[2019] JMSC Civ. 226

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2018 HCV 03808

BETWEEN	**BRANCH DEVELOPMENT LTD. (T/A IBEROSTAR ROSE HALL BEACH AND SPA RESORT)**	**CLAIMANT**
AND	**INDUSTRIAL DISPUTE TRIBUNAL**	**DEFENDANT**
AND	**MARLON McLEOD**	**INTERESTED PARTY**

IN OPEN COURT

Mr. Mathew Royal instructed by Myers Fletcher and Gordon for the claimant

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

Mr. Lorenzo Eccleston counsel for the Interested Party

Miss Tanya Ralph, Legal Counsel for the Industrial Disputes Tribunal present.

Heard: October 28, 2019 and November 29, 2019

CORAM: J. PUSEY J.

INTRODUCTION

[1] By Fixed Date Claim Form filed December 27, 2018 the claimant seeks the following orders:

1. An order of certiorari to quash the decision of the defendant to proceed to hear the alleged dispute between the claimant and its current employee, Mr. Marlon McLeod.
2. A declaration that a suspension pending a disciplinary hearing constitutes “non-engagement” under section 2 of the Labour Relations Industrial Disputes Act.

3. A declaration that under the Labour Relations and Industrial Disputes Act, the Industrial Disputes Tribunal only has the power to award compensation and/or reinstatement in cases of unjustifiable dismissals.
4. In the alternative, an order of certiorari to quash the decision of the defendant to compel the claimant to present its case before Mr. McLeod.
5. In the alternative, an order of mandamus to compel the defendant to direct Mr. McLeod to present his case first.
6. Cost.
7. Such further and other relief as the court deems just.

The grounds on which the claimant is seeking the orders are:

1. The defendant fell into illegality when it decided on September 18, 2018 that it will proceed to hear the alleged dispute as it misunderstood its statutory jurisdiction, in that it erroneously concluded that its jurisdiction emanates from referral of the Minister of Labour and Social Security, and not from the Labour Relations and Industrial Disputes Act ("LRIDA").
2. The aggrieved worker, Marlon McLeod, was suspended by the claimant pending an investigation. The defendant failed to appreciate that 'suspension' in relation to workers who are not part of a trade union under section 2 of LRIDA refers to suspension as disciplinary sanction, not administrative suspension pending an investigation.
3. The defendant failed to appreciate administrative suspensions falls under 'non-engagement' under section 2 of the LRIDA. Only workers who are members of a trade union can bring such a dispute. Mr. McLeod is not a member of a trade union.
4. Even if (which is not admitted) the defendant has the jurisdiction to hear an administrative suspension case for a non-unionized worker, it nevertheless has no power to order compensation and/or reinstatement, as that power is confined only to cases of unjustifiable dismissal.
5. If the defendant has the jurisdiction to hear Mr. McLeod's administrative suspension case, it nevertheless fell into procedural impropriety when it decided on September 18, 2018 to compel the claimant to present its case before Mr. McLeod. This decision was contrary to the principle of 'he who alleges must prove 'as well as the Industrial Dispute Tribunal's own rules of procedure which in paragraph 18, state that 'the prevailing practice is that in cases involving termination of employment, suspension or other disciplinary action, the employer's side makes the first presentation and in all other cases the party whose claim or complaint gave rise to the dispute makes the first presentation.' Mr. McLeod's suspension was not disciplinary action, and therefore fell under, 'in all other cases.'

6. There are no alternative remedies available to the claimant and this application is not out of time.
7. The claimant is directly affected by the decision of the defendant as the defendant has stated it will proceed to hear the alleged dispute.

BACKGROUND

[2] Marlon McLeod, the Interested Party in this claim, was employed to Branch Development Limited (trading as Iberostar Rose Hall Beach and Spa) on April 7, 2010 and assigned to the Public Relations Department as a Concierge. On December 14, 2015 his employment was made permanent and he was promoted to the position of Assistant PR Manager. He was never reprimanded or made the subject of any disciplinary proceedings.

