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IN THE SUPREME COURT.

Before: The Hon. Mr. Justice K.G. Smith, C.J.
The Hon. Mr. Justice W.D. Marsh
The Hon. Mr. Justice L.H. Wolfe

Suit No. M. 53 of 1981

R. v. The Industrial Disputes Tribunal
Alcan Jamaica Company
Alumina Partners of Jamaica
Alcoa Minerals of Jamaica Incorporated
Kaiser Bauxite Company
Reynolds Jamaica Mines Ltd.

Ex parte The National Workers Union Ltd.

R. Carl Rattray, Q.C., P.J. Patterson and Hugh Salmon for Applicant
A.B. Edwards (acting Solicitor General) and R.G. Langrin for the Tribunal
R.G.Langrin for the Minister of Labour (allowed to be heard in opposition)
J. Leo-Rhynie, Q.C., and W.K. Chin See for Bauxite and Alumina Companies

1981 - July 30, 31. August 5, 6, 7, 10, 11, 12, 13, 14, 19.

SMITH, C.J. :

This is an application for an Order of Prohibition to issue prohibiting the Industrial Disputes Tribunal (the Tribunal) from further acting on the reference to it made by the Minister of Labour on April 10, 1981. It challenges the jurisdiction of the Tribunal in the matter referred.

The applicant, the National Workers Union (the Union), holds bargaining rights in respect of certain category of workers employed to the five bauxite and alumina companies (the Companies) who are respondents in these proceedings. The companies are -

Alcan Jamaica Company
Alumina Partners of Jamaica
Alcoa Minerals of Jamaica Incorporated
Kaiser Bauxite Company; and
Reynolds Jamaica Mines Limited.

By letters dated October 24, 1980, the Union served claims on the Companies for new collective agreements. Identical "industry-wide" claims were served on each of the Companies as well as separate "local" claims. The Companies, on their part, each made proposals to the Union for amendments to the existing collective agreements due to expire on January 31, 1981 for incorporation in the new agreements.

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Representatives of the Companies met with representatives of the Union on November 11, 1980, for joint discussions of the industry-wide claims. Up to January 22, 1981, five meetings had been held and by then the Union had clarified the twenty-eight point industry-wide claims made on each company. Simultaneous discussions in respect of the local claims were being held between each company and representatives of the Union at the local level, as it is called, i.e. at the site of each company's operations.

At the sixth meeting on January 22, the Companies made a wage offer, without prejudice, for contracts for a duration of three years. The Union had claimed contracts for a duration of twelve months and had not quantified its claim for wages, claiming instead "a substantial wage increase." There is no evidence of the reaction of representatives of the Union to the Companies' offer on January 22.

A seventh meeting was held on January 29. It is common ground that a dispute arose at this meeting regarding the date from which the new collective agreements would take effect when settled, resulting in the service by the Union of "strike notices" on the Companies to become effective in seventy-two hours. It is also common ground that this dispute was settled after meetings with Ministry officials on January 30, February 2 and 3 at the Ministry of Labour. The strike notices were withdrawn.

Up to January 29 the parties had been meeting at an hotel in St. Andrew. It was after a meeting at that location on that day, during which the strike notices were served, that the first meeting at the Ministry of Labour took place. Thereafter they met at the Ministry up to March 25, when the last joint meeting took place. There is disagreement on the evidence regarding the reasons for the change of location. Mr. Lascelles Perry, who at that time was leader of the Union's team at the meetings, states in his affidavit dated July 10, 1981 that "a meeting was held at the Ministry of Labour to help to resolve the issue of retroactivity" of the new collective agreements. In a further affidavit dated July 29, he stated that the meeting at the Ministry on that date "was for the sole purpose of settling that dispute concerning retroactivity."

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Dr. Keith Panton, the leader of the Companies' team, in his affidavit dated July 27, 1981, said that at the meeting on the morning of January 29 "there was a serious impasse" over the Companies' offer in respect of wages and the Union's demand in that regard. He said that, as a result, it was agreed that the intervention of the Ministry of Labour was necessary because the expiry date of the existing agreements, namely, January 31, was fast approaching. He continued: "A meeting at the Ministry of Labour had been set up for such a purpose later that day and both parties had agreed to attend." After this, he said, the matter of the effective date of the new collective agreements became an issue, strike notices were served as a result and "the parties agreed to use the already arranged meeting at the Ministry of Labour to try and resolve this new matter of a strike notice."

There is apparent support for Mr. Perry's version in the affidavit dated July 27 of the Director of Industrial Relations, Mr. Anthony Irons, where he stated that "following the service of the strike notice by the Union and the threatened closure of the bauxite and alumina plants, the Ministry of Labour intervened; that the Ministry conducted conciliatory meetings with the parties on January 29 and 30 and the strike notices were withdrawn on January 31." The verbatim minutes of the meeting at the Ministry on January 29, however, support Dr. Panton's version. The recorded introductory remarks of Mr. Irons, who is recorded as being chairman, are inconsistent with Mr. Perry's version. After his introductory remarks, the chairman asked both sides to give him "their reading of the situation as they see it" and they would "take it from there." After Dr. Panton had given his account of the background, he (Dr. Panton) is recorded as saying :-

> " So that we are here at the stage, sir, where your intervention is very crucial, and it is very crucial not on the point simply of reaching a settlement <u>per se</u>, but on the point that we do have a strike notice and that will expire, if I am correct, on the 1st February at about midday. "

On his part, at the end of his account in response to the chairman's invitation, Mr. Perry is recorded as saying :

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" Finally, Mr. Chairman, if it is the wish and pleasure of the Ministry to try and get the parties to arrive at a settlement for a new contract, we are available; but we will not, Mr. Chairman, not re-negotiate the 1978 agreement; that is behind us, or will be on the 31st January.

Both sides spent quite some time at that meeting, in terms of words used, blaming each other for the delay which had brought them to the eve, almost, of expiry of the existing collective agreements without there being any settlement of those agreements which should take their place. Insofar as the purpose for going to the Ministry initially can be of any assistance in helping to decide the issue of the Minister's jurisdiction, to be dealt with later, I prefer Dr. Panton's version, supported as it is by the minutes, that the sole or primary purpose was not the issue of the effective date of the new collective agreements. I have no doubt, however, that this became the primary issue for settlement during the unilateral discussions which, it is recorded, followed the joint meeting and thereafter until it was settled on February 3. This was the burning issue, insofar as Mr. Perry was concerned, when the joint meeting was coming to a close. In what can perhaps be described as a peroration, Mr. Perry is recorded as saying :

" We are quite prepared, willing and able to try and arrive at a settlement before midday on the 1st February. But if we are not so lucky, Mr. Chairman, so let it be. Let nature take it's course. Why should I now enter into negotiations with the companies about what it took us seven months to negotiate the last time? We are not negotiating that; that is behind us. "

After this, the Ministry of Labour would certainly have been anxious to have that issue settled first in order to avert a shut-down in the industry.

After this issue was settled, some twelve further meetings between the parties were held at the Ministry. Further meetings fixed for April 2 and April 8 were cancelled. On April 10 the Minister made a reference to the Tribunal in the following terms:

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" To determine and settle the dispute between Alcan Jamaica Company, Alumina Partners of Jamaica, Alcoa Minerals of Jamaica Incorporated, Kaiser Bauxite Company and Reynolds Jamaica Mines Limited, on the one hand, and certain workers employed by those companies and represented by the National Workers Union on the other hand over :

(a) the Union's claims for increased wages and other improved conditions of employment made on behalf of the said workers; and

(b) the claims of the respective companies for certain variations in the terms and conditions of employment of the said workers. "

The letter dated April 10 from Mr. Irons to the chairman of the Tribunal conveying the reference stated that it was made under the provisions of section 11A(1)(a) of the Labour Relations and Industrial Disputes Act.

This reference by the Minister is the subject of the main ground of the application in these proceedings. It is contended, firstly, that no dispute existed between the Union and the Companies, which could be a subject of reference by the Minister. Secondly, that the reference is bad in that "the Minister has referred as one purported dispute, matters arising out of five separate industry-wide claims by the National Workers Union against each of the Bauxite and Alumina Companies and five separate local level claims against each of the five Bauxite and Alumina Companies, the negotiations of which would have resulted in separate collective labour agreements between each Company and the National Workers Union and which matters cannot form part of the same reference without the consent of the parties".

Section 11A(1)(a) of the Act is in the following terms :

" Notwithstanding the provisions of sections 9 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking and should be settled expeditiously, he may on his own initiative :

(a) refer the dispute to the Tribunal for settlement if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties. "

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It will be seen that the existence of an industrial dispute is the main essential for the exercise of the Minister's powers. Section 2 defines "industrial dispute" as follows, so far as is relevant :

> "industrial dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, where such dispute relates wholly or partly to -
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> (a) terms and conditions of employment, of the physical condition in which any workers are required to work.

The first contention of the applicant raises the question of the extent to which the Court is able to review the exercise of the Minister's discretion, conferred, as it is, in subjective terms. The learned acting Solicitor General, basing himself on Robinson and others v. The Minister of Town and Country Planning, (1947) 1 All E.R. 851, submitted that once it is shown that the Minister has exercised the discretion which the legislature has given him and that he has acted bona fide the Court will not enquire into the exercise of that discretion. There is no suggestion that the Minister acted otherwise than bona fide. Mr. Langrin, for the Minister, was less restrictive in his approach. He conceded the right of the Court to review the exercise of the Minister's discretion in order to decide whether there was any foundation of fact upon which the Minister could lawfully have exercised it, but submitted that this should be done within limits which he formulated from Secretary of State for Education and Science v. Tameside Metropolitan Borough Council, (1976) 3 W.L.R. 641 or (1976) 3 All E.R. 665. He submitted that it is clear that as long as there was a foundation of fact before the Minister on which he could reasonably have exercised his discretion in the way he did, a Court ought not to hold that his discretion was not lawfully exercised.

Mr. Leo-Rhynie, for the Companies, would have us revert almost to the restriction for which the Solicitor General contended. He submitted that where, as in the instant case, the exercise of the power impugned does not directly affect the substantive right of an individual, the Courts have refused to interfere, notwithstanding the

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fact that the repository of the power had taken into account irrelevant matters or disregarded relevant matters, or had misdirected himself on any particular point. The Courts, the submission continued, have only interfered in such cases where the repository had acted in bad faith or capriciously. As authority for the submission, Mr. Leo-Rhynie relied on R. v. Barnett & Camden Rent Tribunal, (1972) 1 All E.R.1185 and Secretary of State for Employment v. A.S.L.E.F. (1972) 2 All E.R. 949. Basing himself on these cases, Mr. Leo-Rhynie submitted that the exercise of the Minister's powers under section 11A does not affect the basic rights of individuals.

In his reply for the Union, Mr. Patterson accepted Mr. Langrin's submission on this point and submitted, in addition, that where Parliament has conferred a power on a Minister it becomes exercisable only after all preconditions are established and Courts are entitled to enquire into the existence or otherwise of the preconditions. Further, a requirement that the Minister be satisfied does not introduce a purely subjective test. The Court is entitled, he said, on the evidence before it, to determine whether or not there were facts on which the Minister could be satisfied. Mr. Patterson disagreed with Mr. Leo-Rhynie's submission that the exercise of the powers under section 11A did not affect the basic rights of individuals. He suggested that the substantive rights of the Companies, the Union and the employees were involved, as intervention of the Tribunal will affect the right of free collective bargaining between the Union and the Companies.

In my opinion, the correct principles of law to be applied in these proceedings are those stated by Mr. Langrin, based on the Tameside case. Mr. Leo-Rhynie conceded, in response to a question from the Bench during the argument, that if there was no industrial dispute, as contended by the applicant, the Minister's reference to the Tribunal was ultra vires. As I understand the judgments in the two cases on which he relied, the principles they expound are not applicable in a case where the exercise of the power is completely ultra vires.

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As regards the applicant's first contention, that no dispute existed, it was submitted by Mr. Rattray that the proceedings at the Ministry started as a continuation of the collective bargaining process and there is no evidence that it changed its nature at any time up to the time of the last meeting. This submission is based on the evidence of Mr. Perry in the main, who, in his affidavit of July 10, said that after the settlement of the dispute at the Ministry on February 3 the Minister of Labour suggested, and it was agreed, "that the Union and the Companies would continue to negotiate at the Ministry of Labour;" that "negotiations under the collective bargaining process recommenced at the Ministry of Labour" and further meetings were held on eleven days thereafter, which he identified, up to March 30; that at the time of the reference "the parties were engaged at the Ministry of Labour in the collective bargaining process and were considering the proposals of each other for the purpose of arriving at a collective labour agreement;" and that "the negotiations had not arrived at any impasse since the only dispute, to wit, the question of retroactivity, had been settled by the parties on the 3rd February, 1981."

In his affidavit of July 27, Dr. Panton referred to conciliation meetings between the parties at the Ministry under the chairmanship of the Director of Industrial Relations on the issue of the new collective agreements; to the fact that at these meetings numerous attempts were made by the Director and his deputy to "conciliate the dispute"; and that the representatives of the Union "appeared less and less concerned about attending the meetings and making a serious effort at settling the dispute." Mr. Rattray pointed to passages in the minutes of the meeting of February 26 and March 24 and 25 on the basis of which he submitted that it was clear to Dr. Panton that what they were engaged in, though they were at the Ministry, was the process of collective bargaining. In all these passages Dr. Panton was recorded as using the word "bargaining". Reference was made by Mr. Rattray to the definition of "collective bargaining" in section 2 of the Act and to references to the process of collective bargaining in clauses 16(i) and 18

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dispute or difference" it was not necessary for the Privy Council to express an opinion on Mr. Justice Archer's definition of "trade dispute". So, the authority for Mr. Rattray's contention remains that of that learned Judge.

The Labour Relations and Industrial Disputes Act does not define "dispute". Though in his reply Mr. Patterson submitted that in an industrial context dispute connotes a state of combat or aggression, there is no evidence before us that it has acquired that special meaning. "Deadlock" means "complete standstill" (see the Oxford English Dictionary). If this is the meaning that "dispute" bears in the Act then it would be pointless prescribing a procedure whereby parties are to endeavour to settle disputes between them by negotiation. The ordinary dictionary meaning of "dispute" does not include "deadlock" and there is, in my opinion, no justification for giving it this special meaning in the Act. I would have expected it to be defined in the Act if it was intended that the word should have a meaning other than its ordinary meaning. It seems to me that there is no justifiable basis for the fear expressed during the argument that if "dispute" is not given the restricted meaning suggested the right to free collective bargaining "enshrined in the Act and the Code" will be negated. In every case in which the Minister is given the power to refer an industrial dispute to the Tribunal for settlement, he is expressly enjoined to exercise the power only after he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties (see sections 9, 10, 11 and 11A). This clearly leaves parties free to exhaust the collective bargaining process.

