[2022] JMFC FULL 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU 2020 CV 00914

CORAM: THE HONOURABLE MRS. JUSTICE CRESENCIA BROWN BECKFORD

THE HONOURABLE MRS. JUSTICE STEPHANE JACKSON-HAISLEY

THE HONOURABLE MS. JUSTICE CAROLE BARNABY

BETWEEN	**KEVIN SIMMONDS**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

Kwame Gordon and Joerio Scott instructed by Samuda & Johnson, Attorneys-at-Law for the Claimant.

Louis Jean Hacker and Nicola Richards instructed by the Director of State Proceedings, Attorney-at-Law for the Defendants.

IN OPEN COURT

Heard: 17th, 18th, 20th January and 29th April 2022

Judicial Review - Labour Relations and Industrial Disputes Act (LRIDA)- Sections 2, 11 A (1), 12 (5) (c) - Employment terminated by reason of redundancy - Intervention of Minister of Labour and Social Security under the LRIDA sought after acceptance of redundancy package and filling of post the subject of the dispute - Whether the Minister acted *ultra vires* the Act in deciding not to refer the dispute to the Industrial Disputes Tribunal -

Whether a Minister may properly consider the issue of waiver of the rights at sections 12 (5) (c) of the LRIDA in determining whether or not to exercise the power to refer a dispute to the IDT pursuant to section 11 A (1) of the LRIDA - Whether there was a foundation of facts of waiver upon which the Minister could have acted in not referring the dispute to the IDT.

Constitutional Law - Constitution of Jamaica - Charter of Fundamental Rights and Freedoms - Section 16 (2) - Whether the Minister breached the Claimant's rights to a fair hearing, fair hearing within a reasonable time before an independent and impartial tribunal established by law in deciding not to refer the dispute to the Industrial Disputes Tribunal days before the hearing of the claim for constitutional redress.

Crown Proceedings Act - Sections 2 and 3 - Whether constitutional claims and claims for judicial review are civil proceedings within the meaning of the Act to enable the Attorney General to be joined as a party to the claim pursuant to it.

C. BROWN BECKFORD, J

[1] I have read in draft the judgments of Jackson-Haisley and Barnaby JJ which have comprehensively addressed the issues raised in this claim. Despite my view for the compelling reasons given by my sister Jackson-Haisley that the Claimant's constitutional right to a fair hearing within a reasonable time may have been breached, I agree with the reasoning and conclusions of Barnaby J that the court in this instance should decline to exercise its jurisdiction on the basis that this claim is an abuse or misuse of process.

[2] While one may have been inclined to the view that as recent authorities suggest that there should be a generous approach to constitutional interpretation, the decisions of **Ramanoop** and other similar authorities (infra) may no longer be persuasive on the issue of circumscribing applications for constitutional redress, the Judicial Committee of the Privy Council (Privy Council) recently settled the question in **Brandt v Commissioner of Police and Others** [2021] UKPC 12 (**Brandt**). In **Brandt**, the Privy Council considered a provision similar to Section 19 of our Charter of Rights and Freedoms (infra). In that case the Appellant was charged with various criminal offences. The prosecution sought to admit

at his trial "WhatsApp data" obtained by police from a search of the Appellant's cell phone. The Appellant contended that the search of his cell phone was in breach of his constitutional right of privacy. Instead of challenging the admissibility of this evidence in the criminal trial, the appellant commenced proceedings for an administrative order. Being unsuccessful in the lower courts, he appealed to the Privy Council.

[3] Lord Stephens, writing for the Board, in upholding the decision of the Court of Appeal of the Eastern Caribbean Supreme Court (Montserrat) that the application for an administrative order was an abuse of process said:

> *34. … Abuse of process must involve something which amounts to a misuse of the process of litigation. However, whilst the categories of abuse of process of the court are not fixed there are clear examples which are relevant to this appeal.*
>
> *35. First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature "which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate". The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328 at para 25, as follows: "…where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power." There are examples of the application of that approach in cases such as Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265 at 68, Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 871 at para 39 and most recently, in Warren v The State (Pitcairn Islands) [2018] UKPC 20 at para 11. This approach prevents unacceptable interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral attack on, for example, a judge's exercise of*

> *discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106 at 111–112).*

[4] I am therefore in agreement that parties should not be encouraged forego alternative or parallel remedies afforded to them which are adequate to prevent or arrest a breach or further breach of their constitutional rights (and consequent damages) guaranteed to them under the Charter of Rights in favour of a claim for constitutional relief.

S. JACKSON-HAISLEY, J (Dissenting on the claim for constitutional redress)

[5] I have read in draft the judgment of my sister Barnaby J and I agree with her in respect of the decision on the Judicial Review Claim. However, with respect to the Constitutional Claim, there is a point of divergence, specifically as it relates to my findings as to whether or not the Claimant's right to a fair trial within a reasonable time has been breached. I am of the view that his right has been breached in that regard. I have set out below my findings in relation to the Constitutional Claim in its entirety.

[6] I wish to associate myself with the 'Background to the Claim" set out quite admirably in the judgment of Barnaby J and so I will proceed to deal the Constitutional Claim without the burden of a background.

THE CONSTITUTIONAL CLAIM

[7] The issues raised here have to do with constitutional interpretation and application specifically as it relates to the Charter of Fundamental Rights and Freedoms (the Charter).

[8] This Constitutional Claim is predicated on the right to seek redress pursuant to section 19(1) of the Charter which gives the Claimant the right to apply to the Supreme Court to determine the issues raised in this matter. Section 19(1) provides as follows:

> *If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully applicable, that person may apply to the Supreme Court for redress.*

[9] Section 19(1) is styled the redress clause as it gives the Claimant *locus standi* to approach the Court to seek relief for what he alleges is a breach of his fundamental right to due process and it endows the Court with the power to provide effective relief to him where there has been a violation of a fundamental right. The Supreme Court is vested with original and "unlimited" jurisdiction to hear and determine a matter such as this and so has the power to fashion effective remedies to secure the enforcement of a fundamental right. [1]

[10] The Claimant seeks declaratory reliefs and/or damages by reason of what he alleges to be the breach of his rights to a fair hearing, a fair hearing within a reasonable time and a fair hearing before an independent and impartial tribunal established by the Labour Relations and Industrial Disputes Act (LRIDA). In the Amended Fixed Date Claim Form filed on October 20, 2021 he set out the particulars as seen below:

> *… by reason of the breach of [the Claimant's] rights to a fair hearing, a fair hearing within a reasonable time and a fair hearing before an independent and impartial tribunal established by the Labour Relations and Industrial Disputes Act by reason of her failure to consider and/or direct and/or deliberately causing delay in the adjudication of the Claimant's dispute at the Industrial Disputes Tribunal (the "Tribunal") and/or by reason of her failure to refer the said dispute to the Tribunal, therefore depriving the Claimant of his right to a fair hearing of his dispute within a reasonable time and/or his right to work and thereby causing him to suffer injuries, loss and damage.*

[11] The orders sought relating to the claim for Constitutional relief are:

(i) A declaration that the Defendants have breached the Claimant's right to a fair hearing pursuant to subsection 16(2) of the Charter of Fundamental Rights and Freedoms:

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[1] See Gairy and another v Attorney General of Grenada [2001] UKPC 30; [2002] 1 AC 167

(ii) A declaration that the Defendants have breached the Claimant's right to a fair hearing within a reasonable time pursuant to subsection 16(2) of the Charter of Fundamental Rights and Freedoms: and

(iii) A declaration that the Defendants have breached the Claimant's right to a fair hearing before an independent and impartial tribunal established pursuant to subsection 16(2) of the Charter of Fundamental Rights and Freedoms.

[12] Specifically, he has alleged a breach of his rights under section 16(2) of the Charter which provides as follows:

> *In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.*

[13] This section however does not stand on its own and should be read in conjunction with section 13(2) which guarantees the rights and freedoms set out in section 16 as well as the other sections, with the only limitation being what may be demonstrably justified in a free and democratic society.

[14] The broad issues to be determined by this Court under this heading can be condensed as follows:

(i) Whether the Defendants have breached the Claimant's right to a fair hearing pursuant to subsection 16(2) of the Charter;

(ii) Whether the Defendants have breached the Claimant's right to a fair hearing within a reasonable time pursuant to subsection 16(2) of the Charter; and

(iii) Whether the Defendants have breached the Claimant's right to a fair hearing before an independent and impartial

tribunal established pursuant to subsection 16(2) of the Charter.

THE APPROACH

[15] Counsel for the Claimant suggested that in approaching the issues raised the court should be guided by the Full Court decision of **Julian J Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04 where at paragraph 203 of the judgment Chief Justice Sykes outlined the proper approach to be taken in adjudicating in matters dealing with an alleged breach of the Constitution. He highlighted that the burden of proof is on a balance of probabilities but at the lower end since this would enable the Claimant to have the full and best possible protection guaranteed by the fundamental rights and freedoms.

[16] This Court finds favour with this suggestion and wishes to adopt the formulation by Sykes CJ at paragraph 203 which is set out in these terms:

> *"The proper approach to adjudication on the constitutionality of legislation in the Jamaican Charter of Fundamental Rights and Freedoms". "(a) Section 13 (2) of the Jamaican Charter of Fundamental Rights and Freedoms guarantees the fundamental rights and freedom set out in the Charter subject to the specific limitations as well as a general limitation. Where the statute in question does not fall within the specified limitations, the sole test is the general limitation of whether the law is demonstrably justified in a free and democratic society.*
>
> *(b) In order for section 13 (2) to be invoked by way of a claim under section 19 of the Constitution of Jamaica, the claimant must show that his or her right has been violated, is being violated, or is likely to be violated. The burden of proof is on a balance of probabilities but at the lower end since this would enable any claimant to have the full and best possible protection guaranteed by the fundamental rights and freedoms. If the claimant fails to do this then no claim for redress can possibly arise under the Charter for the reason that no Charter violation has occurred, is occurring, or is likely to occur.*
>
> *(c) The court must determine the scope of the right or freedom in order to have an appreciation of the right or aspects of the right or freedom that are protected by the Charter.*
>
> *(d) The starting point for the court is always that the fundamental rights and freedoms are not to be restricted and are to be given their fullest meaning having regard to the words used…*

[17] Mr Gordon also relied on the case **Maurice Tomlinson v Television Jamaica and Others** [2013] JMFC Full 05 with specific reference to paragraphs 82 and 83 of the judgment wherein the judgment of **R v Oakes** (1986) 26 DLR (4th) 200 was discussed and the Court acknowledged what is often referred to as the Oakes test which is the test 'to be applied when determining whether a measure can be construed as demonstrably justified in a free and democratic society'.

[18] Mr Gordon contended that section 16 in its broad sense can be described as protecting the right to due process and encapsulates the right of an individual charged criminally as well as an individual asserting his civil rights. He stressed that this Court should give a liberal interpretation to the section 16(2) provision as this is the standard when dealing with a potential breach of a fundamental right.

[19] The Court finds favour with this suggestion. In the text, "Commonwealth Caribbean Public Law", 3rd edition, Albert Fiadjoe exalted the practice in Commonwealth Caribbean courts to accord to the constitution a broad, liberal and purposive interpretation as far as fundamental rights and freedoms are concerned. At page 153 he articulated the position in this way:

> *"Perhaps it is in the area of fundamental rights and freedoms that the courts have displayed a manifest predilection for the generous approach to constitutional interpretation."*

[20] This approach is one followed by Chief Justice Sykes, not only in the **Julian Robinson** case (supra) but also in another judgment, not cited before us but relevant to the issues raised in this case, the judgment of **Mervin Cameron v The Attorney General** [2018] JMFC Full 1 where at paragraph 23 Sykes J (as he then was) noted that:

> *"It has been said that fundamental rights provisions of constitutions are not like ordinary statutes passed by the legislature. The rights are to be given a generous interpretation. Some have even used the expression purposive interpretation. I understand all this to mean that the starting point is the actual text of the constitution."*

[21] Although the reliefs sought in the Amended Fixed Date Claim Form were of a general nature, the body of the pleadings referred primarily to breaches relative to the Claimant's right of access to the Industrial Disputes Tribunal (IDT). The submissions however, extended beyond the Claimant's right to access the IDT. In keeping with the interpretation to be afforded to the section 16(2) provision, it is therefore my intention to adopt a broad, purposive and generous approach by giving the words used in section 16(2) their full meaning. This requires me to flesh out and evaluate the different possibilities when it comes to the interpretation of the section so that ultimately the full measure and the spirit of the section, which has at its core the protection of the right to due process, can be realized.

THE RIGHT TO DUE PROCESS

[22] Counsel Mr Gordon drew the Court's attention firstly to the provisions of section 13(2) and 13(3) of the Charter and postulated that these provisions guarantee and reinforce the right to due process by mandating that persons should be afforded (i) a fair hearing; (ii) within a reasonable time; and (iii) by an independent and impartial tribunal established by law. He thereafter delved into a comparison between the provisions of section 16(1) and section 16(2) emphasizing how active the courts have been in the interpretation of section 16(1) *vis a vis* its counterpart section 16(2). He expressed the view that in terms of due process, similar right obtains in both the civil and criminal jurisdiction.

[23] He thereafter cited a number of authorities that have set out the parameters of the right to due process. He highlighted the Privy Council decision of **Mohammed v Trinidad and Tobago** [1998] UKPC 49 wherein it was stated that:

> *It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality on a citizen's rights is not meaningless; it is a clear testimony that an added value is attached to the protection of the right.*

[24] He relied heavily on the Privy Council decision of **Herbert Bell v The Director of Public Prosecutions** [1985] 1 AC 937 (hereinafter referred to as **Bell v DPP**) and submitted that this Court should be guided by the conditions set out in **Bell v DPP** (supra) in determining whether an infringement of subsection 16(1) of the Charter has occurred which are as follows: the length of the delay; the reasons given by the prosecution to justify the delay; the responsibility of the accused for asserting his rights; and prejudice to the accused (in this case the Claimant).

[25] He suggested that with some tweaking these conditions can be applied to the subject Claim. He suggested that the Court could also obtain guidance from decisions made pursuant to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, often referred to as the European Convention on Human Rights ("ECHR") as it is similarly worded as subsections 16(1) and (2) of the Charter. He drew the Court's attention to the decisions coming out of the Strasbourg Court such as **Crompton v The United Kingdom** (Application no 42509/05), **Frydlender v France** (Application no 30979/96) **and Lupeni Greek Catholic Parish and Others v Romania** (Application no 76943/11)**.** He thereafter expressed that these authorities identified the factors which are to be taken into account in determining whether the right to a hearing within a reasonable time has been breached which are: the complexity of the case; the conduct of the applicant and of the relevant authorities; and what is at stake for the applicant in dispute. He summarized that irrespective of whether the Bell and/or the Strasbourg criteria is applied it is clear that there has been a breach of the Claimant's right guaranteed by subsection 16(2).

[26] Mr Hacker responded that in determining whether or not a fundamental right has been breached the Court has to examine the nature, content and meaning of the right which has been said to be infringed.

[27] The dicta of Wolfe-Reece J in **Ernest Smith and Others v The Attorney General of Jamaica** [2020] JMFC Full 7 was cited by both Counsel for the Claimant and Counsel for the Defendants and with good reason as it

provides a helpful insight into the interpretation of Section 16(2) of the Charter and a comparison with Article 6(1) of the ECHR. After an examination of Article 6(1), the dicta of Lord Hope of Craighead in **Porter and another v Magill** [2002] 1 All ER 465, and the authorities of **Bell v DPP** (supra) and **Mervin Cameron** (supra) Wolfe-Reece J arrived at the inevitable conclusion that section 16 creates three separate and distinct rights at paragraph 169 of the judgment:

> *The dicta of Lord Hope is quite useful, it indicates that article 6(1) creates three distinct rights. This reasoning is in line with the approach taken in both **Herbert Bell**, supra and **Mervin Cameron**, supra. Those distinct rights are; the right to a fair trial, the right to a trial within a reasonable time and the right to be tried by an independent and impartial tribunal. However, unlike in **Herbert Bell** and the majority in **Mervin Cameron**, Lord Hope has ruled that the rights are free standing in civil cases with the reasonable time guarantee being independent of the right to a fair trial.*

[28] Wolfe-Reece J also took into account the expressions of the Privy Council in **Darmalingum v The State** [2000] 1 WLR 2303 where Lord Steyn pointed out the following at page 2307:

> *…the s 10(1) right in the Mauritius Constitution contains three separate guarantees, namely (1) a right to a fair hearing (2) within a reasonable time (3) by an independent and impartial court established by law. His Lordship emphasized the separate nature of the rights by noting that if a defendant was convicted after a fair hearing by a proper court, this would be no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time.*

Lord Steyn continued:

> *And, even if his guilt is manifest, this factor cannot justify or excuse a breach of the guarantee of a disposal within a reasonable time. Moreover, the independence of the "reasonable time" guarantee is relevant to its reach. It may, of course, be applicable where, by reason of inordinate delay a defendant is prejudiced in the deployment of his defence. But its reach is wider. It may be applicable in any case where the delay has been inordinate and oppressive.*

[29] The provisions of section 16(1) and (2) are similar to the provisions of Article 6(1) of the ECHR which provides as follows:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

[30] When section 16(2) is compared with Article 6(2), it is clear that three separate rights are created and that each can stand on its own footing. They are: the entitlement to a fair hearing; fair hearing within a reasonable time; fair hearing by an independent and impartial court or authority established by law.

[31] A precise indication of the distinguishing features among these rights can be borrowed from a judgment of the Caribbean Court of Justice in its Appellate Jurisdiction on appeal from the Court of Appeal of Belize **Solomon Marin Jr v The Queen** [2021] CCJ 6 (AJ) BZ (not cited before us) where at paragraph 180 Anderson J articulated:

> *As used in the constitutional provision, 'Fair hearing' is mainly concerned with whether the parties were afforded a fair or reasonable opportunity to be heard. 'Reasonable time' is principally concerned with the period within which the hearing occurred and, particularly, whether there was inordinate and inexcusable delay. The 'independence and impartiality' of the tribunal is primarily concerned with questions to do with objectivity and inoculation from improper influence, whether from the state or some other source.*

[32] In attempting to resolve the issues raised in this Claim, it is my intention to deal with each right separately making allowance for any overlap.

RIGHT TO A FAIR HEARING

[33] The burden of proving that there has been a breach of a right to a fair hearing rests on the Claimant to establish a prima facie infringement of the right. If the Claimant succeeds in doing so then the burden shifts to the State to show that it is "demonstrably justified". There has been no attempt in this case to prove any justification on the part of the State, but rather

the Defendants have boldly asserted that there is no prima facie infringement. In order to determine whether or not the Defendants' arguments have merit, it is therefore apposite to get true sense of what is meant by the "fair hearing" right.

[34] The right to a fair hearing is embedded in the principle of natural justice. Even before its specific inclusion in the Charter, it was observed as one of the twin pillars of natural justice which was recognized to rest on the principles of the right to a fair hearing *audi alteram partem* and the freedom from bias in an adjudicator *nemo judex in causa sua.*

[35] In the landmark judgment of **Natasha Richards and Phillip Richards v Errol Brown and the Attorney General** [2016] JMFC Full 05 my brother Batts J referred to the well-established *audi alteram partem* rule in this fashion:

> *One would have thought that the matter would be impatient of debate. Audi alteram partem has been a sine qua non of British Constitutional law for hundreds of years. Proponents of natural justice, the rule of law and all it implies, regard with anathema the prospect of a person's rights or obligations being determined without reference to that person. This basic principle has been adopted and applied in the Commonwealth Caribbean and is to be regarded as an integral part of our legal fabric. The principle has found concrete manifestation in section 16(2) of the Constitution of Jamaica. Section 16 states: "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. (2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.*

[36] Mr Hacker in his submissions emphasized that the Claimant in order to establish a breach of his right to a fair hearing would have to establish certain elements such as the fact that he will not have equality of arms in that he would not be able to cross-examine witnesses, or fully argue his case. He further submitted that the right encapsulates the full ability to argue one's case. He contended also that this right is a condition precedent for the other two rights to be established and that they cannot

be breached because the Claimant must first prove that the right to a fair hearing has been breached.

[37] He contended further that it is only after that is established, that the Court can go on to consider whether it was not done in a reasonable time and whether the court or tribunal or authority was independent. He argued that this Claim is predicated on the ground that there was a right to the IDT however that right is not engaged unless the Minister exercises his discretion to refer the matter to the IDT.

[38] Mr Hacker commended to us the Court of Appeal judgment of **Al-Tec Inc Limited v James Hogan and Renee Lattibudaire** [2019] JMCA Civ 9 for an understanding of the scope and content of the fair hearing right.

[39] The relevant facts in the **Al-Tec** case (supra) are that the appellant, Al-Tec Inc Limited filed an application to set aside a default judgment and a final judgment pursuant to an assessment of damages hearing. The respondents had obtained default judgment and final judgment on the basis that Al-Tec Inc Limited failed to file an acknowledgement of service or a defence to the claim. It is also to be noted that the final order on assessment of damages was never served on Al-Tec Inc Limited or brought to their attention. However, the application for the provisional charging order for sale of their land was served on them and that exhibited the final judgment on assessment of damages.

[40] In Al-Tec Inc Limited's application to set aside the judgment, they asserted that they were never served with the relevant documents in the claim. Their application was refused at first instance and they appealed that decision. On appeal it was contended that the learned judge's application of rule 12.13 of the Civil Procedure Rules (CPR) infringed their right to a fair hearing guaranteed by section 16(2) of the Charter.

[41] Edwards JA who wrote the judgment of the court after referring to the **Natasha Richards** judgment (supra) reiterated that rule 12.13 of the CPR is unconstitutional and as a result breached the appellant's right to a fair

hearing guaranteed under section 16(2) of the Charter as Al-Tec Inc Limited was not notified of the claim.

[42] Edwards JA took into account the Guide to Article 6 of the ECHR and placed significance on it at paragraph 154 of the judgment. She continued to refer to it at paragraph 155 and thereafter at paragraph 156 articulated the following:

> *The scope and content of the right to a fair trial includes not only compliance with the principle of equality of arms but also the right to cross-examine witnesses, right of access to facilities on equal terms and to be informed of and be able to challenge reasons for administrative decisions. See* ***Beles and others v the Czech Republic*** *and Law of the European Convention on Human Rights Harris D J, O'Boyle M & Warbrick C (1995) London Butterworths at 206-214.*

[43] The ingredients identified in the **Al-Tec** case will be adopted to the issues raised on this limb.

[44] The Claimant in his Amended Fixed Date Claim Form has expressed a breach of his right to a fair hearing generally and also specifically in relation to the IDT. He makes no mention of any potential breach by the Court or the Minister himself.

[45] Sometime in the distant past the right to a fair hearing was confined to the judicial decision making process however that is now a view of the past. **Ridge v Baldwin** [2] has made it clear that the right to be heard depends on the consequences of the decision to the individual rather than the nature of the decision making power. It is therefore not only confined to a hearing before a court or a Judge but extends to other processes.

[46] Bearing in mind the principles of generosity in interpretation, if the fair hearing provision is to be widely interpreted, it could extend to a hearing before the IDT as it could extend to a hearing in court proceedings. This Court will also consider whether this could be construed to apply to the Minister in her decision making capacity.

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[2] Ridge v Baldwin [1964] AC 40; [1963] 2 All ER 66; [1963] 2 WLR 935

[47] An examination as to whether the right to a fair hearing has been infringed presupposes that you have a right to a hearing in the first place. It seems clear to me that the Claimant herein having filed his claim in the Supreme Court, his right to a hearing could not be denied. However, the clarity which comes with arriving at this view is not mirrored in respect of the IDT and seems to be even more elusive when it comes to the "proceeding" before the Minister. I will start where the Claimant himself has begun.

A hearing before the IDT

[48] The IDT is established by virtue of the provisions of section 7(1) of the LRIDA. The IDT is empowered to hear matters arising from an industrial dispute and in fact some cases which could have been brought before the Court for wrongful dismissal can be heard by the IDT. In the case **Village Resorts Limited v The Industrial Dispute Tribunal and Others** (1998) 35 JLR 292, the court reflected on the background to the establishment of the IDT and pointed out the following at page 299:

> *It establishes too, the Industrial Disputes Tribunal ("The Tribunal") to which industrial disputes are referred for settlement and whose decisions "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." Persons who have special knowledge and experience of labour relations are appointed to hold the positions of Chairman or Deputy Chairman of the Tribunal and other members qualify as representatives of organizations representing employers and organizations representing workers. The specialist knowledge component therefore of the Industrial Disputes Tribunal is clearly established.*

[49] Section 11A confers on the Minister the ability to refer a matter to the IDT as provided for in that section:

> "11A. (1) 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-
>
> (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) give directions in writing to the parties to pursue such means as he shall specify to settle the dispute within such period as he may specify if he is not satisfied that all attempts were made to settle the dispute by all such means as were available to the parties.

(2) If any of the parties to whom the Minister gave directions under paragraph (b) of subsection (1) to pursue a means of settlement reports to him in writing that such means has been pursued without success, the Minister may, upon the receipt of the report, or if he has not received any report at the end of any period specified in those directions, he may then, refer the dispute to the Tribunal for settlement."

[50] The power bestowed on the Minister under this section is far-reaching as it gives him the power to act on his own initiative. His power exists regardless of whether the parties consent. Before the inclusion of this section the power was limited to certain situations including that the issue had to relate to a collective group of workers and had to have the capability of disrupting industrial peace. Now, the main criterion on which the power to act is based is that he should be satisfied that an industrial dispute exists.

[51] The case of **Jamaica Police Co-operative Credit Union Society v The Minister of Labour and Social Security** [2019] JMSC Civ 67 makes it clear that it is a condition precedent to the Minister's exercise of his

discretion to refer a matter to the IDT that there must exist an industrial dispute. More eloquently put at paragraph 5 of the judgment:

> *"It is accepted by all parties that it is a condition precedent to the exercise of the discretion given to the Minister to make a referral to the Industrial Disputes Tribunal that an industrial dispute must exist within the undertaking."*

[52] Similarly, in **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** (1981) 18 JLR 293, the judgment of Smith CJ accords with this position and in fact concluded that a decision to refer a matter to the IDT where there is no industrial dispute is ultra vires.

