IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2009 HCV 04798

BETWEEN	REGINA	CLAIMANT
AND	INDUSTRIAL DISPUTES TRIBUNAL	DEFENDANT
	(Ex parte J. Wray and Nephew Limited)	

IN CHAMBERS
Conrad George and Kimone Tennant for J. Wray and Nephew Limited

Lord Anthony Gifford Q.C. for the Union of Clerical Administrative and Supervisory Employees

Lackston Robinson and Michelle Shand instructed by the Director of State Proceedings for the Industrial Disputes Tribunal

October 14, 15 and 23, 2009

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW - WHETHER UNION CAN BE HEARD AT LEAVE STAGE - TEST FOR LEAVE TO APPLY FOR JUDICIAL REVIEW - CIVIL PROCEDURE RULES - PART 10 - PART 56 - RULES 1.1 (1), 1.2, 2.2, 2.2 (1), (2) and (3), 56.3, 56.3 (1), 56.3 (2), 56.3 (3), 56.4 (4), 56.4 (1), 56.4 (2), 56.4 (3), 56.4 (3) (a), 56.4 (8), 56.11 (5), 56.12, 56.13 (2) (c), 56.15 - LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT, SECTION 12 (4) (C), SECTION 12 (5) (C) (I) - SECTION 3 (3) OF THE EMPLOYMENT (TERMINATION AND REDUNDANCY PAYMENTS) ACT

SYKES J.

1. The old has gone. The new has come. Old things are past away. All things are become new. This is the strident message of the new Civil Procedure Rules ("CPR"). Whatever may have existed in the past do not control the CPR. We are to look at the rules as new rules and interpret and apply them accordingly. We are not to keep looking back to see what in the new rules are the equivalent of what existed in the old and then try to interpret the new rules as if they were simply an

update of the old the rules. Let us keep pressing towards the mark of dealing with cases justly in accordance with the spirit and ethos of new rules.

2. Part 56 is new and has new features. It, where possible, assimilates judicial review to ordinary actions. The full range of case management powers as would exist in an ordinary action is imported without exclusion of any power available in case management into the judicial review procedure (rule 56.13 (1)). In fact the judicial review application is referred to as a claim (rule 56.13 (1)).

3. That the rules are to read on their own and not in light of the old is demonstrated by rule 1.1 (1) which has these important words:

> *These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*

4. This is a deliberate wording to indicate to the legal profession that a new day has dawned.

5. The rules even provide a guiding principle in interpreting and applying them. Rule 1.2 states:

> *The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers given under these rules.*

6. As Loughlin and Gerlis, authors of ***Civil Procedure*** 2nd ed (2004), noted at page 5, "An important and distinctive innovation of the new rules was the introduction of the overriding objective, this being to enable the court to deal with cases justly. The CPR are not meant to be definitive of civil procedure and, instead, the court is given a discretion in the application and interpretation of the rules to a particular case in accordance with the overriding objective .... This is meant to facilitate the operation of the rules in order to do justice in a particular case and in order to prevent a complex procedural system

growing up around the rules based on a plethora of case law precedent."

7. The same authors continued at page 10, "The intention was to move away from the old civil procedure system where the rules had become dense and convoluted, covering every eventuality and bound by case law precedent, to a system of procedural rules drafted in plain English which give the court a wide discretion to make decisions in order to deal justly with a particular case in accordance with the overriding objective. As Lord Woolf expressed it: 'Every word in the rules should have a purpose, but every word cannot sensibly be given a minutely exact meaning. Civil procedure involves more judgment and knowledge that the rules can directly express.'" It is my view that Part 56 falls to be considered in this light.

The facts

8. This is an application for leave to apply for judicial review by J. Wray and Nephew Limited ("the company"). The company is seeking to have the Supreme Court review the decision of the Industrial Disputes Tribunal ("IDT") which, after a hearing involving the company and the Union of Clerical Administrative and Supervisory Employees ("the union"), ordered that workers who were alleged to have been dismissed by reason of redundancy should be reinstated. The IDT found that the company did not adhere to the "set procedures laid down in statutes, judicial precedents and guidelines for the equitable and fair implementation of the [redundancy] exercise" (page 8 of Award).

