, is section 8(4) of the LRIDA. It states: -

> *"Where three members of the Tribunal constitute a division thereof and any one of those members dies or is incapacitated or ceases to be a member thereof for any other reason after the division begins to deal with the industrial dispute in relation to which it was constituted but before it has made its award, another person shall be selected in accordance with the provisions of paragraph (c) of subsection (2) to fill the vacancy, thereafter the proceedings of the division shall be begun de novo unless all the parties to the dispute agree in writing that those proceedings may be continued as if they had not been interrupted by reason of such death or incapacity or cessation."*

The guides to interpretation

[25] At page 15 of the text, Cross on Statutory Interpretation, 3rd ed., 1995, the learned author, Rupert Cross, discusses the **Sussex Peerage Case** (1844) 11 Cl & Fin 85. He indicates that where the words used in a statute are precise and unambiguous, the judge's duty is to give them their natural and ordinary meaning. It is only where the words used create doubt or ambiguity as to meaning, that judges should examine the background to the statute to determine its object or purpose, and the deficiency which the statute was introduced to address.

[26] At page 17, Cross highlights the pronouncements of Lord Wensleydale in **Grey v Pearson** (1857) 6 H.L. Cas. 61 at 106, which indicate the proper approach to be adopted by the Courts. The principles can be distilled as follows: -

a. to give effect to the ordinary, grammatical meaning of statutory words;

b. if this produces an absurdity, repugnance or inconsistency with the statute as a whole, judges may modify the plain meaning in favour of an alternative interpretation, to avoid absurdity, repugnance or inconsistency; and

c. any modification made should only be to the extent necessary to give effect to the perceived Parliamentary intention, that is, Courts would be straying beyond their constitutional remit if they went beyond this.

[27] Lord Wensleydale further indicated that absurdity can relate to some conflict or inconsistency between a provision in dispute and other provisions of the same statute, or an inconsistency between the provision and the object or purpose of the statute read as a whole.

[28] In **Dennis Meadows et al v Attorney General of Jamaica and The Jamaica Public Service Company Limited et al** [2012] JMSC Civ 110, ("Dennis Meadows"), the Minister with responsibility for mining and energy had granted the Jamaica Public Service Company Limited ("JPS") a twenty-year all-island

exclusive licence over the transmission, distribution and supply of electricity in Jamaica.

[29] The issues before the Court were, firstly, whether the Minister has the authority to grant an all-island licence to one entity to generate, transmit, distribute and supply electricity to the entire island of Jamaica. Secondly, whether the grant of this licence fettered the Minister's discretion under the Electrical Lighting Act to consider other applicants.

[30] Section 3 of the Electrical Lighting Act ("ELA") reads: -

> *"The Minister may from time to time license any Local Authority as defined by this Act, or any company or person, to supply electricity under this Act for any public or private purposes within any area, subject to the following provisions."*

[31] A condition of the licence granted to the JPS stated that it shall have exclusive rights to provide services in Jamaica. In coming to the proper interpretation to be applied to section 3 of the ELA, Bryan Sykes, J (as he then was) at paragraph [20] stated that the clear and unambiguous meaning of these words was said to express the intention of Parliament.

[32] Sykes, J continued as follows: -

> *"However, as time has gone on it has come to be recognised that the process of interpretation of statutes is more nuanced than previously acknowledged. Language we now know only becomes better understood if the context if [sic] known."*

[33] At paragraph [21] Sykes, J quoted Lord Hoffman in **Investor Compensation Scheme v West Bromwich Building Society** [1998] 1 All ER 98, 115. There Lord Hoffman stated that the meaning of words is the business of dictionaries but the meaning of a provision is determined by examining the words themselves in the immediate context; then in the context of the whole statute; then the statute in the particular social and economic circumstance in which it was passed and, perhaps more important, the context in which it is now to be applied.

