[2015] JMSC Civ.44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2013 HCV003761

BETWEEN THE CARIBBEAN EXAMINATIONS COUNCIL APPLICANT

A N D THE INDUSTRIAL DISPUTES TRIBUNAL 1st RESPONDENT

A N D GERARD PHILLIP 2nd RESPONDENT

Mr. Emile Leiba and Courtney Williams instructed by Dunn Cox for the Applicant.
Ms. Lisa White instructed by the Director of State Proceedings for the 1st Respondent.

HEARD ON: 7th January 2015 and 17th March 2015.

Judicial Review-Decision of Industrial Disputes Tribunal - Labour Relations and Industrial Disputes Act – Caribbean Examinations Council relying on immunity from legal process – Diplomatic Immunities and Privileges Act – Diplomatic Immunities and Privileges (Caribbean Examinations Council Order) 1998 – Whether IDT engaged in a legal process– Whether immunity restrictive – Whether IDT lacked Jurisdiction

CORAM: Dunbar Green, (Ag.)

Background

[1] This is an application for judicial review of a decision by the Industrial Disputes Tribunal (IDT) which arose from a referral to the IDT by the Minister of

Labour pursuant to section 11 A (1)(a)(ii) of the **Labour Relations and Industrial Disputes Act (LRIDA)**. The reference was in these terms:

> *To determine and settle the dispute between Caribbean Examinations Council (CXC) on the one hand and Mr. Gerard Phillip on the other hand over the termination of his employment.*

[2] Both the CXC and 2nd respondent acceded to the IDT's request for submission of briefs relating to the dispute. However, on 11th March 2013, when the matter came on for hearing, the CXC indicated that it would not participate any further in the proceedings as it was entitled to immunity from any legal process, and consequently the IDT had no jurisdiction over the dispute.

[3] The hearing was adjourned to 13th March 2013, to allow for consultations and further submissions on the question of jurisdiction. On resumption, the CXC was not represented and there was a further adjournment to 18th March, 2013. The CXC was advised that the IDT would proceed ex parte if it failed to attend.

[4] On 18th March 2013, the IDT resumed its sitting and having apparently formed the view that the term "legal process" did not include the IDT process for settling of industrial disputes, proceeded to hear the matter ex parte.

[5] On the evidence which it heard, the IDT came to the conclusion that the 2nd respondent had been unjustifiably dismissed and ordered his reinstatement.

Order for Judicial Review

[6] On 26th September 2013, McDonald Bishop, J. (as she then was) granted leave to the applicant to seek judicial review of the 1st respondent's award dated May 17, 2013. This award was also stayed, pending the outcome of judicial review.

The Fixed Date Claim Form

[7] The applicant, by way of Fixed Date Claim Form, filed 1st October 2013, seeks orders as follows:

(1) An order of Certiorari to quash the 1st respondent's award dated May 17, 2013, finding that the 2nd respondent's dismissal from the employment of the claimant was unjustified.
(2) There shall be a stay of the 1st respondent's said award pending the final determination of judicial review proceedings.

[8] At the commencement of the hearing the Fixed Date Claim Form was amended to include a further order viz: A declaration that the applicant is not subject to the jurisdiction of the 1st respondent.

[9] The grounds on which the applicant is seeking the orders are as follows:

1. There is an error of law on the face of the 1st respondent's award dated May 17, 2013, as it was issued in the absence of jurisdiction, as the applicant, in accordance with the provisions of the **Diplomatic Immunities and Privileges Act** and the *Diplomatic Immunities and Privileges (Caribbean Examinations Council) Order 1998* is immune from the process set out under the **Labour Relations and Industrial Disputes Act** from which the 1st respondent derives jurisdiction.

2 This Honourable Court has jurisdiction to grant the orders being sought pursuant to Rule 56.2(1) of the Civil Procedures Rules 2002 (as amended).

3. The applicant is directly affected by the award handed down by the 1st respondent, as the applicant has been directed by the 1st respondent to re-engage the services of the 2nd respondent.

4. Further and/or in the alternative, the 1st respondent's award is unreasonable and/or contains an illegality given the circumstances of the case.

5. There is no alternative form of redress for the matter as it relates to the dispute between the applicant, and the 1st respondent, established by the **Labour Relations and Industrial Disputes Act,** and the 2nd respondent concerning the award handed down.

[10] Counsel made copious submissions which I will now summarise.

Applicant's Submissions

[11] Mr. Leiba asserts for the applicant that there is no ambiguity in the language used in Article iii (i) and (ii) of the *Protocol on legal capacity, privileges and immunities* and the *Diplomatic Immunities and Privileges (Caribbean Examinations Council) Order* (The Order). It is clear from those provisions that the applicant should not be the subject of the "legal process" which has been adopted by the IDT.

[12] A public decision-making body will not act lawfully if it acts ultra vires or outside the limits of its jurisdiction. Such a body will lack jurisdiction if it has no power to adjudicate upon the dispute or make the kind of order in question, or if having the power to adjudicate, it abuses the power, acts in a manner which is procedurally irregular, or, in a ***Wednesbury*** sense, unreasonable, or commits any other error of law (***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 A.C. 147]).

[13] Mr Leiba submits that the IDT, in deciding to proceed with the hearing, had attempted to interpret an agreement entered into between the government of Jamaica and the CXC. It had no jurisdiction to do so. It had also erred in the interpretation which was given to the term "legal process" and in fact had no jurisdiction to have been interpreting the **Diplomatic Immunities and Privileges Act** and the Order.

