JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 116/96

COR:	**THE HON MR JUSTICE DOWNER JA** **THE HON MR JUSTICE BINGHAM JA** **THE HON MR JUSTICE WALKER JA (AG)**	
BETWEEN	**THE JAMAICA GRANDE HOTEL**	**APPELLANT**
A N D	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**RESPONDENT**

Robert Baugh for the appellant

Lennox Campbell, Senior Assistant Attorney General instructed by Director of State Proceedings for the respondent

May 20, 21, 22, & June 27,1997

DOWNER JA

The appellant (the Hotel) seeks to set aside the order of the Full Court (Ellis, Langrin, Pitter JJ) which upheld the award of the Industrial Disputes Tribunal (I.D.T.). That award was as follows:

> "AWARD
>
> The Tribunal awards that the following shall constitute the categories of workers of whom the ballot should be taken to determine the Union's claim for bargaining rights:
>
> UNION'S CLAIM - FORM No. 2
>
> | | |
> |---|---|
> | Waiters | Cooks |
> | Captains | Bakers |
> | Bus Boys | Chefs |
> | Housekeepers | Bellmen |
> | House maids | Plumbers |
> | Housemen | Painters |
> | Laundry Maids | Masons |
> | Bartenders | Electricians |
> | Bar Waiters | Mechanics |

Carpenters	Waitresses
Welders	Lunch Room Attendants
Gardeners/Groundsmen	Room Attendants
Beach & Pool Workers	Seamstresses
Cleaners	Porters
Butchers	Bar Porters
Stewarding	Butcher's Helpers
General Workers	Laundry Attendants
	Dish Washers
	Plant Operators
	Handymen (Engineering)

DATED THIS 23RD DAY OF OCTOBER, 1995"
[Emphasis supplied]

The Union's claim on Form 2 included Waiters to General Workers. The remaining categories from Waitresses were not on the Union's claim so the caption "Union's Claim Form No 2" must be regarded as surplusage.

Why was the dispute referred to the I.D.T.

In a letter dated 5th of August, 1993 the National Workers Union (N.W.U.) claimed bargaining rights for the workers at the Hotel. The letter tells the story:

> "We are pleased to inform you that the vast majority to (sic) your employees are now members of the National Workers Union. The employees have mandated us to represent them on all matters pertaining to their wages, job security and other working conditions.
>
> Attached is Schedule Form No. 2 as provided by the Labour Relations and Industrial Disputes Act of 1975.
>
> Consequent on the above, we suggest you grant us recognition as the sole bargaining agent for and on behalf of your employees in the categories described in the attached Schedule Form, or, alternatively, cooperate with the Ministry of Labour and Welfare for the taking of a poll among the aforesaid categories of employees in order for us to substantiate our claim."

It is necessary to point out that there is a category labelled "General Workers". Since the first paragraph of the letter alleges that the "vast majority of your employees are now members of the National Workers Union" then the categories Waitresses down to Handymen (Engineering) supplied by the Hotel may be specific categories labelled General Workers as supplied by the Union. It was these considerations which were taken into account in framing the terms of reference for the I.D.T.

The taking of poll by the Minister is governed by provisions in the Labour Relations and Industrial Disputes Act (L.R.I.D.A.) and regulations pursuant thereto. Paragraph 3(1) of the Labour Relations and Industrial Disputes Regulations, 1975 is relevant. It reads:

> "3. (1) The Minister may cause a ballot to be taken under section 5 of the Act if -
>
> > (a) a request in writing so to do is made to him by a trade union (hereafter in these Regulations referred to as the applicant) and a certificate in the form set out as Form No. 1 in the Schedule is supplied to him;"

It is appropriate at this point to ascertain the information required by Form No. 1 pursuant to Regulation 3 (1). Here it is:

> "
> Form No. 1
> *Certificate*
>
> In respect of the claim of the .....
> (*Name of trade union*
> for representational rights on behalf of the Employees of .....
> *(Name of employer)*
>
> I required the Secretary/Treasurer of the aforesaid trade union to produce to me the following books and records of that trade union for checks:-
> (a) the membership roll
> (b) the ledger
> On examination those books and records show that .....

number
employees of the said employer as per list of names and categories attached hereto were enrolled on or before the.....
(date of claim)
as *bona fide* members of the said.....
.....
(name of trade union)
and that..... dues cards have been issued
(numbers)
to these members, members; and that the said
.....employees have paid
(number)
their entrance fees and are *bona fide members of the said trade union, in good financial standing.*

Signature.....
(Auditor)"

(b) he is satisfied that a claim in the form set out as Form No. 2 in the Schedule was served on the employer of the workers in relation to whom that request has been made; ..."

The further material part of the Union's compliance ran as follows:

" FORM NO. 2
(Regulation 3 (1)

Claim by Trade Union for Recognition

TO JAMAICA GRANDE
.....
(Name of employer)
OCHO RIOS, ST. ANN
.....
(Address)
The NATIONAL WORKERS UNION OF JAMAICA
.....
(Name of trade Union)
Of 130 - 132 EAST STREET, KINGSTON
.....
(Registered Address)

Hereby claims bargaining rights in respect of your employees specifies the particulars hereto appended.

Particulars

Address of the employer's establishment/s involved:-
OCHO RIOS, ST. ANN
.....

General nature of business at the establishment:
HOTEL BUSINESS
.....

Description of the category/categories claimed:-
WAITERS, CAPTAINS, BUSBOYS, HOUSEKEEPERS, HOUSE MAIDS, HOUSEMEN, LAUNDRY MAIDS, BARTENDERS, BAR WAITERS, COOKS, BAKERS, CHEFS, TELEPHONE OPERATORS, BELLMEN, PLUMBERS, PAINTERS, MASONS, ELECTRICIANS, MECHANICS, CARPENTERS, WELDERS GARDENERS/GROUNDSMEN, BEACH & POOL WORKERS, CLEANERS, BUTCHERS STEWARDING, GENERAL WORKERS."

