

**EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. BVIHCV 2021/0293**

**IN THE MATTER OF THE LABOUR CODE 2010**

**AND**

**IN THE MATTER OF AN APPEAL OF THE DECISION OF THE LABOUR ARBITRATION TRIBUNAL  
Pursuant to Section 30 of the Labour Code 2010**

**BETWEEN:**

**BVI PORTS AUTHORITY**

**Appellant**

**AND**

**LENIUS LENDOR**

**Defendant**

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**2022: May 3<sup>rd</sup>**  
**2022: May 19<sup>th</sup>**  
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**JUDGMENT/ORDER**

**BEFORE:** The Honourable Justice Vicki Ann Ellis

**DATE:**

**ENTERED:**

**UPON** the Fixed Date Claim Form filed on 10<sup>th</sup> November 2021 coming on for hearing;

**AND UPON READING:** Notice of Preliminary Objection received on 22<sup>nd</sup> June 2021, Hearing Bundle filed on 10<sup>th</sup> January 2022, Hearing Bundle filed on 19<sup>th</sup> April 2022, Submissions of Appellant filed on 19<sup>th</sup> April 2022, and Submissions of Defendant for Hearing filed on 3<sup>rd</sup> May 2022; the Labour Arbitration Tribunal's Note of Decision dated 28<sup>th</sup> October 2021.

**AND UPON HEARING**, Mr. Terrence Neale and Ms. Nelcia St. Jean, Counsel for the Appellant and Mr. John Carrington QC, Counsel for the Defendant;

**AND UPON** the Court noting that:

- a. The Appellant is the BVI Ports Authority, a statutory corporation responsible for the management of all ports and harbours in the British Virgin Islands.
- b. The Defendant is a former Managing Director of the Appellant.
- c. The Defendant was employed by the Appellant as its Managing Director under a contract of employment dated 29<sup>th</sup> August 2018.
- d. Clause 8.1 of the contract specifically provided that after the probation period had ended each party may voluntarily terminate this Agreement upon the giving the other at least three (3) months' notice in writing (the "Agreement").
- e. By letter dated 3 June 2020, the Appellant purported to exercise its termination rights under Clause 8 of the Agreement by terminating the employment of the Defendant by the payment of 3 months' salary in lieu of notice.
- f. The Defendant contended that the termination was in breach of the terms of the Agreement and subsequently lodged a complaint ("**the Complaint**") with the Labour Commissioner ("**the Commissioner**") pursuant to section 26 of the Labour Code, 2010 ("**the Code**").
- g. There was however no settlement of the dispute and the matter was subsequently referred by the Commissioner to the Minister of Natural Resources and Labour who, on 26 May 2021, referred the matter to the Labour Arbitration Tribunal, the statutory body responsible for the settlement of labour disputes under the Code the ("**the Tribunal**"), pursuant to sections 27 and 28 of the Code.
- h. The Appellant contends that the Complaint was not properly referred to the Commissioner under section 26 of the Code. Even assuming that the Complaint was properly referred, the Appellant contends that there was a failure to comply with the mandatory time period for referring of disputes to the Minister of under section 26 (3) of the Code i.e. 30 days from the date of reference of the dispute to the Commissioner.
- i. The Appellant further contends that there was no investigation or attempt to reach a voluntary settlement of the matter by the Commissioner and/or Minister as required under section 26 (2) and section 27 of the Code.
- j. The Tribunal served the Appellant with a Case Management Notice on 28 May 2021 advising that a complaint of unfair dismissal had been lodged by the Defendant and that a case management hearing scheduled for 13 July 2020.

- k. The Appellant filed a preliminary objection on 22 June 2020 protesting the hearing of the dispute by the Tribunal on the ground that it had no jurisdiction to hear the dispute for the following reasons ("**the Objection**"):
  - a. The procedure under the Code for the referring of complaints to the Tribunal was not followed as there was no referral of a labor dispute to the Commissioner as required under section 26 of the Act.
- l. The Objection was opposed by the Defendant who filed an affidavit in opposition on the 6<sup>th</sup> day of July 2021.
- m. The Objection came on for hearing before the Tribunal on 28<sup>th</sup> October 2021.
- n. The Tribunal after hearing the Parties dismissed the Appellant's Objection and awarded costs on the Application in favour of the Defendant/Complainant in any event. The Tribunal fixed the substantive hearing of the Complaints for 17 November 2021 and also granted the Appellant leave to appeal the Order.

**AND UPON** the Appellant indicating that it is dissatisfied with the decision of the Tribunal and by the Fixed Date Claim Form herein has appealed pursuant to section 30 of the Code after it sought and obtained the leave of the Tribunal.