The Director of Industrial Relations, Mr. Irons, is accepted by all the parties to these proceedings as an experienced officer in his field. Indeed, it is agreed that he was involved in the conciliation process leading to the collective agreements between the Union and the Companies which expired on January 31. In his affidavit, Mr. Irons said that one of the conditions of the settlement of the dispute

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regarding the commencing date of the new agreements was that further meetings "to settle the many unresolved matters should be conducted at the Ministry". It was submitted by Mr. Rattray that if what was continuing at the Ministry was collective bargaining in order to arrive at collective agreements then, whatever name is given to the Ministry official, what was happening at the Ministry was not an attempt to settle a dispute. Reference was made to passages in the minutes of meetings on February 9 and 26 and March 25 and it was said that in the context as seen in the minutes the Ministry was using procedures to which it was accustomed in conciliation but, in fact, there is no indication that conciliation was taking place. This submission is not only bold, it is clearly self-contradictory. It was made in the face of an affirmative answer given at the meeting on February 26 by Mr. Irons to Mr. Lloyd Goodleigh, then leader of the Union's team, who had asked: "Are we in the process of conciliation, sir?" Of course, an admission that conciliation was taking place is an admission that collective bargaining had ceased and that a dispute had arisen, even if the Union's contention is right that collective bargaining and disputation are incompatible.

Mr. Irons deposed that the further meetings at the Ministry, i.e. from February 9, were conducted under his chairmanship in the capacity of conciliator. He said, in paragraph 11 of his affidavit :

> " Some of the meetings were joint meetings, but the atmosphere was such that unilateral meetings had to be conducted in separate rooms at the Ministry, i.e. I would talk to one side endeavouring to reach a settlement on points in dispute and would then talk to the other side and endeavour to persuade them to accept the settlement or reach some form of acceptable compromise. "

The minutes of the meetings exhibited to his affidavit amply support Mr. Irons' evidence that the meetings from February 9 were conciliatory. Indeed, as indicated above, counsel admitted that the conciliation procedure was used during those meetings. Mr. Irons deposed as follows, in paragraphs 16 and 17 of his affidavit :

> " 16. Twelve conciliatory meetings were held at the Ministry between February 9, 1981 and 30th March, 1981 - all under my Chairmanship, and from my neutral and confidential position as conciliator, it became increasingly clear to me that there was no possibility then or within the reasonably foreseeable future of the parties resolving the dispute themselves or by means of the conciliatory services of the Ministry.

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> 17. Up to that time no real progress towards a settlement had been made, as the difference between the proposals of the parties appeared irreconcilable. "

In my judgment, the inescapable conclusion from the evidence before us is that there was a dispute in existence which had reached a deadlock. So that even on the Union's definition of that word there was a dispute. At the meeting on February 9, Mr. Perry, for the Union, is recorded in the minutes as saying :

> " Mr. Chairman, there is no way, absolutely no way we will settle a three year contract for any amount remotely close to $17.00. In fact, Mr. Chairman, you could not even add them and get a figure, it would be closer if you multiply to come up with a figure that would be closer to our expectations than adding them. So we feel at this stage that the input of the Ministry will bring reason to bear on our colleagues across from us to let us have a fair, reasonable and just settlement. I do not believe at this time we need to elaborate. I am sure you would want to speak with them outside. "

These remarks were in respect of the Companies' offer of January 22, exhibited as "K.S.P. II" to Dr. Panton's affidavit. If there was no conclusive evidence before, certainly this shows in the clearest possible terms that there was a dispute which the Ministry official was being invited to conciliate.

There is nothing to indicate that the Union ever budged from this apparently fixed position. Until March 25 the Companies did not vary their offer, maintaining that they wished a reasonable response from the Union before they could do so. The Union did not oblige. Dr. Panton is recorded as saying, during the meeting on February 9, that the Union had made it clear that the offer of the Companies (of January 22) was no basis for negotiation. The fact that the Union maintained an apparently fixed position is not affected, in my opinion, by the fact that its officers sought information or explanation from the Companies' representatives regarding the way in which the offer would apply to claims other than wages. The fact is that the wage offer was rejected out of hand. When Mr. Goodleigh took over leadership of the Union's team from Mr. Perry on February 26, his attitude towards the Companies' offer of January 22 was that the Union would not accept a response to its claims in that form and that what was wanted was a response on the

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individual items claimed. Dr. Panton eventually obliged, but did so on the basis of the January 22 offer. The meeting adjourned without Mr. Goodleigh giving a direct response and with the chairman appealing to both sides that when they met again they do so "in a mood of give and take so that we can make progress. "

Mr. Perry's affidavit states that there were meetings on March 5, 6, 9, 12 and 17, but we have not seen the minutes of those meetings, if there were any. There was no indication from the minutes of the short meeting on March 23 that any further progress was made. The meeting on March 24 opened with this statement by the chairman :

> " As has been suggested by this side, and the Ministry supports this, I think the time has come that we should have face to face negotiations with a view to seeing if we can break the impasse that exists. I know as a fact that it is said that some people feel that the Ministry has not done as best as it should to speed up these negotiations, but I would just like both sides to realise that the Ministry can only function as best as both sides will allow the Ministry to function, and, therefore, the Ministry needs the co-operation of both sides in this issue. "

There had obviously been much unilateral discussions between the parties and the Ministry since February 26. There was no progress made during this March 24 meeting. The subject of discussion was the same, the January 22 offer, and apart from charges and counter-charges about who was serious and who was playing games, there was no result. The meeting closed with the following exchanges :-

> " MR. GOODLEIGH: He is not trying to be unreal. They have a position which they will not disclose and they want us to move first and we are asking the Chairman to resolve it. We are open to any suggestion to resolve it.
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> " CHAIRMAN: I am going to break now for unilateral talks to try and resolve it. "

The minutes indicate that unilateral talks ensued.

The meeting on March 25 opened with the chairman expressing the need to "break the ice" on the question of wages and indicating that his proposals in this respect during unilateral talks the previous day did not appear to have borne fruit. He appealed to both sides to make an extra effort, enabling negotiations to proceed in a normal and proper

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manner. Dr. Panton agreed that something had to be done to bring the situation to an end and indicated that as somebody had to take the first step, the Companies were

> "...going to try this one more time and we do not anticipate that anybody, whether you or the Ministry or anybody is going to come and ask us to make any further move without we begin to see some amount of reality at the bargaining table if that cannot be we may as well pack up and go home and think of some other way to resolve the issue because it could not be resolved across the table."

He then tabled another offer, which is exhibited as KSP[111] to his affidavit. Like the offer of January 22, it was conditional. It still required a three-year contract. The offer in respect of wages was increased over the previous offer and separate offers were made in respect of certain of the fringe benefits. There was no response at all from the Union and the meeting adjourned with these words from the chairman :

> " What I would hope - I won't ask for a response from this side now, what I would propose is that both sides would consider their positions carefully. I would expect when we next meet, and we will fix that date before we adjourn, the workers side, represented by the Union will come forward with a meaningful position so that we can finalise these negotiations because as I have said before, this is the eleventh meeting and I believe that with goodwill from both sides there is no reason why we cannot resolve this dispute without further delay, so I trust that when we next meet the workers' side will come with a meaningful position that will enable the Ministry to conciliate this matter in the least possible time."

The minutes record the agreement of the parties to meet on Monday, March 30.

For an account of what occurred on March 30 we must turn to paragraph 13 of Mr. Irons' affidavit :

> " That on the 30th March representatives of the Companies and the Union attended at the Ministry. That in the course of the afternoon the Union presented to me what it described as revised proposal but contrary to the understanding arrived at on the 25th March, 1981, stipulated that the revised proposal should not be disclosed to the Companies. That I informed the Companies' representatives of this and they were vocally displeased that the Union was refusing to table its proposals or to have them disclosed to the Companies."

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Dr. Panton's affidavit makes it clear that there was no joint meeting of the parties, as had been arranged, though both parties attended at the Ministry. Two further meetings arranged to take place on April 2 and 3 were cancelled, as already stated. There was no further meeting between the parties before the Minister made his reference on April 10.

I hold that there was a firm foundation of fact on which the Minister could be satisfied that an industrial dispute existed when he made the reference. Mr. Irons deposed that he had kept the Minister informed continuously on the outcome of each meeting and the decreasing possibility of arriving at a settlement expeditiously, either by the parties themselves or through the conciliatory efforts of the Ministry. The Minister must, therefore, be taken to have been aware of all the essential facts known to Mr. Irons. Any suggestion that the existing dispute may have abated when the Companies made their new offer on March 25 can be met by the manner in which the Union responded to the offer. Mr. Irons saw the Union's revised proposals in response to the Companies' offer of March 25 and was therefore competent and able to judge whether the proposals would be likely to result in the resolution of the dispute, having regard to the attitude of the parties at the conciliation meetings. The Minister was entitled, in my opinion, to rely on the judgment of this senior and experienced officer of his Ministery in this respect.

The question which now arises is: What was it that was in dispute? It is common ground that the Minister referred all the claims, both industry-wide and local, and the proposals by the five Companies as the subject-matter of the dispute. There is also no real dispute that the local claims and some of the Companies' proposals were being discussed at the local level and would not have come before the Ministry except such of them as had industry-wide implications or unless the talks at the local level broke down. It is, of course, also agreed that the understanding between the parties was that there would not have been final agreement on the collective agreements until the claims, industry-wide and local, and the Companies' proposals were settled. Mr. Irons said, in his affidavit, that the conciliatory meetings at the Ministry

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ended in deadlock during negotiations at the industry-wide level. It was, therefore, submitted for the Union that matters were referred which had not reached the dispute stage, namely, local claims and Companies' proposals.

I hold that there is a basis of fact upon which the Minister was justified in making the reference in the terms that he did. As I have endeavoured to indicate, the dispute first arose out of the Companies' offer of January 22. That offer was not limited to industry-wide claims. Acceptance of it, as it stood, would settle all the monetary claims both at the industry-wide and the local levels as well as the Companies' proposals. This comprehensive offer was the subject of the discussions from the meeting on February 9 to that on March 24. So that when, as I have found, the dispute arose on February 9, it can reasonably be said that it was over the question whether or not the Companies' offer should be accepted as made. The Companies' offer of March 25 was even more comprehensive. It stated as follows :

> " Acceptance of offer is in settlement of all claims at local and industry-wide levels. Claims not referred to herein or in Company's local level offer are considered dropped. All Companies' proposed amendments, whether at local or industry-wide level, are accepted. "

As I have said, Mr. Irons had the Union's revised proposals in answer to this offer. This is how the matter stood when the Minister came to make his decision. The subject-matter of the dispute was now whether the Companies' new offer should be accepted as made as against the Union's revised proposals. On the background of the conciliation meetings since February 9 and the opinion of the Ministry official on the dim prospects of the dispute being resolved expeditiously or at all by further collective bargaining or conciliation meetings, the Minister was, in my judgment, justified in referring all the claims and the Companies' proposals to the Tribunal for settlement.

It was contended on behalf of the Union that if dispute exists it is five separate disputes and not one, as separate claims were made on the five companies with a view to concluding five

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collective agreements. It was, therefore, submitted that the reference was bad as the relevant provisions of the Act did not allow the Minister to refer the five disputes as one dispute; that the Act does not contemplate a merger of separate undertakings for the purpose of the exercise of the Minister's powers. Reference was made to the definition of "undertaking" and to the fact that references to "industrial dispute" and "undertaking" in sections 8, 9 10 and 11A of the Act are in the singular.

This contention seemed to me highly technical when it was put forward as in the way the bargaining and conciliation took place no prejudice or injustice could be caused by the reference being made as it was in one document rather than in five. It emerged, however, during the argument that there was a perfectly proper and valid basis for the making of the reference as it was made. As defined in the Act, collective bargaining is permitted between an organisation representing workers and one or more employers. The Labour Relations Code, which is authorised by section 3 of the Act, provides in clause 16(iii) that collective bargaining may take place in relation to an industry as a whole or a particular undertaking; and clause 19(iii) provides that where practicable collective agreements should be concluded on an industry-wide level as this ensures uniformity and consistency throughout the particular industry. So that the procedure adopted in the negotiations between the parties in these proceedings was duly authorised. Further, the definition of "industrial dispute" includes a dispute between one or more employers and one or more organisations representing workers. It is plain from these provisions that an industrial dispute as distinct from several may exist, as in this case, between a group of employers in an industry on the one part and a union representing workers in that industry on the other.

The submissions on behalf of the Union seek to place another obstacle in the way of the reference under section 11A. It was said that the section speaks of an industrial dispute "in any undertaking",

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in the singular, and that the five companies together cannot be said to be an undertaking as they are five separate undertakings. There is, in my view, a simple answer to this. In authorising collective bargaining by more than one employer in an industry with one or more organisations representing workers, the provisions to which I have just referred clearly contemplate as many undertakings as there are employers being involved in the negotiations. When, therefore, a dispute exists in those negotiations the plural of "undertaking" is read for the singular in the section as the Interpretation Act permits. An industrial dispute would then exist in undertakings in an industry, satisfying the provisions of section 11A, and could be referred if the other preconditions are satisfied.

The final submission made on the contention that the Minister's reference to the Tribunal was bad was that the specific dispute must be identified in the terms of reference. It was said that the reference as it stands is not definite because it does not identify the dispute in definite terms. It is sufficient to say that a similar point was made before the Privy Council in the Beetham case and was found to be without merit. I am respectfully of the same opinion regarding this submission before us.

At the commencment of the hearing of the application the applicant was allowed to amend the statement setting out the grounds upon which it sought relief by adding the following further ground :

> "That the reference of the Minister of Labour to the Industrial Disputes Tribunal has expired by virtue of the provisions of section 12 of the Labour Relations and Industrial Disputes Act, and the said Tribunal is, therefore, no longer competent to hear and determine the issue and or to make an award thereon. "

This ground is directed at the Tribunal itself and raises for decision the proper interpretation of the provisions of section 12(1)(2) of the Act, which are as follows :

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" 12(1) Subject to the provisions of subsection (2) the Tribunal shall, in respect of any industrial dispute referred to it, make its award within twenty-one days after that dispute was so referred, or if it is impracticable to make the award within that period it shall do so as soon as may be practicable, and shall cause a copy of the award to be given forthwith to each of the parties and to the Minister.

(2) The period of twenty-one days specified in subsection (1) may be extended by the Tribunal -

(a) for a further period not exceeding twenty-one days at the request of any of the parties ;

(b) for such further period beyond that specified in paragraph (a) as the Tribunal may, with the agreement of the parties, determine."

Provisions are made in sections 16 and 17 of the Act for appearances before the Tribunal and for the summoning of witnesses and the production of documents, etc. So though the time fixed in section 12(1) is expressly limited to the making of the award, it impliedly includes the time for hearing the parties or their representatives and the taking of evidence, where necessary.

