[2023] JMSC Civ 89

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2022 CV 03211

BETWEEN	**SCJ HOLDINGS LIMITED**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR & SOCIAL SECURITY**	**DEFENDANT**
AND	**LANCELOT NARAYNSINGH**	**INTERESTED PARTY**

IN CHAMBERS

Messrs Gavin Goffe & Jovan Bowes instructed by Myers, Fletcher & Gordon for the Applicant

Ms. Lisa White & Mrs. Taniesha Rowe-Coke instructed by the Director of State Proceedings for the Respondent

Mr. Lorenzo Eccleston instructed by Temple Law for the Interested Party

March 23, April 19, May 24, 2023

JUDICIAL REVIEW – APPLICATION FOR LEAVE – WHETHER REFERRAL TO INDUSTRIAL DISPUTES TRIBUNAL ULTRA VIRES - WHETHER INDUSTRIAL DISPUTE EXISTED – WHETHER WAIVER BY CONDUCT ON PART OF INTERESTED PARTY – WHETHER BREACH OF LABOUR RELATIONS CODE – LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT, SECTION 11A(1)(a) - LABOUR RELATIONS CODE – EMPLOYMENT TERMINATION AND REDUNDANCY PAYMENTS ACT 1974 – THE CIVIL PROCEDURE RULES 2002 RULES 56.3(1)

WINT-BLAIR J

Background

[1] This matter concerns an application for leave to apply for judicial review.[1] The applicant, SCJ Holdings Limited is seeking leave on the grounds that the party directly affected, waived any right to dispute his dismissal due to the absence of any protest or complaint prior to the dismissal and his acceptance of a severance payment without demur. Accordingly, the applicant argues that there is no industrial dispute in existence between the applicant and the party directly affected, Mr Naraynsingh. The Minister therefore would have no jurisdiction to refer any matters to the Industrial Disputes Tribunal where an industrial dispute does not exist in any undertaking as per ***section 11A of the Labour Relations and Industrial Disputes Act***.

[2] Based on the foregoing, the applicant contends that there are no reasonable grounds for the Minister to be satisfied that an industrial dispute existed at the time of the referral. The applicant is adversely affected by the referral, no other remedy exists, and the application has been brought within time.

The Affidavit Evidence

[3] In support of this application Ms. Kerline Graham[2] deponed that SCJ operates as a land management agency for agricultural and other lands across Jamaica on behalf of the government.

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[1] Filed on October 21. 2022.

[2] Director, HR and Community Relations at SCJ Holdings Limited

[4] By way of a written offer dated November 29, 2019, the applicant company engaged the services of Mr Naraynsingh as a Technical Services Manager at SCJ Holdings Limited on a fixed term contract for two years.[3]

[5] The effects of the COVID-19 pandemic crippled the applicant's business and the company had to make one of its workers redundant on June 16, 2020, and restructure its operations. By letter dated December 1, 2020, the Managing Director wrote to the Deputy Financial Secretary of the Ministry of Finance and the Public Service regarding this situation.

[6] On December 16, 2020, Ms Graham deponed that she consulted with Mr Naraynsingh in her office and there had a fulsome discussion with him about the need to eliminate certain positions which included his post of Technical Services Manager. He was allowed to express his thoughts and to ask questions. She explained to him that based on SCJ's financial position, it had to eliminate this post. Mr Naraynsingh responded saying that he understood the situation and was prepared to accept the elimination of his role from the company.

[7] He was handed a letter of even date,[4] which stated that the post of Technical Services Manager was being eliminated from the company's establishment with immediate effect. He would be paid (subject to statutory deductions and any indebtedness to the company), payment in lieu of notice amounting to two months gross salary, accumulated gratuity and earned but unused vacation leave. The letter went on to invite Mr Naraynsingh to a meeting on Thursday, December 17, 2020, at 10:00am in the boardroom of the company to discuss his separation from the company and separation benefits. The letter informed Mr Naraynsingh that he

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[3] KG1

[4] KG5

could bring someone with him to that meeting. Mr Naraynsingh agreed to the meeting at the stated date and time.