It was in the light of the classification "General Workers" that the Hotel gave a further classification which ran from Waitresses to Handymen (Engineering).

At this stage it is helpful to cite paragraph 3 (2) of the Regulations which reads:

> "3. (2) The Minister shall, as soon as is practicable after he receives a request in relation to which the requirements of paragraph (1), other than the requirement of sub-paragraph (d) of that paragraph, are satisfied, take such steps as he thinks fit to determine whether not less than forty per centum of the workers in relation to whom request for the ballot has been made are members of the applicant."

The information provided to Forms 1 and 2 would have enabled the Minister to see if there was compliance with Regulation 3 (2).

An important point to note is that for the Union to have made this request pursuant to the Regulations, meant that there was a dispute between the Hotel and Union which the Minister had failed to settle. In such circumstances, section 5 of the L.R.I.D.A. comes into play. It reads in part:

> "**5**.-(1) If there is any doubt or dispute-
>
> (a) as to whether the workers, or a particular category of the workers, in the employment of an employer wish any, and if so which, trade union to have bargaining rights in relation to them; or
>
> (b) as to which of two or more trade unions claiming bargaining rights in relation to such workers or category of workers should be recognized as having such bargaining rights,
>
> the Minister may cause a ballot of such workers or category of workers to be taken for the purpose of determining the matter."

Be it noted that in section 5 (1) (a) the guiding principle is "workers" or "category of workers.

Then section 5 (3) states:

> " (3) Where the Minister decides to cause a ballot to be taken and there is a dispute, which he has failed to settle, as respects the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot, the Minister shall refer the dispute to the Tribunal for determination. The Tribunal shall, in determining any dispute referred to it under this subsection, have regard to the provisions of any regulations made under this Act and for the time being in force in relation to ballots."

The significant wording to note is "category of workers" or "the persons who should be eligible to vote"

It was against this background of the Union's claims and the provisions of the L.R.I.D.A. that the Minister referred the dispute to the I.D.T. The final terms of reference after taking into account the objections of the Hotel, were as follows:

> " 'To determine and settle the dispute between Jamaica Grande Hotel on the one hand and the National Workers' Union on the other hand, as respect the categories of workers of whom the ballot should be taken to determine the Union's claim for bargaining rights.' "

It is evident that in framing the terms of reference it would be in the interest of good industrial relations to take into account the relevant number of workers and the categories as defined by the claimant Union and the Hotel. Since the term categories of workers runs through this judgment it is pertinent to be even more specific as to why it was included in the terms of reference. It is to facilitate "bargaining rights" as defined in section 2 of the L.R.I.D.A. That concept is defined thus:

> "means rights to participate, on behalf of the workers in relation to whom that expression is used, in negotiations in respect of-
>
> (a) the terms and conditions of employment of those workers, or the physical conditions in which any of them are required to work;
>
> (b) engagement or non-engagement or termination or suspension of employment, of any worker;
>
> (c) allocation of work as between workers or groups of workers;"

Those workers for whom "bargaining rights" are sought are generally part of a "bargaining unit" which is defined thus:

> "means those workers or categories of workers of an employer in relation to whom collective bargaining is, or could appropriately be carried on."

The aim is generally to achieve a "collective agreement" :

> "means any agreement or arrangement which-
>
> (a) is made (in whatever way and in whatever form) between one or more organizations representing workers and either one or more employers, one or more organizations representing employers, or a combination of one or more employers and one or more organizations representing employers;
>
> **(b)** contains (wholly or in part) the terms and conditions of employment of workers of one or more categories;"

These collective agreements are generally achieved by "collective bargaining" which means:

> "negotiations between one or more organizations representing workers and either one or more employers, one or more organizations representing employers, or a combination of one or more employers and one or more organizations representing employers;"

It is against this background that the term categories has become an issue in this case. On this aspect of the case Mr. Baugh cited two useful decisions from the Supreme Court namely **R v Industrial Disputes Tribunal ex parte Jamaica PlayBoy Club Inc.** [1976] 14 JLR 231 and **R v Industrial Disputes Tribunal Ex parte Reynolds Jamaica Mines Ltd** (unreported) Supreme Court Suit No. M. 53 of 1979 delivered 22nd February 1980.

Ought the award to be quashed as the Hotel has contended?

In adjudicating, the I.D.T. had the N.W.U.'s claim as set out in Form 2 above. The terms of reference would have recognised paragraph 3 (3) of the Regulation. That paragraph states:

> " (3) The Minister may, pursuant to paragraph (2) require the employer to supply him, within such period as the Minister may specify, with such information as the Minister thinks necessary in respect of the workers in relation to whom the request for the ballot has been made, and in particular may require the employer to state-
>
> (a) the names of those workers and the categories in which they are employed;
>
> (b) the names of any other workers in his employment and the categories in which they are employed;
>
> (c) whether he objects to the inclusion, in the voters' list, of the names of any of the workers in relation to whom the request for the ballot has been made, and if so, what are the names of those workers and what are the reasons for his objections;"

Sub-paragraphs (d) (e) (f) and (g) are not relevant.

Then there is the important provision in paragraph 3 (6). It states:

> "3. (6) Any person who refuses to supply to the Minister any information which the Minister, pursuant to this regulation, requires him in writing to supply, or who willfully gives false information in a certificate referred to in sub-paragraph (a) of paragraph (1) shall be guilty of an offence and be liable on summary conviction before a Resident Magistrate to a fine not exceeding one thousand dollars."

