[2025] JMSC Civ 03

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV02544

BETWEEN	**FEDERAL CAPITAL INVESTMENT & FINANCE LIMITED**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR & SOCIAL SECURITY**	**FIRST DEFENDANT**
AND	**THE INDUSTRIAL DISPUTE TRIBUNAL**	**SECOND DEFENDANT**
AND	**JASON BURGHER**	**INTERESTED PARTY**

IN OPEN COURT

Mr Kevin Williams and Ms Rachel Kitson instructed by Grant Stewart Phillips & Company for the Claimant

Mr Romario Miller and Ms. Rochelle Duncan instructed by the Director of State Proceedings for the First and Second Defendants

Messrs. Mikhail Jackson and Stephen Nelson instructed by Livingston Alexander & Levy for the Interested Party

Heard: July 11, 2024 & January 23, 2025

Judicial Review – Termination of Employment Contract –Whether Employee Waived Rights to Challenge his Termination – Two Routes to Determining Issue of Waiver – *Delegatus Non Potest Delegare*

Labour Relations and Industrial Disputes Act 1975, section 11A (1)(a)(i),

The Interpretation Act, section 34(2), Civil Procedure Rules

WINT-BLAIR J

Background

[1] In a letter to the Ministry of Labour and Social Security ("the Ministry,") dated, November 18, 2019, the interested party, Mr Jason Burgher complained that he was unjustifiably dismissed from the claimant company, Federal Capital Investment & Financial Limited ("FCIF").

[2] Several unsuccessful conciliatory meetings hosted by the Ministry were held between Mr Burgher and the claimant. By letter dated April 20, 2021, the parties were advised that the matter had been referred by the Minister of Labour and Social Security ("the Minister") to the Industrial Disputes Tribunal ("the IDT") for its determination. Aggrieved by that referral, and having obtained leave from this court, the claimant filed a fixed date claim[1] seeking the following orders:

1) An order of certiorari to quash the referral purportedly made by the 1st Respondent, the Minister of Labour and Social Security, to the 2nd Respondent, the Industrial Disputes Tribunal, contained in letter dated April 20, 2021 in relation to the dispute between Jason Burgher and the applicant over the termination of his employment.

2) A declaration that the Divisional Director of Industrial Relations and Allied Services at the Ministry of Labour & Social Security is not empowered under section 11 A(1)(a)(i) of the Labour Relations and Industrial Disputes Act 1975 to refer the dispute between Jason Burgher and the Claimant over the termination of Jason Burgher's employment to the Industrial Disputes Tribunal, the 2nd Respondent.

3) A declaration that the purported referral by the 1st Respondent to the 2nd Respondent, as contained in letter dated April 20, 2021 is ultra

[1] Filed on March 6, 2023

vires, of no effect and is a breach of section 11 A(1)(a)(i) of the Labour Relations and Industrial Disputes Act 1975.

4) An order of prohibition preventing the 2nd Respondent from commencing and/or continuing the hearing of the matter involving the Claimant and Jason Burgher consequent upon the 1st Defendant's purported reference contained in a letter dated April 20, 2021.

5) Costs to the Claimant to be taxed if not agreed.

6) Such further and other relief and orders as this Honourable Court shall think fit in the circumstances of this case."

The Issues

[3] The grounds filed by the claimant have been encapsulated into three issues for ease of decision making, with no intention to derogate from the industry of counsel in the preparation of their submissions. The court also requested that counsel submit on certain issues raised by the claimant in order that all sides would have the opportunity to respond.

[4] *Issues raised by the claimant*

i. Delegatus non potest delegare

ii. Section 34(2) of the Interpretation Act

iii. William Andrew Chang v The Commissioner of Taxpayer Appeals (Income Tax)[2]

iv. Costs – (raised by the court)

[5] The issues below are raised in the claim:

1. **Whether Jason Burgher waived his entitlement to challenge his dismissal by conduct**

[2] [2016] JMCA Civ. 106

2. **Whether there was an industrial dispute capable of being referred to the IDT**

3. **Whether the referral to the IDT was delegated by the Minister**

Issue 1: Whether Jason Burgher waived his entitlement to challenge his dismissal by conduct

Evidence

[6] The evidence of Arturo Stewart, a director of the claimant company was that a termination letter was sent to Jason Burgher by bearer on August 9, 2019, in error, later that day, the actual termination letter dated August 7, 2019 was delivered to Jason Burgher by Mr Stewart's office bearer. At no time during telephone discussions with Jason Burgher did he protest or object to the termination of his employment prior to or upon receipt of the said letters. Mr Burgher encashed the enclosed cheque, without complaining about, communicating with or seeking to contest, dispute or protest the terms of his termination in the months before the matter was referred to the Ministry.

[7] Mr Richard Burgher, chairman of FCGL and FCI, gave evidence that on or about September 1, 2017, FCGL entered into an employment agreement ("the September contract") to engage the services of Mr Jason Burgher as the Chief Executive Officer ("CEO") of FCGL.

[8] The affiant continued that on or about January 2, 2018, FCIF entered into an employment agreement to engage the services of Mr. Jason Burgher as the CEO of FCIF. By virtue of clause 8.1 of the said employment contract, the latter contract replaced and discharged the September contract. The only relevant contract is the one dated January 2, 2018.

[9] Jason Burgher was assigned to FCGL, as the CEO of that company on the same terms and conditions as set out in the employment contract. An email in this regard

dated May 1, 2019 was sent to Jason Burgher. On May 17, 2019, the services of Jason Burgher were suspended with immediate effect by email of even date. Jason Burgher continued to receive all contractual emoluments and entitlements during the suspension period.

