In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 132

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
AND IN THE MATTER OF THE LABOUR RELATIONS ACT 1975 ("LRA")
AND IN THE MATTER OF THE DECISION OF THE HONOURABLE MINISTER OF LABOUR TO REFER PURPORTED LABOUR DISPUTES TO THE PERMANENT ARBITRATION TRIBUNAL PURSUANT TO SECTION 8 OF THE LRA

BETWEEN:

STEVEDORING SERVICES LIMITED

Applicant

-and-

THE HONOURABLE MINISTER OF LABOUR

Respondent

-and-

THE CHAIRMAN OF THE PERMANENT ARBITRATION TRIBUNAL

Interested Party

-and-

1. CHRIS FURBERT JNR.
2. THE BERMUDA INDUSTRIAL UNION

Affected Parties

JUDGMENT

Counsel for the Applicant: - Mr. Dante Williams, MDM Ltd
Counsel for the Respondent: - Mr. Eugene Johnson, Attorney General's Chambers
Counsel for the Affected Parties: - Mr. Marc Daniels, Marc Geoffrey

Cases Referred to in the Judgment:-
Burgess & Others v Stevedoring Services Limited [2002] UK PC 39
Regina v. Secretary of State for Health (Respondent) *ex parte* Quintavalle (on behalf of Pro-Life Alliance) (Applicant) [2002] UK HL 13
Cabell and Markham (1945) 148 F 2d 737
NLW Ltd. v. Woods [1979] 1 WLR 1294
British Broadcasting Company v. Hearn [1977] 1WLR 1004
Express Newspapers Ltd v. Shane [1980] AC 672.
Kentucky Fried Chicken (Bermuda) Ltd. v Minister of Economy, Trade and Industry [2013] Bda LR 19
Williams v Case Pack Company (Grenada) Limited [2022] UK PC 9
Dr Gina Tucker v The Public Service Commission and the Board of Education [2020] CA (Bda) 12 Civ
Director of Land Valuation v Banks [2013] Bda LR 47
R. v The Chief Constable of the Thames Valley Police ex parte Cotton [1990] IRLR 344
Braganza v BP Shipping Limited and another [2015] UKSC 17
Malloch v Aberdeen Corporation [1971] 1WLR 1579

DATES OF HEARING: - 21ST AND 22ND APRIL 2022
DATE OF JUDGMENT: - 3RD JUNE 2022

JUDGMENT OF ELKINSON, AJ

INTRODUCTION

1. This is an application for judicial review brought by the Applicant, Stevedoring Services Limited ("Stevedoring Services") to quash a Decision of the Minister of Labour made on 21st April 2021. The Minister, under section 8 of the Labour Relations Act 1975 ("the 1975

Act"), referred the dispute, characterized by Stevedoring Services as a purported labour dispute, to the Permanent Arbitration Tribunal. As a consequence of changes in the legislation this is now replaced by the Employment and Labour Tribunal. Stevedoring Services issued an *ex parte* Notice of Application for Leave to Apply for Judicial Review on 29th June 2021. The court granted leave on the papers on 19th October 2021 to issue an Originating Notice of Motion which was issued on 29th October 2021.

2. The underlying dispute arose from the dismissal of Chris Furbert jnr. from his employment with Stevedoring Services on 21st February 2020. Stevedoring Services say that the dispute is one which should have been dealt with under the Employment Act 2000 as a simple dispute between employer and employee. They say that the Minister should never have made the referral to the tribunal as if it were a labour dispute in an essential service. Stevedoring Services' say that this Decision was ultra vires, void and of no effect. They say that the Minister exceeded his statutory power and that the referral of the dispute under section 8 was illegal as the statutory conditions had not been met. They further sought that the Decision be quashed on the grounds of Wednesbury unreasonableness as there was a delay in excess of a year before the report to the Manager under section 7(1) of the 1975 Act was made. A further ground relied on is that the Minister had an improper purpose in making the referral.

THE PARTIES TO THE PROCEEDINGS

3. Stevedoring Services is a publicly held Bermuda company and a subsidiary of Polaris Holding Company Limited. Stevedoring Services' employees operate the docks of Bermuda, handling the cargo to and from ships. It is the sole provider of port and dock services at the City of Hamilton docks. Those port and dock services include activities which are defined as an essential service pursuant to the legislation.