[14] Where a public decision-making body makes an error in law in reaching a decision, the court may quash the decision (***Anisminic***, p.171). The error of law must be an error in the actual making of the decision which affects the decision itself. (***R v Lord President of the Privy Council ex p Page*** [1993] AC 682, 701]).

[15] In carrying out the judicial review, the court has a duty to confine itself to the question of legality. That is, whether the authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, or reached a decision which no reasonable tribunal could have reached or abused its powers.

[16] The grounds for judicial review have been conveniently classified as "illegality" : the decision maker must understand correctly the law that regulates his decision making power and must give effect to it; "irrationality" : namely the ***Wednesbury*** unreasonableness; and "procedural impropriety" : which depends upon the subject matter of the decision, the executive functions of the decision maker (if the decision is not of an administrative tribunal) and the particular circumstances in which the decision came to be made (**Halbury's Laws of England**, 4th ed. Vol (1) para 59).

[17] The tribunal therefore had no jurisdiction to make the award in the first place.

1st Respondent's Submissions

[18] The Director of State Proceedings (DSP) has taken no issue with the status of the CXC as an international body and that it is immune from every form of legal process except in so far as it has expressly waived its immunity.

[19] In its written submissions, the DSP states that disputes submitted to the IDT "are subject to a form of legal process by virtue of the statutory role of the Tribunal and its power to make awards with which non-compliance results in an offence under section 12 of the Act". However, in making her oral submissions, Miss White

appeared to have contradicted that position when she stated that “it is arguable that the term legal process is not referable to the IDT”.

[20] Miss White also submits, in response to Mr. Leiba, that it is not accurate to say that the IDT cannot interpret sources of law. There is no authority from this jurisdiction which says it can only interpret the Labour Relations Code and contracts.

[21] The DSP asserts that there is a tendency in various jurisdictions to uphold the jurisdictional immunity of international bodies. In employment cases, there is generally an absolute immunity in respect of acts that are carried out to achieve the purpose of the international body. Such acts are regarded in international law as *acta iure imperii* as opposed to *acta iure gestionis* or private acts.

[22] In support of this submission, the DSP cites the cases of (1) ***Giovanni Porru v Food and Agriculture Organisation of the United States*** (report extracted from the United Nations Juridical Yearbook 1969, Part Three, Judicial decisions on questions relating to the United Nations and related inter-governmental organisations, Chapter VIII – Decisions of national tribunals, p.238); (2) ***Marvin R. Broadbent et al, Appellants v Organisation of American States et al, Appellees*** 628 F. 2d 27, 202 US. App. D.C. 27 (3) ***Tuck v Pan American Health Organisation*** 668 F. 2d 547, 215 US. App. D.C. 201; and (4) ***Manderlier v United Nations and Belgian State*** (report extracted from the United Nations Juridical Yearbook 1969, supra p. 236).

[23] A contrary position has emerged in the European Court of Justice (ECJ) which has decided cases based on a principle that an international organisation will not be entitled to immunity where there is no internal dispute resolution mechanism, appeals process or alternative forum available to the applicant. The applicant would be deprived of access to a court, thereby violating a fundamental human right. The cases cited are: (1) ***Beer and Regan v Germany*** (application No. 28934/95) Judgment Strasbourg 18th February 1999; and (2) ***Waite and Kennedy v Germany*** [1999] ECHR 13.

[24] Referencing the ECJ decisions, the DSP submits that the court might determine the circumstances in which jurisdictional immunity should prevail, and particularly whether such immunity ought to prevail in the absence of alternative dispute resolution mechanisms within an international organisation.

[25] Such considerations came up for examination at a meeting of officials on Institutions and Associate Institutions**,** March 22nd to 24th 2010, at which it was resolved that legal recourse should be provided to regional civil servants where there are employment disputes, to "…ensure that the fundamental right of citizens in the Community to adequate access to justice is protected and given expression."

[26] Similarly, the IBRD has established a World Bank Administrative Tribunal in recognition of the Universal Declaration of Human Rights which requires that, wherever administrative power is exercised, a machinery should be available to accord a fair hearing and due process to an aggrieved party in cases of disputes. (Memorandum to the Executive Directors from the President of the World Bank, 14th January 1980, Doc. R80-8, 1 et seq).

[27] The DSP submits also that the CXC has failed to provide internal procedures and/or have fair proceedings. This has violated rights enshrined in the Jamaican Constitution and the obligation to uphold the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights. In the absence of such procedures the employee's human rights would outweigh the immunity.

[28] Miss White submits further that aspects of Mr. Cumberbach's affidavits of 30th September 2013 and 9th July 2014 contained evidence which CXC had not led before the IDT and should therefore be redacted. I did not uphold that submission for reason that the contents were not additional to what was already before the IDT or were in response to Mr. Clinton Lewis' affidavit of 5th May 2014.

[29] The 2nd respondent appeared, unrepresented, and made no submissions.

Issues for Determination

[30] The issues to be decided are: (i) whether the term "legal process" in the Order, includes the proceedings and procedures for settling industrial disputes pursuant to the **LRIDA**; (ii) whether there is a limitation on the scope of immunity from "legal process"; (iii) whether the CXC waived its immunity; and (iv) whether it was an error in law for the IDT to have embarked on proceedings against the CXC.

Analysis

The Caribbean Examinations Council (CXC)

[31] The CXC was established in 1972 under the *Agreement Establishing the Caribbean Examinations Council*, of which Jamaica is a signatory, along with fifteen other Caribbean states.