[3] In or about 2016 a guest reported that he was the victim of credit card fraud after using his card at the hotel. An investigation was launched and the matter was reported to the police. Mr. Kashwayne Eccleston was arrested, charged and imprisoned for the offence. It is alleged that Mr. McLeod was named as a participant in the fraud by Mr. Eccleston. Consequently by letter dated February 2, 2016 he was suspended without pay for two weeks pending further investigations into the fraud. The suspension without pay was, by letter dated February 17, 2016, extended indefinitely.

[4] By letter dated April 2, 2016 Mr. McLeod raised the issue of his continued suspension with the claimant. Several back and forth correspondence on the issue ensued, including communication from his attorney-at-law demanding his reinstatement. The attorney had contacted the police and learned that there was no on-going investigation involving Mr. McLeod. The attorney for the claimant company indicated that Mr. McLeod was not co-operating with the police and refused to give a statement and as such he was hampering the investigations and his resumption of work. Accompanied by his attorney, Mr. McLeod went to the police. He was not arrested or charged and he was not a subject of any investigations by the police.

[5] The matter of the suspension was, by letter dated April 12, 2018, referred to the Industrial Disputes Tribunal (IDT) by the Minister with responsibility for Labour after conciliation efforts failed. Five sittings of the IDT were convened and objections were taken to the jurisdiction and procedures at the IDT which have become the subject of this claim by way of Judicial Review.

THE CLAIMANT'S SUBMISSIONS

[6] The claimant's submission rests on three main pillars. Firstly that in the exercise of its jurisdiction, consistent with Section 12 of the LRIDA, the defendant can only make awards for compensation or reinstatement in a case of unjustifiable dismissal. Secondly, the defendant has no jurisdiction to hear a case of 'administrative suspension', which is a question of law and is not provided for in the definition of an industrial dispute in the LRIDA. Thirdly, the procedure for the order in which witnesses should be called in a hearing at the IDT is set out by the IDT in its articulated policies and its conduct in previous matters. It cannot depart from these standard procedures by ruling that the claimant should present its case first in this matter.

[7] In support of the first limb of his submission, the claimant relied on the case of ***the Queen v The Commissioner of Special Purposes of the Income Tax*** [1888] 21 QBD 313, 319 to assert that where the statute limits the power of the tribunal to deal with certain circumstances only, if it deals with other circumstances, its action would be without jurisdiction. He extracted the same principle from the decision Sykes J. (as he then was) in ***Kristi Charles v Maria Jones and The Ministry of Education*** Claim No. 2007 HCV 0351 (paragraphs 57-59).

[8] He argued that the power to determine whether an industrial dispute exists is vested in the Minister of Labour by virtue of Section 11A(a)(i). The character of the dispute is not a finding of fact open to the IDT but is determined by the Minister. The Minister in the instant case having determined that the dispute concerns 'suspension from employment', it is not open to the IDT to make an

award for reinstatement or compensation as the condition precedent (that there is unjustifiable dismissal) is not established.

[9] The IDT has no inherent jurisdiction and therefore cannot make awards not provided for in the LRIDA. He relied on ***Verma Dayes v The Ritz Carlton Hotel Company of Jamaica Limited*** Claim No. 2008 HCV 03251 (paragraph 40) and ***Regina v Industrial Disputes Tribunal ex parte Jamaica Public Service Company Limited*** Suit No. M 76 of 1985 for this proposition. Outside of compensation and reinstatement awards, the IDT can only make awards in cases concerning terms and conditions of employment of unionized workers.

[10] The claimant also relied on comments by Mr. George Kirkaldy in his text ***Industrial Relations Law and Practice in Jamaica*****,** who argued that as Section 12(5)(c) of the LRIDA does not speak to suspension, therefore the Act should be amended to deal with suspensions of non-unionized workers.

[11] In relation to the second limb of its submission, the claimant argued that the IDT had no jurisdiction to hear this matter because a determination has to be made whether this matter concerns a disciplinary suspension or an administrative suspension. He relied on the case of ***Lewis V Heffer*** [1978] 3 ALL ER 364 in support of his contention that administrative suspensions '*which are made, as a holding operation pending inquiries'* are made '*by way of good administration'* and are not subject to natural justice consideration and therefore not justifiable by the IDT. Counsel found further support for this contention in Section 2 of the LRIDA which he interprets to mean that disputes surrounding disciplinary suspension are justiciable before the IDT as 'suspensions' within the meaning of an industrial dispute; while administrative suspension are justiciable before the IDT as 'non-engagement' within the meaning of an industrial dispute concerning unionized workers. As the interested Party is a non-unionized worker, the IDT has no jurisdiction to hear the claim.

