[2021] JMSC Civ. 114

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2021 CV 00199

BETWEEN	**GUARDIAN LIFE LIMITED**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**DEFENDANT**

IN CHAMBERS- VIA ZOOM

Mr Kevin Powell and Miss Shanique Scott instructed by Hylton Powell for Applicant.

Miss Tamar Dickens instructed by the Director of State Proceedings for the Respondent.

Heard: May 19, 2021 and June 18, 2021

Application for leave to apply for Judicial Review - Test for granting leave - Whether threshold met.

PETTIGREW-COLLINS J.

BACKGROUND

[1] This application before the court is for leave to apply for judicial review. Outlined below are the circumstances which gave rise to the application.

[2] The applicant Guardian Life Limited (hereinafter referred to as Guardian Life or Guardian), dismissed Mrs. Catherine Allen who was permanently appointed to the company in the capacity of an Actuary. She was at the time of the termination of her employment, Vice President and Actuary. The termination was effected by letter dated August 15, 2018. In that letter, the basis of the termination was said to be redundancy.

Mrs. Allen was subsequently given another letter dated November 1,2018 which effectively changed the reason for her termination from redundancy to a dismissal for cause. The effective date of her dismissal remained the same as stated in her August 15, 2018 letter.

[3] As a result of her dismissal, Mrs. Allen filed a Fixed Date Claim Form in the Supreme Court seeking a number of reliefs. I have not been able to ascertain the original date of the filing of this claim but an Amended Fixed Date Claim Form was filed on the 7th of September 2018. It should be noted that this claim numbered 2018 CD 00503, was filed prior to Mrs. Allen receiving the letter which indicated that she was being terminated for cause. The orders sought in the amended claim are many and varied but it would be fair to say that the claim also challenged redundancy as being a proper basis for her termination.

[4] On the 12th of October 2018, Guardian Life filed Claim Form (No. 2018 CD 00566) against Mrs. Allen, claiming an injunction and damages for breach of contract, breach of fiduciary duties and breach of confidence. The allegations against Mrs. Allen were that she had access to confidential information in her capacity as Vice-president and Actuary and that she had emailed confidential information to her personal laptop as well as to unauthorized persons.

[5] On the 17th of December 2018, Mrs. Allen's Attorneys-at-Law Henlin Gibson-Henlin wrote to the Minister of Labour seeking his intervention to resolve the dispute between Mrs. Allen and Guardian Life. Between May 2019 and November 2020, the Ministry sought to have the parties engage in conciliation.

[6] By way of letter dated October 28, 2019, Guardian Life's Attorneys objected to Mrs. Allen's referral of the matter to the Minister. It would appear that the basis of that objection was the fact that there were already two claims before the Supreme Court; one brought by Mrs. Allen, and the other brought by Guardian Life.

[7] Mrs. Allen apparently took the view that the Minister was being dilatory in undertaking the conciliation process and on the 7th of January 2020, she filed claim

number SU 2020 CV 00031 seeking certain constitutional reliefs. In that claim, she sought damages for breach of her rights to: a fair hearing, to a fair hearing within a reasonable time and to a fair hearing by an independent and impartial tribunal. The basis of the claim she said, was the Minister's failure to, among other things, direct the adjudication of the claimant's dispute by the Industrial Dispute Tribunal (hereinafter referred to as the IDT) and his staying of the conciliation proceedings upon the application of Guardian Life.

[8] By way of letters dated January 15, 2020 and January 24, 2020, Guardian Life's Attorneys wrote to the Minister indicating that they were of the view that it would be prejudicial to continue with the conciliation meeting given the fact of the Court proceedings.

[9] The Minister of Labour wrote to the IDT by way of letter dated December 23, 2020, which letter was copied to Guardian Life and Mrs Allen's Attorneys at Law. The Minister referred the dispute to the IDT. The terms of the referral were as follows:

> *"To determine and settle the dispute between Guardian Life Limited on the one hand, and Catherine Allen on the other hand, over the termination of her employment."*

The referral was done pursuant to Section 11A (i)(a) (i) of the Labour Relations and Dispute Act (LRIDA).

[10] The IDT wrote to Guardian Life's Attorneys on the 4th of January 2021 advising them that the dispute with Mrs. Allen was referred by the Minister. It was in response to that information that Guardian Life filed its Notice of Application on the 21st of January 2021, seeking leave to apply for judicial review.

THE APPICATION

[11] The orders sought in that application are:

1. That the Applicant ("Guardian Life") be granted leave to apply for an order of certiorari quashing the decision made by the Respondent ("the Minister") and communicated to Guardian Life in letter dated December 23, 2020 ("the Referral Letter")

2. That the grant of leave to apply for judicial review shall operate as a stay of the Minister's decision in the Referral Letter pursuant to rule 56.4(9) of the Civil Procedure Rules ("the CPR"), pending the determination of the judicial review proceedings.