[10] On August 7, 2019, by written notice, FCIF terminated the employment contract with immediate effect pursuant to clause 13.8 of the employment contract which reads as follows:

> *"13.8 This agreement may be terminated in any event by either party giving to the other notice of termination or thee (3) months or three (3) months' salary in lieu of notice."*

[11] Further, the letter advised Jason Burgher of his entitlement to the following:

a. Three (3) months' salary in lieu of notice of termination amounting to Two Million, Two Hundred and Twenty-Eight Thousand, Eight Hundred and Ninety-Three Dollars and Seventy-Four Cents (J$2,228,893.74). A National Commercial Bank cheque no. 339154 was attached to the said letter in the abovementioned sum.
b. An extension of the health Insurance coverage for an additional three (3) months from the date of the letter.
c. An extension of Jason Burgher's right to use of the company vehicle for an additional three (3) months from the date of the letter with a requirement that the vehicle be returned to FCIF on or before November 6, 2019. Additionally, the motor vehicle fuel card was deactivated with immediate effect from the date of the said notice.

[12] It was averred that Jason Burgher accepted the said letter with the attached cheque and raised no objection or dispute on receipt of the same. In August 2019, FCIF received its National Commercial Bank monthly statement of account which confirmed that on or about August 12, 2019, Jason Burgher enchased cheque no. 339154 in the amount of J$2,228,893.74 representing three months' pay in lieu of

notice. For the ensuing three months from the date Jason Burgher encashed the cheque mentioned above, neither FCIF nor any of its associated companies received any complaint or any form of communication from Jason Burgher.

[13] By way of letter dated November 6, 2019, FCIF wrote to Mr. Jason Burgher enclosing the balance of the principal sum issued by way of cheque no.339154 in the termination letter dated August 7, 2019.

[14] Jason Burgher gave evidence that on the morning of 9th August, 2019, he was surprised to receive a phone call from Arturo Stewart advising that the termination process was complete and that a letter would follow that afternoon outlining the company's decision. He immediately protested and queried how the company could take any decision without giving him a hearing, given that he had been suspended.

[15] In response, Mr. Stewart simply advised that the letter would outline the position of the company. Later that day, a bearer from Mr. Stewart's office delivered a letter of termination to him purporting to include a cheque which it did not. Mr. Stewart called again to indicate that the wrong letter had been sent and that the bearer would be returning with the correct letter that afternoon. During their second conversation, he again lodged his protest and disbelief that the company was proceeding with such a draconian step.

[16] Jason Burgher averred that at no time did he indicate that he accepted his termination by the collection of the cheque or at all. He encashed the cheque only so that he would have funds to meet his recurring expenses. His wife and daughter are both Australian citizens and had relocated to Jamaica with him solely because of the job opportunity. His relocation costs to move to Jamaica were to be paid for by the company and he was not compensated for moving his family back to Australia. At no time was his encashment of the cheque meant as a waiver of his rights to challenge his unjustifiable termination and he continued to lodge his objection to the unfair treatment with the directors by way of numerous phone calls and messages. It was through these communications that he was advised that a

special committee of the board had advised against his termination in the manner carried out by Richard Burgher who had insisted, issued, and signed the termination letter.

[17] He continued to lodge his protests whilst seeking legal advice on the steps that he could take to seek compensation and redress for the unjustifiable manner in which his employment was terminated. Securing legal representation took longer than he anticipated and after initially engaging an attorney at the end of August, he had to later change his representation due to delays in addressing his matter. Shortly after approaching Livingston Alexander & Levy, they issued a letter dated November 4, 2019, as affirmed at paragraph 13 of Richard Burgher's affidavit.

[18] By way of chronology, on December 12, 2019, Desreen Willie-Grant, Director of Industrial Relations at the Ministry of Labour & Social Security, in a letter, notified FCIF that Jason Burgher had referred the above matter to the Ministry of Labour and Social Security for its intervention. Meetings were scheduled by Mrs. Willie-Grant for February 6, 2020 and February 28, 2020. Jason Burgher, his attorney-at-law, Rosemarie King (a representative of FCIF) and Messrs Grant Stewart Phillips & Company attorneys-at-law for FCIF attended the conciliatory meetings.

[19] During the said meetings, FCIF's attorneys-at- law reiterated that FCIF had satisfied its contractual obligations to Jason Burgher and that the termination of Jason Burgher's services from FCIF was lawful and in accordance with the employment contract executed by the parties. The contract between them provided for an express no-fault termination clause which was exercised by FCIF.

[20] FCIF maintained that Jason Burgher extinguished any right to recourse with respect to his termination having accepted the payment in lieu of notice pursuant to clause 13.8 of his contract of employment. Jason Burgher was advised that he was released from a non-compete at clause 16.1 of the employment contract upon his own request, although FCIF was not obliged in any way to do so.

Submissions

[21] The interested party submits that he vehemently protested the termination of his contract from the date he received the termination letter. He encashed the cheque for living expenses, having relocated from Australia. The acceptance of payment did not amount to a waiver of his right to challenge the dismissal.

[22] Having raised his objection immediately and multiple times since then, the claimant would have been well aware of the fact that Jason Burgher was contesting his dismissal. He has not waived his entitlement to oppose his dismissal nor has he agreed with the arbitrary and unfair manner in which he was terminated.

[23] The claimant submits that there was neither protest nor demur on the part of the interested party who accepted the notice payment by retaining the funds, waived his right to challenge his termination.

[24] The defendant submits that the receipt and encashment of the cheque is undisputed. Without more the actions of the interested party by encashing the cheque does not amount to a waiver. The claimant has adduced no evidence to show that they altered their position as a result of their belief in the intention of Mr Burgher to waive his right to challenge the termination of the contract. (See **United Management Services Limited v The Industrial Disputes Tribunal and the Minister of Labour and Social Security**[3] and **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal**[4]).

Discussion

[25] There are two routes to the determination of the issue of waiver, the first is for the Minister and the second is for the IDT. Much depends on the circumstances of each particular case.

