IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MISCELLANEOUS

SUIT NO. M15 OF 1979

REGINA

vs

THE INDUSTRIAL DISPUTES TRIBUNAL

THE SHIPPING ASSOCIATION OF JAMAICA APPLICANT

(MOTION FOR CERTIORARI)

CORAM: WILLKIE, CHAMBERS & CAREY, JJ.

Emil George Q.C. and Dr. L. Barnett for the Applicant
Frank Phipps Q.C. and Earl DeLisser for Bustamante Industrial Trade Union
A. Edwards for Industrial Disputes Tribunal

June 11 and 12
July 19

JUDGMENT

WILLKIE J.
(Read by Ross J.)

This is an application brought by the Shipping Association of Jamaica seeking an Order of Certiorari to bring up and quash an award made by the Industrial Disputes Tribunal established for the purpose of and by the Labour Relations and Industrial Disputes Act, 1975 (No. 14 of 1975) and will hereinafter be referred to as "The Tribunal" while the Labour Relations Industrial Disputes Act, 1975 will be referred to as "The Act".

The Shipping Association of Jamaica is a Registered Trade Union of Employers made up of establishments engaged in Shipping and hereinafter called "The Association" and represents the group in all negotiations with the Trade Unions representing their employees in regard to terms and conditions of employment. In this particular case 3 Unions are involved. The Bustamante Industrial Trade Union, United Port Workers and Seamens Union and The Trade Union Congress of Jamaica hereinafter called "The Unions".

The workers engaged on the Waterfront are divided into 3 separate groups:

(1) Port Workers group

(2) Uncontested group

(3) Port Supervisor group

The Association negotiates on behalf of the Shippers with the Unions representing the Port workers and the Uncontested groups only. The Wharf Companies usually negotiate in their own behalf with the Port Supervisors. It will be seen therefore that the Association, as such, has nothing to do with the Port Supervisors.

The applicants contend that a Collective Labour Agreement hereinafter called "The Agreement" exist between the Association and the Unions effective for the period first January 1976 to 30th October 1977 and have been extended each year by the said agreement (Clause (1) (a)). This Agreement was in full force and effect at the time the dispute arose between the parties. The Agreement related solely to the category designated Port Workers. The Agreement provided for its determination after a prescribed period of Notice by either side and also for its amendment. In relation to amendments Clause 1(a) reads:

> "This agreement shall be effective for the period.......... to............(with dates inclusive) and shall continue in force thereafter from year to year subject to the right of either party to give to the other not less than ninety-three (93) nor more than one hundred and twenty-five (125) days' notice in writing prior to the termination thereof either to terminate the agreement or to amend the same".
>
> Clause 1(b) provides:-
>
> "A notice to amend the agreement shall give details of the proposed amendments and the parties shall forthwith negotiate solely with respect to such amendments".

In keeping with Clause 1(a) and 1(b) the Association by a letter dated

21st July 1977 wrote to the Unions proposing certain amendments to the existing Agreement and giving details of the proposed amendments as required by the Agreement (Exhibit B 1). By a letter dated 27th July 1977 (Exhibit B2) the B.I.T.U. wrote a letter to the Association submitting a number of what the letter described as "Claims" covering a broad set of terms and condition of employment and numbering 24 and in particular item 15 "Laundry allowance to be provided where uniforms are given (Page 22 of Bundle); and reserving the right to submit additional items of "claims" up to and during negotiation. By a letter dated 28th September 1977 (unsigned) captioned B.I.T.U.,U.P.U,T.U.C., the Unions submitted 32 items (Exhibit B3). This letter repeated some of the items hitherto made in the letter by the B.I.T.U. dated 27th July 1977 (Exhibit B2) and additional claims; and in particular item 20 "End of year bonus" (Page 24 - 26 of Bundle.) It is reasonable to infer that this letter was intended to be, and I so hold, revised 'claims' made by Exhibit B2. Meetings were held between the Association and the Unions to consider the proposed amendments. There is nothing unusual about this. A Joint Industrial Council for the Bustamante Port comprising Union and Management representatives were established at the port and met on a continuous basis to provide a ready-made forum to discuss proposed amendments, complaints, improvements and, in effect, to monitor the performance of both sides under the Agreement and to attempt to diffuse potential disputes before such disputes disrupted the smooth functioning of the port. The negotiations progressed and at a meeting on 2nd February 1978 final agreement was reached on a number of claims including the claim for increased wages agreed at $21 per week across the board for 2 years ending 31st October 1979. It should be noted that in Exhibit B2 (letter of B.I.T.U. dated 27th July 1977) Item 19 claimed a 75% increase in wages and in Exhibit B2 (Letter from Unions dated 28th September 1977) Item 15 is a claim for 100% increase in wages. Other items were also agreed to and these are set out in Exhibit C1 and C2 and set out hereunder:-

Exhibit C1

"February 3,1978

CIRCULAR TO ALL MEMBERS NO.6/78

Dear Sirs

AMENDMENTS TO THE JOINT LABOUR AGREEMENT (JLA)
Members are advised that, at the negotiation meeting on February 2 1978, the following amendments to the JLA were finalized:

1) Length of Contract: 24 months from October 31 1977 to October 31,1979.
2) Job Security: for the duration of the Contract.
3) Meal Allowance on the graveyard shift: increased from $3.00 to $5.50 per worker.
4) Rates of pay: for the 24 month period to October 31,1979, as follows:

CATEGORY	WEEKLY RATE	HOURLY RATE
Dockmen and Gangwaymen	$ 116.20	$ 3.32
Holders, Coopers and Watermen	121.10	3.46
Watchmen	131.25	3.75
Gantry Operators	231.00	6.60
Foremen	154.00	30.80 per 7 hour shift

5) All increases in the rates will be applied as of pay week beginning February 6,1978.

Kindly also note the following:

1) Incentive Bonus Rates: Now that new rates of pay have been agreed, a new calculation has been made resulting in a new incentive bonus rate of $2.86 per man per hour saved.
2) Payment of retro-activity 31/10/77 to 5/2/78
While no firm payment date has yet been agreed, the Association wishes to advise all employers of Portworkers and gearsmen labour that:
   a) The Association will be proposing that retro-activity be paid to portworkers and gearsmen on March 21,1978, immediately prior to the Easter week-end.
   b) Statements on a boat-by-boat/berth basis for the retro-active period will be delivered on or before February 28,1978.
   c) All queries on the retroactivity statements must be settled with the Association by March 10,1978.
   d) Cheques in full settlement of retro-activity are to reach the Association on or before March 17,1978.

Members are further advised that negotiations on other items of claim continue although many items have been settled.

Negotiations have already started on the Wharves Uncontested Group Contract and negotiations will commence shortly on the Tally Clerks Contract.

Should clarification be required on any of the foregoing points, kindly contact the Association at your earliest convenience.

Please be guided accordingly.

Yours truly
The Shipping Association
of Jamaica
Sgd. A. Cooke
Actg. GENERAL MANAGER"

Exhibit C2

"February 9, 1978
CIRCULAR TO ALL MEMBERS NO.6/78(A)

Dear Sirs:

RE: GRAVEYARD SHIFT (CLAUSE 6(A) OF THE JOINT LABOUR AGREEMENT)
By negotiations on amendment to the Portworker Labour Contract, it has been agreed that the graveyard shift will be from 9.00 P.M. to 7.00 A.M. as follows:-

(A) A 7-hour guaranteed shift from 9.00 P.M. to 5.00 A.M. inclusive of a one-hour meal break between 1.00 A.M. and 2.00 A.M.

(B) Overtime between 5.00 A.M. - 7.00 A.M., at employers's option, paid at double time on weekdays and triple time on Sundays and Public Holidays.

The above agreement is to be applied for work done on the graveyard shift as of February 6, 1978, in accordance with Circular No. 6/78.
Please be guided accordingly.
Yours truly
The Shipping Association of Jamaica
Sgd. A. Cooke
Actg. General Manager
AC/nms"

Subsequent to these agreements by a letter dated 3rd May 1978 the Unions wrote the Association (Exhibit D) in these terms:-

"3rd May 1978
The Manager
Shipping Association of Jamaica
5 - 7 King Street
Kingston

Dear Sir

On behalf of Port Workers and Gearsmen

employed by the Shipping Association
and its members, the Bustamante
Industrial Trade Union wish an urgent
meeting of the Joint Industrial Council
to conclude settlement on all outstanding
items.
We would particularly, like to settle
outstanding matters such as laundry
allowance, end-of-year bonus, and in
addition, provision of thirty five
dollars($35.00) per week travelling
allowance for all Port workers,
retroactive to 1st November 1977.