3. Alternatively, an interim declaration that Guardian Life is not legally obligated to comply with the Referral Letter.

4. Costs of this application be costs in the claim.

[12] The applicant has identified five separate grounds which it says are arguable grounds for judicial review with a realistic prospect of success. The applicant says further that it is entitled to succeed in its application on any one, or a combination of those grounds.

[13] The following are the grounds on which the applicant relies:

a) The Minister's decision was irrational and unlawful because he exercised his discretion under Section 11A(1)(a) of the Labour Relations and Industrial Disputes Act in circumstances where he could not have been satisfied that Guardian and Mrs. Allen made sufficient attempts to settle their industrial dispute.

b) The Minister's decision was irrational and unlawful in that on a proper interpretation of the Act and the Employment (Termination and Redundancy

Payments) Act the Minister has no jurisdiction to refer a dispute involving termination by reason of redundancy to the IDT.

c) The Minster acted irrationally to refer the dispute to the IDT when the same factual circumstances are already before the Supreme Court.

d) Further the Minster acted irrationally by referring the dispute to the IDT when the issue as to whether the referral should be made is pending in the Allen Constitutional Claim.

e) Guardian has a legitimate expectation that having decided to engage in the conciliation process, the Minister would allow the parties to engage in bona fide efforts at a settlement before referring the dispute to the Industrial Disputes Tribunal.

[14] Both parties filed skeleton submissions which were supplemented by oral submissions, for which this court is grateful.

THE ISSUE

[15] The sole issue which arises for consideration is whether the applicant has an arguable case with a realistic prospect of success.

DECISION

[16] Upon examination of the proposed grounds, for reasons which are detailed below, the applicant is not entitled to the orders sought.

THE LAW

[17] Rule 56.2(1) of the Civil Procedure Rules (CPR) permits an application for judicial review by any person, group or body, with sufficient interest in the subject matter. Therefore, a person who is adversely affected by the decision which is the subject of the application is included.

[18] Rule 56.3 directs that an applicant for judicial review should first seek leave to apply for judicial review. The burden of proof rests with the applicant to satisfy the court on a balance of probabilities that leave should be granted.

[19] I am mindful that at the leave stage, this court is only concerned with whether the threshold is met. It is not within the purview of this court in these proceedings, to delve into the details of the case. I will rely only on undisputed matters of fact and assertions from statements of case in other proceedings presently before this court which have been placed before me. Much of the information is contained in letters which passed between various parties in connection with a series of events which took place leading up to this application. Those letters were exhibited to the affidavits of the deponents in this application. The applicant's case was supported by the affidavit of Miss Ashman. The main deponent for the respondent is Mr Carl Samuda, Minister of Labour and Social Security, to whose affidavit others were exhibited. The evidence as far as I have discerned, is largely undisputed.

[20] In the seminal case of **Council of Civil Service Unions (CCSU) v Minister of State for the Civil Service** [1985] AC 374, HL, Lord Diplock stated three heads under which review may be sought. These are illegality, irrationality and procedural impropriety. At page 410, he said:

> *"By 'illegality' I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it….By 'irrationality' I mean…'Wednesbury' unreasonableness…I have described the third head as 'procedural impropriety' rather than a failure to observe the basic rules of natural justice."*

The applicant has in essence sought to impugn the Minister's decision under two of the three heads.

[21] The primary role of the court at this stage, is to ensure that actions which are frivolous and vexatious are sifted out and eliminated, so that leave is not granted where an action is without any arguable ground, having a realistic prospect of success. The oft cited case of **Sharma v Brown-Antoine and Others** (2006) 69 WIR 379, a decision of the Judicial Committee of the Privy Council sets out the test for granting leave to apply for judicial review. Lords Bingham and Walker had the following to say at page 387 J of the judgment:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy… Arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] QB 468, at para 62 in a passage applicable mutatis mutandis to arguability:*
>
> *…the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.*
>
> *It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen**; Matalulu v The Director of Public Prosecutions** [2003] 4 LRC 712 at 733.*

[22] In **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**, unreported case bearing claim number 2010 HCV 00474, Mangatal J. in explaining the concept of 'arguable ground with a realistic prospect of success', had the following to say:

> *"It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*

[23] The applicant has described the threshold to be met as 'relatively low'. The respondent has however asked the court to find that it is not a low threshold. She directed the court's attention to the case of **Angella Robinson v The Pharmacy Council of Jamaica** [2020] JMSC Civ. 171 at paragraphs 31 and 44. At paragraph 31, Wolfe Reece J adverted to the dictum of Mangatal J in the case **of Digicel (Jamaica) Limited v The Office of Utilities Regulations** [2012] JMSC Civ. 91 where Mangatal J observed that:

> *"It is part of the court's function when it dons its "review hat" to be astute to avoid applications being made by busybodies with hopeless, weak, misguided or trivial complaints. Public authorities need protection from unwarranted interference and plainly, the business of government could grind to a halt and good administration be adversely affected if the courts do not perform this sifting role efficiently and with care"*

[24] The court should always consider the question of the availability and suitability of alternative remedies as well as the question of delay. Neither party to this application has raised either issue. It may be said that this application was made without undue delay based on the undisputed fact that the information was communicated to the applicant by letter dated the 4th of January 2021 that the minister had referred the matter to the IDT. That date in my view, is the date on which the ground for the

application first arose, in accordance with the provision of rule 56.6 (1) of the CPR. The application for leave was filed on the 21st of January 2021, which is well within the three months of the date on which the grounds first arose, as stipulated by rule 56.6 (1). It has not been suggested that the applicant has an alternative remedy I am satisfied that there is none available.

[25] In explaining the concept of irrationality, Wolfe- Reece J in the case of **Angella Robinson** (supra) cited the case of **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3ALL ER 935**,** where it was said that:

> *'An administrative decision may be struck down where it is found that the decision is outrageous that no sensible person who applied his mind to the question would have arrived at the same decision"*

[26] In relation to the concept of lawfulness, I adopt the excerpt from Halsbury's Laws of England Volume 61 A, (2018) paragraph 11, provided by Ms. Dickens. It was there stated as follows:

> *"The courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. Such a body will not act lawfully if it acts ultra vires or outside the limits of its jurisdiction. The term 'jurisdiction' has been used by the courts in different senses. A body will lack jurisdiction in the narrow sense if it has no power to adjudicate upon the dispute, or to make the kind of decision or order, in question; it will lack jurisdiction in the wide sense if, having power to adjudicate upon the dispute, it abuses its power, acts in a matter which is procedurally irregular, or, in a Wednesbury sense, unreasonable, or commits any other error of law. In certain exceptional cases, the distinction between errors of law which go to jurisdiction in the narrow sense and other errors of law remain important.*
>
> *A body which acts without jurisdiction in the narrow or wide sense may also be described as acting outside its powers or ultra vires. If a body arrives at a decision which is within its jurisdiction in the narrow sense, and does not commit any of the errors which go to jurisdiction in the wide sense, the court will not quash its decision*

> *on an application for judicial review, even if it considers the decision to be wrong."*

[27] I shall now address each proposed ground as put forward by the applicant.

GROUND A

The Minister's decision was irrational and unlawful because he exercised his discretion under Section 11A(1)(a) of the Labour Relations and Industrial Disputes Act in circumstances where he could not have been satisfied that Guardian and Mrs. Allen made sufficient attempts to settle their industrial dispute.

[28] This ground was mounted on the basis that the Minister's power of referral under Section 11A (1) (a) (i) of LRIDA is exercisable where certain conditions have been met but that in the instant case, those conditions have not been met. These conditions are that:

1. There is an industrial dispute.
2. The Minister is satisfied that the parties attempted to settle the dispute without success or
3. There is an urgent or exceptional situation that would make it expedient for the Minister to make the referral.

[29] Mr. Powell further submitted that the Minister would be acting ultra vires if he purported to exercise his power under the section where the relevant conditions have not been met. Counsel went on to observe that according to the authors of Halsbury's Law of England (Volume 96 (2018) paragraph 349:

> *"A power to do something extends only to that thing; so, a purported exercise of the power that extends to a different thing is*

to that extent not an exercise of the power at all and in so far as it purports to depend on the power, it is void as being ultra vires…."

[30] Mr. Powell further stated that whilst Guardian Life's Attorneys were in correspondence with the ministry questioning whether the matter could properly be dealt with by the Minister under LRIDA, Guardian Life did not refuse to participate in conciliation meetings. The Minister did not allow the conciliation meetings to take place, but instead referred the matter to the IDT.

[31] Ms. Dickens countered those assertions by firstly asking the court to have regard to the definition of irrationality as highlighted **in Angella Robinson v The Pharmacy Council of Jamaica** [2020] JMSC Civ. 171. She noted that conciliation is a voluntary process and pointed the court to an explanation of the process as given by Ms. Andrea Marshall in her affidavit which is exhibited to the affidavit of Mr Samuda.

[32] Ms. Dickens noted that there was no requirement under the statute that conciliation be concluded. She posited that it was only necessary that attempts be made. She asked the court to say that the applicant refused to engage in the process and cannot now properly be heard to say that because conciliation was not concluded, the Minister had no authority to refer the matter. Counsel urged the court to say it was sufficient that the parties had the opportunity to meet and take steps to settle the matter. She directed the court to Mr Samuda's affidavit which chronicled the various conciliation meetings arranged between the parties and noted that the affidavit evidence shows that it was the applicant who refused to participate unless Mrs Allen elected between the Court and the IDT.