[12] Turning to the third limb of his submission, counsel argued that as decided in ***R v NWC Ex parte Reid*** [1984] 21JLR 62 at paragraph 65), where a public body has

adopted and published procedures to be followed in the exercise of its powers, it cannot depart from those procedures. Counsel cited the well known case of ***Mercer v Whall*** to say that natural justice dictates that the person bringing the claim should go first at the trial, to enable the defendant to know the case he is to meet. The IDT have promulgated the rule that the party whose complaint gives rise to the dispute should make the first presentation, except in cases of termination of employment, dismissal, suspension or other disciplinary action. The instant case, he argues, is not a suspension and therefore the Interested Party should go first. The IDT must observe the rules of natural justice or its decision will be quashed, he submitted, relying on ***Junnet Lynch v Teacher's Appeal Tribunal et al,*** [2019] JMSC Civ. 80 (paragraph 13 and 16).

[13] Further he submitted that the ruling that the claimant should go first is in breach of the cornerstone principle of 'he who alleges must prove'.

THE DEFENDANT'S SUBMISSION

[14] The defendant contends that the claimant's argument that the IDT has no jurisdiction to hear the present dispute is a challenge to the Minister's referral in a 'side wind'. The defendant argues that Section 7 of the LRIDA established the IDT and mandates it to hear and settle disputes referred to it by the Minister. It has no jurisdiction to review the decision of the Minister. This was what was decided by Chief Justice Smith in ***R v The Industrial Disputes Tribunal, Alcan Jamaica 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. It is the defendant's submission that the IDT did not fall into error when it decided to hear this dispute referred to by the Minister and it has jurisdiction to hear suspensions, as issues of the rights of a non-unionized workers on unpaid suspension are for consideration.

[15] Turning to the issue of whether the suspension without pay of a non-unionized worker is a dispute within the meaning of the LIRDA, counsel argued that when

the LRIDA was enacted in 1975 it was only concerned with disputes involving unionized workers with collective bargaining agreements. Non-unionized workers were excluded because they were engaged in contracts of employment freely entered into. However, whenever disputes arose their only remedy rested in contract through the courts.

[16] The LRIDA was therefore amended in 2010. The amendment sought to preserve the reciprocal contract obligations but where the rights of the worker were infringed - 'disputes of rights.' it provided an avenue through the IDT for redress for the infringement of those rights.

[17] She referred substantially for this interpretation of the act, relying on the decision in ***Pepper v Hart*** [1993] 1 ALL ER 32, to the presentation of the legislation in Parliament by then Minister of Labour captured in the Hansard of January 19, 2010 for confirmation that this was the intent of Parliament in promulgating this amendment. The amendment therefore excluded the IDT from settling disputes of interest, which relate to the terms and condition of work being negotiated for non-unionized workers and allowed the IDT to have jurisdiction over interest of rights for both unionized and non-unionized workers. This included suspension, where a worker is prevented from carrying out his functions whilst he remains an employee. The dispute that emanates is a dispute concerning the rights of the worker under his contract of employment which is still extant. This clearly, she argued, is a dispute within the meaning of section 2 of the LRIDA. Consequently the Minister was not in error when he referred this dispute to the IDT because it concerned a dispute of rights concerning the suspension of the Interested Party by the claimant.

[18] Suspension in furtherance of investigations for wrongdoing, counsel argued, is typically with pay where there has been no finding of misconduct by the worker and it is prudent to have the worker away from the workplace. However, counsel posited, that no one can argue that suspension without pay *could* be unfair and *could* be tantamount to being punitive.