Yours truly
BUSTAMANTE INDUSTRIAL TRADE UNION
Sgd. Errol Anderson
EA/nb".

It will be seen that travelling allowance is referred to for the first time and letter includes:

(a) Laundry Allowance (See Exhibit B2 dated 27/7/77)

(b) End of year Bonus (Exhibit B3 dated 28/9/77)

The parties failed to agree these items. The matter was referred to the Ministry of Labour and Employment under section 9 of the Act. The Minister under section 9(3) (a) of the Act referred the matter to the Tribunal, he having failed to resolve the dispute between the Association and the Unions. The terms of reference to the Tribunal were as follows:

"To determine and settle the dispute between the Shipping Association of Jamaica on the one hand, and certain Port Workers employed by the Shipping Association of Jamaica and represented jointly by the Bustamnate Industrial Trade Union, United Port Workers and Seamen's Union and the Trade Union Congress of Jamaica on the other hand, over the claim of the Unions for Laundry Allowance, end of year bonus and travelling on behalf of the Port Workers and Gearsmen submitted by the Unions to the Shipping Association of Jamaica on the 3rd May, 1978".

The matter was heard by the Tribunal and its award made on the 16th February 1979 were as follows:-

CLAIM No. 1 TRAVELLING ALLOWANCE OF $35.00 WEEKLY

The Tribunal awards a Travelling Allowance of Ten Dollars ($10.00) weekly across-the board, retroactive from the 1st November, 1977 to the 31st October, 1978 and Twelve Dollars ($12.00) weekly across-the board, as from the 1st November, 1978, with the proviso that all existing arrangements in relation to transport be unaffected by this award.

CLAIM No. 2 - LAUNDRY ALLOWANCE:

The Tribunal makes no award.

CLAIM No. 3 - END-OF-YEAR BONUS:

The Tribunal makes no award.

It is in the light of this background that the Association seeks an Order Certiorari to bring up and quash this award. The submissions for the Association may be summarised as follows:-

That in as early as 1978 a collective labour agreement had been agreed between the parties which covered all matters relating to wages and fringe benefits with the exception of (a) Laundry Allowance (b) End of year bonus. That the claim for travelling first arose by virtue of the Union's letter dated 3rd May 1978 (Exhibit D) and consequently; no dispute could have arisen prior to 3rd May 1978; therefore, no award for Travelling could be made under the Act which went beyond 3rd May 1978. The Tribunal purported to make the award effective to 1st November 1977. The award was therefore ultra vires, being in breach of section 12(4)(a) of the Act. The agreement between the parties was a valid binding agreement and enforceable at law. The Claim for Travelling breached the

agreement in the following respects: (a) clause 1(a) and 1(b) as to 'Notice to amend the agreement' in that it was 'out of time' and (b) would amount to the Tribunal reopening matters agreed to in a contract between the parties; (c) clause 1(c) as to 'effective date of amendments'. The first necessity is answers to the following questions:-

(1) Is there a collective labour agreement between the parties?

(2) What are its terms?

(3) Is it a contract enforceable at law.

(4) If it is, what are the powers of the Tribunal under the Act i.e. must the Tribunal take into account the agreement between the parties;

(5) If it is not, would it make a difference.

Question 1

It is not in dispute that a collective labour agreement existed between the parties which continued from year to year (see clause 1(a) of the Agreement) subject to agreed amendments; and as a result of negotiations between the parties culminating in the 2nd February 1978 meeting certain amendments to the Agreement were agreed.

Question 2

The terms of this Agreement were embodied in Exhibit "A" (Booklet) with the necessary amendments incorporated therein as expressed in Circulars Exhibit C1 and C2 (Pages 27 - 29 of Bundle).

Question 3

Considerable doubt has been expressed as to whether the genus 'collective labour agreements' are legal contracts. This view of the authorities is grounded on the apparent lack in these agreements of an intention to be legally bound. The better view is that collective agreements are binding "in honour" only. Mr. George for Applicant submitted forcefully that the agreement was entered into in good faith and strongly suggested that the Association, at least, intended the agreement to be legally enforceable. Dr. Barnett submitted that the statements in relation to enforceability have been concerned with the declarations and undertakings set out in these agreements for the

setting up of provisions primarily designed to create peaceful methods for the settlement of industrial disputes and he cited Ford Motor Co. V. Amalgamated Union and Engineering Foundry Workers (1969)2 A.E.R. P.481 as an illustration of this proposition. He submitted that when provisions are precisely made of what the terms and conditions of employment should be, the duration of those terms and the method by which those terms can be amended, then you are within the realm of the law of contract. He submitted that these criteria existed in the provisions of this agreement and are therefore enforceable.

Mr. Phipps for the Unions endorsed Mr. Edwards contention and submitted that the principle of the unenforceability of collective bargaining agreements applied to this case. He suggested that one need not look beyond the "objects" provision in the agreement to see it lacks any apparent intention on the part of the parties to enter into legal relationship. Mr. Edwards cited the Labour Relations Code (hereinafter called 'the code') appended to the Labour Relations Regulations, which was made in the exercise of powers conferred on the Minister by section 3 (4) of The Labour Relations and Industrial Disputes Act. Jamaica Gazettee Supplement LN. 310/76 dated 30th September 1976; and cited paragraphs which he suggested settled the status of collective agreements. He further cited Clause 15 of the Agreement itself which sets out what procedure should be adopted concerning any alleged violation or non-compliance within the provision of the agreement. (Grievance Procedure). It provded for 3 stages:-

Stage (1) Complaints occuring at place of work be discussed with his foreman and other designated persons on the work floor and attempt to reach agreement.

Stage (2) If no agreement reached within 3 days of Stage 1 the full particulars of the dispute within a further 7 days must be notified to the Association

and thereafter discussions held between the Unions and Association.

Stage (3) If no agreement reached the dispute shall be referred to the J.I.C. for the Port of Kingston under the provisions of the constitution of the J.I.C. covering the handling of disputes.

Mr. Edwards submitted that these evidence a clear intention of non-resort to the Court. The solution of such disputes must reside in the J.I.C. or on procedures laid down in the Act and the Code.

I would support the contention of both Mr. Edwards and Mr. Phipps that it cannot be gathered from this agreement that it is enforceable at law. I can find nothing in an overall view of the document of any mutual intention in the parties to be legally bound. I would therefore hold that the Agreement could not be enforced in a Court of law and can be enforced only by industrial sanctions.

Questions 4 &. 5 Having held that the Agreement is not enforceable at law what are the powers of the Tribunal? Should it consider the provisions of the Agreement? No challenge is made here to the Powers of the Minister to refer the matter to the Tribunal nor to the Terms of Reference. Mr. Edwards submitted that the Tribunal's powers were not circumscribed by the Agreement; while they should take it into consideration, they are not obliged to do so. The Tribunal may as national or community interest dictate make an award the effect of which may abrogate, vary or add to an existing agreement. In other words the Tribunal had the power to write a wholly new agreement for the parties. Mr. Phipps concurred in these views and supported the submission that national or community interest may well over-ride, at any time, the agreed terms and conditions expressed in a collective bargaining agreement. That this represented the state of affairs today in industrial relations. Mr. Phipps made the point that to find otherwise would be to give legal sanction to collective bargaining agreements.

What both Mr. Edwards and Mr. Phipps are saying is that the Agreement is not binding even 'in honour'; the facts of today in industrial relations is that there is apparently 'no honour' and that the consequential effect is to disregard obligations stipulated in any agreement if it is found inconvenient or unrewarding. I am of the view, however, that such a contention does not reflect the legal position in relation to the Tribunal and its powers. Let us examine the legislation:

Part 11 is headed 'Labour Relations.'

Section 3 provides for the settlement of a labour relations code which should be guidance in the promotion of good labour relations in accordance with:

> "(a) the principle of collective bargaining freely conducted on behalf of workers and employers and with due regard to the general interest of the public;
>
> (b) the principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration;
>
> (c) the principle of developing and maintaining good personnel management techniques designed to secure effective cooperation between workers and their employers and to protect workers and employers against unfair labour practices".

I have set out section 3 (1) in extenso as I am of the view that it illustrates the whole object of the legislation.

Section 4 sets out the rights of the workers in respect of Trade Union membership and for the first time there was power to compel an employer to recognise a Trade Union as the bargaining agent of the workers of that employer. Refusal by an employer would be visited by criminal sanctions.

Section 5 laid down the procedures to be adopted in determining the bargaining rights of the workers.

Section 6 (1) recognises collective agreements which are defined in section 2 as follows:-

> "collective agreement" means any agreement or arrangement which -

(a) is made (in whatever way and in whatever form) between one or more organizations representing workers and either one or more employers, one or more organizations representing employers or a combination of one or more employers and one or more organizations representing employers;

(b) contains (wholly or in part) the terms and conditions of employment of workers of one or more categories.

