[2021] JMSC Civ.166

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 04348

BETWEEN	**BRANCH DEVELOPMENTS LIMITED T/A IBEROSTAR ROSE HALL BEACH AND SPA RESORT**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**DEFENDANT**
AND	**JOHN JOHNSON**	**INTERESTED PARTY**

IN OPEN COURT

Mr. Gavin Goffe and Mr. Matthew Royal instructed by Myers, Fletcher & Gordon, Attorneys-at-Law for the Claimant

Ms. Kamau Ruddock instructed by the Director of State Proceedings for the Defendant

Ms. Bobbie-Ann Malcolm, instructed by Nigel Jones & Co., Attorneys-at-Law for the Party directly affected

Heard: October 11 & 14, 2021

Judicial Review – Whether industrial dispute existed at time of referral to Minister - Whether referral of dispute to IDT ultra vires - Labour Relations and Industrial Disputes Act, section 11A(1)(a)(i)

WINT-BLAIR, J.

[1] Pursuant to the grant of leave for judicial review, the claimant filed a fixed date claim form seeking the relief set out below:

1. An order of certiorari to quash the decision of the defendant to refer a dispute between the claimant and its former employee, Mr. John Johnson, to the Industrial Disputes Tribunal("IDT").

2. Costs

3. Such further and other relief as the court deems just.

Judicial Review

The court adopts the following statement as correctly reflecting the law: *"The power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of the public authorities in order to ensure that they act within their given powers. Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality."*[1]

Background

[2] Two preliminary points were dealt with before the hearing of evidence, the effective date of termination was agreed as January 23, 2013. Mr. Goffe also suggested that the dispute arose on April 24, 2013, however this may have been an error on the part of counsel at the time. The interested party Mr. John Johnson was absent from the hearing due to illness, he was not available for cross-examination. Counsel Mr. Goffe, did not believe his case would be prejudiced by the absence of Mr. John Johnson, thus the trial proceeded without his viva voce evidence.

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[1] Albert Fiadjoe, Commonwealth Caribbean Public Law 3rd ed. at p. 15.

[3] Mr. Johnson complained of unjustifiable dismissal in a letter to the Ministry of Labour and Social Security on April 24, 2013[2]. In that letter, he sets out that his services were terminated with immediate effect. The termination letter did not state that he was being terminated for poor work performance, rather he said he was informed of this. Mr. Johnson does not say by what means he had been so informed. He also relies on a performance appraisal of February 5, 2013, which was conducted thirteen days after the date of termination. The termination letter has not been exhibited to the affidavit of Mr. Johnson. A copy was later produced to the court and has been marked Exhibit 2. He goes on to cite breaches of the employee handbook and that his dismissal is in breach of the principles of natural justice.

[4] The evidence on affidavit from Mr. G. Anthony Ferguson, Human Resource Manager, for the claimant, discloses that Mr. Johnson was terminated for poor performance. Two issues arise for determination.

[5] Issues

a) Was there an industrial dispute within the meaning of the Labour Relations and Industrial Disputes Acts “LRIDA”, at the time of the referral by the Minister to the Industrial Dispute Tribunal “IDT”.

b) If there was a dispute, did the Minister act ultra vires the LRIDA in referring a dispute to the IDT after an inordinate delay between the time the dispute arose and the date of the referral.

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[2] Exhibit to the affidavit of John Johnson at JJ2.

[6] On the issue as to whether there was an industrial dispute, the agreed evidence is that John Johnson, the interested party, was a non-unionized worker employed to the claimant.