[19] The claimant had raised the issue that the IDT was not empowered to order reinstatement in suspension matters. In relation to this counsel referred to the text of ***Commonwealth Caribbean and Labour Law*** written by Natalie Corthesy and Carla Ann Harris-Roper where, 're-engagement' is defined as akin to reinstatement, save that the employee does not necessarily resume work in the same position, to argue that 'engagement and non-engagement in Section 2 of the Act really means reinstatement for unionized workers. In the case of suspension the worker was not terminated so questions of reinstatement or non-reinstatement do not arise. The IDT is empowered to decide whether the Interested Party's suspension without pay is fair. The decision of the Court of Appeal of Ontario in ***Antionio Felice v Complex Services Inc*****.** 2018 ONCA 625 was offered as providing good guidance about the nature of administrative suspension and who carries the burden of proof in those matters.

[20] Turning to the contention by the claimant that the IDT erred when it ordered the claimant to present its case first at the hearing of this dispute, counsel referred to dicta by Brooks JA in ***Industrial Disputes Tribunal v University of Technology and the University of Allied Workers Union*****,** consolidated with ***University and Allied Workers Union v the University of Technology and the Industrial Disputes Tribunal,*** *S*CCA Nos. 71 & 72 / 2010 delivered October 12, 2012 that says,

> *"[13] .....the IDT has a free hand in determining its procedures...."*

Counsel therefore submitted that the IDT committed no procedural impropriety when it asked the claimant to go first.

THE SUBMISSIONS OF THE INTERESTED PARTY

[21] The Interested Party did not provide written submissions. Nevertheless in an oral discourse, counsel adopted and relied on the submission of the defendant and added comments on ground number 5 of the claimant's claim.

[22] He argued that the remedies of certiorari and mandamus are equitable remedies and are therefore not of right but are discretionary. The conduct of the claimant,

he submitted, is therefore an important fact in assessing whether these orders should be granted. He referred to the well know case of ***DC Builders Ltd. V Sidney Rees*** [1966] 2 QB 617 for the proposition that if the claimant acted inequitably, he should not receive the benefit of the equitable discretion of the court. He recited the conduct of counsel for the claimant at the IDT – refusing to prepare and exchange a Brief - and opined that the claimant cannot now complain of unfairness as it has acted wantonly. He also referenced ***Olive Gray v Robert Gray*** 2018 JMSC Civ 52 to say that 'he, who comes to equity, must come with clean hands'. He concluded, poetically, that the remedies being sought should be refused.

THE ISSUES

[23] The issues for determination are:

1. Whether the IDT has jurisdiction to hear the dispute concerning the suspension, without pay, of the Interested Party by the claimant
2. Whether the IDT can make an award for compensation and/or reinstatement on a complaint of unfair suspension.
3. Whether in exercising its function at the hearing of a dispute, the IDT can mandate that the party, against whom the complaint is made, should present its case first.

ANALYSIS AND CONCLUSION

Jurisdiction

[24] Resolution of the issues raised in this judicial review requires the interpretation of Section 2 of the LRIDA and an understanding of the purpose for the amendment of that Section in 2010.

[25] The LRIDA and its companion Regulations and Code were promulgated in 1975 against a background of mounting disputes between workers and employers, to provide a structure for the resolution of these disputes and provide for better relations between both sides, to enhance economic development. It was not a

codification of the common law, but allowed for procedures and outcomes not contemplated in the common law. It represents a landmark piece of legislation in a country with a significant history of industrial relations that were not amicable.

[26] When the Act was promulgated it was confined to unionized workers whose employment contracts were the result of collective bargaining. It is the result of advocacy by trade unions which are the forerunners of political parties in the post emancipation era.

[27] The IDT was established as a last resort in the settlement of disputes when bargaining and conciliation attempts failed. It has resulted in less tension in labour relations since its inception and protracted strikes, lock-outs and skirmishes have almost disappeared from the labour relations landscape.

[28] Despite its successes, a growing portion of the labour market did not benefit from its provisions because they were not members of a union, but were employed based on contracts negotiated by them. The thinking at the inception of the LIRDA was, as non-unionized workers were freely negotiating parties of employers and employees, legislation should not interfere with the terms of engagement. However, disputes arose between the parties that needed resolution.