[53] An overview of the powers of the Minister under section 11A was carried out by Smith CJ in the authority of **R v Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Bartlett, Lionel Henry and Lloyd Dawkins Ex Parte West Indies Yeast Co. Ltd.** (1985) 22 JLR 407 where at page 412, the learned Chief Justice said:

> *"What s. 11A clearly does is to give the Minister freedom to intervene and take action in respect of any industrial dispute in spite of the restrictive procedures which the other sections require. However, in my opinion, he is not authorised to act with complete freedom. His powers are governed by the scheme and policy of the Act and by the express provisions of the section."*

[54] The Court went on to find that there was no dispute and so no foundation of fact on which the Minister could refer the "dispute" to the IDT.

[55] Mr Gordon in his submissions advanced the point that a determination of a civil right is a fundamental right and the wording used allows for a wide interpretation which includes access to the IDT. He further submitted that the statutory mechanism which provides to the Minister a discretion to refer or not refer, must be guided by this constitutional right and that this is a separate issue from whether the Minister makes a referral or not. By separate issue, he explained that what he meant is that the fundamental right set out in this Charter is established by virtue of the fact that the

Minister is empowered by statute to make a determination and in the determination of a person's civil right he shall be entitled to due process.

[56] He contended that if the right is only engaged when the Minister makes a referral, then that would be of academic interest only so the person who benefits from that referral would have no interest to bring a claim. He further argued that the rights do not rise or fall with the Minister's discretion. The right does not depend on what he decides. It would arise in both circumstances. The exercise of the discretion is the security guard at the front door and the constitutional right does not depend on that security guard. Further, the right to access the IDT exists independently of the Minister's exercise of his discretion. If he decides not to exercise the jurisdiction one can go to the Judicial Review Court and succeed.

[57] Mr Hacker on the other hand contended that the claim is predicated on the ground that there was a right to the IDT, however, he suggested that that right is not engaged unless the Minister exercises his discretion to do so.

[58] I find favour with the submission of Mr Hacker here. It is clear that from an examination of section 11A and the cases mentioned that the right to access the IDT is only engaged when the Minister makes the referral. In other words, under section 11A an employee had no right on his own to go to the IDT. His right to access the IDT is not invoked unless the Minister first makes the referral. If the right is not engaged, how then could the Claimant argue that his right to a fair hearing before the IDT has been breached? How could a breach occur in relation to a right that does not exist as of right? In this case, I have found that there was evidence to support a finding that there was no industrial dispute at the time and so I agree with the contention of Counsel for the Defendants that the Claimant had no right to a fair hearing before the IDT as this right was never engaged.

Fair hearing before the Minister

[59] Some of the submissions mentioned here are placed here merely for convenience as they also relate to other issues however in the interest of

brevity will not be repeated in those sections. Mr Gordon contended that access must be given its widest meaning and so the longer the Minister takes to decide, he affects potential access to the IDT, and the failure to make a decision means depriving the Claimant of access to a judicial review court. If the Minister takes an extremely long period, he contended that that goes to the root of the fair hearing provision, which is to give the person a fair hearing within a reasonable time.

[60] He argued that the fact that the Minister now says he is not referring the matter that is not the end of the matter. If that were so, then it means the Minister can take twenty or forty years to decide and a person would have no basis to argue before the constitutional court. The onus cannot be placed on the citizen to ensure that the Minister does his duty. The Claimant should be given what he is entitled to. The Minister must act with alacrity and that is what is expected in a free and democratic society. He further contended that a breach can occur even where there is delay and the Minister still refers the matter. This is because the delay could result in numerous challenges, for example witnesses may die or even documents could be lost hence why it is important that the Minister be informed that he must move with dispatch. He stressed that it is a necessary component of justice and necessary for the rule of law that those issues are resolved with alacrity. If there is a breach, there must exist very good reasons for the breach.

[61] He highlighted that labour relations disputes have at their core a recognition and respect for human dignity and that there should be an appreciation that the objects of the LRIDA are directly connected to and underpin the fundamental rights. The Minister's role is to make a determination concerning the civil rights of the Claimant and he must do so recognizing the Charter. The Minister is exercising a statutory function on behalf of the citizens of this country. There is no excuse for the way in which he treated with this matter. What is worse is the failure to respond with a reason and so the decision does not seem to have any sort of anchor.

[62] Mr Gordon emphasized that the right of access to a court must be practical and effective, not theoretical or illusory. The only way the concept of access can be upheld is if the Minister is guided by section 16. If the Minister fails to address a matter within a reasonable time he breaches the right because it is bound to the concept of due process as enunciated in the Charter.

[63] Perhaps it is a good starting point to consider whether in according a wide interpretation to section 16(2), it could be construed to mean that the Claimant had a right to a fair hearing before the Minister in his decision making capacity.

[64] The Minister was called upon to make a decision pursuant to the section 11A provision. In the exercise of his power to make a referral he firstly had to be satisfied that an industrial dispute exists and that it should be settled expeditiously and even after that he still had to be satisfied that attempts were made without success to settle the dispute by such other available means or that in all the circumstances it constitutes an urgent or exceptional situation. On top of all of that, the referral **may** be made on her own **initiative** (emphasis mine). It is clear from this that even after all the conditions are satisfied there still exists a discretion on the part of the Minister.

[65] The main issue to be resolved here is whether the fair hearing requirement applies to the Minister in his decision making capacity. There is no direct guidance on this point from any authority to which the Court's attention was drawn so a look at Article 6 of the ECHR may be pertinent. Although Article 6 is not binding, it provides guidance which may sway a court one way or the other. Article 6 applies to hearings which take place in a court, like criminal trials and civil court cases. It also applies to some proceedings and decision making processes outside of the court and even disciplinary hearings and planning proceedings.

[66] Based on my understanding of Article 6, a decision which is quasi-judicial would attract the right to a fair hearing. Could the Minister therefore be

said to be exercising a quasi-judicial function in his capacity as a decision maker? After all, in order to make this decision as to whether a dispute existed he would be required to consider the mixed questions of law and of fact. He may even be required to address the legal principle of waiver in arriving at a decision.

[67] The cases of **Symbiote Investments Ltd v Minister of Science and Technology and Office of the Utilities Regulation** [2019] JMCA App 8; [2019] JMCA App 33 and **The Contractor-General of Jamaica v Cenitech Engineering Solutions Limited** [2015] JMCA App 47 were not cited before us but have provided this Court with valuable insight.

[68] One of the issues as formulated by the court in the **Symbiote** case (supra) was whether the Minister's exercise of discretion is purely executive or is, in fact, quasi-judicial. The position of the Minister was contrasted with that of the position of the Contractor-General at paragraph 31 of the judgment in this way:

> *"The submission that the Minister's decision was quasi-judicial, and therefore amenable to a stay, does not appear to have much force. Firstly, section 69 of the Constitution provides that the Minister is a member of the executive of the government. Secondly, unlike other legislation, such as the Contractor-General Act, which stipulates the conduct of what is deemed, by that Act, as a judicial process, the Act does not stipulate such a procedure for the Minister to follow in carrying out his duties with regard to the revocation of a licence. For that reason, cases such as* ***Cenitech*** *are distinguishable from the circumstances of the present case. In* ***Cenitech****, Phillips JA, at paragraph [69], sets out some of this court's reasons for finding that the investigative process by the Contractor-General is a judicial process. She said:*
>
> *"[69] By virtue of these sections, it is clear that the applicant [the Contractor-General] has considerable power when investigating all matters related to the contract award process* ***and when exercising these powers, he is indeed carrying out a judicial function****. Section 16 of the Contractor-General Act empowers the applicant to undertake an investigation on his own initiative and section 17 allows the applicant to conduct hearings to further his objectives in ensuring lawfulness and transparency in the contract award process. In these hearings, the applicant has the power to hear and receive evidence from persons on oath.* ***Section 18 of the Contractor-General Act classifies these hearings as judicial proceedings within the meaning of section 4 of the Perjury Act which defines judicial proceedings as a***

> ***'proceeding before any court, tribunal, or person having by law power to hear, receive and examine on oath'.*** *In conducting these hearings, the applicant has the power of a Supreme Court judge." (Emphasis supplied)*
>
> *[32] In the present case, an examination of section 14 of the Act demonstrates the difference in the legislature's approach between a quasi-judicial process and an executive one. Subsections (1), (7) and (8) provide steps which the OUR should take if it is of the view that a person has jeopardised his licence by doing, or omitting to do, something. The OUR is required to conduct an investigation and, thereafter, to make a recommendation to the Minister. The Minister, before acting upon the recommendation, is required to "afford the licensee an opportunity to show cause why the licence should not be suspended or revoked" (subsection (5)).*"

[69] In making the decision whether or not to refer the matter to the IDT, although the Minister may have considered the relevant law and how it relates to the facts or may even have acted on legal advice provided, at no point in time would he have been under any obligation to conduct any hearing, call witnesses or hear from any of the parties, or even hear legal arguments. When the role of the Minister is contrasted with the role of the Contractor-General there are several distinguishing features starting with the fact that the Contractor-General Act classifies the proceedings conducted as judicial proceedings. The Minister's functions here are more akin to those of the Minister in the **Symbiote** case which are executive in nature.

[70] I am therefore of the view that the decision the Minister was required to make was an executive decision and that he does not hold a quasi-judicial function. The Minister does not fit into the category of a court, tribunal or public authority engaged in the determination of a party's civil rights and obligations pursuant to section 16(2). In light of that, the Claimant would not have any right of hearing before the Minister and consequently no right to a fair hearing.

Right to a fair hearing in court proceedings

[71] The right of a Claimant to access the court is always extant. The fact that the Claimant filed the action herein requesting inter alia, that the Court

grant an order for mandamus and later an order for certiorari signified that he was aware of his right to petition the court for judicial review. Under those circumstances could it be argued that the Defendants breached his right to a fair hearing? It is useful to look at the avenues open to the Claimant in the event he was not pleased with the decision or lack of a decision on the part of the Minister.

[72] Pursuant to Civil Procedure Rule 56.2 any person who has a sufficient interest in a matter can apply for judicial review. This includes any person adversely affected by a decision under review. Under Civil Procedure Rule 56.1(3) the remedies that can be granted on an application for Judicial Review are squarely identified as:

(i) certiorari, for quashing unlawful acts;

(ii) prohibition, for prohibiting unlawful acts;

(iii) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.

[73] Section 52 of the Judicature Supreme Court Act makes provisions for the court to order the issue of Writs:

(1) The prerogative writs of mandamus, prohibition and certiorari shall no longer be issued by the Supreme Court or any Judge thereof.

(2) In any case where the Supreme Court would, but for the provisions of subsection (l), have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done, or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the Supreme Court for any purpose, the Court may make an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be.

(3) The said orders shall be called respectively an order of mandamus, an order of prohibition and an order of certiorari.

[74] In answer to a question from the Court as to whether the Claimant could have sought a writ of mandamus to compel the Minister to make a decision, Mr Gordon responded that that would be to put an onerous burden on the Claimant. He suggested that the court would have to consider that he may be someone of little means so there really should be an onus on the Minister to fulfil his statutory obligation. He suggested that the citizen should get what he is entitled to and that the ideal situation is one where the Minister does what he is paid to do.

[75] Although there is merit in the contention that there should be an onus on the Minister to fulfil his statutory duty, I do not agree with the argument that there should be no onus on the Claimant. It is clear that the Claimant always had the option of applying for a writ of mandamus to ask the court for an order requiring the Minister to make a decision whether to refer or not to refer his matter to the IDT pursuant to section 11A. There was nothing in the action of the Minister that prevented him from doing this at any point in time. He did not have to await any act on the part of the Minister to do this. The mere fact of the Minister's failure to make a decision would have provided him with the necessary ammunition to file a claim for judicial review on that basis.

[76] The Claimant's other option was to bring an action for certiorari of the Minister's decision. This is what he has now pursued by way of his Claim which was amended during the course of these proceedings. He has sought to challenge the Minister's decision and has asked for it to be quashed on the basis that it is ultra vires. He however, could not have filed this Claim in the absence of a decision. So the Claimant in order to assess his options would have to first be provided with the Minister's decision.

[77] It is important to make the distinction between a writ of mandamus and a writ of certiorari. What is clear is that each stands on its own. In fact, even if he had first brought an action for mandamus and succeeded in having

the Court order the Minister to make a decision and the Minister thereafter made a decision, if he were not pleased with this decision, he would still have the right to bring another claim seeking certiorari. In fact, there are special provisions set out in rule 56.16 of the CPR which relate exclusively to an applicant seeking an order for a writ of certiorari. Whether or not it is applicable to the instant case, it supports the point of the distinction in the two remedies so much so that it could not successfully be argued that the failure to seek an order for mandamus would in any way prejudice his right to seek an order for certiorari.

[78] The Claimant has contended that he has been deprived of the right to a fair hearing. In order to prove this, he would have to establish certain essential elements. Permit me to borrow from the definition accorded to a fair hearing by Albert Fiadjoe in his text, "Commonwealth Caribbean Public Law", where he expressed at page 239:

> *"Fair hearing does not mean a hearing according to what would be required in a court of law. Basically, it means an opportunity to put one's side of a case before a decision is reached. Accordingly, the legal requirement on the adjudicator is nothing more than a basic duty of fairness. Of course, in deciding on what is fair, the courts have to balance several interests, such as those of the State, principles of good administration, speed, efficiency in decision making and the level of injustice suffered by the individual in having been denied the opportunity to present their case. There are no fixed rules, nor is there a requirement that any rules or evidence should be followed or applied. There is no insistence either that there must always be an oral hearing. It all depends on the circumstances of the case. It is however possible to identify from the practice of the courts what are the ingredients of a fair hearing."*

[79] Fiadjoe went on to list some ingredients of "fair hearing" as being the right to make representations; the right to notice of the charge and full particulars thereof (applicable for criminal matters); and the right to legal representation. When these are taken together with the learning gleaned from the judgment of the court in the **Al-Tec** case, it is clear that the Claimant had all of those elements satisfied during the course of the hearing of his matter.

[80] At his hearing he had the benefit of representation by counsel, he had the opportunity to file written arguments, to put question to the witness and the right to be heard. In those circumstances, he has failed to satisfy this Court as to how his fair hearing right has been, is being or is likely to be breached. His claim fails on this limb.

RIGHT TO A FAIR HEARING WITHIN A REASONABLE TIME

[81] Although I have found there to be no breach of the right to a fair hearing in the court proceedings, that does not determine the issue as to whether there has been a breach of the reasonable time guarantee so that is the next issue that will be considered.

[82] Mr Gordon contended that the main issue here is whether in any event there has been a breach of the Claimant's constitutional right to a fair hearing within a reasonable time by an impartial tribunal. He contended that the right to access the IDT exists independent of the Minister. If the Minister decides not to refer a matter, one can go to the Judicial Review Court and if not satisfied he can go to the Court of Appeal, so there is no question about the existence of a right to a fair trial within a reasonable time. He suggested that the term 'access' should be given its widest meaning and so the longer the Minister takes to make a decision the longer it takes to access a Judicial Review Court.

[83] He suggested that an infringement can also occur even if the Minister delays but then refers the matter to the IDT. The fair hearing could be compromised by the delay as there may be evidence necessary to prove the case that is no longer available. He reiterated that it is important that the Minister be informed of the need to move with alacrity regardless of how he intends to move.

[84] On this point, he commended to the Court the authorities from the Strasbourg Court, which I alluded to earlier; **Crompton v The United Kingdom** (supra), **Frydlender v France** (supra) **and Lupeni Greek Catholic Parish and Others v Romania** (supra)**.** He extrapolated three factors that, he advanced, should be taken into account by this Court in

determining whether the right to a hearing within a reasonable time established by Article 6(1) of the ECHR has been breached. The factors are:

(i) the complexity of the case;

(ii) the conduct of the applicant and of the relevant authorities; and

(iii) what is at stake for the applicant in the dispute.

[85] In summary, he posited that when these factors are applied to this case it is clear that the dispute was not complex; the applicant did not by his conduct contribute to the inexplicable delay; what was at stake was the Claimant's guaranteed constitutional right to access the IDT within a reasonable time so that the dispute about his termination can be finally settled.

[86] Mr. Hacker countered those submissions by responding that if the Court were to find that there is delay, then the Court should take into consideration all the factors of this case to include the fact that the Claimant signed the release on November 28, 2017 but that the Ministry was not approached until October 3, 2018. Given the unique circumstances of this case and the fear that the Minister might be held to act ultra vires, the Industrial Relations Division which is responsible for the conciliatory process, referred the matter to the Legal Services Unit of the Ministry for an opinion and there was some delay in providing said opinion. The Legal Services Unit gave their opinion and they indicated that they also had a difficulty with a significant staff shortage and significant staff constraints as they were before the Joint Select Committee in Parliament in the promulgation of an Act. He relied on the affidavit of Ms. Nicola Richards to support these averments. He submitted that in all the circumstances, there is an explanation provided and so it is now a question for the Court to decide if the explanation provided is sufficient.

[87] Mr. Hacker sought to distinguish the cases relied on by the Claimant. He pointed out that the **Crompton** case is different as the delay spanned from 1994 to 2001 in circumstances where the applicant was entitled to due process under the Act. The statutory scheme in that case was completely different when compared to the circumstances of this case. He further argued that the **Frydlender** case is also distinguishable as that court took nine years and eight months to resolve the dispute.

[88] The test in determining whether there has been a breach of the right to a fair hearing within a reasonable time or the reasonable time guarantee was set out in **Bell v DPP** where the Privy Council outlined four factors which should be considered in determining whether the right to a fair trial within a reasonable time has been infringed. This dictum has been followed by this Court in civil proceedings as well as in criminal proceedings. Indeed, the principles to be derived are unassailable and this Court finds it appropriate to borrow those factors and apply them to the civil standard as well. My sister Wolfe-Reece J when delivering her judgment in the **Ernest Smith** case adverted to them when analyzing the issue of whether there had been an infringement of the applicant's right to a fair hearing within a reasonable time. Both Counsel have recommended that this Court be guided by my learned sister's dicta wherein at paragraph 153 of the judgment she relied on Lord Templeman's pronouncement in **Bell v DPP** (supra) and summarized it in this way:

> *"His Lordship relied on the decision of the Supreme Court of the United States in **Barker v Virgo** (1972) 407 U.S. 514 and laid down four conditions which must be satisfied in determining whether an individual has been deprived of his right to a fair trial. The conditions are:*
>
> *The length of the delay*
>
> *The reasons given by the prosecution to justify the delay*
>
> *The responsibility of the accused for asserting his rights*
>
> *Prejudice to the accused."*

[89] I agree with Mr Gordon that with some "tweaking" these conditions can be applied to this Claim and can be used as a guide for this Court in

determining whether there has been an infringement of the right to a fair trial within a reasonable time as provided for in section 16(2). This is no doubt a phrase borrowed from Sykes J in the case of **Mervin Cameron** (supra) where at paragraph 134 he arrived at this formulation:

> *"There is nothing wrong with the analytical model developed by Cromwell J in Jordan with appropriate change in phraseology and a bit of tweaking being applied to civil cases…"*

[90] Whereas the right to a fair hearing in the determination of a person's civil rights has not had the benefit of much judicial consideration in this jurisdiction it has been considered by several decisions emanating out of the European Court of Human Rights dealing with a breach of Article 6(1). The Court finds the Strasbourg line of cases cited by Mr Gordon to be of great assistance and so they will be discussed below.

[91] In **Crompton**, the applicant, Mr Thomas John Crompton who was employed to the Territorial Army as a pay and accounts clerk was made redundant in February 1994 after being informed in July 1993 that the army would be undergoing organizational changes to civilianisation. Mr Crompton's discharge was made on the incorrect basis that his services were no longer required. Mr Crompton had been informed in 1993 that his post would be converted to that of a technical store-man (civilian) post. He later filed a complaint regarding the redundancy to the Industrial Tribunal but his claim was rejected on the basis that they did not have jurisdiction over matters involving military personnel. By December 1996, the matter was placed before the Army Board for a determination as to whether the applicant, Mr Crompton was subject to military law.

[92] In January 1998, Mr Crompton applied for judicial review of the Board's failure to determine the matter within a reasonable time. The application was granted and the High Court ordered that the Army Board deal with the case expeditiously. The matter continued for nine years until 2005 when the Board issued Mr Crompton a final offer of compensation. Mr Crompton made a final application for judicial review to the European Court of Human Rights in November 2005, alleging that the proceedings took

eleven years to conclude and as a result this was a breach of his "right to a fair and public hearing within a reasonable time by an independent and impartial tribunal" under Article 6(1).

[93] The Court found that there was a violation of Mr Crompton's right to a fair hearing within a reasonable time under Article 6(1) however, they found that there was no breach in relation to having the matter determined by an independent and impartial tribunal. In arriving at their decision, the Court considered that the reasonableness of the length of proceedings depends on the particular circumstances. The Court considered the financial importance of Mr Crompton's case, the fact that the issues raised were not factually or administratively complex and that there were significant periods of inactivity by the authorities. As a result, the proceedings were not pursued with diligence thus resulting in a violation of the reasonable time requirement under the Article. Lastly, the Court looked at how the Army Board arrived at its award of compensation to Mr Crompton and found that since they based their calculations on a six-year cut-off date and salary base, the case was determined by an independent and impartial tribunal.

[94] Similarly, in **Frydlender**, the applicant, Mr Nicholas Frydlender was employed under a contract of services by the Economic Development Department of the Ministry for Economic Affairs. In a letter dated December 10, 1985, the Minister informed Mr Frydlender that he would not be renewing his contract upon its expiration due to inadequate performance. In a letter dated January 9, 1986, the Minister informed Mr Frydlender of his final decision not to renew the contract on the ground that, among other matters, he had shown a marked lack of initiative towards importers. Mr Frydlender applied for judicial review of the decision in 1986. The application for judicial review was dismissed by judgment dated January 6, 1989. Mr Frydlender appealed and that application was also dismissed. Mr Frydlender thereafter applied to the European Court of Human Rights in November 1995 alleging a violation of his right to a hearing within a reasonable time under Article 6(1).

[95] The Court determined that in the circumstances, Article 6(1) applied to the applicant's case. On the issue of whether there was a violation, the Court reiterated that "reasonableness" must be assessed in light of the circumstances of the case and the factors: (1) complexity of the case; (2) conduct of the applicant and relevant authorities; and (3) what was at stake for the applicant in the dispute (see Comingersoll SA v Portugal [GC], no 35382/97, § 19 ECHR 2000-IV). The Court noted that the Conseil d'Etat gave judgment nearly six years after the case was referred to it with no explanation for the delay from the Government and that this was manifestly excessive. Further, judicial systems must be organized in a way that guarantees everyone the right to a final decision within a reasonable time in determination of civil rights and obligations (see Caillot v France, no 36932/97, § 27, 4 June 1999, unreported). In the circumstances, the length of proceedings was excessive and failed to satisfy the reasonable time requirement.

> *The case of **Lupeni Greek Catholic Parish and Others v Romania** also addressed the question of the right to a fair hearing within a reasonable time and the court at paragraphs 142 and 143 set out the applicable principles:*
>
> *142. It is for the Contracting States to organise their judicial systems in such a way that their courts are able to guarantee the right of everyone to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time (see **Comingersoll S.A. v. Portugal [GC],**no. 35382/97, § 24, ECHR 2000-IV, and **Vassilios Athanasiou and Others v. Greece**, no. 50973/08, § 26, 21 December 2010).*
>
> *143. The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see Sürmeli v. Germany [GC], no. 75529/01, § 128, ECHR 2006-VII).*

[96] When all these cases are examined the following questions arise as being pertinent to the determination of the main issue:

(i) **How long has the delay been?**

(ii) **What are the reasons provided for the delay?**

(iii) **Is the delay reasonable in light of the particular circumstances of the case such its complexity and the conduct of the parties?**

(iv) **Has the Claimant contributed to the delay or has he done anything to assert his rights?**

(v) **What is at stake for the Claimant, or what does he stand to lose?**

(vi) **Has there been any prejudice occasioned to the Claimant resulting from the delay?**

How long had the delay been?

[97] The question of the length of the delay is a question of fact. In order to ascertain this, it is prudent to set out the relevant chronology of events of what took place between the Claimant and the Ministry from the time the Claimant received the letter of redundancy to the time that the Minister provided his response. These essential facts will be extracted from the affidavits filed by and on behalf of the parties.