[7] The claimant's position as regards attempts at conciliation is that both parties attended three such meetings on June 17, 2013, July 6, 2013 and January 17, 2014. The matter was not resolved and there was no future communication between the parties after January 14, 2014.[3]

[8] Mr. Johnson in his affidavit, says that he was employed as an electrician by the claimant on a six-month contract. His contract was renewed and the renewal of the last employment contract was on or about September 20, 2011 for a further six months. The contract was not further renewed. On or about May 23, 2012, he was transferred to Iberostar Suites and given a new position which was room technician. On January 23, 2013 he was dismissed from his employment and given a termination letter which did not state the basis for termination[4]. Mr. Johnson agrees that there was no further communication between the parties after January 14, 2014. However, he disagrees with the number of meetings held in an effort to resolve the matter, he adds a fourth meeting on February 26, 2015[5]. Mr. Johnson exhibited at JJ1, a letter from his counsel to the Ministry of Labour and Social Security dated December 18, 2013. This letter indicated that the parties had failed to arrive at a settlement and that they had been unable to convene a further conciliation meeting, due to the lack of a positive response from the claimant's attorneys as to a convenient date.

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[3]Affidavit of G. Anthony Ferguson filed December 27, 2018 at para.6

[4] Affidavit of John Johnson filed on February 1, 2019, para. 5

[5]Affidavit of John Johnson filed on February 1, 2019, para.7

[9] In a letter exhibited at JJ3, counsel for Mr. Johnson in a letter dated February 17, 2017, addressed to Mr. Michael Kennedy, Chief Director, Industrial Relations, Ministry of Labour and Social Security, referred to his letter of complainant (JJ2, dated April 23, 2013) and to a Ms. Tameika McHayle of the Ministry. The letter from counsel indicated that Ms. McHayle had recommended that the matter be referred to the Industrial Disputes Tribunal ("IDT"). Mr. Johnson's counsel sought to enquire as to whether the matter had been so referred.[6]

[10] An affidavit in answer from Tameika McHayle was filed by the Director of State Proceedings on February 28, 2019. The affiant is a Conciliation Officer in the Industrial Relations Department, Ministry of Labour and Social Security. She was charged with convening and chairing meetings in respect of the dispute between the claimant and John Johnson[7]. She stated that initial conciliation meeting was held on June 17, 2013 and no settlement was reached.

[11] In paragraph 8, Ms. McHayle says conciliation meetings were held on July 26, 2013 and January 17, 2014. In cross-examination, Ms. McHayle said that on September 18, 2014, she had made a recommendation to Mr. Michael Kennedy that the dispute be referred to the IDT. The file was instead returned to her for further attempts at resolution of the dispute; the dispute remained unresolved. There was another conciliation meeting on February 26, 2015.

[12] Attached to the affidavit of Ms. McHayle is an email dated March 11, 2015[8]. It refers to a telephone conversation between Ms. McHayle and Mr. Gavin Goffe, counsel for the claimant. Ms. McHayle attempted to convene a conciliation

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[6] JJ3

[7] Affidavit of Tameika McHayle, filed on February 28, 2019 at para. 4

[8] TM3

meeting on March 31, 2015 in respect of three persons, with the meeting in respect of Mr. John Johnson scheduled for the same date at 1:00pm. Mr. Goffe responded saying that he "*could not convince his client to return to discuss John Johnson."*[9]

[13] Ms. McHayle replied on March 12, 2015, saying that she would be discussing the claimant's response with her Principal and would be in touch shortly. On March 16, 2015, Ms. McHayle sent another email to Mr. Goffe which stated that, if the claimant remained resolute, then then the matter would be referred to the IDT. She attempted to convene a meeting regarding Mr. Johnson on the date she had earlier proposed which was March 31, 2015. This time, she tried changing the time of the meeting to 2:00pm. There is no indication as to whether this meeting was held or whether counsel for Mr. Johnson was contacted. There is nothing in the affidavit of Mr. Johnson about these unilateral discussions. Counsel for Mr. Johnson wrote letters dated February 21, 2017 and March 23, 2017 to the Ministry enquiring whether there had been a referral to the IDT. [10]

[14] The Ministry responded on March 28, 2017 to letters dated February 21 and March 23, 2017 from counsel for Mr. Johnson. The response of the Ministry was that it was currently *"investigating the status of the matter in order to properly address your concerns in a wholesome manner."*[11]. This was also the date that Ms. McHayle said in cross-examination, was the date on which she had sent the file to Kingston with her second recommendation of even date, that the dispute be referred to the IDT.