It is important to note that the Ministry of Labour, Welfare and Sports alleges that it had to send a reminder to the Hotel. The following extract and the reply establish compliance with paragraph 3 (6):

> " September 22 1993
>
> REMINDER
>
> REGISTERED
>
> General Manager
> Jamaica Grande
> Ocho Rios
> ST. ANN
>
> Dear Sir:
>
> Re: Claim for Bargaining Rights dated August 5, 1993 by the National Workers Union on Jamaica Grande
>
> By letter No. A3851 dated September 2, 1993, you were requested to supply the following information in writing -
>
> a) the names of all employees in each category claimed for namely: Waiters, Captain, Bus Boys, Housekeepers, House Maids, Housemen, Laundry Maids, Bartenders, Bar Waiters, Cooks, Bakers, Chefs, telephone Operators, Bellmen, Plumbers, Painters, Masons, Electricians, Mechanics, Carpenters, Welders, gardeners/Groundsmen, Beach & Pool workers, Cleaners, Butchers, Stewarding, and General Workers.
>
> b) the names of any other workers in your employment and the categories in which they are employed;
>
> c) whether you object to the inclusion in or omission from a voters' list of the names of any of the workers in relation to whom the request for ballot has been made, and if so, the reason for your objection;"

Then after dealing with requests relevant to our concern the letter concludes:

> " To date this Ministry has not received the information requested.
>
> The Labour Relations and Industrial Disputes Regulations (Reg. 3 (6) makes failure to supply such information an offence, and if the information is not received within five (5) days of the date of this letter, consideration will be given to the initiation of appropriate legal action."

The finding of the I.D.T. in this regard was stated as follows:

> "- The Company supplied to the Minister of Labour a list of employees in the categories claimed for and outlined objections raised.
>
> - The Ministry replied to the Company referring to concessions made by the Union during conciliatory talks at the Ministry and requesting four (4) certified copies of the list of names of all workers who are eligible to vote in a ballot.
>
> - The Company replied indicating that the Union had conceded the Company's objection to one item only and repeating a number of objections raised by the Company during conciliatory talks and re-affirming its objections."

The principal submission of Mr. Baugh on behalf of the Hotel, in this court, was that the I.D.T. exceeded its jurisdiction by the inclusion of eleven categories of workers which were not included on Form No. 2 in the Union's claim. It must be borne in mind that section 5 (3) (supra) obliges the I.D.T. in determining a dispute to have regard to the Regulations. Apart from the Regulation cited Regulation 4 is also important".

> " 4. If there is a dispute as respects the category of workers of whom a ballot should be taken or the persons who should be eligible to vote, the matters which shall be taken into consideration for the purpose of settling the dispute include -

> (a) the community of interest of the workers in that category, and in particular, whether the duties and responsibilities and work place are identical for all of those workers;
>
> (b) the history of collective bargaining in relation to the workers in the employment of the employer concerned, or in relation to workers employed by other employers in the trade or business in which that employer is engaged;
>
> (c) the interchangeability of the workers in respect of whom the dispute arises;
>
> (d) the wishes of the workers in respect of whom the dispute arises."

To my mind the purpose of Rule 4 and other Regulations is to ensure that the proceedings leading up to the ballot would produce valuable information for both sides in the bargaining between the Hotel and the Union which aims to reach an agreement on pay and working conditions. If the I.D.T. takes into account such information permitted by the Regulations in making its award, then such conduct was within its jurisdiction. As we have seen, the I.D.T. has stated in its reasons that the Company did supply the information requested. The information spelled out further categories which in effect were covered by the category General Workers. This category of General Workers may still exist but it would be curtailed. It should be noted however that despite the warning in the letter above, at this early stage, the Hotel failed to act with promptitude in this important area of management.

Since this aspect pertains to jurisdiction, it is permissible to examine the proceedings of the tribunal. The first extract is as follows:

> "MR. BAUGH: First of all Mr. Chairman and Member, you should note that the letter of September 22, 1993, is ticked in the top left

hand corner, reminder, and that it was sent by registered mail.

You should also note, Mr. Chairman and Members, that it referred to a previous letter dated September 2nd, 1993, in which the same information was sought.

The hotel's position, Mr. Chairman and Members, is that the previous letter was not received, and therefore their response was in relation to letter of September 22, 1993.

Now, Mr. Chairman and Members, were you to look closely, sir, at the provisions of the Labour Relations and Industrial Disputes Act, regulation 3 (3), you would see, sir, that the Ministry of Labour's letter followed the provisions of Regulation 3 (3) in general, but differ in a number of material precepts.

Earlier I had quoted to you from Regulation 3 (3), but I think it is necessary for this Tribunal, for us to look at it in detail, rather than in relation to a particular section."

An earlier passage is also relevant:

"MR. BAUGH: The Minister of Labour, having received Exhibit would now be satisfied that the provisions of regulations 3 (1) b, have been met.

Now comes, Mr. Chairman and Members, the beginning of the problem. By letter dated September 22, 1993, the Ministry of Labour made certain enquiries of the employer in accordance with Regulation 3, Section 3 of the Labour Relations and Industrial Disputes Regulations, and I would submit, sir, for your perusal, and request that it be marked Appendix 4, copy of said letter.

CHAIRMAN: Mr. Clarke, Exhibit 4, you agree?

MR. CLARKE: Yes, Sir."

In the light of these passages, I reiterate that the I.D.T. was acting within its jurisdiction when it considered the categories supplied by the Hotel and those supplied by the Union. This was conformable with the statute and its Regulations. What would be the point of obtaining information from the Hotel which gave further specific categories and then ignoring those categories in resolving the dispute? To confirm that this is the correct approach, Regulation 5 (1) of the Labour Relations and Industrial Disputes Regulations reads:

> "5. (1) If there is no dispute as respects the category of workers of whom a ballot should be taken or the workers who should be eligible to vote in the ballot, or after the settlement of any dispute which arises in connection with that matter, the Minister may require the employer to prepare and certify a list of those workers from his pay bills, and to furnish the Minister, within such period as he may specify, with such number of copies of that certified list as he may require."