Section 6 (2) details the implied procedures.

Part 111 Section 7 establishes the Tribunal.

Section 8 provides that the Tribunal sit in Divisions and provides for its membership depending upon whether or not the Tribunal proposes to deal with an industrial dispute which in the opinion of the chairman, arises from the interpretation, application, administration or alleged violation of a collective agreement (my under lining).

Section 9 deals with industrial disputes in undertakings providing essential service (such as the matter before us). A report of such dispute may be made to the Minister in writing and any such report must state inter alia:

(b) Whether there is in force any collective agreement between the parties to the dispute, and if so, whether such agreement includes express procedure for the settlement of disputes of the kind referred to in the report.

Setion 10 is inapplicable for our purpose.

Section 11 also makes reference to collective agreements.

Bearing in mind the whole object of the legislation, it is clear that the intendment was to lay down a scheme which would ensure a simple, expeditious, and accessible method of the reporting of and settlement of industrial disputes between parties. The

recognition of the law of the possible existence of a collective agreement between parties and the specific procedures laid down in the composition of a Tribunal in this regard; and what the Minister may and may not do if one exists, is clear proof that the Act recognises these agreements and that they are an integral part of the whole scheme and is an endeavour to enhance industrial peace. I am of the view that The Tribunal would be obliged to give effective consideration to any collective agreement in existence between the parties and I so hold. If the Tribunal is obliged to take into consideration the terms of the Agreement between the parties, then implicit in such an obligation, is to do what is fair between the parties to the dispute giving full consideration to their Agreement entered into in good faith. The Tribunal is a creature of Statute. It has no more power than is given by the statute that creates it. To clothe it with the extraordinary powers attributed to it by Mr. Edwards and Mr. Phipps to abrogate, vary and even to write a wholly new collective agreement would require express language. I find no such language in this statute. Mr. Phipps made the point that to hold otherwise would be tantamount to giving legal effect to the agreement. It is a shrewd observation; but the matter is before an administrative tribunal, one cannot sue for damages; consequently, different considerations arise. I am reinforced in thise views by the tenor of section 12 (4) (c) which lays down that any award in respect of any industrial dispute referred to the Tribunal for settlement "shall be final and conclusive and no proceedings shall be brought in any Court to impeach the validity thereof, except on a point of law". It follows therefore that if the Tribunal had the powers assigned it by Mr. Phipps and Mr. Edwards, no employer or worker's Union for that matter, would risk having a dispute before the Tribunal as no one could predict then how the Tribunal may interpret and declare its so-called national interest powers in relation to points already agreed and working satisfactorily between the parties. It seems to me to be given such powers the Tribunal would be the subject of more disputes instead of

assisting in settlement of disputes. The object of the legislation to enhance industrial peace would be defeated.

Let us now examine the grounds on which the applicant is relying in view of what I have stated to be the powers of the Tribunal. The reference of the Minister to the Tribunal related to 3 items.

(a) Laundry Allowance

(b) End of year Bonus

(c) Travelling Allowance

The Tribunal made no awards in respect of items (a) and (b). An award was made in respect of (c) and is the subject matter of these proceedings.

The grounds on which the Association rely were earlier summarised thus:

(a) That under clause 1(a) and 1(b) of the Agreement the Notice to amend was out of time.

(b) Would amount to Tribunal re-opening matters agreed to between the parties.

(c) Clause 1(c) effective dates of amendments breached.

Now Clause 1a stipulates that during the life of the agreement either party has the right and may "give to the other not less than ninety-three (93) nor more than one hundred and twenty-five (125) days notice in writing prior to amending the same".

Mr. George submitted that on 3rd February 1978 (see Exhibit C1 page 27 of Bundle) agreement was reached between the parties and that all items dealing with money were settled between the parties prior to 3rd May 1978 and That this claim first arose by a letter from the Union dated 3rd May 1978. If this letter is taken to be notice to amend the agreement as required under clause 1(a) then it is dated 3rd May 1978. That this Notice did not conform with clause 1(a) as the prior Notice in writing must be given not less than ninety-three(93)days nor more than one hundred and twenty-five days. It would seem as if Mr. George is suggesting that the period not less than ninety-three (93) days nor more than one hundred and twenty-five (125) is directly referable to the date on which substantial agreement was reached on outstanding proposed amendments between the parties i.e./

3rd February 1978 (Exhibit C1) as clause 1(a) speaks of "prior to amend". In its letter dated 27th July 1977 (Exhibit B2) the Unions at items 25 reserves the right to submit additional items of claims up to and during negotiation. The Union's letter dated 28th September 1978, item 30 stipulates that the items claimed (and many were quite new from those proposed in letter dated 27th July 1977) are subject to amendment before or during the course of the negotiation. No objections were apparently taken by the Association to the wholly new items raised in the Unions letters. The applicant's circular dated 3rd February 1978 (Exhibit C1) advised its members of the amendments agreed to on that date i.e. 3rd February 1978 and the circular read at page 2 "Members are further advised that negotiations on other items of claim continue although many items have been settled"; What does this mean? Surely what it says. The amendments concluded between the parties were not exhaustive of all claims outstanding or further arising during the course of the negotiations which, of necessity would be an almost constant exercise. The agreement, in my view, provides for just such a contingency in clause 1(c) which states that "the agreement shall remain in force until all proposed amendments are settled, after which it shall continue in force as so amended provided however that whatever amendments are made to the agreement, they shall be effective as of the date upon which such amendments were agreed". Effect may be given to the requirement of Notice as to time set out in clause 1(a), if written notice is given;but the proposed amendment can only be countenanced within the time limit set by the clause, unless the party who has the right to object to an improper notice waives his right to such objection. In view of the evidence before us, I would hold that the item in the letter (Exhibit D) dated 3rd May 1978 dealing with Travelling Allowance was notice of a new proposal being put forward by the Union to the Association, and time would begin to run from 5th May 1978 the date on which it was apparently received by the Association (see Association stamp on letter).

Mr Phipps however, submitted that the powers of the Tribunal (as adumbrated by Mr. Edwards and embraced by himself) are without limit and may in its consideration of national and community interest abrogate, vary, or, in effect, ignore the agreement between the parties. It need not, therefore, have considered clause 1(a) of the Agreement which laid down the period within which notice must be given by either party to proposed amendments; that the Agreement was not enforceable at law therefore the Tribunal was not bound by its provisions. He further submitted that it was not a new proposal. That although the Agreement was silent on the point there was a 'traditional' principle of keeping fringe benefits 'on line' for all categories of workers at the Port. Mr. Hepburn Mayne deposed to this effect. He stated that the Supervisory category had received Travelling Allowance by agreement from 1st November 1977. He also exhibited a Tribunal award between the Uncontested Group and Western Terminals Ltd. Kingston Warves Ltd., both represented by the Association, in favour of the Uncontested Group for Travelling Allowance in the sum of $10 per week with effect from 1st November 1977. If i · Mr. Mayne's evidence was believed then the agreement would be subject to such 'traditional practice'; effect could be given such a practice only if it became an implied term of the agreement that "on line" fringe benefits would be read as part of the Agreement. He also put forward another argument to the effect that the documentary evidence presented to the Court indicated that in February 1978 there were outstanding items for negotiation between the parties. That in such a situation the question as to what had been previously determined at the negotiating level was entirely a question of fact, and as such not a matter to be brought to the Court for a decision. He placed reliance on section 12(4)(c) of the Act. He further submitted that no point of law arose here, that unless applicant could show what was agreed to and what was outstanding was a point of law, he was out of Court.