[29] In 2010 the legislature sought to provide an avenue for the resolution of these disputes involving non-unionized workers by an amendment of the definition of 'industrial dispute' in Section 2 of the LRIDA. In doing so the legislature sought to respect the rights enshrined in any contract of employment. However, whenever the **rights** of the non-unionized workers or the employers were infringed, it allowed those infringements to be placed before the IDT for resolution.

[30] It is against this background, which is captured in the Hansard of the January 19, 2010 when Minister, the Honourable Mr. Pernel Charles presented the Bill, that the 2010 amendment to Section 2 and the issues before this court are to be understood.

[31] The interpretation of the statute by the claimant epitomizes a failure to interpret the statute in the spirit in which it was enacted. The Rule in ***Haydon's Case***, [1584] EWHC Exch J36, established the oldest rule of statutory interpretation called the Mischief Rule. Succinctly, the rule is that in interpreting a statute the following exercise should be undertaken where there is ambiguity;

1. *What was the common law before the making of the Act?*
2. *What was the mischief and defect for which the common law did not provide?*
3. *What was the remedy Parliament passed to cure the mischief?*
4. *What was the true purpose for the remedy?*

[32] The ***Sussex Peerage Case*** [1844] 11 Cl & Fin 85, decided that the mischief rule should only be applied where there is ambiguity in the statute under the rule. The court is to suppress the mischief the Act is aimed at and advance the remedy.

[33] Applying these principles of interpretation to resolve the issue that the suspension of the Interested Party should not be heard by the IDT, it is therefore instructive to examine the purpose of the legislature in making the 2010 amendment. This examination will reveal why the amendment is structured as it is. It is instructive to set out the speech of the Honourable Mr. Pernel Charles, then Minister of Labour, not in its entirety – just excerpts, which is pellucid:

> *MR. CHARLES: .....Mr. Speaker the Senate has approved the amendment of the Bill so as to facilitate the referral of 'disputes of rights only', to the IDT in respect of individual non-unionized workers. This was accomplished by the amendment of the term 'industrial dispute' which is contained in Clause 2 of the Bill.*
>
> *.....*
>
> *Mr. Speaker, it is imperative to note that disputes are classified in two categories – 'disputes of rights' and 'disputes of interest'.*
>
> *The 'disputes of rights' refer to disputes which relate*

to application, interpretation or violation of existing contractual labour agreements and statutory provisions. At this stage the rights have already been established through negotiations or otherwise. On the other hand, 'dispute of interest' refer to disputes not regulated by law or agreement. Disputes of interest generally refer to rights which are being bargained for, which are not yet the subject of any agreement – such as employment terms to be adopted for new agreements or otherwise. This would relate to the negotiations of new terms to be adopted for new condition of employment.

.....

Mr. Speaker, there is an important legal rationale for this restriction as to the types of matters which can be referable to the IDT in respect of the individual non-unionized worker. This rationale has its genesis in the central legal principle in contract law, respect for the freedom of the parties to enter into contractual agreement and the freedom to choose the precise terms that form the legal enforceable obligations. The legal freedom of the parties to determine the terms of their economic relations remain fundamental principle of law of contract which governs working relations to this day.....

Mr. Speaker, if disputes of interest are to be referred to the IDT in respect of individual non-unionized workers a third party, the IDT, would be given the authority to interfere with the freedom and right to negotiate their own terms and conditions within the employment contract. The IDT would therefore have the authority to interfere in the negotiation between the employer and the prospective individual employee by determining the wages which will be payable to each employer. .....

Mr. Speaker, the reason for this distinction in this instance between the unionized and non-unionized worker can only be appreciated if one is aware of the unique culture of collective

agreement.....

In the context of the Collective Agreement and the Collective Bargaining the individual has agreed to the subordination of his rights to that of the collective. In collective bargaining the interest of the group prevails over that of the individual. It is, therefore, acceptable and permissible to depart from the principle of freedom of the individual to negotiate his employment contract in the context of collectivity. Consequently, disputes of interest and disputes of right can be properly referred to the IDT in the context of unionized workers.

.....

Mr. Speaker, as a result of the legal implication on the freedom of the parties to negotiate the terms of the employment contract, it is recommended that only disputes of rights are referred to the IDT in respect of disputes involving non-unionized workers. .....