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[3] [2022] JMCA Civ 14
[4] [2005] UKPC 16

(i) The Minister -

[26] In **Kevin Simmonds v The Minister of Labour and Social Security & The Attorney General of Jamaica**[5] Barnaby, J stated:

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

[27] Brown-Beckford, J in **Jamaica Police Co-operative Credit Union Society v The Minister of Labour and Social Security**[6] in analysing the facts then before the Minister opined that on the record before her, there was no demonstration that the Minister had considered material relevant to the question as to whether the industrial dispute existed in the claimant's undertaking at the time the referral to the IDT was made and that this was an error.

[28] In short, by law, the Minister is required to consider when examining the record whether the question of waiver arises and in doing so ask himself whether there is:

a. A dispute as to waiver by conduct at the time of the dismissal and whether it remained unresolved.

b. Sufficient material to indicate on an objective assessment of the dismissed employee's conduct, a clear intention to waive the right to challenge the dismissal.

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[5] [2022] JMFC FULL 02
[6] [2019] JMSC CIV 67 at [34]-[36]

c. Evidence in conflict on the issue of waiver in that, the employee's position is that there was no waiver while the employer's position is that there was.

d. There must be a demonstration by the employer that it based its belief that there was an intention to waive on the part of its former employee and altered its position accordingly.

[29] Should the Minister find that the above criteria have been satisfied, it is open to him to find that there is no industrial dispute that can properly be referred to the IDT. The Minister acting in those circumstances would have properly exercised his discretion.

(ii) The IDT –

[30] Where the material before the Minister is in conflict or there is insufficient material before him for a decision on the issue of waiver to be made, there may need to be a weighing up of the facts. The Minister is incapable of embarking on that weighing exercise as he is merely making a decision on paper. It is then for the IDT to determine the question of waiver.[7] (see **SCJ Holdings Limited v Minister of Labour and Social Security and Lancelot Naraynsingh**)[8]

[31] Having set out the general legal position as I understand it, the record before the Minister was as follows:

i. By email dated May 21, 2019, the interested party was suspended from his post of CEO of Federal Capital Investment & Finance Ltd.

ii. By letter dated August 9, 2019, the interested party was sent a letter of termination enclosing a cheque for three months' notice pay.

iii. By letter dated November 18, 2019 addressed to the Permanent Secretary of the Ministry the dispute was brought to the Minister's

[7] Branch Developments Limited T/A Iberostar Rose Hall Beach and Spa Resort Limited v the IDT and Marlon McLeod [2021] JMCA Civ 44
[8] [2023] JMSC Civ 89

attention by Livingston, Alexander & Levy. The letter raised the suspension and termination of Mr Jason Burgher, the issue of unjustifiable dismissal, breaches of the LRIDA and the Labour Relations Code as well as protests Mr Burgher had made to his employer about the unfair treatment he had received.

iv. On November 25, 2019, the Permanent Secretary referred the letter to the Divisional Director, Industrial Relations Department, attention, Ms Gillian Corrodus.

v. By letter dated December 2, 2019, the Ministry responded to Mr Jackson, of Livingston, Alexander & Levy requesting a copy of the dismissal letter and the employment contract.

vi. By letter dated December 4, 2020, the Ministry was provided with a copy of the employment contract and dismissal letter. The letter of termination stated that the employment was terminated with immediate effect pursuant to clause 13.8 of the contract. Further Mr Burgher was entitled to three months' salary in lieu of notice in the sum of $2,228,893.74 inter alia.[9]

vii. By letter dated December 12, 2019, the Ministry wrote to the claimant advising it of the letter from the interested party seeking the Ministry's intervention. Meeting dates were proposed with both sides.

viii. By letter dated June 23, 2020, the Ministry wrote to Livingston, Alexander & Levy referring to the last conciliation meeting on February 28, 2020, and requesting an update as to whether its intervention was still necessary.

ix. By email dated June 23, 2020, Mr Jackson advised the Ministry that local level discussions had not been held and that he would advise.

[9] Affidavit of Gillian Corrodus at [9]-[11]

x. By letter dated August 10, 2020, Mr Jackson writes to formally advise the Ministry that local level discussions having failed, the last conciliation meeting being February 28, 2020, the matter should be referred to the IDT.

xi. By letter dated August 18, 2020, the Ministry writes to Mr Williams of Grant, Stewart, Phillips & Co. enquiring whether the claimant's position remained the same since the last conciliation meeting as another meeting was being considered with the proposed date of September 10, 2020.

xii. Ms R. Kitson responded on August 20, 2020, on behalf of the firm that the position of the claimant remained the same.

xiii. By letter dated August 28, 2020, the Ministry wrote again to counsel for both sides advising that in an effort to bring closure to the matter, another conciliatory meeting had been arranged for September 10, 2020, and referred to guidelines for social distancing.

xiv. Mr Burgher and Mr Jackson attended the Ministry for the conciliatory meeting, the claimant and its counsel did not.[10]

xv. By email dated September 16, 2020, a final attempt to arrange a meeting between the parties was made by the Ministry, however, the claimant refused to participate and communicated that its position remained unchanged via email through its attorneys to the Ministry on even date.

xvi. The Minister received an internal memorandum dated November 27, 2020, from Mr Michael Kennedy, Director of Chief Industrial Relations and Allied Services recommending referral to the IDT. This memorandum outlines the suspension and letter of termination received by Mr Burgher and refers to his complaint of unfair termination without a hearing or due process under the Labour Code. It also sets out the

[10] Affidavit of Gillian Corrodus at [20]

position stated by the claimant as being in compliance with the employment contract, hence its refusal to review the compensation package or reinstate the dismissed employee as it had satisfied its obligations to Mr Burgher.