[32] Article V (5) of the Agreement empowers the Council to conclude agreements with participating governments relating to, inter-alia, "privileges and immunities to be recognised and granted to it **in respect of its Administrative and Operational Centres**." (My emphasis).

[33] The Agreement also makes provision for a protocol on legal capacity, privileges and immunities (Article VIII (2). That protocol requires the Council to "make appropriate provision for the settlement of…disputes arising out of contracts and other disputes of a private law character to which the Council is a party." (Part VI Article XIV (1)(a).

[34] Article III (1) of the Order provides:

> *The Council, its property and assets, wherever located and by whomsoever held, shall* enjoy immunity from **every form of legal process** except *in so far as in any particular case it has* ***expressly waived*** *its immunity. No waiver of immunity shall extend any measure of execution. (My emphasis).*

[35] Article III(1) of the Order was made pursuant to section 6 (2) (a) of the **Diplomatic Immunities and Privileges Act** which empowers the Minister to

confer immunities and privileges on specified international organisations. Section 6 in so far as is relevant provides, inter-alia:

> 6.-(1) This section shall apply to any organisation declared by the Minister by order to be an organisation the members of which are sovereign powers or the government or governments thereof.
>
> (2) Subject to subsection (3), the Minister may from time to time by order –
>
> (a) provide that any organisation to which this section applies…shall, to such extent as may be specified in the order, have the immunities and privileges set out on Part I of the Second Schedule…
>
> (3) Any order made by the Minister pursuant to subsection (2)—
>
> (a) may, notwithstanding anything contained in subsection (2), confer on the organisation…such immunities and privileges **as are required to give effect to any international agreement in that behalf to which Jamaica is a party.** (My emphasis).

[36] Part I of the Second Schedule to the Order provides for "immunity from suit and legal process" and "[the] like inviolability of official archives and premises occupied as offices as is accorded in respect of the official archives and premises of the head of mission." (ss. 1 and 2, respectively). Under Article 30 the papers and correspondence of a diplomatic agent enjoy inviolability save in the case of, inter-alia, "an action relating to any professional or commercial activity exercised by the diplomatic agent…outside his official functions." (Article 31 (1) (c) of the First Schedule).

[37] The import and purpose of Article V (5) of the Agreement together with Article III (1) of the Order, are to ensure "the smooth and efficient performance of diplomatic duties", consistent with the preamble to the *Vienna Convention on Diplomatic Relations.* In other words, the immunity is granted on the basis of functional necessity, in respect of the CXC's Administrative and Operational Centre in Jamaica. I will return to the scope of this immunity later in this judgment.

The Industrial Disputes Tribunal

[38] For purposes of this case, the relevant provisions of the **LRIDA** are sections 7, 12(4)(c), 16A, 17(1), 17(2), 18(1)(a), 18(1)(b), 18(2) and 20.

[39] The IDT is established under section 7 of the LRIDA and is conferred with the power to "hear an industrial dispute referred to it for settlement" (s.16A).

[40] Section 17 (1) gives the tribunal the power to summon witnesses to attend and give evidence or to produce any paper, book, record or document in the possession or under the control of such person. The tribunal is also empowered under section 17(2) to administer oaths or to take the affirmation of any witness appearing before it.

[41] A witness is "bound to obey the summons served upon him" (s.18(1)(a); and in respect of evidence or the production of documents is entitled to "the same right or privilege as he would have before a court." (s.18(1)(b).

[42] Section 18 also imposes criminal sanction for non-compliance, viz:

> (2) Any person who—
>
> (a) without sufficient cause, fails or refuses to attend before the Tribunal…in obedience to a summons…or fails or refuses to produce any paper, book, record or document…or
>
> (b) being a witness, leaves the Tribunal…without the permission of the Tribunal…or
>
> (c) being a witness, refuses, without sufficient cause to answer any question put to him by or with the permission of the Tribunal…or
>
> (d) wilfully obstructs or interrupts the proceedings of the Tribunal…
>
> Shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding fifty thousand dollars.

[43] The procedure and proceedings of the IDT are regulated as it thinks fit (s. 20) and its award in respect of any industrial dispute referred to it for settlement "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." (s12 (4) (c).

[44] The IDT can therefore be said to be an expert administrative agency which has wide powers to adjudicate on labour disputes and make final determinations on labour relations, obligations and rights as between employers and employees. Rattray, P. described it as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica." (***Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Green*** SCCA No. 66/97 p.12).

[45] Delivering the lead judgment of the Court of Appeal in ***Holiday Inn Sunspree Resort*** *v* ***The Industrial Disputes Tribunal Anors*** [2010] JMCA Civ. 9, Harris, J.A. stated that the IDT's decisions are "unassailable" and "unfettered" save and except on a point of law (para 16). Her ladyship referenced ***R. v. Lord President of the Privy Council ex parte Page*** [1993] AC 682 in formulating the proposition that the IDT "…does not enjoy absolute immunity from a review of its decision by a court of law…[and] its decision is rebuttable notwithstanding the presumption of finality and conclusiveness thereof." (Para 16).

[46] I understand the authorities to be saying that the IDT is unfettered, provided it directs itself correctly in law. It is against this background that I now turn to the scope of the court's supervisory powers in an action for judicial review.