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[9] para. 9

[10] JJ4

[11] JJ5

[15] In an email dated April 21, 2017, Ms. McHayle attempted to convene yet another conciliation meeting to be scheduled for May 5, 2017 at 3:00pm. Counsel for the claimant could not accommodate "*3 meetings within the revised time period*". He suggested May 25, 2017, then went on to state in the email to Ms. McHayle that in his view, *this matter was far too old to still be considered an industrial dispute."* The response of counsel for Mr. Johnson has not been exhibited. There is nothing in the affidavit of Mr. Johnson to suggest that his counsel was aware of the communication between Ms. McHayle and Mr. Goffe regarding conciliation meetings nor of this opinion proffered by counsel for the claimant.

[16] In an email of May 11, 2017[12] between Ms. McHayle and counsel for the parties, there was an attempt to convene one more conciliation meeting to be scheduled for May 19, 2017 at 3:00pm at the Ministry's office in Montego Bay, St. James. She said in her affidavit that both counsel for the parties indicated that the proposed date was convenient for them. However, she withdrew this paragraph in her affidavit in cross-examination by saying that the parties had not agreed on a time to meet and as a result that proposed meeting was not held. In paragraph 14, Ms. McHayle stated that she received a telephone call from counsel for the claimant on January. 15, 2018 seeking an update. She goes no further.

[17] On August 20, 2018, the Chief Director, Industrial Relations for the Permanent Secretary in a letter to the Chairman of the IDT, referred the dispute between the parties to the IDT pursuant to section 11A(1)(a)(i) of the LRIDA.[13]

[18] In cross-examination, Ms. McHayle said that she had made a recommendation that the matter be referred to the IDT on two separate occasions. The first was in

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[12] TM7

[13] TM8

2014 and the file was sent back to her for further efforts at settling the dispute to be made. This is not in her affidavit. She said she attempted conciliation and sent a second recommendation on March 28, 2017. This is also not in her affidavit. She tried to convene a conciliation meeting in May of 2017 which failed and did no further work on the file. She also sent the file to the Head Office in Kingston, from her office in Montego Bay with the second recommendation. The file remained in the Kingston office from March 28, 2017 to August 2018. This statement is also not in her affidavit. In court Ms. McHayle was allowed to refer to the file concerning this dispute and this explains the greater detail in her viva voce evidence.

[19] Ms. McHayle agreed that this was one of the longest disputes in the Ministry. It had been put to her that in the Ministry of Labour and Social Security's annual performance report there was an average time of nine months for the settlement of disputes. Ms. McHayle knew nothing of that suggestion and responded saying that in her experience, the average time for the disposal of disputes was 1 ½ to 2 years and quipped: "*now you're saying we must be held to nine months, I wonder how we are going to get you to Montego Bay?"* This bit of evidence will turn out to be of some note later on.

[20] The parties disagree on whether an industrial dispute existed at the time of this referral. Section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act ("LRIDA") provides:

[21] *(1) "Notwithstanding the provisions of section 9,10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative -*

> *(a) refer the dispute to the Tribunal for settlement -*
>
> > *(i) If he is satisfied that attempts were made without success, to settle the dispute by such other means as were available to the parties;*

[22] There must be a sufficient factual foundation in order for the Minister to have lawfully exercised her discretion. The court has to first decide whether there was an industrial dispute within the meaning of section 2(b) of the LRIDA, into which Mr. Johnson falls as a non-unionized worker who is aggrieved about the termination of his contract with the claimant. The section provides:

> *"industrial dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, and -*
>
> ….
>
> *(b) in the case of workers who are not members of any trade union having bargaining rights, being a dispute relating wholly to one or more of the following:*
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> *(i) the physical conditions in which any such worker is required to work;*
>
> *(ii) the termination or suspension of employment of any such worker; or*
>
> *(iii) any matter affecting the rights and duties of any employer or organization representing employers or any worker or organization representing workers."*

[23] The claimant argues that that there has been an inordinate delay between the time the dispute arose and the date of the referral by the Minister. Counsel for the claimant submitted in writing, that the Minister acted ultra vires in that she referred the alleged dispute to the IDT in excess of five years after the dispute arose. Therefore, there was no dispute at the time of the referral.