9. The company wishes to challenge the award on a number of bases. The applicant claims that the award is ultra vires; is wrong in law in that the IDT improperly interpreted and applied the Labour Relations Code and wrongly found that the dismissal of the workers was unjustified; and that the decision to reinstate the workers is unreasonable.

The application for judicial review

10. When the applicant first appeared before McDonald-Bishop J., it was found that the application was not in compliance with rule 56.3. The applicant amended, and re-amended his application and it is the re-

amended application that is before me. The learned judge directed that the Attorney General and the union be served.

11. Lord Gifford Q.C. is now here representing the union. The Attorney General is represented by Mr. Lackston Robinson and Miss Michelle Shand.

12. Mr. Robinson has taken a number of preliminary points on this application. Mr. George, gratefully, and with obvious relief, adopted the submissions of Mr. Robinson. Mr. George and Lord Gifford made submissions on the application for leave itself. Mr. Robinson declined to make submissions on the application because he was of the view that that was unnecessary in light of his position that the union has no right to be heard at the leave stage.

The preliminary objections

13. Mr. Robinson's primary objection is that at this stage - the application for leave stage - the union has no right of audience and can only come in after leave has been granted and even then, the union can only come in if the court sees fit. He relies on the entire Part 56 and in particular rules, 56.13 (2) (c), 56.15. According to learned counsel, his position is reinforced by the fact that there is no right of appeal or any remedy available to the union if leave is granted. There is nothing that it can do if leave is granted. Mr. Robinson submitted that the union was not a person aggrieved and so has no basis to be present. According to counsel, the union has a decision in its favour and so has nothing to challenge, thus, they have no locus standi to be here at the leave stage. He further submitted that the union is not challenging any decision made by the IDT.

14. It is always good, where possible to identify the ultimate first principle from which ideas spring. This I have tried to do in the case of Mr. Robinson's submissions. It seems to me that his submissions have their origin in the time before the year 1933 and subsequent developments. The ultimate source of the proposition of the notion that the union does not have a right to be heard at the leave stage comes from ancient times. Before the reforms of 1933, the old procedure was that the person seeking judicial review would have to

apply in open court to full court of the Divisional Court for a rule nisi. This was done ex parte. Because it was open court, a note was taken of the submissions by shorthand writers and this note was then sent to the relevant government department whose decision was being challenged. There would follow a hearing, again in open court, by the full court of the Divisional Court, which would decide whether the rule nisi should become absolute. This procedure was cumbersome. A committee called the Business of Courts Committee chaired by Viscount Hanworth M.R. was established to examine delays in court procedures. The application for prerogative orders came up for examination and it was agreed that it needed reform.

15. There was little agreement on what form the change should take until Sir Claude Shuster, Permanent Secretary to the Lord Chancellor, produced the idea of applying for leave as a replacement for the rule nisi application. This basic proposition was accepted. The debate then moved on to whether this new leave procedure should be in open court or in chambers. It was eventually decided that leave should be applied for in open court. The application was still before the Divisional Court.

16. However, the growth of judicial review in the 1960s and 1970s coupled with administrative difficulties, led to long delays. These issues were addressed by Lord Donaldson M.R. who introduced further reforms in the 1980s. Leave was then dealt with by a single judge and not the Divisional Court. The applications were dealt with on paper, that is, no oral submissions and no attendance in person of counsel upon the leave judge was necessary. If leave was refused, then the applicant could renew the application in open court. If again refused the applicant could go to the Court of Appeal. All this was apparently done ex parte.

17. Further reform was undertaken and a report to the Lord Chancellor was submitted by Sir Jeffrey Bowman in March 2000. His basic reforms were accepted and became Part 54 of the English CPR. A critical part of the Bowman reforms was that the leave stage became more inter partes - a radical shift from the ex parte approach of the past. These ideas have influenced Part 56 of the Jamaican CPR. While not explicitly making the leave stage inter partes by requiring service of the claim form before securing leave as in England, the judge in

Jamaica must conduct a hearing with the applicant in certain circumstances. However, the rules do not prohibit a hearing in other circumstances not expressly provided for in the rules. This is in keeping with the flexibility referred to at the beginning of this judgment. There is no mandatory requirement that any other person be present. The judge has the discretion to notify persons about the hearing. What will influence the judge in deciding whether other persons and which persons should be notified of the hearing is largely a matter of judgment depending on the circumstance of the particular case. As Lord Woolf said, civil procedure is largely about judgment and knowledge. This thinking is reflected in various rules which I will now examine. The point being made is that the notion that an application for leave is always ex parte or cannot be inter partes is now relegated to history. Whether it becomes inter partes is left to the good sense and judgment of the leave judge. This is in keeping with the idea of giving the judge full scope to deal with cases and applications justly. The old has gone. We not only have new wine but new wine skins too. There is now a new way of thinking.