xvii. A report of the conciliation proceedings, the steps taken by the parties to settle the dispute along with the requisite file was submitted to the Minister by Ms. Gillian Corrodus.

xviii. The position advanced at conciliation by the claimant was that it had satisfied its contractual obligations to Jason Burgher and that the termination of Jason Burgher's services was lawful and in accordance with the employment contract executed by the parties. The contract between them provided for an express no-fault termination clause which it had exercised. The claimant maintained that Jason Burgher extinguished any right to challenge his termination, having accepted the payment in lieu of notice pursuant to clause 13.8 of his contract of employment. The position of Mr Burgher was that he was unjustifiably dismissed.

xix. The Minister reviewed the file and instructed Ms Corrodus to attempt a further conciliatory meeting to satisfy himself that all attempts had been made by the parties to settle the dispute.[11] This proved futile and the file was re-submitted to the Minister on March 5, 2021.

xx. The Minister signed the internal memorandum and instructed that the referral be made to the IDT with the reference: “To determine and settle the dispute between Federal Capital Investments and Finance Limited on the one hand and Jason Burgher on the other hand over the termination of his employment.”[12]

[11] Ibid [25]-[26]
[12] Ibid [27]

xxi. By letter dated April 20, 2021, signed by Ms Corrodus for the Permanent Secretary, the matter was referred to the IDT.

[32] In determining as a matter of law whether an industrial dispute existed, based on the facts above, it is undisputed that Mr Burgher received and retained the sum representing notice pay. There is no evidence that Mr Burgher was employed elsewhere.

[33] The relevant date for the determination of whether there was an industrial dispute was at the date of dismissal and not the date of referral to the Tribunal. (See **R v Industrial Disputes Tribunal & the Honourable Minister of Labour ex parte Wonards Radio Engineering**[13])

Discussion

[34] The fact that there were two telephone conversations between Mr Stewart and Mr Burgher on August 9, 2019 was not denied by Mr Stewart. Mr Stewart denies the content of the conversation by saying that no protest or objection to the termination of employment was lodged by those means. There is no evidence of any correspondence confirming what was discussed from either side. It is settled law that encashing a cheque does not amount to a waiver. (See **Jamaica Flour Mills Limited v Industrial Disputes Tribunal & Anor**)[14]

[35] By way of letter dated November 4, 2019, Mikhail Jackson, Attorney-at-Law of Livingston Alexander & Levy, on behalf of Jason Burgher, challenged the termination of the employment contract as being unjustifiable and demanded a withdrawal of the letter of termination, and the reinstatement of Jason Burgher to his position. FCIF's position is that it has never withdrawn the letter of termination (issued pursuant to Clause 13.8 of Mr. Jason Burgher's contract of employment) as requested by Mr. Jackson or at all.

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[13] (1985) 22 JLR 64
[14] [2005] UKPC 16

[36] This means, that the evidence of whether or not at the date of dismissal there was a waiver appears to be in conflict as the earliest date a dispute could be said to have arisen on the part of the interested party is August 9, 2019, and for the claimant was November 4, 2019, when it received a letter from Livingston, Alexander & Levy. However, this conflict can be resolved by looking at the state of the evidence, "the ingredients of a waiver are absent."[15] There is no evidence from the claimant that it had a belief in the intention of or had altered its position based on its belief that Jason Burgher had waived his rights to challenge the termination of his contract.

[37] In the **United Management** case, the Court of Appeal had made it clear that the acceptance of payment per se is not sufficient indicia of an intention not to dispute a dismissal, i.e., the acceptance of payment in lieu does not bar an aggrieved worker from launching a challenge to the dismissal on the basis that it is unfair or wrong.

[38] The record before the Minister did not present the issue of waiver as the claimant failed to demonstrate that it had acted to alter its position in accordance with its belief that Mr Burgher had waived his rights to challenge his termination. The issue of waiver therefore did not arise on the material before him as the ingredients of waiver had not been met.

Issue 2: Whether there was an industrial dispute capable of being referred to the IDT

Submissions

[39] The claimant argues that it terminated the employment contract in a contractually correct manner and relies on paragraph 6(ii) of the Labour Relations Code which states: "The legal relationship between employer and worker is determined by the individual contract of employment…." as well as the cases of **Lisamae Gordon v**

[15] Jamaica Flour Mills [33]

Fair Trading Commission[16] and **The Institute of Jamaica v The Industrial Disputes Tribunal and Coleen Beecher.**[17] The claimant strictly complied with clause 13.8 of the said contract. The interested party having encashed the NCB cheque, without demur or objection, expressly accepted the terms of termination. This case does not fall within the ambit of section 2(b) of the LRIDA, or the jurisdiction of the IDT. The first defendant therefore had no basis to find that there was an industrial dispute in existence at all, which would require the intervention of the second defendant.

[40] Counsel also relied on **Coleen Beecher** to submit that the first defendant failed to take into account the legal implications of the formal relationship and the agreed dispute resolution mechanism in the contract of employment dated January 2, 2018, prior to erroneously concluding that a dispute arose for referral to the second defendant. A hearing before the second defendant would only serve to usurp that agreed dispute resolution mechanism.

[41] The fact that the interested party's attorneys-at-law wrote to the claimant on the November 4, 2019, and to the Ministry on November 18, 2019, contending that there was an industrial dispute and/or that the interested party was unjustifiably dismissed, does not objectively determine the issue of whether there was in fact an industrial dispute within the meaning of the Act such that the first defendant could refer the matter to the second defendant.

