[2024] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPLICATION NO COA2024APP00037

BETWEEN	**MINISTER OF LABOUR AND SOCIAL SECURITY**	**APPLICANT**
AND	**MEDICAL DISPOSABLES AND SUPPLIES LIMITED**	**RESPONDENT**

Miss Lisa White and Miss Karessiann Gray instructed by the Director of State Proceedings for the applicant

Gavin Goffe instructed by Myers, Fletcher & Gordon for the respondent

10 April and 7 June 2024

Civil procedure – Application for leave to appeal – Judicial review – Industrial dispute – Reference by the Minister to the Industrial Disputes Tribunal – Whether an industrial dispute exists – Whether an alternative remedy exists – Who is the employer – Labour Relations and Industrial Disputes Act, ss 2(b)(ii) and 11A(1)(a)

BROOKS P

[1] This is an application by the Minister of Labour and Social Security ('the Minister') for permission to appeal a decision of a judge of the Supreme Court ('the learned judge'), made on 8 February 2024. In her decision, the learned judge granted Medical Disposables and Supplied Limited ('MDS') leave to apply for judicial review of the Minister's decision to refer a dispute between MDS and Mrs Debra DeLeon-Jones to the Industrial Disputes Tribunal ('IDT'). The Minister contends that the learned judge erred in the exercise of her discretion, in that she failed to properly assess the issue of who is Mrs DeLeon-Jones' employer.

The factual background

[2] Mrs DeLeon-Jones was employed in 2010 as an area sales manager for products manufactured or marketed by Dr Reddy's Laboratories Ltd of India ('Dr Reddy's'). The letter offering her employment bore MDS' logo and name. However, it was signed by both MDS' managing director and the country head of Dr Reddy's. The letter also indicated that MDS was "acting on behalf of [Dr Reddy's]" in offering her the position of Area Sales Manager. The identity of her employer later became an issue.

[3] In January 2021, after a disciplinary hearing against Mrs DeLeon-Jones, in which she participated, she received a letter from Dr Reddy's, purporting to dismiss her. The letter was on Dr Reddy's letterhead and was signed by an associate director of Dr Reddy's. Mrs DeLeon-Jones, through her attorney-at-law, initially sought to appeal the written decision, making no point about the letter's origin.

[4] Thereafter, Mrs DeLeon-Jones decided that she was still in MDS's employment. She withdrew the appeal and told MDS that she was still employed by it. She asked to be assigned duties and be paid. MDS refuted her stance.

[5] By letter dated 11 March 2021, which was copied to MDS, her attorneys-at-law wrote to the Ministry of Labour and Social Security ('the Ministry'), asking the Ministry to intervene in the dispute between MDS and her. The letter complained that:

a. the party that purported to terminate Mrs DeLeon-Jones' employment (Dr Reddy's) was not her employer; and, in any event,
b. the way Dr Reddy's sought to terminate the employment was in breach of the principles of natural justice and the Labour Relations Code.

[6] Dr Reddy's attorneys-at-law, who also represented MDS at the disciplinary hearing, responded by asserting that the Ministry should decline Mrs DeLeon-Jones' request since she was alleging that she was still employed by MDS and that, in any event, her claim

would be one of breach of contract instead of an industrial dispute. The complaints, they asserted, were inconsistent, since Mrs DeLeon-Jones could not properly insist that she was still employed to MDS, yet criticise the way she was dismissed.

[7] On 26 April 2021, Mrs DeLeon-Jones penned a letter, addressed to MDS, resigning from its employment and indicating that she considered herself to have been constructively dismissed, with effect from 26 April 2021. That letter was shared with the Ministry.

[8] The Ministry hosted a conciliation meeting between Mrs DeLeon-Jones and MDS, in September 2021. Both parties participated, but the exercise proved futile. Just over a year later, the Ministry attempted to host another conciliation meeting, but MDS refused to participate. The Minister then referred the matter to the IDT, which is tasked with inquiring into, and ruling on, industrial disputes.