[8] On December 17, 2020, the meeting was convened with Mr Naraynsingh, Mr O'Neil Bailey, former Director of Operations and Ms Graham. The purpose of the meeting was for Mr Naraynsingh to discuss any concerns or questions he may have had with the proposed elimination of his post. Mr Naraynsingh who attended the meeting alone, explained that he did not need a representative and that he was fine with the decision to eliminate his post because he fully understood the situation faced by the company as was outlined in the letter given to him. Mr Naraynsingh was also given a Christmas bag filled with goodies which he accepted with pleasant exclamations.

[9] On December 28, 2020, Mr Naraynsingh received a letter from the Managing Director outlining final payments that were made to him by wire transfer to his bank account on file.[5] That letter was further to that of December 16, 2020, regarding the elimination of the post of Technical Services Manager. It enclosed the final pay advice slip for December 2020 and an audited final payment calculation sheet. It said that any clarification should be made with Ms. Kerline Graham. Mr Naraynsingh did not make any objection or complaint. As a result, the applicant concluded its restructuring exercise and altered its organizational structure.

[10] The applicant was made aware of an alleged dispute with Mr Naraynsingh when it received a letter from his attorneys dated January 5, 2021.[6] The letter requested reinstatement and alleged unjustifiable dismissal on the grounds set out below:

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[5] KG6

[6] KG7

a) *"not being told of any charges against him relative to any breach committed by him and/or any allegation of misconduct on his part; or*

b) *being told of any breach of your disciplinary code (if any); or*

c) *being informed of his right to attend a hearing; or*

d) *being informed of his right to be represented at a hearing by a representative of his choice; or*

e) *being informed of his right to appeal any adverse decision made against him."*

[11] In addition, the letter requested an appeal of the decision to *"summarily terminate the employment…"*

[12] The applicant responded to this letter with one of its own[7], indicating that there had been a misunderstanding. It advised that as there was no dismissal, there were no disciplinary charges against Mr Naraynsingh. Therefore, there was no need for a disciplinary hearing and that the company had taken the decision for reasons communicated to Mr Naraynsingh and set out in letters to him. That letter was met with a response from Mr Naraynsingh attorneys reiterating that he was unjustifiably dismissed.[8]

[13] In response to the affidavit of Mr Naraynsingh[9], Ms Graham deponed that Mr Naraynsingh did not react in shock, nor did he make her aware he was unhappy with the company's decision at the meeting on December 17, 2020. He did not indicate to her that the company had no proper reason for dismissing him. Had he

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[7] Dated January 14, 2021, KG8

[8] KG9

[9] Filed March 10, 2023

done so, the applicant may have halted the redundancy process including the severance payment to him pending further discussions of his concerns.

[14] In addition, the attorney's letter to the company dated January 5, 2021, did not mention the alleged concerns or objections raised by Mr Naraynsingh. The only dispute raised was that there had been no disciplinary hearing or appeal prior to the position being eliminated.

[15] Thereafter, in the several affidavits of Michael Kennedy, Chief Director, Industrial Relations Department, Ministry of Labour and Social Security ("the Ministry"),[10] he deponed that he received a letter from Mr Lorenzo Eccleston, attorney for Mr Naraynsingh.[11] This letter raised an alleged dispute between the applicant and Mr Naraynsingh and attached the letters sent by the applicant dated December16, 2020 and the letter responding to his attorney dated January 14, 2021.

[16] The parties were invited to a conciliation meeting by way of letter dated January 5, 2022. The applicant did not respond. A subsequent invitation letter was sent dated January 28, 2022. The applicant responded with its own letter on February 3, 2022, stating the position that Mr Naraynsingh held was made redundant in accordance with the law, there was therefore no dispute and no need for a conciliatory process.

