JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2020CV00002

BETWEEN	**BRANCH DEVELOPMENTS LIMITED T/A IBEROSTAR ROSE HALL BEACH AND SPA RESORT LIMITED**	**APPELLANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**RESPONDENT**
AND	**MARLON MCLEOD**	**PARTY DIRECTLY AFFECTED**

Gavin Goffe and Mathew Royal instructed by Myers, Fletcher & Gordon for the appellant

Ms Althea Jarrett instructed by the Director of State Proceedings for the respondent

Lorenzo Eccleston for the party directly affected

26 April and 15 October 2021

F WILLIAMS JA

[1] I have read in draft the judgment of Straw JA and agree with her reasoning and conclusion. There is nothing I wish to add.

STRAW JA

[2] These proceedings stem from an employment issue which arose in 2016, between Mr Marlon McLeod ('Mr McLeod'), the party directly affected (previously referred to as the interested party), and his employer Branch Developments Limited T/A

Iberostar Rose Hall Beach and Spa Resort Limited ('Iberostar'), the appellant before this court.

[3] On 2 February 2016, Mr McLeod was suspended from work without pay, pending investigations into allegations of fraud which involved a report to the police. Mr McLeod took issue with his suspension and made a complaint to the Ministry of Labour and Social Security ('the Ministry of Labour'). In April 2018, after a series of conciliation meetings held by the Ministry of Labour, the issue of Mr McLeod's suspension was referred to the Industrial Disputes Tribunal ('IDT'), the respondent before this court.

[4] The terms of reference:

> "To determine and settle the dispute between Branch Developments Limited (t/a Iberostar Rose Hall Beach and Spa Resort) on the one hand and Mr. Marlon McLeod on the other hand over the suspension of his employment."

[5] In June 2018, when the matter was set for hearing before the IDT, Iberostar objected to the terms of reference and the IDT advised that the objection would be referred to the Minister of Labour and Social Security ('the Minister') for her consideration. At that time, this would have been the Honourable Shahine Robinson.

[6] Subsequently, in September 2018, Iberostar objected (by letter) to the hearing of the matter, on the basis that the IDT lacked jurisdiction. In that same month when the IDT reconvened, it took the decision to proceed to hear the matter, based on the original terms of reference and heard submissions from Iberostar, pertaining to its jurisdiction and certain procedures. A letter of objection to the IDT continuing to hear the dispute was read into the record. It is expedient to set this out, as these complaints were the focal point of the application for judicial review.

> "Thank you for your letter dated August 13, 2018.
>
> On behalf of our client, we hereby formally object to the IDT continuing to hear this alleged industrial dispute. Having carefully studied the matter, we are of the settled view that

the Tribunal lacks the jurisdiction to hear or determine a dispute in relation to a suspension except (i) where the suspension is a disciplinary action or (ii) the worker is unionized.

The following are our reasons:

1. The Tribunal lacks the authority, under Section 12 of the LRIDA to make an Award in relation to suspension. See Kirkaldy, Industrial Relations Law and Practice in Jamaica p. 168. In particular, the Tribunal lacks the power to order an employer to compensate or reinstate a worker who has been suspended. This supports the view that the IDT lacks jurisdiction entirely, but even if we were wrong about that, it is clear from what has been said thus far that Mr. McLeod is seeking compensation or reinstatement. If, as is clear, the Tribunal cannot award that, then the entire process could potentially result in a waste of the Tribunal's valuable time.

2. Mr McLeod's suspension is an administrative one, pending an investigation which may or may not result in disciplinary action being taken against him. It is not disciplinary in nature, and it has not been alleged to be so by anyone.

3. The Labor Relations and Industrial Disputes Act creates a clear distinction between the types of disputes that unionized workers may put before the IDT, on the one hand, and what non-unionized workers may put before the Tribunal. Thus, whereas a unionized worker may complain about 'engagement, non-engagement, termination or suspension' of his employment, a non-unionized member cannot complain about engagement or non-engagement.

4. A suspension pending an investigation, or an interdiction, is not a dispute which can be brought by a non-unionized worker. As it falls to be treated as non-unionized engagement, a dispute of that nature can only be brought by a unionized worker, which Mr. McLeod is not.

> On the matter of procedure, we repeat our objection to the employer being ordered to proceed first. We rely on the IDT's own rules of procedure, which in paragraph 18, state that 'The prevailing practice is that in cases involving termination of employment, dismissals, 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.' As we have already indicated, this suspension is not a form of disciplinary action and therefore it falls to be dealt with under 'in all other cases'. Consequently, if the Tribunal rejects our argument on jurisdiction, we are nonetheless not prepared to present our clients [sic] case before Mr. McLeod presents his. We see no reason for the Tribunal to depart from its own rules of procedure in this case."

[7] Having heard the submissions, the IDT (through its chairman) made the following ruling:

> "CHAIRMAN: ... We have considered all the submissions made to us today, we wish to state that our jurisdiction to hear this matter emanates from the Minister's referral which is in the Act, the tribunal has jurisdiction to deal with the suspension of workers who are not members of any trade union."

[8] Counsel for Iberostar, Mr Goffe, advised that Iberostar was not prepared to proceed with the hearing and indicated that it intended to have certain decisions of the IDT reviewed by the court. To this end, judicial review proceedings were brought promptly by Iberostar. Leave was duly sought and obtained in December 2018, and the matter was heard on 28 October 2019, before J Pusey J ('the learned judge').

Proceedings in the Supreme Court

[9] The fixed date claim form requested the orders as follows:

"1. An order of certiorari to quash the decision of the [IDT] to proceed to hear the alleged dispute between [Iberostar] 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 and Industrial Disputes Act.

3. A declaration that under the Labor Relations and Industrial Disputes Act, the Industrial Disputes Tribunal only has the power to award compensation and/or reinstatement in cases of unjustifiable dismissal.

4. In the alternative, an order of certiorari to quash the decision of the [IDT] to compel [Iberostar] to present its case before Mr. McLeod.

5. In the alternative, an order of mandamus to compel the [IDT] to direct Mr. McLeod to present his case first.

6. Costs.

7. Such further and other relief as the court deems just."

[10] The learned judge gave her reasons for judgment on 29 November 2019 and made the following orders:

"1. An order of certiorari to quash the decision of the [IDT] to proceed to hear the alleged dispute between [Iberostar] 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 Labor Relations and Industrial Disputes Act for non-unionized workers.

3. It is declared that under the Labor 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 [IDT] to compel [Iberostar] to present its case before Mr. McLeod is refused.

5. An order of mandamus to compel the [IDT] to direct Mr. McLeod to present his case first is refused.

6. Cost[s] to the [IDT] and the Interested Party [Mr McLeod] to be agreed or taxed."

The appeal

[11] By way of notice of appeal, filed 10 January 2020, Iberostar indicated that two of the learned judge's orders were being appealed, namely, the orders numbered 1 and 6, as set out above.

[12] The grounds of appeal are as follows:

> "a. The learned Judge erred in awarding costs to the [IDT] and [Mr McLeod] given that there was no finding that [Iberostar] acted unreasonably pursuant to rule 56.15(5) of the Civil Procedure Rules, 2002.
>
> b. The learned Judge erred by finding that the Labour Relations and Industrial Disputes Act empowers the [IDT] to fashion remedies that are not expressly stated in the Act.
>
> c. The learned judge erred in relying on statements which were not before the Court as evidence in the proceedings."

[13] The appeal sought to challenge the learned judge's findings of fact, as well as her findings of law. These were particularised as follows:

> "*Findings of Fact*
>
> a. That the Party Directly Affected, the Interested Party in the Court bellow [sic], 'was never reprimanded or made the subject of any disciplinary proceedings'.
>
> b. That '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.'

c. That the Party Directly Affected's 'attorney had contacted the police and learned that there was no on-going investigation involving Mr McLeod.'

d. That '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.'

Findings of Law

a. Counsel for the defendant suggested that a lifting of the suspension is a reasonable remedy available to the Tribunal. I agree.'

b. 'the fact that there is no stipulated remedy for suspension, does not affect the jurisdiction of the IDT to hear a suspension matter involving a non-unionised 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.'

c. The award of costs to the Defendant and Interested Party."

[14] For the sake of expediency, ground a. will be dealt with subsequent to grounds b. and c.

Ground b – The learned judge erred by finding that the Labour Relations and Industrial Disputes Act empowers the IDT to fashion remedies that are not expressly stated in the Act

Submissions on behalf of Iberostar

[15] The essence of this ground is that the learned judge erred in deciding that the IDT has remedial powers in a suspension case, when such powers are not provided by statute or the common law. Mr Goffe submitted that, although there is a broad

definition of what constitutes an industrial dispute as set out in the Labour Relation and Industrial Disputes Act ('LRIDA'), the powers of the IDT are extremely narrow.

[16] It was submitted that it should be borne in mind that the IDT is an arbitral body and not a court. It has no inherent jurisdiction, as such its power to grant remedies in disputes referred to it, is limited to those prescribed by the LRIDA. Reference was made to sections 12(5)(c) and 12(7), which empower the IDT to grant compensation or reinstatement awards in cases of unjustifiable dismissal, and make awards in respect of the terms and conditions of employment. Outside of these circumstances, the IDT has never sought to issue any other remedies.

[17] Counsel submitted that Mr McLeod was seeking compensation and reinstatement before the IDT, although he has not been dismissed from his position at Iberostar.

[18] He contended that the IDT has no jurisdiction to fashion remedies not given to it under the LRIDA. Reference was made to the case of **Regina v Lord President of the Privy Council, ex parte Page sub nom Page v Hull University Visitor** [1993] AC 682, in support of the principle that powers conferred on a decision maker are so conferred under the underlying assumption that they will be exercised only within the jurisdiction conferred and if the decision maker exercises his power outside of this jurisdiction, he is acting *ultra vires* his powers and therefore unlawfully.

[19] It was submitted that the learned judge erred when she agreed with the submissions of counsel for the IDT (at paragraph [38] of her reasons for judgment) that the IDT can award a "lifting of a suspension". Counsel questioned if the IDT had the power to lift a suspension, which he likened to a mandatory injunction, what else would it have the power to do? Issue was also taken with the learned judge's finding in paragraph [39], that the IDT is allowed to "settle disputes fairly" which was described as confirmatory of the view that the absence of specified remedial powers (in disputes that are not cases of unjustifiable dismissal) means that the legislators intended the IDT

to have broad, unspecified, nondescript and unlimited powers to achieve what in its exclusive discretion would be, a settlement of disputes.

[20] The learned judge's conclusion was described as being wrong in law, in terms of the rules of statutory interpretation, and dangerous to the jurisprudence of labour law. This is so, according to Mr Goffe, because it appropriates to the IDT an unfettered discretion without any statutory basis in the LRIDA. The language of the LRIDA does not support a conclusion that the IDT has the power to apply remedies as it sees fit in the settlement of disputes and this power cannot be inferred. If Parliament intended this, then the LRIDA would provide for that power in clear language.

[21] Mr Goffe submitted that the learned judge seemed to have drawn support for her conclusion by reliance on the decision of this court in **Village Resort Limited v The Industrial Dispute Tribunal** (1998) 35 JLR 292, rather than from an interpretation of any of the provisions of the LRIDA; and that the learned judge erred in so doing. He further submitted that the **Village Resort** case related to unjustifiable dismissal, which did not contemplate the IDT's remedial powers in cases unconcerned with unjustifiable dismissal.