**AND UPON** the Court also noting that the Appellant seeks to challenge the following findings of law:

- a. That the Tribunal has jurisdiction to hear the Complaint notwithstanding its finding that the timeline for referring the Complaint to the Minister of Labour and Natural Resources under section 26.3 of the Code "has long since elapsed."
- b. That the correct procedure for the Appellant to address a breach of the mandatory procedure of sections 26, 27 and 28 of the Code by the Commissioner and/or Minister is to seek relief by means of judicial review and not by a jurisdictional challenge to the Tribunal.
- c. That the failure by the Commissioner and Minister to achieve a voluntary settlement of the dispute is not a jurisdictional bar to the Tribunal hearing the Complaint.
- d. That the Tribunal had the legal authority to impose a fine on the parties for failure to immediately respond to any enquiries from the Secretary to the Tribunal about compliance with all directions and orders of the Tribunal.

**AND UPON** the Court further noting that the Appellant advanced the following grounds of appeal:

- a. The Tribunal erred in law in holding that it had jurisdiction to hear the Complaint notwithstanding its finding that the timeline for referring the Complaint to the Minister of Labour and Natural

Resources under section 26.3 of the Code “has long since elapsed” as such a decision was contrary to established authorities which requires that where the exercise of statutory powers is subject to the existence of a fact or fulfilment of a condition, the exercise of those powers in the absence of that fact or without fulfilment of that condition would be without jurisdiction and ultra vires.

- b. The Tribunal erred in law in holding that it had no jurisdiction to address a breach of the mandatory procedure to refer complaints to the Minister under sections 26 and 27 of the Code and that the correct procedure to do so was by way of judicial review in the absence of any statutory provision or rules of procedure mandating that a party was compelled to adopt such a course of action.
- c. The Tribunal erred in law in holding that it had jurisdiction to hear the Complaint notwithstanding the failure by the Minister and Commissioner to achieve a voluntary settlement of the dispute as such a decision was contrary to established authorities which requires that where the exercise of statutory powers is subject to the existence of a fact or fulfillment of a condition, the exercise of those powers in the absence of that fact or without fulfillment of that condition would be without jurisdiction and ultra vires.
  - i. During the course the appeal, Counsel for the Appellant represented that to the extent that his Ground of Appeal takes issue with purported failures on the part of the Minister, the Appellant no longer wished to pursue this appeal on that basis.
- d. The Tribunal erred in law in holding that the Tribunal had the legal authority to impose a fine on the parties for failure to immediately respond to any enquiries from the secretary to the Tribunal about compliance with all directions and orders of the Tribunal. The Tribunal has no statutory powers to impose such a fine consequently it lacked jurisdiction and acted ultra vires in purporting to do so.
- e. The Tribunal improperly exercised its discretion to award costs against the Appellant on the Objection in circumstances where there were no exceptional reasons empowering it to do so as

required under section 30 (3) of the Code. The Tribunal although making a finding of exceptional reasons provided no explanation or basis of these exceptional reasons.

- f. The Tribunal improperly exercised its discretion to order the Appellant to prepare the trial bundle on the ground that the Appellant was in a better financial position than the Defendant to do so notwithstanding the fact that there was no evidence before the Tribunal of the financial position of the parties and the Defendant was represented by a law firm and Queen's Counsel. The exercise of the discretion was therefore arbitrary and improper and contrary to established practice that in the absence of any exceptional reasons it is the Appellant/Complainant that is responsible for the preparation of the trial bundle.

**AND UPON** the Defendant advancing by way of legal submissions, that the Appellant has incorrectly sought the remedy of certiorari to quash the decisions of the Tribunal on this Appeal

**AND UPON** the Court finding and determining that:

#### **Defendant's Preliminary Objection**

- [1] Counsel for the Defendant submitted that it is clearly wrong in law for the Appellant to seek prerogative remedies in the context of an appeal. He submitted that the writ of certiorari is an administrative order which under CPR Part 56.3 (1), a party may only claim where he has first sought and obtained the leave of the High Court. Counsel submitted that the Court has no jurisdiction to grant an administrative order except where leave was so given. According to Counsel this is sufficient to dispose of the appeal and be noted that the Defendant's submissions are made without prejudice to this preliminary submission.
- [2] Statutes may specifically provide for a particular order or decision of a public body to be challenged by way of an application to the High Court to quash the decision. This is in effect a statutory judicial review. The procedure steps, the scope of review and the powers of the court on application depend in part upon the precise wording of the particular statute.