[24] On the first issue, the court must decide whether or not there was an industrial dispute as this is the condition precedent to the Minister's power to refer the matter to the IDT.

[25] The claimant submits that industrial dispute is defined in the LRIDA at section 2 but the word 'dispute' is not defined in the case of non-unionized workers. Therefore, the Minister ought to have satisfied herself that there was a dispute in existence at the time of the referral.

[26] This court finds that there is no magic in the word dispute, it should be given its ordinary, grammatical meaning, see **Jamaica Police Co-operative Credit Union Society v The Minister of Labour and Social Security**[14] for the meaning of dispute and the **Jamaica Public Service Company Limited v Dennis Meadows et al**[15] for the approach to statutory interpretation.

[27] The word dispute having been defined, it applies with as much vigour to any category of worker. The court will now determine when the industrial dispute began, as both sides agree and so does this court, that this was just such a dispute. The case of **R v Industrial Dispute Tribunal and the Honourable Minister of Labour ex parte Wonards Radio Engineering Limited**[16] was cited by counsel for the defendant in the instant case. In **Wonards** the court held that the operative date at which it must be decided whether or not a person is a worker under the (LRIDA) for the purposes of a dispute must be the date the dispute arose and not the date when the reference was made by the Minister. The court disagreed with the contention that the provisions of section 11A of the LRIDA had not been

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[14] [2019] JMSC Civ. 67at para. 12

[15] [2015] JMCA Civ. 1 at paras. 53-54

[16] (1985) 22 JLR 65

complied with and therefore the reference was bad. It had been argued that the dispute had arisen some twenty-one months before the reference therefore, it could not properly be said that an industrial dispute was in existence in any undertaking and it should be have been settled expeditiously as was then required by section 11A(1) of the Act. The submission went further to advance the position that the failure of the Minister to comply with section 11A(1)(a) was fatal to the reference.

[28] The submissions in **Wonards** are similar to those being made by the claimant in the instant case. In **Wonards**, the workers had taken industrial action on December 18, 1981 regarding the non-payment of a Christmas bonus and the reference by the Minister was made on October 4, 1983. The court in Wonards found that an industrial dispute arose on December 18, 1981.

[29] Counsel for the claimant sought to distinguish **Wonards** in that, the fact situation showed an active industrial dispute, and there was an accounting for the delay in referring the matter, which is absent in the case at bar. Counsel for the defendant conceded, that indeed there was delay in the instant case and that this was undesirable. She chided the defendant saying this ought not to be the position in the future. Nevertheless, Ms Ruddock submitted that, delay was not fatal to the referral as there was in existence an industrial dispute within the meaning of the LRIDA. She argued that there was a factual foundation upon which the Minister could have lawfully exercised her discretion in making the reference.

[30] In **Wonards,** the court did not comment on the delay of twenty-one months and found that there was an industrial dispute, as the decision of the Minister was grounded in facts which the court upon review found to have been established.

[31] The delay between the date of the dispute and the referral by the Minister has been addressed by the claimant by the submission that the IDT was established to provide a speedy resolution to industrial disputes. The LRIDA, it was contended, imposes a twelve month limitation period for the lodging of complaints to the

Minster.[17] The IDT is to hand down awards within twenty-one days after a dispute has been referred to it.[18]. On this basis, the claimant contends that the LRIDA and the IDT are to be viewed as time-sensitive in terms of dealing with matters before both the Minister and the IDT. Counsel cited no authority for this submission. He based his argument on the view that delay by the Minister in making the referral would go against commercial good sense, in that the operations of an employer could be crippled by having to compensate a successful employee for many years of delay caused by the Minister's inaction. Inaction means the complaint is dead, it ought not to be resurrected.