I have found these provisions in section 12 to be extremely difficult to construe and my mind wavered back and forth as the argument continued. On the one hand, the acting Solicitor General submitted, in effect, that so long as it remained impracticable for the Tribunal to make its award it continues to have jurisdiction to do so and is not restricted by the fixed periods stated in the subsections. So that even if the period of twenty-one days fixed in subsection (1) is not extended under subsection (2), the Tribunal continues to have jurisdiction indefinitely, so long as it is impracticable to make the award. It seemed to me, when the submission was made, that the effect of it would be to render the provisions of subsection (2) nugatory. Mr. Patterson, on the other hand, submitted that the "grace period", as he called it, in subsection (1) does not give the Tribunal unrestricted time within which to make its award. He said that the provisions of subsection (2) limit what can be regarded as "as soon as practicable" and that limit

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is forty-two days. I assume this means in the absence of an extension under paragraph (b) of subsection (2). If he is right then it seems to me that the purpose of Parliament in enacting section 11A, which is expressly stated in subsection (1), would be defeated because if an intricate dispute is referred and it became impracticable for the Tribunal to make its award in forty-two days then the Minister may have to keep on referring it every forty-two days. This certainly would not make for expedition.

It seems to me that subsection (2) can only have been included to give parties, who know the intricacies of the matters in which they are involved, the right to apply to the Tribunal for the stated extensions where they anticipate their inability to present their cases to the Tribunal to enable it to give its award within twenty-one days. This is the purpose suggested by Mr. Leo-Rhynie for the inclusion of subsection (2). Where the period is extended under subsection (2) the Tribunal is required to make its award within the extended period or "as soon as may be practicable" thereafter if it was impracticable to make the award within the period. So the question remains: if an award is not made within twenty-one days, or the extended period, if any, does the jurisdiction to make the award continue indefinitely and, if not, if the award is not made, when does the jurisdiction expire ?

Mr. Leo-Rhynie submitted that in order to decide the issue raised on the construction of the provisions of the section it is relevant to decide whether or not the provisions of subsection (1) are mandatory or directory. He submitted that the authorities (which he cited) establish the principle that if on a proper construction of the statute it appears that the legislature intended that non-compliance should render the act invalid the provision is described as mandatory. On the other hand, if non-compliance was not intended to affect the validity of the act the provision is described as directory. The scope and object of the statute are primary guides in deciding the question, the submission continued, and in resolving it the Courts have consistently drawn a distinction between statutes creating public duties and those creating private duties; the general rule that has evolved

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of the Labour Relations Code and he submitted that though a dispute could arise in the process of collective bargaining the process itself was not disputatory; hence the submission based on the use of the word "bargaining" by Dr. Panton.

Mr. Leo-Rhynie submitted that "bargaining" and "negotiating" are synonymous and interchangeable terms and are means by which disputes are settled; that both pre-suppose the existence of a dispute and are processes which occur after a dispute comes into existence. He referred in this connection to the definition of "collective bargaining" in section 2 of the Act, where it is defined to mean "negotiations" between the parties. He submitted further that the contention that collective bargaining and negotiating are processes which ante-date and are unrelated to a dispute is not sustainable, having regard to judicial precedent and the scheme and purpose of legislation governing industrial relations. He pointed, in particular, to the implied procedure prescribed in section 6(2) of the Act for the settlement of industrial disputes, where negotiation is given as the first step, followed by conciliation and finally by reference to the Tribunal. Though the same procedure is prescribed for the settlement of "differences", in my opinion, that provision can be given a sensible meaning in the context of the Act only if "difference" and "dispute" in the section are synonymous.

Mr. Rattray contended that a dispute arises only at the stage where there is a deadlock and that the minutes of the meetings do not establish an irreconciable difference at any stage before the reference was made. He referred to the extract from the judgment of Mr. Justice Archer, cited in the judgment of the Privy Council in Beetham v. Trinidad Cement Limited, (1960) 1 All E.R. 274 at 279, where the learned Judge said that "the prime characteristic of a trade dispute is a deadlock and the determination on the part of both sides to the dispute to stand firm. A mere difference in point of view cannot by itself constitute a trade dispute and it is necessary that the view on each side should be persisted in to the point of rigidity". Because "trade dispute" was defined in the particular statute with which the case was concerned as meaning "any

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is that the provisions of the former are directory only while those of the latter are mandatory. The authorities establish, it was said, that in the absence of an express provision, the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or mandatory. Mr. Leo-Rhynie submitted that upon the application of these principles to section 12(1)(2) and the circumstances of the case this Court ought to hold that the provision as to time is directory with the consequence that a failure to comply with the provision did not affect the Tribunal's jurisdiction so as to prevent it from hearing the matter referred.

In his reply, Mr. Rattray did not dispute the correctness of the principles on which Mr. Leo-Rhynie relied nor did he contend that the provisions in question are not directory. In view of this, it is sufficient for me to say that I agree with the submission and hold that the proper construction to be placed on the provisions of subsection (1) is that they are directory. In my view, striking down an award if the provision as to time is not strictly complied with would defeat the whole object intended to be secured by the enactment of the section. There is just one authority that I wish to mention in support of this decision. In Grunwick Processing Laboratories, Ltd. v. Advisory, Conciliation and Arbitration Service, (1976) A.C. 655, Lord Keith of Kinkel said (at page 702) that the words "so far as reasonably practicable" represent a familiar conception and have often been used by Parliament to qualify an obligation which would otherwise be absolute. In my opinion, that is the effect which the use by Parliament of the words "as soon as may be practicable" in section 12(1) has on the provisions as to time in the section.

The effect of holding that the provisions as to time are directory is that if it proves impracticable for an award to be made within the relevant period the jurisdiction of the Tribunal to make it continues beyond the period, but the award must be made as soon as may be practicable thereafter. Mr. Patterson submitted that this does not mean as soon as practicable "to the convenience of the Tribunal." The

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decisions that now have to be made are factual, namely: was it impracticable for the Tribunal to make its award in this case within twenty-one days? If it was, since it has not yet been made, can it still be made "as soon as practicable"? In view of this, it is well to quote some words from the speech of Lord Diplock in the Grunwick case to which we were referred by Mr. Leo-Rhynie as, contrary to Mr. Rattray's submission, I consider them applicable to the decisions to be made. Lord Diplock said (at pages 691,692):

> " In the context of the exercise of statutory functions by a public authority the use by judges of such expressions as "reasonable" or "reasonably practicable" raises the question as to by whom the decision falls to be made as to what is or is not reasonable or reasonably practicable. Prima facie the decision, which is one of fact, is one which the public authority by whom the statutory functions are exercised would have jurisdiction to decide for itself, and a court of justice would have no jurisdiction to interfere with its decision except upon the third ground stated by Lord Greene, M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 K.B. 223, 229, the locus classicus in which he sets out the grounds upon which the court can hold to be ultra vires and void a decision of an administrative body made in purported exercise of a discretion which a statute has conferred on it. "

The third ground stated by Lord Greene, M.R. is as follows :

> " Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. "

Mr. Rattray submitted that these principles do not apply in this case as the Tribunal has exercised no discretion which is being reviewed. I respectfully disagree. Lord Diplock refers not to the exercise of a discretion but to a factual decision.

I am in no doubt that the decision whether or not it is impracticable for the Tribunal to make its award in a particular case within the prescribed time is, initially at least,one for the Tribunal itself to make. If it proves to be impracticable to make the award within the prescribed time, it follows, in my opinion, that as long as the Tribunal finds it impracticable thereafter to make the award so long will it be before the award can be made as soon as may be practicable. Applying the principles stated by Lord Greene, M.R., quoted above, the Court will have no power to interfere with the Tribunal's decision as to impracticability unless the circumstances are so absurd that no sensible person could ever dream that the Tribunal could reach the

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decision it did. Reference must, therefore, now be made to the facts relevant to this aspect of the case.

The affidavit of Miss Marcia Powell, the acting secretary of the Tribunal at the relevant time, dated July 27, 1981, states that the Tribunal received the reference from the Minister by letter dated April 10, 1981. She does not say when the letter was received, but a photo-copy of the letter exhibited to her affidavit shows a date stamp of April 13 and the initials "M.P." with the date April 13 written under them. Miss Powell says that by letter dated April 13 she advised the Companies and the Union of the reference and asked them to submit within nine days of the date of the letter eight copies of a brief "outlining the cause of the dispute along with the computation of the wage fund." She advised them that a date would be arranged for commencement of the hearing as soon as the briefs were received. By letter dated April 23 addressed to the secretary, the attorneys-at-law for the Companies wrote to say that the Tribunal's letter of April 13 had been received by three of the Companies only on April 21 and that up to the time of writing it had not been received by one of the Companies. The letter suggested that in those circumstances the time for delivery of briefs should not commence to run from April 13. The attorneys wrote to the chairman of the Tribunal on April 24 stating that they anticipated being able to deliver their briefs during the following week. They suggested that in view of the limitations as to time prescribed in section 12 early dates be fixed for the hearing and such as will enable the Tribunal to complete the matter without delay and within the time limitations imposed by the statute.

On April 27 the Tribunal received a letter dated April 22, written to the Permanent Secretary of the Ministry of Labour by the legal officer of the Union. The letter was copied to the Companies and to the secretary of the Tribunal. It acknowledged receipt of the letter advising that the reference had been made. It challenged the authority of the Minister to make the reference, contended that there was no dispute in existence, warned that the members of the Union were suspicious of the steps proposed by the Minister, indicated that the

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Union had taken legal advice and warned that "further pursuit of the course proposed" will result in litigation. It demanded that the reference to the Tribunal be withdrawn.

Miss Powell said in her affidavit that the Companies submitted their brief by letter dated May 1. This was exactly 21 days since the reference was made. The Director of Industrial Relations, Mr. Irons, replied on May 11, on behalf of the Permanent Secretary, to the letter of the legal officer of the Union dated April 22. His letter suggested that the legal officer had not been properly advised on the facts leading up to the reference and suggested that he advise himself properly and see to the representation of the interest of the workers at sittings of the Tribunal. On that same day (May 11) the Companies, in a joint letter, wrote to the Permanent Secretary commenting on the Union's letter of April 22. The joint letter concluded by expressing concern that no dates had yet been set by the Tribunal for the hearing of the dispute and stressing the need for an expeditious resolution of the matter. This letter was copied to the Union and to the secretary of the Tribunal. The photocopy exhibited to Miss Powell's affidavit bears May 14 as the date of its receipt. On May 12 the secretary of the Tribunal wrote to the Union giving the names of the members of the division of the Tribunal who were selected to determine and settle the dispute. The statutory chairman of the Industrial Disputes Tribunal was to be chairman of the division. The letter included a further request to the Union to submit copies of their brief and asked that this be done not later than May 20. On May 18 the Union, through its legal officer, wrote to each of the Companies indicating a desire to resume local level negotiations. The attorneys for the Companies replied on their behalf on May 22 stating that all the claims had been referred to the Tribunal for settlement and that the whole dispute must be resolved and settled there. Copies of those two letters were sent to the secretary of the Tribunal by letter of the Companies' attorneys dated May 26.

On June 15 the secretary of the Tribunal wrote to the Union

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and the Companies advising that a division of the Tribunal had been selected to determine and settle the dispute and that a preliminary sitting would be held on June 17. On June 16 the Union wrote to the Companies in connection with the Companies' letter of May 11 and ended by appealing to the Companies to commence negotiations of the new wages and benefits immediately "in the interest of industrial peace and harmony". The Companies replied on June 19 saying, inter alia, that since the dispute had been referred to the Tribunal it would be ill-advised to pursue direct negotiations without adhering to the provisions of the law and suggested that both parties appear before the Tribunal as ordered.

On Wednesday June 17 a meeting of the Tribunal was held. Mr. N.O. Thompson, president of the Union, represented the Union. There were representatives of all the Companies and their attorneys present. The terms of reference were read at the request of the chairman and the Union's representative, Mr. Thompson, was asked by the chairman if they were acceptable to the Union. Mr. Thompson's response was that the Union was not a party to the terms of reference and as he had only received them the day before he was not in a position then to say whether they were acceptable. Mr. Leo-Rhynie for the Companies indicated that the terms were acceptable, in response to a question from the chairman. The chairman then invited one of the parties to apply for an extension of the first statutory period of twenty-one days, indicating at the same time that that period had long since expired. In response, Mr. Leo-Rhynie suggested that Mr. Thompson be asked to say whether he was in a position to respond to the invitation in view of his (Mr. Thompson's) earlier response with respect to the terms of reference. Mr. Thompson apologised for being unable to make a commitment. He asked the Tribunal to give the Union time until Monday as he thought the Union could respond then. The sitting of the Tribunal was adjourned to reconvene on Tuesday, June 23. Miss Powell's affidavit states that the Tribunal resumed its sitting on June 23 but no representative from the Union attended.

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On July 6 the secretary wrote to the Union referring to what occurred at the meeting on June 17 and pointing out that no representative of the Union attended on June 23. The letter advised that another sitting had been fixed for July 7 and asked that the Union advise the secretary, for the Tribunal's information, whether the Union will attend. It also asked that copies of the Union's brief, which had been requested, be delivered as soon as possible. The Tribunal sat on July 8 but was differently constituted insofar as the workers' representative was concerned. The Companies were represented as before but there was no representative from the Union. On the same day (July 8) the Union wrote to the Companies serving notice of the withdrawal of labour, effective 72 hours after 4.00 p.m. on Friday, July 10. The reason stated for this action was the Companies' continued reluctance to return to the bargaining table. On July 10 these proceedings were instituted.

I do not apologise for rehearsing the facts in the detailed way I have done as the submissions made regarding the conduct of the Tribunal cannot, in my view, be properly considered without a full statement of the background of facts against which the submissions are made. Mr. Rattray, in his reply, referred to the period between April 10, when the reference was made, and June 17, when the division of the Tribunal first sat in respect of the reference. He detailed the events which occurred during that period and submitted that the time schedule showed somnolence rather than expedition. It was said that, granted the involved nature of the claims and bearing in mind the express need for expedition, failure to convene a meeting before June 17 shows either indifference or neglect to comply with the provisions of the Act. It was submitted, further, that the Tribunal has failed after ninety-one days (i.e. the period between April 10 and July 10) to proceed on its reference not because of any practical difficulties or because it is unaware of the time limit, but for reasons completely unrelated to the practicability of having the reference completed and the award made in the given statutory period. Finally, it was said that using even the strictest criteria no sensible person could hold, on the facts

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disclosed in the case, that a tribunal which after ninety-one days has not yet commenced to hear the evidence could possibly establish that any award made now was as soon as practicable after a period of twenty-one days, which expired on May 1.

In my opinion, a careful examination of the facts before us will show that the strictures directed at the Tribunal in these submissions are not justified. The facts before us include an affidavit from the acting statutory chairman of the Industrial Disputes Tribunal, Mr. Leonard Mead Tomlinson, dated August 5, 1981. Mr. Rattray says of this affidavit that it does not address itself to giving any acceptable facts upon which can be based a determination that the award can now be made as soon as practicable after twenty-one days. We shall see whether it does or not.