[22] In the alternative, it was submitted that the learned judge failed to appreciate that, by permitting the IDT to lift a suspension, she was, in effect, permitting the IDT to make a reinstatement award outside of an unjustifiable dismissal case. An award mandating the lifting of a suspension would be the same as a reinstatement award, as the effect would be to restore an employee to the position he would have been in, had the suspension not occurred. In support of this point and in relation to the definition of reinstatement, the cases of **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and The National Workers Union** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2002, judgment delivered 11 June 2003, and **Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security** [2018] JMSC Civ 103 were cited. Counsel posed the question as to whether the IDT had

the power under the LRIDA to return a suspended worker to his duties and order that he be paid a retroactive salary.

[23] Mr Goffe contended, in his oral submissions, that if this judgment is permitted to stand, then the powers of the IDT would be even greater than those of this court and that the issue of the IDT's powers in a case of suspension, have been in contention for decades. He referred to an extract from the text, Industrial Relations Law and Practice in Jamaica by George Kirkaldy as support for this view. Further, he submitted that the term 'suspension' in this context is dealing with a disciplinary sanction. He contended further, that the suspension of Mr McLeod was an administrative suspension and not a disciplinary one.

Submissions on behalf of the IDT

[24] It was submitted that by this ground of appeal, Iberostar has essentially revived the issue it raised before the learned judge, as to whether the suspension without pay of a non-unionised employee is an industrial dispute within the meaning of the LRIDA.

[25] Ms Jarrett traced the legislative development of the LRIDA. She highlighted the amendment made in 2010 and its effect, which was to allow non-unionised workers the facility to have their disputes of rights considered by the Minister and referred to the IDT. This amendment included an expansion of the definition of industrial dispute (in section 2) to include non-unionised workers, such as Mr McLeod, who have disputes relating to, *inter alia*, the suspension of their employment. She also sought to demonstrate the distinction between a dispute of right versus a dispute of interest.

[26] It was recognised that notwithstanding the 2010 amendment to provide protection for non-unionised workers, the LRIDA made certain distinctions between unionised and non-unionised workers. This is as it relates to disputes of rights and disputes of interests. However, it is clear that the disputes of rights in relation to both categories of workers were referable to the IDT. Both categories of workers were placed on equal footing in relation to disputes of existing rights arising from the

employment contract, as well as from statute. In addition to termination of employment, disputes of rights under the LRIDA also relate to physical conditions in which workers are required to work, suspension of employment and any matter affecting the rights and duties of any employer, organisation representing employers, worker, or organisation representing workers.

[27] It was further submitted that the 2010 amendment to section 2 of the LRIDA was indicative of Parliament recognising the importance of non-interference by third parties, such as the IDT, in the freedom of parties to contract in the case of non-unionised workers. This is evident in the fact that Parliament restricted disputes of interest to unionised workers, whose collective interests are reflected in collective agreements negotiated by their trade unions with management on their behalf. Disputes of interest in section 2 of the LRIDA involve disputes over the terms and conditions of employment, engagement or non-engagement, and allocation of work.

[28] Relying on the principle emanating from **Pepper v Hart** [1993] 1 All ER 32, Ms Jarrett contended that if there was any ambiguity that existed in the definition of the industrial disputes in the LRIDA, this could be resolved by having regard to the presentation of the 2010 amendment to Parliament by the promoter, the then Minister of Labour and Social Security (contained in the Jamaica Hansard of 19 January 2010 to 17 March 2010).

[29] It was not disputed that there was no dismissal, given Iberostar's own evidence that Mr McLeod's contract of employment was not determined. However, Ms Jarrett contended that it is plain that not all industrial disputes under section 2 of the LRIDA involve the dismissal of workers. She stated that it was clear that suspension from work is a dispute of right and is an industrial dispute within the meaning of section 2, and applies to a worker who continues to be employed but is temporarily prevented from performing his job functions under his contract of employment, either with or without pay.

[30] It was submitted that it is common knowledge that workers are typically suspended with pay pending an investigation where there has been no finding of misconduct, but time away from the job is necessary and wise in order to facilitate an investigation. Ms Jarrett highlighted that at the time of the Minister's referral in April 2018, Mr McLeod had been suspended for over two years without pay and this is the dispute that he brought to the Minister's attention. When the conciliatory machinery and the Ministry of Labour failed in resolving the dispute, it was referred by the Minister to the IDT.

[31] It was contended that the said dispute was an industrial dispute within the meaning of the LRIDA, the Minister properly exercised her discretion to make the referral and the IDT has the jurisdiction to hear the dispute. This is so, since the IDT is empowered under the LRIDA to settle industrial disputes as defined in section 2, which is not just restricted to disputes involving dismissals.

[32] Ms Jarrett submitted that section 12(5)(c) of the LRIDA, which provides for reinstatement as a remedy where the IDT finds that there has been an unjustifiable dismissal, is not the only remedy the IDT can provide. Such a remedy is clearly only available, where the dispute which the IDT is called upon to resolve, concerns a worker's dismissal.

[33] It was submitted, however, that the learned judge did not fall into error in agreeing that a lifting of the suspension is a reasonable remedy available to the IDT, having properly found that a dispute in relation to the suspension of Mr McLeod, a non-unionised worker, is an industrial dispute within the meaning of section 2 of the LRIDA.

Submissions on behalf of Mr McLeod

[34] The submissions of Mr Eccleston essentially covered the same ground as Ms Jarrett's. So as to avoid repetition they may be summarised thus:

1) The IDT has the requisite jurisdiction to make an award in the settlement of any industrial dispute, which includes cases of suspension;

2) Section 12(4) of the LRIDA and the Labour Relations Code ('the Code') clothed the IDT with the authority to hear the dispute and make reasonable and appropriate awards which would include a lifting of the suspension, as the learned judge found; and

3) Section 12(5)(c) of the LRIDA pertains to dismissal cases and therefore was inapplicable to the present case.

[35] It was also submitted that awards made by the IDT are final, conclusive and unimpeachable. In support of this, reference was made to sections 2, 11, 11b, and 12(4) of the LRIDA and the decision of the Judicial Committee Privy Council (JCPC) in **University of Technology, Jamaica v Industrial Disputes Tribunal and others** [2017] UKPC 22, paragraph [18]).

Discussion and analysis on ground b

[36] In considering appeals in relation to the functions and decisions of the IDT, it is important to do so within the context of all the relevant statutory framework - the LRIDA, the Code and the Regulations. These provide a comprehensive and discrete regime for the settlement of industrial disputes in Jamaica as stated by Rattray P in **Village Resorts Ltd v The Industrial Disputes Tribunal and anor**. This was reiterated by Forte P in **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and The National Workers Union** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2002, judgment delivered 11 June 2003, at page 6 and confirmed, particularly with reference to the Code, by the Privy Council on the appeal of that case [2005] UKPC 16:

> "6. Issues have arisen, also, regarding the effect of the Code and the use that can be made of it in a case such as

> the present. In paragraph 8 of its Award the Tribunal, responding to a submission that the Code was no more than a set of guidelines and was not legally binding, observed that the Code was "as near to law as you can get". This observation was endorsed by Clarke J in the Full Court (p.28) and by Forte P (p.6), Harrison JA (p.20) and Walker JA (p.37) in the Court of Appeal. Both in the Full Court and in the Court of Appeal reliance was placed on *Village Resorts Ltd v The Industrial Disputes Tribunal* SCCA 66/97 (unreported) in which Rattray P, in the Court of Appeal, had described "The Act, the Code and the Regulations" as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica" (p.11) and as a "road map to both employers and workers towards the destination of a co-operative working environment for the maximisation of production and mutually beneficial human relationships" (p.10, cited by Forte P in the present case at p.3 of the Court of Appeal judgment). Forte P went on to say that the Code
>
> > '… establishes the environment in which it envisages that the relationships and communications between the [employers, the workers and the Unions] should operate for the peaceful solutions of conflicts which are bound to develop.' (pp.3 and 4)
>
> 7. Their Lordships respectfully accept as correct the view of the Code and its function as expressed by Rattray P in the *Village Resorts* case and by Forte P in the present case."

[37] While the Code is not a statute, it is accorded statutory recognition. Section 3(4) of the LRIDA sets out its importance and requires the IDT to take relevant provisions into account in determination of any questions arising in its proceedings:

> "3(4) A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."

[38] Rattray P in **Village Resorts** reinforced the relevance of the Code, where he stated at page 10:

> "The Code indicated as one of 'management's major objectives' good management practices and industrial relations policies which have the confidence of all. It mandates that 'the development of such practices and policies are a joint responsibility of employers and all workers and trade unions representing them, but the primary responsibility for their initiation rests with employers.'"

[39] In the case of **Kingston Wharves Limited v Industrial Disputes Tribunal and Union of Clerical, Administrative & Supervisory Employees** [2020] JMCA Civ 66, Phillips JA quoted from, what is now oft described as the magisterial judgment of Rattray P in **Village Resorts**, regarding both the LRIDA and the Code. Paragraphs [83] and [85] of her judgment are set out:

> "[83] It was in these circumstances that Rattray P examined the LRIDA and the [Code]. He mentioned that the IDT was made up of persons who have 'special knowledge and experience of labour relations', and concluded that the specialist knowledge component of the IDT had been clearly established."
>
> "[85] He referred to the relationship between the employer and employee in the modern context in this way at page 11:
>
> > 'The relationship between employer and employee confers a status on both the person employed and the person employing. Even by virtue of the modern change of nomenclature from master and servant to employer and employee there is clear indication that the rigidities of the former relationships have been ameliorated by the infusion of a more satisfactory balance between the contributors in the productive process and the creation of wealth in the society.'"

[40] I have taken the liberty to commence the analysis of this matter at the outset, with these judicial pronouncements, as the LRIDA and the Code provide the relevant statutory framework that must be considered, in order to determine the extent of the jurisdiction of the IDT.

[41] The relevant sections of both the LRIDA and the Code are set out below.

The LRIDA

Section 2:

> "'industrial dispute' means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, and –
>
> (a) in the case of workers who are 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 or 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 of 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 who are not members of any trade union having bargaining rights, 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) **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;"

Section 11(1):

"Subject to the provisions of subsection (2) and sections 9 and 10 the Minister may, at the request in writing of all the parties to any industrial dispute, refer such dispute to the Tribunal for settlement."

Section 11B:

"Notwithstanding the provisions of sections 9, 10, 11 and 11A, where an industrial dispute exists in any undertaking which relates to disciplinary action taken against a worker, the Minister shall not refer that dispute to the Tribunal unless, within twelve months of the date on which the disciplinary action became effective, the worker lodged a complaint against such action with the Minister."

Section 12(1):

"Subject to the provisions of subsection (2) 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."

Section 12(4):

"An award in respect of any industrial dispute referred to the Tribunal for settlement –

(a) may be made with retrospective effect from such date, not being earlier than the date on which that dispute first arose, as the Tribunal may determine;

(b) shall specify the date from which it shall have effect;

(c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."

Section 12(5):

"Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal –

(a) …

(b) it may at any time after such reference encourage the parties to endeavour to settle the dispute by negotiation or conciliation and, if they agree to do so, may assist them in their attempt to do so;

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

(i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv), order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;

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

and the employer shall comply with such order.

Section 12(7):

"Where any industrial dispute referred to the Tribunal involves questions as to wages, or as to hours of work, or as to any other terms and conditions of employment, the Tribunal –

(a) shall not, if those wages, or hours of work, or conditions of employment are regulated or controlled by or under any enactment, make any award which is inconsistent with that enactment;

(b) shall not make any award which is inconsistent with the national interest.

Section 20:

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

The Code

Paragraph 22 of the Code provides:

"(i) Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should –

(a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;

(b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;

(c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;

(d) provided for a right of appeal, wherever practicable to a level of management not previously involved;

(e) be simple and rapid in operation.