[42] In **Jamaica Police Co-Operative Credit Union Society v The Minister Of Labour. And Social Security**[18] Brown-Beckford J held that for the purposes of determining whether there was an industrial dispute to ground the Minister's reference, that question is to be determined at the date of termination/dismissal and not at the date of referral either to the IDT or the commencement of conciliation at the Ministry. At the date of dismissal/termination on August 9, 2019, the interested party was notified of the termination of the contract pursuant to clause

[16] 2005 HCV 2699, (unrep), delivered March 28, 2008
[17] SCCA 9/2002, (unrep), delivered April 2, 2004
[18] [2019] JMSC Civ 67

13.8; given his termination payment which was subsequently encashed; and he raised no objection and/or dispute on August 9, 2019 and failed to do so for another 13 weeks until the arrival of a letter from Livingston, Alexander & Levy dated November 4, 2019.

[43] The Minister in his affidavit did not show that at the time when the material was placed before him, he reflected on and considered the question of whether a dispute existed at the time of termination/dismissal of the interested party. In fact, at paragraph 4 of his affidavit, the Minister expressly noted that his consideration of the matter started with and was influenced by the letter dated November 18, 2019, from the interested party's counsel. The former Minister's error was a consequence of the memorandum dated November 27, 2020, that was sent to him by Miss Corrodus. There simply was no dispute at the date of termination to warrant the reference.

[44] The defendant's counsel submits that the claimant views the matter as one of lawful termination based on the terms of the contract. Further, an industrial dispute only arises in the event of a breach of contract and the contention of Mr Burgher that he believes he has been unfairly/unjustifiably dismissed. The law provides for such a situation to be treated as an industrial dispute. In the case of **Edward Gabbidon v Sagicor Bank Jamaica Limited**,[19] Brooks, JA(as he then was) outlined the distinction between wrongful dismissal and unfair dismissal and how litigants may seek redress under each category. Reliance was also placed on the judgement of Dyson, SCJ in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust**[20] to argue that the IDT is the specialist tribunal established by law to adjudicate upon the issue of whether Mr Burgher was unjustifiably dismissed. That dismissal was a live issue before the Minister who rightfully determined it as an industrial dispute.

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[19] [2020] JMCA Civ 9

[20] [2011] UKSC 58 at [40]

[45] Counsel for the interested party submits that the cases of **Lisamae Gordon** and **Institute of Jamaica**, both relied on by the claimant, are inapplicable to the case at bar as they do not support a finding that there can be no industrial dispute when one's employment has been terminated in a contractually correct manner.

[46] In the first place, both cases deal with instances where the employment contract allows for multiple routes to termination such as (a) immediate termination with salary in lieu of notice; or (b) termination for cause where reasons are given for the termination and no notice or salary in lieu of same is required. They seek to reconcile which of these routes to termination the employer in question took and if they complied with the requirements for the said route.

[47] However, neither **Lisamae Gordon** nor **Institute of Jamaica** makes any pronouncements to the effect that there can be no industrial dispute within the meaning of the LRIDA if the employment was terminated via the route outlined at (a) above.

[48] **Lisamae Gordon** is the authority for the proposition that the route to termination taken in that case was immediate termination with salary in lieu of notice as opposed to termination for cause and that this was provided for in the employment contract. Likewise, **Institute of Jamaica** underscores that one's employment can be immediately terminated in accordance with the employment contract by paying salary in lieu of notice and the termination would not be deemed a nullity. However, it goes on to say that the manner in which the termination was carried out may leave the worker liable to succeed in an action for damages.

[49] The fact that there can be a contractually correct termination which still leaves the worker with means for recourse or relief in damages regarding the manner of the termination epitomizes the dichotomy between wrongful dismissal and unjustifiable dismissal. Termination or dismissal can be deemed to be not wrongful (i.e. contractually correct) but still unjustifiable or unfair thus entitling the worker to compensation.

[50] Counsel relied on the IDT decision of **Housing Agency of Jamaica Ltd and Norman Anderson**[21] to submit that where an employer attempts to terminate a worker's employment with the required contractual notice but without the required considerations of fairness, the worker is entitled to object to the unfair manner of the termination and it is this objection which creates an industrial dispute under LRIDA which can be properly referred to the IDT. Accordingly, the claimant's argument that the termination of the interested party's employment was contractually correct and therefore cannot be the subject of an industrial dispute must fail.

Discussion

[51] In the case of **Edward Gabbidon,** Brooks, JA writing for the Court of Appeal opined on the distinction between wrongful and unjustifiable dismissals. That decision signalled the importance of the statutory regime for the determination of disputes characterized as unfair or unjustifiable as opposed to wrongful.

[52] The law is that there can be a contractually correct termination which still leaves the worker with recourse regarding the manner of the dismissal. Termination or dismissal can be deemed to be not wrongful (i.e. contractually correct) but still unjustifiable or unfair thus entitling the worker to compensation. I agree with the submissions of the interested party on this issue and respectfully adopt them. **Lisamae Gordon** and **The Institute of Jamaica**, are inapplicable to the case at bar and distinguishable on the facts.

[53] By letter dated November 4, 2019, the interested party through his attorneys challenged the termination of the employment contract. This letter was sent before the intervention of the Ministry was sought and is construed by this court as both putting the claimant on notice that there was to be no waiver by conduct as well as attempting to instigate a local-level discussion about reinstatement.

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[21] IDT 46/2017

[54] I find that the termination of the interested party's employment as indicated in **Edward Gabbidon** may well be contractually correct while also the subject of an industrial dispute based on the manner of dismissal and therefore capable of referral to the IDT.

Issue 3: Whether the referral to the IDT was delegated by the Minister

Submissions

[55] Mr Williams submits that the maxim "*delegatus non potest delegare"* as defined in Halsbury's Laws of England[22] means that the purported referral must be exercised only by the officer on whom the power has been conferred. The Minister did not exercise his power on his own initiative as provided in the LRIDA which contemplates a strict statutory function conferred on the Minister to act in the public and national interest; it is solely his discretion to make the referral, which he did not exercise. The presumption against sub-delegation is that where statute has entrusted a person with a legislative power the inescapable position is that he is barred from conferring the power to another unless it is rebutted expressly or an implied power to delegate is evident based on statutory construction or regulation.