CHRONOLOGY OF EVENTS

November 28, 2017- Letter addressed to the Claimant informing him that his employment would be terminated by way of redundancy

December 1, 2017- Revised Letter of Redundancy addressed to the Claimant

December- Claimant became aware of an advertisement for post similar to the one he occupied and spoke to Mrs Dobson-Brown and the Human Resource Manager Mr Judon Bowden

October 3, 2018- Letter from Mr Kwame Gordon addressed to the Ministry of Labour seeking the intervention of the Ministry into the dispute

November 6, 2018- Two Letters from Mrs Keisha Mighty-Brown confirming a meeting on November 30, 2018, one addressed to Mr K Gordon and the other addressed to Mr C George

November 30, 2018- First Conciliation meeting

December 10, 2018- Letter from Mr K Gordon to the Ministry advising that the other party was not available to meet on December 10, 2018 and requesting that the matter be referred to the IDT

December 10, 2018- Email from Mrs Mighty-Brown to Ms Clarke (legal assistant to Mr Gordon) requesting dates to continue the conciliatory process

December 18, 2018- Email from Mrs Mighty-Brown informing of a conciliatory meeting confirmed for December 27, 2018

January 2, 2019- Letters from Mrs K Mighty-Brown to Mr K Gordon and Mr Conrad George confirming the meeting of January 22, 2019

January 22, 2019- Second Conciliation meeting

February 11, 2019- Third Conciliation meeting. Another request made to refer the matter to the IDT

March 29, 2019- Letter from Mr K Gordon requesting that matter be referred to IDT and threatening to seek judicial review

April 1, 2019- Email from Mrs Mighty-Brown to Mr Gordon advising that the matter was being attended to

April 4, 2019- Letter from Mr Michael Kennedy to Mr K Gordon advising that the conciliatory process was not exhausted and advising that another conciliation meeting will be arranged

July 4, 2019- Fourth Conciliation meeting. A further request made to refer the matter to the IDT

January 9, 2020- Letter from Mr Gordon to the Ministry of Labour making enquiries

January 9, 2020- Letter from Mr Michael Kennedy advising that the Minister is dutifully advising himself so as not to fall into error

March 11, 2020- Claimant filed a Fixed Date Claim Form with supporting Affidavit

June 20, 2020- Advice received from the Legal Services Unit of the Ministry

July 7, 2020- Affidavit of Mrs Keisha Mighty Brown filed

July 16 and 27, 2020- First hearing of the Fixed Date Claim Form held

July 29, 2020- Case Management Conference at which hearing fixed for January 17 and 18, 2022

August 12 2020- Letter from Mr K Gordon to the Director of State Proceedings enquiring when the Minister will advise whether the matter is to be referred to the IDT

October 20, 2020- Affidavit of Mr. Joerio E Scott filed

October 22, 2020- Letter from Ms Carian Freckleton-Cousins signing for the Attorney General advising that the matter is being reviewed internally

December 31, 2020- Resignation of attorney-at-law at the Attorney General's Department to whom the Claim was assigned

January 25, 2021- Letter from Mr K Gordon to the Ministry of Labour and Social Security requesting the Minister's decision

October 20, 2020- Claimant filed Amended Fixed Date Claim Form adding a request for an injunction or an Order of Mandamus and exemplary and/or aggravated damages

December 29, 2021- Matter re-assigned within the Attorney General's Department

January 4, 2021- Recommendation of Ms Althea Jarrett sent from the Attorney General's Chambers to the Ministry advising the Minister to refuse to exercise his discretion

January 11, 2022- Letter from Mr Michael Kennedy to Mr K Gordon indicating that the Minister has declined to refer the matter to the IDT

January 12, 2022- Letter from Samuda and Johnson to Ms Althea Jarrett requesting reasons for the Minister's decision

January 13, 2022- Second Affidavit of Mrs K Mighty-Brown filed attaching letter from Mr M Kennedy indicating the decision of the Minister

January 14, 2022- Affidavit of Mr Joerio Scott filed

January 18, 2022- Affidavit of Ms Nicola Richards filed

[98] The relevant period to be considered is the time from which the request was made of the Minister to refer the matter to the IDT. This has to be counted from the time at which the efforts at conciliation ended. The only evidence of that is that on July 4, 2019 the last meeting took place and Mr Gordon again requested that the matter be referred to the IDT so time

would start to run from that date. Between July 4, 2019 and January 9, 2020 there is no evidence of any communication from the Ministry.

[99] The affidavit of Mrs Mighty-Brown is instructive in this regard. She provided a chronology of events up to the last meeting date of July 4, 2019. After that time her affidavit is devoid of any reference to any dates on which any of the other events occurred.

[100] What is clear is that the first time at which the matter could have been referred to the IDT was after the attempts at conciliation had ended. This was after July 4, 2019. The Minister's response however was not forthcoming until January 11, 2022. The earliest time at which the Claimant could have filed this application seeking certiorari was January 11, 2022 after he had received the decision of the Minister.

[101] There has therefore been a delay of thirty months and one week.

What are the reasons provided for the delay?

[102] The reasons for the delay are extracted from the affidavit evidence of Mrs. Mighty-Brown and the evidence she gave in Court as well as the affidavit evidence of Ms. Nicola Richards. Although Mrs. Mighty-Brown speaks of guidance being sought from the Ministry's Legal Services Unit so as to determine whether the Minister has jurisdiction to refer the matter to the IDT, she provides no timeline for when this was done.

[103] She acknowledged the Claimant's request for an update and indicated that none was yet forthcoming as advice was still being awaited from the Legal Services Unit. She then explained that she was advised by the said Unit that the delay in providing the required advice was due to significant staff shortage and other significant constraints. Some of the constraints she cited were the loss of legal officers, the ongoing COVID -19 pandemic and the attendant measures under the Disaster Risk Management Act to include curfews, lockdown days and work from home orders. These factors resulted in the matter being left unassigned. This was combined with the closure of the offices on the order of the Ministry of Health. This

led to the relocation of the offices and the entire operations of the Attorney General's Department.

[104] She adds that the advice has now been provided by the Minister but declines to provide a date relative to this. It can therefore be deduced that on July 7, 2020 when she swore to her affidavit the Minister had within his possession the advice requested.

[105] The affidavit evidence of Nicola Richards is also to be taken into account. Based on her evidence the advice was received from the Ministry on June 6, 2020. By then court proceedings had already commenced so the advice was forwarded to the Attorney General's Chambers for their recommendation on how to proceed. The file was assigned to an attorney-at-law who resigned with effect as of December 31, 2020. No information as to what took place up to December 31, 2020 was provided except to say that this contributed to the delay in the Ministry receiving the recommendation from the Attorney General. It was then stated that due to other severe challenges the matter was only re-assigned on December 29, 2021. Almost an entire year had elapsed with no indication of anything being done on the part of the Defendants.

[106] From the affidavit of Ms. Richards, it is clear that by June 16, 2020 they were in receipt of the advice from the Ministry, yet between June 16, 2020 and January 4, 2022 there was no communication from the Minister and no indication that the Minister or Ministry did anything to nudge the Attorney General's Chamber to provide an earlier response or even to follow up. This is despite the Claimant having filed his Fixed Date Claim Form on March 11, 2021, which Mrs Mighty-Brown was acutely aware of.

[107] On January 4, 2022 a letter was written by Ms. Althea Jarrett on behalf of the Attorney General recommending that the Minister exercise her discretion not to refer the matter to the IDT. It was only then that the Minister acted and provided the response of January 11, 2022 just a few days short of the commencement of the matter in the Full Court on January 17, 2022.

[108] From all the affidavits perused, it is clear that on the part of the Defendants, for the period of June 16, 2020 and December 31, 2020 no reason has been provided for the failure to do anything. There was also no indication that any enquiries were made on the part of the Minister to address the lack of a response from the legal department. There is no indication of any follow up. There was some attempt in the affidavit of Ms. Richards to indicate reasons for the further delay presumably during the period December 31, 2020 to December 29, 2021 which included the resignation of staff, flooding at the Attorney General's Chambers, and the fact that the Chambers had to be relocated.

[109] Even taking all of that in account, that does not absolve the Minister of his duty to do what he is tasked with doing and there still remains the fact of unexplained delays for some periods of time. The fact of the unexplained delays taken together with the unsatisfactory nature of the explanations provided, lead to the inference that there was no justification for the delay. It may very well be that unexplained delay can lead to an inference of unjustifiable delay. [3]

Is the delay reasonable in light of the particular circumstances of the case such as its complexity and the conduct of the parties?

[110] If this were a complex matter or one which was novel, it might have been successfully argued that the delay was reasonable. This is a matter involving the interpretation of the provisions of the LRIDA, an Act that has been a part of our jurisprudence for over forty years and the amendments to section 11 could no longer be described as recent. It is clear from a few of the authorities cited that the issues raised have been raised in other similar matters over the years.

[111] It is also clear from the evidence of Mrs Mighty-Brown that the Defendants were aware of the recent developments in the courts regarding the issues

[3] See the dicta of Sykes J in **Mervin Cameron** and the framework considered which included the Morin framework where Sopinka J. at paragraph 28, in repeating the words of a previous decision (R v Smith [1989] 2 SCR 1120), noted that although the burden of proof is on the applicant, unexplained delay can lead to an inference of unjustifiable delay.

raised. In addition, the letter from Mr Michael Kennedy dated January 9, 2020 demonstrated that from as far back as the beginning of 2020 the Minister had an appreciation of the issues raised and his obligation to consider whether an industrial dispute existed especially in the circumstances where the Claimant had "accepted his redundancy".

[112] When the conduct of the parties is examined the conduct of the 1ST Defendant could be described in some instances as that of a high handed approach. The brusque letter from Mr Kennedy on January 9, 2020 on the Minister's behalf, the failure to respond to Counsel's letter to the Ministry on occasions as well as the failure to provide reasons for the delay to the Claimant himself are all supportive of this kind of approach. Even with the consistent lack of response to Counsel for the Claimant, there was nothing akin to an apology offered for the lack of response. In the furtherance of good administration that might have served to ameliorate the effect of the delay. To make matters worse, after having delayed for so long, there were no reasons provided for the decision.

[113] I am of the view that there was no duty on the part of the Minister to provide reasons for his decision. However, the lack of reasons may very well cause further delay because the Claimant now had to make another request for reasons. He no doubt saw this as a necessary step in the evaluation of his options and next move. This might have assisted him in assessing whether the Minister acted within the bounds of the law or whether he was acting ultra vires so as to be able to determine whether to take further action.

[114] The giving of reasons may also have assisted this Court in determining whether the delay was reasonable. The giving of satisfactory reasons for a decision is viewed as being the hallmark of good administration.[4] The failure to give reasons when viewed as part of the conduct of the 1st Defendant had the potential to exacerbate the situation and cause further delay.

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[4] Lord Wolfe, Protection of the Public, p. 92

[115] Even after the Claimant filed his Claim in court, the conduct of the 1st Defendant remained the same. On the other hand, the Claimant's conduct throughout this matter was always that of respect and conciliation. He was always seeking through his Attorneys-at-law to have the issue regarding his termination determined.

Has the Claimant contributed to the delay or has he done anything to assert his rights?

[116] There is no action on the part of the Claimant that could be construed as having contributed to the delay. As far as can be seen, he did everything within his power to assert his rights. This is viewed in the context of the **Ernest Smith** case in which Evan Brown J in addressing the subject of the responsibility of a defendant for asserting his rights, referred to a passage from the dictum of the court in the case of **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others** [2018] JMCA App 7. The reference is reflected at paragraph 20 of the judgment in this way:

> *"Whether and how a defendant asserts his rights is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain".*

Evan Brown J (as he then) then continued in his own words:

> *"It must be remembered that these signposts were developed in the context of a criminal case. However, in the context of a civil claim in which judgment was reserved, it is reasonable to expect enquiries to be made of the court about when the delivery of the judgment may be expected..."*

[117] The Claimant in this case was relentless. Through his attorney a plethora of letters was written, in fact even when the 'brusque missive' of January 9, 2022 came his way he did not relent. After receiving the Minister's decision of January 11, 2022, within a day he wrote to the Director of State Proceedings seeking reasons for the decision. Although he received no response, he nevertheless, on what could be considered the first

opportunity that lended itself, sought to amend his Claim to include the request for an order of certiorari to quash the Minister's decision.

What is at stake for the Claimant, or what does he stand to lose?

[118] I am of the view that what was at stake was the Claimant's ability to have the issue of his termination settled within a reasonable time and that what he stood to lose was time.

Has there been any prejudice occasioned to the Claimant resulting from the delay?

[119] There is no need on the part of the Claimant to prove prejudice. On the question of prejudice my brother Brown J in the **Ernest Smith** judgment posited at paragraph 23:

> *"In **Bell v DPP**, no prejudice was articulated on behalf of the accused and none was necessary to establish a breach of the trial within a reasonable time guarantee. If none was required to be shown where the liberty of the subject was in jeopardy, a fortiori, it is not required to establish a breach of a hearing within a reasonable time guarantee under section 16 (2)."*

[120] Although proof of prejudice is strictly speaking not compulsory, the Claimant here has asserted that he has been prejudiced by the delay. He has expressed that he is still unemployed, however that in and of itself could not be attributed to any action on the part of the Defendants. However, it is my view that prejudice can be presumed from the very fact of the delay as time lost cannot be regained.[5]

[121] He has asserted that the delay in determining whether the matter should be referred has prevented him, in the event the matter is referred, from having the dispute receive a fair hearing within a reasonable time, or if the referral is unfavourable to him, from considering other legal options. In his affidavit, the likely prejudice seems to be confined to his rights to access

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[5] See the dicta of Sykes J in the Mervin Cameron case at paragraph 143 he said "..Time lost can never be regained."

the IDT and not the court per se although he does mention the hindrance to him considering other legal options.

[122] Even if the Claimant has no case he is entitled to be told he has no case. This position is supported by the dicta of Lord Steyn in the **Darmalingum** case where he postulated that, even if the defendant is guilty, this factor cannot justify or excuse a breach of the guarantee of a disposal within a reasonable time. It therefore stands to reason that this same principle would be applicable in civil proceedings so even where the Claimant's case is doomed to fail, this factor cannot justify a breach of the reasonable time guarantee.

[123] The dicta of the court in the **Darmalingum** case was singled out in the **Ernest Smith** case as well as in the judgment of the Caribbean Court of Justice of **Solomon Marin Jr v The Queen** which I alluded to earlier. At paragraph 185 in the judgment of **Solomon Marin Jr v The Queen**, the following was articulated:

> *"Lord Steyn said in Darmalingum, even the manifest guilt of the accused cannot justify or excuse a breach of the reasonable time guarantee. As Saunders, and Wit JCCJ said in Gibson, there is nothing that can be done to undo past unreasonable delay and its effects on the accused and the society".*

[124] I am of the view that the fact of the delay and length of the delay impacted the Claimant's ability to approach the Court on an application for a writ of certiorari within a reasonable time. The fact that he may well have failed on that point does not interfere with the fact of the breach as there would still remain other avenues and recourses available to the Claimant which include the right to appeal a decision adverse to him. Even now, it could be argued that the Claimant has not reached the stage where he has exhausted all available avenues. Despite all his efforts at arriving at a speedy resolution of his matter, this has been foiled by the Minister's delay. The Claimant on the other hand has always acted promptly in seeking to vindicate his rights. The time it would take him to reach a final position in a matter such as this, which is by no means complex would not

be a reasonable one because of the length of time it took the Minister to make a decision.

[125] There were significant periods of inactivity and the fact that the matter was obviously of some financial importance to the Claimant, it would have been expected that it would be pursued with some diligence. I hasten to say that although there was no evidence of any deliberate act on the part of the Minister to prevent the Claimant's matter from being dealt with, what strikes me is the cavalier way in which his matter was treated with and the failure to exercise due diligence. The Minister failed to exercise the diligence required in this case.

[126] Before making a final determination on the issue as to whether there has been a breach of the Claimant's constitutional right, the authorities have dictated that it is necessary for me to consider whether some other available and adequate means of legal redress was available to the Claimant.[6] What the Claimant has asserted is a breach of the reasonable time guarantee and despite the fact that he could have applied for mandamus to force the Minister to act, there is no guarantee that this would have resulted in any earlier decision on the part of the Minister especially considering what I have found to be the cavalier treatment of this matter by the Minister. This is in circumstances where what the Minister was required to do was simply a part and parcel of her functions. This Court therefore feels compelled to decide this issue on the basis of the actual state of affairs and what is before the Court which is that the Minister failed to act within a reasonable time and therefore deprived the Claimant of his ability to apply for certiorari within a reasonable time and therefore have a fair hearing within a reasonable time on that point.

[127] I am of the view that in all the circumstances, the Claimant has succeeded in proving on a balance of probabilities that the delay has deprived him of

[6] See Brandt v Commissioner of Police and Others [2021] UKPC 12 and The Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328 at para 25

the right to a fair hearing in the Court within a reasonable time and so his right to a fair hearing within a reasonable time has been contravened.

[128] As it relates to the IDT, despite my finding that there was no breach of the fair hearing provision, in the event I am wrong on that point, I move to consider whether there is any likelihood of an infringement of his right to a fair hearing within a reasonable time before the IDT. The reason for this is that although the Minister has made a decision not to refer the matter, this decision is one which is subject to review by the court as is being done here on the application for judicial review and which may be subject to the appellate process.

[129] In addition, the court in assessing whether or not there has been a breach of section 16(2) is also required to address its mind not only to whether the right has been infringed or is being infringed but also whether it is likely to be infringed and whether the delay had the potential to affect his right to access the IDT within a reasonable time.

[130] This would however only be applicable if the Claimant were to succeed in an appeal in which case the Claimant's allegation of a breach of his reasonable time guarantee could still be an issue. However, a court will thereafter have to consider all the factors listed earlier in assessing the nature of the entire delay and whether it breaches the reasonable time guarantee.

[131] Although, under section 19(1) of the Charter, the Claimant's case could succeed if there is a likelihood of his right being breached, that has to be carefully examined in the context of the discussions above. Can it be said to be likely when, it requires an assessment of probabilities and even speculation? To say it is likely means it is more probable than not. All these factors though are dependent on certain possibilities and probabilities and so could not be viewed as tangible. It may very well be that in the future it may become apparent that his right to a reasonable time to access the IDT was breached however, this case has to be decided on the current state of affairs and not on possibilities and probabilities without more. At

this time the Claimant has failed to establish that any right has been, is being or is likely to be breached with respect to the IDT. The Claimant has therefore failed to prove that his right to a fair hearing within a reasonable time before the IDT has been infringed.

[132] In light of my finding that the Claimant had no right to a hearing before the Minister and no right to a fair hearing provision there would be no useful purpose in considering whether his right to a fair hearing within a reasonable time has been, is being or is likely to be breached in respect of the "proceedings" before the Minister.

RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

[133] For the reasons indicated earlier there would be no useful purpose in considering whether the Claimant's right to an independent and impartial tribunal has been breached in relation to the IDT. On the other hand, a Court can find a breach of the reasonable time guarantee but not that the right to an independent and impartial tribunal has been breached. It is therefore incumbent on the Court to consider whether in the circumstances of this case the Claimant's right to an independent and impartial trial in court proceedings has been breached.

[134] The **Crompton** case is supportive of the position taken above as the court found that although there was a breach of the reasonable time guarantee there was no breach in respect of the independence and impartiality of the tribunal. In **Crompton** there was a specific complaint concerning the independence and impartiality of the tribunal in circumstances where it was not difficult to discern the existence of a conflict based on the fact that the members of the Army Board were the members of the tribunal and the complaint concerned their very conduct. They could therefore have been viewed to be judges in their own cause. Mr Crompton had argued that this could not be remedied by judicial review as it was the Board's purview to address the factual complaint and not that of the court. The Court however concluded that the High Court on judicial review did have the "sufficiency of review" to remedy any lack of independence of the Army Board.

[135] There has been no complaint in this case concerning the independence and impartiality of either the IDT or the Court. To give an example of what one would be looking for in a case in which that limb has been breached, I have looked to the Canadian jurisdiction particularly because of the inherent similarities between section 11(d) of the Canadian Charter of Rights and section 16(2) of the Jamaican Charter, and identified the case of **Valente v The Queen** [1985] 2 SCR 673, as useful.

[136] **Valente v The Queen** is a leading judgment out of the Supreme Court of Canada and deals with the question of whether there was a breach of section 11(d) of the Charter with respect to the independence and impartiality of the tribunal. The Court made the following observation:

> *"The concepts of "independence" and "impartiality" found in s. 11(d) of the Charter, although obviously related, are separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others--particularly to the executive branch of government--that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.*
>
> *The test for independence for the purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. This perception must be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence and not a perception of how it will in fact act regardless of whether it enjoys such conditions or guarantees."*

[137] This is indeed a very compelling statement on independence and impartiality and not much more need be said here except that it is the Claimant who is required to prove a lack of independence and impartiality but short of a perfunctory reference to the term in the submissions of Counsel for the Claimant, there was nothing said that described or referred to any impartiality or lack of independence, whether perceived or otherwise on the part of the Court. No matter how wide or broad the

principles of interpretation can stretch there must be evidence to support the assertion before the Court can find in favour of the Claimant on this limb.

[138] There is therefore a lack of evidence to support any element of impartiality or lack of independence. The Claimant's case fails on this limb.

DECISION

[139] The Claimant succeeds only to the extent that the actions of the 1st Defendant are in breach of section 16(2) of the Charter. It is declared that the right of the Claimant under section 16(2) of the Charter to a fair hearing within a reasonable time was breached by the inordinate delay in the Minister's decision making process which rendered him incapable of applying for an order of certiorari within a reasonable time.

ASSESSMENT OF DAMAGES

[140] Having found that the Claimant's constitutional right to a hearing within a reasonable time was breached I now consider the question of the appropriate remedy taking into account the section 19 (1) provision which gives the Court the power to grant redress.

[141] A similar provision in the constitution of Trinidad and Tobago was considered by the Privy Council in 2005, before the promulgation of the Charter and the purpose and intendment of the reparation for breach of constitutional rights was articulated in **The Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 23, **Ramanoop as** follows:

> *"17. Their lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection chapter 1 of the constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.*

> *18. When exercising the constitutional jurisdiction, the court is concerned to uphold or vindicate the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation."*

The Claimant herein has sought vindicatory, exemplary and aggravated and damages. Each will be treated with in turn.

VINDICATORY DAMAGES

[142] An early examination of the types of redress under the Charter was undertaken by Edwards J (as she then was) in **Denese Kean-Madden v The Attorney General of Jamaica and Corporal T. Webster-Lawrence** [2014] JMSC 23. She relied on the decision of the Privy Council in **Ramanoop** as to the court's power to award remedies for violating constitutional rights and concluded that this court had the power to award damages for breach of the constitutional right in addition to any other award. Such an award, she said was not punitive but would serve to discourage the same breach in the future. She was also guided by the following passage from Lord Nicholls of Birkenhead in **Ramanoop** as to the assessment of damages.

> *"18. …The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law*
>
> *19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its objective. Accordingly, the*

> *expressions "punitive damages", or "exemplary damages" are better avoided as descriptions of this type of additional award."*

Ramanoop has since been often cited and accepted in this jurisdiction and in jurisdictions with similar constitutional arrangements as an accurate statement of the law.

[143] Lord Scott of Foscote in **Merson v Cartwright and the Attorney General of The Bahamas** [2005] UKPC 38 considered a similar provision in the Constitution of the Bahamas. After reviewing **Ramanoop** he concluded:

> *"These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount.* **The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression**. *The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge.* ***In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary." (****Emphasis mine)*

[144] However, that is not to say that in every case where a constitutional right has been infringed that constitutional damages flow. In the Privy Council decision of **Dennis Graham v Police Service Commission and the Attorney General of Trinidad and Tobago** [2011] UKPC 46, a decision from Trinidad and Tobago, Sir John Laws speaking for the Board said:

> *"Damages are discretionary; as was stated by Lord Kerr giving the judgment of the Judicial Committee in James v Attorney General of Trinidad and Tobago [2010] UKPC 23 at paragraph 36,* ***"[t]o treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court*** *by section 14 of the Constitution""*

> *The award of vindicatory damages for breach of a constitutional right in the law of Trinidad and Tobago has been considered in a number of authorities of the Judicial Committee. It is to be distinguished both from compensation pure and simple, and from exemplary or punitive damages at common law; and* ***it is by no means required in every case of constitutional violation.***
>
> ***Plainly the statement that "the nature of the damages... should always be vindicatory" does not imply a rule that a distinct vindicatory award should be made in every case of constitutional violation; as the balance of the passage shows, it merely serves to indicate the overall purpose of any award of damages in constitutional cases***.(Emphasis mine)

In that case the Board declined to grant the additional award of vindicatory damages finding an absence of bad faith or deliberate wrongdoing.

[145] The Privy Council again considered this provision in the case of **Everton Welch v Attorney General of Antigua and Barbuda** [2013] UKPC 21, Privy Council Appeal No 0041 of 2012. Lord Kerr delivering the judgment of the Board said at (para 19):

> *It may perhaps be said that if there is any scope for the award of vindicatory damages where exemplary damages are not appropriate, it must be very limited indeed. Such an award could only be justified where* ***the declaration that a claimant's right has been infringed provides insufficiently emphatic recognition of the seriousness of the defendant's default.*** *(Emphasis mine)*

[146] Recently the Law and its application was again traversed by the Court in **Ernest Smith and Others** which for the first time in this jurisdiction, dealt with the question of damages for breach of the reasonable time standard. In addition to considering the cases previously cited, they also examined the case of **Inniss v Attorney General of Saint Christopher and Nevis** [2008] UKPC 42 where the Privy Council again explained that the underlying principles for an award of vindicatory damages was that the only effective way of ensuring a flagrant breach of the constitution was vindicated was by making an award for damages.

[147] Without repeating what was exquisitely said in **Ernest Smith** I have sought to extract the relevant principles:

General

- If an alternative remedy is available, then constitutional relief should not be sought unless the circumstances are such as to make it appropriate to seek constitutional relief
- The nature of the breach will determine the appropriate remedy
- The importance of the right and the gravity of the breach will bear on the assessment of any award
- A declaration is not sufficient where there is protracted delay
- The severity of the delay will impact the award arrived at
- if loss is suffered the claimant will be entitled to compensation for the injury suffered which may include inconvenience, distress, injured feelings as well as physical damage

Quantum of Damages

- As a general rule the award should be a nominal award limited to an award to mark the wrong and to deter future breaches.
- A moderate award may be given where the breach is deliberate to circumvent the provisions of the constitution
- damages may be higher where the breach is continuing

[148] The Claimant in his Affidavit sworn on 6th March 2020 avers that he was unemployed since his termination and that his attempts to seek alternative employment were futile as a consequence of which he was unable to care for his family, himself and see to his other financial responsibilities. The delay prevented him from considering other available legal options and from accessing redress from the **IDT.** He did not indicate that the delay by the Minister in making a decision affected his search for employment.

[149] Mr Hacker argues that a declaration is sufficient as the Claimant has not suffered any loss by the delay of the decision of the Minister. He pointed to the information given to the court for the absence of the Claimant that he is currently employed on a consultancy. The Courts notes that this information was not provided by way of evidence and so will not form a part of the factors to be considered. Mr Gordon on the other hand argues

that a declaration will not give sufficiently robust protection to the public to the extent that it will deter future breaches.

[150] To determine the appropriate remedy, the reasons for the delay assume some import. It is of note that none of the above difficulties were communicated to the Claimant or his counsel despite several requests, demands even, to be advised of the Minister's decision.