[33] She submitted that in all the circumstances, it could not be said that the Minister's decision was irrational or unlawful since the Minister is vested with the power to refer matters based on section 11A (1) (a) of LRIDA where there is an industrial dispute. She asserted that there was such a dispute within the meaning of section of the LRIDA, since Mrs. Allen's employment was terminated for cause. She urged the court to say that the Minister's power was exercised within his jurisdiction, and therefore lawfully in all the circumstances.

ANALYSIS AND CONCLUSION – GROUND A

[34] Section 11A (1) of LRIDA states:

> *"Notwithstanding the provisions of sections 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; 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;*
>
> *(b) ……"*

[35] It is not disputed that the Minister purported to act pursuant to section 11A (1) (a) (i) of LRIDA.

[36] Ms Andrea Marshall who is a Conciliation Officer at The Ministry of Labour and Social Security deponed to an affidavit in response to Mrs Allen's Constitutional claim. That affidavit was exhibited to Mr Samuda's affidavit in this matter. Miss Marshall outlined the steps and effort on the part of the Ministry to convene and conduct conciliation proceedings between Mrs Allen and Guardian Life. She stated that a meeting was held on the 20th of June 2019. Guardian was then represented by Myers Fletcher. A further conciliation meeting was held on July 25 2019. She stated that Guardian raised the issue of the pending Judicial review proceedings (claim SU2019 CV 02011 which has since been discontinued). Another conciliation meeting as scheduled for September 17, 2019. By then Guardian Life was represented by Brocard, Attorneys at Law who requested a postponement of that meeting. After further communication between the parties, Guardian Life's Attorneys at Law Brocard, wrote to the Ministry addressing a number of matters and declined the invitation to attend a conciliation meeting. Miss Marshall also stated that in a further letter dated January 15,

2020, Guardian's Attorneys maintained the position that the matter could not be dealt with by adjudication in the courts at the same time that attempts were being made to address the matter through the Ministry under the provisions of LRIDA.

[37] At paragraph 11 of his affidavit, Mr. Samuda said that in a January 24, 2020 letter from Guardian Life's Attorney Brocard to the Ministry, the Minister was asked to take no further steps in the conciliation and the conciliation proceedings as Guardian Life had been served with court proceedings. He stated further, that the date of September 22, 2020 was proposed for further conciliation meeting and there was no response from Brocard regarding the proposed meeting date. He noted that Mrs. Allen's Attorney-at-Law agreed to the date. Mr. Samuda went on to say that Brocard responded to a reminder sent by way of email, saying that the date proposed was not convenient and questioned the purpose of a conciliation meeting in the light of litigation that as far as Guardian was concerned, would/should cover any claim Mrs. Allen had against Guardian. At paragraph 17 of his affidavit, Mr. Samuda stated that the date of October 13, 2020 was agreed and a meeting was in fact convened. At that meeting, Guardian's representative again raised the issue of Mrs. Allen's existing claim. He noted that in effect Mrs. Allen was being asked to elect between court claim and IDT proceedings.

[38] Ms Ashman in her affidavit filed in support of the application, stated that by way of letter dated October 28, 2019, Guardian Life's Attorney objected to Mrs Allen's referral of the matter to the Ministry but that the Ministry disagreed and insisted on proceeding with the conciliation meeting. She observed that Mrs Allen filed her constitutional claim in January 2020 and that Guardian, by letters of the 15th and 24th of January 2020, again stated their objection, citing the view that the current court proceedings would render it prejudicial to continue with the conciliation meetings.

[39] Based on Ms Marshall's affidavit evidence, she had written to Henlin Gibson Henlin enquiring whether the parties had attempted to settle the dispute at the local level before contacting the Ministry of Labour. She said that Henlin Gibson Henlin had indicated that because of the hostile circumstances surrounding the dismissal of Mrs Allen, there was no access to local level consultation. (see paragraph 26 of her

affidavit). She stated however that Mrs Henlin thereafter indicated that she was willing to attempt local level discussions. (see paragraph 31). Within days, the Ministry was advised that Guardian had retained new Attorneys at Law. It seems also that there were new developments that exacerbated the hostile environment, as by then Mrs Allen had been advised that her life insurance and group health insurance had been cancelled by Guardian.

[40] There is an abundance of evidence to support the position that sufficient effort was made by the Ministry to address the dispute through conciliation. Ms Marshall explained in her affidavit that conciliation is a voluntary process. Without the cooperation and willingness of both sides to the dispute the process could not have taken place.

[41] Based on the evidence from both the applicant and the respondent on the matter, it is reasonable to say that the applicant's position was that it would not engage in the process of conciliation whilst Mrs Allen's claims were pending.