[9] In a letter dated 12 July 2023, the IDT invited MDS to participate in a hearing before it. It stated the terms of reference as follows:

> "*To determine and settle the dispute between [MDS] on the one hand, and Debra DeLeon Jones on the other hand, over the termination of her employment*." (Italics as in original, underlining supplied)

[10] MDS refused to participate. It took issue with the terms of reference, asserting that they were inapt since Mrs DeLeon-Jones contended that she was still employed by it. MDS suggested, in a letter dated 22 August 2023, that the terms of reference be changed to read instead:

> "*To determine and settle the dispute between [MDS] on the one hand, and Debra DeLeon Jones on the other hand, over the rights and duties of the employee*." (Italics as in original, underlining supplied)

[11] The IDT did not respond and, on 12 October 2023, MDS applied for leave to apply for judicial review to quash the Minister's decision to refer the matter to the IDT. MDS contended, in para. 7 of the application for leave to apply for judicial review, that:

> "Given Mrs. Deleon Jones' position that she was never terminated by [MDS], the alleged dispute which was referred to the [Minister] for consideration, does not fall within the scope of an industrial dispute as defined in the **Labour Relations and Industrial Disputes Act**." (Bold as in original)

[12] It is important to note that MDS asserts that it only became aware of Mrs DeLeon-Jones' letter of 26 April 2021, when the Minister filed an affidavit in response to its application for leave to apply for judicial review. This information perhaps explains MDS' position, before the learned judge, that there was no industrial dispute. The letter of 26 April 2021 is a factor which could indicate that there is an industrial dispute. Three live issues between the parties, before the learned judge, were:

a. whether the issues raised by the letter of 26 April had to be the subject of a fresh complaint to the Minister;
b. whether it was MDS or Dr Reddy's that was Mrs DeLeon-Jones' employer; and
c. the propriety of the Minister's treatment of those issues.

[13] The learned judge reviewed the evidence and found that it was arguable that the Minister erred in determining that MDS was the employer. She granted leave to apply for judicial review, stayed the proceedings before the IDT, and made case management orders for the proposed application for judicial review.

The application for permission to appeal

[14] The Minister's application, in this court, for permission to appeal from the learned judge's decision, initially proceeded as a without-notice application. However, counsel for the Minister, ahead of the hearing before the court, served counsel for MDS with the application documents including the affidavits in support of the notice of application for leave to appeal. At the hearing, the court permitted counsel for MDS to make oral submissions and to, later, file written submissions. Counsel for the Minister was allowed to respond in writing on or before 23 April 2024. Counsel for MDS filed the submissions within time, however, counsel for the Minister filed the response, out of time, that is, on

25 April 2024. All the submissions and the material provided by counsel have been considered.

[15] The situation resulting from the various phases of this case is, therefore, as follows:

a. the IDT has been instructed by the Minister to inquire into a dispute between Mrs DeLeon-Jones and MDS over the termination of her employment;
b. MDS, by way of its proposed application for judicial review, seeks to quash the Minister's instruction on the basis that the Minister has erred in two respects:
    i. his finding that there is a dispute over termination is flawed since Mrs DeLeon-Jones stated that she is still employed to MDS; and
    ii. even if his finding is correct that there is a dispute over the termination of her employment, he erroneously found that the dispute is between MDS and Mrs DeLeon-Jones since MDS is not her employer, but rather Dr Reddy's; and
c. the proposed appeal is aimed at preventing the judicial review and placing the parties before the IDT for its action.