I cannot see how Mr. Phipps suggested th t this was not a new matter as the letter of the Union dated 3rd May 1978 stated specifically in paragraph 2:-

> "We would particularly like to settle outstanding matters such as laundry allowance, end of year bonus, and in addition, provision of thirty-five dollars ($35.00) per week travelling allowance for all Port Workers, retroctive to 1st November 1977". (my under-lining)

It was clear that whatever items were outstanding on 3rd May 1978 Travelling allowance was not one of them. The letter said so, or was the outstanding item being added to on the basis of the so called "on line" tradition? It is my view that on the evidence the item was a new item and it had to conform to Clause 1(a) and (b) of the agreement before consideration could be given to the proposed amendment unless the'on line tradition' existed and was applicable by implication. Can it be said that such implication could be made in the agreement? I would say no. The award (Exhibit "A" attached to Affidavit of Mr. A. Cooke) of the Tribunal sets out the background to the dispute and it was clear that there was no automatic application of fringe benefits to one group on the basis of such benefits being granted another group. It had to be obtained by negotiations between the parties. Indeed, the Unions arguments were that it was tantamount to gross discrimination and victimization against the Port Workers group by the Company in not having paid Travelling Allowance to that group, the other groups (Supervisory and Uncontested) having received that particular benefit. Nowhere had it been suggested that the 'on line tradition' was automatically applicable. It is clear it was merely used as a ground for 'bargaining'. Once that situation obtained, it was in substance nothing more than a new claim which in effect was a proposal to amend the existing agreement. Such a term therefore could not have been implied into the agreement then subsisting. The proposal to amend must have conformed to the requirements, as to time, as laid down in Clause 1(a) of the agreement. There was no evidence before us as to when this item came up to be considered by the parties. Mr. Allister Cooke for the applicant deposed that pursuant to section 9(3) (a) of the Act,

The Minister of Labour and Employment having failed to resolve a dispute between the applicant and the Unions referred the matter to the Tribunal. No dates were given. The award of the Tribunal, however, recited that the Reference of the Minister was made by letter dated 16th December 1978 (i.e. some 7 months after 3rd May 1978). It was clear that the claim was in breach of Clause 1(a) and 'out of time'. The Tribunal was therefore in error in disregarding Clause 1a of the agreement and in consequence acted ultra vires its powers. It was further submitted by Mr. George in behalf of the applicant that clause 1(c) of the agreement was breached in that the effective date of amendment was disregarded. That the Tribunal was bound by Clause (1) (c) of the Agreement which stated "provided however that whatever amendments are made to this agreement they shall be effective as of the date upon which such amendments were agreed"; and that the action of the Tribunal was the reopening of matters already agreed to between the parties. He also cited section 12(4) of the Act. I shall return to the Act. In relation to clause 1 (c) the wording seems designed for mutually agreed amendments. Even so it was not in conflict with the powers of the Tribunal under section 12(4) which read:

> "(4) An award in respect of any industrial dispute referred to the Tribunal for settlement:
>
> (a) may be made with retrospective effect from such date; not being earlier than the date on which that dispute first arose, as the Tribunal may determine.
>
> (b) shall specify the date from which it shall have effect;
>
> (c) shall be final and conclusive and no proceedings shall be brought in any Court to impeach the validity thereof, except on a point of law".

Mr. George submitted that since the claim was first made by letter dated 3rd May 1978, no dispute could have first arisen in relation to travelling prior to 3rd May 1978. The fact that the Tribunal's award was effective from the 1st November 1977 made the award ultra vires. It was in breach of section 12(4) (a) of the Act. Mr. Phipps submitted that whether or not a dispute is in existence and

the date from which it arose are questions of fact for the Tribunal. The extent of retroactivity was a question of law and it was so stated in section 12(4) (a) of the Act. When once the Tribunal had made an award retroactive to a particular date it must be taken that the Tribunal found, as a matter of fact, that the dispute arose on that day. That the applicant was saying that the Tribunal could not so find as the claim was dated 3rd May 1978 in the letter from the Union. He submitted however, that you can have a situation where a party may have an interest in a dispute before becoming a party to that dispute and stated that it is a difficult matter at times to ascertain, in point of time, when the dispute first arose; that it is essentially a question of fact for the Tribunal who would have heard the evidence and submission before coming to their findings. It was not for the Court. He cited Conway vs Wade 1908-10A.E.R. p.344 to illustrate the point. This was a case in which the respondent, an officer of a trade union, but acting without the authority of the executive induced the the appellant's employers to dismiss him by threatening that if they did not do so, the members of the union employed by the firm would strike in order to compel the appellant, who was a member of the Union, to pay a fine imposed on him some years before. In considering the ambit of section 3 of the Trade Disputes Act 1906 Lord Loveburn L.C. at page 347G said: "I agree with the Master of the Rolls that the section cannot fairly be confined to an act done by a party to the dispute. I do not believe that that was intended. A dispute may have arisen for example in a SINGLE colliery, of which the subject is so important to the whole industry that either employers or workmen may think a general lock-out or a general strike necessary to gain their point. Few are parties to, but all are interested in the dispute." Mr. Phipps seem to be suggesting that this principle is applicable here where one segment of a whole industry is claiming a benefit; for example, the Supervisors claiming and negotiating travelling, then the Port Workers, although they have not yet put in a claim would have great interest in the negotiation and the result of same, particularly if a 'traditional on line' practice prevailed in the industry. Several authorities were cited which illustrated the difficulties experienced

in ascertaining precisely when a dispute first arose. They were unhelpful as from the Terms of Reference to the Tribunal it was a matter for them and bearing in mind clause 1(c) of the Agreement and whether a 'traditional on line' practice prevailed in the industry and, if it did, what implication it will have in relation to the Agreement. All these matters were before the Tribunal. The breadth of the Tribunal's endeavours rest with the wording of the Terms of Reference which are widely and loosely drafted, no doubt, with deliberation by the Minister to ensure the fullest enquiry into the dispute by the Tribunal. No objection was taken to the Terms of Reference and the award of the Tribunal must be examined in that context to see if any point of law arose on the face of the record. It had been clearly established that the so called "on line tradition" that was said to have prevailed was not such as to become a part of the agreement between the parties by implication; but was merely grounds upon which a negotiating position could have been taken by either party. The Tribunal was obliged to take into consideration the provisions of the Agreement between the parties and give effect to the provisions relating to retroactivity. Clause 1(c) provided that:

> "Whatever amendments are made to this agreement they shall be effective as of the date upon which such amendments were agreed".

This is the Agreement of the parties. They are bound by it. The Tribunal is bound by it. It speaks not of when the dispute first arose. It speaks of the date when the amendment is agreed between the parties regardless of when the dispute, if any, first arose. I agree with Mr. George that the earliest a dispute could have arisen is on 3rd May 1978. It should, however, be pointed out that submission of the claim is not the 'dispute'; it is when it is refused that a dispute may first arise. No such evidence was put before us; however, the Tribunal in making an award must give cognisance to section 12(4) which reads:

> "An award in respect of any industrial dispute referred to the Tribunal for settlement -
>
> (a) may be made with retrospective effect from such date, not being earlier than the date on which that dispute first arose, as the Tribunal may determine;
>
> (b) shall specify the date from which it shall have effect.

The Tribunal made the award retrospective to 1st November 1977. It is clear the earliest time the dispute could have arisen was after 3rd May 1978, or putting the widest possible interpretation on it, the 3rd May 1978 when the claim was first submitted by the Unions. The award on that basis was therefore, in breach of section 12(4)(a).

There is also this consideration; when The Tribunal is seised of any matter referred to it under the Act and in conformity with section 12 of the Act was handing down its award it was, in effect, imposing an 'amendment' of the agreement between the parties by force of law. The Tribunal must take cognisance of and give effect to the Agreement in order to properly exercise its powers under section 12(4)(a) and (b) of the Act. Clause 1(c) of the agreement explicity provided that the amendment shall be effective from the date it was 'agreed'. I would hold that when the award was made by the Tribunal, the effective date of the amendment would be the date of the award in order to conform to Clause 1(c).

The award was therefore in breach of clause 1(c) of the Agreement and of Section 12(4)(a) of the Act and cannot stand, it being ultra vires.

For the above reasons I hold, that the application should be granted with costs.

CHAMBERS, J:

1. The name and description of the applicant is the Shipping Association of Jamaica of No. 5 King Street in the Parish of Kingston, a trade union duly registered under the Trade Union Act of Jamaica.

2. The relief sought is an Order of Certiorari to remove into this Honourable Court and quash the award or decision made by the Industrial Disputes Tribunal on the 16th day of February, 1979, in respect of a Travelling Allowance of Ten Dollars ($10.00) weekly across-the-board, retroactive from the 1st November, 1977 to the 31st October, 1978 and Twelve Dollars ($12.00) weekly across-the-board, as from the 1st November, 1978, with the proviso that all existing arrangements in relation to transportation be unaffected by this award and that all necessary and consequential directions be given.

3. The grounds upon which the said relief is sought are as follows:

(i) The said award or decision was wrong in law.

(ii) The said award or decision contained several errors on the face of the record and in particular:

(a) In their majority award, the Tribunal attempted to re-open or to vary the terms of a basic agreement which had been concluded by the parties and which had been acted upon by the parties. In so doing the Tribunal disregarded and discarded the sanctity of the contract.

(b) The Tribunal attempted to make the award have retroactive effect in contradiction of Clause 1 (c) of the Agreement which forbade retroactivity under the Agreement.