4. The Respondent is described as the Minister of Labour but since 22nd February 2022 he heads the Ministry of Economy and Labour. At the time of the Decision which is under challenge, he was the person to whom a report of a dispute would be sent by the Manager of the Labour Relations Section under the 1975 Act. Under section 14(3) of the 1975 Act he had the discretion to refer a dispute in an essential service for settlement to the Permanent Arbitration Tribunal. All employment and labour legislation has since 1st June 2021 been consolidated and amended under the Trade Union and Labour Relations (Consolidation) Act 2021, to be referred to in this judgment as the 2021 Act, and all the separate provisions relating to employment and labour legislation, including the 1975 Act, have been repealed. The 2021 Act was enacted prior to the commencement of these proceedings.

5. The Interested Party to the proceedings is the nominated Chairman of the Permanent Arbitration Tribunal. Further to the 2021 Act, the Permanent Arbitration Tribunal no longer exists and there is now only one Tribunal to deal with all employment and labour matters. This is the Employment and Labour Relations Tribunal. Dr. Bradshaw, who had been appointed the Chairman of the Permanent Arbitration Tribunal by the Minister to settle the dispute and determine the exact terms of reference, did not participate in the proceedings. No criticism is made of that decision as he had taken no steps further to his appointment.

6. The First Affected Party, Chris Furbert jnr., is a former employee of Stevedoring Services and is a member of the Bermuda Industrial Union. It was Mr. Furbert jnr.'s complaint concerning his summary dismissal by Stevedoring Services on 6th February 2020, alleged to be for gross misconduct and insubordination, which gave rise to a report of a labour dispute under the 1975 Act in October 2020. As an employee of Stevedoring Services, he was a member of the Portworkers' Division of the Bermuda Industrial Union.

7. The Second Affected Party is the Bermuda Industrial Union, headed by Chris Furbert snr. Members of the Bermuda Industrial Union who are full-time employees of Stevedoring Services working under contracts of employment with Stevedoring Services at the City of Hamilton docks are members of the Portworkers' Division. There is a Collective Bargaining Agreement in force which governs the terms of working on the docks.

THE REGULATORY FRAMEWORK

8. The Applicant framed its application under the 1975 Act, both at the time of seeking leave to issue Judicial Review and at the time when it issued and served its Originating Notice of Motion. The Applicant pursued its application as if all matters before the court were to be dealt with under that legislation. The Decision of the Minister to make the referral was on 21st April 2021 and was made pursuant to section 8 of the 1975 Act. However, on 1st June 2021, the Trade Union and Labour Relations (Consolidation) Act became operative. As of that date, the 1975 Act was repealed. It was some four weeks later, the 29th June 2021, that the Applicant issued its application for judicial review.

9. The 2021 Act provided at Section 102(1)(c) that

> *"any actions or proceedings which commenced under the Trade Union Act 1965, Labour Relations Act 1975 or Labour Disputes Act 1992 but have not concluded, shall be deemed to have commenced under this Act;"*

10. This Judicial Review application is deemed to have commenced under the 2021 Act but a question to be considered is whether the phrase *"actions or proceedings"* could also be applicable to the initiation of the labour dispute and the reporting to the Manager or the Labour Relations Officer.

11. Further issues which arise are, having regard to the operation date of the 2021 Act and the transitional provisions, not least that the 1975 Act is repealed and the provisions of

the 2021 are stated to have effect in their place, how does this affect the analysis of what the dispute actually is. The questions which need to answered from that analysis will then be:-

(a) is it a labour dispute?
(b) is it a labour dispute in an essential service?
(c) what is the form of the reporting of the labour dispute to the Manager?
(d) what is the discretion of the Minister to refer the matter to a Tribunal?

12. The judgment considers the aspects of the 1975 Act which are applicable to steps which had been taken in the labour dispute process and the point in time at which the new provisions of the 2021 Act govern any aspects of the dispute given the language of section 102(1)(c) set out above.

13. In the course of this judgment, there is by necessity reference to the repealed 1975 Act and due regard to any amendment introduced by the 2021 Act; what affect such amendments did have, if any, on the process which was followed in the underlying dispute concerning the dismissal of Mr. Furbert jnr. from his employment at Stevedoring Services.