[42] It is therefore not open to the party who repeatedly expressed unwillingness and in essence declined to effectively participate in the process to say that the minister could not have been satisfied that attempts were made without success to settle the dispute by such other means as were available to the parties before referring the matter to the IDT as is required by the LRIDA. There is in my view no basis for saying that this ground is an arguable one with a realistic prospect of success.

GROUND B

The Minister's decision was irrational and unlawful in that on a proper interpretation of the Act and the Employment (Termination and Redundancy Payments) Act the Minister has no jurisdiction to refer a dispute involving termination by reason of redundancy to the IDT

[43] In support of this ground, Guardian Life argued that based on a proper interpretation of the provisions of the Employment, Termination and Redundancy Payment Act (ETRPA), termination on the basis of redundancy should not be classified as involving an industrial dispute. Counsel observed that Section 11A 1(a) (i) empowers the Minister to refer a dispute where there is an industrial dispute. Counsel referred the court to the definition of an industrial dispute as including the termination of employment. Counsel acknowledged that ordinarily, the definition is wide enough to include a termination by reason of redundancy, but says that since the ETRPA provides a self-contained scheme which governs a worker's rights where that worker is terminated by reason of redundancy, a termination by way of redundancy should not be included in the definition of an industrial dispute. Thus, the argument goes, since Mrs Allen's termination was by way of redundancy, the dispute between Guardian Life and Mrs. Allen should not be classified as an industrial dispute.

[44] Mr Powell referred the court to the decision in the case of **Chartermagnates Limited v The Industrial Disputes Tribunal and Norma Roberts** [2020] JMSC Civ. 6, a case which supports the position that the IDT does not have jurisdiction over redundancy matters and that therefore the Minister's referral of such matter to the IDT may be successfully challenged on the ground of absence of jurisdiction.

[45] The applicant's basis for saying that the termination was by way of redundancy and therefore the dispute is not an industrial dispute, is that Mrs. Allen's Attorneys' letter dated December 17, 2018 (exhibited to the affidavit to Mr. Samuda) to the Minister requesting the Minister's intervention, sought such intervention on the basis that Mrs. Allen was terminated on the basis of redundancy.

[46] Ms. Dickens on behalf of the respondent, responded to the applicant's assertions by asking the court to have full regard to the contents of the letter dated November 1, 2018 from Guardian Life under the hand of Mrs. Audrey Basanta-Henry to Mrs Allen, and which refers to letter dated October 18, 2018, from Guardian to Mrs. Allen. Ms Dickens pointed out that the letter of November 1, 2018 expressly stated that Mrs. Allen's employment was being terminated for cause. She said further that in any event there is an earlier decision of the Supreme Court, **Advanced Farm Technologies v The Minister of Social Security** [2019] JMSC Civ. 192 which runs counter to the decision in **Chartermagnetes** which clearly suggests that a dispute involving termination by way of redundancy may give rise to an industrial dispute.

ANALYSIS AND CONCLUSION – GROUND B

[47] Section 2 of the LRIDA defines an industrial dispute in part:

> *"industrial dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, and-*
>
> *(a) "in the case of workers who are not members of any trade union having bargaining rights, being a dispute relating ….*
>
> *(i)…*
>
> *(ii) to a termination or suspension of employment of any such worker".*

[48] It is patently obvious that Ms. Dickens is correct regarding the basis on which Mrs. Allen's employment was terminated by Guardian Life. Guardian's letter to Mrs. Allen dated August 15, 2018, stated that she was being made redundant because the company had taken a decision to outsource the work which she had been employed to do. The subsequent letter of October 2018 advised Mrs. Allen that on the basis that the Mintz Group indicated that she had shared the company's confidential information with

external parties, she had breached the terms of her unemployment as well as committing other breached and that such breaches are grounds for summary dismissal and therefore the company was considering terminating her employment for cause. The letter of November 1, 2018 from Guardian advised Mrs. Allen that having considered the available evidence and having taken legal advice, the company had taken a decision to terminate her employment summarily and for cause. It is quite remarkable that it was also stated in the November 1 letter, that the effective date of her termination would remain August 15, 2018.

[49] This final letter of November 1, 2018 must be taken to have effectively revised the basis of Mrs. Allen's termination, changing it from being a termination by way of redundancy to a termination for cause. Henlin Gibson Henlin's letter of December 17, 2018 to the Ministry of Labour sets out a sequence of events which Mrs. Allen purports, led to her termination. Included in that letter, are the following paragraphs:

> *"The basis of her termination was a Mintz Group Report that highlighted email correspondence between her, her son Ravi, her friends Meagan and Dominic and her partner Patrick.*
>
> *The foregoing details of events strongly suggests that our client has been unjustifiably/unfairly dismissed. Her termination is in breach of her contract of employment and/or good industrial relations as contemplated by the Labour Relations &Industrial Disputes Act."*

[50] The question therefore, of whether the Minister has the power to refer disputes concerning redundancy to the IDT is academic as far as this application is concerned. I do not find it necessary to engage in a discourse as to which of the two contending views as represented by decisions of judges of coordinate jurisdiction should be followed in this case. The evidence clearly does not point to the dispute between Mrs. Allen and Guardian as a dispute arising from termination on the basis of redundancy, as Guardian had withdrawn redundancy as a basis for the termination. Even if termination by way of redundancy was still a consideration, it is abundantly clear that termination for cause remains a clear basis which would undoubtedly vest the Minister with the necessary jurisdiction to act as he did.