(c) The Tribunal exceeded its powers and acted ultra vires in that it granted a travelling allowance retroactive to the 1st day of November, 1977, which is a

date prior to the Union's claim for the said travelling allowance. In so doing the Tribunal made their award retroactive to a date prior to the commencement of any dispute which could have arisen or did arise between the parties concerning the issue of a travelling allowance in contravention of Section 12 (4) (a) of the Labour Relations and Industrial Disputes Act, 1975.

(d) The Tribunal granted a travelling allowance to the Port Workers in circumstances in which they were already receiving transportation from the applicant and further awarded that the arrangement in relation to transport be unaffected by their award. In so doing the Tribunal was awarding an amount for travelling twice in the same award whereas the claim from the Unions was for a single travelling allowance.

(e) The claim by the Unions for a travelling allowance was out of time within the terms of the Collective Bargaining Agreement between the applicant and the Unions and should not have been entertained by the Tribunal.

Mr. Emile George, Q.C., in his submissions on behalf of the applicant, The Shipping Association of Jamaica, referred to the fulfilling of the formalities necessary before this motion could be heard including the fact that in accordance with the Civil Procedure Code, leave to file the motion was granted on the 2nd day of March 1979.

Mr. George referred the court to the various affidavits in support and the exhibits attached thereto, especially the Joint Labour Agreement at Annex A of the exhibits, which was duly signed by all the necessary parties. Various authorities were cited to the court by the the applicant, by the Lawyers for the Unions and by the Lawyers appearing on behalf of the Industiral Tribunal and the Attorney General.

In the hope of shortening this judgment I shall first begin by

dealing with the case of the Ford Motor Company Limited v. A.E.F. (1969) 2 All E.R. p. 481 with special reference to p. 482 as cited by Mr. Emile George for the Shipping Association of Jamaica. A case of an Injunction.

In that case it was held that the ex parte injunction granted to the Ford Motor Company Limited against the striking unions to restrain them from striking or continuing the strike or encouraging its spread in breach of an agreement signed by all the parties should be discharged.

The ex parte injunction was discharged in that case because the court held that the agreement, although it dealt prima facie with commercial relations, was not enforceable because other considerations outweighed such a course - such considerations as the wording of the agreement, the nature of the agreement, and certainly since 1954 by the climate of industrial opinion adverse to legal enforceability.

In short it was decided in the Ford Motor Company Limited's case cited, that collective agreements between employees and trade unions or between trade unions and trade unions are not contracts the terms of which are enforceable in the courts, and that such agreements even if they can be described as contracts remain in the realm of undertakings binding in honour only, unless of course a specific clause is included in such agreement making those agreements enforceable in the courts.

Mr. Emile George also informed the court that the Full Court in Jamaica in the motion of the Half Moon Hotel v. The National Workers Union has held that Collective Labour Agreements are not binding in law.

The injunction sought by the Ford Motor Company Limited was therefore rejected, so it seems to me that the court was there holding that the injunction, if granted, would amount to the indirect enforcement in the courts of the terms of or at least a term or terms of the Collective Agreement, and which they were not entitled to do as the Agreement was not legally enforceable.

Geoffrey Lane J. in delivering the judgment of the court stated at page 487, letter "I":

> "This court is not concerned with the justice of the employers' proposals nor the employees' reactions to those proposals .... It is merely concerned with the strict legal problem involved regardless of their impact and regardless of their consequences."

I for my part do say that that is my outlook in the instant motion with which this court is dealing with.

In the instant motion brought by the Shipping Association of Jamaica for an Order of Certiorari, for this court to quash the award decision of the Industrial Disputes Tribunal which was made on February 16, 1979, in respect of a travelling allowance of Ten Dollars ($10.00) weekly across-the-board, retroactive as from November 1, 1977 to October 31, 1978 and Twelve Dollars ($12.00) weekly across-the-board as from November 1, 1978, with the proviso that all existing arrangements in relation to transport be unaffected by this award can be distinguished from the situation in the Ford Motor Company's application.

The grounds of the relief sought in the instant motion has been stated earlier in this judgment and I shall at this stage distinguish the Ford Motor Company Limited v. A.E.F's case cited, from the instant motion.

The Ford Motor Company brought proceedings by way of injunction against the other parties to their Collective Labour Agreement to seek to enforce by injunction against the unions the agreement or a term or terms thereof, while in the instant motion, the Shipping Association of Jamaica is seeking by Certiorari, not to enforce an agreement between itself and the unions and which agreement like all such Collective Labour Agreements, with the exception I have already mentioned, are binding on morals and honour only, but it seeks, and so I hold, to rectify what a legally constituted body, namely, the Industrial Disputes Tribunal has improperly done, by their acting ultra vires Section 12 (4) (a) of the Labour Relations and Industrial Disputes Act, in other words this court is being asked to rectify or quash what that statutory body has improperly done by their acting contrary to the laws passed by Parliament, and incidentally, this court is being asked to prevent the continuation of a continuing breach of the law as a result of the Tribunal

by their action breaking a solemn agreement which is at least morally binding on the parties to the agreement and in breach of natural justice.

Some might even call the breaking by the tribunal of such an agreement by their ultra vires action and their action in breach of natural justice to one of the parties not only an illegal but immoral act.

The Agreement exhibited at Annex 'A' was signed by and on behalf of the Bustamante Industrial Trade Union by the Rt. Honourable Hugh Shearer. On behalf of the United Port Workers and Seamen's Union by Mr. Thossy Kelly. On behalf of the Trade Unions Congress by Mr. Hopeton Caven. On behalf of the Shipping Association of Jamaica by Mr. L. P. Scott.

These signatures were to be a pledge on behalf of the unions and the Shipping Association of Jamaica and which pledge is contained on page 4 of the said Agreement. The pledge was that the parties or the signatories on behalf of the various parties would comply with the provisions of the Agreement, and would co-operate in good faith for the continuation of such relations within the framework of the Agreement.

Surely such solemn agreements, even though held by decided cases not to be enforceable in the courts in the absence of a clause making them enforceable in the courts, would be morally binding, and a court ought to be able by Certiorari to quash any award made by any one or by any body of persons or by a tribunal and which award results in the breaking of such agreements especially when the award which results in the breaking of the agreement amounts to a breach of the very law under which a tribunal is appointed, whether or not such breach is on the face of the record or not.

In any event Section 12 (4) (c) of the Labour Relations and Industrial Disputes Act allows proceedings to be brought in any court to impeach the award of the Tribunal on a point of law.

Clause I (c) on page 5 of the Agreement shows that the said Agreement can only be altered by negotiation after due notice and that any amendments are effective only from the date when the amendments were agreed, hence no retroactivity can be effective beyond that date, and in any event Section 12 (4) (a) of the Labour Relations and Industrial

Disputes Act does not permit a tribunal to make an award retroactive to any date earlier than the date, should the parties fail to agree, that is, the date when the parties join issue by failing to agree - the date when the dispute first arose.

The Industrial Disputes Tribunal having made an award to the Port Workers retroactive to the extent that was made, a point of law has arisen for the determination of the court as to whether the tribunal can legally interfere with a moral and solemn agreement which provides against retroactivity or whether the tribunal can, as a matter of law, make an award retroactive to a date which as a matter of fact and on the face of the records could not be earlier than the date 3rd May, 1978 when the claim of the unions were first made on behalf of the Port Workers for a travelling allowance.

Mr. Frank Phipps, Q.C., on behalf of the Bustamante Industrial Trade Union submitted that the date when the dispute arose is a question of fact and which date could very well be from the date an interest in a dispute whether between another category of employees or not and the employer arose which can be much earlier than a claim was made on behalf of the Port Workers by the union.

I hold that a dispute as to the travelling allowance could not arise prior to the 3rd May, 1978, when the Bustamante Industrial Trade Union first wrote to the Shipping Association of Jamaica about travelling allowance for Port Workers, not withstanding that the letter referred to, amongst other matters, travelling allowance, as outstanding claims. In any event a dispute could not be said to arise prior to the parties failing to agree on a matter that has been raised by either side, and an interest in a dispute of an earlier date cannot arise in relation to a matter that was not a dispute or disputed at an earlier date and affecting a category of workers which do not include Port Workers.

To hold that the "In line traditional principle" among various categories of workers in regard to keeping wages, fringe benefits and conditions of work in line would entitle Port Workers to be paid a travelling allowance in addition to transportation, so as to keep them

in line with other categories of workers who drew travelling allowance but are not provided with transportation would be a breach of the so-called "Traditional in line principle". Thus no reasonable inference could be drawn that the Port Workers would have an interest in any such payment, which payment could not properly be called a dispute without proof of there being a joinder of issues on that matter.