Section 20 of the Act gives the Tribunal the liberty to regulate its procedure and proceedings as it thinks fit. Mr. Tomlinson stated in his affidavit that the Tribunal has established as part of its procedure the submission of briefs by parties to disputes. This, he says, assists in crystalising the issues and the evidence to be put before the Tribunal, thus assisting in shortening the hearing and restricting the area of argument. The Companies' brief was not received until the twenty-first day after the reference was made, as already stated. Given the complexity of the matter, as Mr. Rattray admits, and the late receipt of the Tribunal's letter of April 13, it cannot be said that the submission of the brief was delayed unreasonably. Up to then no brief was received from the Union. Mr. Tomlinson states in his affidavit that it was impracticable, nay, impossible, for the Tribunal to make its award within twenty-one days. This statement cannot justifiably be challenged. We move, therefore, into the area where the award is to be made as soon as may be practicable.

In view of the contents of the Union's letter of April 22 to the Permanent Secretary, a copy of which the Tribunal received on April 27, it was not unreasonable, in my view, for the Tribunal to await the Ministry's decision on the issues raised, particularly

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the challenge to the Minister's authority to make the reference and the demand made for the withdrawal of the reference. The reply to the Union's letter is dated May 11. On May 12 the parties are written to by the secretary of the Tribunal giving the names of the members of the Tribunal who would hear the dispute and requesting the Union's brief by May 20. The brief is not received by that time. Instead, on May 26 the Tribunal is sent an exchange of correspondence between the Union and the Companies which showed that the Union was ignoring the Tribunal and wanted negotiations resumed directly with the Companies. It cannot be said that it was unreasonable for the Tribunal to await the Union's brief until May 20 before taking further action.

In the meantime (since the letter of May 12), Mr. Tomlinson's affidavit states, the chairman of the Tribunal who was to preside at the hearing of the dispute had to go on leave. It, therefore, became necessary for the division previously named to be reconstituted. All other divisions, he said, had previous long term commitments which prevented their hearing the dispute. The affidavit does not say precisely when the division was reconstituted, but on June 15 a letter was written to the parties giving the names of the members of the reconstituted division and giving June 17 as the date for the first sitting of the division. The Union, in the meantime, is in further correspondence seeking to have the Companies agree to resume direct negotiations. Then there is the sitting on June 17 and what occurred there, the postponement to June 23, which was aborted. A new date is fixed on July 6 for July 8 and a further request is made for the Union's brief. The sitting takes place on July 8 but no one attends from the Union. Up to July 10 no brief had been received from the Union.

It will be seen that, contrary to the charges of somnolence, indifference and neglect, the only period when it can be said with any semblance of justification that there was inaction on the part of the Tribunal is that between May 20 and June 15. When one considers the

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implications for the Tribunal of the absence of a response to its repeated request to the Union to submit its brief and the Union's apparent contemptuous attitude towards it, this period of apparent inaction may not be unreasonable after all.

It was said by Mr. Nattray that if the Tribunal's procedure required the submission of briefs, they must be promptly requested and if they cause undue delay the process must go on without. At the sitting of the Tribunal on July 6, Mr. Leo-Rhynie urged the Tribunal to fix a date and proceed with the hearing in the absence of the Union in view of the Union's conduct towards the Tribunal. The chairman replied :

> " Well, at this stage, the Tribunal will take all you have said, particularly the point about fixing dates to begin the hearing of the matter. I think you will appreciate that we will require some legal guidance in this regard, but we do undertake to have the matter studied and the necessary consultations entered into. "

This obvious reluctance to proceed with the hearing in the absence of one of the parties is consistent with what Mr. Tomlinson says in his affidavit. He said, in paragraph 3 :

> " It is not the practice of the Tribunal to make awards without giving each side a reasonable opportunity to present its case as the Tribunal feels strongly that this would be contrary to the principles of natural justice. The Tribunal's fundamental obligation under the Law is to settle industrial disputes - not to create them. It has never appeared to the Tribunal during the whole period of its operation that it could settle industrial disputes as a practical matter if it proceeded with hearings without giving both sides the fullest opportunity to obtain whatever instructions they needed and to present their cases with as much latitude as was reasonably required consistent with the law. "

It has not been suggested that this is an unreasonable attitude for the Tribunal to take in the discharge of its duties. I think it is a perfectly reasonable attitude if the Tribunal is to serve the purpose for which it was established.

In his affidavit, Mr. Tomlinson stated that as a member of the Tribunal he has never known any dispute to be completed within twenty-one days of the reference; that it is quite impossible to deal adequately

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with any dispute within as short a period as that. He also referred to the extensive volume of work which the Tribunal has and to the fact that at all material times it was grossly understaffed and had inadequate accommodation. Mr. Rattray said that these matters have no evidential value in establishing impracticability in this case. It was submitted that, granted the difficulties under which the Tribunal operates, the affidavit is silent as to the administrative steps taken by the Tribunal to enhance its efficiency and expedite its processes to meet the time frame imposed. With respect, I do not agree with this last submission. In my view, to the extent that the stated inadequacies cause delays which contribute to making it impracticable for awards to be made in the prescribed time, the inadequacies must be viewed as they were at the material time. I do not find it necessary to place any reliance on these aspects of Mr. Tomlinson's affidavit in dealing with the issues raised but I certainly do not agree with the submission that this evidence is of no value in establishing impracticability in a particular case.

Mr. Rattray submitted that the onus is on the Tribunal to establish that it was impracticable to make the award within twenty-one days and that it was made as soon as practicable thereafter. I do not agree. The applicant has brought these proceedings on the ground that the Tribunal now has no jurisdiction to make the award. It is my opinion, and I hold, that the burden is upon the applicant to satisfy us that the Tribunal has no jurisdiction. In R. v. Fulham, Hammersmith & Kensington Rent Tribunal, Ex parte Zerek, (1951) 2 K.B. 1, 11, Mr. Justice Devlin said: "It has never been the practice to put the party who asserts that the inferior Court has jurisdiction to proof of the facts upon which he relies". That case was concerned with the decision of a rent tribunal.

The applicant contends that the Tribunal no longer has jurisdiction to hear the dispute and make an award. When did its jurisdiction cease or lapse? Mr. Patterson submitted that it became functus officio when it failed to hand down its award within twenty-one days. But this cannot be so because it has been clearly

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demonstrated that it was impracticable to make the award during that period. So when after the first twenty-one days did it cease to have jurisdiction? Surely, if it is said that the jurisdiction ceased it should be possible to point to some specific time when it expired! Mr. Rattray submitted that, paying regard to all the relevant facts, no reasonable Tribunal could hold that it had jurisdiction to make an award in this matter since such an award could never be said to be as soon as practicable after the expiry of twenty-one days from the reference. But when did it cease being impracticable to make it? It does not seem to me that it can be sufficient merely to say that when these proceedings were instituted ninety-one days had elapsed since the reference and no award had been made, therefore the Tribunal is functus officio.

In my opinion, in order to succeed the applicant must show that it was practicable at some time during the period since the reference was made for the Tribunal to make the award and it was not made. This, in my judgment, it has failed to do. Quite the contrary, the evidence before us, in my opinion, establishes at least prima facie that it remained impracticable, in all the circumstances, from the expiration of the first twenty-one days up to the taking of these proceedings for the Tribunal to make its award on the dispute referred to it. A decision to this effect by the Tribunal cannot, in the circumstances, be said to be so absurd that no sensible person could ever dream that the Tribunal could reach that decision.

As regards the ground that the Tribunal refused on July 10 to hear the submissions of counsel for the applicant that the Tribunal had no jurisdiction, it is clear that prohibition is not the appropriate remedy to seek for that complaint. I do not think, however, that an application for any other remedy on this ground alone would be likely to succeed. Though in certain circumstances an inferior court or tribunal can properly decide whether or not it has jurisdiction to entertain proceedings before it, in my opinion, the Industrial Disputes Tribunal has no power to decide that the Minister had no authority to

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make a reference to it. The exercise of the Minister's authority in this respect can only be challenged in this Court, as was done in these proceedings.

For the reasons I have endeavoured to give, I would hold that the application fails and would, accordingly, dismiss it with costs.

MARSH, J.:

This is an application by the National Workers Union for an Order of Prohibition, seeking to prohibit the Industrial Disputes Tribunal from further acting on the reference to it made on the 10th April, 1981, by the Honourable Minister of Labour in respect of an alleged dispute between the applicant Union and:

Alcan Jamaica Company,

Alumina Partners of Jamaica,

Alcoa Minerals of Jamaica Incorporated,

Kaiser Bauxite Company, and

Reynolds Jamaica Minies Limited.

The matter comes before the Court as a result of certain incidents which occurred during an attempt by the Union and the abovenamed Companies (all of which constitute the companies engaged in the Bauxite and Alumina Industry in Jamaica) to arrive at a new collective labour agreement for the Bauxite and Alumina Industry.

Briefly, the facts are that between November, 1980 and March, 1981 a number of meetings were held between the parties - initially, at the private level and eventually under the Chairmanship of the Director of Industrial Relations at the Ministry of Labour. On the 10th April, 1981, the Minister, acting under the powers conferred on him by section 11(A)(1) of the Labour Relations and Industrial Disputes Act, decided that a dispute existed between the Union and the Companies and made an order referring the matter to the Industrial Disputes Tribunal for settlement. The Union has challenged the Minister's right to do so, claiming that as there was no dispute existing between itself and the Companies at the relevant time, the Minister had no authority to make the reference

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and the Tribunal, accordingly, had no jurisdiction to hear the matter. The Union is now seeking an Order of Prohibition from this Court prohibiting the Tribunal from acting on the reference.

Whether or not the Union is entitled to succeed in its application will depend, in the first place, on whether this Court has any power to review an exercise of the discretion conferred upon the Minister by section 11(A); and, in the second place, assuming such a power to exist, on whether there was in existence on the date of the reference an "industrial dispute" between the Union and the five Bauxite Companies. If both these questions are answered in the affirmative then a further issue to be determined is that raised by the Applicant in an amended statement, namely, whether by virtue of section 12 of the Act the Minister's reference had expired and the Tribunal was, therefore, no longer competent to hear and determine the issue or to make an award thereon.

I turn now to a consideration of the question of the Court's powers of review in a case such as the instant.

Counsel for the Companies submitted that where, as is the case here, the power impugned does not directly affect the substantative rights of any individual, the Courts have always been reluctant to interfere; even where the repository of the power takes into account irrelevant matters, or excludes relevant matters, or misdirects himself on any particular point. It was submitted that in such cases, the Courts will only intervene where the repository of the power acted in bad faith or capriciously. He relied on the Secretary of State for Employment v. A.S.L.E.F. (1972) 2 ALL ER 949 and R. v. Barnett & Campden Rent Tribunal (1972) 1 ALL ER 1185.

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I do not, with respect, accept this proposition, nor do I accept that the cases relied on go that far. The Minister's authority under section 11(A) is to refer "industrial disputes" - nothing else. If, therefore, the Minister purporting to act pursuant to the section refers to the Tribunal something other than an "industrial dispute", that would be an unlawful exercise of the power. In such circumstances it seems to me to be beyond argument that this Court would be entitled to review the actions of the Minister in any such purported exercise of his discretion, so as to satisfy itself that the power was exercised on a proper foundation of fact; since it is settled law that the repository of such a power cannot give himself authority to act by inventing a state of facts which does not exist. See for example the observations of Lord Wilberforce in Secretary of State for Education v. Tameside Metropolitan Borough Council (1976) 3 W.L.R. 641, 665, where he states the following:

> "The section (i.e. section 68 of the Education Act 1944) is framed in a "subjective" form - if the Secretary of State "is satisfied". This form of the section is quite well known and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is, or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met then the exercise of judgment, however bona fide it may be, becomes capable of challenge."

Section 11(A) of the Labour Relations and Industrial Disputes Act (like Section 68 of the Education Act 1944 supra) ...../

supra) is framed in a "subjective" form, namely: if the Minister "is satisfied"; this Court is, therefore, vis-a-vis the Minister, in the same position as was the Court in the Tameside case and, in my judgment, it is entitled to satisfy itself that the discretion of the Minister was exercised on a proper foundation of fact.

It is therefore my opinion, and I so hold, that this Court is entitled to review the actions of the Minister in making this reference and determine for itself whether it was based on a proper foundation of fact. Subject, of course, to Mr. Langrin's point that it is the Minister's discretion and not the Court's that is in issue.

I turn now to the second point for consideration. Was there in existence on the 10th of April, 1981 an "industrial dispute" between the Applicant and the Five Bauxite Companies; and if so, was it one dispute involving all five companies or was it five separate dispute involving each of the companies?

Part of the answer to these questions lies in the definition of the term "Industrial Dispute" in section 2 of the Act, which reads:

> "Industrial Dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, where such dispute relates wholly or partly to:
>
> (a) terms and conditions of employment or the physical conditions in which any workers are required to work. . . ."

The Section goes on at sub-paragraphs (b), (c) and (d) to list other criteria but I do not propose to list them here since, in my judgment, they are not directly relevant to the matter now before us.

Although the term "industrial dispute" is defined,

it is .../

it is to be noted that the word "dispute" is not. Accordingly, Counsel for the Union contended that a dispute is that point in the process of collective bargaining when the parties have reached a stage of deadlock, or, where there arises between them some irreconcilable difference. On this approach it was contended that, in the instant case no dispute had arisen up to the 10th of April when the Minister's reference was made. The parties at that time, Counsel insisted, were still engaged in the bargaining process; and while that bargaining might have been, admittedly, vigorous and perhaps, at times, even aggressive they were not at any stage in a state of deadlock. There was no dispute.

On behalf of the Companies it was urged that a wider interpretation should be given to the word "dispute". Here the suggestion was that a dispute arose whenever a claim or proposal was made and the same was either rejected or, there was a failure to agree. Negotiation, conciliation, and ultimately, reference to the Tribunal, so the argument ran, were all part of the process of "settling the dispute", which, in terms of logic, must clearly have been antecedent to any such negotiations, or conciliation. The main premise of this contention was that each operation represented a stage in the escallation of the dispute as settlement became more and more unlikely; and so, contrary to the submission of Counsel for the Union, the "dispute" in this case must have arisen at the very first meeting of the parties, in November 1980. Reliance was placed for this proposition on Section 6 of the Act, which deals with the procedure to be applied in settlement of industrial disputes, where a Collective

Labour ...../

Labour Agreement neglects to make provision therefor, as well as R. v. Industrial Dispute Tribunal Ex parte Jamaica Shipping Association, Suit M/15/1979; also Chapter 5 of a work entitled "The System of Industrial Relations in Britian" by Mr. Alan Flanders.

Which of these approaches is to be preferred?

Although this issue of the existence of a "dispute" was quite ardently debated at the Bar, and although it is indeed the main focus of public interest in this case it is, in my opinion, essentially a question of fact, the resolution of which is as much aided by the application of logic and common sense, as by anything else.

In the Shorter Oxford English Dictionary one meaning given to the word 'dispute' is the following:

> "to contend with opposing arguments or assertions; to discuss, argue, hold disputation; often to debate with heat; to altercate."

What are the facts?