[151] I am of the view that in this era of the paramountcy of the protection of constitutional rights, it must be made clear that public servants and public officers must at all times act in a way to preserve the citizens' rights. As said by Sykes CJ in the **Julian Robinson** case when speaking of the standard of proof to justify infringing a charter right

> *"203. …The justification for this approach is that what is being dealt with are fundamental rights and freedoms which are to be enjoyed to their fullest extent subject only to necessary limitations**. These rights and freedoms must never be lightly curtailed, or infringed, or abrogated**. This way of looking at the matter guards against the tyranny of the majority….The very existence of guaranteed entrenched fundamental rights and freedoms, thereby giving them special protection, is a clear recognition of the fact that legislature, executive, judiciary, and individuals have been known to abuse their power. To prevent this, **the rights and freedoms that are entrenched are to be given pride of place at all times in all circumstances**…" (Emphasis mine)*

[152] The inconvenience of the citizen is not a triviality. While the reasons for the Minister's may not have been deliberate, the failure to meaningfully communicate with the Claimant and/or his counsel was unacceptable. I find therefore that a declaration is not sufficient to vindicate the wrong done to the Claimant.

[153] In contemplating the quantum of damages the benchmark is of course the **Ernest Smith** case. There are some important differences from the case at bar:

- the delay was protected - over 7 years;
- the breach was continuing in that the assessment of damages had not taken place;

- the gravity of the breach was more serious in that it was one likely to bring the entire justice system into disrepute; and
- there were four parties whose rights were breached

[154] The effect of the breach at bar is not nearly as far reaching. This affects a limited class of persons seeking the intervention of the Minister in resolving a labour dispute. It has not been shown that as a result of the breach the Claimant suffered beyond inconvenience and the natural anxiety attendant on that. There is also no underlying nominate tort nor is there any evidence of any deliberateness on the part of the Minister. Certainly an award for vindicatory damages could not exceed the amount (updated) given in **Ernest Smith** as suggested by the Claimant's counsel. In my view the case at bar does not merit an award of damages beyond a nominal sum and at the lower end.

[155] An award of $1,500,000.00 was made in the **Ernest Smith** case in May 2020 when the Consumer Price Index (CPI) was 103.8. When converted to today's value with the CPI for March 2022 being 120.5 this amounts to $1,741,329.47. I am of the view that given the seven years' delay when contrasted here with a delay of two years, seven months and one week along with the other contrasting factors, I believe the sum to be awarded here should be in the region of a quarter of what was awarded in the **Ernest Smith** case. This would amount to the sum of $435,332.36.

AGGRAVATED DAMAGES

[156] Counsel also submitted that the Claimant was entitled aggravated damages as the Minister's action is tantamount to a complete disregard for the claimants' constitutional right". The Claimant's humiliation and the impact on his dignity which undoubtedly flows from the circumstances surrounding the dispute has been compounded as the Minister failed or refused to disclose his decision after receiving legal advice. He submitted that the Minister's actions were "tainted with malevolence and spite". It was further submitted that the Minister's actions "reeks of arrogance. However, these submissions do not find favour with this Court as there

was really no evidence of deliberateness surrounding the actions of the Minister.

[157] In the seminal case of **Rookes v Barnard** [1964] AC 1129, Lord Devlin said at page 1221ff:

> *"[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation."*

[158] Morrison P stated the law as applicable in this jurisdiction in **John Crossfield v The Attorney General of Jamaica and Corporal Ethel Halliman** [2016] JMCA Civ 40.

> *[36] …The principle upon which aggravated damages are awarded was well summarised by McDonald-Bishop J (as she then was) in Delia Burke v Deputy Superintendent Carol McKenzie and The Attorney General of Jamaica: "The claimant has claimed aggravated damages in addition to general damages for false imprisonment and trespass. It is settled as a matter of law that aggravated damages are compensatory in nature and are awarded to a claimant for the mental distress, which he suffered owing to the manner in which the defendant has committed the tort, or his motive in so doing, or his conduct subsequent to the tort."*
>
> *[37] On this basis, McDonald-Bishop J therefore considered that "the manner in which the false imprisonment or trespass was effected may lead to an aggravation or mitigation of the damage, and hence damages".*
>
> *[38] Accordingly, unlike exemplary damages, the object of which is to punish the defendant for his or her wrongful conduct, the objective of an award of aggravated damages is compensatory. Such an award is intended to reflect the fact that the particularly egregious nature of the defendant"s conduct has been such as to cause greater – or „aggravated" – damage to the claimant. Therefore, as Lord Woolf MR observed in Thompson - "... Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high-handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment*

or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted."

[159] Among the features that came to the fore in the **John Crossfield** case were that the appellant was handcuffed and detained for four (4) days in deplorable conditions. He was obliged to share an overcrowded unsanitary cell with various undesirables, crowded cell with undesirables who branded the him as an "informer", threatened him with harm and in one instance assaulted him in the presence of the police; the cell was filthy with virtually no amenities, sanitary or otherwise (the cell had rats and roaches, faeces and urine on the floor and walls and he had to use a pail to pass faeces and urine in the presence of other prisoners; Additionally, information about his arrest was publicized in a daily newspaper.

[160] Similarly, in the case of **Nicole-Ann Fullerton v The Attorney General (supra)**, the claimant was unlawfully detained at the airport in full and humiliating view of the public, prevented from leaving the island, taken to a police station and detained overnight. She was placed in a small dark cold cell where she had to sleep on newspaper and use a filthy bathroom which the Claimant had to use a stick to operate.

[161] In the present case, the Claimant submits that the refusal to disclose the initial recommendation received from the Legal Services Unit on July 16th 2020, was an aggravating feature. However, counsel for the Defendants submitted that upon receiving that advice, it was referred to the AGD, the government's legal advisor, for advice as to how the Minster was to proceed given that litigation was in train. This was a reasonable step to take in the circumstances and a sufficient reason for not disclosing the recommendation of the Legal Services Unit. I am of the view that it is quite a stretch to characterise the Minister's actions as malevolent or spiteful or deliberately done to aggravate the infringement of the Claimant's right.

[162] As is made clear from the foregoing cases an award of aggravated damages is compensatory in nature. Thus there must be some harm done. There is no evidence that the Claimant was humiliated and his dignity

impacted by the Minister's actions and this consequence cannot be said to naturally flow from the Minister's inaction. There is no evidence of any harm being done to the Claimant. He is therefore not entitled to an award under this head.

EXEMPLARY DAMAGES

[163] The Claimant also seeks exemplary damages relying on the same particulars set out to justify an award of aggravating damages.

[164] Morrison P (as he then was) conducted a review of the law and authorities on exemplary damages in **Attorney General (The) et al v Cunningham (Roderick)** [2020] JMCA Cave 34 and arrived at the followed conclusion:

> *"These cases all recognise and proclaim the court's power to award exemplary damages in deserving cases, as a valuable means of punishing and deterring outrageous and contumelious disregard by servants or agents of the state of the rights of persons in Jamaica. However, following the steer given by Lord Devlin in Rookes v Barnard, the cases all say that exemplary damages should only be awarded in cases in which the court considers the level of compensation afforded by an award of basic and aggravated damages to be insufficient in the circumstances of the particular case to punish the defendant and deter others. And further, the cases all urge moderation in the amounts awarded for exemplary damages."*

[165] This review makes it clear that though an exceptional remedy, exemplary damages may be awarded for unconstitutional action by public servants or public officers together with compensatory damages. Even though many of the cases seen relate to the actions of the police, the disregard of the citizen's rights must be so outrageous, contumelious, oppressive or arbitrary as to warrant an award over and above compensatory damages.

[166] In **Odane Edwards v The Attorney General** [2013] JMSC Civ. 116, the court opined that an award of exemplary damages would not be

appropriate if sufficient pleadings for the award of aggravated damages was not satisfied. The Court said;

> *"the particulars taken as a whole have to be looked at to see if they disclose sufficient in the pleadings to sustain claims not only for exemplary but also for aggravated and vindicatory damages. Even before that examination is done, it would seem logical that on the facts of this case, a claim for exemplary damages could not be sustained unless there was some pleading sufficient to support a claim for aggravated damages. If therefore, there is sufficient pleaded to support a claim for exemplary damages, a fortiori, it would mean there was sufficient pleaded to support a claim for aggravated damages."*

[167] Despite Mr Gordon's submissions above, I repeat that there is no evidence nor is there any pleading of circumstances supporting an award for exemplary damages. There is nothing in the pleadings or in the circumstances of this case which suggest that the Minister's actions were so outrageous, contumelious, oppressive, arbitrary or beyond the pale so as to support an award beyond vindicatory damages.

[168] I am grateful to my sister Brown Beckford J for her contribution to the discussion on the assessment of damages.

C. BARNABY, J

BACKGROUND TO THE CLAIM

[169] The Claimant was employed to Red Stripe Limited (hereinafter called "the Company") as a Business Analyst until his employment was terminated by reason of redundancy in the latter part of 2017. By letter dated and received 3rd and 10th October 2018 respectively, the Claimant, through his attorneys-at-law wrote to the Permanent Secretary in the Ministry of Labour and Social Security (hereinafter called "the MLSS") requesting the intervention of the Minister. This follows what the Claimant labels the "unjustifiable termination" of his employment. There being no resolution of the matter after several conciliation meetings between the Claimant and the Company at the MLSS, the dispute was referred to the Minister. The referral to the Minister was made pursuant to section 11 A (1) (a) of the **Labour Relations and Industrial Disputes Act** (hereinafter called "the

LRIDA"). By that provision the Minister is empowered to refer an industrial dispute existing in any undertaking to the Industrial Disputes Tribunal (hereinafter called "the IDT" or "the Tribunal"), after unsuccessful attempts by the parties to settle the dispute by other available means. The Minister decided not to refer the dispute to the IDT and communicated his decision to the Claimant by letter dated 11th January 2022, a few days before the trial of this claim was scheduled to commence on the 17th January 2022.

[170] The claim was initiated by way of Fixed Date Claim Form filed on 11th March 2020. The Claimant sought declarations that the Minister and the Attorney General breached his rights to a fair hearing, fair hearing within a reasonable time, and a fair hearing by an independent and impartial tribunal established by law as guaranteed to him by section 16 (2) of the **Charter of Fundamental Rights and Freedoms** (hereinafter called "the Charter"); an injunction requiring the Minister to refer the dispute to the IDT without the issue of any further proceedings or requiring the Claimant to engage in any further conciliation; damages; costs and such further and/or other relief as the court deems just, including orders under rule 56.7 of the **Civil Procedure Rules** (hereinafter called "the CPR").

[171] The claim for constitutional redress is made against the Minister

> *… by reason of the breach of [the Claimant's] rights to a fair hearing, a fair hearing within a reasonable time and a fair hearing before an independent and impartial tribunal established by the Labour Relations and Industrial Disputes Act by reason of her failure to consider and/or direct and/or deliberately causing delay in the adjudication of the Claimant's dispute at the Industrial Disputes Tribunal (the "Tribunal") and/or by reason of her failure to refer the said dispute to the Tribunal, therefore depriving the Claimant of his right to a fair hearing of his dispute within a reasonable time and/or his right to work…*

[172] The Minister is named as a defendant to the claim on the ground that he is responsible for administering and discharging certain functions under

the LRIDA; and the Attorney General by virtue of the **Crown Proceedings Act** (hereinafter called "the CPA").

[173] On the 20th October 2021 the Claimant filed an Amended Fixed Date Claim Form seeking as an alternative to the injunctive relief, an order of mandamus directing the Minster to refer the dispute to the IDT without the issue of any further proceedings or requiring the Claimant to engage in any further conciliation; and exemplary and/or aggravated damages. There is no evidence that leave to apply for judicial review was sought or granted to the Claimant to pursue any order of mandamus.

[174] That notwithstanding, in light of the belated determination and communication of the decision of the Minister not to refer the matter to the IDT, the Claimant sought and was granted leave to apply for judicial review and to further amend his Fixed Date Claim Form to seek the following additional relief.

> 5. *An order directing the 1st Defendant to consider the dispute in question according to the provisions of the Labour Relations and Industrial Disputes Act.*
> 6. *Alternatively, an order granting leave to the Claimant to apply for an order of certiorari to quash the decision of the 1st Defendant to not refer the dispute to the Industrial Disputes Tribunal.*
> 7. *An order granting the Claimant permission to argue before this Honourable Court the question or issue as to whether an order of certiorari should be granted quashing the decision of the 1st Defendant not to refer the issue to the Industrial Disputes Tribunal.*

[175] The ground on which the application for leave to make a claim for judicial review was sought is that the decision of the Minister is *ultra vires* the LRIDA, sections 2 and 11 A (1) (a) in particular.

[176] The request for the intervention of the Minister under the LRIDA, which is the subject of the claim, was premised on the Claimant's instructions to his attorneys-at-law that the Company via letter received on the 28th

November 2017 had advised that he would be made redundant as at the 31st December 2017; the subsequent advertising of the same job for which he was the incumbent; and the absence of an amicable resolution of the dispute between himself and the Company to whom he caused letters to be written on the 7th, 20th and 25th September 2018. In the latter correspondence it was stated that the matter would be referred to the MLSS if a settlement proposal was not received from the Company by 27th September 2018.

[177] No settlement proposal was forthcoming as requested or at all. In fact, the Company through its attorneys-at-law rebuffed the request of the Claimant to be compensated for unjustifiable dismissal by their letter dated 12th October 2018, and brought the following to attention.

> *(i) [The Claimant's] full participation in consultations prior to the termination of his employment;*
> *(ii) the nature of the new post having been part of such consultations;*
> *(iii) [the Claimant] raising in the course of such consultations the question of whether the new post was materially different to the old, such as to render the old position redundant;*
> *(iv) [the Claimant's] signed agreement in full and final settlement in an all-encompassing terms of release on 28th November 2017; [and]*
> *(v) [the Claimant's] acceptance of the redundancy package (also signed for) without complaint until your letter of claim…*

[178] It was also indicated that the Company would oppose any claim for compensation in the above circumstances and that its attorneys-at-law held instructions to commence legal proceedings to seek, among other things, the enforcement of the settlement agreement.

[179] In their letter of response dated 6th November 2018 the attorneys-at-law for the Claimant indicated that the Claimant was not a party to any consultations and that until he was handed the letter of termination on the 28th November 2017, the intention to make his position redundant had not been communicated to him. It was also stated that the Claimant

confronted his Manager after he received the termination letter and saw the advertisement for the post which was still occupied by him. In concluding, it was stated, *"(iv) [w]ith respect to this issue, as we are certain you are aware, our client's acceptance does not regularize your client's breach of the procedure established by law."* A copy of the executed settlement agreement referred to in the letter sent on behalf of the Company was requested.

[180] On the 30th November 2018 the first conciliation meeting was convened at the MLSS. There was no resolution as the Company's attorneys-at-law had not responded to certain enquiries made in correspondence written to them by the attorneys-at-law for the Claimant.

[181] A subsequent conciliation meeting was scheduled for the 10th December 2018 but did not proceed on account that the attorneys-at-law for the Company had advised those for the Claimant that they would not be able to attend. This was communicated to the MLSS by the Claimant's attorneys-at-law by letter dated 10th December 2018. No reason for the inability to attend having been supplied, and the provision of the information requested from the Company's attorneys-at-law being still outstanding, the attorneys-at-law for the Claimant expressed the view that the Company's behaviour was

> … *consistent with its continued disregard for due process… [and that they] do not believe that [the Company] intends to resolve this matter at the conciliation stage. [They go on to state that] [w]e reiterate that the matter should be referred to the Industrial Disputes Tribunal. The facts of this matter overwhelmingly support such a referral. We ask that this be done at your soonest as our client who is still unemployed wishes for the matter to be determined as soon as possible.*

[182] After some effort to agree a date for a further conciliation meeting, one was convened for the 22nd January 2019. Another was also convened for the 11th February 2019. There was no settlement of the dispute.

[183] On the 29th March 2019 the Claimant's attorneys-at-law wrote to the MLSS requesting an update as a matter of urgency, the Claimant being unemployed and desperate for a resolution one way or other. It was indicated that they had constantly requested that the matter be referred to the IDT as a resolution at the conciliation stage was very unlikely. They advised that their *"… instructions [were] to approach the Courts and seek judicial review with a view to seeking relief for our client"* if they failed to hear from the MLSS within seven (7) days of the date of the missive.

[184] By way of letter dated 4th April 2019, the MLSS acknowledged receipt of the above correspondence and indicated that they were of the view that the conciliatory process, which is designed to bring disputing parties to the negotiating table with the primary intent of brokering an amicable resolution, had not been exhausted. Accordingly, it was proposed to arrange another conciliation meeting. A further and final conciliation meeting was convened on 4th July 2019 but the dispute remained unresolved.

[185] There being no settlement through conciliation, it was determined that guidance from the Legal Services Unit of the MLSS should be sought to assist with any recommendations to the Minister following the failure of conciliatory efforts, having regard to what was considered to be serious legal questions and then recent judicial developments.

[186] On 9th January 2020 the Claimant's attorneys-at-law wrote to the MLSS indicating that they were advised at the last conciliation meeting that legal advice would be required before the parties would be informed of its position relative to a referral to the IDT. They expressed their belief that the Ministry had had sufficient time to consider the matter and expressed the desire to hear from the MLSS within seven (7) days of the letter. A response from the MLSS was forthcoming in correspondence of the said date wherein the writer stated as follows.

We find it most disconcerting that Counsel would seek to rush a legal process in an effort to achieve expediency in a matter where the Minister is dutifully advising herself in order not to fall into error. Based on recent judgments from the Courts, the Minister is obliged to consider - among other things - whether an ***industrial dispute*** *does exist, especially in circumstances where the worker accepted his redundancy by virtue of the acceptance of his redundancy package.*

Therefore, we will not be coerced into making a hasty decision which can later prove to be incorrect and costly.

Accordingly, as you continue to exercise the commendable quality of patience, we undertake to revert to you at the soonest possible time following the receipt of such advice.

[187] The guidance sought from the Legal Services Unit of the MLSS was received on 16th July 2020 and was forwarded to the Attorney General's Chambers (hereinafter called "the AGC"), for a recommendation on how to proceed in light of the current claim. Owing to staffing and other challenges at the AGC, including its relocation consequent on the flooding of its offices; and the determination by the Ministry of Health that the offices should be closed to facilitate remedial works after conducting an air quality assessment, the recommendation of the AGC was not sent to the MLSS until 4th January 2022. It was recommended that the Minster refuse to make a referral to the IDT for reasons advanced in the opinion produced by the Legal Services Unit. That opinion was not supplied in the course of these proceedings. The Director of State Proceedings in the AGC nevertheless went on to state as follows as part of the recommendation.

We will only add that we believe that the Claimant waived his rights when he accepted the terms of redundancy as outlined in the letter dated November 28, 2017. Furthermore, as outlined at paragraph 17 in the affidavit of [the Conciliation Officer], the employer has

clearly acted upon the Claimant's acceptance and filled the advertised post.

In coming to our conclusion, we relied on the dictum of Lord Scott in ***Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal and another****, [2005] UKPC 16, at paragraph 20. Where he outlined the ingredients of a waiver, namely, an objectively ascertained intention to waive and that the employer believed that the employee waived his rights and altered his position accordingly. (sic)*

[188] It was upon receipt and consideration of this recommendation, the case file at the MLSS and the legal opinion from the Legal Services Unit that the Minister is said to have made the decision not to refer the matter to the IDT, and so advised the Claimant by letter dated 11th January 2022.

ISSUES

[189] I find the following four (4) issues to be determinative of the claim.

(i) Whether there is a valid claim against the Minister and the Attorney General.

(ii) Whether the Minister acted *ultra vires* the LRIDA in deciding not to refer the dispute to the IDT.

(iii) Whether the due process rights to a fair hearing within a reasonable time before an independent and impartial court or authority established by law which are enshrined at section 16 (2) of the Charter have been engaged.

(iv) Whether this would be an appropriate case to refuse jurisdiction in respect of the constitutional claim as an abuse of the process of the court, in the absence of an explanation or demonstration by the Claimant that an order of mandamus would not have been adequate to secure the right to a fair hearing with a reasonable time as guaranteed by section 16 (2) of the Charter; and in circumstances where he was permitted to challenge the legality of the decision of the Minister by way of judicial review.

SUMMARY CONCLUSIONS

[190] For reasons which appear more fully below, I find as follows.

(i) Constitutional and judicial review claims are not civil proceedings within the meaning of the CPA so that the addition of the Attorney General as a party pursuant to that Act is improper. Accordingly, the Attorney General is removed as a defendant to the claim.

(ii) The court is not prevented from exercising its supervisory jurisdiction over the Minister in respect of his decision not to refer the dispute to the IDT on account of the improper addition of the Attorney General as a party to the claim.

(iii) The decision of the Minister not to refer the dispute to the IDT is *intra vires* the LRIDA, there being a foundation of facts upon which the Minister could lawfully conclude that the Claimant waived the statutory right afforded him by section 12 (5) (c) of the LRIDA. Accordingly, there was no industrial dispute existing in the Company's undertaking at the time the Claimant referred the matter for the intervention of the Minister. No order of certiorari will lie to quash the decision of the Minister.

(iv) There was no failure on the part of the Minister to consider whether to refer the Dispute between the Claimant and the Company to the IDT in light of the decision communicated by letter dated 11th January 2022.

(v) In deciding not to refer the dispute to the IDT, the Minister has in effect "failed" to direct its adjudication by that Tribunal, but having concluded that the Minister acted *intra vires* the LRIDA in doing so, the Claimant's challenge on that basis is rendered obsolete.

(vi) There is no evidence of the Minister *"deliberately causing delay in the adjudication of the Claimant's dispute at the Industrial Disputes Tribunal";* and there is no foundation for an adjudication before the said IDT consequent on the lawful exercise by the Minister of his discretion not to refer the dispute for settlement by the Tribunal.

(vii) There being no relief sought or argument made in respect of the allegation that the Claimant was deprived of the right to work, that basis for challenge is regarded as abandoned.

(viii) Section 16 (2) of the Charter is applicable in two broad circumstances: (i) in the determination of a person's civil rights and obligations, and (ii) in the determination of any legal proceedings which may result in a decision adverse to the person's interests.

(ix) The decision of the Minister pursuant to section 11 A of the LRIDA is an administrative decision and does not concern the determination of civil rights and obligations, which are properly within the remit of private law. That notwithstanding, to the extent that section 13 (4) of the Charter prescribes that the *"… Chapter [under which section 16 (2) falls] applies to all law and binds the legislature, the executive and all public authorities"*; and the amenability of administrative decisions to the supervisory jurisdiction of the court by way of judicial review, the decision of the Minister is open to Charter scrutiny on the basis that it is part of the state apparatus engaged in the determination of legal proceedings which may result in a decision adverse to the Claimant's interests.

(x) Having regard to the nature and scope of the right to a fair hearing guaranteed by section 16 (2) of the Charter however, the right cannot be said to have been engaged in circumstances where the Claimant pursued an application for

judicial review in which he challenged the decision of the Minister as being *"ultra vires"* section 11 A of the LRIDA. While I have found that the application for judicial review is to be refused, that determination follows an examination into the merits of the challenge to the lawfulness of the Minister's decision and cannot, on its own, facilitate engagement of the right to a fair hearing as guaranteed by section 16 (2) of the Charter.

(xi) I would nevertheless decline jurisdiction on the constitutional claim on the ground that it constitutes an abuse of the process of the court. The decision by the Minister is an administrative decision, the lawfulness of which is appropriately challenged by way of judicial review for which the remedy of mandamus to compel the Minister to make a decision lay. Damages would also have been a remedy available on an application for judicial review. It was open to the Claimant to pursue either relief but he did not. Further, he has not supplied any explanation for the failure to pursue the remedies available on judicial review nor has it been demonstrated that the remedies available there would not have been adequate to compel the Minister to make a decision before he did, had they been pursued by the Claimant.

(xii) Having regard to the belated communication of the Minister's decision on what was almost the eve of the trial of the claim, the state should be ordered to pay one third of his costs of the proceedings, the trial of which was extended to facilitate an application and arguments in respect of the said delayed decision. This notwithstanding that the Claimant has been unsuccessful on the claim.

REASONS

Issue (i)

Whether there is a valid claim against the Minister and the Attorney General.

[191] It is contended by Counsel Mr. Hacker that the claim having been brought against the Attorney General pursuant to the CPA, it was to be regarded as having been brought against the Minister as a crown servant. On the basis of authority indicating that judicial review proceedings are not civil proceedings within the meaning of the CPA, Counsel went further to submit that there was no basis for the Court to exercise its supervisory jurisdiction over the Minister by way of judicial review. I am unable to agree with the conclusions arrived at by Counsel in respect of the competence of the judicial review claim against the Minister.

[192] In the decision of the Judicial Committee of the Privy Council in **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd. and another** [1991] 1 WLR 552 referred to by Counsel in support of his contention, the following was said at page 555 para. C by Lord Oliver in response to whether the Attorney General should be named as a respondent instead of the Minister of Foreign Affairs, Trade and Industry whose exercise of statutory powers was sought to be challenged by way of judicial review.

> *… [T]heir Lordships entertain no doubt whatever that the Court of Appeal was correct in concluding that the proceedings were not "civil proceedings," as defined by the Crown Proceedings Act, and that the minister and not the Attorney-General was the proper party to proceedings instituted for the purpose of reviewing the exercise of his statutory powers.*

[193] I accept that the addition of the Attorney General as a party to judicial review claims and constitutional claims, which are *sui generis,* pursuant to

the CPA is improper. Accordingly, the Attorney General is removed as a defendant and designated an "Interested Party" on account that the office is required to be served with claims for constitutional relief pursuant to the **Civil Procedure Rules** (hereinafter called the CPR) and may make submissions to the court in that capacity on such claims.