Because certain category of workers, other than Port Workers receive a travelling allowance may be interesting news but it cannot be said to create an interest in a dispute.

In addition, the Port Workers were already "out of line" to their benefit by enjoying the following benefits which no other category of workers enjoyed, job security and guaranteed pay and in addition, unlike other workers, they could not be declared redundant during the life of the agreement and was entitled to full pay so long as they reported for work twice daily whether or not they actually worked or not.

Surely any interest in an earlier dispute, if an earlier dispute did exist, could only be an interest in an event which directly concerned the parties now allegedly interested, if the earlier event affected them physically/ or financially or they were parties to the earlier negotiations or event. I shall deal with decided cases on this point later.

It would seem to me that such interest as referred to by Mr. Frank Phipps could only be in the Port Workers' imagination, and the question whether the provision of transportation would still entitle the Port Workers or persons who enjoyed that benefit to be paid a travelling allowance is a question of law for the interpretation of the court pursuant to Section 12 (4) (c) of the Labour Relations and Industrial Disputes Act.

The following case cited namely, Evans v. The National Union of Printing and Book Binding (1938) 4 All E.R. p. 51 need not have been cited in this Motion as it took the matter no further and seemed irrelevant.

The following cases were taken into account in this judgment: Conway v. Wade (1908-1910) All E.R. Reprints p. 344; White v. Riley (1920)

All E.R. Reprints p. 371; Texaco, Trinidad v. Oilfield Workers Trade Union (1977) Vol. 20 W.I.R. p. 457 letters "E" and "F" and p. 458, "E" and "F"; Beetham v. The Trinidad Cement Company Limited (1960) 2 W.L.R. I shall comment on the latter two cases later.

Before commenting on those relevant cases I should point out that Section 12, Subsection (4) (c) states,

> "An award in respect of an industrial dispute shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."

I have already pointed out that a point or points of law has or have arisen in this motion for certiorari.

In R. v. Minister of Health (1936) 2 K.B., p. 29, it is shown that orders of certiorari are discretionary and may be granted even though some other remedy is available, and in R. v. Thames Magistrates Court, ex parte Greenbaum (1957) 55 L.G.R. 129 C. A. Canebook 279 it was held that a person whose legal rights have been infringed or who is otherwise substantially interested may be granted an order of certiorari ex debito justiciae.

Atkin L.J. in R. v. Electricity Commissioners (1924) 1 K.B. 171 at page 205 stated, and quote:

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, then prohibition and certiorari will lie."

It is also well known or should be well known that certiorari will lie for errors on the face of the record.

It is also similarly known that even where the legislature provides that any act should not be cognizable by the courts or enquired into by the courts, the courts are entitled to see whether such acts or functions have been carried out in accordance with, and not in breach of the law. I would like to have cited authority on this principle but as I am in the country on circuit duties and without a proper legal library I have for the moment to rely on legal principles in this regard. However on my return to Kingston I may cite the authority if I should think it necessary as a postscript to this judgment.

However, even in Chapter I of the Jamaica (Constitution) Order in Council 1962, Section I, Subsection 9, is stated the following:

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

I have cited this section of the Constitution to show that apart from principle even the Constitution provides for the courts to enquire whether a person or body has performed their functions in accordance with law. I shall now deal with some of the cases that I have just mentioned.

In the case of Texaco, Trinidad v. Oilfield Workers Trade Union (1972) 20 W.I.R. p. 455, cited by Mr. A. D. Edwards who appeared amicus curiae for the Industiral Dispute Tribunal, and cited by him to show that the award referred to in the instant motion could be made with retrospective effective to the extent that it was done inspite of the restriction in the Labour Relations and Dispute Act. Mr. Frank Phipps, Q.C. also relied on this cited case, to show that the award could be made retrospectively to the date to which it was retrospectively made, a date as he submitted that the dispute could have been in being namely the 1st November, 1977 and prior to the 3rd of May, 1978 when the Union first made its out of time claim on the Shipping Association of Jamaica, as says Mr. Phipps, the Port Workers would have had an interest in a dispute or an event, when the agreement was made between the Shipping Association and the Unions for travelling allowances to be paid to the uncontested workers, and which award excluded or omitted the Port Workers.

As I interpret the ratio in the cited case as far as it affects retroactivity one has to look on the facts of that cited case to see what is "the event" out of which that dispute arose so as to comply with the terms of the particular Trinidad Act which, incidentally, is worded differently from our local Industrial Disputes Act.

In the cited case of Texaco, Trinidad v. Oilfield Workers Trade Union, one Mr. Blaise Figuero was dismissed by the employer-plaintiff on the

22nd November, 1966, because he was found in unauthorised possession of his employer's property on the very day of and prior to his dismissal.

Figuero was tried on the 21st February, 1967 for larceny of the said property that he was found in unauthorised possession of on the 22nd November, 1966. On the day of his trial, February 21, 1967, he was acquitted.

Six days later, that is on February 27, 1967, the Oilfield Worker's Trade Union, hereafter referred to as "the Union" raised the question of Mr. Figuero's dismissal and re-instatement under the Grievance Procedure of the Industiral Agreement between the parties.

The company or employer refused to consider the grievance on the ground that it was time barred under the procedural agreement between them and the Union. That referred to agreement was "the Grievance Procedure of the Industrial Agreement between them". Nonetheless the Union and the company did meet twice to discuss the matter, and on July 19, 1967, the Company finally refused to consider re-instating Figuero.

The Union therefore, on August 9, 1967, five months and eight days after the 27th February, 1967, when the Union first raised the question of Figuero's dismissal under the Grievance Procedure of the industrial agreement between the employer-company and themselves, and eight months and eight days after Figuero was fired, reported the existence of a trade dispute between them and the employer-plaintiff to the Minister pursuant to Section 16 (1) of the Industrial Stabilisation Act, No. 8 of 1965, as amended by Acts 6 of 1967 and Act II of 1967 of the Acts of Trinidad (together referred to as "the Act").

On September 25, 1967 the Minister referred the trade dispute to the Indistrial Court (referred to as "the court") pursuant to S. 16A (5) of the Act.

Section 16 (2) of the Act reads as follows:

"A trade dispute may not be reported to the Minister if more than six months have elapsed since the issue giving rise to the dispute first arose."

The "issue" in that case, for the purpose of the six months period

turned on the question of, when did the issue or event out of which the dispute first arose - in other words, how far back or retroactively did this dispute "first arose"?

The company argued before the Industrial Court of Trinidad that the issue giving rise to the dispute first arose when Figuero was dismissed by the company on November 22, 1966, and the gist of the Union's reply, was that the grievance arose, not when the workman Figuero was dismissed by the company, but when the charge against the workman was dismissed after his trial, as it then became evident that the company had made a mistake in dismissing him.

The Trinidad Indistrial Court rejected the company's claim and accepted the Union's claim that the issue or event giving rise to the dispute arose when Figuero was acquitted on February 21, 1967, which would be a period of less than six months up to August 9, 1967 when the matter was reported to the Minister.

The Court of Appeal in Trinidad, (Coram: Phillips C.J. (Ag.), Fraser and Georges J.J.A.) unanimously rejected the Industrial Court's ruling and held, whilst also referring at page 457 letter "g" of the judgment, to the case between Port of Spain City Council and Amalgamated Workers' Union, Trade Dispute No. 68 of 1968 decided on April 3, 1969, where in the latter case the Industrial Court also ruled that an issue giving rise to a trade dispute, was not at the time the worker was dismiseed in that case, but when the negotiations between the union and the employer under the grievance procedure reached deadlock.

The Court of Appeal in Trinidad (Georges J. delivering the judgment of the court in which the two other judges concurred) in commenting on the decision of the Industrial Court in the case of the Port of Spain City Council v. Amalgamated Workers' Union said:

> "In reaching its decision the (Industrial) Court examined the Act and concluded correctly in my view, that it had established a system of settlement of trade disputes through trade unions." (The word "Industrial" in brackets before the word court is mine)

Georges J., before further commenting on the decision in the Port of Spain City Council and Amalgamated Union's case, quoted the following passage from the ruling of the Industrial Court in that case and quote:

> "In the procedure provided thereunder, the word "issue" in Section 16 (2) must therefore, in our opinion, in regard a dispute with an employer refer to an issue between the employer on the one hand and a trade union of workers on the other.
>
> It is true as contended for the council that any such issue is itself a trade dispute, but it need not be identical with the trade dispute eventually reported to the Minister. In the course of negotiations between the employer and the trade union which the Act envisages, the issues may have become altered, enlarged, or diminished, but there must in every case be the original issue between them out of which the eventual report to the Minister is made, whether or not the issue remains identical with the trade dispute actually reported.
>
> This in our view is the "issue" about which Section 16 (2) speaks, and the interval referred to is the lapse of time between the joinder of issue and the eventual report of the dispute to the Minister."