[17] Mr Kennedy wrote to the Minister by memorandum[12] dated July 4, 2022 recommending that consideration be given to referring the dispute to the Industrial Disputes Tribunal ("the IDT.") for the following reasons:

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[10] Filed January 9, 2023

[11] Dated January 27, 2021, MK1

[12] MK6

i. Conciliation having failed;

ii. The nature of the dispute;

iii. In particular, the employee's concern about the lack of consultation;

iv. The immediacy of the termination by reason of redundancy;

v. The applicant's failure to explore other available employment options within the organizational structure.

vi. The applicant's strongly held view that further conciliatory meetings would be unnecessary as the termination was correct in law and justified in the circumstances.

[18] Mr Kennedy continued by saying that the Minister was obliged to take into consideration the fact that the applicant had made the decision to make the employee redundant from as early as June 16, 2020, which was not communicated to him until December 16, 2020. The termination was immediate, the consultation meeting was after termination and there was no evidence that the employee did not object to the redundancy exercise or that he accepted his separation package without demur. All attempts to settle the dispute had been exhausted. There was no evidence of waiver of his right to redress under the Labour Relations and Industrial Disputes Act ("LRIDA".)

[19] The Minister referred the matter to the IDT on July 22, 2022 with the following terms of reference[13]:

> *"To determine and settle the dispute between SCJ Holdings Limited on the one hand, and Lancelot Naraynsingh on the other hand, over the termination of his Contract of Employment."*

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[13] MK7

[20] Mr Andrew Lawrence, Legal Officer of the applicant company deponed that he attended the conciliation meeting held on March 3, 2022, and March 10, 2022. There he told Mr Kennedy that there had been no protest by Mr Naraynsingh concerning the proposed redundancy. Mr Naraynsingh when he met with Ms Kerline Graham on December 16 and 17, 2020 had said that he was "ok" and that he understood the situation. The issue of waiver is therefore live. Mr Lawrence denies that Mr Kennedy has correctly stated the position and the applicant specifically denies that it had made such a decision to make the employee redundant from as early as June 16, 2020, which was not communicated to him until December 16, 2020, and that neither counsel for the applicant nor the employee had made that assertion to anyone at the Ministry.

[21] He denies that no invitation to a consultation meeting was extended to Mr Naraynsingh for December 17, 2020, as it is common ground that there were only two meetings the first on December 16, 2020 and the second on the next day.

[22] Mr Kennedy denies that at the conciliation meeting there was no objection by Mr Naraynsingh to the termination of his employment by reason of redundancy. He said in his second affidavit that:

"*it would be unlikely for such an utterance from the company to go unchallenged by the aggrieved party, and inexplicable on the part of the Chair, not to invite comments from the aggrieved side…*"

[23] Mr Lancelot Naraynsingh in his affidavit agrees that he was employed on a two year fixed term contract in the post of Technical Services Manager. He had no meetings nor consultation with the applicant company about his position.

[24] Mr Naraynsingh deponed that he attended the office of Ms Kerline Graham, she handed him a letter dated December 16, 2020, he was being terminated effective immediately and the reason given was apparent financial difficulties made worse by the pandemic. He was in shock and could not believe that he no longer had a

job. He could not believe he was being summarily dismissed by his employer. He had expected that his contract would have been renewed for another two years. He made Ms Graham aware that he was not happy with the company's decision and that he believed the company had no proper reason for his dismissal.

[25] Further, he was not paid for the remainder of his contract period and was not given the reasons for his dismissal in breach of the principles of natural justice. There was no hearing, no consultation and no discussions regarding alternative employment within the company. The sudden decision forced him into financial arrears with his mortgage company causing him severe embarrassment and anxiety. He was unfairly treated by his employer given the nature and manner of his dismissal.

[26] At the meeting on December 17, 2020, he challenged the decision to summarily dismiss him and asked Ms Graham and Mr Bailey (who was present) for a better reason for his dismissal as the pandemic was not a valid reason. They were unable to do so. He returned the company's property and left the building. His acceptance of the Christmas bag of goodies did not amount to a waiver of his rights to challenge the company's decision.