[34] In examining the aids to statutory interpretation, Sykes, J, at paragraph [33], stated as follows: -

> *"[33] The process of interpretation of statutes has evolved. It is now appreciated that, on the face of it, there is usually a range of meanings that may be applied to the words used. This does not mean that a judge is free to give any meaning he wishes to the statute…The meaning eventually given to the words ought to be one that the words can reasonably carry unless of course the context compels some very unusual meaning. What used to be called rules of interpretation are nothing more than guides to direct the thought process when interpreting a statute. The Latin maxims operate more as refined tools designed to see if the court's interpretation is reasonable."*

The correct interpretation of "any person" and "any area"

[35] In examining the first issue, Sykes, J indicated that the starting point should be the actual text of section 3 of the ELA. This provides that the Minister may grant a licence to 'any person' (companies as well as natural persons) or Local Authorities (Parish Councils) to supply electricity within 'any area'.

[36] At paragraph [63] Sykes, J noted that it is important to note what the section does not say in explicit terms. It does not say that one person cannot be granted an all island licence neither does it say that the Minister must grant multiple licences to a multiplicity of persons.

[37] Sykes, J found that section 3 of the ELA gives the Minister a discretion to grant to one person an all-island licence for generating, distributing and supplying electricity. He also found that the section also permits the Minister to grant more than one all island licence to generate, transmit and supply electricity and that the Minister may also grant more than one licence for a part of the island.

[38] This decision of Sykes, J was reviewed on appeal by the Court of Appeal. In delivering the decision of the Court, Brooks, JA, at paragraph [34], pronounced,

in relation to the wide interpretation of "area", that, in the absence of any limitation on the word "area", as used in the ELA, it would, therefore, not be incorrect to interpret the term "any area" as meaning any land space in the island. It would also not be incorrect to state that that land space may be the entire island. Thus, the Minister may, therefore, have properly granted a single licence for the supply of electricity to the entire island if he deemed fit.

[39] The decision of the Court of Appeal was reviewed by the Judicial Committee of the Privy Council. Lord Carnwath, in pronouncing the decision of the Board, noted at paragraph [16] that the language of section 3 of the ELA is clear. He added that there is nothing in the section or its context to require that expression to be used in anything other than its ordinary sense.

The relevance of context

[40] Brooks, JA, in **Special Sergeant Steven Watson v the Attorney General and Others** [2013] JMCA Civ 6, at paragraph [19] quoted and applied Lord Reid's statement on statutory interpretation in **Pinner v Everett** [1969] 3 All ER 257.

[41] At paragraph [19] Brooks, JA quoted the following section of Lord Reid's pronouncement: -

> *"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again* ***that it is wrong and dangerous to proceed by substituting some other words for the words of the statute****." (Emphasis supplied)*

[42] The authority of **Dennis Meadows** (supra) also reiterates this principle. Understanding the context of a statute is as important as understanding the ordinary meaning of any word that is used therein. Sykes, J, at paragraph [22], quoted Lord Steyn in **R (On the application of West Minister City Council) v National Asylum Support Service** [2002] 1 WLR 2956 at page 2958.

[43] Lord Steyn stated as follows: -

> *"The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. …in Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 WLR 896, 912-913, Lord Hoffmann made it crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction."*

The object and purpose of the LRIDA

[44] The leading case in Jamaica in this regard is **Village Resorts Limited v Industrial Disputes Tribunal** (1998) 35 JLR 292, which upheld the decision of the Supreme Court, under the name of **In re Grand Lido Hotel Negril**, Suit No. M-98, judgment delivered 15 May 1997.

[45] The learned President of the Court of Appeal, Rattray P, explained, at pages 299-300 as follows: -

> ***"****The need for justice in the development of law has tested the ingenuity of those who administer law to humanize the harshness of the common law by the development of the concept of equity. The legislators have made their own contribution by enacting laws to achieve that purpose, of which the Labour Relations and Industrial Disputes Act is an outstanding example. The law of employment provides clear evidence of a developing movement in this field from contract to status. For the majority of us in the Caribbean, the inheritors of a slave society, the movements have been cyclic, - first from the status of slave to the strictness of contract, and now to an accommodating coalescence of both status and contract, in which the contract is still very relevant though the rigidities of its enforcement have been ameliorated. To achieve this Parliament has legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes. …*

> *The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate of the Tribunal, if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law. …"*

[46] This pronouncement was most recently approved by the Judicial Committee of the Privy Council in **University of Technology, Jamaica v Industrial Disputes Tribunal and others** [2017] UKPC 22, at paragraph [23].