[194] I arrive at the opposite conclusion in respect of the claim instituted against the Minister who has always been a named defendant, and whose addition is not invalidated only as a result of the impropriety in joining the Attorney General pursuant to the CPA. It is the Minister who exercised the statutory power which is the subject of the complaint which is amenable to judicial review. The Claimant has, since the initiation of proceedings by Fixed Date Claim Form filed on 11th March 2020 made it abundantly clear that the Minister was named a party for the various relief sought on account of his responsibility for administering and discharging statutory duties under the LRIDA. In these premises I find that there is indeed a basis for the court to exercise its supervisory jurisdiction over the Minister.

THE JUDICIAL REVIEW CLAIM

Issue (ii)

Whether the Minister acted *ultra vires* the LRIDA in not referring the industrial dispute to the IDT.

[195] Judicial review is a unique remedy which is available to persons who are aggrieved by the unlawful exercise of public law duties. It is used *"… to check a usurpation of power by [public functionaries who have been charged by Parliament to perform public duties], to the disadvantage of the ordinary citizen, or to insist on due performance by such bodies of their statutory duties and to maintain due adherence to the laws enacted by Parliament*…": **R v IRC, ex p National Federation of Self-Employed and Small Businesses Ltd** [1982] AC 617, 656, HL per Lord Roskill.

[196] The jurisdiction of the court on an application for judicial review is accordingly supervisory. As held *per curiam* in **Chief Constable of the**

North Wales Police v Evans [1982] 1 WLR 1155, and reflected in the dicta of Lords Brightman and Hailsham at pp. 1173 and 1160 respectively,

> *[j]udicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power. [Per Lord Bingham]*
>
> *… [it] is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner. [Per Lord Hailsham]*

[197] In the well settled and oft cited **Council of Civil Service Unions and ors. v Minister for the Civil Service** [1984] 3 WLR 1174, Lord Diplock at p. 1196 said this of the grounds for judicial review.

> *… Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community…*
>
> *By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute,*

by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury unreasonableness"* (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation *[1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…*

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice…

[198] It was conceded in submissions made on behalf of the Claimant that there is no right to access the IDT pursuant to section 11 A of the LRIDA and that access is dependent upon the exercise of the discretion given to the Minister by the provision. It was nevertheless submitted in the *Claimant's Written Submissions in Support of Fixed Date Claim Form* thus:

> *33. …[S]ection 11 A imposes a duty on the [Minister] to refer disputes to the IDT once certain prerequisites have been satisfied. Section 11 A (1) (a) (i) states that the referral of a dispute is subject to the [Minister] being "satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties". It is beyond dispute that the conciliation process was engaged at the offices [of the Minister]. Consequently, the Claimant and representatives of the Company attended four meetings at the offices of the [Minister]. These meetings did not*

result in a settlement of the dispute. The [Minister] has not said that he believes that additional attempts to settle ought to be pursued. Neither has the [Minister] invoked section 11 A (1) (b) which permits him to give a written directive to the parties to pursue a specified course with a view to arriving at a settlement.

34. Further when one examines the issues for which the [Minister] alleges he sought legal advice it is clear that these are issues of facts and/or law. However, these are not issues for which the LRIDA requires the [Minister] to resolve. According to the LRIDA these are issues to be determined by the IDT…

[199] It is in the foregoing premises, the substance of which were also repeated in oral submissions, that the Claimant contends that the decision of the Minister not to refer the dispute to the IDT is *ultra vires* the LRIDA, sections 2 and 11 A (1) (a) in particular. It appears to us that the Claimant's *ultra vires* challenge is in the nature of illegality, in that the Minister in exercising the discretion reserved to him failed to understand correctly the law that regulates his decision making power and give effect to it.

[200] I would be inclined to agree with the Claimant's submissions if the only matter of which the Minister was required to be satisfied under section 11 A (1) (a) was that the parties had attempted to settle a dispute by such other means as were available to them without success, but that is not the only prerequisite. Before considering whether he will exercise the discretion given to him on the basis of the provisions at sections 11 A (1) (a) or (b), the Minister is in fact required to be satisfied that an *"industrial dispute exists in any undertaking".* Where a Minister in exercise of the discretion given to him by section 11 A (1) (a) of the LRIDA refers an industrial dispute to the IDT without being so satisfied, the referral would be *ultra vires* the power given to him by the provision. It is my judgment that when all the circumstances of this case are objectively viewed, it was open to the Minister to consider and determine that the dispute should not be referred to the IDT for settlement, on account that no industrial dispute existed in the Company's undertaking at the time the intervention of the

Minister was sought. I therefore find his decision to be *intra vires* the LRIDA.

[201] To the extent relevant, section 11 A of the LRIDA provides as follows:

> *12. Notwithstanding the provisions of sections 9, 10 and 1 1, where the Minister* ***is satisfied that an industrial dispute exists in any undertaking****,* ***he may on his own initiative*** *–*
>
> (i) *refer the dispute to* ***the Tribunal [the IDT] 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;*
>
> (ii) *give directions in writing to the parties to pursue such means as he shall specify to settle the dispute within such period as he may specify if he is not satisfied that all attempts were made to settle the dispute by all such means as were available to the parties.*
>
> *13. …*
>
> [Emphasis added]

[202] No authority was cited before us as to what is meant by the words *"is satisfied",* but the dictum of Lord Pearson, part of the majority in **Blyth v Blyth** [1966] 1 All ER 524, 541 comes in aid. While said in the context of a court, there is no reason that the meaning attributed to the term should not apply in respect of a statutory decision maker such as the Minister, who must act judicially and in accordance with law. He said this of the term which appears at section 4(2) of the UK Matrimonial Causes Act, 1950:

> *The phrase used … is simply "is satisfied", with no adverbial qualification… The phrase "is satisfied" means, in my view, simply "makes up its mind"; the court on the evidence comes to a conclusion which, in conjunction with other conclusions, will lead to the judicial*

decision. There is no need or justification for adding any adverbial qualification to "is satisfied" …

[203] So far as is necessary, "industrial dispute" is defined at section 2 of the Act thus,

> *"industrial dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, and –*
>
> (i) *…*
>
> (ii) *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:*
>
> *(i) …*
>
> *(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 of any worker or organization representing workers; …*

[204] At the said section 2, "undertaking" and "worker" are defined as follows:

> *"undertaking" includes a trade or business and any activity involving the employment of workers;*
>
> *""worker" means an individual who has entered into or works or normally works (**or where the employment has ceased, worked**) under a contract, however described, in circumstances where that individual works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee."*
>
> [Emphasis added]

[205] Section 11 A appears in Part III of the LRIDA which provides for the establishment and functions of the IDT. The Tribunal is established by section 7 and its composition is prescribed at section 8. Sections 9, 10 and 11 are concerned with the power of the Minster to make a referral to the IDT in respect of existing industrial disputes in undertakings which

provide essential services; existing industrial disputes in undertakings which do not provide such services but for which the Minister may act in the public interest to settle industrial disputes; and the reference of industrial disputes to the IDT by the Minister at the request of the parties to the dispute, respectively. Section 11 B makes provision for the referral of industrial disputes of a disciplinary nature by the Minister to the IDT. Section 12 provides for awards of the IDT on industrial disputes referred to it for which it may give reasons, if it thinks it necessary or expedient to do so. Section 13 creates offences in connection with unlawful industrial action. While the Tribunal is empowered by section 16 A of Part V of the Act to hear and determine a dispute, pursuant to section 12 (5) (b), it may, at any time after a referral encourage settlement of a dispute by negotiation or conciliation, and if the parties agree to do so, it may assist them in their attempt.

[206] On a reading of the LRIDA there appears to be a scheme for the settlement of industrial disputes which may, but must not necessarily include a referral and determination by the IDT either after a hearing, or on what I would call "Tribunal facilitated or assisted settlement through negotiation or conciliation", where the parties so agree. As acknowledged by the Claimant in oral arguments there is no unbridled right given to any worker or employer to access the IDT within the legislative scheme. Access is dependent upon a referral to the Tribunal by the Minister.

[207] I would therefore readily agree with a submission that the power to determine an industrial dispute and make awards are in fact reserved to the IDT, where an industrial dispute has been referred to it under the LRIDA. That is an altogether different power to that which is reserved to the Minister at section 11 A (1) (a). By that provision the Minister *"may on his own initiative"* refer to the IDT an industrial dispute which *"exists in any undertaking"* if he is satisfied that the parties have attempted its settlement through other means available to them without success.

[208] Although not cited before us, I find support for this conclusion in the recent decision of the Court of Appeal in **Dr O'Neil Lynch v Minister of Labour**

and Social Security [2021] JMCA Civ 43 where Simmons JA, with whom the other Justices of Appeal agreed that,

> *80. [t]he use of the word "may" in section 11A (1) of the LRIDA, confers on the respondent the discretion to refer disputes to the IDT "where the minister is satisfied that an industrial dispute exists in any undertaking." If the respondent is not so satisfied, such referral should not be made.*

[209] There is no dispute that the Claimant is a worker as defined at section 2 of the LRIDA, including as it does an individual whose employment has ceased; that the information supplied to the MLSS and thereby the Minister under the legislative scheme, was that the employment of the Claimant with the Company was terminated by reason of redundancy; that the Claimant had advanced that he was not consulted or communicated with prior to the decision being made to terminate his employment in that way; that the Claimant had also complained at some point after being made aware of the Company's decision; and that the Company is an undertaking within the meaning of the Act. In consequence of these matters, the conclusion that there was an industrial dispute some time after the Claimant became aware that his employment was terminated by reason of redundancy is inescapable.

[210] The presence of an industrial dispute at some point is not the first condition of which the Minister must be satisfied in order to exercise his discretion pursuant to section 11 A (1) (a) of the LRIDA however. He must first be satisfied that an industrial dispute exists in the undertaking. If so satisfied, he may make a referral under subsection (a) (i) on which the Claimant relies, if he is also satisfied that attempts were made by the parties using such other means as may be available to them to settle the dispute without success. In these cumulative circumstances the Minister may, on his own initiative and notwithstanding the restraints or otherwise which may exist on the exercise of the powers given to him by sections 9, 10 and 11 of the LRIDA, refer the industrial dispute to the IDT.

[211] No reasons were supplied for the decision of the Minister not to refer the matter to the IDT. It was submitted by Counsel Mr. Hacker that his reasons were not required by law. While there is nothing in the legislation which requires the Minister to give reasons for his decision - which was open to the legislature to prescribe, especially where it gave the IDT a discretion to set out reasons for its awards where it thinks it necessary or expedient to do so, pursuant to section 12 (3) - it may nevertheless be desirable to state the reasons for a decision on its communication to the persons affected and certainly to the court on an invocation of its supervisory jurisdiction.

[212] While we are without the reasons for the decision of the Minister not to refer the dispute to the IDT, the decision came on the heels of the recommendation from the AGC in letter dated 4th January 2022 that he should refuse to exercise the discretion to refer the matter to the IDT and formally communicate his decision to the parties. A copy of the communication was requested to enable it to be entered into evidence for the purpose of these proceedings. The document was accordingly exhibited to an affidavit. Although the recommendation from the AGC is said to be premised on an opinion which is not before the court, an additional basis for the recommendation was the view that the Claimant waived his right to have the matter referred to the IDT when he accepted the terms of the redundancy, the Company acted upon that acceptance and filled the advertised post.

[213] Counsel Mr. Gordon contends that the conclusion in respect of waiver is erroneous. As he does the decision of the Minister, Counsel criticised the conclusion of the AGC on the ground that it favoured one version of disputed facts between the Claimant and the Company over the other.

[214] In respect of a decision of the Minister not to refer the matter to the IDT on the basis of waiver by a worker, Mr. Gordon contends that this would be beyond the power given to the Minister by the LRIDA to assist in arriving at a settlement of an industrial dispute and is therefore *ultra vires* the statute. The argument goes, that it is for the IDT to determine whether

there was waiver and the dispute ought to have be referred to it for such a determination to be made. I am unable to agree with the submission.

[215] In **R v Industrial Dispute Tribunal and The Honourable Minister Of Labour; Ex Parte Wonards Radio Engineering Ltd** (1985) 22 JLR 65 which was referred to by Brown Beckford J in **Jamaica Police Co-operative Credit Union Society v the Ministry of Labour and Social Security** [2019] JMSC Civ 67 on which the Minister relies, the Full Court in refusing an application for an order of prohibition prohibiting the IDT from hearing a reference made to it by the Minister of Labour held that the operative date at which it must be decided whether or not a person is a worker under the Act is the date when the dispute arose. It was also held that the court ought not to interfere with the exercise of the discretion given to the Minister at section 11 A (1) (a) to refer a dispute to the Tribunal for settlement once it appears that the Minister had acted within the provisions of the statute; and there is a foundation of facts upon which he could have lawfully exercised his discretion. The duty of the court was to ascertain whether or not there was such a foundation of facts on which the Minister could have lawfully exercised the discretion he did.

[216] In that case workers went on strike following the issue of a memorandum by the applicant company on 15th December 1981 that it would not be able to pay Christmas bonuses for the year due to financial difficulties. The workers went on strike on 18th December 1981 and in so doing contended that they were being punished for recently becoming unionized. It appeared from a letter dated 22nd December 1981 that the applicant reported the taking of industrial action by the workers to the Ministry of Labour. The strike continued and on 4th January 1982 the applicant wrote to the workers informing them that they had abandoned their jobs and that the abandonment was accepted by the company. On 27th and 28th January 1982 the picketing workers were dismissed. On the 13th October 1983 after several efforts to settle the dispute, the Minister of Labour made a reference to the IDT, the terms of which were that the Tribunal should determine and settle the dispute between the applicant and the striking

workers on one hand and the termination of their employment by the company on the other.

[217] Among the contentions of the company was that the reference was invalid because at the time of the reference by the Minister, the workers had already been dismissed and were not workers within the meaning of the LRIDA.

[218] Vanderpump J, after observing that "dispute" was not defined in the Act and determining that it meant "a controversy" as defined in the Oxford Dictionary, notwithstanding that "industrial dispute" had been defined in the Act concluded thus.

> *So it could be said that this controversy related partly to the termination of their employment. At the time when this controversy was aggravated by their dismissal they were workers, that is the relevant date, not the date of reference to the tribunal. It seems to me that this controversy over the termination of their employment is an industrial dispute and I so hold.*

[219] As indicated previously, "worker" is now expressly defined in the LRIDA to include an individual whose employment has ceased. Section 11 A (1) (a) of the LRIDA at the time of the decision in **ex parte Wonards Radio Engineering** then read,

> *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 -*
>
> *(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 . . .*

[220] Save for the removal of *"and should be settled expeditiously"*, the umbrella to section 11 A (1) at the time of that decision and in its present iteration remain the same.

[221] With the exception of a twelve (12) month limitation on referrals to the IDT which relate to disciplinary action against a worker in respect of industrial disputes which exist in an undertaking, there is no prescribed limitation period in the LRIDA in respect of a challenge to the termination of employment, or a referral by the Minister of an industrial dispute concerning termination to the IDT. Section 11 A (1) (a) nevertheless requires the Minister to be satisfied that an industrial dispute exists in the undertaking in order for the discretion reserved to him to be exercised.

[222] While "undertaking" is defined in the legislation, the term *"exists in any undertaking"* is not and no authority was supplied which expressly defines the term. I am of the view that the word "exists" is to be given its ordinary meaning of "being present". This construction is supported on the authorities where an industrial dispute was considered to have been properly referred by the Minister to the IDT pursuant to the powers given to him at section 11 A (1) (a). In those cases, there were subsisting industrial disputes in the undertakings which had been referred for intervention by the Minister.

[223] While an industrial dispute may properly be said to have arisen at the time of dismissal or termination and may indeed continue for some time thereafter, the controversy cannot properly be regarded as subsisting in an undertaking in perpetuity. It is for that reason that I believe the legislature retained the words *"exists in any undertaking"* which follows and in my view qualifies *"industrial dispute"* at section 11 A (1). That language pre-existed the 2010 amendments to the section and was preserved by the legislature post amendment. If the legislature intended to enable the Minister to intervene and refer an industrial dispute to the IDT when it no longer existed in an undertaking, it should have removed *"exits in any undertaking", but* it did not do so It is therefore my judgment that the Minister is empowered to exercise his discretion to refer an

industrial dispute pursuant to section 11 A (1) only where it exists or subsists in an undertaking at the time the industrial dispute is referred to him for intervention. In this case the dispute was brought to the attention of the Minister and a request made for his intervention by letter to the MLSS dated and received 3rd and 10th October 2018 respectively.

[224] In **Jamaica Police Co-operative Credit Union Society v the Ministry of Labour and Social Security**, para. 27 (supra), although Brown Beckford J questioned whether a dispute which commenced at a time far removed from the act giving rise to it could initiate an industrial dispute in reliance on the principle that there must be finality in litigation, she regarded it as unnecessary in the circumstances of that case to give a final position on the issue. She nevertheless went on to conclude that the Minister on the facts before him was required to consider the question of waiver in determining whether an industrial dispute existed within the applicant's undertaking at the time of the referral to the Minister. On the evidence, there was no such consideration by the Minister who was accordingly held to have erred in making a referral to the IDT.

[225] In that case two interested parties and former employees of the applicant were terminated by reason of redundancy on 29th January 2016. Both were paid and accepted redundancy entitlements and were subsequently employed elsewhere. They raised in letter dated 16th January 2017, almost a year after the termination of their employment that there was no genuine redundancy, they were unjustifiably dismissed and that there was failure by their former employer to comply with the **Labour Relations Code**. Subsequent to that letter disputing their termination, a complaint was lodged with the MLSS and attempts made at conciliation, which were unsuccessful. The successfully challenged referral to the IDT by the Minister was made against that background.

[226] **R v Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins ex parte West Indies Yeast Co. Ltd.** (1985) 22 JLR 407 was among the authorities relied on by the Claimant. Barrett, Henry and Dawkins were employees

of the applicant company who accepted without dispute, letters of termination of their employment and the amounts which were due to them in lieu of notice. Several days after their dismissal, they wrote to the relevant Ministry seeking its intervention in what they alleged was a dispute between them and their former employer. Conciliatory efforts having failed, the minister referred the matter to the IDT on 29th February 1984 pursuant to section 11 A (1) (a) of the LRIDA. The Full Court granted the orders of certiorari and prohibition sought by the applicant to quash the reference of the Minister and prohibiting the IDT proceeding on it. It was held that in order for the Minister to exercise his discretion under section 11 A it was essential that a dispute which threatened industrial peace in the particular undertaking existed. Counsel had proceeded on the assumption that an industrial dispute did exist. Smith CJ at p. 412 - 413, with whom the Theobalds and Gordon JJ agreed said this of section 11 A, the umbrella which is in terms of that referenced in **ex parte Wonards Radio Engineering.**

> *What s. 11 A clearly does is to give the Minister freedom to intervene and take action in respect of any industrial dispute in spite of the restrictive procedures which the other sections require. However, in my opinion, he is not authorised to act with complete freedom. His powers are governed by the scheme and policy of the Act and by the express provisions of the section.*
>
> *I agree with the contention of counsel for the applicant company that the Minister is authorised to act only in the public or national interest or in the interest of industrial peace. In my view, he has no authority to act in the interest of a dismissed ex-employee where his dismissal has not given rise to a dispute which threatens industrial peace, as would occur if, for example, he is represented in his dispute by a trade union which also represents workers currently employed to his former employer who may take industrial action if the dispute is not settled…*
>
> *It is a fundamental requirement, expressly stated in s. 11A as in ss. 9 and 10 that the industrial dispute should exist in an undertaking before it can be referred for settlement to the Tribunal…*

It is a fundamental requirement, expressly stated in s. 11A as in ss. 9 and 10 that the industrial dispute should exist in an undertaking before it can be referred for settlement to the Tribunal... In this case, the applicant company's managing director has stated that there has been no cessation of work or any disruption of, or interference with, the production of the applicant's plant as a result of the termination of the employment of the three ex-employees. He said that at all material times industrial peace and stability have existed and still existed between the company and its workers up to the date he swore his affidavit on 29 March 1984. The Minister's reference was made almost two years after the dismissal of the employees.

Assuming it can be said that an industrial dispute existed between the dismissed employees and their former employers, that dispute did not exist in the applicant company's "undertaking".

[227] While the LRIDA has come a far way since then, it remains essential that the Minister be satisfied of the existence of an industrial dispute in an undertaking and the Act is still

…aimed not only at encouraging industrial harmony but also at quelling industrial action or preventing its occurrence altogether…

Perhaps the most far-reaching power afforded to the Minister, in the quest to minimise industrial action, is that delineated by Section 11A of the Act, where he may act on his own initiative to refer a matter to the IDT for settlement. Once he is satisfied that a dispute exists, that attempts made to settle it have proved futile, and that all the circumstances surrounding the dispute constitute an urgent or exceptional situation, then, even without the consent of the parties, he may proceed to refer the matter. Prior to the 2010 amendment to the LRIDA, before the Minister could exercise this wide power, he had to ensure that the dispute related to a collective group of workers, and had the capability of disrupting industrial peace and he had to act expeditiously; otherwise, he would have acted ultra vires. *However, the amendment has removed these prerequisites,*

thus arguably giving the Minister even greater license to restrict a party's indulgence in industrial action… [7]

[228] While I do not agree that the provisions at section 11 A (1) (a) (i) and (ii) of the LRIDA are to be read conjunctively, which the learned authors of *Commonwealth Caribbean Employment and Labour Law* appear to suggest in stating "*that attempts made to settle [the industrial dispute] have proved futile, **and** that all the circumstances surrounding the dispute constitute an urgent or exceptional situation"* [emphasis added], their observations on the aim of the LRIDA and the Minister's power under the section are accepted. In the result, although **ex parte West Indies Yeast Co. Ltd.** may not have been decided on the issue of whether an industrial dispute existed - counsel having proceeded on that basis - and the case having been decided at a time when the industrial dispute must have related to a collective group of workers in respect of industrial peace, the dictum of Smith CJ is nevertheless useful in demonstrating that a fundamental premise for referral to the IDT under section 11 A (1) (a) is the existence of an industrial dispute in the particular undertaking at the time of referral of the dispute to the Minister. That is consistent with the policy of the LRIDA even in its current form.

[229] If the Minister is to be satisfied that an industrial dispute exists in an undertaking, he must in my view be permitted to consider any matter which may objectively be assessed and regarded as terminative of an industrial dispute in the undertaking. Accordingly, it is my judgment that a Minister can properly consider and determine that no industrial dispute exists in an undertaking on the basis that there was abandonment by the worker of any statutory rights he may have on the basis of waiver.

[230] So far as is relevant to the matter being immediately considered, section 12 of the LRIDA provides as follows.

12 (1) Subject to the provision of subsection (2) [extension

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[7] N Corthésy and C Harris-Roper, *Commonwealth Caribbean Employment and Labour Law* (Routledge, 2014), 328-9.

of time for making award] the Tribunal shall, in respect of any industrial dispute referred to it, make its award within twenty-one days after that dispute was so referred, or if it is impracticable to make the award within that period it shall do so as soon as may be practicable, and shall cause a copy of the award to be given forthwith to each of the parties and to the Minister.

…

(5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal -

…

(c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision 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.

[231] Lord Scott in the decision of the Judicial Committee of the Privy Council in **Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal and another** [2005] UKPC 16, at para. 20 described the elements of waiver in the context of the acceptance of payment by workers whose employments had been terminated by reason of redundancy thus.

> *… **Waiver, as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the alleged waiver. If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present.** An objectively ascertained intention to waive is the first requirement. JFM's case falls at this hurdle. The cashing of the cheques took place after the Union had taken up the cudgels on the employees' behalf, after the dispute had been referred to the Tribunal and after arrangements for the eventual hearing had been put in train. In these circumstances the cashing of the cheques could not be taken to be any clear indication that the employees were intending to abandon their statutory rights under s 12(5)(c). Nor is there any indication, or at least no indication to which their Lordships have been referred, that JFM or any representative of JFM thought that the two employees were intending to relinquish their statutory rights. **Even assuming that the cashing of the cheques could be regarded as a sufficiently unequivocal indication of the employees' intention to waive their statutory rights, the waiver would, in their Lordships' opinion, only become established if JFM had***

believed that that was their intention and altered its position accordingly. *There is no evidence that JFM did so believe, or that it altered its position as a consequence. The ingredients of a waiver are absent. Their Lordships would add that they do not see this as a case where the employees were put to an election between inconsistent remedies, ie cashing the cheques or pursuing their statutory remedy (see Scarf v Jardine 7 App Cas 345 at 351, 51 LJQB 612) …*

[Emphasis added]

[232] There was no evidence or argument that the Claimant was put to an election between inconsistent remedies referred to in the above dictum.

[233] Counsel for the Claimant nevertheless called in aid paragraph 17 of the Conciliator's affidavit where the following is averred.

17. Based on the circumstances of the matter, more particularly allegations by the Claimant that:

i. there was no legitimate redundancy;

ii. there was a failure on the part of his former employer to comply with the Labour Relations Code; and

iii. he had raised issues relative to his termination prior to his departure demonstrating that he disputed the redundancy.

Contrasted with his former employer's position that;

i. there was consultation in adherence with the Labour Relations Code;

ii. the Claimant had signed an Agreement in full and final settlement "in all encompassing terms of release" dated November 28, 2017;

iii. this release was executed after he raised a complaint which was addressed fully by the former employer without further issue;

iv. the post was filled subsequent to the redundancy exercise; and

v. the Claimant failed to complain about the authenticity of the redundancy until September, 2018,

raised serious legal questions which required advice and it was believed that the guidance of the Ministry's Legal Services Unit was necessary to assist with the recommendations to the Minister.

[234] The Conciliator goes further at paragraph 18 to state:

18. Subsequently, and in light of the recent developments in the Courts, guidance was sought from the Ministry's Legal Services Unit as to whether the Minister has jurisdiction to refer the matter to the Industrial Disputes Tribunal.

[235] On this undisputed evidence there may in fact be said to have been an industrial dispute between the Claimant and the Company within the meaning of "industrial dispute" at section 2 (b) (ii) and (iii) of the LRIDA. Whether or not the dispute existed in the latter's undertaking is an entirely different matter.