The Standard of Judicial Review

[47] In ***Council of Civil Service Unions v. Minister for the Civil Services*** [1985] A.C. 374,410 Lord Diplock classified judicial review under three heads, illegality, irrationality and procedural impropriety. His Lordship explained the classifications in these terms:

> *By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par*

> *excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"* ***(Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*** *[1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…*
>
> *I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.*

[48] In ***The Industrial Disputes Tribunal v. University of Technology Anors and Others*** [2012] JMCA Civ. 46, para. 24, Brooks JA, in the course of discussing the role of the review court, approved the following definition of judicial review by the learned editors of **The Caribbean Civil Court Practice** 2011, p. 431:

> Judicial review…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.

[49] The purpose of the court's intervention, as articulated by the Privy Council, is "to ensure that the powers of public decision-making bodies are exercised lawfully." (**R. v. Lord President of the Privy Council ex parte Page** [1993] AC

682, 701). In other words, the role of the court is to determine whether the public body acted within the parameters that are established by the legislature.

[50] In **Anisminic** Lord Pierce said:

> *…Tribunals must…confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of enquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to enquire and decide as set out in the Act of Parliament. (p*.233).

[51] His Lordship continued:

> *Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry.*

[52] The learned authors of **De Smith's Judicial Review**, 6th ed, describe the "pure theory of jurisdiction" as follows:

> *…Jurisdiction means authority to decide…The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and is determinable "at the commencement, not at the conclusion, of the enquiry*" (para 4-010, citing ***R v Bolton*** (1841) 1 Q.B. 66 at 74).

[53] **De Smith's** continues:

> *A preliminary or collateral question is said to be one that is collateral to the "merits" or to "the very essence of the enquiry"; it is not "the main question which the tribunal have to decide". Thus a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office…but it has no implied jurisdiction to entertain a claim for reinstatement or*

damages for wrongful dismissal, and it will exceed its jurisdiction if it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters…

[54] I have distilled from these authorities that in this case, the court should concern itself only with the legality of the IDT's action. The role of the court is to interpret the **LRIDA**, the **Diplomatic Immunities and Privileges Act** and the Order to decide whether at the commencement of proceedings the IDT had authority to decide the matter before it. If I find that by embarking on the hearing, the IDT acted contrary to the statutory provisions or exceeded its jurisdiction, the decision under review will be an unlawful administrative action and must be quashed.

[55] I now turn to the question of whether it was an error in law or illegality for the IDT to have embarked upon resolving an industrial dispute which involved the CXC. It is necessary at the outset to decide the meaning of "legal process" in the **Diplomatic Immunities and Privileges Act** and the Order and whether an IDT proceeding is a legal process.

The Meaning of "legal process"

[56] Borrowing from, and at the risk of over-simplifying what is referred to as the "legal process school", I define "legal process" as a structure of decision-making processes, of which quasi-judicial decision-making is one form. See generally "*The Legal Process School Central Tenets*"- http//cyber.law.harvard.edu/bridge/LegalProcess/essay2.htm)

[57] A quasi-judicial body is one with "authority or discretion to decide upon matters affecting other persons' rights and interests" (**Halsbury's Laws of England** 5th Ed. Vol. 20, para. 614). Even though they have to decide questions and must do so judicially, they are not a court (ibid, 607).

[58] Curzon, **Dictionary of Law**, 1994, p387, defines this type of body as being "…outside the hierarchy of the courts with administrative or judicial functions."

[59] In the specific case of the IDT, it is a body charged by Parliament to carry out decision-making tasks based on its functional competency. It is vested with quasi-judicial powers and is part of the administrative legal process (**Commonwealth Caribbean Law and Legal Systems**, 2nd ed. 346).

[60] On my interpretation, the objective of the **LRIDA** is to replace a judicial process (decision-making tasks allocated to the courts based on their functional competence) with an administrative process (decision-making tasks allocated to the IDT based on its functional competence). Both are legal processes, only that the quasi-judicial, industrial relations legal process, is the responsibility of an inferior body. (See generally "*The Legal Process School" supra*)

[61] The Canadian Supreme Court in ***Amartunga v Northwest Atlantic Fisheries Organisation*** [2013] 3 S.C.R. 866, in a note to paragraph 30 of the judgment, approved the definition of legal process by the Canadian Court of Appeal in **Selkirk, Re** (1961), 27 D.L.R. (2d) 615 (Ont. C.A.) viz:

> *As a legal term, process is a word of comprehensive signification. In its broadest sense it is equivalent to 'proceedings' or 'procedure' and may be said to embrace all the steps and proceedings from its commencement to its conclusion. 'Process' may signify the means whereby a Court compels a compliance with its demands. Every unit is of course, a process, and in the narrowest sense the term 'process' is limited to writs or writings issued or out of a Court under the seal of the Court and returnable to the Court.*

[62] Although this definition was used in relation to the courts, it is broad enough, in my view, to cover any and every form of decision-making process affecting rights between parties, encompassed by the industrial relations processes of the IDT. This broad, rather than narrowly confined definition of legal process, is necessary, having regard to the objective of international organisation immunity.

[63] Accordingly, I find that the phrase "legal process", in the **Diplomatic Immunities and Privileges Act** and the Order, applies to the IDT decision which is under review.

[64] If the interpretation were otherwise, I could envisage no logical or rational reason why the legislature would have intended that the CXC's immunity should not apply to the IDT, whilst excluding the Supreme Court's jurisdiction. This would be an absurdity which Parliament clearly could not have intended.