Once there is a dispute the I.D.T. must take into account both classifications obtained pursuant to the Regulations. After the award in this case sub-paragraphs (2) (3) (4) and (5) empowered the Minister to take the necessary steps for a ballot.

Is there any merit in the Hotel's claim that there was an error on the face of the award?

The other submission by Mr. Baugh was that the terms of reference referred to "categories" of workers instead of "a particular category" or "category" of workers in conformity with section 5 (1) (a) and 5 (3) of the L.R.I.D.A. Moreover, he continued that Regulation 4 also emphasizes "category" instead of "categories". Perhaps it is appropriate to cite Regulation 4 again it reads:

> "4. If there is a dispute as respects the category of workers of whom a ballot should be taken or the persons who should be eligible to

> vote, the matters which shall be taken into consideration for the purpose of settling the dispute include-
>
> (a) the community of interest of workers in that category, and in particular, whether the duties and responsibilities and work place are identical for all of those workers;
>
> (b) the history of collective bargaining in relation to the workers in the employment of the employer concerned, or in relation to workers employed by other employers in the trade or business in which that employer is engaged;
>
> (c) the interchangeability of workers in respect of whom the disputes arises;
>
> (d) the wishes of workers in respect of whom the dispute arises."

In this context, the approach of Devlin J as he then was in **Regina v Industrial Disputes Tribunal and Another *Ex parte* Queen Mary College, University of London** [1957] 2 QB 483 at p. 496 is helpful:

> "... Mr. Donaldson relies again on the fact that the word 'workers' is in the plural, but we see no reason why in relation to this paragraph the Interpretation Act, 1889, should not have its usual effect, and why the word 'workers' should not be construed as meaning either the singular or the plural;..."

There is another passage in this judgment which is useful because the Hotel made no further objection to the terms of reference. In a similar situation Devlin J said:

> " That concludes the substantial point that has been argued by Mr. Donaldson, but we ought just to say this about a subsidiary point he has argued. He has argued that there is not here any dispute at all, that the matter has not really reached the stage of a dispute between Carreck and the college. It is significant, as is pointed out by Mr. Gumbel, that that is not one of the grounds set forward in the statement. It is significant also that when the notice of reference

> was sent to the college they did not reply on the basis that there was no dispute, but on the footing that they maintained their attitude that the matter should be dealt with as between the college and the individual worker. We think in this case there is a dispute, though it is of a somewhat narrow character."

Other issues - (a) Estoppel (b) Delay (c) Severance

(a) There is another useful approach advanced by Mr. Campbell for the I.D.T. He contended that the Hotel was estopped from challenging the terms of reference since they made no further objection to its terms before the commencement of the enquiry. **Oakland Metal Co Ltd v D Benaim & Co Ltd** [1957 1 All ER 650 pertained to arbitration proceedings. The headnote illustrates the circumstances which gave rise to an estoppel:

> " HELD: the buyers had acted throughout as if their arbitrator was qualified to act under the rules of the National Association, and, therefore, it was not open to them to contend after the award had been made that he had not the necessary qualifications, and the award was valid."

(b) Langrin J who delivered the judgment of the court also decided in view of the delay in instituting these proceedings that certiorari should not issue. These are the relevant dates. The I.D.T.'s award was handed down on 23rd October 1995. The ex parte application before a judge in chambers was dated 14th June 1996. This essential initial application was made some eight months after the award. I am somewhat puzzled as to why the award was not implemented during that period. The initial steps towards voting contemplated by Regulation 5 (1) could have been taken and the provisions in the other sub-paragraphs implemented. As the I.D.T. has discharged its

duties any subsequent challenge in the courts must be to the Minister not the I.D.T. Equally, the Union could have taken steps to see that the Minister take the necessary steps to take the ballot. The Notice of Motion was filed 3rd July although date stamped June 3 1996. The hearing before the Full Court was on November 4 and 5 1996 when certiorari was refused. The delay seems somewhat unusual and merited the strictures of the court below.

In the light of the following passage in **R v Herrod *ex parte* Leeds city District Council** [1976] 1 All ER 273 at 292 Langrin's J remarks were well timed. Shaw LJ said:

> " An applicant for a prerogative order (or in earlier history a prerogative writ) is not in the position of a litigant who seeks to assert some right to which he claims he is entitled. He is rather a suppliant who seeks to invoke those remedial measures on the ground that the High Court would wish to correct some irregularity in the administration of justice which has caused him to be aggrieved so that justice may be done. Whether the order sought will be granted or refused is a matter wholly within the court's discretion: prerogative orders are not to be claimed as of right.
>
> Accordingly it is for an applicant to show that in all the circumstances justice will be better served if the order goes than if it does not. If there has been unreasonable delay, then even though the application for leave is made within the six months, resulting hardship to an opposing party may well be a reason for refusing the order sought. It is true that the six months can be extended, but only if the delay is accounted for to the satisfaction of the court: and, if it is so accounted for, the question whether the case is a proper one for granting relief will only be answered in the affirmative if the applicant shows that in all the circumstances the demands of justice are best served by that answer. It is for him to show that on balance it is

> right to make the order and not for an opposing party to show it would be wrong to do so."

These remarks are particularly apt when applied to this jurisdiction where the rules provide for the application to be made within a month.

(c) There is another area raised in these proceedings which it is pertinent to address. Even if Mr. Baugh were correct that the I.D.T. had no jurisdiction to decide on the eleven categories not mentioned in Form No. 2 because that part was made without jurisdiction, it would not result in quashing the award. Severance could be applied to sever that part of the award. **In Judicial Review of Administrative Action** 2nd edition Professor deSmith wrote at p. 442:

> " If the invalid part of an order or conviction is distinct and severable from the remainder, certiorari may issue to quash that part only."