18. Let me begin by referring to rule 56.3 (1). It states that a person wishing to apply for judicial review must first obtain leave. Rule 56.3 (2) provides that an application for leave may be made without notice. Rule 56.3 (3) sets out what the application must contain. Rule 56.4 (1) and (2) combined say that a judge is to consider the application and the judge may give leave without hearing the applicant.

19. Pausing here to analyse the rules referred to so far. It is clear that the application for leave can be done on paper without oral submissions or the applicant being present. This is what is called the paper application. It reduces costs and saves time.

20. It appears that the practitioners and persons in the civil registry have not fully appreciated that there is no need to set a hearing date before a judge for the applicant to attend. This is why rule 56.4 (1) provides that the application for leave must be placed before a judge to "be considered forthwith." If the judge grants leave then the applicant is notified and the process continues. There is a safe guard for the applicant. If the judge is "minded to refuse" leave (note the

wording), the judge must have a hearing, that is to say, if the judge is tending to saying no, then the applicant must be heard (rule 56.4 (3) (a)).

21. Also the application for leave may be made without notice, obviously implying that the applicant may serve the respondent. It is therefore true to say that at the leave stage the respondent need not be heard but there is nothing to say that he cannot be heard.

22. Nowhere in Part 56 is it stated what the criteria are to be met if the applicant desires to make the application an inter partes hearing. There is no threshold for the applicant to meet other than serving the respondent.

23. The only time a hearing is mandated at the leave stage is if the judge is (a) minded to refuse the application; (b) the application includes a claim for immediate interim relief; and (c) it appears that a hearing is desirable in the interest of justice (rule 56.4 (3)). These conditions are not cumulative though all three may arise in any one application. Once any of them is present in any application for leave, then that is sufficient to trigger the hearing.

24. Rule 56.4 (4) states that the judge may direct that notice of the hearing be given to the respondent or the Attorney General. It is to be noted that even if a hearing is going to be held, the rule does not require that the respondent be informed. The rule merely permits the judge to decide whether the respondent or the Attorney General should be informed.

25. Significantly, the rule does not limit who can be at the hearing. The reason is obvious. It is possible, as is the case before me, that there may be instances where the judge may wish to hear from other persons such as directly affected third parties. In this case, the company is seeking immediate interim relief for a stay of the reinstatement order, that is to say, the workers should not immediately reap the benefit of an award in their favour by a properly constituted tribunal. The framers of the rule did not hamstring the judge by putting in any restriction on who may be present. The reason

has to be that because once interim relief is involved, there may be issues that affect the third party in ways that even the most Solomonic of judges, the wisest of applicants and the most perspicuous of respondents simply cannot foresee. The judge therefore has the leeway to invite the third party in order to hear his views on the matter. After hearing from the third party the judge may decide to grant leave with conditions or on such terms as appears just (rule 56.4 (8)).

26. Even if rule 56.4 (8) were absent, the judge would still have those powers because Part 56 is a part of the CPR and is therefore subject to the overriding objective and the two rules referred to at the beginning of this judgment. Dealing with cases justly must include a power to give directly affected parties an opportunity to say how a particular order of a court may affect him if the court considers it necessary to do justice to the parties.

27. Rule 2.2 (2) states that the expression civil proceedings, "include Judicial Review and applications to the court under the Constitution under Part 56". The proceedings that are not regarded as civil proceedings by the CPR are insolvency (including winding up of Companies); proceedings when the court acts as a Prize Court; and any other proceedings instituted in the court by virtue of a statute and so far as rules made under that statute govern the proceedings. On the face of it, the only proceedings that are not regarded as civil proceedings for the purposes of the CPR have been clearly stated.