(ii) The disciplinary measures taken will depend on the nature of the misconduct. But normally the procedure should operate as follows –

(a) the first step should be an oral warning, or in the case of more serious misconduct, a written warning setting out the circumstances;

(b) no worker should be dismissed for a first breach of discipline except in the case of gross misconduct;

(c) action on any further misconduct, for example, final warning [,] suspension without pay or dismissal should be recorded in writing;

(d) details of any disciplinary action should be given in writing to the worker and to his representative;

(e) no disciplinary action should normally be taken against a delegate until the circumstances of the case have been discussed with a full-time official of the union concerned."

Role of the Supreme Court in judicial review proceedings

[42] The learned judge was asked to review the ruling of the IDT, in relation to its jurisdiction, as it related to (i) the power to conduct a hearing into the suspension (pending a disciplinary hearing) of a non-unionised worker; (ii) whether or not the IDT has power to make awards outside of unjustifiable dismissal cases; and (iii) the discretion the IDT had to order its procedure. Iberostar, however, has only challenged

the decision of the learned judge in so far as it relates to the first and second issues, as there has been no appeal as regards her ruling on the third issue.

[43] This court has stated the approach to be taken by a judicial review court in respect of decisions of the IDT, in several cases, including **Hotel Four Seasons v The National Workers' Union** (1985) 22 JLR 201 (per Carey JA at page 204). More recently, Brooks JA (as he then was) reiterated this approach, at paragraphs [21], [23] and [24] of the judgment in **The Industrial Disputes Tribunal v University of Technology Jamaica and the University and Allied Workers Union** [2012] JMCA Civ 46 (upheld on appeal to the JCPC cited at paragraph [35] above). He quoted from both the dicta of Carey JA in **Hotel Four Seasons**, as well as Cooke J (as he then was) in the first instance case **In Re Grand Lido Hotel Negril** (unreported), Supreme Court, Jamaica, Suit No M-98/1995, judgment delivered on 15 May 1997:

> "[21] As mentioned above, the IDT's findings, in respect of questions of fact, are unimpeachable. In **Hotel Four Seasons Ltd v The National Workers' Union** (1985) 22 JLR 201, Carey JA explained the role of a court which is asked to review an award by the IDT. He said at page 204G:
>
> > 'The procedure is not by way of appeal but by certiorari, for that is the process invoked to bring up before the Supreme Court orders of inferior tribunals so that they may be quashed. Questions of fact are thus for the [IDT] and the Full Court is constrained to accept those findings of fact unless there is no basis for them...**the Full Court exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the [IDT]**.' (Emphasis supplied)
>
> That stance was endorsed by Rattray P in **Village Resorts Ltd**.
>
> **...**

"[23] Cooke J, at page 29 of the **In re Grand Lido Hotel Negril** judgment, set out the main duty of a court that is asked to carry out a review of an award of the IDT:

> '...this court does not perform an appellate function but concerns itself with reviewing the approach of the tribunal. **The primary question to be asked is if the tribunal has [taken] into consideration factors that were not relevant? Or conversely did it ignore relevant factors? Can it be said that its decision was outside the bounds of reasonableness?**' (Emphasis supplied)

[24] As a final word of context, it would be helpful to set out the difference between judicial review and an appeal. A basic but accurate distinction has been set out in The Caribbean Civil Court Practice 2011. The learned editors, at page 431 state:

> 'Judicial review of an administrative act is distinct from an appeal. The former is concerned with the lawfulness rather than with the merits of the decision in question, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than its correctness.'

In Administrative Law 10th edition, Wade and Forsythe state the principles a little differently, but with no less merit, at pages 28 - 29 of their work:

> 'The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'"

The powers of the IDT

[44] The IDT is a creature of statute and is only empowered to do what the statute and the regulations allow (see the dictum of Brooks JA at paragraph [12] of **The Industrial Disputes Tribunal v University of Technology Jamaica and anor**). The relevant portions of the statute necessary for the determination of this appeal, including the Code, have been set out above (see paragraph [41]) and will only be identified by the specific sections hereafter.

[45] In the case at bar, the only determination made by the IDT in respect of its jurisdiction prior to Iberostar's application for judicial review was to the effect that it had the jurisdiction to hear the issue of Mr McLeod's suspension. No ruling had been made about the type of award that could be granted in relation to the matter of Mr McLeod's suspension.

[46] There are two issues arising from Iberostar's challenge to the jurisdiction of the IDT; (i) whether the LRIDA empowers the IDT to hear disputes relating to or arising from suspensions of non-unionised workers, which are purely administrative in nature, (that is, one pending an investigation into misconduct); and (ii) even if it is so empowered, whether the IDT has the statutory authority to make an award in relation to such hearings?

Can the IDT hear all cases of suspension of non-unionised workers?

[47] The definition of an industrial dispute is contained within section 2 of LRIDA. The Minister is empowered to refer an industrial dispute relating to disciplinary action against a worker (both unionised and non-unionised) to the IDT (sections 11A and 11B of the LRIDA). There are, however, some distinctions made between both categories of workers, in relation to the definition of an industrial dispute. Section 2 of LRIDA speaks to these categories. Category (a) sets out the definition for unionised workers and category (b), for non-unionised workers. However, both categories include the term "suspension of employment". In the case of Mr McLeod, being a non-unionised worker,

the relevant category would be that set out at category (b). The LRIDA makes no distinction between administrative or disciplinary suspension as it relates to non-unionised workers.

[48] Mr Goffe, in his submissions before the learned judge below, had contended that an administrative suspension of a non-unionised worker, fell into the category of "non-engagement" which was only applicable to unionised workers as defined under category (a). However, counsel has not sought to challenge the declaration of the learned judge (order number 2) that a suspension pending a disciplinary hearing does not constitute "non-engagement" under section 2 of the LRIDA for non–unionised workers. Consequently, there will be no analysis or determination relevant to that issue of 'non – engagement', except in so far as it may be necessary to determine whether the IDT has the jurisdiction to consider, what has been termed, an administrative suspension of a non-unionised worker.

[49] Mr Goffe is contending that the IDT would only have the power to consider a disciplinary suspension. But is this a correct interpretation of 'suspension of employment' as set out in section 2 of the LRIDA?

[50] Counsel referred the court to the case of **Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security**, a decision of the Supreme Court, in support of his interpretation of the limited use of the word "suspension". The workers in **Spur Tree**, having been accused of theft, had been summarily dismissed from their employment without due process (in non-compliance with the Code) and so had been reinstated with full pay by the employer, before the matter was referred to the IDT. These employees had not been allowed to resume duties however, as disciplinary proceedings were pending. It was the matter of this first dismissal that was referred by the Minister to the IDT.

[51] D Fraser J (as he then was) observed that the effect of their reinstatement was that they were put on paid leave of absence, in effect interdicted, pending the outcome

of disciplinary hearings (see paragraphs [65] and [66] of that judgment). The complaint of the workers was that they had not been allowed to resume duties. The issue that arose was whether there had been an extant industrial dispute at the time of the Minister's referral, since they had been reinstated after being initially terminated.

[52] D Fraser J concluded that the referral of the dispute over the initial termination of the employment of the workers, was *ultra vires*, as at the time of the referral, there was no industrial dispute as defined in the LRIDA. This is because they had been reinstated. He also opined, that it could not be sustained that the requirement for the employees to complete that process (of disciplinary hearings) before a decision could be made as to whether there could be any resumption of duties, could be considered improper (the workers had been subsequently dismissed after the disciplinary proceedings were held but had made no complaint to the Minister in relation to the second dismissal).

[53] The circumstances in **Spur Tree** do not assist with any judicial consideration as to whether it would have been open for the IDT, to consider the issue of the suspension of those workers (after reinstatement) pending the disciplinary hearing. That issue was never the gravamen of the complaint and referral by the Minister. While the workers were also non-unionised, the factual circumstances are quite distinct from the case at bar.

[54] Mr Goffe also relied on an excerpt from George Kirkaldy's text, Industrial Relations Law and Practice in Jamaica, to bolster in general, his challenge as to the jurisdiction of the IDT relevant to suspensions. The author, commenting on the LRIDA and the issue of suspensions noted that "[i]t has been mooted that the [IDT] does not have the authority to make an award in respect of suspensions". The author also noted that section 12(5)(c) makes no reference to suspensions (this section is relevant only to unjustifiable dismissals). He then referred to the fact that the IDT exists to settle disputes which remain unresolved by negotiation or conciliation. The following comment is then made by the author:

> "Perhaps the Act should be amended **to make it clear that the tribunal has the authority to deal with a suspension dispute referred to it**." (Emphasis added)

[55] This scholarly contemplation of the LRIDA published in 1998, by Mr Kirkaldy is commendable, but does not obviate the duty of the court to apply the rules of statutory interpretation to any enactment of Parliament where it is required (see paragraph [14] of **Fazal Ghany v Attorney General and Another** [2015] UKPC 12, where the interpretative function of the court was discussed by reference to the principles stated by Lord Nicholls in **Inco Europe Ltd v First Choice Distribution** [2000] 1 WLR 586 and Professor Sir Rupert Cross in his text, Statutory Interpretation, 3rd ed (1995)). In any event, Mr Kirkaldy's comments preceded the 2010 amendment of the LRIDA which expanded the definition of industrial dispute (in section 2) to include non-unionised workers, albeit the amendment did not include descriptions of awards that could be made.

[56] In relation to statutory interpretation, it is also useful to set out paragraphs [53] and [54] of the dictum of Brooks JA (as he then was) in **Jamaica Public Service Company Limited v Dennis Meadows and others** [2015] JMCA Civ 1 which summarise the major principles:

> "[53] … The major principles of statutory interpretation, currently approved, include the use of the plain and ordinary meaning of words in the document, the application of the context of the document and the rejection of any interpretation that makes nonsense of the document.
>
> [54] The learned editors of Cross' Statutory Interpretation 3rd edition proffered a summary of the rules of statutory interpretation. They stressed the use of the natural or ordinary meaning of words and cautioned against "judicial legislation" by reading words into statutes. At page 49 of their work, they set out their summary thus:
>
> > '1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general

> context of the statute; he must also determine the extent of general words with reference to that context.
>
> 2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.
>
> 3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and **he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute**....'(Emphasis supplied)
>
> This summary is an accurate reflection of the major principles governing statutory interpretation."

[57] Where the court is involved in the interpretation of a statute, it is permitted to vary or modify the language used therefore, if a literal adherence to such language would result in an absurdity or the legislation is ambiguous or obscure. This is often referred to as the golden rule of interpretation (see **Becke v Smith** (1836) 2 M&W 191, 195 and the judgment of Lord Salmon, in **Eaton Baker and another v The Queen** [1975] AC 774, 790 in which the principle was reiterated). If necessary, in such cases reference can be made to Parliamentary material as an aid to statutory construction (see **Pepper v Hart**). The court should also give effect to the grammatical and ordinary meaning or any technical meaning of the words within the general context of the statute.

[58] Also, the court must make a finding as to whether it is necessary to read in words which are already implied in the statute, or in a limited capacity, add, alter or

ignore words to prevent a provision from being unreasonable or unworkable (see **Jamaica Public Service Company Limited v Dennis Meadows and others**).

[59] Having examined the LRIDA, in particular, the relevant sections set out above, I find that on the plain reading of the statute, there is no obfuscation, absurdity or ambiguity, as to what Parliament intended in relation to the types of industrial disputes the IDT is empowered to hear. The definition of an industrial dispute for non-unionised workers is clearly set out at section 2 of the LRIDA. It includes the suspension of a non-unionised worker (section 2 (b) (ii)).