[32] In support of this submission, the claimant cited **Jamaica Infrastructure Operators Limited v Pearnel Charles, Minister of Labour and Social Security**[19]. In this case, G. Brown, J held that a delay of two years meant that the dispute had ended as the Minister had taken no steps to refer the matter to the IDT. Brown, J cited **Cremo Limited v Minister of Labour, Social Security and Sport**[20] in which the ex-employee had been dismissed some two and a half years earlier and the court found that there was no industrial dispute as per the LRIDA. The **Cremo** case was interpreted in accordance with the judgment of the Full Court in **R v Minister of Labour and Employment, The Industrial Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins ex parte West Indies Yeast Co.**

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[17] section 11B

[18] section 12(1)

[19][2015] JMCA Civ. 1

[20] Suit. No. M. 122 of 1998

Ltd[21]. However, the law has moved on since **ex parte West Indies Yeast** and **Cremo** were decided.

[33] The LRIDA was amended on the 6th of June, 1978 to add section 11A(1)by way of the Labour Relations and Industrial Disputes (Amendment)Act. By section 2 of the Act of 1978, section 11A-(1) provided:

> *"Notwithstanding the provisions of sections 9, 10 and 11 where the Minister is satisfied that an industrial dispute exists in any undertaking* ***and should be settled expeditiously****, he may on his own initiative – (emphasis mine)*
>
> *(a) refer the dispute to the Tribunal for settlement if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties; or"*
>
> …

[34] The Act was amended several more times with the last amendment to section 11A proclaimed into force on March 23, 2010 by an Act to be cited as the Labour Relations and Industrial Disputes (Amendment) Act, 2010, which shall be read and construed as one with the Labour Relations and Industrial Disputes Act (hereinafter referred to as the principal Act) and all of the amendments thereto.

[35] In the LRIDA before the amendment in 2010, section 11A provided that the Minister may on his own initiative refer an industrial dispute to the IDT if he is satisfied that the dispute "*should be settled expeditiously*", those words were left out of the amended section 11A(1)(a)(i) and instead paragraph 11A(1)(a)(ii) now provides:

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[21] (1985) 22 J.L.R. 407

…

"Or

(ii) if, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do."

[36] Pursuant to the amendment of section 11A in 2010 it would seem to suggest that referrals are no longer conditioned upon expediency, unless the dispute and its surrounding circumstances meet the criteria of urgency or an exceptional situation. The court notes that the amendment of 2010 did not remove the criterion of expediency from the discretion of the Minister and it remains within the discretion of the Minister to categorize disputes.

[37] This amendment would also seem to suggest that the Minister may still give directions to the parties as provided by section 11A(1)(b) and that the referral to the IDT ought to be made at the end of the conciliation process, as a last resort. The Minister's role remains unchanged save for the additional factor of encouraging conciliation and resolution, rather than referral unless there are circumstances which lead to a decision favouring expediency

[38] Cases decided before 2010 which reviewed the powers of the Minister under section 11 would have taken the words "should be settled expeditiously" into account. This court views the amended section as meaning that there are some disputes which ought to be viewed as requiring a speedy resolution by a tribunal duly constituted to hear the matter. This is left to the discretion of the Minister. The converse is also true, the section gives the Minister the discretion to engage the conciliation process in an attempt to resolve an industrial dispute. There is therefore no timeline prescribed by the legislation.