[236] While the conciliatory facility offered by the MLSS is undoubtedly aimed at settling disputes between one or more workers and employers, the engagement of the facility is not determinative of whether or not an industrial dispute exists in the undertaking. While the Minister may properly receive and is likely to routinely receive opinions and recommendations from various technocrats who because of their expertise exercise governmental authority, having regard to the matters of which the Minister must be satisfied to exercise the discretion given to him pursuant to section 11 A (1) (a), the recommendations and opinions of such officers, while they may be considered are not determinative of the matter either.

[237] Having earlier determined that the phrase "is satisfied" as appears at section 11 A (1) (a) of the LRIDA means that the Minister must "make up his mind", the duty of the Court in the exercise of its supervisory jurisdiction is to determine whether or not there was such a foundation of facts on which the Minister could have lawfully exercised the discretion he did.

That duty is immutable and unaffected by the absence of the Minister's reasons. On the evidence I find that there was such a foundation of facts on which the Minister could have lawfully made the decision not to refer the dispute to the IDT.

[238] The documentary evidence filed on behalf of the Minister discloses that by letter of 28th November 2019 the Company advised the Claimant that *"as per discussions held with [his] line manager*", his position would be made redundant as of 31st December 2017; and that in full and final settlement of all claims and liabilities, all monies due to him consequent on the termination by means of redundancy would be paid in the December 2017 pay cycle. As stated in the letter, among benefits which would come to an end at the stated redundancy date, the following were made available to the Claimant.

i) Confidential counselling services at no cost to him up to 28th February 2018;

ii) if he was on a named bonus plan he would be eligible for bonus payment in accordance with the plan rules subject to business and individual performance, to be prorated for the period of employment in the financial year up to 31st December 2017; and which was to be paid in the customary payment cycle, stated as "usually March 2018";

iii) health benefits until 28th February 2018; and

iv) the provision of a grant of J$50,000.00 which he could access up to three (3) months after the termination date to assist with setting up a business or furthering his studies.

[239] The letter goes on to say that the HR Service Delivery & Reward Manger would contact the Claimant to discuss details of pension contributions and options *"once [the Claimant's detailed package is receive (sic) from the Administrator later in the month of January 2018."*

[240] On the 7th September 2018 the Claimant's attorneys-at-law wrote to the General Manager of the Company and advised thus.

> *We act for Mr. Kevin Simmonds, a former employee whose contract of employment was purportedly terminated for reason of redundancy. We understand that our client was advised of his termination pursuant to letter dated the 28th of November, 2017. However, our instructions indicate that this termination was done in breach of the law, and among other things, you had invited the individuals to apply for the very position which our client occupied, and for which you advised our client was being redundant.*
>
> *We invite you to enter into discussions with us with a view to amicably resolving this matter.*

[241] I make two observations in respect of the information contained in these letters, which were not challenged. That approximately nine (9) months elapsed between the Claimant being notified that he would be terminated by reason of redundancy pursuant to letter dated 28th November 2017; and eight (8) months between the date of termination on 31st December 2017 and the time the Claimant's attorneys-at-law wrote to the company to challenge the redundancy.

[242] Approximately a month later, pursuant to letter to the MLSS dated and received on 3rd and 10th October 2018 respectively, the Claimant requested the intervention of the Minister in the dispute between him the Company. This followed the exchange of correspondence between attorneys-at-law for the Claimant and the Company including a letter from the former to the latter dated 25th September 2018 where it was stated that the matter would be referred to the MLSS if they failed to receive a settlement proposal by close of business on 27th September 2018.

[243] During the approximately ten (10) months between the Claimant being advised that he would be terminated by reason of redundancy and the request for the Minister to intervene, a number of things objectively happened.

[244] Firstly, the Claimant signed a letter dated 28th November 2017 which set out the monies payable to him *"… in full and final settlement of all obligations to you and that you have no right or further claim in the future… with respect to your redundancy and/or arising out of, or in connection with your employment with the Company."* Second, a "CORRECTED COPY" letter dated 1st December 2017 was produced wherein the figure for "Tax Free" and "Taxable Redundancy" were adjusted upwards and downwards respectively. There is a notation dated 4th December 2017 on that letter which reads *"[e]mployee refused to sign. Indicated he already signed letter given to him on Nov 28, 2017."* I believe those words speak plainly for themselves.

[245] Counsel for the Claimant did not concede that the release signed by the Claimant was appropriate but nevertheless went on to contend that on the assumption that there was acceptance by him of the redundancy, the acceptance was predicated upon a misrepresentation. As I understand the argument, and certainly the only position capable of finding support on the evidence, it is that the Company purported to advertise the job which the Claimant effectively held, while it had represented to him that the post was being made redundant. Even if the validity of the executed release could be open to question on the basis that it came about because of misrepresentation, it would be improper to embark upon such an enquiry in circumstances where neither the Company nor any of its representatives is a party or participant in these proceedings in any capacity.

[246] In any event, there is no dispute that the Claimant collected the redundancy package offered to him by the Company. It was argued by Counsel Mr. Gordon however, that the fact that a worker accepts payment does not mean that he does not challenge his dismissal and that acceptance does not regularize a former employer's breach of procedure established by law.

[247] While I agree that the acceptance of payment without more does not always mean that the worker does not challenge his dismissal or that

acceptance of payment does not "regularize" any procedural breach by an employer in terminating the employment, the acceptance of payment may, in an appropriate case constitute waiver by the worker of the right to access the IDT.

[248] In **Jamaica Flour Mills Ltd.** (supra) on which the Claimant relies, it was determined that the acceptance and encashment of cheques by the employees did not constitute a waiver as the cashing of the cheques and the realisation of their benefit took place after the union had taken up the fight on the employees' behalf, "…*after the dispute had been referred to the Tribunal and after arrangements for the eventual hearing had been put in train."* In those premises it was found that there was no clear intention on the part of the employees to abandon their statutory rights. Further, there was no evidence that JFML believed that that was the employees' intention and altered its position in consequence. The case is therefore distinguishable from the instant case on its facts. There is no evidence here that the ministerial process had been engaged by the Claimant before he accepted the redundancy package.

[249] In my view, the appropriate questions in this case are whether on the evidence available to the Minister there an objectively ascertained intention on the part of the Claimant to abandon his statutory rights under section 12 (5) (c) of the LRIDA; and if there was, whether there is evidence that the Company believed that was the Claimant's intention and altered its position as a result.

[250] The Claimant's evidence is that at no time prior to the 28th November 2018 when he received the letter advising of his termination did any representative of the Company conduct consultation or other meetings with him relative to his post being made redundant. He goes on to aver that in or about December 2017 - the particular date was not specified - the Company published an advertisement inviting applications for the post of Senior Business Analyst, which post required the same qualifications, financial acumen and skills as the post of Business Analyst, which he still occupied. Although a copy of the alleged advertisement was exhibited,

neither the publication nor the date of the advertisement are stated. It is also his evidence that when he discovered the advertisement he *"spoke with his [Supervisor] and the Human Resource Manager… who was unable to provide a plausible explanation as to the reason why the Company was advertising a post that they contend was being made redundant."* This evidence was unchallenged. I therefore find that in or about December 2017, there was certainly an industrial dispute within the undertaking as contemplated by the LRIDA.

[251] The Claimant also says that he approached his attorneys-at-law and instructed them to intervene on his behalf in the foregoing circumstances. The date or period of the approach and issue of those instructions was not supplied. Suffice it to say however that the objective documentary evidence is that the Claimant's attorneys-at-law wrote to the Company on the 7th September 2018 to indicate that they were representing the Claimant, briefly stated the nature of the dispute and extended an invitation to enter into discussions to resolve it amicably. That was some eight (8) moths after the Claimant said he spoke with his Supervisor and the Human Resource Manager, and nine (9) months before the dispute was referred for the intervention of the Minister. The Company, subsequent to the redundancy exercise but before the dispute was referred to the Minister through the MLSS, filled the post. That is not disputed.

[252] Consequently, on the unchallenged evidence that the Claimant accepted the redundancy package offered to him and remained inactive in the challenge of the dispute for eight (8) months after he was terminated by reason of redundancy, I find that there was a foundation of facts upon which the Minister could conclude that there was an intention on the part of the Claimant to abandon his statutory rights under section 12 (5) (c) of the LRIDA. I also find that there was a foundation of facts upon which the Minister could have determined that the Company believed that to be the Claimant's intention and had altered its position accordingly by filling of the post subsequent to the redundancy exercise. On the evidence, all of

this occurred before the Minister's intervention was sought nine (9) months after the Claimant was made redundant on the 31st December 2017. In these premises it is my judgment that there was a foundation of facts upon which the Minister could lawfully determine that there was waiver on the part of the Claimant and that no industrial dispute existed in the Company's undertaking at the time his intervention in the dispute was sought by the Claimant to enable his decision to be regarded as *intra vires* the LRIDA, sections 2 and 11 A in particular.

[253] Although we do not have the Minister's reasons for decision, based on the legal advice he received almost immediately preceding it and the communication thereof to the Claimant, waiver appeared to be a live concern for the Minister. Even if it is said that we cannot know if he considered it, having regard to the conclusions arrived at in respect of the challenge to the exercise of the Minister's discretion not to refer the dispute to the IDT, no useful purpose could be served by quashing the decision and remitting it to him on that basis. The orders available on an application for judicial review under Part 56 of the CPR are discretionary and it is no part of the Court's function to make academic orders. Accordingly, the order of certiorari to quash the decision of the Minister and an order directing him to consider the dispute in question according to the provisions of the LRIDA is refused.

[254] Among the relief included by the Claimant in his Amended Fixed Date Claim Form filed on 20th October 2021 is an order of mandamus directing the Minister to refer the dispute to the IDT without the issue of any further proceedings or requiring the Claimant to engage in further conciliation. No leave was sought or obtained to pursue that relief, which could not be granted by the Court in any event in light of the fact that its supervisory jurisdiction does not permit it to arrogate unto itself a discretion given to the Minister under the statute. An order of mandamus in the manner pleaded would only have been open to the Court to make if the Minister did not have a discretion in respect of a referral to the IDT.

CLAIM FOR CONSTITUTIONAL REDRESS

Issue (iii)

Whether the due process rights to a fair hearing within a reasonable time before an independent and impartial court or authority established by law which are enshrined at section 16 (2) of the Charter have been engaged.

[255] In addition to the remedies sought by way of judicial review the Claimant also seeks constitutional redress by way of declaratory relief that the Minister breached each of the rights guaranteed by section 16 (2) of the Charter; and or damages, including exemplary and/ or aggravated damages.

THE GROUNDS OF CHALLENGE

[256] On my assessment of the bases for the constitutional challenge, which appear in the Fixed Date Claim Form filed 11th March 2020 and on the Amended Fixed Date Claim Form filed on 20th October 2021, which were already reproduced, it appears to me that the Claimant challenges the constitutionality of the Minister's conduct on the following five (5) grounds.

(i) The Minister failed to consider the referral of the dispute between the Claimant and the Company to the IDT for adjudication in breach of the rights guaranteed to him by section 16 (2) of the Charter; and/or

(ii) The Minister failed to direct adjudication of the dispute by the IDT in breach of the rights guaranteed to him by section 16 (2) of the Charter; and/or

(iii) The Minister was deliberately causing delay in the adjudication of the said dispute at the IDT in breach of the rights guaranteed to him by section 16 (2) of the Charter; and/or

(iv) The Minister deprived him of his right to a fair hearing within a reasonable time by failing to refer the dispute to the IDT in breach of section 16 (2) of the Charter; and/or

(v) The Minister deprived him of his right to work in failing to refer the dispute to the IDT.

[257] I make a number of observations and findings on these various grounds which I note, refer to access to the IDT.

Ground (i)

[258] The matter of the referral of the dispute to the IDT was considered and the Minister decided not to refer it, albeit belatedly. Consequently, on the 11th January 2022 when the Minister's decision was communicated to the Claimant and certainly by the time of the trial commencing on 17th January 2022, it could no longer be maintained that there was a failure on the part of the Minister to consider whether to refer the Dispute between the Claimant and the Company to the IDT. Ground (i) has therefore become obsolete.

Ground (ii)

[259] In what I have labelled ground (ii) of the Claimant's challenge, he contends that the Minister failed to direct adjudication of the dispute by the IDT in breach of the rights guaranteed to him by section 16 (2) of the Charter. Although no decision had yet been returned by the Minister at the time of the filing of the Fixed Date Claim Form and Amended Fixed Date Claim Form, the Claimant appears to have considered the failure of the Minister to deliver a decision by that time as a refusal. While I do not believe that the requirements for a refusal had been met, the Minister has since made and communicated his decision not to refer the dispute to the IDT.

[260] In deciding not to refer the dispute, the Minister has in effect "failed" to direct its adjudication by the Tribunal. I have concluded however that in deciding not to refer the dispute to the IDT, the Minister acted *intra vires*

the LRIDA, section 11 A in particular. In consequence, this ground has also become obsolescent.

Ground (iii)

[261] The Claimant contends in respect of this ground that Minister was *"deliberately causing delay"* in the adjudication of his dispute at the IDT in breach of the rights guaranteed to him by section 16 (2) of the Charter.

[262] In the Oxford Paperback Dictionary & Thesaurus (3rd edn, 2009) for example, the adverb "deliberately" is defined as "***1*** *consciously and intentionally.* ***2*** *carefully and unhurriedly."* The verb "delay" is defined as *"**1** make someone late or slow. **2** Hesitate or be slow. **3** put off or postpone."* The word "delay" already encompasses dilatory conduct so that in the context of the allegation by the Claimant that the Minister was "*deliberately causing delay*", it appears to me that he is contending in the first instance that the Minister delayed referring the dispute to the IDT consciously and intentionally. I am unable to agree with this characterization of what I will readily concede was slow decision making by the Minister between the last of the conciliation meetings in July 2019 and the delivery of his decision in January 2022.

[263] That there was some need for clarity as to what the Minister may take into account in order to be satisfied of at least one fundamental prerequisite for referral to the IDT pursuant to section 11 A of the LRIDA - that an industrial dispute exists in an undertaking - is demonstrated on this very case. While the Claimant contended that waiver was not a lawful consideration for the Minister, I have found that it was and that there was a foundation of facts in the case upon which the Minister could lawfully decide not to make the referral to the IDT on that basis. On the evidence it was the need for clarity which caused legal advice to be sought form the Legal Services Unit of the MLSS.

[264] It is also the evidence that at the time that legal advice was received, receipt of which was averred to in affidavit evidence filed on behalf of the Minister on 7th July 2020, it was thought necessary to seek the

recommendation of the AGC, the attorneys-at-law for the Minister as to how to proceed, in light of the existence of this claim. That appears to be an eminently sensible approach.

[265] Further, the evidence is that shortly after receiving the legal advice supplied by the Legal Services Unit, the attorney in the AGC with conduct of the matter resigned, effective 31st December 2020. This, as well as the resignation of five other attorneys from the division responsible for litigation are said to have contributed to the delay in the Ministry receiving the recommendations of the AGC. The delay occasioned by these human resource concerns is said to have been further compounded by the ongoing pandemic, curfew hours, lockdown days and work from home measures which caused the matter to be unassigned for some time.

[266] I consider it the responsibility of the state to ensure that the AGC is sufficiently kept in the number of attorneys required to discharge its business, and that any failure in that regard does not itself provide a good and satisfactory explanation for the admitted delay. That notwithstanding, with the confirmation of our first imported case of the Coronavirus Disease 2019 (COVID-19) in March 2020 and the raft of containment measures which followed shortly thereafter which caused many disruptions in work, I am prepared to accept that challenges brought about by these measures are likely to have contributed to the delay.

[267] That was not the extend of the maladies experienced. On 7th October 2021 the offices occupied by the AGC were flooded and had to be closed for remedial works. They were further ordered to remain closed by the Ministry of Health on 20th October 2021 until the completion of those works following an air quality assessment. Alternate accommodations were accordingly required.

[268] Having regard to the size of the staff, number of files, equipment, furniture and other items which required relocation; and the absence of any one site to accommodate them all, the AGC was spread out across various ministries within the corporate area. This is said to have caused severe

challenges and significantly hampered the efficient operation in the litigation division. In these circumstances, the matter was only reassigned on 29th December 2021 when it became apparent that the recommendation sought by the MLSS from the AGC had not in fact been provided. On 4th January 2021 the recommendation was sent and the Minister by letter dated 11th January 2021 communicated his decision to the Claimant.

[269] On the foregoing unchallenged evidence, I can see no consciousness or intention on the part of the Minister to cause delay in making a decision under section 11 A of the LRIDA. There is no evidence of the Minister *"deliberately causing delay in the adjudication of the Claimant's dispute at the Industrial Disputes Tribunal"*, and I so find. In any event, there being no industrial dispute in the Company's undertaking at the time the Claimant sought the Minister's intervention, there was no foundation for an adjudication of the dispute by the IDT pursuant to section 11 A of the LRIDA which the Minister delayed. There is therefore no merit in the contention.

[270] For organizational convenience, I will address the observations in respect of ground (v) and then proceed to ground (iv).

Ground (v)

[271] There was no argument before us in respect of the allegation that the Minister deprived the Claimant of a "right to work" and no relief was specifically sought in respect of it. In any event, in an effort to explain the Claimant's absence from court in one instance during the course of this trial, and his inability to remain for the duration of a day's proceedings in another, the court was advised that the absences were on account of the Claimant's work obligations. The allegation at ground (v), that the Minister deprived the Claimant of his right to work is therefore regarded as having been abandoned.

Ground (iv)

[272] This ground is pleaded in addition to or as an alternative to the grounds which precede it. The Claimant asserts that the Minister deprived him of his right to a fair hearing within a reasonable time by failing to refer the dispute to the IDT.

[273] As found earlier in this judgment, section 11 A of the LRIDA does not confer any right of access to the IDT. Access is dependent on the exercise of a discretion by the Minister on his own initiative, if he is satisfied that an industrial dispute exists in an undertaking, and of other conditions set out in the section. In order to determine whether the right to a fair trial guaranteed by section 16 (2) of the Charter is engaged on the exercise of the discretion by the Minister, it is first necessary to define the nature and scope of the right. In doing so I find that the right as guaranteed by the section has not been engaged.

THE NATURE AND SCOPE OF THE RIGHT GUARANTEED

[274] Section 16 (2) of the Charter provides as follows.

> ***In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests****, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.*
>
> [Emphasis added]

[275] At section 13 (1) (c) of the Charter all persons are ascribed *"a responsibility to respect and uphold the rights of others recognized in the Chapter, the [provisions of which] shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in [the Charter], to the extent that those rights and freedoms do not prejudice the rights and freedoms of others."* It goes further to prescribe at section 13 (2) that

> *[s]ubject to sections 18 [status of marriage] and 49 [alteration of constitutional provisions], and to subsections (9) [laws permitting*

limitations on certain freedoms during public emergencies and disasters] and (12) [saving of certain existing laws] of this section, and save only as may be demonstrably justified in a free and democratic society

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

[276] The foregoing provisions notwithstanding, the rights and freedoms guaranteed by the Charter should not be regarded as existing or operating in a vacuum. In any case where it is alleged that there has been a breach of any of the rights or freedoms guaranteed, the right or freedom invoked must first be shown to have be "engaged". By "engaged" I mean that matter of the complaint arguably falls within the scope of the right or freedom guaranteed and invoked. It is only on such a determination that the need for an enquiry into whether or not the right or freedom has been limited and if so, whether the limitation is demonstrably justified in a free and democratic society becomes necessary.

[277] Perforce, in order to determine whether the complaint falls within the scope of a Charter right, *"the nature, content and meaning of the right"*, to borrow the phraseology of Mr. Hacker must first be determined. In making that determination, I join in the various judicial pronouncements in this jurisdiction that the rights and freedoms which are embodied in the Charter are to be purposively interpreted to give full effect to the protections offered by them. In this regard see for example the decision of the Court of Appeal in **The Jamaica Bar Association v The Attorney General and the General Legal Council** [2020] JMCA Civ 37 where McDonald-Bishop JA stated:

[328] … there must… be a broad and purposive approach to the interpretation of the Charter. This is necessary to give full effect to the liberty rights as guaranteed. This approach would be in keeping with the intention of its framers. In Minister of Home Affairs and

> *another v Fisher, Lord Wilberforce pointed to the need for a, "generous interpretation" that is suitable to give to individuals the full measure of the fundamental rights and freedoms guaranteed to them by the Constitution.*

[278] To start, the dictum of E. Brown J (as he then was) of the Full Court in **Ernest Smith & Co. (A firm) et al v Attorney General of Jamaica** [2020] JMFC Full 7, on which both parties rely, provides some assistance. He said this of the provision invoked.

> *[3] Section 16 (2) of the Charter is a near cousin of the previous section 20 (1) of the old Bill of Rights section. That is to say, as was said of section 20(1) in Bell v The Director of Public Prosecutions [1985] 1 AC 937 (Bell v DPP), section 16 (2) is a composite of three discrete rights: entitlement to a fair hearing; fair hearing within a reasonable time; and by an independent and impartial court or authority established by law.*

[279] That case was concerned the right to a fair hearing within a reasonable time in the context of the failure of a judge to deliver a judgment which was reserved on 7th October 2013 following an assessment of damages hearing. At the time of delivery of the judgment in the claim for constitutional redress on 9th May 2020, the judge who was then retired had not delivered the judgment. Delivery of a judgment was therefore an impossibility. Among other things, it was held that the delay and/or impossibility of rendering a judgment constituted a breach of the claimants' right to a fair hearing as guaranteed by section 16 (2) of the Charter. Having regard to the concern of that case it is understandable that while the dicta went into some depth on the scope of the right to a fair hearing within a reasonable time, the nature of the other elements of the right to a fair hearing as guaranteed by section 16 (2) were not explored.

[280] Like other cases before and after it, resort was had to Strasbourg jurisprudence in delineating the ambit of the right to a fair hearing within a reasonable time, having regard to the similarity between article 6 (1) of the European Convention on Human Rights (hereinafter called the ECHR)

and section 16 (2) of the Charter. So far as applicable article 6 (1) ECHR states that

> *[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

[281] Although similar, the provisions of article 6 (1) of the ECHR and section 16(2) of the Charter are not the same. Under the ECHR the entitlement to the right to a fair hearing is engaged in two circumstances. Firstly, it arises *"in the determination [of a person's] civil rights and obligations"*, or secondly "*"in the determination… of* ***any criminal charge against him****."* While the first of these circumstances is also a gateway, if you will, to the right enshrined at section 16 (2) of the Charter, the second gateway is much broader in scope in that entitlement to the right guaranteed also arises *"in the determination… of* ***any legal proceedings which may result in a decision adverse to [the person's] interests…"*** It is my judgment that the latter but not the former of the two gateways under the Charter are capable of engagement in the circumstances of this case.

[Emphasis added]

In the determination of a person's civil rights and obligations …

[282] Among the decisions relied upon by the Claimant in this case is the decision in **Lupeni Greek Catholic Parish and Others v. Romania** Application no. 76943/11 (ECHR, 29 November 2016). Among other things, the applicants contended that their right to a fair hearing within a reasonable time as guaranteed by article 6 (1) of the ECHR was breached in circumstances where domestic courts refused to grant their claim for restitution of a church building which had been transferred to another church. The Chamber had previously found, which was not contested by the parties, that the action of the applicants fell within the scope of the civil limb of article 6 (1) as it was aimed at securing recognition of a pecuniary right, the applicants' title to a building.

[283] The European Court of Human Rights (hereinafter called "the ECtHR") used the opportunity to reiterate its position thus.

> *71. …[F]or Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("contestation" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether the right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the existence of a right but also as to its scope and the manner of its exercise; and finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections and remote consequences not being sufficient to bring Article 6 § 1 into play…*

[284] The court determined that the right being relied upon by the applicants was based on the domestic civil law of recovery of possession; that there was a sufficiently serious dispute in respect of it; and that the outcome of the proceedings in issue was directly decisive of the right in question. Article 6 (1) of the ECHR was therefore applicable.

[285] The principles arising on **Lupeni** and other Strasbourg decisions as to the scope of the rights at article 6 (1) of the ECHR, are undoubtedly attractive and have proved helpful in the task of purposively interpreting the similarly worded provisions of section 16 (2) of the Charter. Particular care must be taken however where the subject of a constitutional challenge is an administrative decision made in circumstances where the decision maker is without full jurisdiction to deal with the matter before him, which includes the jurisdiction to resolve factual errors.

[286] While the "civil limb" of Article 6 (1) has been found to be applicable to administrative proceedings in Strasbourg jurisprudence, applicability is limited to the extent that the administrative proceedings affect and determine private law rights. Although not cited in these proceedings, I find the following dictum of Lord Slynn in delivering the judgment of the House of Lords in **R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the**

Regions and other cases [2001] UKHL 23 in these regards to be particularly insightful. He said this of European jurisprudence.

> *78. As a matter of history it seems likely that the phrase "civil rights and obligations" was intended by the framers of the Convention to refer to rights created by private rather than by public law. In other words, it excluded even the right to a decision as to whether a public body had acted lawfully, which English law, with that lack of a clear distinction between public and private law which was noted by Dicey, would treat as part of the civil rights of the individual. Sir Vincent Evans, in his dissenting judgment in Le Compte, Van Leuven and De Meyere v. Belgium (1981) 4 EHRR 1, 36, said that an intention that the words should bear this narrow meaning appeared from the negotiating history of the Convention. In his dissenting judgment in König v Federal Republic of Germany (1978) 2 EHRR 170, Judge Matscher said that the primary purpose of article 6(1) was, by way of reaction against arbitrary punishments under the Third Reich, to establish the right to an independent court in criminal proceedings. The framers extended that concept to cases which, according to the systems of the majority of contracting states, fell within the jurisdiction of the ordinary courts of civil law. But there was no intention to apply article 6(1) to public law, which was on the continent a matter for the administrative courts.*
>
> *79. These views of the meaning of "civil rights and obligations" are only of historical interest, because, as we shall see, the European court has not restricted article 6(1) to the determination of rights in private law. The probable original meaning, which Judge Wiarda said, at p 205, in König's case was the "classical meaning" of the term "civil rights" in a civilian system of law, is nevertheless important. It explains the process of reasoning, unfamiliar to an English lawyer, by which the Strasbourg court has arrived at the conclusion that article 6(1) can have application to administrative decisions.* ***The court has not simply said, as I have suggested one might say in English law, that one can have a "civil right"***

> ***to a lawful decision by an administrator. Instead, the court has accepted that "civil rights" means only rights in private law and has applied article 6(1) to administrative decisions on the ground that they can determine or affect rights in private law…***
>
> [Emphasis added]

[287] In light of the second gateway to the rights enshrined at section 16 (2) of the Charter, which I will address subsequently, it is my view that the approach adopted in Strasbourg jurisprudence in respect of the applicability of the "civil limb" of article 6 (1) of the ECHR to administrative decisions is unnecessary here. Consequently, it is my judgment that the determination of "civil rights and obligations" within the context of section 16 (2) of the Charter means the determination of rights and obligations existing only in private law.