[60] Is there any legal basis for the court to limit that term, as set out in section 2 (b)(ii) of the LRIDA, to what Mr Goffe describes as a disciplinary suspension (that is, a penalty imposed subsequent to a disciplinary process)? Certainly, the words in the statute itself put no such limit on the jurisdiction of the IDT. But bearing in mind Mr Goffe's submission on the technical use of the word suspension, further consideration will be given to this matter.

[61] In that regard, it is expedient to consider the plain dictionary meaning of the word. In the Concise Oxford Dictionary, (8th edition) the word "suspension" speaks to (i) the act of suspending someone, or the condition of being suspended; and (ii) to suspend also implies a temporary stoppage, with an added suggestion of waiting until some condition is satisfied.

[62] The ordinary use of the word would, therefore, embrace both concepts of an administrative and a disciplinary suspension. This issue must also be considered within the context of Parliament's intention to give jurisdiction to the IDT to settle industrial disputes. That jurisdiction has been judicially recognised in **Village Resorts Ltd, Kingston Wharves Limited**, and **R v The Industrial Disputes Tribunal, ex parte, Esso West Indies Limited** (1977) 16 JLR 73 (SC) among others. In the first instance case of **ex parte Esso,** Parnell J, at page 82, gave judicial expression to this intent of Parliament, albeit stated within the context of unionised workers:

> "When Parliament set up the Industrial Disputes Tribunal, it indicated that the settlement of disputes should be removed as far as possible from the procedure of the Courts of the land. The judges are not trained in the fine art of trade union activities, in the intricacies of collective bargaining, in the soothing of the moods and aspirations of the industrial workers and in the complex operation of a huge corporation."

Therefore, it is difficult to find any reasonable basis, based on the context of the statutory framework and the language used, to limit the interpretation of the IDT's jurisdiction as submitted by Mr Goffe.

[63] Parliament's intention is also reflected in the Code. The importance of the Code has been set out earlier in this judgement (see paragraphs [36] to [39]). In that regard, Phillips JA reinforced this court's view of its important role by reiterating Forte P's endorsement in **Jamaica Flour Mills** at paragraph [99] of her recent judgment in **ATL Group Pension Fund Trustees Nominee Limited v The Industrial Disputes Tribunal and Catherine Barber** [2021] JMCA Civ 4:

> "…'[The Code] establishes the environment in which it envisages that the relationships and communications between [employers, workers and unions] should operate in peaceful solutions of conflicts, which are bound to develop.'"

[64] It is expected, therefore, that the IDT would have regard not only to the LRIDA but also to the Code in settling an industrial dispute. Obviously, if a worker is suspended pending a police investigation into his or her conduct, this is the condition that needs to be fulfilled before any further determination is made as to the future of the worker. The "quality" of such a suspension would be radically different from that of a worker, who is suspended after being found to be in breach or guilty of improper conduct. The latter is being punished for an established breach.

[65] An examination of the Code (set out at paragraph [40]) speaks to the necessity for disciplinary procedures to ensure that "fair and effective arrangements exist for dealing with disciplinary matters" (section 22(i)). It also reveals that timely resolutions

are required in matters of a disciplinary nature (see paragraph 22(i)(e)). In this particular set of circumstances, I apply the word 'disciplinary' in a wider context than that used by Mr Goffe, to include administrative as well as disciplinary suspensions and am of the opinion that a worker such as Mr McLeod, who has been suspended without pay for two years (pending an investigation into criminal conduct) is ultimately involved in a disciplinary process.

[66] It should be appreciated, however, that any referral to the IDT concerning an administrative suspension may very well be unwarranted and premature, depending on the existing circumstances. The context of the suspension could, therefore, be an important factor in any determination as to whether the IDT acted "outside the bounds of reasonableness" (per Brooks JA in **The Industrial Disputes Tribunal v University of Technology Jamaica and anor** at paragraph [23], quoting Cooke J, in the judgment of **In re Grand Lido Hotel Negril**). Considerations, such as those identified in **Spur Tree** are certainly relevant. As D Fraser J observed (at paragraphs [71] and [72]), where a company has legitimate concerns regarding suspicious conduct — in that case, stolen goods — the employees could not merely be reinstated without an inquiry. This is the purpose for the disciplinary process established by the Code. It is expected that the same appreciation should be given to matters of a similar nature in relation to suspensions, by the Minister, and ultimately the IDT. D Fraser J's positing of the question in **Spur Tree**, "[w]ould there have been a proper industrial relations atmosphere of trust, if the suspicions were not ventilated and the workers given a chance to defend themselves and clear their names?" remains a legitimate one.

[67] However, there can be no dispute concerning the clear words of the LRIDA. As stated previously, the statutory framework of LRIDA, as well as the Code, leave no interpretative difficulties. The IDT is to settle industrial disputes as defined by the statute and the definition of industrial dispute can embrace the circumstances of a suspension of a worker such as Mr McLeod. Further, the LRIDA also permits the IDT, at any time after the reference by the Minister, to encourage the parties to settle the

dispute, by negotiation or conciliation and if they agree to do so, to assist them in the attempt (see sections 12(4B) and 12(5)(b) of the LRIDA). When one peruses the record of proceedings of the IDT relevant to this matter, there were occasions when the chairman of the panel suggested the possibility of the parties endeavouring to settle the matter (see page 9, lines 19 to 23 of the record). This might have been achieved, if the hearing was not aborted by the application for judicial review by Iberostar.

[68] The circumstances of Mr McLeod's suspension required intervention and a resolution. At the time of the referral to the IDT, the suspension could be described as punitive in nature, as he had been suspended for two years without pay. The Minister's attempt at conciliation had borne no fruit. When the matter was considered by the learned judge, no evidence was presented that any charges (relative to the criminal investigation) had been laid against Mr McLeod. Mr G Anthony Ferguson ('Mr Ferguson'), Iberostar's human resource manager, made no reference to any such fact in his affidavit and Iberostar presented no evidence that there had been any determination of wrongdoing on Mr McLeod's part.

[69] It would be expected that all the circumstances relevant to Mr McLeod's complaint would be taken into consideration by the IDT. Undoubtedly, this would include the fact that there had been a report to the police, which would have necessitated some investigation on their part (Iberostar could not be held responsible for any lack of alacrity in those investigations); the existence of a breakdown of trust between the parties, as Mr McLeod could not have been expected to continue his duties, in such an atmosphere; also the fact that Iberostar had not held any disciplinary proceedings nor had any date been set relevant to such, if that was indeed the case (again there was no such evidence presented by Iberostar before the learned judge).

[70] It was Iberostar's submissions (before the IDT) that the police had indicated that it was not to interfere with the criminal investigation; and that Mr McLeod had refused to give a statement to the police. On the other hand, Mr Eccleston had submitted that he was in possession of a letter from the Commissioner of Police, dated 7 June 2017, to

the effect that there was no ongoing investigation relevant to Mr McLeod. One would have expected that evidence of all these matters would have been led before the IDT for its consideration.

[71] In relation to the determination made by the learned judge, Mr Goffe complained that she wrongly relied on the dictum in **Village Resorts**, in reaching the conclusion that she did. At paragraphs [39] and [40] of her judgment, the learned judge set out her understanding of the remit of the IDT. It is expedient to set out paragraph [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*** [sic]. It is not bound by common law remedies. In fact, the only dictate regarding 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 [sic] P, albeit related to unjustifiable dismissal, in ***Village Resorts Limited v The Industrial Dispute Tribunal*** [1998] 35 JLR 292. He said at paragraph [sic];
>
> > 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 preindustrial 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."

[72] The learned judge, in my opinion, properly reminded herself of Parliament's intention for the IDT which was expressed in **Village Resorts Ltd**. She also understood that the determination in that case was within the context of a consideration of unjustifiable dismissal. However, understanding the intention of Parliament in the enactment of a statute may have some value forits interpretation, if this is necessary. Rattray P's dictum remains important, as it is an elucidation and

illumination of Parliament's objectives in the passing of the LRIDA and the Code. The learned judge was alert to this nuance at the commencement of her analysis of the matter. Her observations, set out at paragraphs [25] of her judgment, also bear repeating:

> "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."

[73] The emphasis of both the LRIDA and the Code is, therefore, pointing towards a fast-paced resolution of issues between employer and employee. The purpose, as demonstrated in the words of the Code, includes the promotion of a cooperative working environment in labour relations in the society. The concept of work as a social right, which is to be respected along with an emphasis on the continuity of employment and security of earnings, is also a major plank of the statutory scheme (see paragraph 2 of the Code).

[74] Phillips JA, having considered the dictum of Rattray P in **Village Resorts**, thereafter concluded at paragraph [87] of the judgment in **Kingston Wharves Limited** "[g]iven these powerful words of the learned President, particularly with regard to the role of the [Code], there is clearly a strong imperative as to how employers and employees ought to interact with each other".

[75] Against such a background, this imperative cannot be restricted to cases of unjustifiable dismissal, as the definition of industrial disputes that are to be settled by the IDT is wider in scope. Parliament has established the IDT as the appropriate tribunal to promote the mandate for labour relations. The use of specialised individuals

to serve on that tribunal to solve industrial disputes, is also an indication of the emphasis on functionality required for such a tribunal.

The issue of an award/remedy in the matter of a suspension

[76] If the IDT is therefore empowered to consider the suspension of a worker, such as Mr McLeod, what then are the remedies available for settling the dispute? This issue is the final bone of contention, in relation to the challenge to the IDT's jurisdiction. Is it a correct interpretation of the statute, that it has no power to make any other category of award or remedies, except that which is set out at section 12(5)(c) relevant to a finding of unjustifiable dismissal, or one relevant to terms and conditions of unionised workers (section 12(7)(a) and (b))? This latter section speaks to a category of award being made relevant to unionised workers' terms and conditions of employment (including wages and hours of work). The IDT can make an award relevant to those issues, as long as that award is not inconsistent with any pertinent enactment or with the national interest.

[77] The starting point for this determination is not section 12(5)(c), which is relevant to a finding of unjustifiable dismissal, but section 12(1) which empowers the IDT (subject to subsection (2), which is not relevant to the determination of this matter) to make **its award in respect of any industrial dispute referred to it**. An award is to be made within 21 days after the dispute is referred or, if that period is impracticable, as soon as may be practicable (see section 12(1) of the LRIDA). The award is to be final and conclusive and is only to be impeached on a point of law (see section 12(4)(c) of the LRIDA). No description or specified awards are identified until section 12(5)(c), when it is stated that certain remedies – (reinstatement and/or compensation) - may be awarded in the instances of unjustifiable dismissal.

[78] It is based on the clear provisions as set out at section 12(5)(c) that the learned judge would have been correct in granting the declaration, that an award of re-instatement and/or compensation can only be made when there is a finding of unjustifiable dismissal.

[79] However, it would be an incorrect interpretation of the relevant sections of the LRIDA, to submit that the only awards that can be granted by the IDT are those limited to reinstatement and compensation (relevant to unjustifiable dismissal) and that the IDT, has no power to "fashion remedies" in relation to other types of industrial disputes. This would be an absurdity if the IDT is empowered to settle industrial disputes but lack the jurisdiction to make a final determination on the matter.

Definition of award in labour law

[80] It may be expedient, at this juncture, to consider the meaning of the word "award" in justification of my interpretation in this regard. There is no definition of the term in the LRIDA. In Black's Law Dictionary, ninth edition, it is defined as "[a] final judgment or decision, esp. one by an arbitrator or a jury assessing damages". In Osborn's Concise Law Dictionary, ninth edition, it is defined as "[t]he finding or decision of an arbitrator or compensation awarded in respect of legal liability".