[16] The Minister proposes to argue three grounds of appeal:

"i. The Learned Judge erred as a matter of fact and/or law in the exercise of her discretion when she found that the Minister had not considered all the information with respect to Mrs Deleon Jones' [sic] employer;

ii. The learned judge failed to properly consider the material evidence filed on behalf of the Minister, as contained in the Affidavits of Desreen Willie-Grant filed

on November 24, 2023, and the Supplemental Affidavit of Desreen Willie-Grant filed on December 19, 2023; and

iii. The Learned Judge erred in conflating the test in Sharma v Brown-Antoine with the [civil standard of proof] of on a balance of probabilities."

[17] Ground ii is a subset of ground i. In her affidavits, Mrs Willie-Grant outlined the history of the case that came to the Ministry and exhibited all the correspondence between the parties and between the Ministry and the parties. She concluded her substantive affidavit, filed on 24 November 2023, with assertions that:

a. the Minister, based on that correspondence and the guidance of the Ministry's Legal Services Unit, decided that an industrial dispute existed between Mrs DeLeon-Jones and MDS;
b. the industrial dispute "emanated from a disciplinary hearing arising from the misconduct of [Mrs DeLeon-Jones] or from [her] claim of being constructively dismissed" (para. 19); and
c. the dispute is an industrial dispute as defined by section 2 of the Labour Relations and Industrial Disputes Act ('the LRIDA').

[18] Consequently, the proposed grounds of appeal only address two issues:

a. whether the learned judge erred as a matter of fact and/or law in the exercise of her discretion when she found that the Minister had not considered all the information with respect to Mrs Deleon-Jones' employer; and
b. whether the learned judge erred in conflating the test in **Sharma v Browne Antoine and Others** [2006] UKPC 57 with the civil standard of proof of 'on a balance of probabilities'.

[19] The submissions on each issue will be outlined separately but analysed together.

Issue a. - Whether the learned judge erred as a matter of fact and/or law in the exercise of her discretion when she found that the Minister had not considered all the information with respect to Mrs Deleon-Jones' employer

Submissions

[20] Counsel for the Minister, Miss Lisa White, submitted that the Minister's remit, was to resolve a question of fact: whether there was an "industrial dispute" according to section 2 of the Act. She urged upon the court that the learned judge erred when she failed to realise that that was the issue she was to determine, but instead concentrated on who was Mrs DeLeon-Jones' employer. Learned counsel argued that, based on the information before him, the Minister correctly concluded that there was an industrial dispute between MDS and Mrs DeLeon-Jones.

[21] Miss White submitted that, at this stage, the Minister was only tasked with considering the matter based on the material submitted by the parties. The material that the parties had placed before the Minister, learned counsel argued, was sufficient for the Minister to properly exercise his discretion and refer the matter to the IDT. Learned counsel argued that there must be an industrial dispute before the Minister can exercise his discretion. If he so finds, she contended, then the IDT must consider the matter to determine whether Mrs DeLeon-Jones was unjustifiably dismissed. Learned counsel argued that the information before the Minister was that:

a. Mrs DeLeon-Jones indicated that a purported employer terminated her employment;
b. Mrs DeLeon-Jones' rights and duties under her contract of employment were affected;
c. MDS indicated that Dr Reddy was the party which possessed the authority to terminate her employment.

[22] Ms White submitted that, in any event, the IDT was entitled to decide if MDS was Mrs DeLeon-Jones' employer. Learned counsel relied on, among others, **Regina v**

Industrial Disputes Tribunal *ex parte* Salada Foods Ja Ltd (unreported), Supreme Court, Jamaica, Suit No M50/1978, judgment delivered 13 November 1978, **R v The Industrial Disputes Tribunal, Alcan Jamaica Company and others (*Ex parte* the National Workers Union Ltd)** (1981) 18 JLR 293 and **Regina v Industrial Disputes Tribunal and Others *ex parte* The National Workers Union Ltd** (1981) 18 JLR 293, in support of these submissions.