[39] The case of **Jamaica Infrastructure Operators Limited v The Honourable Pearnel Charles Minister of Labour and Social Security ("JIPO")** [22]has been cited by all of the parties. In sum, the applicant who operates Highway 2000 decided to outsource certain aspects of its business. As a result of this decision, some employees were made redundant. These employees included unionized members and objections were raised by the UAWU about the redundancy exercise. The union objected on the basis that it had not been consulted. Meetings and correspondence between the applicant and the UAWU were fruitless. The first set of redundancy exercises commenced in June 8, 2008 and ended in October 28, 2008. A second such exercise commenced in June 2009. In April 2008, the UAWU wrote to the Minister. Correspondence and meetings between the applicant and the Ministry again bore no fruit. In June 2009 there was a restructuring exercise by JIPO which led to another dispute with the union. In September 2009, the union wrote to the Ministry of Labour requesting its intervention.

[40] The learned judge, G. Brown, J, in deciding the very issues in the case at bar, heard submissions from the applicant who argued that the reference came almost two years after the dispute with the parties, when in fact no dispute existed. The subject of the alleged dispute which was the first redundancy exercise had been concluded in October 2008. The minister therefore acted ultra vires. The respondent argued that the decision was correct in law as it was the respondent who believed that there was an industrial dispute and the reference was based on the power given to the Minister under the LRIDA. The court held that the Act is clear in that it gives the Minister the power to refer a matter to the IDT where there is an industrial dispute.

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[22] [2018] JMSC Civ. 103

[41] G. Brown, J said:

> *"The first hurdle to cross is that there needs to be an industrial dispute. There was no industrial dispute in September 2010 in respect of the 2008 redundancy exercise because for all intents and purposes that industrial dispute had ended from the year 2008 and there were no steps taken by the Ministry or the UAWU when the redundancy exercise had commenced at the time to refer the matter to the IDT…. The second redundancy exercise was correctly referred to the IDT. "The unfortunate delay on the Minister's part may be a contributory factor as to why the redundancy exercise was not addressed earlier by the IDT. It is also my view that despite the delay on the Minister's part in referring the matter, an industrial dispute nevertheless existed. (See R v Industrial Disputes Tribunal Alcan Jamaica Company, Alumina Partners of Jamaica, Alcoa Minerals of Jamaica Incorporated, Kaiser Bauxite Company, Reynolds Jamaica Mines Ltd. Ex parte the National Workers Union Ltd.)"* [23]

[42] The learned judge found that the dispute began in 2008 and that the reference was made in 2010, he referred to delay on the part of the Minister, however the delay was not the reason given by the court for finding that there was no industrial dispute, the court found that the end of the redundancy exercise had rendered the dispute at an end. There had been correspondence and meetings between the parties as well as between the applicant and the ministry. The court found that the ministry had not dealt adequately with the dispute in that there were no steps taken by either the Ministry or the union at the time the redundancy exercise had begun to refer the matter to the IDT, the redundancy exercise ended and the Minister still had not made the referral. Though the dispute had not been settled, the court found that no industrial dispute existed at the time of the referral in 2010 in respect

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[23] (1981) 18 JLR 293

of the first dispute only. In **JIPO,** G. Brown, J held that delay is a factor to be considered, however it did not render the referral fatal.

[43] Both sides have also relied on the case of **Jamaica Police Co-operative Credit Union Society v The Ministry of Labour and Social Security**[24] in which the learned trial judge, Brown-Beckford-J, found that on the material placed before the Minister, the interested parties did not raise a dispute at the time the redundancy exercise took place. A dispute only arose after they saw an advertisement which they believed to be for similar positions in the claimant company some eleven months after they had been made redundant. They then wrote to the Ministry of Labour. The court found that the dispute commenced at a time far removed from the acts which gave rise to it. The principle of finality in litigation would suggest that the interested parties could not initiate an industrial dispute after the effluxion of so much time. The court took no final position on the point of inaction. The case was ultimately decided on the failure of the Minister to consider material relevant to the question of waiver in determining whether an industrial dispute existed. This case did not assist the claimant beyond this court adopting the definition of the word 'dispute' set out therein.

[44] In the case of **Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security**[25], the learned trial judge, D. Fraser, J found that the dismissal of workers on December 24, 2014 had been fully cured by reinstatements and were no longer a basis for maintaining that an industrial dispute existed. The complaints which ought to have been made was for dismissals of February 12 and March 5, 2015, however none were forthcoming. This case is distinguishable on its facts.