[56] Counsel argued that pursuant to section 34(2) of the Interpretation Act, there is no evidence that Ms Corrodus was appointed to act for Minister in relation to the reference to the IDT. In the absence of any express or implied legislative authority in the LRIDA authorising the Minister to delegate the exclusive powers under section 11 A(1)(a)(i) of the LRIDA, the Minister erred in law by purporting to exercise the said statutory powers by or through Ms Corrodus on behalf of the Permanent Secretary (in her letter dated April 20, 202). The referral is therefore unlawful, void and of no effect to vest the IDT with any jurisdiction to hear and determine the purported dispute. Additionally, the Minister acted unreasonably by failing to recognize the irrationality of the referral.

[22] Fourth edn reissue, p. 36-37 at [31]

[57] Alternatively, even if the Minister was authorised to delegate his statutory function to the Permanent Secretary (or some other officer) to refer the matter to the IDT, the same is a procedural irregularity as the Permanent Secretary, being an official representative of the Minister's authority, is legally precluded from further devolving that authority to Ms Corrodus to refer the matter to the IDT. The Minister's explanation is not sufficient to surmount the delegation issue both from a factual standpoint and a legal standpoint. The court insists that the primary decision must be consistent with reasonableness and fairness, and if the decision in question breaches these principles, the court will not hesitate to set it aside. There are no exceptional circumstances in the instant case.

[58] Counsel relied on the cases of **Barnard And Others v National Dock Labour Board And Another**[23], **Thomson v Dundee Police Commissioner**[24], **Llandovery Investments Ltd Commissioner of Taxpayer Appeals (Income Tax)**[25] and **William Andrew Chang v The Commissioner Of Taxpayer Appeals (Income Tax)**[26] to submit that where a power is conferred to a person holding public office by way of statute such power is vested in and confided to that individual to exercise independent judgment and discretion. Unless by some enactment that the public functionary is expressly empowered to delegate their power, there is a strong presumption against construing delegation particularly where matters concern a judicial function.

[59] In the present case, the statute has compelled the Minister to exercise at its highest a quasi-judicial power, and at its lowest a statutory/legislative power, not an administrative one and therefore in these circumstances it should only have been effected by the Minister. By this token there ought to be unequivocal evidence that it is the Minister who has addressed his mind to the issues.

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[23] [1953] 1 All ER 1113
[24] 25 SLR 137
[25] [2012] JMCA Civ 19
[26] [2016] JMCA Civ 16

[60] The former Minister states that he did not delegate his authority to Ms Corrodus but instructed her to refer the matter to the IDT in keeping with the Ministry's procedure. Conciliatory meetings took place, the parties remained opposed and a Memorandum was then issued by Mrs. Desreen Willie Grant (Director of Conciliation at the Ministry) to the Minister providing a report on the conciliatory meeting. Notably, the report details the basis upon which the parties hold opposing views as to whether an industrial dispute exists. No indication of any analysis or deliberation which must be demonstrably justified on the facts on those issues by the Minister is shown in this case. The Minister in his affidavit ultimately says that it is the signing of the memorandum which confirms that the Ministry had acted by virtue of section 11 A (1) (a) (i) of the LRIDA. There is nothing to show that he analysed the matter before him, that he did not act on his own initiative or at all in breach of section 11 A (1) (a) (i). Further, the purported signature is simply an acknowledgement that a document was signed by the Minister.

[61] In **William Andrew Chang**, the Commissioner was found to have made the decision in relation to the Tax Appeal based on cogent evidence that he reviewed the evidence given and ultimately adjudged on the matter. Unlike **William Andrew Chang,** there is no subsidiary legislation authorizing another officer to execute the functions of the Minister.

[62] Counsel for the defendants submits that the claimant contends that the letter dated April 20, 2021, under the signature of Ms Gillian Corrodus for the Permanent Secretary which communicated the referral of the dispute to the IDT is evidence of the Minister delegating his power under section 11A of the LRIDA and him doing so is not substantiated by law. In the context of the case at bar "to refer" means to make a decision. It is clear that based on the spirit of the statute upon which the Minister's power is derived he had to take into consideration certain factors and be satisfied with a particular occurrence prior to making this referral. This duty to consider certain factors and satisfy himself of a particular occurrence implies that the referral of the dispute to the IDT is a decision that nobody but the Minister could make

[63] The Minister has outlined his involvement in the process, his considerations, his decision and how it was communicated to his agents. The Minster has indicated that the matter involving Jason Burgher and the claimant benefited from several conciliatory meetings, but a settlement could not be achieved. Gillian Corrodus has outlined in great detail the conciliatory process implemented, the role she played in receiving instructions from the Minister, how the Minister was kept informed about the conciliatory meetings, how she received the Minister's decision and the custom employed by the Ministry of Labour and Social Security in communicating the Minister's decision to the parties. It was the Minister who exercised the power to refer the matter to the IDT and he merely delegated the task of communicating his decision.

[64] Therefore, the referral was in keeping with section 11 A of the LRIDA. In any event even if the referral was made by Gillian Corrodus the validity of the referral by her would have been protected by virtue of the **Carltona** principle. The principle was birthed from the authority of **Carltona Limited** where it was reasoned that *"The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case."*

[65] Counsel relied on the case of **Lewisham Borough Council v Roberts**[27] to submit that the Minister does not even have to address his mind to the matter personally so long as the Minister authorises an officer of a senior level to carry out his instructions, the decision is deemed to be that of the Minister. The evidence of Gillian Corrodus has succinctly outlined that it is the custom of the Ministry pursuant to the guidelines of the Government of Jamaica that all correspondence generated by the Ministry must be sent under the administrative authority of the Ministry's Permanent Secretary and signed as such.