[51] Mr. Powell has argued that the fact that there are decisions evidencing disparate views from judges of coordinate jurisdiction on the same point of law suggests that there is an arguable ground for judicial review. I do not agree for the reason stated in the foregoing paragraph.

[52] It is accepted that if the court finds that there is evidence that the minister acted outside the limits of his jurisdiction, then that would amount to evidence that he would have acted ultra vires and the applicant would be entitled to leave to have the decision reviewed. I agree with Miss Dickens that whether in the narrow sense of having no power to adjudicate upon the dispute, or to make the decision made, or in the wider sense of having the power to make the decision but acted in a manner which is procedurally irregular, it cannot be said that the minister acted without jurisdiction.

[53] The applicant's submission that the minister acted ultra vires in purporting to exercise his power under the section where the conditions were not met; that is that he had not first satisfied himself that there was an industrial dispute is untenable.

GROUNDS C AND D

The Minster acted irrationally to refer the dispute to the IDT when the same factual circumstances are already before the Supreme Court.

The Minster acted irrationally by referring the dispute to the IDT when the issue as to whether the referral should be made is pending in the Allen Constitutional Claim

[54] The two grounds stated above may conveniently be addressed together. The applicant has also advanced the position that there are three separate matters now before the court as a consequence of the same factual situation. The position was further advanced that the question of whether Guardian Life's termination of Mrs Allen by way of redundancy was valid and whether Mrs. Allen should be reinstated, are all issues to be determined at the trial of Mrs. Allen's first claim which is scheduled to

commence in September of 2021. It was also said that in Claim No. 2018 CD 00506 brought by Guardian the circumstances surrounding Mrs. Allen's termination are in issue.

[55] Mr Powell also postulated that one of the issues that the Court will have to determine in Mrs. Allen's 2020 claim is whether the Minister should have referred Mrs. Allen's dispute regarding her termination to the IDT. Counsel noted that the Minister is also a party to that claim and he is opposing the claim. For these reasons, counsel says the Minster acted irrationally in referring the matter to the IDT. Counsel bemoaned the likelihood that there could be conflicting findings of fact by an inferior tribunal with the findings of fact of the Supreme Court in the 3 claims before it.

[56] In relation to paragraph 31 of Ms. Dickens written submissions outlining the fact that it was determined in the case of **Village Resorts Ltd. v. The Industrial Disputes Tribunal** (1998) 35 JLR 292, that the LRIDA created a new regime with new rights, obligations and remedies, counsel says that that case is distinguishable from the present scenario in that that case turned on the interpretation of section 12 of the LRIDA and the meaning to be assigned to the word unjustifiable as used in the section. Secondly, Mr. Powell said there was no issue in that matter of there being any concurrent proceedings in the Supreme Court, based on the same facts which were before the IDT.

[57] Miss Dickens submitted that there is no principle of law which provides that the IDT cannot adjudicate over a matter where there are similar factual circumstances in issue between the parties in the Supreme Court. Further, she said the issues in the Allen claim are distinct from the issues raised in the dispute before the IDT and therefore should not operate as a bar to the IDT exercising its statutory power to hear a dispute properly referred to it by the Minister. She then quoted extensively from the case of **Village Resorts Ltd. v The Industrial Disputes Tribunal** (1998) 35 JLR 292, highlighting the fact that the regime is discrete and distinct from the common law.

[58] Ms Dickens observed that the issue Mrs. Allen sought to address in the constitutional claim concerns the delay in referring the dispute to the IDT and the question of whether the delay amounts to a breach of her constitutional rights. That claim she states, does not bring into question the jurisdiction of the Minister to refer the claim to the IDT.