[47] Rattray P also indicated that the LRIDA provides a comprehensive regime for the settlement of industrial disputes in Jamaica. It is within the context of this regime that the Court must consider the issues that arise in the instant matter.

The role and functions of the IDT

[48] The establishment and functions of the IDT are set out in Part III of the LRIDA. Section 7 provides that the IDT is established in accordance with sections 8 and 10 and the Second Schedule. The chairman and two deputy chairmen are appointed by the Minister after consulting both with employers' and workers' organizations and must appear to him 'to have sufficient knowledge of, or experience in relation to, labour relations'. The other members are appointed from panels supplied to him by organizations representing employers and organizations representing workers. (See – Second Schedule, Paragraph 1 of the LRIDA).

[49] The IDT does not hear applications from individual workers. Rather, it considers industrial disputes that have been referred to it for settlement by the Minister. Thus, for example, under section 11 of the LRIDA, the Minister may refer any industrial dispute for settlement at the request of all parties to the dispute. Under section 11A, he may, on his own initiative, refer an industrial dispute to the IDT for settlement, if attempts have been made to settle it without success. Under section 11B, where an industrial dispute relates to disciplinary action taken

against a worker, the dispute cannot be referred unless the worker has lodged a complaint within twelve (12) months of the time when the disciplinary action became effective.

[50] Section 12 of the LRIDA deals with awards made by the IDT. The section provides that the IDT may, in any award made by it, set out the reasons for such award. It provides that an award made in respect of any industrial dispute referred to the tribunal for settlement shall be final and conclusive and that no proceedings shall be brought in any Court to impeach the validity thereof, except on a point of law.

[51] **Sections 12(3), 12(4)(c), 12(5)(c)(i), (ii), (iii)** and **(iv)** and **20** of the LRIDA are instructive. These sections read, in part, as follows: -

> *"12(3) The Tribunal may, in any award made by it, set out the reasons for such award if it thinks necessary or expedient so to do.*
>
> *(4) An award in respect of any industrial dispute referred to the Tribunal for settlement-*
>
> *(a)…*
> *(b)…*
> *(c) shall be final and conclusive and no proceedings shall be brought in any Court to impeach the validity thereof, except on a point of law.*
>
> *(5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal -*
>
> *(a) it may at any time after such reference –*
>
> *(i) …*
>
> *(ii) …*
>
> *(b) …*
>
> *(c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award-*
>
> *(i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv), order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;*

(ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;

(iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine;

(iv) shall, if in the case of a worker employed under a contract for personal service, whether oral or in writing, it finds that a dismissal was unjustifiable, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine, other than reinstatement,

and the employer shall comply with such order."

"20. Subject to the provisions of this Act the Tribunal and a Board [of Inquiry] may regulate their procedure and proceedings as they think fit."

[52] Three points about this statutory framework are noteworthy. First, the emphasis throughout is on the settlement of disputes, whether by negotiation or conciliation or a decision of the IDT, rather than upon the determination upon claims. Second, where the dispute relates to the dismissal of a worker, the IDT has a range of remedies, where "it finds that the dismissal was unjustifiable". Third, its award is "final and conclusive" and no proceedings can be brought to impeach it in a Court of Law "except on a point of law".

[53] Provided that there is no breach of the rules of natural justice, the IDT is not bound by the strict rules of evidence. (See - **R v The Industrial Disputes Tribunal, Ex-Parte Knox Educational Services Ltd** (1982) 19 JLR 223 at 231C, where Smith, CJ not only stated that the IDT may admit hearsay evidence but opined that "it was for the [IDT] to decide whether any of the documents produced before it had any value as evidence and was entitled to use such of them as it considered to be of value in arriving at its decision.")

[54] The IDT is however obliged to act reasonably, despite the wide ambit of its role. This is reasonableness in the sense of Wednesbury reasonableness. The concept of 'Wednesbury reasonableness' is derived from the decision of the Court of Appeal of England in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 233.