.....so, Mr. Speaker, this amendment will provide non-unionized workers with less expensive and less adversarial avenue for seeking redress in cases where they may have been treated unjustly and harshly by the employer.....

The worker, Mr. Speaker, will be able to address the IDT for guidance to the application, interpretation or violation of established agreement contained in the employment contract and all statutory rights contained in the employment provision. In addition, these workers will now be able to access the important protection for unjustifiable dismissal which is only accessible through the IDT.

[34] It is clear from this that the amendment incorporated into the Act the determination of issues of rights for non-unionized workers which were not recognized in the Act before.

[35] I will set out in its entirety the amendment that was inserted into Section 2, in the definition of an industrial dispute and highlight the amendment;

> *"Industrial dispute" means a dispute between one or more employers or organization representing employers and one or more workers or organizations representing workers, and –*
>
> *(a) In the case of workers who are* ***members of any trade union having bargaining rights,*** *being a dispute relating wholly or partly to –*
>
> *(i) Terms and conditions of employment, or the physical conditions in which any workers are required to work;*
>
> *(ii) Engagement and non-engagement, or termination or suspension of employment, of one or more workers;*
>
> *(iii) Allocation of work as between workers or groups of workers;*
>
> *(iv) Any matter affecting the privileges, rights and duties of any employer or organization representing employers or any worker or organization representing workers; or*
>
> *(v) Any matter relating to bargaining rights on behalf of any worker;*
>
> ***(b) In the case of workers <u>who are not members of any trade union having bargaining rights</u>, being a dispute relating wholly to one or more of the following:***
>
> ***(i) The physical conditions in which any such worker is required to work;***
>
> ***(ii) <u>The termination or suspension of employment of any worker; or</u>***
>
> ***(iii) <u>Any matter affecting the rights and duties of any employer or organization representing employers or of any worker or organization representing workers.</u>***
>
> ***Emphasis mine.***

[36] The Interested Party is a non-unionized worker who has been suspended for a substantial amount of time from his job, without pay, on allegations that he was

engaged in criminal activities in the workplace. His complaint is a complaint about his rights in relation to this suspension, even if he is seeking the remedy of reinstatement, which is not open to him on a suspension. It is a dispute of rights. It is not a dispute about a proposed contract of employment and the terms of engagement. It is not a dispute of interest. It is therefore a dispute the amendment was enacted to address. It is consistent with subparagraph (ii) and (iii) underlined above. It is also consistent with the overall objective of the amendment. Issues of engagement and non-engagement do not arise. Consequently I agree with the defendant that the Minister cannot be faulted for referring it to the IDT. It is a matter within the IDT's remit, as a dispute over the rights of the worker which the IDT is mandated to hear and settle.

[37] The claimant's submission that because the suspension is an administrative suspension, that is a bar to the IDT considering it, cannot be maintained. Suspension is forced separation from your job temporarily, here without compensation. The allegations suggest that there is some controversy about whether the police investigations are complete and there is the suggestion that the Interested Party's failure to 'co-operate' with the police is hampering his resumption of work. Rattary P in ***The Village Resort*** case (which will be discussed later in this judgment), decided that a major focus of the IDT in carrying out its function is fairness. The IDT is therefore duly authorised to examine the facts in this matter to ascertain whether this continued suspension is fair, irrespective of it being an administrative suspension or otherwise.

REMEDIES OF THE IDT

[38] The claimant's assertion that the IDT has no jurisdiction to hear the dispute as it is an 'administrative suspension' for which the IDT has no remedy, is based on the interpretation of Section 12(5)(c) of the Act. That section provides the remedies of reinstatement and/or compensation. These remedies relate solely to 'dismissal of a worker'. The proposition is that as there is no remedy for administrative suspension, then it is not justifiable before the IDT. When this submission is viewed against the background above stated, that it is a dispute

about ‘the rights of the worker’ on suspension, it should be clear that remedies confined by the statute to unjustified dismissal cannot be applied to it. Counsel for the defendant suggested that a lifting of the suspension is a reasonable remedy available to the Tribunal. I agree.