[65] Having decided that the proceedings of the IDT is a process to which the CXC's immunity applies, I now enquire into the merits of the DSP's submission that a restriction may be placed on the immunity.

Is there a limitation on the scope of Immunity from "legal process"?

[66] As I said before, *The Vienna Convention on Diplomatic Relations* is incorporated in the first schedule to the **Diplomatic Immunities and Privileges Act.** The preamble to the Convention makes clear its function, which is to ensure the smooth and efficient performance of diplomatic duties in the interest of comity and of friendly relations between sovereign nations, irrespective of their differing constitutional and social systems. (See generally "The Function of State and Diplomatic Privileges and Immunities in International Cooperation", Fordham International Law Journal Volume 23, Issue 5, 1999, Article 3).

[67] In **Akehurst's Modern Introduction to International Law**, 7th Ed., 129, it is reasoned that if there were no provision for immunity from all legal process then the international body would be at risk of having its functions interfered with by "…a combination of eccentric litigants and biased courts." It is also for that reason that its premises, assets, archives and documents are inviolable. The rationale encompasses the staff of an international body being exempt from income tax on their salaries.

[68] In ***Amartunga***, the Supreme Court of Canada had to decide whether there was an "international human rights" exception to international organisation immunity. The Court stated that "…international human rights conventions that

have not been adopted by Parliament…cannot form the basis for an exception to international organization immunity." (supra, para 26).

[69] The court rejected the argument that Canadian labour and employment laws could be enforced against an international organization. Those laws, the court said, reflected "Canadian socio-political attitudes towards the employment relationship" and the decision to locate NAFO's Secretariat in Canada did not mean the contracting parties had "…consented to the imposition of Canadian law." (ibid, para 56).

[70] I find the decision of the Canadian Supreme Court to be persuasive. I am also inclined to its decision in ***Re Canada Labour Code***, [1992]2 S.C.R. 50, where a functional interpretative approach led to a conclusion that the management of employees of an international organization, for example the right to dismiss an employee for cause, goes to the heart of the workplace's operations and is therefore immune from Canadian law. (ibid, para 74).

[71] Whilst I acknowledge that there are other legal views and international authority on the meaning and scope of legal process, it appears to me that support for or against the proposition that international organisation immunity extend to employment contracts is dependent on whether certain treaties have been incorporated in domestic law or can be applied due to accession. Several of those authorities were referenced by counsel, and conveniently grouped jurisdictionally in ***Amartunga.*** They are summarized as follows***:***

Canadian and American Decisions

[72] In **Attorney General of Canada v. Lavigne** (1997), 145 D.L.R. (4th) 252 (Que. C.A.) the Quebec Court of Appeal concluded that "diplomatic rights, privileges and immunities, by virtue of public international law and the conventions to which Canada has adhered, take precedence over the jurisdictional sensitivities of internal courts of competing jurisdictions." (***Amartunga*** , para. 41).

[73] The Quebec Superior Court and the Quebec Court of Appeal in **Trempe v. Assoc. Du Personnel del' OACI**, 2005 QCCA 1031, found that ICAO enjoyed immunity from an employee's lawsuit. (ibid, para. 42).

[74] The U.S. Court of Appeals in ***Mendaro v. World Bank*** ((1983), 230 U.S. App. D.C. 33) stated that international organization immunity from employment suits is an accepted doctrine of customary international law which , inter-alia, "…is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory" and justified because " [the] sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide." (ibid, para. 43).

[75] The Canadian Supreme Court noted, in reference to ***Mendaro,*** that a distinction needed to be made between commercial transactions with the outside world in which the international organization could choose to waive its immunity and " internal operations, such as [the] relationship with employees" for which there was no waiver of immunity since to do so would interfere with the functioning of the international organization. (ibid, para. 46).

[76] The New York District Court said in ***Boimah and United Nations General Assembly*** , (1987) 664 F. Supp. 69, p.3 (E.D.N.Y.) that "case law is clear that an international organization's self regulation of its employment practices is an activity essential to the fulfilment of its purposes and thus an area to which immunity must extend***."*** (ibid, para. 45).

[77] In ***Broadbent v OAS*** 628 F.2d 27 (D.C. Cir. 1980) the District Court held, inter-alia " the relationship of an international organization with its internal administrative staff is non-commercial , and absent a waiver, activities defining or arising out of that relationship may not be the basis of an action against the organization, regardless of whether international organisations enjoy absolute or restrictive immunity." (para. 32).

[78] The court had said earlier that "the employment by…an international organization of internal administrative personnel…is not properly characterized as "doing business". (para. 26).

[79] The court observed that "[denial] of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and the decisions of international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively". (para. 31).

[80] In a note to the judgment, reference is made to an observation by the learned authors of **M.B. Akhurst, The Law Governing Employment in International Organisations** 12 (1967), that:

> *…the special nature of the law governing employment in international organisations, closely linked as it is with the delicate questions of administrative policy, makes municipal tribunals totally unsuitable to deal with it…There is therefore a vacuum which needs to be filled by the organisations themselves. The creation of an independent body, empowered to make binding decisions in legal disputes between an organization and its staff, is by no means an altruistic gesture from the organisation's point of view; without it, officials might suffer from a sense of injustice which would impair the smooth running of the Secretariat.* (para. 31 n. 27).