THE 2021 ACT

14. The recital to the 2021 Act sets out as follows:-

> *"Whereas it is expedient to consolidate the Trade Union Act 1965, the Labour Relations Act 1975 and the Labour Disputes Act 1992 into a single Act; to establish an Employment and Labour Code in respect of trade union, labour relations and employment related matters and to provide for general reforms in respect of such matters; to provide for civil penalties to be imposed for contraventions under the Employment and Labour Code; to provide for a single*

tribunal called the Employment and Labour Relations Tribunal to hear matters referred to it under the Employment and Labour Code; and to provide for related matters;"

15. It is described as a consolidation act but it also provides for some general reforms which are in fact amendments to certain provisions of the repealed acts. The fact that there are amendments is borne out by Section 100 of the 2021 Act which provides as follows:-

"100 (1) The statutory provisions set out in Column One of Schedule 8 are amended as set out in Column Two thereof.

(2) The following enactments are repealed –

(a) The Trade Union Act 1965;

(b) The Labour Relations Act 1975; and

(c) The Labour Disputes Act 1992. …"

16. From a reading of the 2021 Act some of the plainly obvious consequences are:-

(a) There is no longer a Permanent Arbitration Tribunal. Section 44 of the 2021 Act establishes the Employment and Labour Relations Tribunal to have jurisdiction to hear and determine, including by way of arbitration, complaints, labour disputes, differences, conflicts and other matters referred to it under the Employment and Labour Code. This expression is defined in the amended Employment Act 2000, the last of its amendments at the time of writing this Judgment being 1st June 2021. Section 3A of the Employment Act 2000 provides that it and the 2021 Act and any subordinate legislation made under those statutes constitutes the Employment and Labour Code of Bermuda. The only tribunal which can hear a labour dispute is the Employment and Labour Relations Tribunal.

(b) Section 67 of the 2021 Act now requires the labour dispute, whether existing or apprehended, when it is reported, to be reported in writing to the Manager. Under

section 3 of the repealed 1975 Act, there was no requirement for the report to be in writing. However, section 7, which dealt with the form of a report of a labour dispute in essential services, required it to be in writing and what it should specify. Whilst the form of report under section 67 of the 2021 Act appears to be similar to the form of report required under section 7 of the 1975 Act, there is one distinction which has some relevance for these proceedings. The old report required under section 7(d):-

> *"where there is a relevant procedure agreement in being, what action has been taken for dealing with the dispute under the agreement."*

17. The new provision, section 67 (2) (d) states:-

> *"where there is a collective agreement in being, what action has been taken for dealing with the dispute under that agreement."*

18. These reports, whether under the new or repealed legislation, are sent to the Manager.

(c) Section 69(3) of the 2021 Act provides:-

> *"If there is in the relevant trade or industry **any collective agreement** for the settlement by negotiation, conciliation or arbitration of a labor dispute, the Manager shall not, except with the consent of all the parties to the dispute, endeavor to conciliate the parties unless and until there has been a failure to obtain a settlement by means of those arrangements."*

19. This is in contrast to the language of the repealed section 3(4) of the 1975 Act:-

> *"if there is existing in any trade or industry **any relevant procedure agreement** for the settlement by negotiation, conciliation or arbitration of a*

labour dispute in such trade or industry, the Minister shall not, except with the consent of all parties to the dispute, and unless and until there has been a failure to obtain a settlement by means of those arrangements, refer any such labour dispute for settlement in accordance with the foregoing provisions of this section."

20. The key change brought about by section 69(3) relates to the elimination of the words '*relevant procedure agreement'* and replacement with '*collective agreement'*. This is considered further in the judgment. The issue which arose in this application was whether the *'relevant procedure agreement'* provided for resolution of a dispute where the employee is terminated.

21. When it comes to the power of the Minister to refer a dispute to the tribunal, Section 70 replaces the repealed sections 3(3) and 3(4) and section 8. The most significant change relates to labour disputes. Under the 1975 Act, it was put to the court that the referral required the consent of all the parties to the dispute. Under the 2021 Act, this is clearly not the case. In an essential service, under section 70 of the 2021 Act, once the Minister receives a report from the Manager that the Manager was unable to effect a settlement or is of the opinion that the dispute is not amenable to resolution by conciliation, the Minister shall, after taking any steps which seem to him to promote a settlement, refer the matter to the tribunal.