28. There is certainly nothing in the rules that precludes the conclusion that Part 56 is subject to the overriding objective of dealing with cases justly and I cannot see any rational reason why a court in seeking to dispose of an application for judicial review, cannot have an inter partes hearing if the judge forms the view that this is necessary for a just disposal of the application.

29. In other words, the sheer common sense of the matter makes it plain, that dealing with a case justly must mean that a court, should it think necessary, can hear from persons who may be directly affected by decision the court may make.

30. In this particular application there is a request for immediate interim relief. Because of what it asks for justice, the circumstance clearly suggests that disposing of the application justly would be better served if the court heard from the union.

31. The reason why the company had to ask for a stay is that the award, unless or until set aside, must be obeyed. The workers and the union now have a decision giving back the workers their jobs, or at least, a job at the company even if the job they get back is not identical to the one from which they were dismissed.

32. I now pose these questions: could a court, acting justly, grant a stay of the reinstatement order of the IDT without hearing from the workers in circumstances where there is no suggestion that having an inter partes hearing could adversely affect the applicant? Could a court, in the absence of urgent reasons, acting justly, delay the enjoyment of an award secured from a lawfully constituted tribunal without hearing from the person who is to benefit from the award? The answers must be no. Who is best able to articulate the interest of the workers in this situation? Certainly not the company. Certainly not the Attorney General.

33. Let us follow the logic of Mr. Robinson who contends that the union cannot be heard at this stage. This is in the context of the Attorney General's position that it is not opposing the application. If this application were heard ex parte or with just the Attorney General present, what might have happened is that the workers who expected to be reinstated would be told that a court, without hearing from them, took the view that reinstatement should not take place, at this time. This, in my view, could not be fair in the absence of any compelling reason for the court acting in this way. This to me is elementary justice that does not have to be articulated in any written rule. I do not find the consequence of the logic appealing and I do not accept it. In any event, the real issue to my mind is not so much whether there is a right to be heard as it is whether it is within the power of the judge to invite persons to make submission that can assist in the just disposal of the application.

34. There is nothing in Part 56 which precludes the union or counsel being heard on behalf of the affected workers.

35. Mr. Robinson's further point that the union would have no remedy if the court grants leave against its wishes is beside the point. The fact that this is so does not prevent a judge from acting justly by seeking to allow an affected party to be heard.

36. I conclude that, in this case, McDonald-Bishop J. was absolutely correct to have the union served with the application. Once served, the court can invite submissions from the third party on any matter the court believes that it needs assistance on. If it so happens that the union has views on whether leave should be granted so be it. The applicant for leave is there and can advance his arguments. In effect, the application for leave may become an inter partes hearing. The rules do not prohibit this. Whether it is inter partes or not depends upon (a) whether the applicant served anyone with his application for leave or (b) whether the judge wishes to hear from the respondent or directly affected third parties.

37. If a court has lawful authority to grant an interim relief than can deprive a person of the benefit of an order that he has received from a competent tribunal, then surely such a person has the right to make submissions to the court on the point.

38. Mr. Robinson, in further support for his submission that the union has no right to be heard at the leave stage, also submitted that "interested parties" can only come in at the first hearing and at that hearing they may be granted permission to be heard at the substantive hearing of the administrative orders sought. I fear that the expression "interested parties" as used by counsel is not sufficiently pointed to recognise the real and substantive distinction made between persons "directly affected" and persons with a "sufficient interest."

39. Part 56 distinguishes between persons "directly affected" and any person or body having "a sufficient interest" (rule 56.2, 56.11 and

56.13). While it is clear that any person who is directly affected must necessarily have a sufficient interest, it is not true to say that every person who has a sufficient interest is directly affected.

40. The expression "directly affected" was defined by the House of Lords in ***R v Rent Officer Service and another Ex parte Muldoon*** [1996] 1 W.L.R. 1103. In that case, a local authority would be reimbursed upto 95% of the money it spent on housing benefits for persons entitled to housing benefit from the council. The Secretary of State for Social Security sought to be made a party to judicial review proceedings brought by two applicants. The Secretary of State argued that he was a person "directly affected" within the meaning of Order 53 r 5 (3). The House of Lords held that he was not because his liability would only arise in the even that the local authority paid the housing benefit. According to Lord Keith, "directly affected by something connotes that he is affected without the intervention of any intermediate agency" (page 1105).