[81] **Broadbent** was cited with approval in ***Ronald Tuck v Pan American Health Organisation, et al*** *ed* 668 F.2d 547(D.C. Cir. 1981)

[82] In another wrongful discharge case, **Donald v Orfila**, 618 E. Supp. 545 (D.D.C. 1985), aff'd per curiam, 788 F. 2d 36 (D.C. Cir. 1986), the action was brought against the OAS Secretary General. The District Court concluded, inter-alia, that the termination of the plaintiff "unquestionably [related]" to official functions. (***The World Bank Legal Review***, Nov 4, 2011 at p. 143).

[83] Sixteen years earlier, the Supreme Court of Chile had made a similar ruling in a case involving the Economic Commission for Latin America (ECLA). By virtue of Article II, section 2 of the Headquarters Agreement between Chile and the Economic Commission for Latin America, ECLA was recognized as having "immunity from legal process…" (Reported in **The United Nations Juridical Yearbook** 1969, 237-238).

[84] In a judicial review matter decided 8th November 1969, The Supreme Court of Chile held that an action which was brought in a labour court against the ECLA, in relation to a salary dispute, "…was not one of the cases in which, according to the principles of international and the provisions of the Vienna Convention on Diplomatic Relations…immunity from civil jurisdiction [did] not apply." (ibid).

[85] The court also stressed that the provision in the agreement was merely a specific application of Article II, section 2 of the Convention on the Privileges and Immunities of the United Nations, which had been ratified by Chile.

[86] In the circumstances, the Supreme Court of Chile set aside a summons which the Labour Court had served on the Secretary General of ECLAC, on the grounds that the Labour Court was not competent to try the suit.

English Decisions

[87] ***Mukoro v. European Bank for Reconstruction and Development and Another***, [1994] I.C.R. 897 (UKEAT), is a decision of the English Employment Appeals Tribunal in which, at page 7, Mummery J. recognized that if the ERBD enjoyed immunity, the complainant would have no remedy with respect to a breach of fundamental rights, but said that the lack of such remedy can be justified on the basis of an overriding public policy or interest. (***Amartunga***, supra, para. 47).

[88] Mummery J. also provided a similar policy explanation for international organization immunity to that which was stated in ***Mendaro***; namely, that immunity may be justified on the ground that it is necessary for the fulfilment of the international organization's purpose, the preservation of independence and

neutrality from the host state's control, and uninterrupted exercise of its multinational functions through its representation. (ibid, para. 48).

[89] In ***Bertolucci v. European Bank for Reconstruction and Development***, [1997] EAT/276/97 (LexisNexis), Judge Hull of the Employment Appeal Tribunal, citing ***Mukoro,*** concluded that "the substantive proposition that national courts are under an obligation to ensure that individuals have a right to an effective remedy to enforce and protect their rights under European Community law, have no application." (ibid. para 49).

[90] The judge rejected the claimant's reference to various international human rights treaties, including the Universal Declaration of Human Rights, International Covenants of Human Rights, and the European Convention on Human Rights. He concluded that the fact of the ERBD's headquarters being in the United Kingdom did not mean that its staff was entitled to rights under European Community law, or that the immunity granted to the ERBD should be construed in a manner consistent with European Community law. (ibid).

[91] In ***Jananyagam v. Commonwealth Secretariat,*** Appeal No. UKEAT/0443/06/DM, Judge Longstaff of the Employment Law Tribunal, at paragraph 29 of the decision, considered the question of whether the lack of an internal remedy violated Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* which guarantees a right to access a court. The court concluded that a claim for immunity is not generally a disproportionate breach of Article 6(1)94 and that the assessment of the disproportionate analysis must take into account the extent of the disadvantage suffered in "practical terms". (ibid para. 50).

[92] The House of Lords in ***Holland v. Lampen – Wolfe Holland*** [2000] 3 All E.R. 833 (H.L.), confirmed that Article 6 of the European Convention provides procedural protection, but does not in itself provide jurisdiction where such jurisdiction is not provided pursuant to international law. Millett, J. said that "Article 6 forbids a contracting state from denying individuals the benefits of its power of

adjudication; it does not extend the scope of those powers." (p. 847, referenced in ***Amartunga*** , para. 51).

[93] In ***Entico Corp. Ltd. v. United Nations Education, Scientific and Cultural Organization*** [2008] I C.L.C. 524 (Q.B.), the court considered whether UNESCO's immunity and Entico's lack of remedy violated Entico's rights under Article 6(1) of the European Convention. At paragraph 19 of the judgment, the court stated that "[it] would be implausible that when the parties drafted and acceded to the ECHR, that they intended to place themselves in violation of their existing international obligations which required them to recognize and to give effect to a broad and unqualified jurisdiction on immunity enjoyed by each specialized agency."(ibid, para. 53).

[94] At paragraph 27 of the judgment, the court analyzed the decision in ***Waite and Kennedy v Germany*** [1999] ECHR 13 and pointed out, inter-alia, that the court in that decision "[did] not approach the matter that it is a prerequisite of Article 6(1) to be compatible with organizational immunity that the organization provide an alternative forum for dispute resolution" and "[was] only concerned with the obligations an ECHR state owed to other ECHR states." (ibid).