The Submissions

The Applicant

[27] The applicant agreed that there were two meetings between Ms Graham and Mr Naraynsingh. That he accepted the Christmas basket and the payments set out in the letter marked KG5. Further, that there were two conciliation meetings at the Ministry which yielded no settlement.

[28] The applicant submits that based on the agreed facts, the company justifiably formed the view that there was no industrial dispute as defined in the LRIDA and by accepting the payments without demur, Mr Naraynsingh waived any right to later claim that there was such an industrial dispute. On the date of the referral,

there was no dispute. In the alternative, the Minister of Labour was required to have considered the question of waiver in determining whether an industrial dispute existed. Having failed to consider that issue, he failed to consider relevant material. Accordingly, leave for judicial review should be granted to the applicant. In support of these submissions counsel relied on the cases of: **R v Industrial Disputes Tribunal & Honourable Minister of Labour ex parte Wonards Radio Engineering**[14], **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal & Anor**[15], **Jamaica Infrastructure Operators Limited v The Honourable Pearnel Charles, Minister of Labour and Social Security**[16], **Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security**[17], and **Jamaica Police Co-operative Credit Union Society v The Minister of Labour and Social Security**[18].

The Respondent

[29] The respondent submitted that the pre-requisites for the Minister's exercise of his powers **under section 11A(1)(a) of the LRIDA** were satisfied at the time of the referral. Counsel relied on the case of **R v Industrial Disputes Tribunal, Alcan Jamaica Company et al,**[19] to support the argument that the jurisdiction of the Minister's referral

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[14] (1985) 22 JLR 65.

[15] [2005] UKPC 16.

[16] HCV 5486 of 2010.

[17] [2018] JMSC Civ 103.

[18] [2019] JMSC Civ 67.

[19] [1981] 18 JLR 293.

to IDT is solely based on whether an industrial dispute exists. Once satisfied that there is a dispute and upon the Minister's referral, it is within remit of the IDT to consider all aspects of the case so as to determine whether or not, the employee was consulted by the company.

[30] It is submitted that in keeping with **Village Resorts Limited v The Industrial Disputes Tribunal and Others**[20], where the term unjustifiable dismissal was deemed to mean a dismissal which is unjust and done in a manner that is not in keeping with principles of fairness and natural justice, the IDT would also have to consider in the circumstances surrounding the redundancy, whether the dismissal on this basis was justifiable. In that case, the appellant hotel sought to challenge the Full Court's decision upholding the IDT award that 225 workers of the hotel had been unjustifiably dismissed. Counsel for the hotel, contended that the Full Court misdirected itself in law by determining that the term 'unjustifiable' as used in section 12(5)(c) of the LRIDA is synonymous with the term 'unfair'.

[31] In examining the meaning of the word unjustifiable, Rattray P stated:

> *"The distinction between the words 'unlawful' and 'unjustifiable' is evident. The Act eschews the use of the word 'wrongful' with respect to dismissals. The usual common law term is therefore avoided…Despite the stirring submissions by counsel for the appellant, in my view the word used, 'unjustifiable' does not equate to either wrongful or unlawful, the well-known common law concepts which confer on the employer the right of summary dismissal. It equates in my view the word 'unfair', and I find support in the fact that the provisions of the Code are specifically mandated to be designated inter alia… 'to protect workers and employers against unfair Labour practices."*

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[20] [1998] 35 JLR 292.

[32] The Privy Council adopted this view in **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal**. At paragraph 7 the Board stated: "Their Lordships respectfully accept as correct the view of the Code and its function as expressed by Rattray P in the Village Resorts case and by Forte P in the present case."