[27] [1949] 2 K.B. 608

[66] Counsel for the interested party relied on the case of **Fahy v Commissioner of An Garda Siochana**[28] to submit that the Latin maxim *delegatus non potest delegare* prohibits what may be referred to as double delegation. For the avoidance of doubt, the argument pertaining to the **Carltona** principle is not an alternative argument. The interested party's main contention on this issue is that it is the Minister who referred the dispute to the IDT and he did not delegate his power. The Minister and Ms. Corrodus have given unchallenged evidence confirming this.

[67] Counsel relied on **Carltona Limited** and **Lewisham Borough Council v. Roberts**[29] to make the point that no question of delegation arises. The application of the **Carltona** principle does not contemplate any question of delegation. The **Carltona** principle is that an act done by an official within a particular Ministry is deemed to be the act of the Minister himself. The officials are the alter ego of the Minister and accordingly, there is no question of whether there was a delegation or if the Minister's power was exercised by another person. Therefore, the referral of the dispute to the IDT was carried out by the Minister and accordingly, there was no breach of section 11A of LRIDA, no breach of section 34(2) of the Interpretation Act and no double delegation so as to run afoul of the maxim *'delegatus non potest delegare'.*

[68] In what Lord Denning in **Lewisham** describes as the modern machinery of government where the Ministers are given a myriad of powers to exercise, the principle exists to allow Ministers to enlist the assistance of the officials within their Ministry with the exercise of such powers, without fear that they will be deemed to have acted contrary to the statutes granting the powers. Otherwise, the work of the Ministries would grind to a halt as the Minister cannot conceivably be expected to personally carry out every task which he is empowered to carry out under statute. The authorities above demonstrate that the principle covers a scenario where the power in question is a power to make a decision and the Minister reviews the

[28] [2021] IEHC 440; (2020] No. 294 JR. at paragraph 26
[29] [1949] 2 K.B. 608

relevant material, makes the decision, and then has his officials handle the task of communicating the decision to the relevant parties. In these circumstances, he would have addressed his mind to the matter personally and the decision would be his.

[69] The principle also extends to circumstances where the Minister does not address his mind to the matter at all and simply directs his official to make the decision on his behalf. This decision is still deemed to be the decision of the Minister through his alter ego who acted on his behalf. The authorities set out that this is more properly described as a devolution of power rather, than a delegation of power. (See **R v Secretary of State for the Home Department, Exp Oladehinde**[30] and **Re Golden Chemical Products Ltd**[31]). In circumstances where a ministry official acts as the alter ego of a Minister and exercises a power which is entrusted to the Minister by statute, there is no delegation of the Minister's power but rather a devolution of the power to the ministry official.

[70] In the case at bar, the evidence before the court shows that the Minister personally addressed his mind to the dispute between the interested party and the claimant and decided to refer the matter to the IDT. He explicitly states that he did not delegate his power under section 11A of LRIDA. He avers that he exercised his power under section 11A of LRIDA to refer the dispute to the IDT and that he then instructed Ms. Corrodus to communicate this to the IDT. The power was exercised by the Minister in accordance with LRIDA as the letter signed by Ms. Corrodus expressly asserts that she was directed by the Minister. The Minister cannot be expected to sign every single document in which he purports to exercise a statutory power.

[71] But even if, for argument's sake, the claimant's contention was to be taken to be correct, Ms Corrodus' act in signing the letter would still be deemed to be an act of the Minister. Per the **Carltona** Principle, she would have been directed by the

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[30] [1991] 1 AC 254
[31] [1976] Ch. 300

Minister to carry out this act and would be acting on his behalf. Therefore, she would be acting as the Minister's alter ego and there would have been a devolution, not a delegation, of the Minister's power to refer the dispute to the IDT.

[72] There would, therefore, be no breach of section 34(2) of the Interpretation Act. Since Ms Corrodus' act would be deemed to be the act of the Minister, then it is the Minister who would have referred the dispute to the IDT and accordingly, it could not then be said that the statutory power vested in the Minister had been exercised by another person. It follows that there could also be no double delegation in contravention of the maxim *delegatus non potest delegare.* There was no delegation of any power to either the Permanent Secretary or Ms. Corrodus as any act done by either of these officials under the Minister's direction would be deemed to be the act of the Minister.

[73] The decision to refer the dispute to the IDT was taken by the Minster and accordingly, there was no breach of section 11A of LRIDA. In **William Andrew Chang**, officials in the Commissioner of Taxpayer Audit and Assessment's (CTA) department assisted in the hearing of the appeal but in the end it was the Commissioner who addressed his mind to all the material relevant to the matter and decided whether the appeal would be allowed. Likewise, in the instant case, ministry officials took charge of the conciliation process however the ultimate decision as to whether the dispute would be referred to the IDT was taken by the Minister.

[74] What is important is not the administrative action of signing a letter or sending a communique to the relevant parties but whether the decision which is the subject of the statutory power was made by the person entrusted with that power. It was the Minister who decided to refer the dispute to the IDT and it is the Minister who so referred the dispute to the IDT. That was the decision which was made in the exercise of the Minister's power under section 11A of LRIDA.

Discussion

[75] Regarding the issue of delegation of the discretion to make the referral the argument of the claimant, in essence, is that the letter referring the dispute to the IDT was signed by Ms Gillian Corrodus for the Permanent Secretary of the Ministry and this is a breach of section 11A of the LRIDA, the document not being signed by the Minister himself.

[76] The claimant contends that delegation is also, a breach of section 34(2) of the Interpretation Act as the power of the Minister to refer the dispute was exercised by a person other than himself, where there was no appointment granting a power for a person to act for the Minister. Finally, the fact that the letter was signed for the Permanent Secretary, demonstrates that there was double delegation.