In 1978 the Union and each of the Companies had signed collective labour agreements which were due to expire on the 31st of January, 1981. The Union apparently decided to re-negotiate the 1978 agreement and on the 24th of October, 1980, it submitted a twenty-eight point claim for the consideration of the Companies. Between the 10th of November, 1980 and the 29th of January, 1981, the parties met privately at some six or seven meetings but failed to come to any agreement on the claims. At the meeting on the 29th of January a dispute arose between them on the question of retroactivity and there was a threat of strike action taking place. This was averted

when...../

when the parties agreed to refer the matter to the Ministry of Labour where a meeting was held on that same day under the Chairmanship of Mr. Irons, the Director of Industrial Relations in the Ministry. The dispute as to retroactivity was settled on the 3rd of February, 1981 - but the Union's claim was not, and the parties decided to continue their efforts to resolve that issue by continuing to meet at the Ministry under the Chairmanship of Mr. Irons, instead of privately as had previously been the case. There were some twelve such meetings at the Ministry. During that time the parties were also meeting at the local level with a view to settling those aspects of the Union's claim which related to the local level. From the outset, i.e. from the first meeting in November, 1980, both parties were agreed that the object of the exercise was to negotiate a "total package" - that is to say a concluded agreement for each company which covered all claims at the industry-wide level, local level or in respect of company amendments.

It appears that at the meeting at the Ministry of Labour on the 22nd of January, 1981, the Companies tabled an omnibus proposal, the object of which was to achieve agreement on all three aspects of the claim (see "Exhibit K.S.P. II" exhibited to the Affidavit of Dr. Keith Panton dated 27th July, 1981). That document, however, failed to resolve the issue and from that date until the meeting of the 30th of March, 1981, the difference between the parties hardly shifted. As will be seen by reference to "K.S.P. II" the Companies' proposal was based on figures which omitted to spell out the matter item by item, but which left it to the Union to apportion the sums stated, in its discretion, over the spread of items. The Union, however, apparently

wished ..../

wished the matter to be dealt with in greater detail.

This led to a great deal of argument and, in my respectful opinion, time wasting; and the minutes of some of these meetings, which are exhibited to Mr. Irons' Affidavit, bear eloquent testimony to the climate of industrial relations in Jamaica. The impression that I have gained from an examination of these minutes is that there was an absolute lack of trust between the parties. There was one meeting in which the entire time was spent debating what was meant by the reference in "K.S.P. II" to the terms "impact costs" and "non-impact costs"; and which ended, needless to say, without any resolution of the matter. There was a great deal of talking on both sides but very little bargaining, with each side accusing the other of playing games, or of not being realistic. It was as if by agreement they were executing some kind of ritual dance, the intricate movements of which were known only to the participants. After twelve meetings the parties never got beyond the first item dealing with wages and fringe benefits.

Eventually, on the 25th of March, 1981 the Companies tabled a revised proposal (K.S.P. III in Mr. Panton's Affidavit) in which the figure for total wage increases was revised from $24 per week to $26.40 per week, with the same discretion being left for the Union to apportion the wage related "impact" and "non-impact" costs as in K.S.P. II. The Union then, apparently, agreed to table its own revised proposals at the next meeting which was scheduled for the 30th of March, 1981 but failed to do so.

The Affidavit of Mr. Irons, Director of Industrial Relations in the Ministry speaks to the matter. At paragraphs 11 to 17 he states the following:

"(11) These ...../

"(11) These further meetings were conducted under my Chairmanship and in that capacity I was acting as a conciliator. Some of the meetings were joint meetings but the atmosphere was such that unilateral meetings also had to be conducted in separate rooms at the Ministry, i.e. I would talk to one side endeavouring to reach a settlement on points in dispute and would then talk to the other side and endeavour to persuade them to accept the settlement or reach some form of acceptable compromise.

(12) That on the 25th of March, 1981, the companies tabled revised proposals. It was agreed that another meeting was to be held on the 30th of March, 1981, when the Union was expected to table revised proposals.

(13) That on the 30th March representatives of the Companies and the Union attended at the Ministry. That in the course of the afternoon the Union presented to me what it described as revised proposal but contrary to the understanding arrived at on the 25th March, 1981, stipulated that the revised proposal should not be disclosed to the Companies. That I informed the Companies' representative of this and they were vocally displeased that the Union was refusing to table its proposals or to have them disclosed to the Companies.

(14) That another meeting was scheduled for the 2nd April. That meeting had to be cancelled as I was informed by telephone by the Union that Mr. Goodleigh, the Officer in charge of the Union's team was ill.

(15) That another meeting was scheduled for the 8th April, but it fell through as the Union advised me by telephone on the 7th April, that it could not attend that meeting, and it was unable to suggest any other date until certain internal problems within the Union were settled.

(16) Twelve conciliatory meetings were held at the Ministry between February 9, 1981 and 30th March, 1981 - all under my chairmanship and from my neutral and

confidential..../

> confidential position as conciliator it became increasingly clear to me that there was no possibility then or within the reasonably foreseeable future of the parties resolving the dispute themselves or by means of the conciliatory services of the Ministry.
>
> (17) Up to that time no real progress towards a settlement had been made as the difference between the proposals of the parties appeared irreconcilable."

The "revised proposals" referred to in paragraph 12 above is the document known as KSP^{III}. That document at paragraph 3, contains the following:

> "Acceptance of offer is in settlement of all claims at local and industry-wide level. Claims not referred to herein or in the Companies' local level offer are considered dropped."

At paragraph 4 of the same document, the following is stated:

> "All Companies proposed amendments, whether at local or industry-wide level, are accepted."

This document speaks for itself. Clearly it was intended by the Companies as anaccross-the-board proposal for settling all the collective agreements over which the parties had been negotiaging since the 10th of November, 1980. The same, of course, is also true of KSP^{II}, to which I have already referred, which was tabled by the Companies of the meeting of the 22nd January, 1981.

I emphasize this because it was part of the Union's contention that even if there had been a dispute in existence on the 10th of April, which they were of course denying, it could only have related to the <u>industry-wide</u> claims and, consequently, any enlargement of the dispute to include <u>local level</u> and <u>company amendments,</u> would have been contrary to the facts, and so, ultra vires the Minister.

Against ..../

Against that background of facts, some of which are set out in more detail in the exhibits, the Companies contend that there was in existence, at the relevant date, an industrial dispute upon which the Minister could properly have grounded his reference.

Was there a dispute?

It seems to me that any enquiry into this question must include reference to the Affidavit of Mr. Irons who had been Chairman of all the meetings at the Ministry and who had, in the course of those meetings, held unilateral discussions with both sides. He, more than anyone else involved, was best situated to determine whether there was any real possibility of the parties reaching agreement within a reasonable time. At paragraphs 16 and 17 of his Affidavit, to which I have already referred, he states the following:

> "... from my neutral and confidential position as conciliator it became increasingly clear to me that there was no possibility then, or within the reasonably foreseeable future, of the parties resolving the dispute themselves or by means of the conciliatory services of the Ministry.
>
> "... up to that time (that is the 30th of March, 1981), no real progress towards a settlement had been made as the differences between the proposals of the parties appeared irreconcilable."

Having examined the minutes of the relevant meetings, on which that conclusion of Mr. Irons was based, I have no hesitation in agreeing that there was ample evidence upon which he could have arrived at the conclusion stated in his Affidavit. In simple terms the fact is, that after seventeen (17) meetings between the 10th of November, 1980 and the 30th of March, 1981 the parties were no nearer agreement than they were at the

outset. ...../

outset. The Minister had been kept informed of the situation from time to time by Mr. Irons and I am entitled to assume that his decision to make a reference on the 10th of April must, to a large extent, have been based on the advice given to him by that officer as to the likelihood of the matter being resolved. It is common ground also that an expeditious settlement of the matter was necessary and desirable. I remind myself therefore, that all I am required to do here is to ascertain whether there was a sufficient foundation of fact upon which the Minister could reasonably have acted in making the reference.

Having examined the matter I have come to the conclusion, and I so find, that there was a sufficient foundation of fact upon which the Minister could have satisfied himself that a dispute existed between the Union and the Companies. That dispute was whether or not the offer by the Companies to settle all the claims on the basis proposed should be accepted by the Union. The Union wanted the matter dealt with in greater detail, that is. item by item, whereas the Companies did not think that necessary; and the parties became bogged-down in arguments about it. In other words, there was an irreconcilable difference. Whether this occurred on the 22nd January, 1981, when KSP^{II} was tabled, or on the 25th of March, 1981 when KSP^{III} was, need not detain us here since either way the result would be the same. Similar considerations apply to the interpretations of the term "dispute", which were respectively canvassed by Mr. Rattray and Mr. Leo-Rhynie, and which I need not pursue in the light of the finding which I have just made. The parties had reached a deadlock or an irreconcilable difference, and

that, in ...../

that, in my book, is a dispute in any language.

The question remains - was it one dispute or was it five? It seems to me that the answer to this lies in the documents K.S.P. II and K.S.P. III. Examination of these shows that it was a single dispute but that it affected all five companies. The documents also show that the dispute related to all three elements in the claim, namely industry-wide and local level claims, as well as company amendments (note, in particular, paragraphs 3 and 4 of K.S.P. III to which I have already adverted).

I pause here to make one observation on the submissions made by the parties as to whether or not they were at the Ministry to "conciliate" or merely, as it was put - "under the auspices of the Ministry". It seems to me, reading the minutes, that there was, or there might have been a genuine misunderstanding about why the parties were there, but that this was cleared up by the Chairman in response to a direct question by Mr. Goodleigh. I mention it only out of respect for the arguments submitted by counsel; since, in my judgment, K.S.P. II and K.S.P. III when properly construed, clearly indicate that the company wished an across-the-board settlement; even, therefore, if there were meetings going on simultaneously at the local level, the object of the exercise was clearly to try to settle the matter in one fell swoop, so to speak.

The further question arises - did the five companies, in the light of the finding that there was a single dispute, constitute one "undertaking" in terms of section 11(A)? or was each a separate undertaking? Here the wording of section 11(A) is relevant. Subsection (1) reads:

"(1) Notwithstanding.../

> "(1) Notwithstanding the provisions of sections 9, 10 and 11 where the Minister is satisfied that an industrial dispute exists in any undertaking and should be settled expeditiously, he may, on his own initiative:
>
> (a) refer the dispute to the Tribunal for settlement if he is satisfied that attempts were made without success to settle the dispute by such other means as were available to the parties."

In support of the Union Mr. Rattray contended that (in terms of the section) the Minister was restricted to referring one dispute in one undertaking only. Therefore, since each company was a separate undertaking, he was in fact required to make five separate references; and the fact, therefore, that he had not done that but instead had sought to roll them all up as one dispute, invalidated the reference.

I do not agree. The definition of "industrial dispute" in the Act reads in part as follows:

> " 'Industrial dispute' means a dispute between one or more employers ... and organisation representing workers." (my emphasis)

/employers That reference to "one or more"/is, in my view, a sufficient indication that the Act comprehends that a single dispute may exist, even where there is more than one employer, and even though each employer may constitute a separate "undertaking". While, therefore, it may be true, as was contended, that once settlement had been achieved the Union would be required to execute five separate agreements with each undertaking that fact would not, in my opinion, vitiate a reference to the Tribunal of a single dispute involving five separate "undertakings" since the statutory language clearly envisages such an

approach. .../

approach. This is even more so where, as in the instant case, the dispute is on a matter common to all five undertakings and the settled objective was unanimity. The proper approach in such a case, it seems to me, is to apply the provisions of section 4 of the Interpretation Act and read the word "undertaking" in section 11(A)(1) in the plural, since clearly the context would so require in a case where there is a single dispute involving five undertakings. Such an approach does no violence to the language and it upholds the principle envisaged by the Labour Relations and Industrial Disputes Act that there can be a single dispute involving several employers and one Union. In my judgment, therefore, this point fails.

It was further contended on behalf of the Union that there was, in any event, a lack of precision in the actual wording of the reference, in that it failed to make clear whether or not all three elements of the claim were included or only that relating to industry-wide claims. This point was not, however, pressed and it appeared during the arguments that both sides were agreed that the wording of the reference was wide enough to include all three elements. In any event, it is clear from the decision in Beetham's case that failure to be precise or specific in the wording of the reference is not fatal thereto.

On this aspect of the case, therefore, I find that:

(1) there was an industrial dispute in existence between the Union and the Companies on the 10th of April, 1981;

(2) it was one dispute and not five separate disputes;

(3) the ...../

(3) the dispute related to all three elements in the claim served by the Union, and existed in the failure of the parties to agree on proposals tabled by the Companies which were designed to settle all outstanding matters between them. It was, in terms of the Statute, a dispute over the terms and conditions of employment of those workers employed by the companies who were members of the Applicant Union;

(4) the wording of the Minister's reference adequately reflected the nature of the dispute.

Basing myself, therefore, on these findings, I hold that the reference by the Minister made on the 10th of April, 1981, to the Tribunal was a valid exercise of the discretion conferred upon him by section 11(A) of the Act; and, consequently, that on the 10th of April, 1981, the Tribunal had jurisdiction to settle the dispute.

That jurisdiction would, in terms of Section 12 of the Act, have expired on the 1st of May, 1981, unless:

(a) an extension of the twenty-one day period was obtained pursuant to subsection (2); or

(b) it was "impracticable" for the Tribunal to make the award on that day - in which event the jurisdiction could continue until it ceased to be impracticable.

This brings me to the final ground relied on by the Applicant, namely that the Tribunal having failed to comply with section 12(1) of the Act, as to the time within...../

within which its award should be made, is now functus officio and therefore, no longer competent to hear the issue or to make any award thereon. Section 12, so far as is relevant, reads as follows:

> "12(1) Subject to the provisions of subsection (2) the Tribunal shall, in respect of any industrial dispute referred to it, make its award within twenty-one days after that dispute was so referred, or if it is impracticable to make the award within that period it shall do so as soon as may be practicable, and shall cause a copy of the award to be given forthwith to each of the parties and to the Minister.
>
> (2) The period of twenty-one days specified in subsection (1) may be extended by the Tribunal -
>
> (a) for a further period not exceeding twenty-one days at the request of any of the parties;
>
> (b) for such further period beyond that specified in paragraph (a) as the Tribunal may, with the agreement of the parties, determine."

The first thing to be decided about the section is whether or not the provisions of subsection (1) supra are mandatory or merely directory. A number of authorities was cited in relation to this but I do not think it necessary to review them here. Suffice it to say that the wording of the subsection speaks for itself. The Tribunal shall make its award within a specified period, or so soon thereafter as may be practicable. A provision so worded clearly confers upon the Tribunal a discretion to make its award either within the specified period, or when this proves to be impracticable, so soon thereafter as may be practicable. For this reason the provision should, in my judgment, be construed as being merely directory; therefore, failure to make the award within the specified period will not automatically vitiate the same. Subsection (1) is made subject to subsection (2),

I ...../

I construe that to mean that where necessary the period of twenty-one days in subsection (1) may be extended in the manner provided by subsection (2). If so extended, the combined periods then become the specified period; and the award in such a case must be made within that specified period, or, if it is impracticable to do so, it may be made so soon thereafter as may be practicable.