[95] The House of Lords in ***Maclaine Watson & Co Ltd v International Tin Council*** [1989] 3 WLR 969, was concerned with whether the ITC had waived its immunity by entering a contract which provided that it would "…irrevocably submit to the non-exclusive jurisdiction of the High Court of England and consent to the giving of any relief and/or the issue of any process for enforcement or otherwise against [it]." (ibid para. 54)

[96] The case provides insight in how the English courts interpret treaty law. At page 979 of the judgment, Templeman L.J. said that "…*judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty."*

[97] His Lordship continued, at page 984: *"Public international law cannot alter the meaning and effect of United Kingdom legislation… The courts of the United Kingdom only have power to enforce rights and obligations which are made enforceable by [the Order]"*

[98] At page 1002 of the judgment, Lord Oliver of Aylmerton said:

> *Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.*

[99] Evidently, the English courts have not recognised a universal application of European treaty law. Their attitude, made clear in ***Jananyagam***, and adopted by the Canadian Supreme Court in ***Amartunga,*** is that European principles are to be "adapted" and "not applied by rote".

[100] More importantly, these American, Canadian and English cases establish beyond doubt that employment matters are *jure imperii,* and therefore covered by its immunity. I find these decisions to be persuasive for purposes of the instant case, even as I keep in mind Brooks JA's observation in ***IDT v University of Technology***, that the statutory regime in England is different from that established by the LRIDA (para 37).

European Decisions

[101] In ***Giovanni Porru v Food and Agriculture Organisation of the United Nations*** (referenced in **The United Nations Juridical Yearbook** 1969, 238-239), the Rome Court of First Instance (Labour Section) made a distinction between the private law activities of an international organization, which it carries out on an

equal footing with individuals, and its public law activities by which it pursues its specific purposes. The appointment of staff, the court held, falls in the category of public law activities over which Italian courts have no jurisdiction. The court dismissed the action for lack of jurisdiction because "…the acts by which an international organization arranges its internal structure fall undoubtedly in the category of acts performed in the exercise of its established functions and [in that] respect therefore the organization enjoyed immunity from jurisdiction." (ibid).

[102] In a decision of 15th September 1969, the Brussels Appeals Court, in ***Manderlier v United Nations and Belgian State*** (ibid, p. 236), held that the immunity from every form of legal process granted to the United Nations under the Convention on the Privileges and Immunities of the United Nations was unconditional and not limited by, inter-alia, article 10 of the *Universal Declaration on Human Rights* or by Article 105 of the *United Nations Charter*.

[103] The Appeals Court considered that Article VIII, section 29 of the *Convention on the Privileges and Immunities of the United Nations* states that the UN "shall make provisions for appropriate modes of settlement of…disputes of a private law character to which the United Nations is a party" and that Article 10 of the *Universal Declaration on Human Rights* entitles everyone to a hearing by a tribunal. The court concluded that the Declaration could not alter the rule of positive law constituted by the principle of immunity from every form of legal process. (ibid).

[104] The Brussels Appeals court also rejected arguments that limits be placed on the immunity, since the signatories of the Charter had defined the necessary privileges and immunities and the courts would be exceeding its authority if they were to arrogate to themselves the right of determining whether the immunities granted to the United Nations by that Convention were necessary. (ibid pp.236-237).

[105] More recently, the European Court of Justice applied the test of proportionality, as a restriction on the scope of international organisation immunity.

[106] ***Beer and Regan v Germany*** [1999] ECHR 6 concerned an industrial dispute which the applicants instituted against the European Space Agency (ESA),

which was established under the Convention for the Establishment of a European Space Agency ("ESA Convention") of 30 May 1975. The applicants' case was dismissed by the Labour Court on the basis of ESA's diplomatic immunity. An appeal was made to the ECJ on grounds that the applicants had been denied access to a court for a determination of their dispute with ESA. The applicants relied on Article 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

[107] The court applied the test of proportionality, which is that "a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved". That test required the court to assess the limitation placed on Article 6 in light of the particular circumstances of the case. A material consideration of whether the limitation was permissible under the Convention was whether the applicants had available to them reasonable alternative means to protect their rights. The court considered that alternative means of legal process was available to the applicants, as ESA had established an independent appeals board. (para 60).

[108] The court held:

…[Bearing in mind the legitimate aim of immunities of international organisations…the test of proportionality cannot be applied in such a way as to compel an international organization to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6(1) of the Convention and its guarantee of access to the courts as necessarily requiring the application of national legislation in such matters would…thwart the proper functioning of international organisations… (para 62).

[109] In view of all the circumstances, the court said that in giving effect to the immunity, the German courts had not exceeded "their margin of appreciation". In other words, by taking account of the legal process available to the applicants, the limitation on their access to the German courts did not impair "the essence of their "right to a court" or was disproportionate for the purposes of Article 6(1) of the Convention." (para 63).

[110] In ***Waite and Kennedy*** the applicants were employed, through an agency, to the European Space Agency (ESA). The court considered that "…where States establish international organisations…and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution…This is particularly true for the rights of access to the courts…" (supra para 67).

[111] The court applied the test of proportionality and placed weight on the alternative means ESA afforded the applicants to protect their rights, and determined that by giving effect to the immunity, the German courts had not exceeded their margin of appreciation.

[112] Similarly in ***Wallishauser v. Austria*** *(Application no. 156/04* the European Court of Human Rights), which dealt with state immunity, the ECJ applied the proportionality test in the context of developments in European treaty law including the *1972 European Convention on State Immunity ("the Basle Convention")* which provides in Article 5 that:

> *A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum…*

[113] The court also considered Article 11 (contracts of employment) of the *2004 United Nations Convention on Jurisdictional Immunities of States and their Property* which Austria ratified on 14 September 2006. Article 11 provides:

> *Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.*

[114] In my view, the restrictive immunity policy and proportionality test enunciated in ***Beer and Regan*****, *Waite and Kennedy*** and ***Wallishauser*** emanate entirely or in part from very specific European jurisprudence that has evolved. Moreover, the European-specific treaty obligations being enforced are not applicable to non-signatories and cannot therefore be of assistance in the interpretation of Jamaican domestic law.