[81] In examining legislation from other jurisdictions such as India and Australia, definitions of the term are provided. In India, section 2(b) of their Industrial Disputes Act, 1947, defines award as an interim or final determination of any industrial dispute or of any question relating thereto by any Labour court. The Australian Industrial Relations Act, 1988 defines 'award' in the following manner:

> "'award' means an award or order that has been reduced to writing under subsection 143 (1), and includes a certified agreement;"

The section referred to in that definition states:

> "Where the Commission makes a decision or determination that, in the Commission's opinion, is an award or an order affecting an award, the Commission shall promptly:
>
> (a) reduce the decision or determination to writing that:
>
> (i) expresses it to be an award;
>
> …"

[82] In the Australian context, an award can include an order reduced to writing and expressed to be an award. While there is no such equivalent provision in the LRIDA, these definitions are helpful. If one comprehends an award, within the context of a final decision on the matter or any question pertaining thereto, it incorporates, without any strain to the language used in the statute, the concept of an award or remedy, fitting or fashioned to the specific circumstances, being granted in relation to a particular industrial dispute. The LRIDA does empower the IDT to come to a final decision in the process of settling an industrial dispute. It may have been useful to include certain remedies in the statute that could be utilised by the IDT in relation to industrial disputes generally. However, an award (in the context of the LRIDA) cannot be limited to the specific remedies relevant to unjustifiable dismissal set out in the statute. The remedy, as granted, would be one determined in relation to a particular industrial dispute and would, of course, be subject to the reviewing power of the court.

The reviewing power of the court

[83] Mr Goffe is contending that such a conclusion (that the IDT can fashion remedies not set out in the statute) would create an unfettered discretion in that tribunal that Parliament could not have intended. However, the reviewing power of the court does provide boundaries to that discretion. In the House of Lords decision of **Ex parte Page**, Lord Griffiths (who was part of the majority of the panel in the delivery of the judgment) restated the circumstances under which the court will intervene in the decisions of bodies susceptible to judicial review. At page 693 A-B, he indicated that the purpose of judicial review is to ensure that these bodies have carried out their public duties in the way it was intended. He also stated that they are required to apply the law correctly; that if they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct the error.

[84] Lord Browne-Wilkinson at page 701 C set out this principle more extensively:

> "…Over the last 40 years, the courts have developed general principles of judicial review. The fundamental principle is

> that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223), reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully: see Wade, Administrative Law, 6th ed. (1988), pp. 39 et seq. The one possible exception to this general rule used to be the jurisdiction of the court to quash a decision taken within the jurisdiction of the decision taker where an error of law appeared on the face of the record: Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw [1952] 1 K.B. 338."

[85] As expressed in **Ex parte Page**, the reviewing court would intervene to ensure that the IDT is not acting *ultra vires* its powers or is Wednesbury unreasonable. In examining the doctrine of *ultra vires*, the learned authors Wade & Forsyth, in their text Administrative Law, 10th edition at page 30, expressed that "[w]here the empowering Act lays down limits expressly, their application is merely an exercise in construing the statutory language and applying it to the facts".

[86] However, the authors refer to situations, where the limits to jurisdiction may be nuanced and require more detailed examination, for example, where an act may provide for the opinion of a Minister. They opined "[r]eading the language literally, the court would be confined to ascertaining that the minister in fact held the opinion required". Further that, "the court will hold the order to be ultra vires if the minister acted in bad faith or unreasonably or on no proper evidence". The authors expressed further, on page 30:

> "Results such as these are attained by the art of statutory construction. It is presumed that Parliament did not intend

> to authorise abuses, and that certain safeguards against abuse must be implied in the Act. These are matters of general principle, embodied in the rules of law which govern the interpretation of statutes. Parliament is not expected to incorporate them expressly in every Act that is passed. They may be taken for granted as part of implied conditions to which every Act is subject and which the courts extract by reading between the lines. Any violation of them, therefore, renders the offending action, ultra vires."

[87] In **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and another** [2015] JMCA Civ 48, a decision of this court, Morrison JA (as he then was) found that the IDT had acted unreasonably in the Wednesbury sense, in aspects of its decision-making process; and in considering an award made pursuant to section 12(5)(c)(iii), the court, although recognising that the LRIDA had conferred a discretion on the IDT to order compensation, stated that the discretion, as with any other judicial discretion, is not unfettered and must be reasonable and rational (see also paragraph [121] of **ATL Group Pension Fund Trustees Nominee Limited v The Industrial Disputes Tribunal and Catherine Barber**) .

[88] This aspect of the court's supervisory function was again reiterated by Phillips JA at paragraphs [76] and [77] of **Kingston Wharves** where reference was also made to **Branch Developments Limited**:

> "[76] The court, in pursuing its supervisory function, should endeavour to assess if the tribunal, in its deliberations and in the exercise of its discretion, has acted reasonably in the **Wednesbury** sense, which phrase is well known and recognised, referring to the dictum of the Lord Greene MR in that case. In **Wednesbury**, a local authority which was empowered by statute to grant cinematograph licences had done so to the owners of the Gaumont Cinema for Sunday performances to be given, but subject to the condition that no children under 15 years of age should be admitted to the said performances, with or without an adult. The action brought by the owner/licensee of Gaumont for a declaration that that condition was *ultra vires* and unreasonable, did not succeed, and that decision was upheld on appeal. Lord Greene MR made the following powerful statement

summarising the applicable principles emanating from the case. He said at page 233:

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

[77] In endorsing these principles, Morrison JA (as he was then) in the leading judgment in **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and another** [2015] JMCA Civ 48, when dealing with the power of the court to interfere with and set aside the decision of the IDT, which was the main focus of several grounds of appeal in that case, commented at paragraph [33] in his own inimitable style, with such clarity, where he stated:

> 'So, in addition to the court's power (or duty) to intervene where the decision of a public body is illegal, in the sense that it was arrived at taking into account extraneous matters, or failing to take into account relevant considerations, there is a wider power in the court to interfere with a decision which, although based on the appropriate considerations, is so unreasonable that no reasonable body could have reached it.

> The concept of '**Wednesbury** unreasonableness' therefore connotes, as Lord Diplock put it famously in **Council of Civil Service Unions and others v Minister for the Civil Service** [[1985] 3 All ER 935, 951], '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.'"

[89] The reviewing court, in examining the correctness of the decision of the IDT, would be tasked with the responsibility to ensure that the decision reached or remedy granted would be within the ambit of the statutory framework; and that it was procedurally correct, with the principles of natural justice being observed; that it cannot be said to be unreasonable in the Wednesbury sense; and that it did not take into account irrelevant considerations or failed to take into account relevant considerations.

[90] Any contention, therefore, that the IDT would have an unfettered discretion to fashion remedies as it sees fit, would be to deny the role of the reviewing court and ultimately an appellate court, in considering whether the IDT was *ultra vires* in its decision making, or erred in law.

[91] Once the court determines that the power of a decision making body has been exercised lawfully and within the jurisdiction conferred, there will be no interference with the outcome designated by the particular decision maker. Any award made by the IDT is to be final and conclusive and cannot be impeached except on a point of law (see section 12(4)(c)).

[92] Therefore, no jurisdictional basis exists for Iberostar's objection to the IDT considering Mr McLeod's suspension. The IDT had the jurisdiction to hear such a dispute and the learned judge was correct in finding that it did. She was also correct that the IDT would also have the jurisdiction to make a determination as to the proper award/remedy to suit the particular circumstances under consideration.

[93] As was stated previously, the IDT had made no final decision in relation to what potential remedies existed. However, the learned judge, in dealing with the issues that were before her, made a determination in a manner that was commendable. The force of her findings in relation to the power of the IDT to provide suitable remedies is set out at paragraphs [38] and [39] of her judgment. She stated in paragraph [38]:

> "[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 [sic] 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 [sic] 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."

[94] The LRIDA and the Code, provide the context within which the IDT would determine suitable remedies, according to the circumstances of an industrial dispute. These include the suspension of a worker, where specific remedies are not and indeed would be difficult to set out, in the statute. Industrial disputes (as broadly defined) come in all shades and colours in relation to the specific circumstances of each case. There can be no presumption that one size fits all.

[95] Therefore, it is expected that any remedy granted should be one fashioned within the context of the statutory framework. Further, it cannot be one arbitrarily plucked out of the air, according to whims and fancies of the IDT, but specifically designed to fit the particular circumstances, with fairness to all parties.

[96] Paragraph 21 of the Code, for example, speaks to individual grievance procedures:

> "All workers have a right to seek redress for grievances relating to their employment and management in consultation with workers or their representatives should establish and publicize arrangements for the settling of such grievances. The number of stages and the time allotted between stages will depend on the individual establishment. They should neither be too numerous nor too long if they are to avoid frustration. The procedure should be in writing and should indicate -
>
> (i) that the grievance be normally discussed first by the worker and his immediate supervisor—commonly referred to as the 'first stage';
>
> (ii) that if unresolved at the first stage, the grievance be referred to the department head, and that the worker delegate may accompany the worker at this stage -- the second stage, if the worker so wishes;
>
> (iii) that if the grievance remains unresolved at the second stage, it be referred to higher management at which stage it is advantageous that the worker be represented by a union officer; this is the third stage;
>
> (iv) that on failure to reach agreement at the third stage, the parties agree to the reference of the dispute to conciliation by the Ministry of Labour and Employment;
>
> (v) a time limit between the reference at all stages;
>
> (vi) an agreement to avoid industrial action before the procedure is exhausted."

[97] Certainly, Mr McLeod has a right to seek redress for his grievance with his employers. It is noted that stages are described to deal with the grievance process and if it remains unresolved by a certain stage, the parties are to agree to a reference to the relevant Minister. Also, there is an emphasis on time limits being established between the different stages of the process. The IDT should certainly have regard to all the relevant provisions of the Code in dealing with this issue.

[98] Paragraph 22 deals with considerations for the actual disciplinary procedure (set out at paragraph [40] above). The procedure establishes that the worker must be given an opportunity to state his case and provides for a right of appeal; it also provides that the worker should not be dismissed for a first breach of discipline except in the case of gross misconduct. Again, these processes and procedures would be matters for the consideration of the IDT in arriving at a final decision.

[99] While the learned judge agreed with the suggestion that the lifting of the suspension is a reasonable remedy that is available to the IDT, she made no such declaration, nor was it required of her, to make any declaration to such an effect.

[100] The IDT, in settling the matter, may determine, for example, that fairness demands that Iberostar should recommence the payment of Mr McLeod's salary while the suspension endures, until the grievance procedure is determined and a conclusion reached as to his future employment. It could not be said that such an act would be reinstatement in guise, as Mr McLeod has not been dismissed and would not be reassigned to duties. Reinstatement is awarded within the context of an unjustifiable dismissal (see **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and anor**, paragraphs [31], [32] and [45]). On the other hand, having heard the evidence from the parties, it may determine that the suspension, without pay, should continue but that the grievance or disciplinary procedure is to be scheduled and completed by a certain time. Failing any successful negotiation or conciliation between the parties, the IDT should move forward as quickly as possible, to make a determination in this matter.

[101] Ground b is, therefore, unsustainable and fails.