A number of cases are cited. In **Bournemouth Licensing JJ *ex parte* Raggs** [1963] 1 WLR 320 Lord Parker said:

> "Accordingly I have come to the conclusion that the order of certiorari should go to quash that part of the order which required the applicant to pay the justices costs."

This principle was applied in **Regina v Arundel Justices *ex parte* Jackson** [1959] 2 WLR 798.

All these considerations make it imperative to affirm the order of the court below.

Were the remedies of declarations and injunctions permissible in these proceedings?

Section 12 (4)(c) of the L.R.I.D.A. states:

> " (4) An award in respect of any industrial dispute referred to the Tribunal for settlement -

...

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

The significance of this section is brought out when sections 1 (9) and 2 of the Constitution is examined. Firstly section 1 (9) reads:

"(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

Then section 2 the supremacy clause in the Constitution states:

" 2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Since the Constitution enshrines judicial review, a law which sought to prohibit or curtail judicial review would be inconsistent with the Constitution. So by these two provisions our Constitution entrenches judicial review and section 12 (4) (c) of the L.R.I.D.A. correctly acknowledges the constitutional imperative that the Supreme Court cannot be excluded from reviewing the legality of the awards any public body entrusted to decide issues on the basis of law. The prerogative orders of which certiorari is perhaps the most prominent, is one way of testing the validity or legality of the decision of public authorities. But there certainly are disadvantages in some instances as this case demonstrates. There must be an initial ex parte application. Then there must be

a hearing before the Full Court in the light of the Civil Procedure Code. But there is no doubt that certiorari was the traditional remedy to test when jurisdiction has been exceeded and error on the face of the record. This latter type of error has been regarded as error within the jurisdiction.

The declaration and the injunction are more modern remedies in public law and the use of the declaration was expanded in the important cases of **Ridge v Baldwin** [1964] AC 40 and even more significantly in **Anisminic Ltd v Foreign Compensation Commission** [1969] 1 All ER 208 [1969] 2 A.C. 147. Here is an important statement of principle by Lord Diplock in **Racal Communications Ltd** [1980] 2 All ER 634 at p. 638:

> "... In *Anisminic* [1969] 1 All ER 208, [1969] 2 AC 147 this House was concerned only with decisions of administrative tribunals. Nothing I say is intended to detract from the breadth of the scope of application to administrative tribunals of the principles laid down in that case. It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for courts of law to resolve in fulfillment of their constitutional duty. So, if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity."

It is important to pause at this point. If the I.D.T. goes wrong in law whether as regards jursidiction or by an error on the face of the award then it can be questioned by a declaration and if it was wrong then its decision was a nullity. The effect of this is that

no legal relations can flow from a nullity. It is void and must be ignored. The effect is just as if it had been quashed by certiorari.

Then Lord Diplock continues:

> "... Parliament can, of course, if it so desires confer on administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so. The breakthrough made by *Anisminic* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity." [Emphasis supplied]

Lord Edmund-Davies at p. 643 had the same approach. Here it is:

> " *Anisminic* arose from the fact that the statute creating the Foreign Compensation Commission enacted that 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law' (see the Foreign Compensation Act 1950, s 4(4)). The commission rejected the company's claim to participate in a compensation fund and, when the company sought a declaration of entitlement in the High Court, they pleaded that the statute operated to deprive the commission's objection, but the Court of Appeal upheld it ([1967] 2 All ER 986, [1967] 3 WLR 382). Your Lordships' House finally held that the word 'determination' in the ouster clause should not be construed as including everything which purported to be a determination, but which in fact was nothing of the kind because the commission had misconstrued the provisions of the order defining

> their jurisdiction. They had in truth acted without jurisdiction in making their determination and the company were accordingly entitled to the declaration sought." [Emphasis supplied]

Lord Keith of Kinkel at p. 646 agreed with Lord Diplock. Lord Scarman said:

> " In the *Anisminic* case, this House had to consider the effect of a statutory provision excluding appeal from a determination of statutory tribunal. The statute, the Foreign Compensation Act 1950, defined the jurisdiction of the tribunal, the Foreign Compensation Commission, and provided s 4(4) that 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.' The House held that the subsection did not oust the supervisory jurisdiction of the courts, whose duty remained to ensure that the limits set by statute to the area designated for the commission's determination were observed. In the course of his speech, Lord Wilberforce laid emphasis on the distinction between the separate responsibilities of court and tribunal (see [1969] 1 All ER 208 at 244-245, [1969] 2 AC 147 at 208-209). In so doing, he was making the point previously made by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1959] 3 All ER 1 at 6, [1960] AC 260 at 286, where he said: [Emphasis supplied].
>
> > 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.'
>
> The question in the *Anisminic* case was whether the subsection excluded recourse to the courts to determine whether an inferior tribunal had exceeded the limits set by Parliament to its jurisdiction; and the House decided that it did not."

Then in **R v Greater Manchester Coroner *Ex parte* Tal** [1985] 1 QB 67 Robert Goff LJ as he was then said at p. 82:

> " Since *Anisminic*, the requirement that an error of law within the jurisdiction must appear on the face of the record is now obsolete. ..."