[115] I am persuaded by the reasoning of the Canadian Supreme Court that as Canada is not a party to the European Convention, cases which involve the adjudication of the right to a hearing by an independent court or impartial tribunal established by law, as provided for in Article 6(1) of the European Convention, are inapplicable in Canada. (***Amartunga,*** supra, para. 55).

Is CXC's immunity restrictive?

[116] I do not accept that the boundaries of immunity granted to the CXC should be restricted by the court based on notions that under customary international law employment matters and the absence of a right to a fair hearing limit the nature and scope of international organisation immunity.

[117] There is no international consensus in favour of such a proposition. This is evident from the cases referenced above. The point was also considered at pages 680-682 in **Principles of Public International Law**, 7th ed. where it is stated that there is "no general agreement on the precise content of the customary law concerning the immunities of international organizations."

[118] Having said that, there is merit in the criticism that the CXC's arrangements for treating with employment disputes are inadequate. The CXC has established an Administrative and Finance Committee (AFC) and provides in Rule 65 of the CXC Staff Rules, 2007, that "unless the decision to terminate or the decision against renewal or extension was made by the AFC itself, the staff member may appeal against the decision by letter stating the grounds of appeal and addressed

to the chairman of the AFC…the decision of the AFC shall be final and no further reasons need be given by that committee."

[119] In my view, the CXC's arrangement falls short of the international standard, which is to establish an alternative, independent means of dispute settlement. However, it is a matter for the member states that have established the CXC to ensure that it is brought in line with good and necessary international practice.

[120] Unfortunately, one of the consequences of the type immunity granted to the CXC, as was observed by the Canadian Supreme Court in ***Canada* (House of Commons) v. Vaid**, 2005 SCC 30. P. 85, para. 74, is that there can be "…the absence of a legally enforceable remedy."

[121] I am also of the view, that the parties to the CXC agreement did not intend or consent to the CXC being subject to differing employment laws in the various jurisdictions.

The Constitution

[122] I cannot uphold the DSP's argument that the Jamaican Constitution has been breached because the CXC's internal mechanism for dispute resolution is inadequate or does not exist. I have four reasons for this. The first is that the CXC is not a public authority or Jamaican institution which is obliged not to act in a way which is incompatible with the Constitution. It is not subject to domestic law, in so far as it has been granted immunity, and this applies to the Constitution which is the grand norm of our domestic laws. However, this does not mean that the CXC can carte blanche act in flagrant disregard of the Constitution because to do so would offend against the comity of nations which international organisation immunity is intended to facilitate.

[123] Secondly, the legislature, in entering the agreement to establish the CXC and granting it immunity, had carried out a constitutionally permissable act. There has, accordingly, been no violation of the Constitution by the grant of immunity from

legal process. Furthermore, the Constitution cannot be used to nullify a constitutional act.

[124] Thirdly, I agree with the reasoning in ***Amartunga*** (para. 31), that an applicant for judicial review gets an opportunity to make submissions that he has a justiciable claim, which is that the international organization does not enjoy immunity, and as such the applicant could not succeed in maintaining that he has been denied the right to appear before a court or impartial tribunal in relation to his dispute.

[125] My fourth reason, applying Lord Oliver's dictum in ***International Tin Council,*** is that the CXC agreement, the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights are pacts between Jamaica and other states. Individuals are not party to the agreements although they benefit from them. They are *"res inter alios acta"* from which the individual *"cannot derive rights and by which they cannot be deprived of rights or subjected to obligations"* whether claimed directly or under the Constitution.

Did the CXC waive its immunity from "legal process"?

[126] The CXC enjoys immunity from legal process except where it has ***expressly waived*** its immunity (Article III (1) of the Diplomatic Immunities and Privileges (Caribbean Examinations Council) Order).

[127] The circumstances of this case reveal no basis on which any express waiver can be found. Not even an implied waiver could be established. At the very first sitting of the IDT, the CXC asserted its immunity and maintained that position by refusing to appear and participate in the process. The CXC's submission of a brief, at the request of the IDT, was at best a courtesy.

Conclusion

[128] The purpose of the **Diplomatic Immunities and Privileges Act** and the Order is clearly to grant an absolute immunity to the CXC from legal processes including those that are pursuant to the **LRIDA** from which the 1st respondent derives its jurisdiction.

[129] No case law has been brought to this court's attention that is supportive of the proposition that the doctrine of sovereign immunity applicable in this jurisdiction is one that is restrictive. But even if it were accepted that the concept of restrictive immunity has developed in international customary law, employment is a *jure imperii* function, closely connected with the main purpose of the CXC, and the immunity should therefore not be restricted.

[130] In all the circumstances, I find that the 1st respondent's decision against the CXC should be quashed on the basis that its jurisdiction over labour relations matters involving the CXC is ousted and the hearing of a dispute in which the CXC was a party, violated the principle of international organisation immunity.

The Orders

[131] Accordingly, I make the following declaration and orders:

1. A declaration that the applicant is not subject to the jurisdiction of the 1st respondent.

2. The 1st respondent's award dated May 17, 2013 finding that the 2nd respondent's dismissal from the employment of the applicant was unjustified, is quashed.

3. No order as to Costs.