[23] Ms White also submitted that the learned judge erred:

a. when she said she was not satisfied that the Minister had regard to the information to determine who was Mrs Deleon-Jones' employer;
b. in her finding that the Minister concluded that MDS was Mrs DeLeon-Jones' employer because of the employer's name appearing on the health insurance policy and Mrs DeLeon-Jones' salary slip;
c. when she ruled that the Minister failed to determine who Mrs DeLeon-Jones' employer is since the Minister did not give reasons; and
d. in considering matters that went beyond the Minister's scope under section 11A(1)(a) of the Act.

[24] Mr Gavin Goffe, on behalf of MDS, argued that the submissions on behalf of the Minister were misguided. He contended that, in this court, counsel for the Minister stated that the IDT is empowered to determine whether the entity that the Minister has referred to as the employer is indeed the employer. He submitted that the Minister did not advance that argument in the court below, and further, it is nowhere to be found in its draft notice and grounds of appeal. Learned counsel contended that the Minister should, therefore, be prevented from relying on that argument, without an amended notice and grounds of appeal reflecting it.

[25] Learned counsel highlighted that the crux of the matter is whether the Minister identified Mrs DeLeon-Jones' employer before referring the matter to the IDT, which he was required to do. Mr Goffe added that the Minister also disregarded section 2 of the Act, which requires an industrial dispute to be a dispute between an employer and an employee. Learned counsel submitted that the fact that the Minister referred the matter to the IDT as being between MDS and Mrs DeLeon-Jones, means that the Minister thought that MDS employed her. This, he insisted, was improper since numerous factors suggested that Dr Reddy's was Mrs DeLeon-Jones' employer, including the fact that she was selling Dr Reddy's products, and she was charged for breaching Dr Reddy's policies.

[26] Mr Goffe argued that it was open to the Minister to have named both MDS and Dr Reddy's as the employer but he failed to do so and did not state a reason for that failure. In the absence of a reason, learned counsel asserted, the learned judge could not have been satisfied that the Minister properly considered all the evidence concerning the identity of the employer. Mr Goffe emphasised that the Act provides that the employer is the person or entity that the employee worked for and not solely who paid the salary and benefits. He argued that there was nothing to suggest that the Minister considered that MDS was acting as Dr Reddy's agent, which meant that MDS was not liable to Mrs DeLeon-Jones.

[27] Learned counsel asserted that Mrs DeLeon-Jones' initial letter to the Minister is essential to the analysis. He posited that her letter, dated 11 March 2021, did not meet the threshold to buttress a referral for unjustifiable dismissal. He relied on **R v Minister of Labour and Employment et al ex parte West Indies Yeast Co Ltd** (1985) 22 JLR 407 and **Spur Tree Spices Jamaica Ltd v The Minister of Labour & Social Security** [2018] JMSC Civ 103. The letter of 26 April 2021, he submitted, could not convert the initial case to a dispute; it could only have been used to initiate a new invitation to the Minister to intervene, but that step is now time-barred by the Act.

[28] Mr Goffe highlighted that, in the court below, the Minister did not state that MDS had an alternative remedy. On that premise, learned counsel proclaimed that the Minister

should not be allowed to argue that point in this court. In any event, Mr Goffe insisted that the IDT does not have the jurisdiction to determine whether the person, who the Minister refers to the IDT, is the employer and does not interfere with the terms of reference. Additionally, learned counsel submitted that if the IDT concluded that MDS is Mrs DeLeon-Jones' employer, it would be difficult to set aside that finding of fact unless there was an error of law. That principle, he argued, is inapplicable to the decisions of the Minister.

[29] Mr Goffe submitted that the Minister's referral to the IDT is prejudicial to MDS because:

a. the terms of reference cannot be amended since the IDT does not have jurisdiction to interfere with the terms of reference;
b. the main issue is who is the employer but the terms of reference, as framed, has impliedly determined that issue; and
c. the Minister considered two possible disputes at the time of referral, namely, dismissal for misconduct in January 2021 or the constructive dismissal in April 2021.