[77] The evidence of the Minister is that on or about January 2021 he reviewed the file along with a report of the unsuccessful conciliation proceedings and the steps taken to settle the dispute by the parties themselves. Importantly the Minister avers that *"I was asked to review the matter and render a decision on same. I reviewed the report and the file concerning the dispute and noted that several contentious issues remained unresolved between the parties despite both local level discussions and conciliatory meetings being conducted. I was not convinced that all means available to settle the dispute had been exhausted. Accordingly, I instructed Ms Corrodus to make further attempts to assist the parties in resolving the dispute."*

[78] Having indicated the internal practice for approving his recommendations in these matters, and having reviewed the matter once again, he approved the recommendations in the report by affixing his signature to it as was his practice. The Minister averred that he directly instructed Ms Corrodus to have the dispute between the claimant and Mr Burgher sent back to conciliation and later he directed Ms Corrodus to have the dispute referred to the IDT in accordance with section 11A(1)(a)(i) of the LRIDA. The terms of reference are not in dispute.

[79] Ms Corrodus averred that she was instructed by the Minister to attempt further conciliatory meetings and the industrial relations division attempted to schedule these meetings but was unable to do so. She re-sent the file to the Minister on March 15, 2021. The evidence of Ms Corrodus and the Minister are unchallenged on this aspect.

[80] The claimant has not set out in its affidavits any evidence of what if anything transpired after January 2021 in terms of any further conciliation meetings. The position of the claimant is that it had validly terminated the contract. Further, the claimant has not said why the explanation of the Minster is insufficient nor what is unreasonable and unfair about it. They merely contend that the explanation in the affidavit of the Minister is insufficient.

[81] To my mind, there must be some evidence from the claimant upon which to base the submission that it was not the Minister who made the decision to refer the matter to the IDT in light of the evidence of his review of the matter, his decision to return the matter to conciliation, his further review and his referral of the matter as an industrial dispute to the IDT. Any person claiming that a decision-making authority has ignored the law governing its procedure must produce some direct evidence or adduce facts from which the inference may be drawn as to the validity of that contention.

[82] In **Carltona Limited** the appellants were manufacturers of food products. Their factory was requisitioned under Defence (General) Regulations, 1939, reg. 51(1). The appellants commenced proceedings against the Commissioners, on the basis that the defendants were not entitled to take possession on the ground that the notice was invalid. The sole question before the court was the validity of the requisition order of the Commissioners.

[83] The Court of Appeal decided affirming the dictum of the trial judge, that there was no point to the argument that the Commissioners of Works had not taken the matter into consideration or that the First Commissioner did not personally direct his mind to the matter. They said:

> *"In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministers. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament…"*

[84] The point being made by the Court of Appeal is that the Minister does not delegate his power when any of the officials within the Ministry are instructed to perform work on the file ultimately placed before him.

[85] In the present case, the responsible officers are known by name, they have set out their varied roles and responsibilities in dealing with this matter. A recommendation was made to the Minister who upon his own review, sent the matter back to them with instructions for a further attempt to settle the matter by conciliation. Upon further review, the Minister made the decision only he could make which was to refer the matter to the IDT.

[86] If the claimant does not complain about the Minister sending the matter back to conciliation with instructions to further attempt to settle the dispute, then it is difficult

to see how there is a complaint about instructions the Minister gave to Ms Corrodus in respect of the referral.

[87] In my view, both sets of instructions are his and both sets of instructions were acted upon by Ministry officials. Neither set of instructions was based on the decisions of anyone other than the Minister.

[88] Section 34(2) of the Interpretation Act also does not arise. The **Carltona** Principle simply put, is that an act done by an official within a particular Ministry is deemed to be the act of the Minister himself. The officials are the alter ego of the Minister and accordingly there is no question of delegation. Therefore, the referral of the dispute to the IDT was carried out by the Minister and accordingly there was no breach of section 11A of LRIDA, no breach of section 34(2) of the Interpretation Act and no double delegation so as to run afoul of the maxim *'delegatus non potest delegare'.* The issue of delegation does not arise. With all due respect to Mr Williams, the case of **William Andrew Chang** similarly does not assist the claimant in the determination of this issue.

Judicial Review

[89] In the case of **Council of Civil Service Unions v Minister for the Civil Service**[32] Roskill LJ set out the heads of judicial review:

> *"...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power - which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see* ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** *[1947]*

[32] [1984] 3 All ER 935

2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called principles of natural justice."

[90] In discussing the power of this court to interfere with and set aside a decision of the IDT on the issue of reasonableness, Morrison JA (as he then was) said in **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and another**[33]:

"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 3 [1984] 3 All ER 935 at pages 953 to 954 4 [2015] JMCA Civ 48 at para 33 5 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, "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".

[91] Accordingly, the procedure for challenge by way of certiorari is limited in scope. Any error of law which has arisen out of such proceedings must be on the face of the record or from want of jurisdiction. This court is not engaged in a rehearing of the case, it is only concerned with the manner in which decisions of the Minister have been taken and is not entitled to substitute its judgement for that of the decision maker. Rather, the court is to engage in an examination of the record of the proceedings with a view to ascertaining whether there has been any breach of natural justice or whether there has been an action in excess of jurisdiction, or in any other way contrary to law.

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[33] [2015] JMCA Civ 48

Conclusion

[92] Many of the issues raised by the claimant are properly the subject of determination by the IDT. They have not been considered in this decision based on the disposition below. The claimant has not adduced evidence to meet the requisite standard of proof in such matters. Accordingly, the orders below are made by the court.

[93] Orders

1. The orders sought in the Fixed Date Claim Form filed on March 6, 2023, are refused.

2. No order as to costs.

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Wint-Blair, J