The principles which govern *Anisminic* are part of the unwritten Constitution of England. These principles are expressed in section 1 (9) of our Constitution. They recognised that when a tribunal misconstrues the law, it was not so empowered by Parliament or the Constitution. If there is an error of law on the face of the award it is therefore ultra vires. If challenged by way of declaration, the declaration has a retrospective effect, and the decision is void. There is another passage from this judgment which is apt. Robert Goff LJ said at pp. 81-82:

> "... In his authoritative statement in *O'Reilly v. Mackman* [1983] 2 AC 237, with which the remainder of their Lordships agreed, he referred, at p. 278, to *Anisminic* as
>
> > 'the landmark decision ... which has liberated English public law from the fetters that the courts had therefore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction.' " [Emphasis supplied]

S E Asia Fire Bricks v Non-Metallic Union [1980] 2 All ER 689 pertains to the constitution and legislation of Malaysia which have no counterpart in Jamaica. Here is the clue to that legal system. Lord Fraser of Tullybelton said at p. 692

> " ' Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any Court of law.' "

To demonstrate the inapplicability of this decision to the Jamaican legal system, the following passage at pp. 694-695 from Lord Fraser is instructive:

> " A further reason for thinking that certiorari is effectively ousted in such a case is, in the opinion of their Lordships, to be found in s 53A of the Act (added by s 18(b) of the Industrial Relations (Amendment) Act 1971) which indicates that Parliament intended to exclude certiorari. Section 53A provides that the Industrial Court may, and shall if so directed by the Attorney General, refer any question of law to the Attorney General for his opinion and that it may make an award 'not (in)consistent with the opinion'. The section is unusual in thus making the opinion of the Attorney General on a question of law effectively binding on the Industrial Court. It seems to be intended to keep questions which have been remitted to the Industrial Court away from the ordinary courts; otherwise it would have followed the more usual pattern of directing the court to state a case for the opinion of the High Court. It would be inconsistent with that intention that an award of the Industrial Court, giving effect to the Attorney General's opinion, should be liable to be quashed by the High Court for an error of law on its face."

This provision would be inoperative in England and would be in breach of section 1 (9) of our Constitution. Even then Lord Fraser states the *Anisminic* position in the same terms as Lord Diplock although he later qualified it in relation to the circumstances of the legal system in Malaysia. The unqualified version runs thus at 692:

> " The second question then arises. The decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147 shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if 'it has done or failed to do something in the course of the inquiry which is of

> such a nature that its decision is a nullity' ([1969] 1 All ER 208 at 213, [1969] 2 AC 147 at 171 per Lord Reid) . ..."

It would not be appropriate to conclude this analysis without at least one citation from *Anisimic.* At p. 171 Lord Reid said:

> "... But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account."

To my mind the declaration would have been an appropriate remedy to seek in circumstances such as this case. It would have saved time as there would be no need for an initial ex parte application to the Supreme Court. Also it would conserve valuable judicial personnel as one judge would have heard the case in the first instance instead of three. Challenges to I.D.T. awards are an area of law which require prompt attention and we have the tools to do the job. I may add that an ex parte injunction could be used to stay the award of the tribunal pending the hearing of the motion for a declaration in the Supreme Court. The conditions imposed by the court could ensure a prompt hearing.

Conclusion

I would dismiss the appeal, affirm the order of the Supreme Court and award costs to the respondent. It is anticipated that the arrangements will be made with promptitude to hold the poll as ordained by the I.D.T.

BINGHAM, J.A.:

I have read in draft the judgment of Downer, J.A. and Walker, J.A. (Ag.). I am in agreement with their reasoning and the conclusions reached that the appeal be dismissed for the reasons more fully set out in the judgment of Downer, J.A.

As the appeal, as argued by counsel, raised some novel questions, however, I am moved to add a short contribution of my own.

Ground 1 (The Jurisdictional Ground)

Mr. Baugh, in advancing his submissions, sought to challenge the tribunal's award in so far as it awarded eleven additional categories of workers, of whom a ballot should be taken, to determine bargaining rights. He contended that these categories were not a part of the Union's claim in their Form 2, hence the Minister's terms of reference to the tribunal ought not to be read as including them as a proper subject for the tribunal's determination. It would follow, therefore, that the tribunal exceeded its jurisdiction in including these additional categories as a part of its award.

This argument is clearly untenable as it overlooks the whole scheme and intendment of the Labour Relations and Industrial Disputes Act and Regulations in so far as it relates to the matter of collective bargaining and the right of a worker to be represented by the trade union of his choice. What was being sought in the Union's claim was representational rights

for all the workers at the Jamaica Grande Hotel who fell within a particular class and whose representation could be accommodated within a single bargaining unit. Included in the categories listed in the Form 2 submitted by the Union to the Honourable Minister for her consideration was a category labelled "General Workers". It was the hotel management, in response to the Union's claim, that submitted the eleven additional categories for the Minister's consideration as to their suitability to be accommodated within the bargaining unit forming part of the Union's claim.

There was no objection raised that any of the categories either in the Union's claim or in those submitted by the employers (the Hotel) coming within a category which could be termed as "arms of management".

The amended terms of reference which were finally submitted to the tribunal and to which no objection was taken at the hearing were sufficiently wide to encompass all the categories submitted by both the Union and the hotel management.

In response to a request by the court for assistance by way of case law, Mr. Baugh cited ***R. v. Industrial Disputes Tribunal ex parte Jamaica Playboy Club Inc.*** [1976] 14 J.L.R. 231. In that case a similar question arose in relation to the categories of workers to be included in a bargaining unit and for whom a ballot should be taken in order to determine representational rights. In delivering the main judgment of the Full Court, Parnell, J. approached the matter in this way (p. 237 (I)):

> "Is it open to us to say that there was no evidence to ground this award? Can the award be attacked in the way it is worded having regard to the manner in which the battle was fought before the tribunal? Did the tribunal commit any error so as to move us to quash the whole or part of what they have awarded? As far as I am concerned I would answer each of these questions in the negative. The true standing and efficacy of each of the positions on the list cannot be determined by reference to the label given to it. The duties and responsibilities which are attached to the office and actually performed must be the measuring rod."
> [Emphasis supplied]

In the light of the above, for learned counsel to contend, therefore, that the additional categories were not properly before the tribunal or that they arrived at a determination on evidence that was not before them would be a groundless exercise.

Ground 2

Equally so and also devoid of merit was Mr. Baugh's submission that section 5(1) of the Labour Relations and Industrial Disputes Act, in so far as it made reference to "category of workers", restricted the power of the tribunal to make an award limited to either all the workers or to a single category of workers.