[3] In the case at bar, the High Court's jurisdiction is set out at section 30 (1) which does not prescribe a statutory judicial review procedure but provides that:

30. (1) The findings of the Tribunal shall be binding upon the parties to the dispute and may only be appealed to the High Court on a point of law.

[4] Section 30(1) of the Code contemplates a statutory appeal procedure which is distinct from a statutory review which is concerned with legality while an appeal is concerned with the substantive merits. However, where, as in this case, an appellant raises questions which strictly are questions of legality such as an objection to the Tribunal's jurisdiction, (which is clearly permissible on appeal – see: **R v Inland Revenue Commissioners ex parte Preston [1985] AC 835 at 862**) the position may become somewhat murky.

[5] While prerogative remedies may not be the appropriate relief when invoking the Court's appellate as opposed to its supervisory jurisdiction, the Court has had regard to the provisions of CPR Part 60.8 (4) which provides as follows:

(4) The court may–

- (a) give any decision or make any order which ought to have been given or made by the tribunal or person whose decision is appealed; and
- (b) make such further or other order as the case requires; or
- (c) remit the matter with the opinion of the court for rehearing and determination by the tribunal or person.

This provision gives the Court the wide ambit or powers which may effectively quash any proceedings by declaring them a nullity and setting aside any consequential actions or orders made.

[6] In these premises, the Court is therefore not satisfied that the Appeal could be disposed of or dismissed solely on the basis that the incorrect remedy was sought. In the event that the Court found for the Appellant and determined that it lacked jurisdiction to deal with the Complaint, the Preliminary Order would in fact be a nullity which could be so declared and appropriate orders made.

**Ground (a) - Ground (c)**

- [7] During the course of the preliminary hearing before the Tribunal, the Appellant sought to challenge the jurisdiction of the Tribunal to hear the Complaint levied by the Respondent. Central to this challenge were the application of section 26 (3) and section 27 of the Code. These provisions regulate the procedure which ought to be followed where a complaint of unfair dismissal is referred to the Commissioner and then to the Minister.
- [8] Section 26 (1) provides that, any dispute or complaint arising out of any matter covered by the Code or any law relating to labour or generally out of the relationship between the employer and the employee may be referred by either party concerned or his or her representative to the Commissioner for settlement. Section 26 (2) provides that the Commissioner shall investigate the matter and make every effort to dispose of the issue raised in the reference by voluntary settlement in accordance with industrial relations practice, and list a number of action which he/she may mandate or take in furtherance of this obligation. Section 26 (3) then provides as follows:
- (3) Where the Commissioner fails to achieve a settlement within thirty days from the date of reference under subsection (2) or such longer period as the parties may agree, he or she shall transmit the matter, with a full written report on the matter, to the Minister.
- [9] Under section 27 (1), once in receipt of a report transmitted by the Commissioner under section 26 (3), the Minister has several options, he may himself or herself attempt to achieve a voluntary settlement of the issue, taking the necessary steps he or she deems appropriate; or refer the matter to a Board of Inquiry or the Tribunal within twenty-one days in accordance with the provisions of section 28; or permit the parties to submit their dispute to mediation.
- [10] At paragraph 38 of the Note of Decision, the Tribunal determined as follows:
- “The timeline for referring matters to the Minister under section 26 (3) of the Code, that time has long since elapsed. The Tribunal has already indicated in its decision in **Dawn Weekes v Commonwealth Trust** and that is not a jurisdictional bar. There is actually another remedy that is available to the parties in respect of the time lapse.”

It is common ground between the Parties that the Commissioner did not comply with this provisions of section 26 (3) and that in fact a period of 4 months lapsed before she actually referred the matter to the Minister.

[11] The Appellant contends that the Commissioner's failure to comply with the provisions of section 26 (3) meant that the timeline for referring the matter to the Minister had long since lapsed and that as such a decision was contrary to the authorities which have established that where the exercise of statutory powers is subject to the existence of a fact or fulfillment of a condition, the exercise of those powers in the absence of that fact or without fulfillment of that condition would be without jurisdiction and therefore ultra vires. Counsel relied on the following excerpt from **Halsbury's Laws of England** Forth Edition Vol. 1 (1) at paragraph 75:

"Where the exercise of statutory powers is subject to the existence of a fact or fulfilment of a condition, the exercise of those powers in the absence of that fact or without fulfilment of that condition will be without jurisdiction and ultra vires. A body may by taking a valid decision exhaust its powers such that any further decision on the same matter will be made without jurisdiction or vires."