41. The consequence of the distinction is that persons who are directly affected "must be served" with the claim form and affidavit after leave and 14 days before the first hearing (rule 56.11 (1)). This is a right to be served. The question then is why does the rule confer this right to be served? It must be because, after leave, persons directly affected have a right to participate in the proceedings.

42. By contrast, persons not directly affected but with only a sufficient interest are not conferred the same rights. They have lesser rights. They have no right to be served. They have no right to be served 14 days before the first hearing. They may not be allowed to participate in the proceedings. This class of person is restricted to making written submissions unless the court orders otherwise. No such restriction is placed on persons who are directly affected. The question is why does the CPR treat the two classes so differently? Surely, there must be some underlying rationale for this, "double standard". The rationale must be that persons directly affected have more at stake than a person with merely a sufficient interest. The directly affected person is "affected without an intermediate agency." If this is so, it makes perfect sense for the CPR to insist

that the directly affected persons be served and given full rights of audience. It is true that the rule does not say expressly that directly affected persons who have been served have full rights of audience but this must be one of the consequences of being within that class. If it is not so then distinguishing between the classes in this way would be a meaningless exercise. This explains why there is no need to spell out the rights of audience in respect of persons directly affected. It is necessarily so.

43. The distinction between the two classes of persons is further supported by rule 56.11 (5) where the claimant must comply with elaborate measures to prove to the court that he has in fact served persons who are directly affected. Again, what is the goal of all this? The rule even refers to the persons directly affected and who have been served as defendants. Rule 56.12 states that evidence may be filed in answer for an administrative order. The answer must be by way of affidavit. Part 10 of the CPR applies to the answer. It could not simply be to give information. It appears from the rules that only defendants are permitted to file an answer. Persons with just a sufficient interest do not appear to have this possibility open to them. They are restricted to making submissions only.

44. Indeed it is safe to say, that there has been a narrowing of the prior existing differences between a judicial review application and an action begun by way of a fixed date claim form. The general provisions of the CPR apply to both. Part 56 is making the necessary adjustment to include defendants because the historical origins of judicial review do not make it a 100% fit with party and party actions, but nonetheless the assimilation to such actions cannot be doubted. So full is the assimilation that although mediation does not apply generally to Part 56 application, the court still has the power to direct mediation in any proceedings (rule 74.3 (1), (2)).

45. Judicial review claims are intituled in the way they are because of the history of such claims. It was a petition to the sovereign to call up the record of an inferior tribunal. The record would be examined and if the complaint was made out, the sovereign would then grant the prerogative remedy appropriate to the case. As time went one this

function became "judicialised." The reality now is that it is the courts that hear and determine judicial review without any referral to the sovereign. Under the CPR, no one speaks of prerogative remedies any more. The language is administrative orders. There really is no reason why judicial review proceedings cannot be intituled like ordinary actions. Modern governance has embraced the idea of judicial review and it is now an integral part of governance and accountability structures. Part 56 has recognised this reality.

46. The workers clearly fall within the definition of persons directly affected. Assuming Mr. Robinson is right that the workers cannot be heard at the leave stage, they would have a right to be served and participate at the first hearing as of right, and the full scale hearing of the application for the administrative order on the basis of persons directly affected.

47. It is clear that simply to use the expression "interested parties" disguises the fundamental distinction made by the rules. All this feeds back into my earlier conclusion that on the facts of this case, the union as a directly affected party could have been invited by the court to participate in the leave stage.

48. Mr. Robinson rounded off his submissions by saying that the Attorney General represents the IDT and was not objecting to the grant of leave. Added to this, said he, was the fact that the threshold for leave was very low. The implicit proposition here is that if the Attorney General is not objecting and the union cannot be heard then leave should be granted.

49. Respectfully, I must say that whether the Attorney General chooses to oppose or remain neutral on this application cannot be taken into account because Part 56 places the duty on the court to decide whether leave should be granted. The case law sets out the test.