[33] In the **Jamaica Flour Mills Case**, the Supreme Court considered the application for an order of certiorari to quash the IDT award, that three workers dismissed on the grounds of redundancy by the company was unjustifiable. The court stated:

> *"To say that because the employer has complied with section 5(2) of the Employment Termination and Redundancy Payments Act, there can be no issue of unfair dismissal or unjustifiable dismissal, is wholly misconceived. There may be grounds for Redundancy but the manner in which the Redundancy is effected may cause it to be classified as unfair or unjustifiable dismissal."*

[34] In the instant case, clause 17 of the contract of employment between the applicant and the Mr. Naraysingh explicitly excludes the right of redundancy payments under **section 5 of the Employment Termination and Redundancy Payments Act 1974** ('the ETRPA') and redundancy does not apply to the contract as alleged or at all. This clause under the heading *"Redundancy"* states:

> *"Renewal of this Contract while not automatic will be subject to the requirement for the continuation of service. You shall have no claim in respect of rights under Section 5 of the Employment (Termination and Redundancy Payment) Act and shall not be entitled to a redundancy payment under the said Act by virtue of the expiry of the term of the employment without it being renewed."*

[35] Therefore, the company cannot purport to exercise a power, where the employee could never make a claim or exercise a right. Accordingly, it is arguable that the applicant's premise that they conducted a redundancy exercise is otiose concerning Mr. Naraysingh.

[36] The applicant contends that the employee accepted the purported redundancy payments without demur and effectively waived his right to object having accepted the said payments without more. Counsel submitted that the Minister was not furnished with objective evidence or any evidence to demonstrate the alleged waiver by the employee. In absence of same, it was submitted that the court should note the **Spur Tree Spices** case, which also considered the **Jamaica Flour Mills** case.

[37] The applicant failed to furnish the Minister with any evidence of a waiver, the absence of which means that the complaint of a failure by the Minister to consider the issue of waiver fails. Therefore, an industrial dispute arises based on the manner in which the employment was terminated, the employee's non-acceptance of the termination, by his allegation that he was not consulted and by breaches of the Labour Relations Code.

[38] Paragraph 7 of Ms. Graham's affidavit sworn to and filed on October 21, 2022, shows that the applicant made the decision to make the employee redundant on June 16, 2020. It did not inform the Deputy Financial Secretary until December 1, 2020, after which approval was given by the Deputy Financial Secretary on December 3, 2020 for the redundancy. Despite all this, Mr. Naraysingh was not informed of the decision until December 16, 2020, and even at that time, no consultation occurred in keeping with the Labour Relations Code. Between the date of the decision to make Mr. Naraynsingh's position redundant and the date it was communicated to him, a period of six months elapsed.

[39] Despite the applicant's stance that it had 'fulsome discussions' on December 16 and 17, 2020, the evidence indicates the opposite, in that the employee was dismissed on December 16, 2020, with immediate effect and allegedly consulted on December 17, 2020. Paragraphs 11 and 19 of the Labour Relations Code provides for the right to consultation prior to the termination of an employee.

[40] Consultation is not a mere advising about a state of events, but rather mature discussions between employer and employee to reach acceptable solutions. An agreement may not be arrived at but there must be cooperation between the parties. Counsel relies on the case of **Fletcher v Minister of Town and Country Planning**[21] where Morris J stated:

> *"The word" consultation" is one that is in general use and that is well understood. No useful purpose would be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one."*

[41] Therefore, it is submitted that in allegedly making the position redundant and getting approval from the Ministry of Finance, before speaking with the employee, there is an arguable case that the dismissal is unfair, unreasonable, and unconscionable. It would be within the remit of the IDT to determine the instant matter and any permutations that may arise on the evidence to ultimately find whether or not the employee was unjustifiably dismissed.

[42] It is submitted that based on the foregoing, the Minister did not err, by referring the matter to the IDT and accordingly, the application for leave should be refused.

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[21] [1947] 2 All ER 496.

The Interested Party

[43] Counsel for the interested party submitted that the respondent was correct and acted within its statutory powers when the industrial dispute was referred to the IDT by way of letter dated July 22, 2022. The evidence shows that there was no consultation or due process, prior to the decision to terminate the worker's employment. Accordingly, he was unjustifiably dismissed by the applicant when he was handed a letter dated December 16, 2020 on December 16, 2020, which advised him that his post was eliminated "effective immediately". This was also a clear breach of the Labour Relations Code and the rules of natural justice.