[288] The decision of the Minister, a member of the executive, is in exercise of the discretion given by statute, specifically section 11 A of the LRIDA. In arriving at it, a determination in public and not private law was made. The first gateway to the rights guaranteed by section 16 (2) of the Charter does not avail the Claimant in his pursuit for constitutional redress in the circumstances. This brings me to the second gateway.

In the determination of any legal proceedings which may result in a decision adverse to a person's interests …

[289] A person is also entitled to the right to a fair hearing guaranteed by section 16 (2) in respect of "*any legal proceedings which may result in a decision adverse to his interests". "*Legal proceedings" is not defined in the Charter but it is my view that it is capable of being applied to administrative decisions. Pursuant to section 16 (5) of the Charter which provides as follows in respect of the horizontal application of the rights guaranteed: "*[a] provision of this Chapter binds natural or juristic persons* ***if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."*** That is to be contrasted with the provision at section 13 (4) of the Charter which

provides that the *"… Chapter [under which section 16 (2) falls]* ***applies to all law and binds*** *the legislature, the executive and all public authorities."* It is in these premises - the absolute applicability of Charter rights as appears in section 13 (4) - that I come to the conclusion that there is no need to resort to the approach taken in Strasbourg jurisprudence to arrive at the conclusion that section 16 (2) is applicable to administrative decisions.

[Emphasis added]

[290] In **R (on the application of Alconbury Developments Ltd)** (supra) Lord Slynn, in addition to succinctly describing the approach of the ECtHR on the applicability of article 6 (1) of the ECHR to administrative decisions also said this of the European jurisprudence.

> *83. The majority view which prevailed in König's case has enabled the court to develop a jurisprudence by which it has imposed a requirement that all administrative decisions should be subject to some form of judicial review…*
>
> *84. … The cases establish that article 6(1) requires that there should be the possibility of some form of judicial review of the lawfulness of an administrative decision. But the European court, in deciding the extent to which such decisions should be open to review, has been in practice fairly circumspect…*

[291] It seems clear to me on the foregoing extract and indeed the Strasbourg jurisprudence cited in these proceedings, that in respect of administrative decisions, there is compliance with the right to a fair hearing as guaranteed by article 6 (1) of the ECHR where the decision is subject to some form of judicial review by an independent and impartial "tribunal". While the decisions of the ECtHR do not bind this court, I nevertheless regard them as having high persuasive value to the extent that they concern the interpretation and application of rights and freedoms which are comparable to those which are guaranteed by the Charter.

[292] I now address in turn, the elements of a fair hearing to which a person is entitled pursuant to section 16 (2) of the Charter.

The right to a fair hearing …

[293] It was contended by Mr. Hacker that in order for this court to conclude that there was a breach of the right to a fair hearing as guaranteed by section 16 (2) of the Charter, the Claimant must have been deprived of the right to bring a case, which includes the right to equality of arms, the right to call witnesses, and the right to cross examine. He also submitted that there is no evidence of such deprivation on the circumstances of this case. I find favour with these submissions.

[294] For his contentions Mr. Hacker relied upon the decision of the Court of Appeal in **Al-Tec Inc Limited v James Hogan and Renee Lattibudaire** [2019] JMCA Civ 9. There Edwards JA (Ag) (as she then was), whose treatment of the subject was agreed by the court said this of the right to a "fair trial":

> *[156] The scope and content of the right to a fair trial includes not only compliance with the principle of equality of arms but also the right to cross-examine witnesses, right of access to facilities on equal terms and to be informed of and be able to challenge reasons for administrative decisions. See* ***Beles and others v the Czech Republic*** *and Law of the European Convention on Human Rights Harris D J, O'Boyle M & Warbrick C (1995) London Butterworths at 206-214.*

[295] As to the right to be heard generally, Edwards JA said this.

> *[151] The right to be heard is a fundamental principle underpinning our legal system. This right has been codified in section 16(2) of our Constitution…*
> *[152] In addressing this venerable principle Batt's J in* ***Natasha Richards*** *said at paragraph [22]:*
>
> > *"One would have thought that the matter would be impatient of debate. Audi alteram partem has been a sine qua non of British Constitutional law for hundreds*

> *of years. Proponents of natural justice, the rule of law and all it implies, regard with anathema the prospect of a person's rights or obligations being determined without reference to that person. This basic principle has been adopted and applied in the Commonwealth Caribbean and is to be regarded as an integral part of our legal fabric. The principle has found concrete manifestation in section 16(2) of the Constitution of Jamaica.*

[296] On the dicta reproduced there is acknowledgement that the applicability of the right to a fair hearing as guaranteed by section 16 (2) of the Charter to administrative decisions involves the right to be informed of and be able to challenge administrative decisions.

Within a reasonable time …

[297] In demarcating the scope of the right to a hearing within a reasonable time as guaranteed by section 16 (2) of the Charter, the Claimant relies on the decision of the Judicial Committee of the Privy Council in **Bell v The Director of Public Prosecutions** [1985] 1 AC 937. The case concerned the right of criminal accused to a fair trial within a reasonable time in the context of the provision which then appeared at section 20 (1) of the Bill of Rights which stated that *"whenever a person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

[298] In deciding the question of whether the right had been infringed in the circumstances of that case, guidance was sought from the judgment of Powell J in **Barker v Wingo** (1972) 407 U.S. 514 in which the right enshrined in the Sixth Amendment to the Constitution of the United States was considered. It provided that "*[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury*…" Powell J identified four factors for consideration in determining the question. They are:

(1) The length of the delay;

(2) The reasons given by the prosecution to justify the delay;

(3) The responsibility of the accused for asserting his rights; and

(4) The prejudice to the accused.

[299] In respect of the length of delay, Powell J said this at pp. 530 to 531.

> *The length of the delay is to some extent a triggering mechanism.* ***Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of the delay that will provoke such an inquiry is necessarily dependent upon the circumstances of the case.*** *To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.*
>
> [Emphasis added]

[300] All four factors in **Barker** were regarded as *"protect[ing] an accused from oppression by delay"* and were considered by the Board in **Bell** which found that the appellant's right to a fair hearing within a reasonable time before an independent and impartial court established by law had been breached. Almost three (3) years had passed between the order for the appellant's retrial following the quashing of a criminal conviction on appeal, his rearrest and proposed retrial. During that time the case had been mentioned on several occasions and adjournments granted which led, on one occasion, to the Crown offering no evidence on account of the unavailability of witnesses.

[301] The length of delay was regarded as presumptively prejudicial; It was accepted that parts of the delay were due to overcrowded courts, negligence by the authorities and the unavailability of witnesses; and that the appellant had complained as soon as he had been rearrested that he had been discharged and told to go free. In respect of the latter matter, which concerns the assertion of his rights by an accused, the Board considered that the appellant and his counsel had no doubt taken the view

that strenuous objections to requests for adjournment by the prosecution or an appeals against orders for such adjournments would have been a waste of time. Further, notwithstanding that the appellant had not lead evidence as to specific prejudice, it was considered inevitable that a lapse of seven (7) years between the date of the alleged offences and the eventual date for retrial could not be ignored.

[302] It was submitted by Mr. Gordon that the four (4) considerations in **Bell** should be applied in this case with "some tweaking". The nature and extend of any adjustment was not stated. Counsel nevertheless suggested that guidance could be sought from decisions made under article 6 (1) ECHR.

[303] The first of the three cases to which counsel referred us for assistance is **Crompton v The United Kingdom** Application no. 42509/05 (ECHR, 27 October 2009). The applicant applied to the Strasbourg court against the United Kingdom of Great Britain and Northern Ireland complaining of breaches of the rights guaranteed to him by article 6 (1) of the ECHR. One complaint was that proceedings for redress of what was in fact his unlawful redundancy from the Territorial Army which took eleven (11) years to be concluded breached his right to a fair hearing within a reasonable time which was guaranteed by article 6 (1) of the Convention. The Government had accepted during the proceedings that the time which had passed between the applicant's complaint for redress on 19th December 1994 to his commanding officer and the final determination by the Army Board on 24th May 2005 was not reasonable within the meaning of article 6 (1). The court held that there was a violation of article 6 (1) of the ECHR. In doing so it took the opportunity to repeat at para. 59 of the judgment

> *… that the reasonableness of the length of proceedings is to be assessed in light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and the relevant authorities (see Selmouni v. France [GC], no. 25803/94, §112, ECHR 1999-V; Frydlender v. France [GC], no.*

30979/96, § 43, ECHR 2000-VII). On the latter point, the importance of what is at stake for the applicant in the litigation has also to be taken into account (see e.g. Glaser v. the United Kingdom, no. 32346/96, § 93, 19 September 2000; and Frydlender, cited above, § 43.

[304] In finding that the State had breached the reasonable time guarantee at article 6(1) of the Convention, the court considered that the proceedings there were of some financial importance to the applicant; that the issues were not factually or administratively complex; the significant periods of inactivity on the part of the authorities; and the comment of the High Court on the *"inordinate period of delay"* in the proceedings. The applicant had applied for judicial review to the High Court on no less than five (5) times in respect of his request for redress, the first of which followed the issue of a decision by the Army Board on 7th May 1998 refusing his request for redress and to not hold an oral hearing or convene a Board of Inquiry.

[305] Whilst the judicial review was pending the Army Board convened a Board of Inquiry in January 1999 which determined that the Applicant ought to have been given priority before five selection boards but was not. Despite the favourable determination by the Board of Inquiry, the Army Board did not take any step until 2001 when it agreed that the applicant should be offered compensation. Another judicial review application had also been made which concerned a request for the compensation to be reassessed by the Army Board within a specified time. On that occasion the Army Board undertook to review the level of annual salary used in its compensation calculations and reassess the compensation if appropriate within thirty-five days. It was then that the High Court remarked that "*the history of this matter displays an inordinate period of delay."*

[306] The second decision is **Frydlender v. France** Application no. 30979/96 (ECHR, 27 June 2000) which was cited with approval in **Crompton**. The applicant had been employed as an official under successive individual contracts since 1972 by the Ministry of Economic Affairs. By letter served on him on 27th December 1985 the minister advised that owing to his inadequate performance, the applicant's current contract would not be

renewed when it expired on 13th April 1986. It was an express term of the contract that it was terminable by the State on three months' notice, for among other things, inadequate performance. The Minister's final decision not to renew the contract was served on the applicant on 21st January 1986. By letters of 28th February, 3rd March and 13th June 1986 the applicant lodged three applications for judicial review to the Paris Administrative Court. Respectively they sought the setting aside of the first "preliminary to a final decision" of the minister, the quashing of the "final decision" and the appointment of the applicant's replacement. The court dismissed the applications in a judgment of 6th January 1989.

[307] The applicant appealed to the *Counseil d'Etat* on points of law and lodged his statement of the grounds of appeal by 23rd February 1990. The appeal was dismissed. The *Counseil d'Etat* held, *inter alia,* that the minister had lawfully dismissed the applicant on the ground of inadequate performance. On his application to the ECtHR, the applicant complained of the length of the administrative law proceedings which began on 28th February 1986 and ended on 26th October 1995 when the decision of the *Counseil d'Etat* was served on him, a period of approximately nine years and eight months. The court determined that article 6 (1) was applicable to the dispute between the applicant and the French State and in respect of the complaint about delay which the State had left to the discretion of the Court, that article 6 (1) of the Convention had been breached. It was

> *43…. reiterated that the "reasonableness" of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, among other authorities, Comingersoll S.A. v. Portugal [GC], no 35382/97, § 19, ECHR 2000-IV).*

[308] The Court considered that the length of the proceedings was not explained either by the complexity of the case or the conduct of the applicant. The government had also failed to supply any explanation for the delay which

appeared to the court to be manifestly excessive. The court also took the opportunity to reiterate.

> *45. … that it is for the contracting States to organize their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time in the determination of their civil rights and obligations… [and] … that an employee who considers that he has been wrongfully suspended or dismissed by his employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly, since employment disputes by their nature call for expeditious decision, in view of what is at stake for the person concerned, who through dismissal loses his means of subsistence…*

[309] The third Strasbourg case referred for the Court's guidance was **Lupeni Greek Catholic Parish and Others** (supra), the facts for which were already stated. There the ECtHR once again reiterated the criteria which had been set out in the cases already referenced in determining the reasonableness of the length of proceedings and found that the right to a fair hearing within a reasonable time had been breached. It considered that a period of about five years had elapsed between three levels of jurisdiction when two of the applicants were formally joined as parties to the proceedings. A period of ten years had elapsed in respect of the second applicant. Judicial proceedings had been taken in the lower courts, the Court of Appeal and the High Court. The court found that although the case was not regarded as being particularly complex, the lack of clarity and foreseeability of domestic law had rendered its examination difficult. This was found to be entirely attributable to the national authorities and had decisively contributed to the length of the proceedings. Although there had been a stay of the proceedings it was concerned with an attempt to arrive at a friendly settlement, for which the applicants could not be faulted. Further it was clear that what was at stake for the applicants was a pecuniary right - recognition of their tile to a building.

[310] The considerations in the Strasbourg jurisprudence on the "civil limb" of article 6 (1) of the ECHR in determining whether the length of proceedings constitute a breach of the right to a fair hearing within a reasonable time is not far removed from the criteria set out in **Bell**. There is consideration of the circumstances of the case, in particular, the length of proceedings, the reasons which have been offered in justification thereof, the conduct of the parties, and what is at stake for the person who invokes breach of the fundamental right. I see no reason that the approach taken by the Strasbourg court cannot be applied here in delimiting the scope of the right to a fair hearing within a reasonable time which is guaranteed by section 16 (2) of the Charter including where the pathway to applicability is *"… in the determination… of any legal proceedings which may result in a decision adverse to [a person's] interests.*"

By an independent and impartial court or authority established by law.

[311] Though not binding, I find that the Strasbourg jurisprudence offers valuable assistance in determining the meaning of *"… by a court or authority established by law"* which appears at section 16 (2) of the Charter. I arrive at this conclusion notwithstanding that the forum for guaranteeing the rights in article 6 (1) of the ECHR is a *"tribunal"*. The jurisprudence of the ECtHR demonstrates that it is the circumstances under which proceedings take place and not the name given to the forum which is determinative of its value in guaranteeing the right to a fair hearing.

[312] In **De Wilde and others v Belgium [[1971] ECHR 2832/66** the matter was stated thus.

> *78. It is true that the Convention uses the word "court" (French "*tribunal"*) in several of its Articles. It does so to mark out one of the constitutive elements of the guarantee afforded to the individual by the provision in question (see, in addition to Article 5(4), Articles 2(1), 5(1) (a) and (b), and 6(1) (*tribunal*). In all these different cases* ***it denotes bodies which exhibit not only common fundamental***

> ***features, of which the most important is independence of the executive and of the parties to the case*** *(see* Neumeister *judgment of 27 June 1968, Series A, p. 44, para. 24),* ***but also the guarantees of judicial procedure. The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place.*** *Thus, in the* Neumeister *case, the Court considered that the competent courts remained "courts" in spite of the lack of "equality of arms" between the prosecution and an individual who requested provisional release (*ibidem*); nevertheless, the same might not be true in a different context and, for example, in another situation which is also governed by Article 5(4).*
>
> [Emphasis added]

[313] What is absolutely clear, even without the benefit of Strasbourg jurisprudence is that a fair hearing cannot be guaranteed in the absence of the independence and impartiality of the court or authority which is tasked with determining the civil rights and obligations of a person or other legal proceedings which may be adverse to his interests. To put that beyond doubt, the framers of the Charter have explicitly included it as an aspect of the right to a fair hearing at section 16 (2) of the Charter.

[314] I believe that the considerations for the court in determining whether there is *"independence"* or *"impartiality"* are aptly summarised in **Halsbury's Laws of England** (5th edn, 2018) vol 88A at paras 341 and 342 in this way.

> *341. In deciding whether a tribunal is independent, in the sense of being free from the control of the executive and the parties as well as the legislature and other outside bodies, the court will consider:*
>
> *(1) the manner of appointment of its members and their term of office;*

(2) the existence of guarantees against outside pressures; and

(3) whether the body presents an appearance of independence…

342. 'Impartiality' denotes absence of prejudice or bias, assessed by reference to both subjective and objective tests, which are the counterpart to the criteria of actual and apparent bias respectively under the common law…

[315] The Court of Appeal recently had occasion to discuss bias in **Carrol Ann Lawrence-Austin v the Director of Public Prosecutions** [2020] JMCA Civ 47 where Phillips JA, with whom the other Justices of Appeal agreed, said this.

*[34] Lord Hope of Craighead in **In Re Pinochet**, in accepting that "one of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered" …, made it clear that "[i]n civil litigation the guiding principle is that no one may be a judge in his own cause; nemo debet esse judex in propria causa". The second guiding principle is that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to done" (see R v Sussex Justices). In **In Re Pinochet**, Lord Browne-Wilkinson suggested that there were two ways in which a person could be conceived of as a judge in their own cause, he stated: "... First [the principle] may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own*

cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial ..."

[35] In relation to the second cornerstone of our legal system, in ***R v Sussex Justices****, Lord Hewart CJ also made the following statement: "... the question depends not upon what actually was done, but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."*

[36] The law is well settled with regard to the test for apparent bias. It has moved away somewhat from the approach laid down in ***R v Gough*** *[1993] AC 646 in the speech of Lord Goff of Chieveley, where the test was formulated in the headnote as "whether, in all the circumstances of the case, there appeared to be a real danger of bias". The current test is found in the well-known statement of the Lord Hope of Craighead in* ***Porter and v Magill*** *[2002] 1 All ER 465, where he stated that the reference to "real danger" should be deleted as it no longer served any useful purpose, and that the question should now be "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". (sic)*

[316] In respect of the requirement under article 6 (1) of the ECHR that a tribunal be *"established by law",* it is aptly summarised in **Halsbury's Laws of England** (5th edn, 2018) vol 88A at para 343.

343. The requirement that a tribunal be established by law covers not only the legal basis for the existence of a tribunal but also the composition of the bench in any given case: it has the purpose of ensuring that the judicial organisation in a democratic society does not depend on the discretion of the executive and is not arbitrary, but should be regulated by law emanating from the legislature, subject to a discretion to make detailed rules by way of delegated legislation.

[317] I can think of no good reason why that rationale should not be applicable in any free and democratic society such as our own.

APPLICABILITY OF SECTION 16 (2) OF THE CHARTER TO THE CASE

[318] I have not, before now, sought to apply the principles emanating from the cases referred to in construing the meaning of the rights embodied in section 16 (2) of the Charter in light of what I believe to be the centrality of the right to "an independent and impartial tribunal or authority established by law" to the engagement of the right of a fair hearing.

[319] As earlier stated, a fair hearing cannot be had in the absence independence and impartiality of the decision maker. It is my judgment that in the context of section 16 (2) of the Charter - certainly in respect of its application to administrative decisions made pursuant to a discretion given by statute - a mechanism must exist in the enabling statute which guarantees the independence and impartiality of the decision maker. Absent such a mechanism, the person whose interests may be adversely affected by the decision must have access to an independent and impartial court established by law, that exercises control in respect of the decision and whose decisions bind the administrative decision maker.

[320] On my assessment of the pleaded case I can discern no ground which contends that access to this court has been or was likely to be infringed. I therefore join Counsel Mr. Hacker in his observation that the claim for breach of the right to a fair hearing appears to be premised entirely on the Claimant's expressed view that he had a right to have had his dispute referred to the IDT by the Minister. That this was the view is evident on the response to the issue: *"Is the 1st Defendant [the Minister] obliged to refer this dispute to the IDT?"* on the Claimant's Written Submissions in Support of Fixed Date Claim Form, portions of which were earlier reproduced.

[321] On a review of the LRIDA and section 11 A in particular, although the Minister is required to be satisfied of the statutory prerequisites to make a referral to the IDT and consider the applicable law in doing so, there is no mechanism for guaranteeing the independence of the Minister as a member of the executive from the executive, legislature, parties or other

outside bodies in exercise of the discretion reserved to him. There is also no mechanism in the Act to guard against bias, whether actual or apparent, on the part of the Minister in his decision making. In those circumstances the Minister cannot be said to be an impartial or independent authority.

[322] That deficit alone is insufficient to engage the rights to a fair hearing or a fair hearing within a reasonable time as enshrined by section 16 (2) of the Charter, which are required to be delivered *"… **by** an independent and impartial court **or** authority established by law".* On my assessment, in using the word "**or**", the framers of the Charter intended to link two alternative vehicles for delivery of the rights, either an independent and impartial authority established by law or an independent and impartial court established by law. In the result, where the authority established by law lacks independence or impartiality, the rights to a fair hearing within a reasonable time may nevertheless be delivered through an independent and impartial court established by law that exercises control over the decisions of the authority established.

[323] In the instant case the decision of the Minister is amendable to the supervisory jurisdiction of this court by way of judicial review. Among the grounds upon which the decision may be challenged is "Wednesbury unreasonableness" or "irrationality" if you will, which as stated by Lord Diplock in **Council of Civil Service Unions** (supra),

> *… applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…*

[324] Another well-established ground for judicial review which the Claimant has in fact pursued on its merits in these very proceedings, albeit unsuccessfully, is "illegality".

[325] It is true that the Minister's decision was delayed and as observed by Edwards JA in **Al-Tec Inc Limited** (supra), the right to a fair trial includes the right to be informed of and be able to challenge reasons for administrative decisions. In that regard she referred to the decision of the ECtHR in **Běleš and others v The Czech Republic** Application no. 47273/99 (ECHR 12 November 2002), which I find to be particularly useful in the circumstances of this case.

[326] The applicants in **Běleš** were members of a Homeopathic Association (hereinafter called "the Association") which was expelled from membership in the Czech Medical Society J.E. Purkyně (hereinafter called "the Medical Society"), an independent association of private individuals in the medical and paramedical professions, and companies. The expulsion came as a result of changes to the internal rules of the Medical Society and a recommendation of its executive board. The applicants sought declarations that the change to the internal rules and the decision of the Medical Society were nullities; and that the Association remained a member of the said society. They contended that the decision of the Medical society was arbitrary, unlawful, subjective and taken without the benefit of expert professional or scientific advice; was liable to unjustifiably cause discrimination against certain healing methods; had damaged the reputation of the Association; and had caused patients to become wary of doctors practising homeopathy.

[327] The appellant's action was dismissed by the Municipal Court without examination of the merits. There were appeals in respect of that decision including to the Constitutional Court which declared the appeal inadmissible on the basis that the applicants had failed to exhaust statutory remedies by appealing on points of law, consistent with the findings of courts below.

[328] On their application to the ECtHR where they alleged breach of the right to fair hearing by a tribunal established by law as guaranteed by article 6 (1) of the ECHR, the applicants maintained that they were denied a fair trial by the ordinary domestic courts which refused to examine the merits of their action; and that the Constitutional Court in ruling that the

constitutional appeal was inadmissible for failure to exhaust statutory remedies, had violated their constitutional right of access to a court.

[329] The ECtHR determined that article 6 (1) applied as the decisions taken against the applicants related to their "civil rights and obligations" which entitled them to have their case examined by a tribunal. The court found as follows:

(i) The provisions of the Code of Civil Procedure referred to by the domestic courts did not appear to be applicable to the applicants' action as the Medical Society was an independent professional association and not a State administrative authority. The provisions of the Code relied upon by the domestic courts was found concern only applications for the judicial review of administrative decisions.

(ii) There was a violation of article 6 (1) of the ECHR by the domestic courts' failure to examine the merits of the applicants' case on a particularly strict construction of a procedural rule and the refusal undermined the essence of the applicants' right to a court which is part of the right to a fair trial as guaranteed by the article.

(iii) The Constitutional Court had deprived the applicants of the right to access a court which is part of the right to a fair trial as guaranteed by article 6 (1) of the ECHR and constituted a violation of the said Convention. The court regarded that the issue was not simply a problem of the interpretation of substantive rules, but that a procedural rule had been construed in such a way that it prevented the applicants' action being examined on its merits.

[330] In respect of the construction of the rights at article 6 (1) of the Convention, the following principles were reiterated.

(i) The right to a fair trial as guaranteed by article 6 (1) is to be construed in light of the rule of law which has as one of its fundamental aspects the principle of legal certainty, which requires that litigants should have an effective judicial remedy to assert their "civil rights".

(ii) That compliance with procedures which govern steps to be taken and time limits for compliance - in the lodging of an appeal in that case - were aimed at ensuring the principle of legal certainty and the proper administration of justice, which litigants should normally expect to be applied.

(iii) The right of access which is an aspect of the "right to a court" is not absolute but calls for regulation by the State which enjoys a certain margin of appreciation in that regard - particularly where the concern is in respect of admissibility appeals.

(iv) The limitations applied to right of access to an effective judicial remedy must not restrict or reduce an individual's access in such a way or to such an extent that the very essence of the right is impaired.

(v) The limitations on access to an effective judicial remedy will only be compatible with article 6 (1) if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means and the aim pursued.

(vi) A fair balance has to be struck between the legitimate concern to ensure that the formal procedures are complied with and the right of access to the court.

[331] While the Claimant wrote on a number of occasions and requested to be advised of the decision of the Minister prior to being advised of it; and requested the reasons for decision when the decision was in fact made and communicated, there is no evidence that the Claimant's right of access to judicial remedy available in this court to challenge the lawfulness

of the Minister's conduct to the extent that it concerned delay in decision making was infringed.