[55] Lord Greene, by way of summary, stated as follows: -

> "*The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them."*

[56] The Judicial Committee of the Privy Council, in **University of Technology, Jamaica v Industrial Disputes Tribunal and others** (supra), stated, at paragraph [30]: -

> "*There is, however, no reason to suppose that 'a point of law' within the meaning of section 12(4)(c) of LRIDA is any different from a point of law or error which will found a claim for certiorari. This of course includes the well-known grounds on which the decision of an inferior tribunal may be impeached, that is, illegality, procedural impropriety or unfairness, and irrationality or Wednesbury unreasonableness (see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223). This covers a lot of ground. But the reviewing function is quite distinct from the appellate function. The reviewing Court has to accept the findings of fact of the IDT, unless there is no basis for them. And the reviewing Court is not entitled to substitute its own view of the merits of the case for those of the IDT. If there has been an error of law, the case would normally have to be sent back for reconsideration by the IDT, unless there was only one decision open to it on a correct view of the law."*

The role of the court in judicial review

[57] The approach of the Court is by way of review and not of an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935.

[58] Roskill, LJ stated as follows: -

> *"...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."*

[59] In **Alcoa Minerals of Jamaica v The Industrial Disputes Tribunal et al** [2014] JMSC Civ 59**,** Edwards, J stated at paragraph [21]: -

> *"The role of the Court is to examine the transcript of proceedings to ensure that no error of law was made. It must accept the findings of fact made by the IDT, unless there was some illegality, irrationality and procedural impropriety in making such findings of fact. In that regard, even if this Court may very well have come to a different conclusion if faced with the same evidence and legal issues as the IDT, it is not for a Court of judicial review to substitute its judgment for that of the IDT and quash the Tribunal's decision or make any award, unless there was an error in law. (See the judgment of Carey JA, in* ***Hotel Four Seasons Ltd v The National Workers' Union*** *[1985] 22 JLR 201)."*

ANALYSIS

The ordinary meaning of the words used in section 8(4) of the LRIDA

[60] In its approach to its consideration of the proper interpretation to be applied to section 8(4) of the LRIDA, the Court has had regard to the legal principles stated

above. In examining the words of the section, the Court considers the clear and unambiguous, natural and ordinary meaning of the words “any one”, as well as the context in which they are used. The Court finds that the term “any”, as used in the section, is limited or qualified by the use of the word “one”.

Ambiguity

[61] The Court finds that the natural, ordinary meaning of the words “any one” create no ambiguity as to the intention of Parliament.

The internal context of the LRIDA

[62] The context of the LRIDA is also instructive. As a fact finder, the IDT has a duty to hear matters referred to it, at the end of which it is expected to make a decision. In arriving at a decision, the members of a division have a duty to consider the evidence adduced in relation to the dispute that they are hearing. This process includes observing the demeanour of witnesses, assessing their credibility as well as the credibility and reliability of the evidence that each witness gives, in an attempt to determine where the truth lies. It can reasonably be stated that Parliament must have intended that, in arriving at a decision, the members of a division are to be guided by these considerations. It is therefore imperative that the majority of the members of a division are present throughout the entirety of the hearing of a dispute. The importance of this cannot be sufficiently emphasised. To find that some other interpretation is to be applied to section 8(4) of the LRIDA would be to defeat the object and purpose of the statute.

The object and purpose of the LRIDA

[63] The object and purpose of the LRIDA is to provide a new regime with new rights, new obligations and new remedies in a dynamic social environment with respect to the employer/employee relationship at the workplace. The majority of persons in Caribbean societies are descendants of slaves and the inheritors of a slave society. It is to be recognized that there has been a movement from the status of

slaves to the strictness of contract, and now to an accommodating coalescence of both status and contract, in which the contract is still very relevant, though the rigidities of its enforcement have been ameliorated. In order to achieve this, Parliament has legislated a distinct environment, including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes.

[64] The Court finds that the words used in section 8(4) of the LRIDA are clear and unambiguous and are to be given their ordinary, English meaning. The section provides that "any one" member of a three-member division can be replaced before an award is made. The object and purpose of the LRIDA does not require a departure from the natural, ordinary English meaning being accorded to the words used in the section. The Court is therefore of the view that the proper interpretation to be applied to section 8(4) of the LRIDA is that, where any one (1) member of a three-member division dies or is incapacitated or ceases to be a member for any other reason, the statute allows the IDT to replace such a member.