[44] It is submitted that the procedural and substantive law related to the grant of leave for judicial review is governed by **Part 56 of the Civil Procedure Rules 2002** as amended ('the CPR') and also the common law.

[45] At common law, the authorities outline that for leave to be granted, an applicant must satisfy that he has *"an arguable case with a realistic prospect of success"*. To support this argument counsel relied on the cases of **Digicel (Jamaica) Limited v The Office of Utilities Regulation**[22]**, Clayton Powell v The Industrial Disputes Tribunal and another**[23] and **Regina v Industrial Disputes Tribunal (ex parte J. Wray and Nephew Limited**[24].

[46] In the case of **Regina v Industrial Disputes Tribunal**, Sykes J (as he then was) stated in respect of the threshold test that:

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[22] [2012] JMSC Civ 91

[23] [2014] JMSC Civ 196

[24]Claim No. 2009 HCV 04798

"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 the light of the now stated approach….(This) 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."

[47] The learned judge stated further at paragraph 60-63:

"…Is there an arguable case disclosed by the material which has a realistic prospect of success?"…Realistic prospect of success does not mean that the applicant has to establish a more than 50% chance of success.

[48] **Section 11A(1)(a) of the LRIDA**, provides the Minister with the discretionary power, once satisfied that there is an industrial dispute in the undertaking, to make a referral to the IDT. In the case of **United Management Services Limited v The Industrial Disputes Tribunal**[25], the court outlined in respect of the Minister's power of referral that:

"[115] By virtue of this amendment, if the Minister is satisfied that an industrial dispute exists in any undertaking, and one of the two conditions

[25] [2022] JMCA Civ 14

is fulfilled, he can exercise his power to refer the dispute to the Tribunal. That is:

(i) If he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available in the parties; or

(ii) If, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient to do so."

[49] It is submitted that in keeping with sections 11, 15 and 19 (a) and (b) of the Labour Relations Code, which stipulates that consultation with the worker must occur, the Minister has a right to refer an industrial dispute concerning a redundancy exercise to the IDT. This is also supported by the **Jamaica Infrastructure Operations** case. In any event, questions of when a consultation should begin or had begun and whether there had been adherence to the Labour Code, are questions for the IDT to determine. Counsel relies on the **Private Powers Operators Limited v Industrial Disputes Tribunal**[26] for this proposition.

[50] Ms. Graham deposes that the worker was prepared to accept the elimination of his role from the company and in her second affidavit, that there had been no protestations or any mention of any alleged concerns or objections by the worker. The law is clear on the question of waiver, that it is for the IDT to determine this issue. In the **United Management** case, the Court of Appeal had made it clear that the acceptance of payment *per se* is not sufficiently indicia of an intention not to dispute a dismissal, i.e., the acceptance of payment in lieu does not bar an aggrieved worker to challenge their dismissal on the basis that it is unfair or wrong.

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[26] [2021] JMCA Civ 18

[51] In the instant case, it is submitted that the question to be asked is whether the Minister had properly considered and determined that an industrial dispute exists in an undertaking on the basis that the worker had not abandoned his statutory rights on the basis of waiver. In other words, whether the worker's acceptance of the package given to him, was an unequivocal indication of his intention to waive his statutory rights.

[52] It was respectfully submitted that the court takes into account the following relevant circumstances:

a) there was no consultation and/or effective and/or proper consultation between the applicant and the worker.

b) the worker was handed the letter of termination on the day of the meeting held on December 16, 2020.

c) the letter of December 16, 2020, makes it clear that the worker's post was eliminated *"effective immediately"*.

d) the inference to be drawn is that the letter dated December 16, 2020, was prepared before the said meeting as it was *"handed"* to the worker during the said meeting.

e) the meeting of December 17, 2020, was of no moment as the decision to terminate the worker's employment had already been made and taken effect.

f) it is the worker's evidence that on December 16, 2020, and on December 17, 2020, he protested and/or challenged the decision to terminate hi[s] employment.

g) the worker's attorney challenged the decision to terminate by letter dated January 5, 2021.