[332] Save in exceptional circumstances, to which I will allude later in this judgment, judicial review is the normal and appropriate judicial remedy for unlawful administrative action. As observed in dictum of Lord Roskill at p. 656 of **ex p National Federation of Self-Employed and Small Businesses Ltd** (supra), judicial review is used

> *… to check a usurpation of power by [public functionaries who have been charged by Parliament to perform public duties], to the disadvantage of the ordinary citizen,* ***or to insist on due performance by such bodies of their statutory duties*** *and to maintain due adherence to the laws enacted by Parliament…*
>
> [Emphasis added]

[333] In respect of the highlighted use an order of mandamus will usually lie to compel the public functionary to perform his statutory duty. As stated by Brooks P in **Latoya Harriot v University of Technology Jamaica** [2022] JMCA Civ 2,

> *[13] It has long been accepted that a refusal, especially by a public institution, to perform a public duty is subject to judicial review. Lord Diplock, in* ***Council of Civil Service Unions and Others v Minister for the Civil Service*** *[1985] AC 374 ('CCSU v The Minister'), made that point clear when he said, in part, at page 408:*
>
> > *"Judicial review…provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker'* ***or else a refusal by him to make a decision.****" (Emphasis supplied)*
>
> *[14] The relief granted by the court, in such circumstances, is alternatively known as mandamus or as a "mandatory order" …*

[334] While Brooks P makes the point that failure on the part of a decision maker to carry out a statutory duty does not always constitute a refusal to act, he nevertheless observed that it can be in an

appropriate case. After briefly recounting the development of the law in respect of demand and refusal for the purpose of a grant of mandamus, the learned President cited with approval the following dictum from Wooding CJ in **Re Maharaj and the Constitution of Trinidad and Tobago** (1966) 10 WIR 149, 150:

> *[18] … there should be a distinct demand. This he found in Halsbury's, at paragraph 198:*
>
> > *"As a general rule the order will only be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that that demand was met by a refusal."*
>
> *Wooding CJ also approved a formulation of a demand, for the purposes of granting a mandatory order. He said, at page 150:*
>
> > *"Thus GRIFFITH'S GUIDE TO CROWN OFFICE PRACTICE sets out, at p 161, as one of the conditions precedent to the court making any such order that:*
> >
> > > *'There has been a distinct demand and refusal to do the act…. It is therefore advisable that the demand should be made in writing,* ***and should state that failure to comply with such demand within a reasonable time therein specified will be treated as a refusal for the purposes of an application for a mandamus.'"*** *(Italics as in original; Emphasis supplied)*
>
> *[19] It cannot be ignored, however, as has been highlighted in the extract, that the demand for compliance must be reasonable. The*

reasonableness of the demand will depend on the circumstances of the particular case.

[20] Another factor to be considered in determining whether a refusal is to be subject to a mandatory order is whether the making of the decision lies within the discretion of the decision-maker. The learned authors of Textbook on Administrative Law, cited above, have opined that courts are slow to grant mandatory orders where the duty being compelled involves an exercise of the decision-maker's discretion. This is because the court's intervention may result in dictating how the decision-maker should make a choice…

[21] That principle was applied in ***Medical Council of Guyana v Dr Muhammad Mustapha Hafiz*** *(2010) 77 WIR 277 at page 283, where the court said, in part: "A clear and settled principle of law is that the person compelled to the performance of an act by an order of mandamus must have a clear duty imposed on him as opposed to a mere discretion."*

[335] The Claimant, perceiving and in fact alleging that there was delay by the Minister has always had the option of demanding that a decision be made by the Minister and indicating that if there was failure to comply with the demand within a specified reasonable time, it would be treated by him as a refusal by the Minister to make a decision on whether or not the dispute would be referred to the IDT, for the purposes of an application for mandamus.

[336] While the Claimant through his attorneys-at-law wrote to the MLSS on the 29th March 2019 for example, for an update on the decision of the Minister and advised that their *"… instructions [were] to approach the Courts and seek judicial review with a view to seeking relief for our client"* if they failed to hear from the MLSS within seven (7) days of the date of the missive - from which one could reasonably infer that absent a response within the time specified such remedies as were available to the Claimant by way of judicial review would be pursued by him to arrest the delayed decision making by the Minister - the Claimant did not do so before the Minister made and communicated his decision by letter dated 11 the January 2022.

[337] In the context of the determination that a decision to refer an industrial dispute to the IDT pursuant to section 11 A is discretionary, one might be tempted to instinctively conclude that the limitation on the grant of mandamus - that it lies only in respect of a public duty - would cause it to be excluded as an adequate judicial remedy for the Claimant in his complaint in respect of the delay. The urge is to be stoutly resisted.

[338] Pursuant to section 52 of the **Judicature Supreme Court Act** and to the extent relevant to these proceedings,

> *(1) The prerogative writs of mandamus, prohibition and certiorari shall no longer be issued by the Supreme Court or any Judge thereof.*
> *(2) In any case where the Supreme Court would, but for the provisions of subsection (1), have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done, or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the Supreme Court for any purpose, the Court may make an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be.*
> *(3) The said orders shall be called respectively an order of mandamus, an order of prohibition and an order of certiorari.*

[339] Rule 56.1(3) of the Civil Procedure Rules ('CPR') provides that:

> *"**Judicial Review**" includes the remedies (whether by way of writ or order) of –*
>
> *(a)…*
> *(b)…*
> *(c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case."*
>
> [Emphasis in original]

[340] While a Minister may properly be said to have a discretion whether or not to refer an industrial dispute to the IDT under section 11 A, there is no discretion reserved to him to refuse to decide or determine the question

one way or another, once a dispute has been referred for his intervention. The Claimant had a right to be informed of and be able to challenge the administrative decision and to that right must be a corresponding duty on the Minister to make and communicate his decision.

[341] Further, notwithstanding the delayed decision making by the Minister, the Claimant sought and received at trial, leave to amend his statements of case to challenge the Minister's decision on the basis of illegality in order that the decision may be quashed. The parties gave affidavit evidence in support of their respective positions on the claim; were permitted to and did cross examine such of the affiants as they wished to cross examine; made submissions to this court in respect of the lawfulness of the Minister's decision and the absence of his reasons for it.

[342] I have found the decision of the Minister not to refer the dispute to the IDT to be *intra vires* section 11 A of the LRIDA and therefore lawful. That conclusion was arrived at notwithstanding the absence of the Minister's reasons for his decision, there being a foundation of facts established on the evidence, upon which the Minister could conclude that no industrial dispute existed in the Company's undertaking at the time the matter was referred for his intervention.

[343] Concerns as to whether the Minister could properly consider matters which enabled this court to come to the conclusion referenced above - and which was the basis of the defence advanced on behalf of the Minister to the alleged unlawfulness of the decision - have long been proffered as the reason for the need for legal advice and the delay by the Minister in making a decision after the final conciliation meeting. In fact, in the Claimant's Written Submissions in Support of Fixed Date Claim Form filed 29th October 2021, just over two months before the Minister made and communicated the decision not to refer the dispute to the IDT, the very issue was addressed. In one paragraph of those submissions the Claimant stated:

> *"34. [f]urther when one examines the issues for which the [Minister] alleges he sought legal advice it is clear that these are issues of facts and/or law. However, these are not issues for (sic) which the*

LRIDA requires the [Minister] to resolve. According to the LRIDA these are issues to be determined by the IDT. In fact the seminal Privy Council decision of Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal *reinforces the view that the issues which apparently challenged the [Minister's] exercise of his discretion are matters to be determined by the IDT…"*

A finding opposite to that which is advanced by the Claimant in the foregoing extract has been made in these proceedings.

[344] In all the foregoing premises I find that the delayed decision of the Minister or the absence of his reasons for it are neither presumptively nor actually prejudicial to enable engagement of the constitutionally guaranteed right to a fair hearing as enshrined at section 16 (2) of the Charter.

Issue (iv)

Whether this would be an appropriate case to refuse jurisdiction in respect of the constitutional claim as an abuse of the process of the court in the absence of an explanation or demonstration by the Claimant that an order of mandamus would not have been adequate to secure the right to a fair hearing with a reasonable time as guaranteed by section 16 (2) of the Charter.

[345] So far as is relevant, section 19 of the Charter provides as follows in respect of constitutional redress.

> *(1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *(2) …*
>
> ***(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or***

securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

(5) …

[Emphasis added]

[346] As adverted to earlier in these reasons, a parallel judicial review remedy was always available to the Claimant to compel the Minister to make a decision or determination on whether or not he would refer the dispute to the IDT before the return of the decision by letter dated 11th January 2022. This would be by way of a request for order of mandamus in judicial review proceedings, had the Claimant pursued it.

[347] The Minister having made a decision just before the trial, which I have found to be lawful, there is no question of granting an order of mandamus to compel him to do that which he has already done. In that sense it may be argued that there is now no adequate means of redress for the Claimant who waited over two years from his last conciliation meeting for a decision from the Minister.

[348] It is true that the court does not now have the option of declining constitutional redress and remitting the matter to the Minister for his consideration, which is a course ordinarily open to it pursuant to section 19 (4) of the Charter, but a party should not be permitted to sit on the due process rights which are afforded to him by other law to prevent, or at minimum arrest dilatory performance of a statutory duty to make a decision and then be allowed to access constitutional redress on the basis of the said dilatory performance, without providing justification or it being

demonstrated to the court that the parallel remedy would not have provided adequate redress.

[349] The refusal of redress is not the only course open to the court to show its disapproval of conduct of that nature on the part of litigants however. Resort only be had to the decisions out of the Judicial Committee of the Privy Council in respect of the redress clause in the Constitution of Trinidad and Tobago which appears to have provided the most fertile jurisprudential ground on the subject of redress where an adequate parallel remedy exists at law, in the context of a similarly worded provision to that which exists at section 19 of the Charter. In that jurisdiction, there is no proviso similar to that which exists at section 19 (4) of the Charter but as the learned authors of **Fundamentals of Caribbean Constitutional Law**[8] put it,

> *[t]he courts in Trinidad and Tobago have assumed a comparable discretion based on their inherent jurisdiction to prevent abuse of process. Ironically, most of the guidelines [on declining constitutional relief] emerged in litigation of the Trinidad and Tobago redress clause which contains no proviso. This could reflect judicial conservatism activated by the prospect of being compelled to adjudicate a plethora of novel constitutional issues.*

[350] In **Attorney General of Trinidad and Tobago v Siewchand Ramanoop** [2005] UKPC 15 for example, the Board determined that *"[23] …a discretion to decline to grant constitutional relief is built into the Constitution of Trinidad and Tobago. Section 14(2) provides that the court "may" make such orders, etc, as it may consider appropriate for the purpose of enforcing a constitutional right".*

[351] To the extent relevant section 14 of the Constitution of Trinidad and Tobago reads:

> *(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is*

[8] T Robinson, A Bulkan and A Saunders (1st edn, Sweet& Maxwell 2015) 457.

being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of sub-s (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of sub-s (4), and may, subject to sub-s (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

Subsection 4 generally empowers any person presiding over a court other than the High Court or Court of Appeal in which questions arise as to the contravention of any of the fundamental rights and freedoms under Chapter I of the Constitution to refer the question to the High Court unless the question is frivolous or vexation. Subsection 3 prescribes that the State Liability and Proceedings Act shall have effect for the purpose of proceedings under the said section.

[352] The provision upon which the Board in **Ramanoop** concluded that the discretion in the High Court to decline to grant constitutional relief was built into the Constitution of Trinidad and Tobago also appears at section 19 (3) of the Charter thus.

> *The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and* ***may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.***

[353] It therefore appears to me that outside of declining constitutional relief on the basis of the discretion which appears in the proviso at section 19 (4)

which is exercisable if the court is *"… satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law*", this court also has the discretion to decline jurisdiction in respect of a constitutional claim pursuant to section 19 (3) of the Charter on the basis of its inherent jurisdiction to prevent abuse of its processes.

[354] The scope of that discretion can be seen in another of the Trinidad and Tobago cases, **Kemrajh Harrikissoon v Attorney General of Trinidad and Tobago** (1979) 31 WIR 348. In that case the appellant complained that he had been unlawfully transferred by the Teaching Service Commission to a similar post of class teacher at another school by the Teaching Service Commission in Trinidad and Tobago against his will. It was contended that this was in breach of his constitutional right to *"… enjoyment of property, and the right not to be deprived thereof except by due process of law"* guaranteed by section (1) of the Constitution. The appellant appealed to the Judicial Committee of the Privy Council against the dismissal by the Court of Appeal of Trinidad and Tobago of his appeal for redress of the contravention of his constitutional rights.

[355] Although the appellant's solicitors had written a letter of protest to the commission, the appellant failed to take the steps under the regulations then in force to obtain a review of the order of transfer by the commission. He chose to go directly to the High Court for constitutional redress pursuant to section 6 of the Constitution. Their Lordships regarded the procedure adopted by the applicant instead of pursuing the remedy given to an aggrieved teacher by the regulations to be misconceived.

[356] In delivering the opinion of the Board dismissing the appeal, Lord Diplock stated as follows at p. 349.

> ***The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to***

> ***the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.*** *In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.*
>
> [Emphasis added]

[357] Two of the relevant principles emanating from the foregoing dictum are that the value of the right to apply for constitutional redress when any human right or fundamental freedom is or is likely to be contravened will be diminished if permitted to be misused as a *"general substitute for the normal procedures for invoking judicial control of administrative action";* and that the court will decline to exercise the jurisdiction given where a breach of the constitution is not in issue.

[358] Lord Diplock was cited with approval in **Ramanoop**, where Lord Nicholls in delivering the decision of the Board stated thus.

> *24.In Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a*

human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268 (emphasis added).

*25.**In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process.** A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.*

[Emphasis added]

[359] The avenues for redress which are provided on an application for judicial review are themselves a part of the right to due process and it cannot be said that the means of legal redress afforded by that process, particularly by way of an order of mandamus to compel the Minister to make a decision one way or the other would not have been an adequate remedy had the Claimant pursued it. In the absence of any explanation as to why that remedy was not pursued, the conclusion that the Claimant sat on those rights and deprived himself of an adequate and hitherto available means of legal redress aimed at arresting unlawful dilation in public decision making is inescapable. The Claimant's conduct is to contrasted with the conduct of the applicants in the Strasbourg cases relied upon by the Claimant. In those cases, the applicants sought to avail themselves of the remedies available to them in domestic law and in doing so had nevertheless encountered unreasonable and in some instances unexplained delays in the determination of their requests for redress.

[360] While the decision of the Minister remained outstanding, the Claimant filed his Amended Fixed Date Claim Form on the 20th October 2021 requesting *"… an Order of Mandamus directing the [Minister] to refer the dispute to the Industrial Disputes Tribunal without requiring the issue of any further proceedings or requiring the Claimant to engage in further conciliation."* As stated earlier, leave for judicial review to pursue that relief was neither sought nor obtained nor could it be granted in those terms.

[361] The Amended Fixed Date Claim Form was supported by affidavit evidence sworn and filed on behalf of the Claimant on the 20th October 2021. It is averred that no indication having been given as to how the Minister would exercise his discretion in the affidavit filed on his behalf on the 7th July 2020, the Claimant's attorneys-at-law wrote to the attorneys-at-law for the Minister by letter dated 12th August 2020 to enquire whether they were able to say *"… when the Minister will advise whether the industrial dispute is to be referred the Industrial Disputes Tribunal?"* By letter dated 22nd October 2020 the attorneys-at-law for the Minister responded to the missive sent on behalf of the Claimant, apologised for the delayed response and stated as below.

> *We wish to advise that having regard to the highly contentious nature of the claim, the matter is being reviewed internally and as such we are not yet in a position to provide a timeline as to when the decision will be communicated to your offices.*

[362] The court is further advised by the affidavit evidence that the Claimant's attorneys-at-law again wrote to the attorneys-at-law for the Minister on 27th October 2020 advising that there was no good reason for further delay and that the Claimant was being prejudiced by the delay. There being no communication in response, the Claimant's attorneys-at-law wrote to the officer at the Ministry who was handling the dispute by letter dated 25th January 2021 referring to the last conciliation meeting and the evidence filed in the proceedings that the legal opinion from the Legal Services Unit had been provided. The following was also stated,

> *[a]s we are certain you appreciate the delay with respect to the Minister's exercise of its (sic) statutory responsibility continues to impact our client's constitutional rights. In fact, the prolonged delay exacerbates the wrong suffered by our client. We are certain that the constitutional court, at the minimum, will frown on this delay.*
>
> *We urge you to let us have the Minister's decision regarding this matter. Any further delay would reinforce the injustice which unfortunately has been twinned with this dispute.*

[363] I note with some concern and remark on the undesirability of a letter being written directly to an officer in the Ministry during the course of the litigation, particularly without the attorneys-at-law for the Minister being copied, in circumstances where the Claimant and his attorneys-at-law were aware that the Minister was legally represented, and the said representatives had earlier indicated that due to the contentious nature of the matter it was being handled by them.

[364] That concern notwithstanding, on the Claimant's own evidence, the interval between the last conciliation meeting at the Ministry and the failure of the Minister to make a decision before he did, has always been a concern of the Claimant. There was also a demonstrated recognition of the availability of judicial review proceedings as an avenue for redress.

[365] In the result, having raised the matter of delay at the very early stages of the proceedings and thereafter, it is my view that it was incumbent on the Claimant to explain his failure to pursue a claim for an order of mandamus and demonstrate that there was some feature of the case which indicates that that means of legal redress would not have been adequate to compel the Minister to return a decision earlier than he did, had the Claimant pursued that relief.

[366] The failure of the Minster to respond to correspondence indicating his decision or in only making and communicating his decision at the time he did, does not itself rise to the level of a special feature to enable the Claimant to seek constitutional relief in circumstances where there was a

parallel remedy. Absent such a feature, a constitutional claim which is premised on an alleged breach of the right to fair hearing within a reasonable time at the ministerial level would constitute a misuse and abuse of the court's process.

[367] To entertain a constitutional claim in those circumstances is to leave it up to persons aggrieved by statutory decision making to elect for themselves their preferred court process without any or sufficient regard to the process which is available to specifically and adequately address challenges of that nature. In this regard it must not be forgotten that in addition to or instead of the prerogative orders of certiorari, prohibition and mandamus, other relief including damages may in fact be ordered by the court without requiring the issue of further proceedings pursuant to rule 56.1(4) of the Civil Procedure Rules.

[368] As the decision in **Běleš** demonstrates, while a person is entitled to have an effective judicial remedy in the determination of any legal proceedings which may be adverse to his interests, a fair balance must be struck between the right of access to the court and the legitimate concern to ensure that the formal procedures and processes are complied with. Where there is non-compliance no less than an explanation for the default is required to determine how a fair balance ought to be struck.

[369] I cannot think of many permissive conduct on the part of the court which would cause the special remedy afforded for breaches of constitutional rights and freedoms to be more quickly diluted, opening up a floodgate of claims for constitutional redress when there are other adequate means of redress in other law than to allow a litigant in the position of the Claimant in the circumstances of this case, to pursue by way of a constitutional claim something which could have been adequately redressed by other law without so much as an explanation as to why that parallel remedy was not in fact pursued or without demonstrating that had it been pursued, it would not have been an adequate remedy. Further, the Claimant was permitted to challenge the decision of the Minister not to refer the dispute to the IDT by way of judicial review, albeit unsuccessfully.

[370] In all these premises it is my judgment that this would be appropriate case to decline jurisdiction in respect of the claim for constitutional redress on the ground that it constitutes an abuse of the process of the court.

COSTS

[371] The foregoing notwithstanding, I do not turn a blind eye to the conduct of the state in this case. The making and communication of the decision not to refer the dispute to the IDT on what was almost but not quite the eve of the trial has had real consequences in these proceedings which commenced on the 11th March 2020, months after the last conciliation meeting at the Ministry. No decision was made and communicated to the Claimant until the 11th January in 2022. This follows an indication on 7th July 2020 by a witness for the Minister in these very proceedings that an awaited legal opinion which had caused delay up to that point was at hand, and a number of requests by the Claimant before and after, for a decision or information as to when the decision would be made.

[372] I find that the observations of their Lordships in **Ramanoop** are instructive in these circumstances. Although the observations were made in the context that the Constitution of Trinidad and Tobago which required claims for constitutional redress to be commenced by originating motion, I find that they are capable of being applied with equal force in circumstances where the choice for legal relief for alleged unlawful administrative action is between constitutional redress and a parallel remedy, appropriate allowances being made for procedural differences.

[373] To the question, *"[30] [w]hat, then, of the case where on the information available to an applicant a constitutional motion is properly launched but it later becomes apparent (1) that there is a substantial dispute of fact or (2) that a claim for constitutional relief is no longer appropriate?*" their Lordships said this:

> *[30]… As to the first of these two events, the emergence of a factual dispute does not render the proceedings an abuse where the alleged facts, if proved, would call for constitutional relief.*

Where this is so, the appropriate course will normally be for the applicant to apply promptly for an order that the conditional proceedings continue as though begun by writ and for any appropriate ancillary directions for pleadings, discovery and the like. Where appropriate, directions should also be given for expedition and a timetable set for the further steps in the proceedings. If the second of these two events happens, and constitutional relief is no longer appropriate, it would be an abuse of process for the applicant to continue to seek constitutional relief at all. In such a case the applicant should either abandon his motion entirely or, here again, seek a direction that the proceedings continue as though begun by writ. In this case, however, unlike the first case, the applicant will also need to amend the relief he seeks so as to abandon his claim to constitutional relief and instead seek to pursue his parallel remedy. Needless to say, on all such applications the court will exercise its discretion as it sees fit in all the circumstances. Moreover, the court may of its own motion give any of these directions.

[31] The observations in Jaroo's case are not to be taken as differing from what is set out above. In Jaroo Lord Hope of Craighead said, at [2002] 1 AC 871, 886, para 39:

> *"If, as in this case, it becomes clear after the motion has been filed that the use of the [originating motion] procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."*

[32] ***Lord Hope's observation was directed at a case where proceedings seeking constitutional relief are properly started*** *by way of originating motion* ***and it later becomes apparent that a parallel remedy ("some other procedure either under the common law or pursuant to statute") is the appropriate remedy for the applicant.*** *In Jaroo, where this situation arose, the applicant did not seek any direction of the character mentioned above. Instead he chose to adhere to what had become an unsuitable and inappropriate procedure: para 36. It was in this circumstance that the Board agreed with the Court of Appeal that*

for the applicant to proceed as he did was an abuse of process: para 40.

[374] It was further stated,

> *[33] … that it is in everyone's interest that an applicant should be in a position to decide which procedure is appropriate, preferably before he starts his proceedings or, failing that, at the earliest opportunity thereafter. To these end observations made by Hamel-Smith JA in George v Attorney-General of Trinidad and Tobago (8 April 2003, unreported), para 19, are pertinent:*
>
> > *"The decision [in Jaroo] also serves to emphasise, in my view, that* ***the State must at an early stage****, ideally in response to any letter before action,* ***make it known whether it will be challenging the allegations or not and on what basis. In that way, the aggrieved party would be in a position to make an informed choice of procedure. Failure to respond may lead to the State being condemned in costs, in the event that the party proceeds under s.14 of the Constitution only later to find that the facts were in issue and no constitutional principle of general significance to citizens is involved.****"*
>
> [Emphasis added]

[375] The determination of the constitutional challenge has turned on the view I have taken of the decision of the Minister not to refer the dispute to the IDT and in one instance, the view taken of the evidence explaining the delay in the making of that decision. The decision only came about days before the trial and the explanation for delay on the second day of trial. In these circumstances there was little to no time for the Claimant to conduct a proper assessment and make an informed choice on the propriety of continuing to pursue his claim for constitutional relief.

[376] It is the general rule that an award of costs of proceedings is within the discretion of the court, which discretion is to be judicially exercised. The court on an application for administrative orders may make such orders as to costs as appears to it to be just pursuant to rule 56.15 (4) of the CPR.

[377] While I accept the evidence of the attorneys-at-law for the Minister that they encountered some difficulties with the onset of the pandemic, staff shortages and the relocation of offices, which interfered with their ability to advise the Minister before the date they did, there was no evidence as to any step taken by the MLSS to remind the Minister's attorneys-at-law of the outstanding recommendation as to how to proceed. Further there is no evidence of any of the difficulties being faced being communicated to the Claimant prior to the filing on the 18th January 2022, the second day of the trial, of affidavit evidence speaking to the challenges. This notwithstanding the Claimant's various requests through his attorneys-at-law for information as to when a decision would be made by the Minister and of the decision of the Minister over a period in excess of two (2) years.

[378] While the Minister has in fact succeeded on the claim and costs is generally awarded against an unsuccessful party, it is my judgment that a departure from the general rule is warranted.

[379] In making and communicating the decision of the Minister just before the start of trial in particular, the Claimant - without an adjournment of the dates fixed for trial (none was sought) - was required to respond to a changed set of circumstances including that the Minister had now made a decision not to refer the dispute. This required the Claimant to seek leave to pursue an order for certiorari to quash that decision and to make arguments to the court in respect of its grant. In consequence, the trial of the claim which was scheduled to last for only two (2) days required three (3) days of hearing.

[380] In these premises I find that although the Minister has succeeded on the claim, the state should nevertheless be made to pay one third of the Claimant's costs of the proceedings.

C. BROWN BECKFORD J

ORDER

1. By unanimous decision:

    1. The Attorney General is removed as a defendant in the proceedings.

    2. The claim for an order of certiorari to quash the decision of the Minister not to refer the dispute to the Industrial Disputes Tribunal is refused.

    3. The claim for an order directing the Minister to consider the dispute in question according to the provisions of the Labour Relations and Industrial Disputes Act is refused.

2. By majority, the claim for constitutional redress is refused.

3. The Claimant is awarded one third of his costs, to be agreed or taxed.

4. Claimant's Attorneys-at-Law to prepare, file and serve this order.

……
Brown Beckford J

……
Jackson-Haisley J

……
Barnaby J