[39] It is important to understand the remit of the IDT. It is not a court. It is a place for the ***settlement of dispute***. It is not bound by common law remedies. In fact, the only dictate regarding a remedy is in relation to unjustifiable dismissal. It is therefore, based on the expertise of the Chairman and his members, who are experienced in industrial relations, allowed to **settle disputes** fairly. That is the tenor of the judgment of Rattary P, albeit related to unjustifiable dismissal, in ***Village Resort Limited v The Industrial Dispute Tribunal*** [1998] 35 JLR 292. He said at paragraph;

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

[40] Further in defining the word ‘unjustifiable’ he referred to the tenor of the Code to arrive at his meaning. He said;

> *Despite the strong submissions by counsel for the appellant, in my view the word used ‘unjustifiable’ does not equate to either wrongful or unlawful, the well known common concepts which confer on the employer the right of summary dismissal.*
>
> *It equates in my view to the word ‘unfair,’* ***and I find support in the fact that the provisions of the Code are specifically mandated to be designed inter alia....’to protect workers and employers against <u>unfair</u> labour practices.***
>
> *Emphasis mine.*

[41] Therefore the fact that there is no stipulated remedy for suspensions, does not affect the jurisdiction of the IDT to hear a suspension matter involving a non-unionized worker. It can do so and settle the dispute as it sees fit, having regard to principles of fairness and reasonableness garnered from its expertise and experience in labour relations. By Section 12(4)(c) its decisions are final and only reversible on points of law. I cannot therefore agree with the claimant's submission on this point as it is unsupportable by the spirit and dictates of the Act.

PROCEDURES OF THE IDT

[42] Section 20 of the LRIDA mandates the following;

> *Subject to the provisions of this Act the Tribunal and a Board may regulate their procedure and proceedings as they think fit.*

This was recognised in the ***University of Technology*** matter.

[43] In this matter the Tribunal held five (5) Sittings in which amendments were made to the terms of reference and other house-keeping issue were addressed. When it commenced its hearing counsel for the claimant was asked to proceed with its case before the Interested Party. Counsel objected, and in this judicial review is seeking an Order of Mandamus to compel the Tribunal to let the Interested Party go first, as it is he who brought the matter and 'he who alleges must prove'.

[44] Counsel for the claimant referred to 'articulated policies' and prior 'conduct' of the IDT in other matters, as the basis for his contention that the Interested Party should go first. Unfortunately, counsel failed to put before the court the policies to which he alluded or to reference any examples of past conduct by the IDT to support these contentions. I agree with the claimant that the decision in ***Mercer v Whall*** concerning the order of witnesses in a trial court is good law, the breach of which could infringe natural justice principles. However, the IDT is not a court and consistent with the tenor of the Act and its schema, there is a wide breadth of flexibility permitted by Section 20 in the way it proceeds. This is not accidental but reflects the fact that the IDT is suppose to be versatile in carrying out is

mandate, depending on the substance of what is before it. However, it must observe natural justice consideration in so doing.

[45] In the instant case although the Interested Party referred the matter to the IDT, it seems the IDT wished to start with the claimant establishing the basis for or the reasonableness of the suspension. The IDT would then hear the complaint of the referrer and settle the dispute. This to my mind is understandable. Section 20 permits this. This is not a court. It is a hearing in a specialized institution with unequivocal power to regulate its proceedings. I can find no fault in the position taken by the IDT that it should be ordered to reverse by an Order of Mandamus.

ORDER

1. An order of certiorari to quash the decision of the defendant to proceed to hear the alleged dispute between the claimant and its current employee, Mr. Marlon McLeod is refused.
2. It is declared that a suspension pending a disciplinary hearing does not constitute “non-engagement” under Section 2 of the Labour Relations Industrial Disputes Act for non-unionized workers.
3. It is declared that under the Labour Relations and Industrial Disputes Act, the Industrial Disputes Tribunal statutorily only has the power to award compensation and/or reinstatement in cases of unjustifiable dismissals.
4. An order of certiorari to quash the decision of the defendant to compel the claimant to present its case before Mr. McLeod is refused.
5. An order of mandamus to compel the defendant to direct Mr. McLeod to present his case first is refused.
6. Cost to the defendant and the Interested Party to be agreed or taxed.