[30] Learned counsel highlighted that it was relevant to determine which dispute the Minister had referred to the IDT in order to ascribe the appropriate limitation period outlined in section 11B of the Act. The section required that Mrs DeLeon-Jones to have made a complaint within 12 months of the disciplinary action. He, however, argued that if the dispute relates to the dismissal for misconduct in January 2021, her letter of 11 March 2021 fails to meet that time threshold, since it does not acknowledge that a dismissal occurred. In those circumstances, the limitation period to file a complaint against a disciplinary action had expired. Learned counsel relied on **R v Industrial Disputes Tribunal, *ex parte* Gayle's Supermarket and Hardware Limited**

(unreported), Supreme Court, Jamaica, Suit No M-036 of 1990, judgment delivered 7 November 1991.

[31] Miss White, in the Minister's tardy submissions in reply, submitted that MDS argued in this court that it needs clarification, by way of judicial review, of the terms of reference to the IDT, but it did not make those submissions before the learned judge. Learned counsel submitted that MDS could raise that issue before the IDT, and it is the IDT, not the court, that should then seek clarification from the Minister.

[32] Learned counsel insisted that the Minister knew there was a dispute regarding whether Mrs DeLeon-Jones' employment was terminated and if so, how. In those circumstances, learned counsel submitted that MDS does not need to raise the argument about the IDT's determination as to who was Mrs DeLeon-Jones' employer and who could terminate her employment. Learned counsel contended that the Minister, in seeking to address the issues in dispute between the parties, engaged in the conciliation process, but counsel for MDS did not follow through with that process and thereby obstructed the Minister's attempt at determining who was Mrs DeLeon-Jones' employer. The failure of the conciliatory process resulted in the Minister's referral of the dispute to the IDT. Miss White emphasised that Mrs DeLeon-Jones accepted MDS as her employer. Learned counsel highlighted that MDS acted in a manner that was consistent with them being her employer such as engaging investigators to determine the probity of her actions, conducting disciplinary processes, and paying her.

[33] Learned counsel argued that **R v Industrial Disputes Tribunal, ex parte Gayle's Supermarket & Hardware Limited** is distinguishable from the present case. In that case the dispute involved a union seeking bargaining rights for workers. Before that dispute was settled, there was a clear change of ownership of the business, which resulted in a different legal person employing the workers by the time the union was granted bargaining rights. The union's subsequent claim of an industrial dispute with the new business owner was held to have been misplaced, since the union had been awarded bargaining rights in respect of the original business owner's employees. In the present

case, learned counsel argued, Dr Reddy's as well as MDS had been engaging Mrs DeLeon-Jones. Additionally, in **R v Industrial Disputes Tribunal, ex parte Gayle's Supermarket & Hardware Limited** there had been no industrial dispute between the parties because when there was a change of ownership, the union had not yet obtained bargaining rights. In the present case, learned counsel asserted, there does exist an industrial dispute. Learned counsel outlined that the terms of reference do not suggest that the Minister has determined who is Mrs DeLeon-Jones' employer. She argued that the parties that were before the Minister were Mrs DeLeon-Jones and MDS. She also noted that Dr Reddy's is not a party to MDS's application for leave to apply for judicial review. The Minister's conduct, in referring the matter to the IDT, learned counsel contended, has simply advanced the matter between the parties and it is for the IDT to determine who is Mrs DeLeon-Jones' employer and whether she was unjustifiably dismissed.

[34] Learned counsel maintained that the Minister was not empowered to decide who the employer is, in the light of the dispute between the parties. She indicated that the learned judge erred when she ruled that the Minister should have provided reasons, as that is a misunderstanding of section 11A(1)(a) of the Act. She urged that all the Minister was required to do was to determine whether there was an industrial dispute that could be referred to the IDT. She stressed that the Minister did not need to provide reasons for referring the dispute.