50. Indeed so seriously have the courts, at least in England and Wales, been taking their role as the gate keepers of judicial review, that there has in fact been a decline in permission percentages for judicial review applications (see Bondy, Varda, and Sunkin, Maurice, ***Access to***

Judicial Review, P.L. 2008 Win 647 – 667). The authors point out that between 1981 and 2006 there was a massive drop in the percentage of persons who were permitted to go forward with judicial review proceedings. In 1981, 71 % were granted leave compared with only 22% by 2006. For those who prefer hard numbers, the authors note that in 1996, there were a total of 3901 but only 1257 were granted leave. By 2006, there were 6458 applications with only 752 being granted.

51. The authors have sought to explore the reasons for this decline. One reason put forward is that the test for granting leave to seek judicial review has undergone modification. To support their point, the authors refer to a number of cases which I also refer to below. The old test was stated by Lord Diplock in ***Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.*** [1982] A.C. 617, 643 – 644:

> *The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.*

52. This kind of language has undergone a remarkable shift so that by the time of ***Sharma v Bell-Antoine*** [2007] 1 W.L.R. 780, the Judicial Committee of the Privy Council, on an appeal from the Republic of Trinidad and Tobago, could speak in these terms at paragraph 14 (per Lord Bingham and Lord Walker):

The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham, Judicial Review Handbook 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.

And later in the same paragraph:

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 733.

53. Having read the judgment in its entirety there is nothing there to suggest that the principle just cited is limited to the facts of the case. It was a statement of general application. His Lordship was enunciating the test for granting leave for judicial review generally. The judicial review application has gone from Lord Diplock's "quick perusal" to Lord Bingham's and Lord Walker's having "a realistic prospect of success." In short, the days of letting the case go forward and see what happens is no longer in vogue. The language of Lord Diplock is speculative. His Lordship says that if the "quick perusal" discloses what "might" turn out to be an arguable case then leave should be granted. This approach explains, at least to me, why Mr. Robinson said that the practice has been not to oppose the application for leave and argue everything at the hearing stage. With

a test like this, then clearly leave for judicial review was a mere formality.

54. The Privy Council is saying that while a full scale hearing is not to be done at the leave stage, Lord Diplock's approach is not to be followed. I couldn't agree more. Judicial review is not immune from considerations that apply to other kinds of litigation.

55. The Court of Appeal of England and Wales has added its voice too. In ***R v Legal Aid Board Ex parte Hughes*** (1992) 24 H.L.R. 698, through Lord Donaldson M.R. said at paragraph 16:

> *Lord Diplock may well have been right in 1981 to have said in R v I.R.C. ex p. the National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617, 644A that: "If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief."*
>
> *However, things have moved on since then. This was an ex parte application. In such a case leave is or should now only be granted if prima facie there is already an arguable case for granting the relief claimed. This is not necessarily to be determined on "a quick perusal of the material," although clearly any in-depth examination is inappropriate. Furthermore, a "prima facie arguable" case is not established merely by the disclosure of "what might on further consideration turn out to be an arguable case" (my emphasis). It is only when there is clearly an arguable case that leave should be granted ex parte. Equally, it is only when prima facie there is clearly no arguable case that leave should be refused ex parte. Usually ex parte*

applications fall into one or other of these categories, but not always. There is also a small "I really need a bit more about it" category and in such cases the appropriate course is to adjourn the application for an inter partes hearing ... . This is quite different from a substantive hearing in that the respondent need only summarise its answer sufficiently to enable the judge to decide there is or is not an arguable case.

56. I will the first to admit that this passage from the Master of the Rolls is not very clear on the test to be applied at the leave stage. To say that leave should be granted if prima facie there is an arguable case and then say in the next breadth that a quick perusal may be insufficient but an in depth look is not required, regrettably, does not provide much assistance to the leave judge.