Ground c – The learned judge erred in relying on statements which were not before the court as evidence in the proceedings

Submissions on behalf of Iberostar

[102] Mr Goffe submitted that the learned judge was not entitled to make the findings of fact which were challenged (set out at paragraph [13]). This is so because there was no evidence before her, as the affidavit of Mr McLeod was filed late. Reference was made to rules 56.12, 10.3(1), 10.2(2)(b), 10.2(2) of the Civil Procedure Rules ('CPR') in support of the objection that was taken before the learned judge. In any event, counsel for Mr McLeod indicated that there would be no reliance on the late affidavit and it was on that basis that the hearing proceeded before the learned judge.

[103] It was contended that Iberostar was denied its natural justice right to respond with its own accounts of the facts, as would have been afforded it, had Mr McLeod's affidavit been filed within the prescribed time. Iberostar was further prejudiced by the fact that the hearing proceeded on the premise that there would be no reliance on the affidavit, yet the learned judge considered the facts raised in the affidavit in determining the matter.

[104] Further, Mr Goffe complained that the only evidence of any alleged unreasonable conduct on the part of Iberostar, is an impugned affidavit and the transcript of proceedings before the IDT. The latter did not constitute evidence but contained statements made by counsel (in the form of opening remarks and submissions) which were elevated to evidence and included in the abandoned affidavit of Mr McLeod.

Submissions on behalf of the IDT

[105] It was accepted that some of the learned judge's statements, in her rehearsal of the factual background, were not included in the evidence of Iberostar or the IDT and Mr McLeod's affidavit (filed out of time) was not allowed to stand. However, it was submitted that it could not be seriously contended on any reading of the reasons for judgment, that that inclusion of these statements had any impact on the ultimate orders made by the learned judge.

[106] Further, it was submitted that Iberostar cannot seriously argue that it was prejudiced in any way by these statements or that it was denied its natural justice right to respond with its account of the facts.

Submissions on behalf of Mr McLeod

[107] It was not disputed that the affidavit of Mr McLeod was withdrawn on the day of the hearing before the learned judge. Mr Eccleston referred to the fact that a brief was submitted to the IDT prior to the commencement of the proceedings before it and that this brief, set out in extensive detail, the relevant facts and exhibited at least 28 exhibits in support of Mr McLeod's case.

[108] Specifically, in relation to the challenged findings of fact which were set out in paragragh [13] above at (a) and (b), it was submitted that these matters were set out in the said brief and would have been material before the IDT, at the time that the preliminary decisions being challenged by Iberostar were made and would have been considered by the IDT, at the time it made its preliminary findings.

[109] In relation to the challenged findings of fact at (c) and (d) set out in paragragh [13] above, the court was referred to the discussion contained in the notes of the IDT proceedings exhibited to the affidavit of Mr Ferguson (at pages 185 to 192 of the record of appeal). This set out the basis upon which the learned judge would have come to such findings of fact. Further, this evidence was also set out in the said brief submitted to the IDT on behalf of Mr McLeod.

[110] Mr Eccleston submitted that the learned judge made no error in her findings of fact, and he adopted Ms Jarrett's submission that in any event, the findings had no impact on her ultimate decision.

Discussion and analysis on ground c

[111] As conceded by Ms Jarrett, Mr Goffe is correct in his complaint relating to the learned judge's references to aspects of evidence that were not properly before her. In so far, therefore, as the learned judge would have made findings of facts based on hearsay evidence, she would have erred. The complaint about finding of fact "a" is that the learned judge stated that Mr McLeod was never reprimanded or made the subject of any disciplinary proceedings. However, what would have been before her, was the affidavit of Mr Ferguson (filed on 27 December 2018). At paragraph 5 of that affidavit, he stated that a guest at the hotel alleged that he had been a victim of credit card fraud; that the company launched an investigation and reported the matter to the police; that Mr McLeod was suspected to be responsible for the fraud and that he was suspended on 2 February 2016, pending further investigations. Further, at paragraph 6, he stated that a criminal investigation was commenced, but that Mr McLeod chose to remain silent in the criminal investigations and refused to give a statement to the police.

[112] This affidavit is completely silent as to whether, after the passage of two years, any disciplinary proceedings were held or scheduled for commencement or even, whether the investigation was ongoing. This would be a relevant fact to include in the affidavit. It would have been open to the learned judge, in my opinion, to comment on that issue in a manner unfavourably to Iberostar based on the passage of time.

[113] The complaint about finding of fact "b" speaks to references by the learned judge to several pieces of communication from Mr Eccleston, raising the issue of Mr McLeod's suspension and demands for reinstatement. However, Mr Ferguson's affidavit mentioned that Mr McLeod's attorney, Mr Eccleston, began writing to Iberostar in June 2016, demanding his reinstatement. Again, there would have been a basis for the learned judge to conclude that there was some (at least, one) written communication to that effect.

[114] There is no evidence that would have been before the learned judge concerning the findings of fact "c" and "d" set out at paragraph [13]. These were to the effect that Mr Eccleston had contacted the police and learned that there were on-going investigations; and that Mr McLeod, along with his attorney, had visited the police station, but was neither arrested nor charged. However, it would have been an acceptable comment for the learned judge to make that there was no evidence that Mr McLeod had been arrested for any offence. Common sense would dictate also, that if Mr McLeod had been charged for a criminal offence, this information would have been set out in Mr Ferguson's affidavit.

[115] In any event, as Ms Jarrett has submitted, these aspects of the evidence had no consequential bearing on the orders made by the learned judge in refusing the application for certiorari. Her ultimate decision was based on the determination that the IDT had jurisdiction to hear the issue of the suspension of Mr McLeod and to grant a remedy on the matter.

[116] While this ground of appeal does have some merit, the impugned findings of fact would be inconsequential and would not be sufficient to affect the outcome of the appeal.

Ground a – The learned Judge erred in awarding costs to the IDT and Mr McLeod given that there was no finding that Iberostar acted unreasonably pursuant to rule 56.15(5) of the Civil Procedure Rules, 2002

Submissions on behalf of Iberostar

[117] Counsel submitted that the starting point for consideration under this ground is rule 56.15(4) of the CPR, which lays down the general rule in respect of costs in administrative matters (such as judicial review). This rule provides, that no order for costs may be made against an applicant for an administrative order, unless the court considers that the applicant acted unreasonably in making the application or in the conduct of the application. Reference was made to the case of **Danville Walker v The**

Contractor-General [2013] JMFC Full 1(A), wherein this rule and its rationale were explained.

[118] Mr Goffe submitted that it is recognised that costs orders are discretionary, but contended that the learned judge improperly exercised her discretion.

[119] The learned judge did not invite submissions on costs and this went against the duty of the court, to afford litigants a reasonable opportunity to be heard on a relevant matter. The decision of the Privy Council in **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6 was cited in support of this principle. It was submitted that the said duty is even greater where the court proposes to make an order for costs that goes against the general rule, and which suggests that a party acted unreasonably.

[120] The learned judge's order for Iberostar to pay costs was described as surprising, given the fact that it was successful on the primary issue in dispute between the parties.

[121] It was submitted that the determination of an applicant's unreasonable conduct required a principled exercise and that the "exceptional circumstances" outlined in the case of **Mount Cook Land v Westminster City Council** [2004] 2 Costs LR 211 (referred to in the **Danville Walker** case) equated to the unreasonable conduct within the meaning of rule 56.15(5) of the CPR. These exceptional circumstances were summarised thus:

(a) hopelessness of the claim;

(b) persistence of the applicant after being alerted to facts and law demonstrating its hopelessness;

(c) the extent to which the claimant has sought to abuse the process of judicial review for collateral ends;

(d) whether, by reason of the conduct of a contested application, the unsuccessful claimant had, in effect, the advantage of an early substantive hearing.

[122] Mr Goffe submitted that it was clear that none of these circumstances applied in the present case, and it could not be maintained that the claim was hopeless merely because all the orders sought by Iberostar were not granted. The real dispute between the parties was whether the IDT had the power to do what Mr McLeod wanted it to do and this was resolved in IDT's favour. In that regard, a direct result of one of the orders granted by the learned judge, was the filing of a constitutional claim by Mr McLeod, seeking damages against Iberostar, as the IDT cannot provide the compensatory relief he was seeking.

[123] Mr Goffe also submitted that it was reasonable for Iberostar to raise the issue of jurisdiction regarding suspension and to seek to clarify the distinction between non-engagement and suspension. He contended that a non-unionised worker, for example, could not go to the IDT and argue that he had been laid off from his job due to the pandemic. That classification as a suspension would be *ultra vires* the LRIDA. The IDT is only empowered to deal with a disciplinary suspension.

[124] Mr Goffe also questioned whether it was reasonable for Mr McLeod, after he had agreed to meet with the police, to change his mind (invoking his right to remain silent), then to wish to be reinstated with no loss of pay.

[125] In support of the submission that the learned judge failed to apply rule 56.15(5) of the CPR and thereby, erred in awarding costs against Iberostar, Mr Goffe made a number of observations. These observations included (i) that there was no evidence before the learned judge, or information on the face of the record of proceedings, tending to demonstrate unreasonableness on Iberostar's part, in how it conducted itself in the course of the judicial review; (ii) neither counsel for the IDT, nor for Mr McLeod made any submissions inviting the learned judge to award costs, or as to why the

general rule should be departed from; (iii) the learned judge made no enquires of the parties as to their position in respect of costs, (iv) the learned judge's written reasons for judgment does not disclose any consideration of rule 56.15(5) of the CPR, any contemplation of unreasonableness on the part of Iberostar, nor a corresponding finding of unreasonableness to support the order, and (v) Iberostar was successful in obtaining the declaration it sought, in respect of the IDT's jurisdiction to award compensation and reinstatement in suspension cases (that is, order number 3).

[126] Further, it was contended that Mr McLeod's reliance, before this court, on the transcript of proceedings before the IDT does not contain any evidence, but merely arguments before the IDT on the jurisdictional challenge. These "facts" were merely submissions by his counsel and did not constitute evidence.

[127] In response to the submission that irrelevant material had little or no impact on the learned judge's decision, Mr Goffe submitted that because the learned judge did not give reasons for the costs order, it was not possible to know what operated on her mind. Accordingly, it was unsafe to speculate how much of the affidavit, that was not in evidence, led to the order for costs.

[128] Counsel sought to emphasise that costs orders against an applicant for an administrative order should only be made in rare circumstances, particularly so, where leave to bring judicial review proceedings was granted. It was argued that the grant of leave could be regarded as a threshold test, and where a judge has determined that there is an arguable prospect of success, no costs order could be made against an applicant, on the basis that there were no grounds for bringing the claim.

Submissions on behalf of the IDT

[129] Counsel for the IDT, Ms Jarrett, submitted that the learned judge was correct to award costs against Iberostar and that this ground was without merit.

[130] It was contended that the proper interpretation of rule 56.15(5) was not in dispute. While courts will not ordinarily award costs against an unsuccessful applicant

for judicial review (unless the court considers that the applicant acted unreasonably in making the application or in the conduct of the application), it was clear from the evidence and the submissions before the learned judge, that she was satisfied that Iberostar's pursuit of its challenge of the IDT's decision to embark upon the referral from the Minister was unreasonable. The **Danville Walker** case was also referred to, in support of the IDT's position.

[131] Ms Jarrett pointed to three unreasonable arguments advanced by Iberostar before the learned judge. Firstly, the learned judge's reasons for judgment revealed that Iberostar's argument that Mr McLeod's suspension (without pay since 2 February 2016, pending a police investigation) was a mere administrative suspension, was clearly unmaintainable and unreasonable in light of the clear facts.

[132] Secondly, the argument that the meaning of an "industrial dispute" in the LRIDA did not include disputes relating to the suspension of non-unionised workers (such as Mr McLeod) was also clearly unsustainable in light of an amendment made to the LRIDA in 2010. It was therefore unreasonable for Iberostar to maintain such an argument before the learned judge.