One should note that there are two matters dealt with in that quotation, the second of the two matters is the "trade dispute" or "joinder of issue", and the first matter is the actual issue of which the "joinder of issue" or "trade dispute" arose, and the actual statute which was being interpreted is saying, that the second matter, namely the "trade dispute" or "joinder of issue" cannot be reported to the Minister if more than six months (6) has elapsed from when the first matter, namely the "issue" that first arose.

Thus from the wording of the particular Trinidad Statute as it applies to the two Trinidad cases cited or referred to earlier, the retroactive dates were the dates of the "issue" arising, namely the dismissal by the company in the first case and by the council in the second case of the two respective workers.

The Jamaica Act states in Section 12 (4) (a) - The Labour Relations and Disputes Act, that the Tribunal cannot make an award retroactive beyond the date the dispute first arose, not as in the Trinidad Act, in relation to lapse of time, which specifically refers to the "issue" out of which the trade dispute arose. Two matters, as I have explained earlier.

Georges J. A. also at letters "g" and "h" on page 458 of the judgment in the Texaco Trinidad v. Oilfield Workers Trade Union case referred to the case of Beetham v. Trinidad Cement Limited (1960)

1 All E.R. p. 274 P.C. and quoted with approval the following from the judgment in that case.

> "A trade dispute exists whenever a difference exists, and a difference can exist long before the parties become locked in combat. It is not necessary that they should have come to blows. It is sufficient that they should be sparring for an opening."

Georges J. A. went on to say:

> "In the light of this definition, it is clear that when there is a "joinder of issue", to use the Court's phrase in the Port of Spain Council case, a trade dispute has already been in existence.
>
> The sparring is over. In interpreting Section 16 (2) of the Act, one must seek the "issue" giving rise to the "dispute", and note when it first arose."

So in the Trinidad cases, one has the source of the difference, namely the dismissals of the respective workmen, and thereafter the dispute. The dispute is as a result of the issue.

So the dismissal which is the "issue" antedates the dispute or trade dispute.

No question that the date of "issue" out of which the dispute arose can be considered under the Jamaica Statute, as our Act refers to the date "the dispute" first arose, not the "issue" out of which it arose or any interest in that issue because as in the case in this motion there is an agreement between a category of workers not being the Port Workers and that agreement cannot be considered an issue as in the Trinidad cases where persons were fired and it was the very firing and non-reinstatement of those persons that the dispute with the employers later arose. The firing was the issue out of which the later re-instatement dispute arose and those fired workers in relation to the dispute could or would have an interest in their earlier dismissal. Consequently Mr. Phipps' submission that when the uncontested workers were awarded a travelling allowance, the Port Workers may well be interested in that matter when they heard of it and so the dispute could be referred back to that date, and at that, if that matter which was agreed to could be considered a dispute is not tenable. I hold that when the Bustamante Trade Union wrote to the Shipping Association

Further that the Award, having regard to the Agreement, contained errors on the face of it and the Tribunal in the face of the Agreement knowingly made a retroactive award for travelling in breach of that solemn agreement and in breach of the Labour Relations and Industrial Disputes Act, the very Act from which they derived their jurisdiction.

I would therefore order that the Award of the Industrial Disputes Tribunal made on the 13th March 1979 be quashed.

Carey, J. :

Counsel moves for an order of Certiorari to remove into this Court for the purpose of its being quashed an award of the Industrial Disputes Tribunal made on 16th Febraury, 1979. The matter came to the Tribunal by way or a ministerial reference pursuant to sec. 9(3)(a) of the Labour Relations and Industrial Disputes Act. Succinctly stated, the scope of the function of the Tribunal was to settle a dispute between portworkers employed by the applicants and represented by various Trade Unions, on the one hand, and the applicants on the other, regarding three claims, viz, laundry allowance, end-of-year bonus and travelling, this last having been submitted by the Unions on 3rd May, 1978. The Tribunal disallowed the first two claims, but made an award in respect of the third which included a determination as regards retroactivity, and the Tribunal added a rider that existing transportation arrangements were to remain in force.

The complaint of the applicants was, that the Tribunal had by the terms of its award, attempted to re-open or vary the collective agreement between the parties, and in so doing, paid scant attention to the sanctity of that contract. In making the award retroactive, the Tribunal had acted contrary to the terms of that agreement which precluded retroactivity, and as well, had breached sec. 12(4)(a) of the Act, in that, it had made an award to take effect prior to the commencement of any dispute between the parties regarding travelling allowance. Further by their award, in allowing existing arrangements to continue in force, the Tribunal was making an award for travelling allowance twice over in a situation where the Unions were claiming a single allowance. Finally, the claim for travelling was out of time, and thus in breach of the collective bargaining agreement.

The agreement which was made between the applicants and the Unions representing the portworkers, provided in clause 1(a), that in case of termination or amendment of the agreement not less

than 93 nor more than 125 days' notice in writing must be given. The first intimation the applicants had of the claim for travelling, was a letter dated 3rd May, 1978, inviting settlement of the outstanding claims for laundry allowance and end of year bonus and including a claim for travelling allowance. Mr. Phipps did not deny that the claim was out of time but contented himself by asserting that the principle of unenforceability of collective bargaining agreements was applicable to this case. Clause 1(b) was concerned with retroactivity.

The substantive question which, in my opinion, is raised starkly in these proceedings, is: what, if any, is the legal effect of a collective agreement? So far as this matter is concerned, was the Tribunal wrong in law, when it ignored the terms of the agreement, specifically as regards the time limit for claims and the retrospectivity of the award?

At common law, a collective agreement is regarded neither as a commercial nor a domestic agreement. In the former, there is a presumption that the parties intend to create legal relationship and therefore to be bound by the terms of the agreement: in the case of a domestic agreement, for example, family arrangements, there is no such presumption. This is made clear in the judgment of Geoffrey Lane, J. (as he then was) in Ford Motor Company v. Amalgamated Union of Engineering and Foundry Workers & Ors. /1969/ 2 Q.B. 303, where at page 321 he says:

> " Either they (that is, contracts generally) are commerical contracts between parties at arm's length, which are obviously intended to be enforceable at law unless the parties by express provision declare that they are binding in honour only or otherwise they are social or domestic arrangements which are equally obviously not designed to be legally binding .... "

A collective agreement falls into neither category. Such agreement will have to be considered on its own facts. Where the terms are precisely stated and are certain, there is no reason in law why the intention to be bound by the terms, cannot be imputed to the parties. However that may be, in the

case to which I have just referred, the learned judge had this to say at page 330 about the particular agreement he was called upon to construe:

> " The fact that the agreements prima facie deal with commercial relationships is outweighed by the other considerations, by the wording of the agreements, by the nature of the agreements, and by the climate of opinion voiced and evidenced by the extra-judicial authorities. Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability, are, in my judgment, not contracts in the legal sense and are not enforceable at law. Without clear and express provisions making them amenable to legal action they remain in the realm of undertakings binding in honour. "

This led Campbell, J. in Ex parte Half Moon Hotel: R. v. Industrial Disputes Tribunal (an unreported judgment of this court) to express the view that:

> " The better legal view of such agreements is that they are not enforceable because in the contemplation of the parties, having regard to the climate of opinion in which the said agreements are made, they were never intended to be enforced by order of Court but only by industrial section - See Ford Motor Co. v. Amalgamated Union of Engineering and Workers /1969/2 Q.B. 303. Thus even where the purported rights are grounded in agreements they still do not savour of rights known to the law and a dispute in relation thereto is not amenable for adjudication by a court. "

The judgment of Parnell, J. was to the like effect. Morgan, J. expressed no concluded view of her own, but agreed with the reasoning and conclusions of the other members of the court. Parnell, J. did add that:

> " It (a collective agreement) is and always has been construed to give rise to mutual obligations only. "

The position at common law must now be regarded as settled. Strictly speaking, a collective agreement may be enforced if the intention can be discovered from the terms if precisely stated and from the surrounding circumstances. Certainly, in this country, the surrounding circumstances are against such an inference being drawn. In ex parte Half Moon Hotel: R. v. Industrial Disputes (supra), the most recent example of resort to court proceedings, by a party to a collective agreement, the court were at one, in saying that such an agreement, as a matter of legal principle, was not justiciable.

The statutory position is, I think, much clearer. The Labour Relations and Industrial Disputes Act recognises a collective agreement, It is defined in the Act (sec. 3). There is provision that where a grievance procedure is not contained in such an agreement, the procedure prescribed by the Act, is deemed to be incorporated in the agreement (sec. 6). The Act raises an agreement of this nature to a place of pre-eminence where the settlement of disputes are concerned. The composition of the Tribunal is specially provided for.