[12] The Court takes no issue with this statement of legal principle. However, the Appellant has advanced no cogent argument which could persuade the Court that the failure of the Commissioner to refer the matter to the Minister in accordance with section 26 (3) of the Code is a fact or condition which could affect its jurisdiction to hear and determine the complaint and which ought to have been considered and acknowledged by the Tribunal. The Appellant's submission suggests a statutory scheme which affords a 3-tiered framework for the resolution of employment disputes. The first tier is at the level of the Commissioner. The second tier is at the ministerial level. The final tier is the LAT. The suggestion appears to be that where there are procedural failures in the lowest tier, then that would ultimately deprive the final tier of jurisdiction to entertain a complaint.

[13] This Court does not agree.

[14] While it is clear to this Court that the aim of the Virgin Islands Legislature was to establish a regime whereby labour disputes can be determined fairly and expeditiously the Code does not make the speed of transmission by the Commissioner to the Minister a condition precedent to the statutory jurisdiction of the Tribunal.

[15] Ultimately when courts are seeking to determine the consequences of non-compliance with an express procedural requirements laid down in legislation, they are theoretically at least undertaking an exercise in statutory construction; did the Legislature intend that a breach of a provision should

result in a decision being invalid and in this case would it deprive subsequent decision makers of their jurisdiction to carry out their statutory duty.

- [16] While the facts of the judgment are not on all fours with the case at bar, the following excerpt from the Privy Council judgment in **Nina T. H. Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286** illustrates the point. At pages 1296D – E of that judgment, the Court (per curiam) in **Nina T. H. Wang v Commissioner of Inland Revenue** put the position in the following way:

“When a question of an alleged failure to comply with a time provision arises it is simpler and better to avoid the two words “mandatory” and “directory” and to ask two questions: first, whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time; and secondly, if so, whether the legislature intended that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void.”

- [17] The Court concluded:

“It does not follow that his jurisdiction to make a determination disappears the moment a reasonable time has elapsed. If the court establishes the time by which a reasonable time is to be taken as having expired, which will depend on all the circumstances, including factors affecting not only the taxpayer but also the Inland Revenue, it would be surprising if the result was that the commissioner had jurisdiction to make the determination just before but not just after that time. Their Lordships do not consider that that is the effect of a failure to comply with the obligation to act within a reasonable time in the present legislation. Such a result would not only deprive the government of revenue, it would also be unfair to other taxpayers who need to shoulder the burden of government expenditure; the alternative result (that the commissioner continues to have jurisdiction) does not necessarily involve any real prejudice for the taxpayer in question by reason of the delay.

Their Lordships accordingly consider that in the context of this legislation a failure to act within a reasonable time (had it occurred) would not have deprived the commissioner of jurisdiction or made any determination by him null and void.”

- [18] This reflects the so called “modern approach” described in **De Smith on Judicial Review of Administrative Action**<sup>1</sup>:

“In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in hand. Although

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<sup>1</sup> 4<sup>th</sup> Edition at page 142

“nullification is the natural and usual consequence of disobedience”, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the Court is for any reason disinclined to interfere with the act or decision that is impugned.”

- [19] The case of **Nina T. H. Wang v Commissioner of Inland Revenue** concerned notices of objection which were given to the commissioner in February 1987 by a taxpayer as agent for a company for the years of assessment 1980 – 81 and 1981 – 82. In May 1988, the deputy commissioner made a determination confirming the assessments for the two years on the taxpayer as trustee for the company. Notice of appeal to the board of review was given on her behalf and shortly before the hearing was due to take place, so as to enable the board of review to consider all the assessments at the same time, the deputy commissioner in October 1990 made two determinations confirming the assessments made on the taxpayer as agent for the company and in her personal capacity. On an application by the taxpayer for an order of certiorari to quash those two determinations, the first instance judge held that the deputy commissioner had lacked jurisdiction to make them since he had not done so within a reasonable time as required by section 64 (2), and so the determinations were quashed.
- [20] In **Nina T. H. Wang v Commissioner of Inland Revenue** the delay in question was attributed to the inaction of the actual decision maker and yet the Board determined that nevertheless, he did not lack jurisdiction to decide the matter. In the Court’s judgment, the position must be even more certain where there was no delay registered by the Minister who referred the matter to the Tribunal or indeed by the Tribunal itself. In the Court’s judgment, invalidating the reference on the basis of failures committed by the Commissioner would be contrary to the intention of the Legislature and cause inconvenience and injustice to potential complainants.
- [21] It is not disputed that the matter was referred to the Tribunal by the appropriate agency and that the subject matter of the referral is one which the Tribunal would statutorily be empowered to consider and determine. The Court therefore finds that the Tribunal has the requisite jurisdiction to deal with this matter.