The amended terms of reference before the tribunal in clear and express terms mentioned "categories of workers". This also had to be examined against the background of both the Union's claim and the representations made by the hotel management which addressed a total of some thirty-eight (38) categories.

The Full Court, in approaching this question, rightly drew attention to section 4 of the Interpretation Act which provides that:

> "4.-- In this Act and in all Acts, regulations and other instruments of a public character relating to the Island now in force or hereafter to be made unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided,
>
> (a) words importing the masculine gender include females; and
>
> (b) words in the singular include the plural and words in the plural include the singular."
> [Emphasis supplied]

An industrial dispute, while it may involve a dispute between a single worker and his employer, in most instances relates to a dispute involving an employer and workers. For one to accept Mr. Baugh's submission on this point, therefore, would, with respect to counsel, be doing violence to the enactment.

Regina v. Industrial Disputes Tribunal ex parte Queen Mary College London [1957] 2 Q.B. 483, cited by Mr. Campbell and relied on by the Full Court, supports a similar approach in keeping with the terms of reference and the award made.

Ground 5 - The delay in making the application

This ground, while fully argued, did not raise any material issue affecting the eventual outcome of the appeal. It has been dealt with in the judgment of Downer, J.A. and calls for no further comment on my part.

At the end of the day, when the judgment of the Full Court is examined, there is nothing to indicate that on the material before it, the Full Court erred in the manner in which it dealt with the points of law canvassed before it and the conclusions it arrived at.

I would also dismiss the appeal and affirm the order of the Supreme Court with costs to the tribunal to be agreed or taxed.

WALKER J A

The genesis of these proceedings lies in a dispute which arose out of representations made by the National Workers' Union ("the union") to be recognised as the sole bargaining agent for and on behalf of certain categories of workers employed to the Jamaica Grande Hotel ("the hotel"). In the last resort the dispute was reported to the Ministry of Labour, Social Security and Sports ("The Ministry") at which level conciliatory efforts were pursued. Still, there was no satisfactory resolution of the dispute which was finally referred to the Industrial Disputes Tribunal ("the tribunal") with terms of reference as follows:

> " 'To determine and settle the dispute between Jamaica Grande Hotel on the one hand and the National Workers' Union on the other hand, as respect the categories of workers of whom the ballot should be taken to determine the Union's claim for bargaining rights.' "

The tribunal conducted hearings in the matter and in the result handed down an award in the following terms:

> "AWARD
>
> The Tribunal awards that the following shall constitute the categories of workers of whom the ballot should be taken to determine the Union's claim for bargaining rights:
>
> UNION'S CLAIM - FORM No. 2
>
> | | |
> |---|---|
> | Waiters | Welders |
> | Captains | Gardeners/Groundsmen |
> | Bus Boys | Beach & Pool Workers |
> | Housekeepers | Cleaners |
> | House Maids | Butchers |
> | Housemen | Stewarding |
> | Laundry Maids | General Workers |
> | Bartenders | Waitresses |
> | Bar Waiters | Lunch Room Attendants |
> | Cooks | Room Attendants |

Bakers	Seamstresses
Chefs	Porters
Bellmen	Bar Porters
Plumbers	Butcher's Helpers
Painters	Laundry Attendants
Masons	Dishwashers
Electricians	Plant Operators
Mechanics	Handymen (Engineering)
Carpenters	

DATED THIS 23RD DAY OF OCTOBER, 1995"

This award did not satisfy the hotel which moved the Full Court of the Supreme Court for an order for certiorari to go to quash the award. That motion was duly heard by the Full Court (Ellis, Langrin and Pitter JJ) and was on November 5, 1996, dismissed by that court. It is from this order of the Full Court that the hotel now appeals to this Court. The appeal is now prosecuted on the following grounds:

1. That the Full Court was wrong in Law when it upheld the ruling of the Industrial Disputes Tribunal to add Eleven (11) categories of employees to those claimed for by the Union i.e. Waitresses, Lunch Room Attendants, Room Attendants, Seamstress, Porters, Bar Porters, Butchers Helpers, Laundry Attendants, Dishwashers, Plant Operators, Handymen (Engineering).

2. That the Full Court was wrong in Law in its ruling concerning the provisions of the Labour Relations and Industrial Disputes Act and the Regulations thereunder and in particular Section 5 of the said Act and the Regulations pertaining thereto.

3. That the Order of the Full Court was based upon a mis-construction of the Labour Relations and Industrial Disputes Regulations.

4. That the Full Court was wrong in law when it held that the applicant's delay in prosecuting its rights cannot earn him the relief which he seeks in that the Full Court

> erred as a matter of fact in finding that the Notice of motion was filed on the 4th November, 1996 there being a delay of one year from the award of the Industrial Disputes Tribunal handed down on the 23rd October, 1995 and the filing of the said Notice of Motion."

The pith of Mr. Baugh's submissions before us is contained in the first ground of appeal. By that ground is raised the jurisdictional question whether in making the award which embraced the categories of workers therein described, the tribunal was acting ultra vires its terms of reference. Mr. Baugh's argument was that the tribunal was so acting with the result that its award is entirely null and void. Indeed, Mr. Campbell for the tribunal agreed with Mr. Baugh that the award would be a complete nullity were this Court to find that the tribunal acted in excess of its jurisdiction even as regards a part of the award. Mr. Baugh complained that the categories of workers which are described in the first ground of this appeal were not included in the terms of reference, a fact which the Full Court failed to appreciate and, therefore, to address. The first issue to be resolved must, therefore, be whether or not the tribunal's terms of reference included these eleven categories of workers. If they did, the tribunal's award would be unobjectionable. If they did not, the award would have been made without jurisdiction, at least insofar as it purported to incorporate these eleven categories of workers.