Section:

> " 8(1) The Tribunal shall sit in such manner of divisions as may from time to time be necessary.
>
> (2) A division of the Tribunal shall-
>
> (a) where the Tribunal proposes to deal with an industrial dispute which, in the opinion of the chairman, arises from the interpretation, application, administration or alleged violation of a collective agreement, consist of -
>
> (i) one member of the Tribunal, who shall be either the chairman or one of the deputy chairmen selected by the chairman; or
>
> (ii) three of the members of the Tribunal selected in the manner specified in paragraph (c), if all the parties inform the chairman in writing that they wish the matter to be dealt with by a division consisting of three members; "

Moreover, there is a Labour Relations Code which includes provisions dealing with such an agreement. An entire section, Part IV is devoted to it. Paragraph 16(1) of the Code enacts:

> " Collective Bargaining is the process whereby workers or their representatives and management negotiate with a view to reaching agreement on the terms and conditions of employment of the workers concerned. It should be conducted in an atmosphere of reasonableness and good faith, and management and unions should take all steps to ensure that their representatives conduct themselves during negotiations in a manner which will avoid undue acrimony and facilitate the peaceful and orderly conduct of the negotiations. There should be a determination to abide by the terms agreed and due regard should always be paid to the interest of the community. "

The main purpose of collective agreements is stated in the Code to be - "to arrive at terms and conditions acceptable to both employers and workers" (Paragraph 18). Further, collective agreements should be in writing and lodged with the Minister (paragraph 18(iv)). All these provisions amply demonstrate two matters of, I think, fundamental importance in Labour Relations. Firstly, that collective agreements once entered into are expected to bind the parties, at least to the extent of giving rise to mutual obligations. It must now be accepted from judicial pronouncements in this country and the experience over the years in this field, that the agreement may not be enforced in a court of law. Secondly, that the true aim and object of collective agreements is to ensure that good labour relations are promoted, developed and pursued to the end that industrial peace may be maintained.

If I am right in this view I hold, with respect to a collective agreement, then, on a reference to a Tribunal by the Minister, for the settlement of disputes between employers and employees bound by such an agreement, the Tribunal is obliged to have regard to that collective agreement, for that represents the climate in which the parties expect to operate in relation to each other; it governs their conduct. Where the agreement contains terms which are certain and precise, then the Tribunal, if it is to give effect to the object of the statute and the code, and indeed to reflect its own raison d'etre, cannot ignore those terms: it is constrained to comply with them.

In the present collective agreement, there existed precise and certain terms with regard to retroactivity and a limitation period as regards notice of claims. The Tribunal could not ignore those terms and endeavour to re-write the agreement for the parties. In the same way that a court is not permitted to re-write a contract for parties, by parity of reasoning, the Tribunal will not be permitted to act in this way. By their award,

this is what the Tribunal did. Their true role should not be peace at any price, but peace that is just and honourable having regard to the interests of both parties and as well the public interest.

I should like at this stage to deal with the argument by Mr. Phipps that there was evidence of a tradition of automatic parity existing in the Port of Kingston between the different categories of workers. The Tribunal, it was contended, had determined this as a matter of fact, and therefore the award based on that finding could not be impugned. The evidence put forward before this court in support of this tradition which, of course, formed no part of the collective agreement, consisted of the minutes of a meeting held at the Board Room of the Shipping Association on 16th March, 1978, between Unions, Wharf owners and Shipping Association members called to deal with the "Uncontested Group", a category of workers in the Port of Kingston. In these minutes appeared an Item 8 - "All portworker fringe benefits to be made applicable to this group". Two matters fell to be determined under this item, viz, Housing and Scholarships. As to the first, it was stated that housing for portworkers were then under discussion and it was said that if any of the uncontested group satisfied the requirements, the Association would try to include them. If there was in fact an automatic principle of parity, it is a little difficult to see how the discussion or the final response could have taken the form and shape it did. With regard to scholarships, it was noted that there were a number of scholarships for portworkers' children, not being utilized by them, and it was mooted that these be made available to children of workers in the uncontested group. Again, if there was a tradition of automatic parity, there was no need for any request for the facility to be extended. In my view, there was no evidence in these minutes to support the contention of automatic parity. An award made by another Tribunal in which it purported to grant a travelling allowance to the uncontested group similar to that

granted to supervisors by negotiations, was exhibited as further evidence in this regard. Again, I would have thought that if there was any principle of automatic parity, there would hardly have been any need for reference by the Minister. In its brief to the Tribunal, the argument advanced by the Unions did not rest on any automatic parity but on the fact that the award of "travel allowance to supervisory category by agreement and to the uncontested group by a division of the Tribunal has created an anomalous, inequitable and an untenable situation on the Bustamante Port in respect of the portworker category". Indeed, this is the argument which was set out in the award itself as the contention advanced on behalf of the Unions. The argument as to automatic parity, I would hold, had no factual basis to support it. The argument before the Tribunal was concerned with the merits of the claim, with which this court is not concerned.

The Tribunal's decision by virtue of sec. 12(4)(c) may only be impeached on a point of law. If it is found that there is an error of law, the Tribunal would have acted without jurisdiction and certiorari would lie. In this case, I have therefore come to the firm conclusion that the Tribunal, by virtue of its award, ignored the very basis of the arrangements between the parties, namely, their collective agreement and in particular Clause 1(a) and (b). Had the Tribunal considered these clauses, as I hold, it was bound to do, it could neither have entertained the claim nor made the award retroactive to the extent it did. The Tribunal had also acted without jurisdiction when by its award it directed that existing arrangements for travelling were to continue. By this direction, it was re-writing the agreement for the parties. Neither side, it should be remembered, had made any such claim.

It was also argued by the applicants that at all events, the Tribunal acted in breach of sec. 12(4)(a) in that it made the award retroactive to a date prior to the date any dispute arose. Section 12(4)(a) states as follows:

> " (4) An award in respect of any industrial dispute referred to the Tribunal for settlement-
>
> (a) may be made with retrospective effect from such date, not being earlier than the date in which that dispute first arose, as the Tribunal may determine; "

The meaning of that section, I would have thought, is crystal clear. The Tribunal may determine a date not being earlier than the date a dispute first arose as the date from which the award should take effect. The words "may determine" govern "such date". Mr. Phipps' argument, attractive and interesting, though it was, has really no merit. He sought to say that "dispute" meant "interest in dispute" and a party may have an interest before he becomes a party. The section is plain. The Tribunal must find when the dispute arose and determine an effective date, not being earlier than the date the dispute arose. It is concerned with parties to a dispute not parties who may have an interest in the dispute. Indeed, the reference invariably sets out the disputants. A dispute needs at least two parties taking opposite sides, in confrontation so to speak. It is true that when the Tribunal has determined that date, not being earlier than the date the dispute arose, that determination cannot be challenged in this court. But the circumstances in the instant case are altogether different; the date determined on the face of the records is earlier than when the dispute arose. That is an error of law and can be challenged. The Tribunal, in my judgment, acted without jurisdiction as well when it made the order as regards the effective date of the award. But for the view I have expressed earlier in this judgment as conclusive of the matter in favour of the applicants, the effect of this finding, would be, that the award as regards retroactivity, only, would have to be quashed.

Before leaving this matter, I desire to emphasize that this court was not concerned with the merits of this dispute, but with the legal problems involved, regardless of their consequences. The apt words of Geoffrey Lane, J. in Ford Motor Company v. Amalgamated Union of Engineering and Foundry Workers & Ors. (supra)

at p. 321, are worthwhile repeating and I do so with respectful approval:

> " It must be made clear that this court is not concerned in any way with the merits of the dispute, nor is it concerned with the remoter issues which have been suggested in some of the affidavits in this case and the exhibits to those affidavits, namely, that the casus belli is really the government's income policy. This court is not concerned with policy, nor with politics, not with the justice of the employers' proposals, not the employees' reactions to those proposals. It is not concerned with the question whether the wishes of the majority of the employees are being subordinated to the self-interest of the influential few. It is merely concerned with the strict legal problems involved, regardless of their impact and regardless of their consequence. "

If the parties wish, as we all expect they do, for industrial peace and harmony to prevail, then, they should not object to being reminded that they freely entered into and accepted the terms of this agreement, and agreed to abide by those terms. Only chaos in the Port would ensue if this is not their mutual concern. Disruption of work in the Port is incompatible with the public interest.

I concur with my brothers in holding that the applicants succeed. The award of the Tribunal must therefore be set aside with the usual consequences.