- [22] The Court further agrees that the Appellant would have had alternative remedies available to it to challenge the purported failures by the Commissioner. It elected not to do so. However, even if such a challenge had in fact been successfully levied, where the matter proceeded before the Tribunal, it could still be open to a court to find that those proceedings would nevertheless not be vitiated as a result of its findings. See: **R v Ofsted ex parte Shoesmith [2011] EWCA 642**

**Ground (b)**

- [23] Having considered the reasoning of the Tribunal, set out in its Note of the Decision, it is clear that the Tribunal did in fact consider and address the submissions made by Appellant in which it contended that the Tribunal erred in holding that it had no jurisdiction to address a breach of the mandatory procedure to refer complaint to the Minister under sections 26 and 27 of the Code and that in the absence of any statutory provisions or rules of procedure, the correct procedure to do so was by way of judicial review.

- [24] At paragraphs 36 and 39 and of the Note of Decision, the Tribunal noted the following:

“After considering the arguments presented, the Tribunal was prepared to give its decision based on the submissions presented to the Tribunal by the parties. The Chairperson went through the submissions and gave the Tribunal’s decision on each of those points.

The Tribunal does not believe that whether the Labour Commissioner or the Minister attempted to achieve a settlement is a jurisdictional bar as the Tribunal cannot look behind the face of the documents that have been presented to it and so the Tribunal finds that the ground must fail.”

- [25] It follows that while the Tribunal found that it had the jurisdiction to entertain the submission, it ultimately ruled against the Appellant and determined that in fact it had the jurisdiction to deal with the Complaint before it despite the findings made in respect of actions of the Commissioner and the Minister.

**Ground (d)**

- [26] This Ground is predicated on a prospective order made by the Tribunal in its Preliminary Order of the 29<sup>th</sup> October 2021 (“the Order”). That Order disposed of the Appellant’s preliminary objections

before the Tribunal but it also contained case management directions, no doubt aimed at advancing the appeal to a final hearing and determination consistent with the overriding objective prescribed at section 3 of the **Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (“the Rules”)**. Under that section, the Tribunal is mandated to deal with cases fairly and justly having regard to the interests of the persons concerned and the community as a whole and one of the main tenets of dealing with a case fairly and justly includes, so far as practicable, the avoidance of delay.

[27] At paragraph 16 of the Order, the Tribunal directed as follows:

“The parties shall immediately respond in writing to any enquires from the Secretary to the Tribunal about compliance with all directions and orders of this Tribunal, and if the Secretary to the Tribunal does not receive immediate response from the parties or any of them, the Tribunal may make appropriate orders as to costs against the party in default.”

[28] Counsel for the Appellant has described this amounts to an imposition of the fine which he contends that the Tribunal does not have the jurisdiction to levy. Having regard to the clear and wording of the Order this Court does not agree that this direction could or would amount to a fine. What is clear is that the Tribunal does have the jurisdiction under section 30 (3) of the Code to make as order regarding costs where there are *exceptional reasons* which the Tribunal considers appropriate.

[29] The term exceptional reasons have been statutorily defined under section 47 (3) of the Rules. It provides that “*exceptional reasons*” shall include any situation that arises outside the standard practice and procedure contemplated by the Act or these Rules such as:

- (a) where the Tribunal awards punitive damages;
- (b) where a question of equity under rule 3 (4) arises;
- (c) where the Tribunal is of the opinion that a party acted without good conscience under rule 3 (5);
- (d) where, in order to make a decision on the substantial merits of the case under rule 3 (6), the Tribunal had to address any jurisdictional and/or procedural issues, including exercising its powers under rules 5 (7) or 6;
- (e) where, in applying “good industrial relations” under rule 3 (7), the Tribunal is of the opinion that a party acted other than in accordance with good industrial relations; or

- (f) improper, unreasonable or negligent conduct by a legal practitioner which causes or might cause unacceptable loss, damage or injury, in which case the Tribunal may make a wasted costs order against the legal practitioner.

[30] It follows that the Tribunal's has a limited power to make an order as to costs where there are exceptional reasons within section 47 (3) of the Rules. The existence of exceptional reasons is clearly a precondition to the exercise of the Tribunal's power to make an order for costs and so unless the Tribunal finds that there are exceptional reasons it has no power to order costs.

[31] In assessing whether an order for costs would be appropriate, the Rules clearly contemplate that the Tribunal may consider how the Parties have conducted themselves in proceeding with the matter before the Tribunal and during the proceedings.

[32] Where a Tribunal has found that a party had conducted proceedings unreasonably, it may award costs which were attributable to such unreasonable conduct. However, the Tribunal must bear in mind that the power to award costs is framed in restricted terms and that costs orders are not the norm and ought not to be routinely made.