[35] Miss White maintained that the IDT is the appropriate forum to address the issues between the parties. She submitted that the terms of reference accurately reflected the issues between the parties and do not denote who Mrs DeLeon-Jones' employer is. Learned counsel added that Mrs DeLeon-Jones' letter dated 11 March 2021 amounted to a sufficient objection to a disciplinary action, within the time stipulated by the Act.

Issue b. - The Learned Judge erred in conflating the test in Sharma v Brown-Antoine with the civil standard of proof of 'on a balance of probabilities'

Submissions

[36] Miss White argued that the learned judge applied the incorrect standard in her assessment. Learned counsel noted that the learned judge applied the civil standard to arrive at her findings of fact when she should have applied the standard as outlined in **Sharma v Brown-Antoine**. Accordingly, learned counsel submitted that the learned judge erred in the exercise of her discretion in granting MDS leave to apply for judicial review.

[37] Mr Goffe made no submissions in respect of this proposed ground of appeal.

Discussion and analysis

[38] The submissions in respect of the application for leave to appeal raise numerous sub-issues, however, at this stage, this court is not tasked with the duty of comprehensively assessing those aspects. The court, at this stage, is only required to consider whether either or both issues, it has identified above, has or have a real chance of success (see rule 1.8(7) of the Court of Appeal Rules, 2002). This means that the issues must have a real and not a "fanciful prospect of success".

[39] The court is also mindful of its function, that as an appellate court, it will not lightly disturb the exercise of discretion, which is given to a judge at first instance. The authorities for that principle are well known and **The Attorney General of Jamaica v John MacKay** is frequently cited among them.

[40] Both judgments by their Lordships in **Sharma v Brown-Antoine** stipulate that judicial review should not normally be granted where an alternative procedure would resolve all the issues which are identified to be addressed by the proposed administrative action. Mr Goffe contended that arguments to this effect were not made on behalf of the Minister in the court below. However, there is a fundamental principle that judicial review should not be granted if an alternative remedy exists. In the circumstances, whether

these arguments were made in the court below or not, it was a matter to which the learned judge should have addressed her mind.

[41] Lords Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, in **Sharma v Brown- Antoine**, at para. [14](5)(iv) of their joint judgment, made reference to that principle:

> "…But, as Lord Lane CJ pointed out with reference to abuse applications in *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, 642:
>
> 'We would like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, **that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay**.'" (Italics as in original, bold type supplied)

[42] Their Lordships applied the principle to the case before them and found that the judge at first instance erred in failing to recognise this principle. They said, in part, in para. [24]:

> "…**Nor did she consider which, if any, of the Chief Justice's complaints could not be adequately resolved within the criminal process itself**, either at the trial or, possibly, by application for a stay of the proceedings as an abuse of process. It is ordinarily a condition of obtaining relief that a complaint cannot be satisfactorily resolved in this way (as it cannot where the decision is not to prosecute) and a grant of leave which ignores this condition must be suspect." (Emphasis supplied)

[43] In the other joint judgment, Baroness Hale of Richmond, Lord Carwell and Lord Mance expressed similar views. They said, in part, in para. [31]:

> "The possibility of a challenge to the prosecutorial decision, and the apparent inevitability of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. **They could properly be raised in the criminal proceedings, either in the course**

> **of an application to stay those proceedings on the ground of abuse of process or in any substantive trial**. Like Lord Bingham and Lord Walker, we are not persuaded that the Chief Justice's complaint could not properly be resolved within the criminal process. It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court…. (Emphasis supplied)

[44] It is also to be noted that, if granted permission to appeal, the Minister could seek to argue the point on appeal.