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[24] [2019] JMSC Civ. 67

[25] [2018] JMSC Civ.103

There was no dispute in existence in law or in fact which could have been referred to the Minister.

[45] Based on the authorities cited to the court, the following criteria have presented themselves: in order for an industrial dispute to exist, actions taken by the parties, actions taken by the ministry officials, actions taken by the Minister and delay are all factors to be considered by the court. As we have seen from the cases, 11 months of inaction, the acceptance of cheques without demur and other employment sought on the part of the interested parties, constituted a waiver of their rights to contest their dismissal and should have been considered by the Minister. These are also factors for the consideration of a court on judicial review. The failure to properly deal with a dispute submitted to the ministry is another such factor.

Analysis

[46] In the case at bar, in order to determine what was placed before the Minister, the facts found in the matter will be revisited in sequence. The date of termination and therefore the date the dispute first arose was January 23, 2013. The complaint to the Ministry, was dated April 24, 2013. There were conciliation meetings on June 13, 2013, July 26, 2013, January 17, 2014. The first recommendation by Ms. McHayle, was on September 18, 2014. The file was returned to her to further engage the parties. There was a conciliation meeting on February 26, 2015 and further attempts on both March 11 and 16, 2015 by Ms. McHayle to convene a meeting on March 31, 2015. That meeting was not held as the claimant refused to attend. There was no action from any quarter until counsel for Mr. Johnson wrote letters to the Ministry seeking to find out the status of the matter on February 21, 2017 and March 23, 2017. Ms. McHayle recommended that the matter be referred to the IDT but the file was again returned to her. She attempted to convene a conciliation meeting on May 11, 2017 to be held on May 19, 2017, that meeting was not held and so no settlement was reached. The referral to the IDT

was made by Mr. Michael Kennedy for the Permanent Secretary on August 20, 2018.

[47] That there remained a continuing dispute is demonstrated by the parties agreeing to return the table on May 19, 2017 but finding no convenient date to do so. Counsel Mr. Goffe appeared in this matter as counsel for the claimant and therefore could not also give evidence as a witness. Suffice it to say that it was the conduct of the claimant which was responsible for the delay between March 11, 2015 and May 11, 2017, some twenty-six months. It was also indicated earlier, that Mr. Johnson had exhibited at JJ1, a letter to the Ministry of Labour and Social Security dated December 18, 2013 stating that the parties had failed to arrive at a settlement and had been unable to convene a further meeting due to the lack of a positive response from the claimant's attorneys as to a convenient date. This was not challenged by the claimant.

[48] The claimant had taken the intractable position of not returning to the table and until that position changed the dispute was at a standstill. Ms. McHayle expressed her frustration with the conduct of the claimant when she said in cross-examination "*now you're saying we must be held to nine months, I wonder how we are going to get you to Montego Bay?*" Having indicated that position, there was a further attempt at conciliation. The matter was then referred by the Minister some sixteen months later.

[49] While the claimant was refusing to attend any further meetings, Mr. Johnson also did nothing. The Minister also did nothing. Each of the parties sat on their hands for a period of twenty-six months. The period between the last recommendation by Ms. McHayle and the referral is 17 months which falls within the average disposal period for disputes brought to the ministry of 1½ to 2 years which was her evidence in cross-examination.

[50] The claimant in all these circumstances is hard-pressed to submit that there was no industrial dispute based on delay or the age of the matter. The dispute clearly

existed as an industrial dispute which was not resolved up to the last attempt at a conciliation meeting on May 19, 2017 which was to be set up but was not held. There would have been nothing to agree to meet about had there been no dispute. Would a delay of 10 months between the last conciliation meeting and the referral to the IDT have extinguished the dispute? There was no evidence placed before this court that delay would have had that effect within the context of this dispute.