[33] In the South African case of **Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others (CCT 192/20) [2021] ZACC 26** (7 September 2021), the South African Constitutional Court very helpfully put the position in the following terms:

[30] In the labour context, the right of access to the statutory dispute resolution mechanisms created by the LRA guarantees that labour disputes, which are not infrequently fraught and contested, are resolved in peaceful, regulated and institutionalised fora. It ensures that parties do not resort to unlawful means of resolving disputes that should be ventilated in the specialised institutions envisaged by the LRA. Indeed, the priority given by the LRA to the dispute resolution mechanisms that it creates is no more evident than in its proscription of industrial action if the issue in dispute "is one that a party has the right to refer to arbitration or to the Labour Court". **When the very same institutions created by the LRA shut their doors to litigants by too keenly mulcting them in costs, they encourage recourse to industrial action and other proscribed means to air disputes that the LRA demarcates for resolution in those institutions.** Zondo JP, as he was then, on behalf of a unanimous Labour Appeal Court in *Dorkin*, explained the position thus:

**"In making decisions on costs orders this Court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the**

**other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to court.** That is a balance that is not always easy to strike but, if the court is to err, *it should err on the side of not discouraging parties to approach these courts with their disputes. In that way these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication.*" (Emphasis added.)

[31] Lest I be misunderstood, I must make this clear: the right to pursue industrial action, which is protected by both the LRA and section 23 of the Constitution, is indispensable to our democracy. It is "of both historical and contemporaneous significance"; it enables workers "to assert bargaining power in industrial relations"; and is a key "component of a successful bargaining system" of the nature contemplated in the Constitution and the LRA. Nothing said in this judgment must be taken as suggesting otherwise. **The crisp point I am making, rather, is this: when costs orders are too readily made against those who seek to vindicate their constitutionally entrenched labour rights in the specialist institutions created by the LRA, employers and employees alike may be left with no option but to resort to industrial action to remedy disputes that the LRA places beyond the purview of protected industrial action. That would cultivate unlawfulness and be inimical to the foundational value of the rule of law underpinning our democratic order.**

[32] It is therefore imperative for our democracy that the doors of labour dispute resolution institutions be kept wide open for litigants to air their grievances, so that unlawful industrial action, and all its potential consequences, is generally avoided. That accords with the scheme of the LRA, which contemplates industrial action only where no other avenues are readily available. The rule against automatic costs orders is an integral part of that scheme in that it ensures access to labour dispute resolution institutions and no doubt enlarges the width by which the doors of those institutions are kept open.

[33] **The principles set out above form the bedrock of how the question of costs should be understood in labour matters in the context of our democracy.** These principles find expression in section 162 of the LRA, [23] which rejects the ordinary rule of litigation that costs should follow the result in favour of an approach based on "law and fairness". When we pay heed to this fairness standard, we do so because we are obliged by the LRA and the above constitutional imperatives. **Hence, I repeat: when making costs orders in labour matters, courts are enjoined to apply the fairness standard in the LRA as a matter of constitutional and statutory obligation.** Emphasis mine

[34] This Court and the Tribunal should be guided by this dictum. The Code does not preclude the Tribunal from exercising its discretion to award costs where it deems appropriate, provided that this discretion is exercised judicially and only where exceptional circumstances are made out. When

departing from the general principle the Tribunal must give reasons for its decision and must *apply its mind to the dictates of the fairness standard, and the constitutional and statutory imperatives that underpin its jurisdiction.*

- [35] Where, as in this case, the Tribunal is concerned that the failure to respond or any consequential delays may amount to conduct which *arises outside the standard practice and procedure contemplated by the Code* doing so, the Tribunal would need to consider the alternative courses available to it under sections (7) and 6 of the Rules. The Tribunal should also consider that in assessing costs liability on the basis of conduct of the parties that the totality of the parties' conduct could best be evaluated in the round (when a complete picture can be gleaned) and having regard to all of the circumstances of the particular case including the obligation *"to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with."* The Tribunal has to have regard to the requirements of the law and fairness.

#### **Ground (e)**

- [36] The Court has had regard to paragraph 23 of the Note of Decision, where the Tribunal noted that Counsel for the complainant (the Defendant herein) had asked for \$6000.00 in costs. At paragraph 17, the Tribunal noted the following:

"The costs of and caused by the Notice of Preliminary Objection filed by the respondent shall be costs to the Complainant in any event."