ANALYSIS AND CONCLUSION - GROUNDS C AND D

[59] In Guardian's claim against Mrs Allen, it is alleged that Mrs Allen's capacity as Vice President and appointed Actuary of Guardian allowed her access to confidential information and that unauthorized disclosure of confidential information was a breach of her contract of employment and breach of her fiduciary duties to the company. Consequently, Guardian claimed damages for breach of contract, damages for breach of fiduciary duties and damages for breach of confidence. In addressing the issues raised in that claim, the question of whether Mrs Allen was wrongfully dismissed would necessarily arise. That issue is of course the central one to be determined in Mrs Allen's 2018 claim. In the constitutional claim brought by Mrs Allen, no such issue would arise. The question which is to be addressed in that claim is whether Mrs Allen's constitutional rights have been breached as a consequence of the delay in referring the matter to the IDT. Whereas the question of whether or not the Minister should have referred the matter to the IDT might arise for consideration, the issue can only arise in the context of the court deliberating on the time frame of the referral; that is, as far as the question of whether there was sufficient basis on which the minister could have, at any time prior to the constitutional claim being filed, formed the view that there had been sufficient efforts at conciliation and yet failed to refer the matter. I say that the question could only have arisen in that way, because as indicated before, I find that there was a dispute within the meaning of Section 11A (1) (a) that formed the basis for a referral and that by the time the referral was made, there was proper basis on which the Minister could have formed that sufficient effort at conciliation had been made without success.

[60] That discussion brings me to a consideration of the nature of the matter that the IDT is required to address based on the referral. In **Village Resorts Ltd. v. Industrial Disputes Tribunal** (supra), it was explained by Rattray P (as he then was) that the LRIDA, the accompanying Code and the Regulations provide a comprehensive and discrete regime for the settlement of industrial disputes in Jamaica. He continues at pages 299 H to 300:

> *"The relationship between employer and employee confers a status on both the person employed and the person employing. Even by virtue of the modern change of nomenclature from master and servant, to employer and employee, there is clear indication that the rigidities of the former relationships have been ameliorated by the infusion of a more satisfactory balance between the contributors in the productive process and the creation of wealth in the society.*
>
> *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 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.* ***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 settlements of disputes.*** *(emphasis my own)*
>
> *Where a dispute is referred to the tribunal for settlement the Act provides (section 12(5) at paragraph (c))*
>
> *"If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award*

> *(i) Shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, 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."*
>
> and the employer shall comply with such order."

[61] Later at paragraph 300 G, he said:

> *"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 work place, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal "unjustifiable" is the provision of remedies unknown to the common law."*

In University of Technology v Industrial Disputes Tribunal and others [2017] UKPC 22 at paragraph 18 Lady Hale in discussing the framework of the LRIDA, said:

> *"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 of 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". This is the sum total of the guidance given by the LRIDA in relation to the dismissal of workers."*

[62] This court recognizes the need to avoid multiplicity of proceedings, even if one or more of the proceedings will be in another forum outside of the courts, but it becomes evident from the above exposition of the law regarding the mandate of the IDT that the claims before the court cannot address some of the issues that the IDT is empowered to address. The IDT is concerned with the procedure that was employed in effecting the dismissal and will be able to determine whether the dismissal was unjustifiable, that is unfair, as distinct from wrongful. That matter cannot be addressed in any of the claims before the court. It is not difficult to envisage the possibility of a dismissal not being wrongful, yet found to be unfair. The IDT is also able to provide a remedy that the courts cannot provide, that is the remedy of reinstatement. The court will be concerned with the question of whether there was a breach of Mrs. Allen's contract of employment in her claim for wrongful dismissal. The court will primarily be concerned with whether Mrs Allen breached her contract of employment in Guardian's claim against Mrs Allen and whether there was basis for a dismissal for cause; not with whether the correct procedure was employed in effecting the dismissal.

[63] The fact that the LRIDA has not abolished the common law regime of wrongful dismissal but has allowed the new regime to exist alongside the old, is suggestive to me that in principle there is nothing inconsistent with a disgruntled employee being able to pursue her claim in the court as well as a matter before the IDT at one and the same time. I am firmly of the view that the applicant has no realistic prospect of being able to successfully argue this ground in support of an order of certiorari to quash the Minister's decision to refer the matter to the IDT.

GROUND E

Guardian has a legitimate expectation that having decided to engage in the conciliation process, the Minister would allow the parties to engage in bona fide efforts at a settlement before referring the dispute to the Industrial Disputes Tribunal

[64] Regarding this matter, Mr. Powell noted that exhibited to Mr. Samuda's affidavit is a letter dated October 30, 2020. By way of that letter, Mrs. Allen's Attorneys were informed that certain steps would have been taken but that this letter was not copied to Guardian's Attorneys-at-Law. He stated that there was a legitimate expectation that the Minister would have allowed the conciliation process to be concluded, and if that was not going to happen, then Guardian's Attorney should have been given an opportunity to make representations. Further, that Guardian had a legitimate expectation that the Minister would only refer a matter to the IDT in accordance to the provisions of LRIDA permitting him to do so.

[65] Ms. Dickens observed that Mr. Samuda's affidavit shows the great effort and many steps taken by the Ministry of Labour to have the parties engage in, and complete conciliation proceedings. Ms. Dickens observed that the applicant was provided with many opportunities to participate fully and bona fide in the conciliation proceedings but the applicant refused to participate and thus it was the applicant's own conduct why the conciliation proceedings were not completed.