[53] It is submitted that clause 17 of the contract excludes any claim for redundancy, under section 5 of the ETRPA, which denies the worker a benefit and in so doing, the applicant, should be estopped from relying on the said Act in order to deny Mr Naraynsingh, the opportunity to be heard before the IDT. The interested party submits that the application should accordingly be dismissed.

The leave stage

[54] **Rule 56.2(1) of the Civil Procedure Rules** (CPR) permits an application for judicial review by any person, group, or body, with sufficient interest in the subject matter. **Rule 56.3** directs that an applicant for judicial review should first seek leave to apply for judicial review.

[55] The burden of proof rests with the applicant to satisfy the court on a balance of probabilities that leave should be granted. At the leave stage, the court is concerned with whether the threshold is met. The court is not concerned with the merits of the claim and there is really no need to delve into the details of the case.

[56] The applicant is the person adversely affected by the decision it seeks leave to have reviewed. There is no issue of delay in this matter. Whether there exists any discretionary bar such as delay, or any alternative remedy has not been shown. This application has proceeded on the basis that the applicant has filed the claim in a timely manner and that it has no alternative remedies.

[57] The primary role of the court at this stage, is to ensure that actions which are frivolous and vexatious are sifted out and eliminated, so that leave is not granted where an action is without any arguable ground, having a realistic prospect of success. The seminal case of **Sharma v Brown-Antoine and Others**[27], a decision

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[27] (2006) 69 WIR 379.

of the Judicial Committee of the Privy Council, sets out the test for granting leave to apply for judicial review at paragraph [14] (4), where their Lordships said, in part, that the applicant must show a real prospect of success: Lords Bingham and Walker expounded at page 387 J of the judgment:

> *"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… 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. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:*
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> *'… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'*
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> *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 The Director of Public Prosecutions [2003] 4 LRC 712 at 733."*

[58] In **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**,[28] Mangatal J. in explaining the concept of 'arguable ground with a realistic prospect of success', had the following to say:

> *"It is to be noted that an arguable ground with a realistic prospect of success, is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*

Issues

[59] The court has to first decide whether there was an industrial dispute within the meaning of section 2(b) of the LRIDA, into which Mr. Naraynsingh falls as a non-unionized worker who is aggrieved about the termination of his contract with the applicant.

> *"industrial dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, and - ….*
>
> *(a) …*

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[28] I have considered the dicta of both Mangatal J, (as she then was) in the matter of ***Shirley Tyndall v Patrick Hylton et al*** 2010 HCV 00474 and Sykes, J in ***R.* v. *Industrial Disputes Tribunal, ex p. J. Wray & Nephew*** Limited 2009 HCV 04798 which are both very instructive and have aided greatly in arriving at this decision.

(b) in the case of workers who are not members of any trade union having bargaining rights, being a dispute relating wholly to one or more of the following:

(i)…

(ii) the termination or suspension of employment of any such worker; or

(iii)…"

[60] Section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act ("LRIDA") provides:

(1) "Notwithstanding the provisions of section 9,10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative –

(a) refer the dispute to the Tribunal for settlement –

(i) If he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties;"

Discussion

[61] The interested party submitted that he made an objection at the date of dismissal which he maintained, and which remained unresolved at the date of the referral. His attorney wrote letters to the Ministry dated January 27, 2021, and February 1, 2021. These letters raise the issues set out in the letters to the applicant regarding disciplinary charges and breaches of the Labour Relations Code. That the dispute alleged by the interested party existed on the date of termination and continues as all efforts to settle failed and was demonstrated before the date of the referral in the letters from Mr Eccleston.

[62] In examining the affidavits filed in support of the application for leave, this court is not conducting a hearing or deciding the substantive matter. The court in the exercise of its duty is deciding the application on the material placed before the court by the parties. There must be a sufficient factual foundation in order for the Minister to have lawfully exercised his discretion.