57. Despite the difficulty of expression what is clear is that Lord Donaldson is clearly distancing himself from Lord Diplock's formulation. As he has said, "things have moved on since then." An arguable case is not established simply by disclosing what may, on investigation turn out to be an arguable case. In this regard, Lord Donaldson as well as Lord Bingham and Lord Walker are at one when they all say that leave is not made out by establishing potential arguability. There must be, in the words of Lord Bingham and Lord Walker, "*arguable ground for judicial review having a realistic prospect of success.*"

58. The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in light of the now stated approach. Thus the practice identified by Mr. Robinson, of not opposing applications for leave to review decision of the IDT and then if leave is granted, then the transcript of proceedings is prepared may be sufficient for the Attorney General but clearly cannot be the legal standard applied by the courts. It is also means

that an application cannot simply be dressed up in the correct formulation and hope to get by. An applicant cannot cast about expressions such as "ultra vires", "null and void", "erroneous in law", "wrong in law", "unreasonable" without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions.

59. In the final analysis, I cannot accept any of the objections raised by Mr. Robinson to the union being heard at this stage.

Should leave be granted?

60. I now turn to an examination of the material placed before the court and ask my self, "Is there an arguable case disclosed by the material which has a realistic prospect of success?" I remind myself that arguability does not exist in splendid isolation but in relation to the nature and gravity of the matter. Realistic prospect of success does not mean that the applicant has to establish a more than 50% chance of success.

61. I should indicate that Mr. Robinson took the position that what is before me is not sufficient to enable me to say that the application is hopeless or frivolous and so leave should be granted. He cited, the highly respected work of de Smith, Woolf & Jowell, ***Judicial Review of Administrative Action,*** 5th ed (1995, para. 15-014, 15-015) which in turn cited cases in support the proposition advanced by Mr. Robinson. However, in light of the new test, the fact that an application is not frivolous does not mean that it has a realistic prospect of success.

62. I will not ascribe to the current application any adjectives but assuming that it is not frivolous or hopeless is not the same thing as saying that the present case meets the test as I understand it to be.

63. I wish to be understood that when examining the affidavit filed in support of the application for leave, I am not conducting a hearing or deciding the substantive matter. I am simply examining the material placed before the court. This is what was done by the English Court of Appeal in the case of ***R v Secretary of State for the Home Department ex parte Swati*** [1986] 1. W.L.R. 477, when it dismissed

an appeal against refusal to grant leave to apply for judicial review. I cannot help but note that this case was decided within four years of the ***I.R.C.*** case and even from those early days, it is apparent that Lord Donaldson did not embrace Lord Diplock's test. He simply did not refer to it at all. Lord Donaldson stated the test for leave in these terms at page 485:

> *I would have been minded to refuse leave to apply upon the grounds that an applicant must show more than that it is not impossible that grounds for judicial review exist. To say that he must show a prima facie case that such grounds do in fact exist may be putting it too high, but he must at least show that it is a real, as opposed to a theoretical, possibility. In other words, he must have an arguable case.*

64. Also of significance is the fact that Lord Donaldson analysed the allegations of the applicant and concluded that his real complaint was that he should have been believed by the immigration officer. In effect, he was saying that the immigration officer was wrong to disbelieve him as distinct from saying that the officer had no basis for deciding against the applicant.

65. The application is supported by the affidavit of Mrs. Andrea Hardware. Mr. George, quite helpfully, produced skeleton arguments.

66. The award of the IDT begins by stating the terms of reference which was "to determine and settle the dispute between J. Wray & Nephew Limited on the one hand and the Union of Clerical Administrative and Supervisory Employees on the other hand over the termination of employment on the grounds of redundancy of" named employees.

67. The award goes on to give the background and context of the dispute. It sets out the rival cases. It then summarises the evidence at the hearing and thereafter gives findings.

68. It is clear that the IDT, **after hearing both sides**, preferred the factual sequence of events for the critical period December 15 to 18, 2008 advanced by the union. The affidavit in support of the application does not say that the IDT did not have any basis for accepting the union's version. It simply says that the IDT was wrong in accepting this sequence. To my mind, the company, like the applicant in ***Swati***, is raising an issue of credibility which it is for the tribunal to resolve which they did. It is not being said that it had no basis for so preferring the union's version. What is being said is that it should not have so concluded.