[133] Thirdly, the argument advanced that the IDT was not entitled to determine which of the parties should present its case first was bound to fail and was unreasonably pursued. It being a settled issue that the IDT is empowered, by virtue of section 20 of the LRIDA, to regulate its own procedure and proceedings as it deems fit. Reference was made to the words of Brooks JA where he expressed that "the IDT has a free hand in determining its procedure…" (see paragraph [13] of **The Industrial Disputes Tribunal v The University of Technology and The University of Allied Workers Union**).

Submissions on behalf of Mr McLeod

[134] Counsel for Mr McLeod, Mr Eccleston, submitted that the learned judge was correct in departing from the general rule based on Iberostar's failed arguments coupled with the unchallenged evidence that it acted unreasonably prior to and during the judicial review proceedings. In addition to rule 56.15(6) of the CPR, Mr Eccleston referred to part 64 which deals with costs generally. In particular rule 64.6(4) which sets out a number of circumstances which the court must have regard to in deciding who should be liable to pay costs. One of the circumstances being the conduct of the parties, both before and during the proceedings (per rule 64.6(4)(a)).

[135] It was contended that Iberostar was both unreasonable in its conduct prior to the commencement of the judicial review proceedings as well as in its pursuit of said proceedings. In relation to the latter, it was submitted that the orders sought by Iberostar were unreasonably pursued, unmeritorious and some of the issues raised were previously settled by judicial decisions. Mr Eccleston's submissions in this regard were similar to those of Ms Jarrett, which he adopted.

[136] The court was, however, referred to a number of additional authorities by Mr Eccleston, who clearly expended great industry in his preparation. In relation to the point that the IDT can determine its own procedure, reference was made to the cases of **National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA Civ 24, **Mark Leachman v Portmore Municipal Council et al** [2012] JMCA Civ 57, and **Garrett Francis v The Industrial Disputes Tribunal and anor** [2012] JMSC Civil 55, which referred to the dictum of Parnell J in **ex parte Esso** at page 82.

[137] In relation to whether the meaning of industrial dispute included or recognised suspension cases, Mr Eccleston referred to a number of sections of the LRIDA, namely sections 2, 11, 11B, 12(4) and 12(5), as well as the Code, sections 2, 3, 20, 21 and 22, and the dictum of Phillips JA in relation to the Code at paragraph [105] of **ATL Group**

Pension Fund Trustees Nominee Limited v The Industrial Disputes Tribunal and anor.

[138] Returning to the propriety of the costs order, Mr Eccleston referred to the colourful dicta of Lord Scott of Foscotte at paragraphs 44 and 47 of **Regina v Her Majesty's Attorney General, ex parte Rusbridger and anor** [2003] UKHL 38, and Philips JA at paragraph [47] of **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMCA App 13.

[139] In relation to his argument that Iberostar's conduct was unreasonable, prior to and during the proceedings, the following observations were made with references to the record of appeal which included the notes of the proceedings before the IDT. Prior to the proceedings, it was contended that Iberostar deliberately refused to disclose documents requested by counsel for Mr McLeod, and initially suggested that Mr McLeod was on a six-month contract which had expired.

[140] During the proceedings before the IDT, Iberostar wrote letters to the IDT on two occasions challenging its jurisdiction. These letters were not disclosed to counsel for Mr McLeod. Iberostar also failed to provide a brief as required by the IDT or have its designated representative/witness available, which tended to demonstrate, that it did not intend to take part in the proceedings before the IDT. It was also alleged that Iberostar insisted that Mr McLeod was on administrative leave pending its investigation, while also insisting that there was an ongoing criminal investigation by the police. This was in the face of a letter (dated 9 June 2017) by the Commissioner of Police advising Mr McLeod that there was no ongoing criminal investigation involving him.

[141] In addition to the contention that Iberostar's conduct was unreasonable, it was generally submitted that the learned judge could have refused to grant the discretionary remedies of certiorari and mandamus on the basis that Iberostar had run afoul of the maxims of equity – "he who comes to equity must come with clean hands" and "he who seeks equity must do equity". The cases of **Olive Grey v Robert Grey**

[2018] JMSC Civ 52, **Chappell and others v Times Newspapers Ltd and others** [1975] 1 WLR 482 and **D & C Builders Limited v Sidney Rees** [1965] EWCA Civ 365 were cited in support of the contention that litigants who commit gross inequity, ought not to have equity determined in their favour. This gross inequity/unreasonable conduct on Iberostar's part was detailed thus:

> (a) there was a deliberate failure to comply with the general requests or orders of the IDT and refusal to make disclosure to Mr McLeod;
>
> (b) it sought to advance untrue arguments geared to mislead the IDT; and
>
> (c) Mr McLeod was placed on suspension without pay for an egregiously long time without any proper justification, denying him the protection of paragraph 22 of the Code and natural justice safeguards.

[142] In essence, Mr Eccleston contended that Iberostar's conduct was so reprehensible, that no remedy ought to have been made available.

Discussion and analysis on ground a

[143] The matter of the award of costs is within the discretion of the learned judge. As this is a judicial review hearing, she should have been guided by rule 56.15(5) of the CPR, (see **Fritz Pinnock and Ruel Reid v Financial Investigations Division**, paragraph [47]; **National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal and Peter Jennings** and the full court decision of **Danville Walker v The Contractor-General**). Rule 56.15(5) provides:

> "(5) The general rule is that no orders as to costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.

> (Part 64 deals with the court's general discretion as to the award of costs, rules 64.13 and 64.14 deal with wasted costs orders.)"

[144] For completeness, the Privy Council considered the interpretation of the Eastern Caribbean equivalent of our rule 56.15(5) in **Toussaint v Attorney General of Saint Vincent and the Grenadines** [2008] 1 All ER 1 and stated at paragraph [39]:

> "The Court of Appeal thus appears to have viewed r 56.13(6) as a general rule, not merely that no order for costs would be made *against* an unsuccessful applicant who had acted reasonably, but as a general rule that no order for costs would be made in favour of a successful applicant against the unsuccessful state represented by the Attorney General. **The Board cannot agree with this interpretation of r 56.13(6), which is a provision intended to facilitate administrative law applications, not to deprive a successful litigant against the state of the ordinary award of costs in his favour**." (Emphasis added)

[145] The learned judge could, therefore, have exercised her discretion to make no order for costs or, having considered the circumstances, to order costs against Iberostar. However, in ordering costs against Iberostar, she failed to invite submissions from the parties, as she was obliged to do, and would have erred on this basis. It is the duty of a court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard (see **Sans Souci Limited v VRL Services Limited** at paragraph [22]).

[146] Since the parties were never invited to consider the matter of costs, it cannot be known whether they would have wished to be heard on this issue. Further, the learned judge did not set out her reasons for the costs order made, bearing in mind the type of proceedings that were before her.

[147] Having received submissions from all parties, this court is, therefore, in a position to reconsider the issue and to determine whether a proper basis existed for the exercise

of the learned judge's discretion in ordering costs against Iberostar (see rule 2.14(b)(f) of the Court of Appeal Rules).

[148] As stated previously, Iberostar's application should have attracted the consideration of the learned judge of the general rule as set out in rule 56.15(5) of the CPR, in relation to applications for judicial review. The general rule relating to costs (that is, the successful party is entitled to costs, per rule 64.6(1) of the CPR) is not normally applicable to judicial review proceedings based on the wariness of the court to restrict or hinder applicants in administrative claims who wish to have decisions of tribunals reviewed.

[149] When a finding of unreasonableness is made therefore, the court is pronouncing a judgment on the application; that it was, for example, asking the court to decide on an issue that was unnecessary in the sense of being hypothetical, premature, merely academic or in the particular circumstances, a colossal waste of the court's time (see **R (Rusbridger and another) v Attorney General** per Lord Hutton at paragraph 35 and Lord Scott of Foscote, paragraph 44) However, what may be considered relevant factors constituting unreasonableness have never been fully ventilated in this court.

[150] In **Fritz Pinnock**, Phillips JA, in considering whether costs in the appeal court should be ordered against the applicants in an administrative claim, had regard to the general rule in 56.15(5) of the CPR. The court was not addressing the issue as to whether costs were properly granted against the applicants for judicial review in the court below, as is the circumstances of the case at bar. However, the consideration of the issue of unreasonableness is relevant. In that regard, Phillips JA identified persistence in seeking leave to obtain judicial review despite consistent rulings in the court that alternative remedies existed elsewhere as a factor constituting unreasonableness. I have set out paragraph [47] of her judgement as this describes the context for her conclusion:

> "[47] Rule 56.15(5) of the CPR states the general rule that no order for costs may be made against an applicant for an

> administrative order (such as an application for judicial review), unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application (although this rule not [sic] specifically included in rule 1.1(10) of CAR). Nonetheless, guided by the powers of the Court of Appeal in rule [2.14] of CAR, in spite of rule 56.15(5) of the CPR, in my view, the circumstances of this case would warrant an order for costs against the applicants. There has been persistence in seeking leave to obtain judicial review, despite consistent rulings of the courts that an alternative remedy exists in the Parish Court, and also in the face of an application by the applicants to obtain similar relief before that court, where such relief ought initially to have been pursued, and where a date to determine the issues joined has now been set. Yet, the applicants have nonetheless pursued this application before this court, presumably 'hedging their bets', so to speak, which this court ought not to encourage. Therefore, in my view, costs ought to be awarded to FID to be taxed if not agreed."

[151] The consideration applied by the court in **Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 12)** [2006] EWHC 816 (Comm) to the issue of awarding indemnity costs is also helpful. In that case Tomlinson J, at paragraph 25(5), used words such as speculative, weak, opportunistic or thin in describing what may be unreasonable. Although this is not a case in which indemnity costs are being considered, the principles are somewhat similar. In particular, where there is some conduct or circumstance which takes the case out of the norm and the test being one of unreasonableness. One such circumstance which would take a case out of the norm and justify an order for indemnity costs is "[w]here the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched" (see paragraph 25(8)(e)).

[152] The case of **Mount Cook** which was relied upon by the full court in **Danville Walker** is also noteworthy. In **Danville Walker**, the full court, while considering a renewed application for leave to apply for judicial review, referred to the principle of

exceptional circumstances, as set out by Auld LJ in **Mount Cook** as helpful in regard to assessing unreasonable conduct in claims for judicial review.

[153] In **Danville Walker** Sykes J (as he then was), at paragraph [18] of the judgment, adopted the following proposition from **Mount Cook** as to when exceptional circumstances may exist:

> "With this is mind given and given the importance of judicial review and its special place in our democracy I am in favour of a rule that says that costs should not generally be awarded against an unsuccessful applicant for leave in the absence of exceptional circumstances. Of the factors to be considered when deciding whether exceptional circumstances exist identified by Auld LJ ([76]), I would adopt proposition number five which states:
>
> *Exceptional circumstances may consist in the presence of one of more of the features in the following non-exhaustive list:*
>
> *(a) the hopelessness of the claim;*
>
> *(b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness;*
>
> *(c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends – a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and*
>
> *(d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.*"

[154] In relying on **Danville Walker**, Mr Goffe has submitted that none of these factors, as adopted in that case, would apply in the case at bar, and in any event, Iberostar was successful in obtaining one of the orders requested. He has also

reminded the court that Iberostar had been granted permission to apply for judicial review. However, both Ms Jarrett and Mr Eccleston have contended that Iberostar acted unreasonably in pursuing certain aspects of the claim, based on the existing law. The approach of Ms Jarrett and Mr Eccleston does have merit, as rule 56.15(5) does not bar the court from a consideration of unreasonableness if leave is granted to proceed to judicial review. However, the fact that leave has been granted may be of some relevance in the exercise of the court's discretion as to whether costs should be granted against the applicant. Certainly, Iberostar could not be said to be unreasonable in the sense of persisting with the application as described by Phillips JA in **Fritz Pinnock** as well as the factors set out in **Mount Cook** (see paragraph [153] above, in particular, circumstance (b).