If I am correct in this approach then it follows that the right to make a so called late award is not at large and will depend entirely on the question of impracticability.

Two further questions arise. Since the provision confers a discretion upon the Tribunal, is it open to this Court to review it and,if so, to what extent? The second question is, assuming a power to review - what do the words "impracticable" or "as soon as may be practicable" mean?

As to the first, do we have a power of review?

The most recent authority available to me on the powers of judicial review in a case such as this is the Grunwick case (already cited by the learned Chief Justice) (1978) A.C. 655, where Lord Diplock, in a passage commencing at page 691 made reference to the matter in the following terms:

> "My Lords, I agree with the Court of Appeal that the requirement in section 14(1) that Acas 'shall ascertain the opinion of workers to whom the issue relates' is mandatory, whatever the precise content of the requirement may be. Like the Court of Appeal, I am unable to accept the qualification, which Lord Widgery, C.J. held to be implicit in the subsection, that the obligation to ascertain the opinions of workers extended only 'so far as reasonably practicable' in the circumstances of the particular case. In the context of the exercise of statutory functions by a public authority the use by judges of such expressions as 'reasonable' or 'reasonably practicable' raises the question as to by

whom...../

> whom the decision falls to be made, as to what is or is not reasonable or reasonably practicable. Prima facie the decision, which is one of fact, is one which the public authority by whom the statutory functions are exercised would have jurisdiction to decide for itself, and a Court of Justice would have no jurisdiction to interfere with its decision except upon the third ground stated by Lord Green, M.R. in Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 K.B. 233, 229, the locus classicus in which he sets out the grounds upon which the Court can hold to be ultra vires and void a decision of an administrative body made in purported exercise of a discretion which a statute has conferred on it:
>
> . . . . . (my emphasis)

And here, Lord Diplock quotes from Lord Green in the following terms:

> "...similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority to reach the decision that it did."

Lord Diplock, in this passage, seems to be suggesting that it is for the Tribunal to decide what is or is not impracticable, and also that the power of review of this Court is limited to the third ground stated by Lord Green, M.R. supra, namely that turning on absurdity or patent lack of reasonableness. In the Wednesbury case Lord Green, in a later passage at page 233 of the report, summed up his view thus:

> "I do not wish to repeat myself, but I will summarise once again the principle applicable. The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority it may be still possible to say that, although the local authority have kept

within ...../

> within the four corners of the matters which they ought to consider, they have, nevertheless, come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere. The power of the Court to interfere in each case is not as an appellate authority to over-ride a decision of the local authority, but as a judicial authority which is concerned, and concerned only to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them."

With respect, I find this second passage from Lord Green's judgment somewhat more clearly expressed than the earlier passage therein which was cited by Lord Diplock in the Grunwick case.

I understand these authorities to mean:

(1) that the relevant words confer upon the Tribunal a discretion;

(2) that it is for the Tribunal to decide what is or is not practicable;

(3) that, however, it must do so not upon a basis of whim or humour or negligence, but upon a principle based upon a concept of reasonableness; and

(4) that this Court is entitled to examine (review) the exercise of that discretion and to interfere where it is satisfied that the Tribunal has violated this principle.

Whether or not the Tribunal has violated this principle will depend upon the meaning to be given to the words "impracticable" or "as soon as may be practicable" which appear in the subsection.

The terms are no where defined in the Statute, but in the Shorter Oxford English Dictionary, the leading meaning

given...../

given to the word "impracticable" is:

> "not practicable; that cannot be carried out or done; practically impossible."

In the Second Edition of "Words and Phrases - Legally Defined", published by Messrs. Butterworths Limited, Winn-Parry, J. in re L. Sombrero Limited (1958) 3 ALL E.R., in a passage cited, gives the following meaning to "impracticable":

> "...the next words being 'it is impracticable to call a meeting of a company'. The question arises, what is the scope of the word 'impracticable'? It is conceded that the word impracticable is more limited than the word 'impossible' and it appears to me that the question necessarily raised by the introduction of the word 'impracticable' is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held."

Again, Lord Parker, C.J. in the same work states:

> " 'Impracticable' in Regulation 97 is a strong word. It must mean 'not possible' or 'not feasible'. At any rate, it means something very much more than 'not reasonably practicable' ".

There is not a great deal of difference, in my opinion, in these definitions. As I understand them, the dictionary meaning of "practically impossible" coincides substantially with the judicial definitions quoted. To say that a thing is "practically impossible" is merely a different way of indicating that the word "impracticable" is more limited than the word "impossible". For example, a thing might well be not impossible to perform but it may, nonetheless, be difficult to achieve, in which case, it could be said to be 'practically impossible'. For my part, therefore, I would adopt the approach suggested by Winn-Parry, J., that is to say examine the circumstances of the particular case and answer the question whether as a practical matter the award of the Tribunal could or could not have been made within the prescribed period.

I turn ...../

I turn now to the meaning of the word "practicable", Again in the Shorter Oxford Dictionary the leading meaning given to this word is "capable of being carried out in action; feasible". And in the Butterworth publication Parker, J., as he then was, at page 98 of the case cited (1953) 1 ALL E.R. 97 states the following:

> "What does 'practicable' mean? In Webster's Dictionary 'practicable' is defined as 'possible to be accomplished with known means of resources'."

Finally, I come to an Australian case which was, I think, cited by Mr. Leo-Rhynie during the arguments, the case of Potter v. Neave (1944) S.A.S.R. 19 where, at page 21 of the report, Mayo, J. states:

> " 'Practicable' may possibly be paraphrased in the context of section 165 as capable of being done or accomplished with the available resources whatever they may be."

Having considered all of the foregoing I have formed the view that one way of looking at the matter in the instant case, is to say that the Tribunal may postpone the making of an award if it finds it "practically impossible" to do so within the prescribed period and, it may continue to so postpone it, until the available resources allow the action to be completed.

Basing myself, therefore, on that approach, I now turn to an examination of the evidence in order to satisfy myself whether the Tribunal herein failed to make its award within the prescribed time, because it had found it impracticable to do so. Obviously, if the answer to this question is yes, then that would be an end of the matter. If not, the Tribunal's jurisdiction would have expired and it would now be functus officio

and ...../

and incompetent to hear the matter.

Apart from the minutes of the meetings of the Tribunal and the correspondence, which are all exhibited in Miss Powell's Affidavit, the only other evidence before me as to the factual situation existing at the Tribunal is the Affidavit of Mr. Tomlinson, the Acting Chairman. That Affidavit was filed, I think, on the second day of the hearing and great reliance has been placed thereon by counsel for the Tribunal as well as counsel for the Companies. Both contended that it represented a definitive answer to the question of impracticability and is a complete justification for the failure of the Tribunal to make its award within the prescribed time.

At paragraph 2 of the Affidavit the following is stated:

> "In all my experience as a member of the Tribunal I have never known any dispute to be completed within twenty-one days of the reference. It is not only impracticable but it is really quite impossible to deal adequately with any dispute within as short a period as twenty-one days, taking into consideration the steps involved and other conditions prevailing."

Pausing there for a moment, my first comment on this is that the Act itself anticipates that the period of twenty-one days might not always be sufficient, and so provided in subsection (2), machinery for the period to be extended where this became necessary. The mere fact, therefore, that disputes are rarely ever settled within twenty-one days is not very much to the point, although it may be a good reason to provide by legislative amendment for a longer initial period.

As regards the second sentence in that paragraph, in my opinion the failure of Mr. Tomlinson to indicate

what are ...../

wh-

what are the steps to be taken in the making of the award precludes this Court from making any realistic assessment as to whether the failure was due to impracticability or, to some other reason.

The third paragraph of the Affidavit which refers to the staffing and accommodation problems existing generally at the Tribunal, is more to the point, although, here again, there is a failure to be specific and the Court is left to infer or worse yet, speculate whether this was the explanation for the instant Tribunal's failure to act within the period. If the fact was that because of a shortage of staff and a lack of accommodation the Tribunal, having been appointed, was unable to complete its functions, or, at any rate, to carry them out adequately, that would be more to the point and would be a most cogent argument in support of impracticability. However, paragraphs 5 and 6 of the Affidavit suggest that, notwithstanding this general shortage of staff and accommodation, the Tribunal was nevertheless functioning normally. For example, the parties were written to on the 13th of April, which is the same day on which the Tribunal received the Minister's reference, asking for briefs to be submitted. Again, when it was realised that the Companies' briefs may be delayed, a decision was taken (presumably by the Tribunal) to extend the time and the attorneys for the Companies duly informed by letter. Most of this is corroborated in the Affidavit of Miss Powell, Secretary of the Tribunal, in which she documents the events which occurred from her receipt of the reference on the 13th of April, up to and including the meeting of the 10th of July, 1981.

There..... /

There is no suggestion in Miss Powell's Affidavit that during this period this particular panel of the Tribunal was hampered in its function by any shortage of supporting staff or of accommodation or, for that matter, anything else.

Turning once more to Mr. Tomlinson's Affidavit, the following is stated at paragraph 7:

> "When the dispute was first referred to the Tribunal it had been determined by the Chairman that the division to deal with it was his own division consisting of Mr. W.B. Lynch, Chairman, Mr. Winston Meeks, Enployers Representative, and Mr. Headley Alman, Workers Representative."

The expression "When the dispute was first referred ", used by Mr. Tomlinson, suggests that this decision on the membership of the Tribunal must have been made either on the 13th of April when the reference was received, or shortly thereafter. This panel, therefore, must have been responsible initially for dealing with the reference in the instant case, and that, apparently, continued to be the case at least up to the 12th of May, 1981, when the letter at "B" of the Affidavit was written informing the parties that this same panel was the panel selected to deal with the reference. The fact, therefore, that there was a problem about recruiting sufficient members for the Tribunal does not appear to have affected this particular reference. In so saying, I am aware that the Chairman, Mr. Lynch, went on leave; but, on the facts, this must have been some time after the 12th of May when the letter at "B" was written. The inescapable inference therefore, is that for the period ending on the 12th of May there was in place at the Tribunal a panel charged and ready to deal with, and in fact dealing with, the responsibility of hearing and determining the reference in this case.

After...../

After the 12th of May, Mr. K.K. Walters took over as Chairman and it was he who chaired the first preliminary meeting on the 17th of June.

There is no indication in this portion of the available evidence, therefore, that the panel responsible for making the award herein, at the very least, between the 13th of April and the 12th of May was under any disability which might have rendered it impracticable for them to make the award or to seek to have the twenty-one day period extended. In so stating, I accept Mr. Tomlinson's Affidavit as a sufficient indication that there were bureaucratic and administrative problems plaguing the Tribunal; but I do not accept the inference which we were invited to draw that those problems so affected the relevant panel of the Tribunal as to make it impracticable for an award to be made. A panel had been appointed from the available resources, also letters were being drafted, typed and sent and decisions made, all within the available resources. There is not the slightest suggestion that in relation to this particular panel, and I stress that, there was any kind of logistical problem; indeed quite the opposite.

When the panel finally had its first preliminary meeting on the 17th of June, the then Chairman, Mr. Walters was aware that there was a problem about the specified period having expired; and he sought, even at that late stage, to resolve it by having the period extended under or in terms of subsection (2) of Section 12. (Please see page 115 of the Judges' Bundle.)

The point which I wish to emphasize here is, that the fact that Mr. Walters, was seeking to have the period extended under Section 12(2) of the Act at this meeting,

is an ...../

is an almost inescapable indication that he, as Chariman, did not think that the failure of the Tribunal to make its award within twenty-one days had anything whatever to do with impracticability. It really is quite simple. If the Tribunal had failed to make its award by the 1st of May, 1981 because it had found it impracticable to do so, it would have been absurd for the Chairman to seek an extension of the period under Section 12(2), since he would have been already protected by the "slip-rule" of impracticability. The fact, therefore, that such a move was considered necessary, is a sufficient indication that the Tribunal did not consider itself covered by the slip-rule and was seeking to remedy the situation by extending the period under subsection (2). That, at any rate, is the clear inference as to the position existing on the 17th of June, 1981.

In taking this approach, I bear in mind particularly the observations of Lord Diplock in the Grunwick case, in which he stated that the decision, whether or not it is impracticable to make an award, is one for the Tribunal to make. This, in my respectful opinion, must necessarily be so because no one is better situated to make such a decision than the Tribunal itself, since the knowledge is peculiarly within its own purview; accordingly, in the instant case, it is a decision which Mr. Walters, as Chairman of the Tribunal, was eminently suitable to make. If, therefore, one places this along with the other evidence on the point, what emerges is a picture which suggests that the failure to act had nothing whatever to do with any question of it being impracticable to make an award. I pause here to note that I come to that conclusion, even on the basis submitted by Counsel for the Companies, that the onus, the burden of proof, is on the

Applicant,.../

Applicant, and not on the Tribunal.

There are, however, two other areas which require examination. Firstly, did the failure of the Union to supply a brief render it impracticable for the Tribunal to make an award? Secondly, did the threat by the Union to litigate the question of the Minister's reference, and its actual initiation of that litigation on the 10th of July, 1981, make it impracticable for the Tribunal to make its award within the prescribed time?

As to the first, I would think not. Any such approach would mean that either party appearing before the Tribunal could delay and frustrate its proceedings by the simple device of failing to submit a brief. I do not therefore accept the argument which sought to base itself on the rules of natural justice. It is my opinion that in such cases the Tribunal must proceed to hear the matter and do the best it can in the circumstances. It must always seek to promote the intention of the legislature for these matters to be expeditiously dealt with and must effect a balance between the statutory need for expedition and that of indulging or accommodating recalcitrant or devious protagonists.

The second point is perhaps more difficult of resolution.

In the period immediately preceding the 10th of July, 1981 matters had escalated considerably, and there was talk of strike notices being issued and plants being shut down, and so on. The whole matter had by then become a widely discussed public issue which terminated in the filing of the writ in this Court. All other things being equal, therefore, one could reasonably have concluded that this chain of events could have made it

impracticable...../

impracticable for the Tribunal to proceed further on the reference. Unfortunately, things were not all equal. The initial twenty-one days had expired on the 1st of May, 1981, and, if I am right in the view which I have taken of Mr. Tomlinson's Affidavit and other evidence in the case, the water was then already over the bridge. What happened subsequently, therefore, even if it did qualify on the grounds of impracticability, could not have remedied the initial default and could not have been relied on by the Tribunal.

The question of what may or may not be impracticable is essentially one of fact and, therefore, one of degree. Consequently, reasonable people looking at the same facts can quite properly come to opposite conclusions. It is, I think, difficult to state precisely the point at which a thing ceases to be practicable. Each case is different and must necessarily turn on its own facts. One can do no more, therefore, than look at the totality of the matter and attempt to make some determination thereof.