69. The sequence of events that the IDT clearly accepted was that the company first sought to contact the union on December 15, 2008 about possible redundancies. There is no allegation in the supporting affidavit that contrary evidence was adduced. A meeting was arranged for December 16 which fell through. There is no contrary evidence allege by the applicant. A meeting was held on December 17. Again, it is not being alleged that contrary evidence was put before the tribunal. On this date, the company says that the union terminated the meeting and so the consultation laid down by the Labour Relations Code was truncated by the union. The union, on the other hand, said that the meeting ended because the union representative had another meeting to attend. The union also said that it was promised a document by the company. On December 18, the union was shocked to hear that workers were in fact made redundant.

70. The IDT having accepted the union's version concluded that the company's conduct did not allow sufficient time for consultation. It is not being said that the IDT had no evidence on which to base its findings. What is really being alleged is that the IDT should have accepted the company's version. On the face of it this is a credibility issue. It is these kinds of findings that are prohibited from challenge by section 12 (4) (c) of the Labour Relations and Industrial Disputes Act (see Forte P. in ***Jamaica Flour Mills Limited v The Industrial Disputes Tribunal*** S.C.C.A. No. 7/2002 (delivered June 11, 2003 at page 11)).

71. The law on ouster clauses is well known. Section 12 (4) (c) is not suggesting that a finding based on the absence of evidence cannot be challenged. It is simply seeking to prevent an appeal against the facts masquerading as judicial review. If there is a clear choice between two rival versions and one is accepted, then one cannot say, without more, that the acceptance of one as opposed to the other is so unreasonable that no reasonable tribunal could so find. As Rattray P. said in ***Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Green*** S.C.C.A. No 66/97 (delivered June 30, 1998), "Parliament had legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes" (see page 11). In this context, quibbles about who should be believed are strictly for the IDT and not the courts. What section 12 (4) (c) does is remind judges of the boundaries between the role of the tribunal and the role of the court. The court has no power to reinterpret facts. All the court can do in relation to facts is to indicate whether or not the facts adduced support the finding. Even if the courts would interpret the facts differently, that is not a basis for interference. Where the courts can and should intervene is where there is no evidence to support the conclusion.

72. There is no allegation in the affidavit of Mrs. Hardware that the tribunal made any finding that the evidence was not capable of supporting. In my view, all the affidavit says is that the company disagrees with the tribunal. That is their right but that does not translate into what the Board calls "*an arguable ground for judicial review having a realistic prospect of success.*"

73. Mrs. Hardware goes one to say that the order of reinstatement was unreasonable because such an order would be forcing "the Company to continue to incur high overheads and reduced profitability" and further "the Company has entered into long term contracts with outside contractors for the services formerly provided by the Employees" (see para. 21).

74. It is well known that when one speaks of unreasonableness in this context one is speaking of what is called Wednesbury unreasonableness, that is "unreasonableness verging on absurdity" (per

Lord Brightman in ***Puhlhofer v Hillingdon London Borough Council ex parte*** [1986] A.C. 484, 517). The affidavit of Mrs. Hardware comes nowhere close to suggesting this kind of unreasonableness. All it amounts to is that the IDT should have chosen a different remedy.

75. In any event the Judicial Committee of the Privy Council in ***Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and the National Workers Union*** P.C. A. No. 69 of 2003 (delivered March 23, 2005) dealt with this point of reinstatement. The Board stated that if in seeking to comply with the order the employer has no suitable job for them then he can begin immediately the process of dismissal by reason of redundancy and do so fulfilling his obligations of communication and consultation under the Labour Relations Code. This decision was done when the word "shall" was in section 12 (5) (c) (i) of the Labour Relations and Industrial Disputes Act. It now has the word "may" but that change in my view does alter the value of their Lordships advice.

76. Finally, it is said that the IDT misinterpreted section 3 (3) of the Employment (Termination and Redundancy Payment) Act. This is undoubtedly a point of law but in the findings given by the IDT the decision was not based on its interpretation of the provision. The IDT found that the inadequate time allowed for consultation made the dismissals unjustified.

Disposition

77. The union can be heard at the leave stage in this particular case.

78. In accordance with the Board's view in ***Sharma***, an examination of the supporting affidavit does not meet the test for granting leave. The application merely states the remedy sought and the grounds. It is the affidavit which gives the allegations of fact being relied in support of the stated grounds. I therefore conclude that the company has not shown that it has "*an arguable ground for judicial review having a realistic prospect of success.*" The application for leave to apply for judicial review is refused.