[45] Although the present case does not concern criminal proceedings, the principles set out above are nevertheless applicable. MDS would be entitled to raise their objections before the IDT that Mrs DeLeon-Jones is Dr Reddy's employee and/or that her service was properly terminated. The IDT would have a wider mandate than a judicial review court, and could analyse more issues between the parties than the issue of whether the Minister had properly referred the case to the IDT. The IDT exists as an appropriate alternative remedy for these parties if an industrial dispute exists. **R v Industrial Disputes Tribunal ex parte Gayle's Supermarket and Hardware Limited** is distinguishable from the present case, for whereas there was no issue in that case as to the difference in the legal entities that were, at various stages, identified as the employer, the present case has no such clear lines of demarcation. MDS dealt with Mrs DeLeon-Jones in respect of aspects of an employer/employee relationship. It paid her salary and provided her with health insurance. It dealt with Mrs DeLeon-Jones in the disciplinary proceedings as if she were its employee. Additionally, the attorney-at-law who chaired earlier disciplinary proceedings between MDS and Mrs DeLeon-Jones seemed to have identified MDS as the employer. These are matters that the Minister could have contemplated in making his decision.

[46] Section 2(b)(ii) of the LRIDA provides that an industrial dispute arises where an employee, who is not a member of a trade union, has a dispute relating to the termination

or suspension of the employee. Mrs DeLeon-Jones' position, in her letter of 26 April 2021, is that she was constructively dismissed. That assertion was before the Minister although MDS says it was not aware of it. There was, therefore, evidence before the Minister of an industrial dispute meriting the referral to the IDT.

[47] It is true that an issue between the parties concerns who the correct parties should be. It is also true that the Minister, in the terms of reference, assumes that MDS is the employer. According to **R v Industrial Disputes Tribunal ex parte Salada Foods Ja Ltd**, when the matter is referred to the IDT, if the issue is raised there, the IDT can seek further clarification on the terms of reference from the Minister about who the proper parties should be. Where the IDT makes an order against the wrong party that decision should be quashed (see **R v Industrial Disputes Tribunal ex parte Gayle's Supermarket and Hardware Limited**). The employer's identity, in this case, would be a mixed question of law and fact. A decision on that issue would be subject to judicial review. However, the IDT has not yet decided that issue.

[48] The Minister has a real chance of success in convincing this court on an appeal that MDS has available to it "an alternative form of redress" (rule 56.3 of the CPR). Based on the sparse information concerning the learned judge's ruling, it is unclear if she considered this principle.

[49] In the circumstances leave to appeal ought to be granted.

Costs

[50] As was mentioned above, the Minister failed to obey an order of this court that set the time within which submissions should have been filed in response to MDS' submissions. There must be a cost sanction for the disregard of the court's order. A limit to a half of its costs of the application, if it is successful on appeal, would be an appropriate sanction.

Proposed orders

[51] I propose the following orders:

1. The application for leave to appeal the decision of the Supreme Court, handed down on 8 February 2024, is granted.

2. The applicant shall file and serve his notice and grounds of appeal on or before 10 June 2024.

3. The application for a stay of any proceedings commenced in pursuance of the orders of the learned judge, made on 8 February 2024, pending the determination of the appeal, is granted on condition that the applicant strictly complies with order 2 hereof.

4. Costs of the application to be costs in the appeal and are to be agreed or taxed. The applicant, in the event that it is successful on appeal, is to be limited to one-half of its costs of the application.

EDWARDS JA

[52] I have read the draft judgment of my brother Brooks P. I agree with his reasoning and conclusion.

LAING JA (AG)

[53] I too have read the draft judgment of my brother Brooks P and agree.

BROOKS P

ORDER

1. The application for leave to appeal the decision of the Supreme Court, handed down on 8 February 2024, is granted.

2. The applicant shall file and serve his notice and grounds of appeal on or before 17 June 2024.

3. The application for a stay of any proceedings commenced in pursuance of the orders of the learned judge, made on 8 February 2024, pending the determination of the appeal, is granted on condition that the applicant strictly complies with order 2 hereof.

4. Costs of the application to be costs in the appeal and are to be agreed or taxed. The applicant, in the event that it is successful on appeal, is to be limited to one-half of its costs of the application.