[63] The relevant date to determine whether there was an industrial dispute was at the date of dismissal.[29] This is a mixed question of fact and law based on the evidence.

[64] There are many factual issues which require resolution, such as:

(a) Whether there was any objection by Mr Naraynsingh at the date of termination as the evidence on this point is in conflict.

(b) The evidence of Ms Graham of a severance payment, whether there was one, in light of clause 17 of the contract.

(c) Whether there was a waiver by conduct on the part of Mr Naraynsingh.

(d) What transpired at the conciliation meetings.

(e) The applicant's specific denial that it had made a decision to make the employee redundant from as early as June 16, 2020, which was not communicated to him until December 16, 2020.

(f) Mr Naraynsingh's particular concern about a lack of consultation.

(g) The applicant argues that the Minister should have but did not consider the issue of waiver by conduct.

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[29] See R v Industrial Disputes Tribunal & Honourable Minister of Labour ex parte Wonards Radio Engineering (1985) 22 JLR 64

(h) The respondent argues that there was no evidence from the applicant regarding waiver.

[65] The material placed before the Minister concerned all of these factual issues. The interested party by January 2021 had retained counsel and made his concerns known to the applicant in a letter dated January 5, 2021. There was no issue of delay.

[66] In my view, the interested party in placing the issue before the Minister, exhibited letters written by counsel to the applicant. Those letters do not raise the issue of waiver which is being raised now.[30] The letters from his attorney in my view therefore do not bolster the evidence of Mr Naraynsingh on this issue. However, I do not resolve this issue by this comment as it is he who alleges who must prove.

[67] The applicant argues that any waiver cured potential breaches of the Labour Code in the process of termination but was there such a waiver? This is a question of fact which the Minister need only be satisfied has not been resolved through conciliation or other means.

[68] The evidence to be weighed as to whether there was conduct on the part of the employee which constituted a waiver is a question of fact and law given the circumstances of the particular case. The Privy Council in **Jamaica Flour Mills Limited v the Industrial Disputes Tribunal & Anor**,[31] in respect of waiver said that:

"Waiver, as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the

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[30] See KG7 dated January 5, 2021and KG9 dated January 21, 2021 to the company; MK9 dated January 27, 2021 & MK8 dated February 1, 2021 to the Ministry.

[31] [2005] UKPC 16.

alleged waiver. If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present. An objectively ascertained intention to waive is the first requirement."

[69] The Privy Council made clear that in order to establish the existence of a waiver, its ingredients must be made out, the party making the allegation must have believed that the employee's intention was to waive his statutory rights and altered its position accordingly. The evidence to establish the existence of a waiver is in conflict as both the interested party and the applicant have given evidence which needs to be weighed.

[70] The referral by the Minister concerns an issue of termination, the lawfulness of which falls to be determined at the date of termination looking back but not forward. The propriety of the termination has to be judged based on the actions taken by the company up to and on December 16, 2020.[32]

[71] Issues regarding consultation prior to termination pursuant to the Labour Relations Code; redundancy under **section 5(1) of the Employment Termination and Redundancy Payments Act** as the employee had not been continuously employed for 104 weeks and fairness in the sense used in **Village Resorts Limited v the Industrial Disputes Tribunal and Others**[33] are also live.

[72] I have considered all that has been filed and submitted, even those cases and points made which have not been cited. The central question as to whether there

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[32] Spur Tree Spices Jamaica Limited v The Minister of Labour and Social Security [2018] JMSC Civ 103.

[33] [1998] 35 JLR 292

was an industrial dispute within the meaning of section 2 of the LRIDA capable of being referred to the IDT is answered in the affirmative.

[73] On the totality of the circumstances in this case the Minister cannot be faulted for having made the referral based on the foregoing. The real prospect of success threshold has not been crossed on the evidence presented to the court.

[74] **Orders**:

(1) Leave is refused to the applicant to apply for certiorari to quash the respondent's referral to the Industrial Disputes Tribunal dated July 22, 2022 in respect of the dispute between the parties herein.

(2) No order as to costs.