The union's claim for bargaining rights was initiated by a letter addressed by the union to the hotel dated August 5, 1993. That letter reads:

"August 5, 1993

The General Manager
Jamaica Grande
Ocho Rios
St. Ann

Dear Sir:

We are pleased to inform you that the vast majority to (sic) your employees are now members of the National Workers Union. The employees have mandated us to represent them on all matters pertaining to their wages, job security and other working conditions.

Attached is Schedule Form No. 2 as provided by the Labour Relations and Industrial Disputes Act of 1975.

Consequent on the above, we suggest you grant us recognition as the sole bargaining agent for and on behalf of your employees in the categories described in the attached Schedule Form, or, alternatively, cooperate with the Ministry of Labour and Welfare for the taking of a poll among the aforesaid categories of employees in order for us to substantiate our claim.

We look forward to your prompt response and usually kind cooperation in the matter.

Yours sincerely,
NATIONAL WORKERS UNION

sgd/ VINCENT MORRISON
ISLAND SUPERVISOR"

In a document (Form No. 2) appended to that letter the categories of workers in respect of whom the union was seeking recognition as sole bargaining agent were described as:

WAITERS, CAPTAINS, BUSBOYS,
HOUSEKEEPERS, HOUSE MAIDS,
HOUSEMEN, LAUNDRY MAIDS,

BARTENDERS, BAR WAITERS, COOKS, BAKERS, CHEFS, TELEPHONE OPERATORS, BELLMEN, PLUMBERS, PAINTERS, MASONS, ELECTRICIANS, MECHANICS, CARPENTERS, WELDERS GARDENERS/GROUNDSMEN, BEACH & POOL WORKERS, CLEANERS, BUTCHERS STEWARDING, GENERAL WORKERS."

Form No 2 was necessary because the Labour Relations and Industrial Disputes Act ("the Act") and the Labour Relations and Industrial Disputes Regulations, 1975 ("the Regulations") required that prior to referring the matter to the tribunal the Minister should be satisfied that such a claim as was evidenced by the particulars contained in that form had been served on the hotel. In due course the tribunal proceeded to hear the matter and make its award which Mr. Baugh argued was made in excess of its authority.Mr. Baugh submitted that as regards the eleven categories of workers described in the first ground of this appeal the union made no claim in the form prescribed by the Regulations. He said that such a claim was necessary because the Minister was under a duty to comply with the Regulations before causing a ballot to be taken under section 5 (1) of the Act.

At first glance Mr. Baugh's submission would appear to be attractive, but when scrutinized it is really without merit. The whole purpose of this exercise was to define the categories of workers of the hotel eligible to participate in a poll to determine the union's claim for bargaining rights. To this end the union had submitted a list of categories of workers, the last category of which was a category of workers described as "General Workers." It was, therefore, within the competence of the tribunal in making its award to consider the position of the general workers employed to the hotel and in respect of whom the union had claimed for bargaining rights. As it seems to me the tribunal did just that, albeit in handing down its award it named eleven categories of

workers which were not specifically mentioned among those listed in the union's claim. I can see nothing wrong with the award embracing these eleven categories of workers which, in all the circumstances of the present case, must be regarded as categories of workers subsumed under the broad description of "General Workers" originally claimed for by the union. The first ground of this appeal must, therefore, fail.

In arguing the second and third grounds of this appeal Mr. Baugh's complaint was, essentially, that the decision of the Full Court was based upon a mis-construction of section 5 (1) of the Act. Section 5 (1) reads:

> "**5**.-(1) If there is any doubt or dispute-
>
> (a) as to whether the workers, or a particular category of the workers, in the employment of an employer wish any, and if so which, trade union to have bargaining rights in relation to them; or
>
> (b) as to which of two or more trade unions claiming bargaining rights in relation to such workers or category of workers should be recognized as having such bargaining rights,
>
> the Minister may cause a ballot of such workers or category of workers to be taken for the purpose of determining the matter."

Mr. Baugh contended that, properly interpreted, these provisions confine a doubt or dispute either to <u>all</u> the workers of an employer or, otherwise, to a <u>single category of workers</u> of an employer. According to Mr. Baugh this is so because section 5 (1) refers in the plural to "workers" or singularly to "a particular category of workers." This section, he said, made no reference to "categories of workers." It followed, Mr. Baugh submitted, that a ballot had to be taken either in respect of all the workers of an employer or of a single category of them. The section did not permit a ballot to be

taken of "categories of workers" falling short of all the workers. The Full Court found this submission to be unacceptable. So do I. The submission is in truth a fallacious one. If statutory authority be necessary to answer it, the same may be found in section 4 of the Interpretation Act. Section 4 provides as follows:

> "4- In this Act and in all Acts, regulations and other instruments of a public character relating to the Island now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided-
>
> (a) words importing the masculine gender include females; and
>
> (b) words in the singular include the plural, and words in the plural include the singular." [Emphasis mine]

Finally, Mr. Baugh submitted that the Full Court, by relying upon inaccurate dates which in reality resulted from administrative error, itself fell into error in finding inordinate delay on the part of the hotel in prosecuting its application for certiorari. There is merit in this submission. For one thing, it seems clear that the original Notice of Motion was filed in the Supreme Court on June 3, 1996, but in error was date stamped July 3, 1996. Certainly, the Notice of Motion could not have been filed on November 4, 1996 as was found by the Full Court when the Full Court commenced to hear that motion on the very same date. To this extent, therefore, the Full Court erred, and the Court also went wrong in finding as a consequence that there was delay of a period of one year attributable to the hotel. With regard to the question of delay, I would only observe that certiorari is a discretionary remedy which may, in a proper case, be denied by reason of culpable delay. However, in this case the factor of delay is of no moment having regard to the conclusion to which I have come.

In the result I would dismiss this appeal with costs to the respondent to be agreed or taxed.