In the instant case the Labour Relations and Industrial Disputes Act is designed, inter alia, to effect an expeditious settlement of disputes. It is clearly not in the public interest for industrial disputes to be unduly protracted; consequently, Section 12 was not, in my opinion, intended to confer upon the Tribunal a blank cheque which it may or may not cash as the mood shifts, in terms of making an award; nor, is it a mere pious exhortation to them to make haste. Subject to the power to extend time conferred by subsection 2, the Tribunal must proceed with due despatch in the making of its awards. The so called slip-rule of impracticability

is merely...../

is merely Parliamentary recognition of human frailty and the uncertainties of life. It would have been unjust and inexpedient for the specified period in section 12 to have been made mandatory. Nevertheless, the need for expeditious settlement of disputes is ever present and impracticability will only excuse where this is clearly seen to be the case.

Turning, therefore, to Lord Green's test, I ask myself the question - has the Tribunal in alleging that it was impracticable for it to make an award within the prescribed time, come to a conclusion which is absurd or at which no other reasonable authority could have arrived? As I have already indicated it's a question of fact and different people will decide differently. However, I have come to the conclusion, and I so hold, that in the instant case it is not open to the Tribunal to plead impracticability,having regard to all the surrounding circumstances including, in particular, the Chairman's decision to attempt to resolve the problem by invoking the aid of section 12(2). For these reasons I hold that having failed to comply with the provisions of section 12 aforesaid the jurisdiction of the Tribunal has expired, and it is now, therefore, functus officio and so no longer competent to hear and determine the reference or to make an award thereon.

In so holding I bear in mind, as I must, the consequences which must flow therefrom. It is my opinion, however, that such an approach creates no particular problem, either for the Minister or for the parties. If the Tribunal is now functus, then the Minister may, if he so wishes, make a new reference so that the matter may once more be placed before it. (See for example the note cited in Halsbury's Laws 3rd Edition at paragraph 656 as

to the need.../

to the need for the Court to take into account the balance of convenience involved in holding a particular act to be invalid.)

Nor am I troubled by the slight caveat entered by Mr. Leo-Rhynie that a finding to this effect might well lead to a flood of applications to this Court. As I have said more than once in this judgment, the question whether it is impracticable for an award to be made is essentially one of fact and each case must, therefore, be viewed in that light. If, as Mr. Tomlinson suggests, the period of twenty-one days is proving inadequate because of the growing complexity of matters reaching the Tribunal, then Parliament must intervene and make the necessary amendment.

On this last point, therefore, I hold that the applicant is entitled to succeed.

.....
Dermot Marsh
Puisne Judge

WOLFE, J. :

The National Workers Union Limited, a registered trade union in Jamaica, represents certain categories of workers employed in the Bauxite and Alumina Industry.

Up to January 31, 1981, there were in existence collective labour agreements between the National Workers Union Limited (hereafter referred to as the Applicant) and each of the five Bauxite and Alumina Companies operating in Jamaica. For purpose of ease the Bauxite and Bauxite Alumina Companies shall hereafter be referred to collectively as "the Companies." These collective agreements had a life span commencing on June 1, 1978, and expiring on January 31, 1981.

The collective agreements govern the employer and the employee relationship between the workers and the Companies as also the terms and conditions of employment of the workers.

In September, 1980, the Companies wrote to the Applicant requesting it to submit claims relative to the new agreements. The purpose for so doing was to ensure that new collective agreements were arrived at before the expiry date of the existing agreements. In response to this request, the Applicant, in due course submitted its claims upon the Companies.

Negotiations to arrive at collective agreements have three distinct features, namely:-

A) Industry-wide claims, which are claims common to all the Companies and are negotiated on an industry-wide basis between the Applicant and its delegates on the one hand, and the Companies acting together, on the other hand.

B) Local Level Claims which are claims peculiar to each of the five companies and are negotiated at five different sites and by five different teams representing the Applicant and each of the Companies.

C) Company Proposals - which are matters raised by the companies for considering during the negotiations.

It is common ground that negotiations commenced on November 10, 1980 and continued up to January 29, 1981.

It must be noted that on January 22, 1981 the Companies made the first wage offer in a document swhich shall hereafter be referred to as KSP[II] .

This offer was in the nature of a package and stipulated: Nothing is agreed until all is agreed."

On January 29, 1981 the question of retroactivity became a sore one and the Applicant served notice on the Companies that if the workers were not guaranteed retroactivity they were not prepared to work beyond January 31, 1981.

A meeting was arranged at the Ministry of Labour on January 29, 1981 to resolve the situation which existed then. The purpose of this meeting and what occasioned its necessity is a matter of dispute but on the evidence before us I hold that it was occasioned by the necessity to resolve the question of retroactivity, as it was crystal clear that meaningful negotiations could not have continued until this very important and vital issue was resolved.

On January 31, 1981 the strike notice was withdrawn and on February 3, 1981 the question of retroactivity was settled conditionally, one of the conditions being that further meetings to settle the many unresolved matters should be conducted at the Ministry of Labour.

Following the meeting of February 3, the parties resumed at the Ministry of Labour on February 9, 1981. The Companies' offer as contained in KSP^{II}, was then on the table.

The document KSP^{II} incurred the wrath of the Applicant. The meeting ended without any agreement being reached.

Further meetings were conducted on the 13th and 26th February and on the 5th, 6th, 9th, 12th, 17th, 23rd, 24th, 25th, and 30th March.

On March 25, the Companies tabled a new offer as contained in the document KSP^{III}. This offer was still in the nature of a package and again stipulated, "Nothing is agreed until all is agreed".

The meeting of March 25, produced no change in the Applicant's position except to say that the Applicant agreed that at a meeting scheduled for March 30, it would table revised proposals.

On March 30, the Applicant presented to Mr. Anthony Irons, the Director of Industrial Relations at the Ministry of Labour, and under whose Chairmanship the meetings were being conducted, "what it described as revised proposals but contrary to the understanding arrived at on the 25th March, 1981, stipulated that the revised proposals should not be disclosed to the companies".

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This met with the Companies' disapproval.

Two further meetings were arranged for April 2 and 8 but were aborted for reasons which do not deserve mention.

During all this time the Minister of Labour was kept abreast of the developments by the Director of Industrial Relations.

> "I had continuously kept the Minister of Labour informed of the outcome of each meeting and the decreasing possibility of arriving at a settlement expeditiously either by the parties themselves or through the conciliatory efforts of the Ministry."

On April 10, 1981 the Minister of Labour, pursuant to Section 11A (1)(a) of the Labour Relations and Industrial Disputes Act, hereafter termed "the Act", referred the matter to the Industrial Disputes Tribunal, hereafter referred to as "the Tribunal", for settlement.

The terms of reference referred to in Miss Marcia Powell's affidavit dated July 27, 1981, marked "A" are set out hereunder.

> "To determine and settle the dispute between Alcan Jamaica Company, Alumina Partners of Jamaica, Alcoa Minerals of Jamaica Incorporated Limited, Kaiser Bauxite Company and Reynolds Jamaica Mines Limited, on the one hand, and certain workers employed by those companies and represented by the National Workers Union on the other hand, over
>
> (a) The Union's claims for increased wages and other improved conditions of employment made on behalf of the said workers; and
>
> (b) the claims of the respective companies for certain variations in the terms and conditions of employment of the said workers."

The Applicant and the Companies were duly informed of the Reference by letter dated April 13, 1981 in which the terms of reference were set out and were each requested to furnish the Tribunal with copies of their briefs outlining the cause of the dispute along with computation of the Wage Fund.

The response to the letter dated April 13, 1981 was a mixed one. The Companies on the one hand requested further time to submit their brief while the Applicant, on the other hand, challenged the authority of the Minister to make the reference based upon the existing circumstances as the Applicant perceived them.

The Companies submitted their brief to the Tribunal on May 1, 1981 and by letter dated May 12, 1981 the parties were duly informed

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of the composition of the division of the Tribunal to hear the matter.

By letter dated June 15, 1981 the parties were advised of a change in the composition of the division of the Tribunal to hear the matter as also the date for the preliminary sitting which was set for June 17, 1981.

On June 17, 1981 a meeting of the Tribunal was convened and all parties duly represented. The meeting achieved nought and was adjourned to June 23, on which date the Applicant was not represented. A further adjournment was taken to July 8, 1981 when again the Applicant failed to turn up although it had been advised of the date by letter dated July 6, 1981.

An emergency sitting of the Tribunal was set for July 10, 1981, when the Applicant was represented by Mr. Carl Rattray, Q.C., who informed the Tribunal that his appearance was limited to taking a preliminary objection as to the jurisdiction of the Tribunal.

The Tribunal would have none of this and so informed Mr. Rattray, whereupon he withdrew, thereafter the Tribunal adjourned its sitting until Monday, July 13, 1981.

On July 10, 1981 the Applicant obtained an Order Nisi, restraining the Tribunal from further proceeding with the matter.

The Applicant now moves this Court for an Order of Prohibition to prohibit the Tribunal from further acting on the reference to it made on or around the 13th day of April, 1981 by the Honourable Minister of Labour in respect of an alleged dispute between the Union and the Companies.

The Grounds upon which the said Relief is sought are as follows:

(a) That no dispute exists between the Union and the Companies which could be a subject of reference by the Minister of Labour to the Industrial Disputes Tribunal or at all.

(b) That the Industrial Disputes Tribunal refused, on the 10th of July, 1981, to hear the submissions of the Attorney-at-Law for the Applicant, that the Industrial Disputes Tribunal had no jurisdiction in the matter.

(c) That the Industrial Disputes Tribunal has no jurisdiction to enter upon the Reference and to hear and determine the matters referred to it by the Minister.

(d) That the Minister referred to the Industrial Disputes Tribunal local level claims which were never /...

at any time before the Ministry of Labour.

(e) That the reference to the Industrial Disputes Tribunal by the Minister of Labour is bad in that the Minister has referred as one purported "dispute", matters arising out of five (5) separate, industry-wide claims by the National Workers Union against each of the Bauxite and Alumina Companies, and five (5) separate local level claims against each of the five (5) Bauxite and Alumina Companies, the negotiations of which would have resulted in separate collective labour agreements between each Company and the National Workers Union, which matters cannot form part of the same reference without the consent of the parties.

(f) That the reference of the Minister of Labour to the Industrial Disputes Tribunal has expired by virtue of the provisions of section 12 of the Labour Relations and Industrial Disputes Act, and the said Tribunal is, therefore, no longer competent to hear the issue and/or to make an award thereon.

Arising from the grounds relied upon, the arguments as they were presented by the Applicant and the Respondents, four issues fall to be resolved :-

1) The Court's power to review the exercise of the Minister's discretion pursuant to section 11(A)(1)(a) of the Act;

2) was there an industrial dispute, and if so, what was it about and when did it arise and were the provisions of section 11(A)(1)(a) of the Act complied with;

3) was the reference dated April 10, 1981, good in law?

4) Has the jurisdiction of the Tribunal, as set out in section 12 subsections (1) and (2) of the Act expired?

<u>Re Court's Powers of Review</u>:

The learned Solicitor General, Acting, submitted that once the Minister stated that he was satisfied that a dispute existed the Court could not review the exercise of the discretion.

Mr. Langrin, appearing on behalf of the Minister conceded that judicial review of the exercise of the discretion given to the Minister by virtue of section 11(A)(1)(a) of the Act was not excluded by that section. However, he contended that the Court ought not to interfere with that exercise unless it could be established that the Minister acted - in bad faith, a contention not put forward by the Applicant,

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or misdirected himself in law by taking into account irrelevant matters or by failing to consider relevant matters. He urged that the Court was bound to assume that the discretion was lawfully exercised until the contrary was established.

Compendiously put he argued that as long as there was a basis of fact upon which the Minister could have exercised his discretion in the way he did, then the Court ought not to disturb the exercise. He placed reliance upon Secretary of State for Education and Science v. Metropolitan Borough of Tameside (1976) 3 A.E.R. 665.

Mr. Leo-Rhynie on behalf of the Companies took a less flexible position. He contended that where :-

(1) the Statute formulates the discretion in subjective language;

(2) does not make the exercise of the discretion subject to appeal; and

(3) the exercise of the discretion does not affect any basic right of individuals, then, in such circumstances the Court's power of review was considerably circumscribed.

He further contended that the reference by the Minister did not in any way
way affect any basic rights of individuals. With this contention I respectfully disagree. To improperly deprive the workers of the right to freely bargain with their employers as to the terms and conditions of their employment and as to the wages payable to them and thereby impose upon them terms and conditions of employment by way of an award by the Tribunal is, in my view, a serious incursion upon their basic rights. The argument that the reference per se does not affect any basic individual right is attractive but untenable, as ultimately it usurps the right of free collective bargaining.

Mr. Patterson concurred with the submission of Mr. Langrin and posited the following :-

(a) Where Parliament has by statute conferred a power on a Minister it becomes exercisable by him only after all the preconditions specified in the Act are established, and consequently the Court can enquire to ascertain if the preconditions existed at the time of the exercise of the power.

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(b) A requirement in a statute that requires a Minister to be satisfied before exercising a discretion does not introduce a purely subjective test and, therefore, the Court is entitled on the evidence before it to determine whether or not there were facts upon which the Minister could be satisfied.

In Secretary of State for Education and Science v. Metropolitan Borough of Tameside supra at page 703, Lord Russell of Killowen had this to say:-

> "It is, my Lords, no doubt a most serious matter for the Judiciary to overset a conclusion of a Secretary of State with overall responsibility in a field of such importance to the national welfare as education, when it is not suggested either that the conclusion was motivated by party political considerations or that it involved bad faith. On the other hand, it is not my understanding that the mere expression by the Secretary of State of his satisfaction that particular proposals are unreasonable deprives the Court of the ability to decide that there were no sufficient grounds for that satisfaction, and that consequently the Secretary of State must in some respect have misdirected himself in applying his mind to the problem."

It seems to me a matter of common sense that where the exercise of a power is dependent upon the existence of certain conditions then a Court is entitled to see if those conditions have been satgified before the power is exercised.

In Ross-Clunis v. Papadopoullos (1953) I WLR 546 an appeal from Cyprus dealing with the imposition of a communal fine which the Commissioner was entitled to impose if he had "satisfied himself" of certain circumstances, Lord Morton of Henryton said at page 560:

> "Their Lordships think that if it could be shown that there were no grounds upon which the Commissioner could be so satisfied, a court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts."

Based upon the authorities, I am of the view that this Court has the power to review the exercise of the discretion in the instant case. It must, however, be borne in mind that the power of review "is not that of an appellate body from the mode in which the discretion has been exercised, but to see that the power exercised has been the power conferred."

DISPUTE:

Having held that the Court's power of review has not been

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excluded, the question arises, was there a dispute which was properly referable to the Tribunal by the Minister.

Section 11(A)(1)(a) under which the reference was made states:-

> "Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking and should be settled expeditiously, he may on his own initiative -
>
> > refer the dispute to the Tribunal for settlement if he is satisfied that attempts were made without success to settle the dispute by such other means as were available to the parties."