[66] Regarding Mr. Powell's submission that Guardian had no opportunity to make representations to the Minister regarding his decision to refer the matter, counsel noted that the letter of October 30, 2020 was evidently not copied to Guardian by virtue of an obvious error. That error she said was apparent because the letter though addressed to Henlin Gibson-Henlin, was copied to Henlin Gibson-Henlin.

ANALYSIS AND CONCLUSION - GROUND E

[67] In **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935 Lord Fraser of Tullybelton at page 943-944 of the judgment in explaining the concept of legitimate expectation said

> *"But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by Lord Diplock in* ***O'Reilly v Mackman*** *[1982] 3 All ER 1124, [1983] 2 AC 237 and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue ... The submission on behalf of the appellants is that the present case is of the latter type. The test of that is whether the practice of prior consultation of the staff on significant changes in their conditions of service was so well established by 1983 that it would be unfair or inconsistent with good administration for the government to depart from the practice in this case. Legitimate expectations such as are now under consideration will always relate to a benefit or privilege to which the claimant has no right in private law, and it may even be to one which conflicts with his private law rights. In the present case the evidence shows that, ever since GCHQ began in 1947, prior consultation has been the invariable rule when conditions of service were to be significantly altered. Accordingly, in my opinion, if there had been no question of national security involved, the appellants would have had a legitimate expectation that the minister would consult them before issuing the instruction of 22 December 1983."*

[68] With regard to the letter of October 30, 2020 from Ms Marshall, the Director of Industrial Relations at the Ministry, I fail to see the point being made by Mr Powell, given the posture of the applicant regarding the attempts to resolve the matter through conciliation. That letter was directed to Henlin Gibson Henlin, advising that Guardian's Attorney at Law had indicated a continued unwillingness to negotiate because of the

existing case before the court, and therefore the Minister would be asked to make a decision in the matter. It is evident that there was an error in copying that letter to Henlin Gibson, but nothing in my view turns on that error.

[69] I will state the obvious. Guardian's Attorney at Law speaks on behalf of Guardian. The failure to communicate to Guardian a particular position assumed by Guardian (which position had consistently been communicated by Guardian), albeit that at all times communication by Guardian was through its Attorney at Law, cannot lead Guardian to say that it did not have an opportunity to make representations to the Ministry/Minister on the matter. Guardian's position had been made pellucidly and unmistakably clear by letter dated November 4, 2020 from Brocard, Guardian's Attorneys at Law (per M Angela Robinson) which in part stated that "Negotiations can only commence when Ms Allen makes an election between her claim in the court for wrongful dismissal and her claim for unjustifiable dismissal in accordance with the provisions of the Labour Relations and Industrial Disputes Act. Once Ms. Allen makes the necessary election, we would be able to enter discussions in this matter." Mrs. Allen clearly did not intend to, and certainly has not made any such election and so it could not have been anticipated that there was any likelihood of Guardian Life's precondition being met thereby rendering it likely that conciliation could take place.

[70] Further, for the reasons explained in paragraphs 35 to 42 above in addressing the question of whether the Minister could have been satisfied that Guardian and Mrs. Allen made sufficient attempts to settle their industrial dispute, Guardian could not properly have had a legitimate expectation that the Minister would allow the parties to engage in bona fide efforts at a settlement before referring the dispute to the Industrial Disputes Tribunal. Guardian's legitimate expectation that the Minister would only refer a matter to the IDT in accordance with the provisions of LRIDA permitting him to do so, was in fact not frustrated, since that was exactly what the Minister did.

[71] As observed earlier, the evidence discloses that Guardian was resistant to engaging in the conciliation process**.** Guardian had no basis whatsoever for holding a

legitimate expectation and therefore, that is not an arguable ground with a realistic prospect of success.

CONCLUSION

[72] Neither in the wider or the narrow sense, could it be said that the Minister acted outside of his jurisdiction in referring the matter to the IDT. It was well within his powers based on the provisions of sections 11A (1) (a) of the LRIDA to do so. It could not be said that the preconditions for a referral had not been met. There was material before him on which he could have concluded that there was an industrial dispute within the meaning of section 2 of the act and that sufficient attempts had been made to settle the dispute. Neither is there any basis whatsoever upon which it could be said that the Minister's decision is so outrageous that no sensible person who applied his mind to the question could have arrived at the same decision. On none of the bases put forward by the applicant has it been shown that the applicant has a realistic prospect of successfully establishing that the Minister's decision to refer the matter between Mrs Allen and Guardian to the IDT was wrong. Based on the foregoing, the application for leave to apply for judicial review is refused. There will be no order as to costs.

……..
Pettigrew-Collins: J