- [37] The final recital of the Preliminary Order sets out the only indication of the Tribunal's reasoning on this issue. The Tribunal noted:

**"WHEREAS** the Tribunal also finds that there are exceptional circumstances to award costs in accordance of LPR 47 (3) (d) are the only instances where the Tribunal would have addressed the issue of costs."

- [38] Section 47 (1) and (3) (d) of the Rules provides that:

47. (1) The Tribunal may by order for exceptional reasons in respect of an application under rule 9 (1), or in respect of a referral by the Minister under rules 10, 11 or 12, award to any party such costs as it may consider reasonable and direct how and by whom they are to be paid.

(3) For the purpose of sub-rule (1), “exceptional reasons” shall include any situation that arises outside the standard practice and procedure contemplated by the Act or these Rules such as;

(d) where, in order to make a decision on the substantial merits of the case under rule 3 (6), the Tribunal had to address any jurisdictional and/or procedural issues, including exercising its powers under rules 5 (7) or 6;

[39] Again, the Tribunal has a limited discretion to award costs only in exceptional circumstances. It follows that in proceedings before the Tribunal, costs do not follow the event. This means that the default position regarding claims and litigation associated with employment (e.g., unfair dismissal and general protections claims) is that no claims for costs against the other party can be made and consequently each party will pay its own costs. It is only in exceptional cases that a departure from this rule will be applied. In doing so, there ought to be sufficient justifiable reasons advanced to show that indeed the requirements of the law and fairness were considered. The Court can do no better than to borrow generously from the words of Kampepe J in the case of **Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd** at paragraphs 30 – 33. (See: paragraph 24 above)

[40] However, where appropriate, costs are discretionary to the tribunal adjudicating a matter and like all exercises of discretion; a court exercising its discretion to award costs must do so judicially. This requires that a tribunal provide give reasons for doing so accounting for its departure from the ordinary rule that costs should not be ordered. The tribunal must also apply its mind to the dictates of the fairness statutory imperatives that underpin it. Where a tribunal fails to do so, it commits an error of law and thus misdirects itself.

[41] Counsel for the Appellant has submitted that the Tribunal did not provide any reasons for awarding of costs on the Application to the Complainant and certainly there appeared to be no exceptional reasons as required under section 30 (3) for it to do so. He submitted that the Tribunal appeared to not exercise any discretion in the matter but merely award costs based on the dismissal of the preliminary objection. However, Counsel appeared to have ignored the relevant recital in the Preliminary Order which indicated that the Tribunal was well aware of its limited jurisdiction to award costs and was also well aware of the precise circumstances which would amount to “*exceptional reasons*” under the Code.

[42] There can be no doubt that in the instant proceedings the Appellant raised jurisdictional issues in its Notice of Preliminary Objection which pursuant to section 13 of the Rules had to be determined before the merits of the Complaint could be entertained. It is also clear that these proceedings would fall within the remit of section 47 (d) of the Rules which defines such jurisdictional issues as “exceptional reasons”. Although, the Court has some concern that the Tribunal chose to reflect its reasoning in the form of a recital to its Order, it is apparent that the Tribunal considered the remit of its jurisdiction. There is therefore no error in principle by which this Court can determine that the Tribunal is plainly wrong.

[43] However, the Court has noted that Order makes no mention of the relevant quantum of costs. It goes without saying that under the Code, where exceptional reasons are made out and an award of costs is contemplated, the Tribunal is required to make such an award of costs as it considers fair and just having regard to the interests of the persons immediately concerned and the community as a whole. The Tribunal must act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.

[44] In quantifying costs pursuant to an order as to costs made by it, the Tribunal is not obligated to adhere to the practices and procedures of the High Court for the taxation of costs however, by way of guidance, this Court will note that costs must not only be reasonably incurred and reasonable in amount but should also be proportionate. What proportionality seeks to do is to impose a sensible correlation between the costs a party may recover and the claim. It acts as a counter-weight to disproportionately high costs. Costs are not awarded so as to ensure that the successful party is not out of pocket. To quantify costs on such a basis may result in an entirely unreasonable and disproportionate award as to costs and is not an approach that promotes the aims of the Code. The Tribunal should in any event provide thorough reasons to support its assessment.

#### **Ground (f)**

[45] At paragraph 9 of the Order, the Tribunal directed that the Appellant shall prepare and lodge at least four copies of the agreed trial bundle. The Respondent has objected to this order relying on what

Counsel described as “the time honoured established practice” which prescribes the responsibility for preparing the trial bundle should be that of the party who has brought the claim.