[51] Section 11A(1)(a)(i) requires the Minister to be satisfied that there had been unsuccessful attempts to settle the dispute by such other means, this speaks to the many and varied conciliation meetings. There were six such meetings. This dispute could not have fallen into the category of expedient matters given the posture of the claimant. No correspondence was exhibited by the claimant demonstrating any interest in having the matter resolved whether speedily or at all. Ms. McHayle on behalf of the defendant, employed extraordinary effort in trying to settle the matter but to no avail.

[52] It is now convenient to deal with the fixed date claim form filed on December 27, 2018 at this point, the claim was grounded as follows:

1. *Any industrial dispute between the claimant and Mr. Johnson has long ceased to exist due to the inordinate delay of the Minister in exercising her discretion to refer the matter to the IDT between April 24, 2013 when the alleged dispute was lodged with the Minister of Labour by Mr. Johnson on June 17, 2013, when the parties first attended conciliatory meetings at the Ministry and August 20, 2018, the date of the purported referral.*

2. *The existence of an industrial dispute in the undertaking of Branch Developments is a condition precedent under section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act ("LRIDA") for the Minister of Labour and Social Security to refer the matter to the Industrial Disputes Tribunal ("IDT").*

3. *The Minister therefore fell into the error of illegality by failing to understand that an industrial dispute as defined by the LRIDA did not exist at the time of the referral.*

4. *There are no alternative remedies available to the Claimant and the Fixed Date Claim form is not out of time.*

5. *The Claimant is directly affected by the decision of the Minister as the IDT has directed that it submit briefs and attend hearings.*

In respect of ground one, the framers of the legislation did not give the Minister a time frame within which to refer a dispute, and what is reasonable in the circumstances has to be viewed against the background of the conduct of the parties and the ministry staff. This ground fails for the reasons set out above.

On the matter of illegality, a decision is illegal if it:

> "*(a) contravenes or exceeds the terms of the power which authorises the making of the decision;*
>
> *(b) pursues an objective other than that for which the power to make the decision was conferred;*
>
> *(c) is not authorised by any power;*
>
> *(d) contravenes or fails to implement a public duty*."[26]

[53] The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power

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[26] De Smith's, Judicial Review, 6th ed., para 5-002

upon the decision maker[27]. Illegality arises where a decision-maker who must understand correctly, the law that regulates his or her decision-making power and must give effect to it fails to do so (Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service**[28]. Illegality also includes ultra vires acts and errors of law. Whether or not a decision is ultra vires depends upon the relevant primary or secondary legislation and its interpretation on the particular facts and circumstances of each case[29].

[54] There is also an obligation of candour on the Minister to set out the facts and the reasoning behind the decision-making process. (See **Tweed v Parades Commission for Northern Ireland**[30]. This duty to make full and fair disclosure should set out fully what they did and why, so far as is necessary to fully and fairly to meet the challenge made by the claimant[31]. This court finds that the affidavit of Ms. McHayle sets out the attempts at conciliation, the reasons why meetings which she attempted to convene could not be held and how she handled the file. There is no evidence from Mr. Michael Kennedy as to the basis for his decision. The court is therefore left with what was before Michael Kennedy without more. On the facts of this case, this court cannot find that the Minister's actions as delegated

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[27] supra, para 5-003

[28][1985] AC 374)

[29] Blackstone's Civil Practice, 2004, para.74.7, 74.8

[30][2007] 1 A.C. 650] at [31] and [54]

[31](See R v Lancashire CC Ex p. Huddleston [1986] 2 All E.R. 941, Sir John Donaldson at p. 945 and Purchas, L.J. in R. (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 at [50].

were ultra vires. Each dispute has to be viewed in context and on its particular facts.

[55] On grounds two and three, this court finds that an industrial dispute existed and therefore the Minister had material before her upon which she could have exercised her discretion. These grounds also fail.

The court makes the following orders in disposition of the matter:

1.The order of certiorari to quash the decision of the Defendant is refused.

2. No order as to costs.