"Industrial dispute" is defined by the Act as :

> "A dispute between one or more employers of organizations representing employers and one or more workers or organizations representing workers, where such dispute relates wholly or partly to :
>
> (a) terms and conditions of employment, or the physical conditions in which workers are required to work."

The rest of the Section, for purposes of the instant case, is of no import.

The Act defines "undertaking" thus:

> "Undertaking" includes a trade or business and any activity involving the employment of workers."

To ascertain whether or not a dispute existed in accordance with Section 11A(1)(a) it is necessary to advert to the facts surrounding the negotiations.

The evidence discloses that as far back as the meeting of February 9, 1981 the Companies laid on the table an offer contained in KSP^{II}.

The Applicant, prior to this, had submitted a twenty-eight (28) point industry-wide claim as also local level claims on the Companies.

KSP^{II} sought to deal with all the claims of the Applicant on a package basis. The reactions of the Applicant to KSP^{II} are reflected in the minutes. of February 9, 1981.

Extract of minutes of meeting, February 9, 1981.

> "Mr. Perry:
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> The records will show, Mr. Chairman, that there is a new method of doing things. We have no objection, we want to be enlightened and if that is the method it will take to resolve it, we will try it. But Mr. Chairman there

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> there is no way, absolutely no way we will settle a three-year contract for any amount remotely close to $17.00. In fact, Mr. Chairman, you would not even add them and get a figure: it would be closer if you multiply to come up with a figure that would be closer to our expectations than adding them.
>
> So we feel at this stage that the input of the Ministry will bring reason to bear on our colleagues across from us to let us have a fair, reasonable and just settlement. I do not believe at this time we need to elaborate. I am sure you would want to speak with them outside."

So there we have an offer by the Companies couched in KSP^{II} and a rejection by the Applicant.

Notwithstanding some nine (9) meetings at the Ministry of Labour, after the meeting of February 9, 1981 up to March 24, 1981 the positions of the parties in relation to KSP^{II} remained unchanged.

On March 25, 1981 the Companies produced KSP^{III}, a new offer, another package situation.

The Applicant in turn agreed to table revised proposals by March 30, 1981. This they failed to do.

It is abundantly clear from the evidence that the Applicant was not prepared to negotiate the claims on a package basis as offered by the Companies. I am satisfied that the Applicant intended to deal with the industry-wide claims as submitted, item by item and separate and apart from the local level claims. The Company on the other hand was making an offer which, if accepted, would take care of all the claims industry-wide, local level, and company proposals.

Whatever meaning one attaches to the word dispute, whether it be deadlock or irreconcilable differences, as suggested by the Applicant, or disagreement, difference of opinion, debate, impasse, contention, as urged by the Respondents, it is clear to my mind that commencing on the 9th February, 1981 and continuing through to the 10th April, 1981 when the reference was made, there was existing a dispute between the parties. It matters not whether the parties were then pursuing the Collective bargaining process or under the Conciliatory process of the Ministry.

What then was the dispute? I hold that the dispute existed "over whether the Companies' offer involving all claims should be settled or not. Should it be accepted en bloc or negotiated item by item as suggested by the Union?"

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Having found that a dispute existed and the dispute having been identified, the questions to be answered are: (a) Did the dispute exist in an undertaking? and, (b) were attempts made without success, to settle the dispute by such other means as were available to the parties?

Concerning the latter there can be no doubt. In this regard I rely upon the affidavit evidence of Mr. Anthony George Irons and the minutes of the various meetings exhibited thereto.

At paragraph Sixteen (16) of his affidavit Mr. Irons had this to say :

> "Twelve conciliatory meetings were held at the Ministry between February 9, 1981 and 30th March, 1981 - all under my chairmanship and from my neutral and confidential position as conciliator it became increasingly clear to me that there was no possiblility then or within the reasonably forseeable future of the parties resolving the dispute themselves or by means of the conciliatory services of the Ministry."

It is conceded by the parties that Mr. Irons possesses a great deal of skill and experience in matters of this nature. He actually participated in the bringing about of the Collective Agreement of 1978.

Mr. Irons deposed in his affidavit that he kept the Minister informed of the outcome of each meeting and the decreasing possibility of arriving at a settlement expeditiously either by the parties themselves or through the conciliatory services of the Ministry. The Minister was entitled to rely upon the advice of his officer. To say that the importance of the Bauxite and Alumina industry to the National life requires the expeditious settlement of any dispute therein is to state the obvious.

The Applicant contended that the Five (5) Bauxite and Alumina Companies cannot, for the purposes of Section 11A(1), be considered as an undertaking in which an Industrial Dispute can exist.

In this regard Counsel for the Applicant cited and relied upon R. v. INDUSTRIAL DISPUTES TRIBUNAL EX PARTE COURAGE, 3 A.E.R. at page 412, as authority for the proposition that undertaking is used in relation to a unit within an industry.

Upon an examination of the definition of "Collective Bargaining" one sees that the Act predicates a situation where negotiations can be conducted "between one or more organizations representing workers and either

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one or more employers, or one or more organizations representing employers or a combination of one or more organization representing employers."

Having regard to the definition of collective bargaining it is conceivable that during negotiations between one organization representing workers and more than one employer a dispute may arise.

In the definition of "Collective Bargaining", Parliament has made it possible for more than one undertaking to join forces or combine to negotiate with one or more than one organization representing workers.

Any dispute which arises in the above given situation would be a dispute with each undertaking involved in the negotiations. Put another way, it would be a dispute with each and all the undertakings represented in the combination.

Where by practice or custom an amalgam of employers are accustomed to negotiate together with an organization representing workers, a situation recognised by the Act, then surely any dispute so arising must be properly referable by the Minister to the Tribunal as a dispute with an undertaking, bearing in mind that the Interpretation Act states that the singular shall include the plural.

It is clear that the purpose of allowing amalgams to negotiate is one of convenience ensuring, at the same time, consistency in the agreements arrived at within a particular industry such as the Bauxite and Alumina Industry.

REFERENCE

The Applicant contended that the reference by the Minister dated April 10, 1981 was bad in law for the following reasons:

(a) The reference is vague in that it does not identify in definite terms the dispute.

(b) Assuming the Court finds that a dispute exists, then it is five disputes with five different Companies and therefore not properly referable in one reference since a separate award would be required in respect of each company.

(c) The reference included matters which did not form part of the negotiations, namely, the local level claims and the Companies amendments.

Dealing with the first of the reasons set out above, in a decision of the Full Court of the Supreme Court of Jamaica in Re Sun Enterprises Limited (1976) 14 J.L.R. p.197, it was held in refusing a motion for an

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order of certiorari that :-

> "It is not a valid ground for the issue of certiorari that in a reference by the Minister of Labour and Employment, acting under section 9 of the Labour Relations and Industrial Disputes Act 1975, of a dispute in an essential service to the Industrial Dispute Tribunal the Minister does not identify the nature of the issues to be resolved by the Tribunal."

The terms of reference in the case cited were as follows :-

> "To determine and settle the dispute between Sun Enterprises Limited, on the one hand, and certain workers employed by the Company members of the N.W.U. on the other hand."

In the instant case the terms of reference go beyond that in Re Sun Enterprises Limited supra, in that it gives particulars of the dispute.

The Full Court in its judgment cited with approval the observation of Lord Denning in Beetham v. Trinidad Cement Limited (1960) 1 A.E.R. p. 274 at page 280. In Beetham's case an argument similar to that put forward by Mr. Rattray was urged when a reference was made to a Tribunal for settlement but the nature of the dispute was not stated in specific terms. Lord Denning had this to say:-

> "Then it was said that the Governor did not make a valid reference to the Board of Enquiry because he did not, in the minute of appointment, specify the nature of the dispute. There is nothing in this point. If there is a dispute in existence, the parties must know of it and there is no need to tell them about it. They may not be able to formulate it themselves, at that stage, or at any rate, not precisely. So, how can the Governor be expected to do so? Suffice it for it to be formulated by the parties themselves, when they get before the Board."

I have already indicated that I am of the view that there was only one dispute. Assuming that I have erred in so holding and that there are five disputes with five separate Companies, the objection taken to the reference is, in my view, technical only.

Section 20 of the Act provides:-

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

This section empowers the Tribunal, even if separate references were made, to hear the matter in a consolidated form. The maxim "De minimus non curat lex" would be applicable to the situation.

I find as a fact that the documents KSP II and K.S.P.III the

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tabling of which gave rise to the dispute, embraced all the three constituents of the claims which would eventually result in a collective agreement. The Companies had clearly indicated from as early as January 1981, that they were dealing with a package situation which involved all aspects of the claim. It is conceded by all the parties that all aspects of the claim have been included in the reference. In the event that this has been improperly done, I would be prepared to order that such aspects of the claim which have not properly been included in the reference be severed therefrom. However, such an order is unnecessary, as I hold that all aspects of the claim were properly included in the reference.

I, therefore, hold that the reference is valid.

JURISDICTION:

The question as to whether or not the jurisdiction of the Tribunal still subsists is, in my view, the main thrust of the Applicant's case.

The Tribunal's jurisdiction is derived from section 12 subsections (1) and (2) of the Act. Section 12 subsection (1) states:-

> "Subject to the provisions of subsection (2) of the Tribunal shall, in respect of any industrial dispute referred to it, make its award within twenty-one days after that dispute was so referred, or if it is impracticable to make the award within that period it shall do so as soon as may be practicable and shall cause a copy of the award to be given forthwith to each of the parties and to the Minister.
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> "(2) The period of twenty-one days specified in subsection (1) may be extended by the Tribunal -
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> (a) for a further period not exceeding twenty-one days at the request of any of the parties;

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(b) for such further period beyond that specified in paragraph (a) as the Tribunal may, with the agreement of the parties, determine."

The Applicant contends that the provisions of section 12 are mandatory and that in any event the words "as soon as may be practicable" cannot serve to extend the life of the Tribunal beyond a maximum period of forty-two days from the date of reference. It is further contended by the Applicant that the Tribunal, not having made its award within forty-two days of the date of the reference, is now functus officio.

The Respondents, on the other hand, contend that the provisions of section 12 are directory and that the jurisdiction of the Tribunal has not lapsed with the effluxion of time.

It, therefore, arises for consideration whether the provisions of section 12 are mandatory or directory. What are the principles by which a Court must be guided in resolving the issue?

In Montreal Street Rail Company v. Normandin (1917) A.C. 170, Sir Arthur Channell opined:-

> "The question whether the provisions in a statute are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at."

This view is supported in Halsbury's Laws of England 3rd Edition, Vol. 36 paragraphs 655 and 656. The principles cited make it clear that the answer to the question is not solely dependent on the words used in the statute but that a Court in seeking to determine the question must have regard to the scope and object of the Legislature.

When the Act is viewed as a whole it is clear that the object of the Legislature is to ensure the expeditious settlement

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of disputes arising under the Act. It may, therefore, be said that time is of the essence, hence the Legislature prescribes a period of twenty-one days for the handing down of an award by the Tribunal. However, the specified period is qualified by the introduction of the words "or if it is impracticable to make the award within that period it shall do so as soon as may be practicable."

When a specified time for the performance of an act is qualified by words which are of a permissive nature, then it is my view that it reflects the intention of Parliament to make the provisions directory as opposed to mandatory.

Notwithstanding the directory nature of the provisions it is necessary to ascertain the meaning and significance of the words "or if it is impracticable to make the award within that period it shall do so as soon as may be practicable."

In the absence of clear judicial interpretation of a word, then such word must be given its ordinary meaning. In ascertaining the ordinary meaning of a word, the Court may rely upon the meaning given in well known and authoritative dictationaries.

Websters Third New International Dictionary defines 'impracticable' as: Not practicable; incapable of being performed or accomplished by the means employed or at command; infeasible. "Practicable" is defined by the same work as meaning capable of being put into practice, done or accomplished, feasible.

From the meanings ascribed to the words impracticable and practicable, it is my considered opinion that the qualifying words in Section 12(1) cannot be interminable in their effect upon the specified period of twenty-one days. There has to be

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a point in time when the words cease to be applicable. Put inelegantly, there has to be a cut-off point.

The Applicant has directly challenged the jurisdiction of the Tribunal. When there is such a challenge the burden of proving absence of jurisdiction rests upon the party making the challenge. See Judicial Review of Administrative Action by S.A. de Smith, 3rd Edition, at page 104.

Has the Applicant discharged the burden which rests upon it to show that the jurisdiction has lapsed by the effluxion of time? that is, that it was not impracticable to make the award within twenty-one days and that even if it were, then it has not been done as soon as may be practicable.

The Affidavit of Mr. L.M. Tomlinson, Acting Chairman of the Industrial Disputes Tribunal is of assistance in resolving this issue.

The Affidavit sets out the difficulties under which the Tribunal operates physically, the work-load of the Tribunal, the fact that all other Divisions of the Tribunal had been engaged in hearing other disputes; the failure of the parties to submit their briefs in the required time and the fact taht a new division of the Tribunal had to be constituted owing to the unavailability of the Chairman of the original panel appointed to hear the matter. These conditions, Mr. Tomlinson says, made it impracticable for the Tribunal to have handed down its award within twenty-one days of the reference.

It has been contended by the applicant that Tomlinson's affidavit does not specifically deal with circumstances which would have made it impracticable, for the particular Division of the Tribunal appointed to hear the matter to hand down its award within twenty-one days.

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However, I hold that it may be reasonably inferred from the facts deposed to by Mr. Tomlinson that the Tribunal as a whole would have been affected by these conditions.

The Applicant has not produced any evidence to contradict Mr. Tomlinson's affidavit. What it has sought to do is, by critical analysis of the contents thereof and an examination of the evidence as a whole, destroy the effect of Mr. Tomlinson's affidavit.

I am not satisfied that this objective has been achieved.

I hold, on the totality of the evidence, that it was impracticable for the Tribunal to have made its award within twenty-one days of the reference and that any award handed down would come within the ambit of the words: "It shall do so as soon as may be practicable."

I would therefore order that the Order Nisi be discharged and the Motion dismissed.

Finally, there are two observations I would wish to make.

1. The summary manner in which the Tribunal dealt with Counsel who appeared on the 10th of July, 1981 to make submissions on behalf of his client as to the jurisdiction of the Tribunal is to be deprecated.

Section 16, sub-section 1 of the Act gives a party concerned in any matter before the Tribunal the right to be represented by Counsel. There is a duty on the Tribunal to hear any counsel who appears before it on behalf of an interested party.

2. It is incumbent on the Powers that be to ensure that the Tribunal is put in a position where the

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intention of Parliament as set out in the Act may be given effect to. The spirit and intendment of the Act is to ensure the expeditious settlement of disputes by the Tribunal. To speak of expedition and to allow the conditions deposed to by Mr. Tomlinson to exist is to pay lip service to expedition.

I can only hope that the situation will be speedily remedied so that the Tribunal can efficaciously proceed with the task with which it has been entrusted.

SMITH, C.J. :

By majority decision of the Court, the application is dismissed. The cost of the Tribunal and of the Companies, to be taxed or agreed, are to be paid by the Union.

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