[155] In assessing this issue, it is useful also to have regard to rule 64.6 of the CPR and in particular, factors as set out therein, when an order is being considered against the general rule. These include whether a party has succeeded on particular issues, even if not successful in the whole of the proceedings (rule 64.6(4)(b)); as well as the reasonableness in pursuing an allegation (rule 64.6(4)(d)(i)), and/or raising a particular issue (rule 64.6 (4)(d)(ii)).

[156] I will, therefore, be guided by the various factors set out above in assessing whether costs should be awarded against Iberostar.

[157] The actual wording of rule 56.15(5) of the CPR is of importance. It circumscribes consideration of the costs against the general rule (for administrative orders) in circumstances where the applicant has acted unreasonably **in making the application or in the conduct of the application** (as compared to rule 64.6(4)(a) which invites the court to consider the conduct of the parties, **before and during the proceedings**). The question for determination is whether Iberostar acted unreasonably, in making the application or in the conduct of the application.

[158] The important starting point, therefore, contrary to Mr Eccleston's passionate and exuberant submissions on what he regarded as the inequitable conduct of Iberostar (prior to and during the proceedings before the IDT), is the actual making of the application; and further assessment may be made as regards Iberostar's conduct in pursuing the application before the learned judge. In other words, was it unreasonable for Iberostar to have made the application for judicial review, bearing in mind the factual circumstances and settled law; or was the conduct of Iberostar unreasonable during the judicial review hearing?

[159] In that regard, Mr Goffe is correct that there is no evidence of unreasonableness by Iberostar before the learned judge in the conduct of the judicial review. This is because there is a nothing on the record or as set out in the judgment of J Pusey J, on which this court could conclude that Iberostar acted unreasonably in its conduct while pursuing the application. The assessment as to unreasonableness will therefore be restricted to the making of the application and in particular, the hopelessness of the claim and/or pursuit of a particular issue.

[160] Is Mr Goffe correct in his submissions, that, in deciding on whether the claim was hopeless or that it was unreasonable to pursue a particular issue, regard should be had to whether the applicant has had any success? Would this be demonstrative of the fact that the making of the application could not be described as unreasonable in the round? This is a factor for consideration, as per rule 64.6(4)(d) of the CPR. Ultimately, however, that question can only be determined in the particular factual and legal matrix that exists in the case at bar. This issue must be weighed properly, as both the IDT and Mr McLeod have expended costs relevant to the judicial review proceedings.

Can the pursuit of any of the issues be described as unreasonable?

[161] As discussed under ground b, Iberostar's application for judicial review challenged the jurisdiction of the IDT. The learned judge was asked to grant an order of certiorari to quash the decision of the IDT, to hear the industrial dispute relevant to Mr McLeod's suspension. Iberostar complained that the IDT failed to appreciate that the

suspension of a non-unionised worker under section 2 of the LRIDA referred to a disciplinary suspension, not an administrative one, pending an investigation. The learned judge was also being requested to grant a declaration that a suspension pending a disciplinary hearing constituted "non-engagement" under section 2 of LRIDA (see the second and third orders sought in the fixed date claim form and the corresponding grounds under which orders were sought).

[162] In his oral submissions before this court, however, Mr Goffe did not pursue the issue as to whether the worker was unionised or non-unionised, but whether the term 'suspension' included circumstances relevant to Mr McLeod.

[163] I have already determined that the challenge to the IDT to hear Mr McLeod's suspension was jurisdictionally imprudent, based on the plain reading of the LRIDA and the Code. Mr Goffe failed to establish any reasonable basis within the statutory framework to exclude the consideration of Mr McLeod's suspension, bearing in mind the circumstances.

[164] In his submissions before this court, Mr Goffe did seek to distinguish between suspensions due to, for example, natural disasters or a temporary layoff, which would only be applicable to unionised workers. Certainly, Iberostar was not concerned with a suspension of a non-unionised worker due to a pandemic or any other acts of God. In dealing with the issue under ground b, I concluded that, in certain circumstances, a referral by the Minister to the IDT relevant to the suspension of employment of a worker, may be unwarranted or premature. However, circumstances such as those were not the factual matrix that had to be considered by the IDT. The matter of Mr McLeod's suspension required an urgent resolution. It is inexplicable what Iberostar hoped to achieve by this particular challenge. Should Mr McLeod continue on indefinite suspension without pay and without any date for resolution, bearing in mind the framework of the LRIDA and the Code? The litigation of this particular issue could therefore be considered as unreasonable, in face of the existing factual circumstances. He had been suspended without pay for over two years and had never been afforded

any hearing as required by the Code. This was a matter that begged for a timely and swift resolution by the parties either through negotiation, conciliation or a settlement by the IDT.

[165] There was also a challenge by Iberostar as to whether the IDT had jurisdiction to make any award or grant any remedies in relation to a case of suspension. While I have concluded that on a plain reading of the statutory framework, the IDT had the jurisdiction to make a final determination on that issue, I would not conclude that Iberostar acted unreasonably in challenging the extent of the IDT's power in this regard. However, there appears to be an element of prematurity to the challenge, as the IDT also had the jurisdiction to assist the parties in conciliation or negotiating a settlement of the matter.

[166] Further, Mr Goffe has conceded that the issue of remedies (that is, what would be available to the IDT) was never engaged by the parties before the IDT. This is also confirmed by the content of Mr Ferguson's affidavit, which sets out the submissions relied on by Iberostar at the time. In that affidavit, Mr Ferguson merely stated that it was Iberostar's understanding, having participated in conciliation meetings at the Ministry, that Mr McLeod was asking the IDT to reinstate him to his position and/or to grant compensation.

[167] Iberostar requested a declaration from the learned judge that, under the LRIDA, the IDT only had power to award compensation and/or reinstatement in cases of unjustifiable dismissal. The learned judge did indeed grant such a declaration. However, in spite of the fact that Mr Eccleston may have been seeking compensation for Mr McLeod, there is no indication from the notes of proceedings (attached to Mr Ferguson's affidavit and the affidavit of Ms Royette Creary, the assistant secretary to the IDT), that the IDT had concluded or stated that it had any power to order those awards in the matter before them. The chairman of the panel (at page 194 of the record), merely indicated that the IDT had the jurisdiction to deal with suspension of workers, who were not members of a trade union.

[168] The declaration as obtained, while appearing to grant a measure of success to Iberostar, could be described as a pyrrhic victory, as it could not obviate the need for the hearing before the IDT to proceed and there was no indication that the IDT would have been considering any such remedies. The matter had to be resolved, by negotiation, conciliation or by a final determination of the IDT. One would have thought that, at the appropriate time, submissions could have been made on the issue, if the necessity arose. My assessment that the pursuit of this particular issue was premature is thereby fortified. However, any conclusion as to unreasonableness, must be tempered, as the learned judge did grant a declaration regarding certain limits on the jurisdiction of the IDT in relation to a particular category of awards. In that regard, I am not minded to conclude that the pursuit of this issue was unreasonable.

[169] However, Iberostar's challenge to the order of the IDT, that it should proceed first in the presentation of the evidence, was a hopeless cause, right out of the gate. It ought not to have been pursued and could be described as a "colossal waste of time" (**R (Rusbridger and another) v Attorney General**). Iberostar had requested an alternative order, that *certiorari* be granted to quash the decision of the IDT to compel Iberostar to present its case before Mr McLeod's. Section 20 of the LRIDA empowers the IDT to regulate its own procedure and proceedings. The issue is trite and has been pronounced upon in several authorities of this court (see the dictum of Brooks JA at paragraph [13] of **The Industrial Disputes Tribunal v University of Technology Jamaica and the University and Allied Workers Union**; and paragraph [11] of **Mark Leachman v Portmore Municipal Council et al** as well as the dictum of Sinclair-Haynes JA at paragraph [139] of **National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal and Peter Jennings**). Although Mr Goffe's submissions appear to be nuanced, that this was not the typical case of suspension and that the IDT ought to have ruled that Mr McLeod should proceed first, the result of such a challenge could only have failed, as it did, before the learned judge.

[170] In her determination in relation to the challenge to the IDT's decision on its procedure, the learned judge referred to the settled law on the issue. She also took a pragmatic approach as set out at paragraph [45] of her judgment:

> "In the instant case although [Mr McLeod] referred the matter to the IDT, it seems the IDT wished to start with [Iberostar] 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."

[171] Both legally and pragmatically, this particular issue was frivolous and ought not to have been raised for ventilation by the reviewing court. In the round, when this is weighed along with the other issues that were raised, it can be concluded that Iberostar essentially engaged both the IDT and Mr McLeod in costly legal proceedings that could have been avoided.

[172] Since the learned judge erred in awarding costs without giving an opportunity for the parties to be heard, Iberostar does succeed, to that extent, on this ground of appeal. The order of the learned judge should therefore be set aside. However, based on the above analysis and assessment, I am of the opinion that costs should indeed be awarded against Iberostar and that both the IDT and Mr McLeod should be granted two-thirds of their costs below.

[173] In relation to the costs of the appeal, I am of the view that both the IDT and Mr McLeod should be awarded a portion of their costs. This court is guided by rule 1.18(1) of the CAR which incorporates parts 64 and 65 of the CPR. A consideration of rule 56.15(5) is therefore excluded. However, rule 64.6 of the CPR provides that as a general rule, costs should be awarded to a successful party unless there is some good reason to depart from the general rule.

[174] Rule 64.6(4) sets out material factors for consideration in determining who should be liable to pay costs. One of these factors is whether a party has succeeded on a particular issue, even if that party has not been successful in the whole of the proceedings. Iberostar did partially succeed in relation to ground c, however, it has been determined that while the learned judge did err in some respects, those errors did not affect the outcome of the appeal. Iberostar has succeeded also in relation to ground a, to the extent that the learned judge failed to invite submissions and did not set out her reasons for the actual order made.

[175] In the round, taking into consideration the impact of the issues on which Iberostar has had some degree of success, it can be said that the respondents have succeeded on the appeal. The order as to costs should be reflective of this and I would therefore propose that the IDT and Mr McLeod should be awarded two-thirds of their costs of the appeal as a provisional order of the court. However, should any party disagree with the order as to costs, submissions are invited in writing in accordance with the procedure outlined in the final order of the court.

D FRASER JA

[176] I too have read the draft judgment of Straw JA. I agree with her reasoning and conclusion and have nothing to add.

F WILLIAMS JA

ORDER

1. The appeal is allowed in part.

2. Order number 6 of J Pusey J made on 29 November 2019 is set aside and substituted as follows:

   Two-third costs to the Industrial Disputes Tribunal and Mr Marlon McLeod to be agreed or taxed.

3. Two-third costs of the appeal to the Industrial Disputes Tribunal and Mr Marlon McLeod to be agreed or taxed.

4. Should any party disagree with the order as to costs, that party is entitled to file and serve written submissions in that regard within 14 days of the date of this judgment, failing which the order as to costs shall stand.

5. Should submissions in opposition to the order as to costs be filed and served in accordance with order 4 hereof, the parties served with the submissions in opposition are entitled, within 14 days of being served with those submissions, to file and serve submissions in response.

6. The court will thereafter consider and rule on the written submissions.