[65] The Court is strengthened in this position by the fact that section 8(4) of the LRIDA continues to provide that 'another person' shall be selected in accordance with the provisions of paragraph (c) of subsection (2) to fill the 'vacancy'. The use of the singular words 'person' and 'vacancy' are also instructive.

[66] As a fact finder, the IDT has a duty to sit and hear matters referred to it before coming to its decision. Replacing two (2) members of a three-member division would amount to replacing the majority of the members of that division. Replacing the majority of the members of a three-member division during the course of the hearing of a dispute and before an award is made, is inherently unfair. This is made pellucid in the instant matter because the award made by the IDT was made by a majority of the members of the three-member division who did not have the benefit of observing the demeanour of the witnesses called on behalf of Milex or of hearing the evidence of those witnesses, both in examination-in-chief and in cross-examination. This is made worse by the fact

that the verbatim notes of the evidence adduced at the second hearing were not made available to the substituted members of the newly constituted division until 22 January 2018. This would be more than seven (7) months after the IDT had published its decision in relation to the dispute in the instant case. It is inconceivable that this could have been the intention of Parliament in the crafting of the LRIDA.

[67] Consequently, the Court finds that the proper interpretation to be applied to section 8(4) of the LRIDA does not allow the IDT to replace more than one (1) member of a three-member division, as a result of death, incapacity or for some other reason, after the division begins to deal with the industrial dispute in relation to which it was constituted and before an award is made. Thereafter, the proceedings of the division must commence de novo unless the parties agree in writing that those proceedings may be continued as if they had not been interrupted.

[68] By replacing two (2) members of the three-member division, the IDT acted ultra vires its statutory authority. Consequently, everything that was done subsequent to the replacement of the two (2) members of the three-member division would therefore be null and void. The parties could not therefore have consented to the hearing of the dispute being continued before the newly constituted division.

[69] The IDT must commence de novo the hearing of an industrial dispute where two (2) or more members of a three-member division have to be replaced, as a result of death, incapacity or for some other reason, after the division begins to deal with the industrial dispute in relation to which it was constituted and before an award is made.

SHOULD THE MATTER BE REMITTED TO THE IDT?

[70] **Part 56.16 (2)** of the Civil Procedure Rules, 2002 (“CPR”) gives the Court a discretion, on granting an order of certiorari, to remit the matter to the Court,

tribunal or authority concerned, with a direction to reconsider it in accordance with the findings of the Court.

[71] **Rule 56.16 (2)** of the CPR provides as follows: -

> *"Where the claim is for an order or writ of certiorari, the court may if satisfied that there are reasons for quashing the decision to which the claim relates -*
>
> *(a) direct that the proceedings be quashed on their removal to the court; and*
>
> *(b) may in addition remit the matter to the court, tribunal or authority concerned with a direction to reconsider it in accordance with the findings of the court."*

[72] The Court is vested with a wide discretion when making a quashing order to remit the issue to the decision-maker with a direction that the decision-maker reconsiders the matter in accordance with the findings of the Court. (See – **R (On the application of The Governing Body of the London Oratory School v The Schools Adjudicator and Ors** [2015] EWHC 1155 (Admin) and **R (On the application of Fatima Farhana Mohammed v The Secretary of State for the Home Department** [2012] EWHC 3091 (Admin)).

[73] It has been submitted on behalf of Milex that it will be severely prejudiced if the dispute in the instant matter is remitted to the IDT. This is due to the passage of time and the fact that its ability to advance its case would be hindered by the fact that its main witness, then General Manager for Operations, Mr. Jamie McMillan, left the company in October of 2017. His departure from the company's employ, it was submitted, was not on amicable terms. (See – Paragraph 4 of the Affidavit of Lovina Tulloch-Guthrie, filed on 11 January 2019.)

[74] Secondly, it was submitted that Milex would be prejudiced financially should the matter be remitted because it would be forced to incur further legal costs to advance its case again before the IDT.

[75] Thirdly, it was submitted that Milex is opposed to reappearing before a body that demonstrated such little regard for the rules of natural justice and fairness, principles that are at the very core of its functions. Were the matter to be remitted to the IDT, it was further submitted, there would be an appearance of bias. This is so because the IDT is on the losing end of litigation in the instant matter and would be required to make a determination in respect of the same dispute that gave rise to that litigation. (See – Paragraph 8 of the Affidavit of Lovina Tulloch-Guthrie, filed on 11 January 2019.)