[46] At paragraphs 43 – 44 of its Note of the Decision, the Tribunal addressed this submission and concluded that, “*The Chairperson is of the view that the Code places the burden of proof on the employer in an unfair dismissal claim and the practice of the Tribunal is to require the respondent to prepare the trial bundles....The Tribunal exercised its discretion for the Respondent to prepare the bundle as there was no reason to deviate from the practice [which] had developed.*”

[47] It is clear that this direction amounts to a case management decision. It is well established that a case management decision will not be interfered with or reversed by appellate courts unless it was, as Lord Neuberger put it in **Global Torch Ltd v Apex Global Management Ltd (No. 2) [2014] UKSC 64** approving of the test in **Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743**, ‘*plainly wrong in the sense of being outside the generous ambit where reasonable decisions-makers may disagree*’. Even if there was a serious procedural irregularity, the Court of Appeal would only allow the appeal and order a retrial if satisfied that the decision of the judge was ‘unjust’ (see CPR 52.21(3)(b)) and this will ultimately depend on ‘*all the circumstances of the case*’ (per Clarke LJ in **Hayes v Transco Plc [2003] EWCA Civ 1261**).

[40] Appellate courts are therefore generally reluctant to second guess the tribunal’s discretionary case management decisions under the pretext of an arbitrariness analysis. However, it would nonetheless be appropriate for an appellate court to interfere with it, if it could be shown that irrelevant material was taken into account, relevant material was ignored (unless the appellate court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached.

[41] More recently, since the introduction of the CPR regime, the English Court of Appeal in **Royal & Sun Alliance v T & N Limited [2002] EWCA Civ 1964** has emphasised that the “*...Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account, and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.*”

[48] These principles have been applied by the Eastern Caribbean Supreme Court in **Michel Dufour and Others v Helenair Corporation Ltd. 52 WIR 188** where Sir Vincent Floissac, CJ stated:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong”.

- [49] The learned Chief Justice pointed out that the first condition was explained by Viscount Simon LC in **Charles Osenton & Co. v Johnston [1942] AC 130** who stated that an appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. The appellate tribunal should not reverse the order of the judge merely because that tribunal would have exercised the original discretion in a different way. However, if the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations, then the reversal of the order on appeal may be justified.
- [50] Counsel for the Appellant has submitted that the Tribunal improperly exercised its discretion on the ground that the Appellant was in better financial position than the Defendant to do so notwithstanding the fact that there was no evidence before the Tribunal of the financial position of the parties. He concluded that the decision was therefore arbitrary and improper and contrary to established practice. He further submitted that the practice of the Tribunal in ordering all respondents in all matters to prepare the trial bundle which purports to be based on its interpretation of the burden of proof under section 85 of the Code is flawed since such an order would require a case by case analysis of the circumstances of each party. He therefore contended that there was no proper exercise of the discretion disclosed.
- [51] In addressing this issue, the Chairperson appeared to rely on the provisions of section 85 of the Code which prescribes who would bear the burden of proof in any claim or complaint arising out of the dismissal of an employee. The Court is not satisfied that this would *without more* be a relevant consideration in determining such a case management decision bearing in mind that the proceedings would have been instigated by a complainant.

[52] However, the Tribunal's actual decision is set out at paragraph 44 and that clearly reflects that the Tribunal determined that there was no basis advanced which would deviate from its established practice. Rather than demonstrating a failure to exercise its discretion this clearly demonstrated a willingness to depart from established practice where an appropriately sound case had been made out.

[53] The sole matter advanced by the Appellant before the Tribunal is a purported practice established in the High Court which, even if this could be proved, would clearly not bind the Tribunal in any event. Clearly, the Tribunal considered the merits of this contention and found it wanting. The Tribunal was therefore entitled to conclude that there was no basis to deviate from its established practice. The Court is therefore not satisfied that the ultimate decision was outside the bounds of what a reasonable tribunal could have decided in the circumstances.

[54] For the avoidance of doubt, this Court is satisfied that the purported policy or practice to the extent that it is not enshrined in any regulations should not be applied in a blanket fashion. where necessary, the Tribunal may deviate from the established practice where it would be consistent with the overriding objective which prescribes that the Tribunal must deal with cases fairly and justly having regard to the interests of the persons concerned and the community as a whole. The Tribunal must act in accordance with equity, good conscience, and it clearly must consider the competing interests of parties.

[55] For the reasons set out herein the Court is satisfied that the Appeal should be dismissed with costs quantified on a prescribed basis in accordance with CPR Part 65.3 and 65.5 and 65.7.

[56] **IT IS HEREBY ORDERED THAT:**

1. The Appeal is dismissed.
2. The Defendant will have his prescribed costs of the Appeal.

**Vicki Ann Ellis  
High Court Judge**

**By the Court**

**Registrar**