[76] By way of response, Mr. Gordon stated that Milex has other employees who have knowledge of the matter and of the events that led to the dispute being referred to the IDT. These persons include Mr. McMillan's secretary. (See – Paragraph 7 of the Affidavit of Wesley Gordon in response to the Affidavit of Lovina Tulloch-Guthrie, filed on 25 January 2019.)

[77] It was submitted that there has been no inordinate delay in the instant matter as the IDT published its award in the instant matter on 7 June 2017. It was further submitted that the matter remains current before the Court because Milex sought judicial review of that decision.

[78] Mr. Gordon has stated that he has been prejudiced in that he has been unable to collect on the award made in his favour, is currently unemployed and continues to incur legal costs.

Delay

[79] The Court accepts the submissions made on Mr. Gordon's behalf that there has been no inordinate delay in this matter. The Court has had regard to the fact that the IDT published its award in relation to the dispute in the instant matter on 7 June 2017. The fact that one aspect of the instant matter is currently before the Court in 2019, by way of an application for judicial review, should not be viewed as a 'delay'. In fact, by bringing its application for judicial review, Milex simply seeks to avail itself of Administrative Law remedies that may be available to it.

This Court is of the view that no sanction should be applied to any of the parties on the basis of delay.

Witness's unavailability

[80] The Court has noted the evidence that, should the matter be remitted to the IDT, one of Milex's main witnesses would no longer be available to it. The Court observes however, that, the fact that Mr. McMillan is no longer employed to Milex, does not, without more, mean that he is unavailable for the purpose of a hearing before the IDT. The witness referred to is a competent and compellable witness. All sane adults are recognized by Law as having the capacity to give evidence and can be compelled so to do.

[81] It is also to be noted that section 17(1) of the LRIDA gives the IDT and a Board the power to summon any person to attend before the Tribunal or the Board and to give evidence or to produce any paper, book, record or document in the possession or under the control of such person. A summons under this section is to be in the form prescribed in the Third Schedule and may be served either personally or by registered post. (See – Section 17(2) and 17(3) of the LRIDA.)

[82] Section 18(1) of the LRIDA provides that any person summoned to attend and give evidence or to produce any paper, book, record or document before the Tribunal or a Board shall be bound to obey the summons served upon him and shall be entitled, in respect of such evidence or the disclosure of any communication or the production of any such paper, book, record or document, to the same right or privilege as he would have before a Court. (See – Section 18(1)(a) and (b) of the LRIDA.)

[83] Section 18(2)(a) of the LRIDA provides that any person who, without sufficient cause, fails or refuses to attend before the Tribunal or a Board in obedience to a summons under this Act, or fails or refuses to produce any paper, book, record or document which he was required by such summons to produce, shall be guilty of

an offence and shall be liable on summary conviction before a Parish Court Judge to a fine not exceeding Fifty Thousand Dollars.

[84] The Court has also had regard to the evidence that there are other persons, currently in the employ of Milex, who would be in a position to testify to the circumstances that gave rise to the dispute herein. This evidence has not been challenged by Milex.

[85] Mr. McMillan was one (1) of three (3) witnesses called on behalf of Milex during the hearings before the IDT. The other two (2) witnesses called were Mr. Frederick Derby and Mrs. Lovina Tulloch-Guthrie. (See – Exhibit "NS-M1 of the Affidavit of Nicola Smith-Marriott, filed on 13 February 2018.)

[86] Mr. McMillan testified that, in or around February 2015, he summoned Mr. Gordon to a meeting, which was also attended by Mr. Frederick Derby and Ms. Shanice McCarthy. He gave evidence of the shift on which Mr. Gordon was working at the material time and of the concerns that Milex had. Certainly, either Mr. Derby or Ms. McCarthy should be able to give this evidence on a rehearing of the dispute in the instant matter.

[87] Furthermore, the IDT is able to receive hearsay evidence and to rely on that evidence in arriving at its decision. Evidence of the admission of documents as exhibits, such as the Milex Security Services Limited Interview Form and the termination letter (in respect of Mr. Gordon) dated 12 February 2015, at the hearing of this dispute, can certainly be adduced at a rehearing.

[88] The Court has a duty to consider what is just and fair in all the circumstances of the instant case. Through no fault of Mr. Gordon, the award made by the IDT has had to be quashed. Should he be left without a remedy? In an effort to answer that question the Court must weigh the possible prejudice to Milex vis a´ vis the possible prejudice to Mr. Gordon. This Court is of the view that the justice of this case demands that the dispute in the instant matter be remitted to the IDT for a

hearing to be commenced de novo and in accordance with the findings of the Court.

Appearance of bias

[89] Milex asserts that, should the matter be remitted to the IDT, there would be an appearance of bias. The submissions of Milex can be summarized as follows. Firstly, that the two (2) substituted members of the division signed off on the award made by the IDT without themselves having heard the evidence of the witnesses called on behalf of Milex. Secondly, that the two (2) substituted members of the division did not have the benefit of the verbatim notes of the evidence previously adduced and that there is no evidence that they read those notes of evidence before signing off on the award that was made. Thirdly, that the IDT, the 'losing party' in contentious litigation, would be required to hear the very dispute that gave rise to that litigation.

[90] This Court is of the view that there is no evidence before it that indicates that there would be presumed, apparent or actual bias on the part of the IDT, should the matter be remitted to it, for the hearing of the dispute to be commenced de novo. There is no evidence that a fair-minded and informed observer, considering the facts, would conclude that there is a real possibility that the tribunal is biased. A decision making body must not have a direct interest in the outcome of a decision or show actual bias or the real possibility of bias. Presumed bias relates to the first of these instances; the latter is referred to as apparent bias and actual bias is where the decision maker is influenced by partiality or prejudice. (See – **Ervin Moo Young and Debbian Dewar v Marshanee Cheddesingh and ZIP (103) FM Limited** [2017] JMSC COM 12 and **Porter v Magill** [2002] 2 AC 357.)

[91] In any event, this Court is of the view that any perceived bias can be cured by the Court simply making an Order that the dispute in the instant matter be remitted to the IDT for the hearing to be commenced de novo before a differently constituted division.

CONCLUSION

[92] By way of summary, the Court finds firstly, that, the proper interpretation to be applied to section 8(4) of the LRIDA does not allow the IDT to replace more than one (1) member of a three-member division, as a result of death, incapacity or for some other reason, after the division begins to deal with the industrial dispute in relation to which it was constituted and before an award is made. Thereafter, the proceedings of the division must commence de novo unless the parties agree in writing that those proceedings may be continued as if they had not been interrupted.

[93] Secondly, by replacing two (2) members of the three-member division, the IDT acted ultra vires its statutory authority. Consequently, everything that was done subsequent to the replacement of the two (2) members of the division would therefore be null and void. The parties could not therefore have consented to the hearing of the dispute being continued before the newly constituted division.

[94] Thirdly, the IDT must commence de novo the hearing of an industrial dispute where two (2) or more members of a three-member division have to be replaced, as a result of death, incapacity or for some other reason, after the division begins to deal with the industrial dispute in relation to which it was constituted and before an award is made.

[95] Finally, there is no evidence that there would be presumed, actual or a real possibility of, bias on the part of the IDT, should the matter be remitted to it, for the hearing of the dispute in the instant matter to be commenced de novo before a differently constituted division.

DISPOSITION

[96] It is hereby ordered that: -

(1) The proper interpretation to be applied to section 8(4) of the Labour Relations and Industrial Disputes Act does not allow the Industrial

Disputes Tribunal to replace more than one (1) member of a three-member division, as a result of death, incapacity or for some other reason, after the division begins to deal with the industrial dispute in relation to which it was constituted and before an award is made. Thereafter, the proceedings of the division must commence de novo unless the parties agree in writing that those proceedings may be continued as if they had not been interrupted;

(2) The Industrial Disputes Tribunal must commence de novo the hearing of an industrial dispute where two (2) or more members of a three-member division have to be replaced, as a result of death, incapacity or for some other reason, after the division begins to deal with the industrial dispute in relation to which it was constituted and before an award is made.

(3) The matter is remitted to the Industrial Disputes Tribunal for the hearing of the dispute to be commenced de novo before a differently constituted division and in accordance with the findings herein;

(4) The Claimant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.