22. However, this duty to refer is subject to section 70(3) of the 2021 Act which contains the same condition as the repealed Section 8 which is that, in the case of a labour dispute involving an essential service, the Minister shall refer the dispute to a tribunal before the expiration of any notice of lock-out, strike or regular industrial action short of a strike given to the Manager in accordance with Section 80(2)(e). The issue of the requirement of such a notice being in existence as a precondition to the Minister's referral is dealt with later in this judgment as the Applicant relies on the absence of such a notice as determinative of the issue of the Minister referring the dispute to the tribunal in their favour.

23. The starting point for any analysis as to the effect of the 2021 Act is a review of the facts to determine if there was a labour dispute and whether it was in an essential service or not, appreciating that this issue can engage a determination of how much of the 2021 Act is to be utilized in the analysis of whether the Minister validly referred the dispute to a tribunal. The analysis of it has also proved useful as an aid to construction of some of the terms of the 1975 Act.

THE EVIDENCE

24. The evidence comprised four affidavits, two from Mr. Warren Jones on behalf of Stevedoring Services (dated 29th June 2021 and 21st March 2022), an affidavit of Mr. Chris Furbert jnr. and an affidavit of Mr. Chris Furbert snr. in his capacity of President of the Bermuda Industrial Union, both dated 17th December 2021. From the factual evidence, there is a determination to be made of whether it is an employment dispute under the Employment Act 2000 or a labour dispute under the 1975 Act. If under the 1975 Act, which was the legislative provision the Manager, the Inspector and the Minister were acting under, whether it was in an essential service or not, and whether there was threatened industrial action such that the provisions concerning a dispute in an essential service were engaged. The Minister, the Respondent to these proceedings, did not file any evidence.

First Affidavit of Warren Jones

25. This affidavit supported the Application for Leave to Issue Judicial Review proceedings as required under Order 53 Rule 3 of the Rules of the Supreme Court 1985. The Order requires that the application be made ex parte to a Judge by filing in the Registry of the Supreme Court a Notice in Form No. 86A setting out the details as required by Order 53 Rule 3(2)(a). Order 53 Rule 3(2)(b) requires an affidavit verifying the facts relied on. This was that affidavit. Mr. Jones also set out the relief which was being sought. The background to the

application starts in July 2019 with a disagreement between Mr. Furbert jnr. and a fellow employee, Mr. Joshua Butler which resulted in Mr. Butler making a complaint to the Bermuda Police Service. Mr. Furbert jnr. was subsequently charged in the Magistrates' Court with assault to which he pleaded not guilty. He was granted bail with a condition that there was to be no contact between himself and Mr. Butler.

26. Both of these men continued in employment at the docks working together. On 10th December 2019, on Mr. Jones' version of events, there was friction within the Portworkers' Division which he described as concerning the Bermuda Industrial Union and Mr. Butler. This resulted in nine employees leaving the place of work. His evidence was that a significant cause of the friction was the unresolved issues concerning Mr. Furbert jnr. and Mr. Butler.

27. The following day Mr. Jones and members of the management of Stevedoring Services went to the offices of the Bermuda Industrial Union for a meeting with Portworkers' Division members and senior executives of the Bermuda Industrial Union. It was determined to form a Joint Consultation Committee to see if Mr. Furbert jnr. and Mr. Butler would attend mediation under the Employment Assistance Program to determine if they could work together. If there was a positive outcome, then Mr. Furbert jnr. and Mr. Butler would meet with the Joint Consultation Committee for the committee to determine if they both could return to the workplace.

28. Mr. Furbert jnr. and Mr. Butler were suspended with pay until the attempts to mediate were concluded. When they were informed of this proposal, Mr. Furbert jnr. raised the point that his bail condition included a prohibition of contact with Mr. Butler and that this would prohibit him from attending mediation. Mr. Jones took the view that since they had been working together without incident and that Mr. Furbert jnr. had never raised the bail condition previously, he determined that it was best that they go to the Employment Assistance Program mediation. In the context of the bail condition which

Mr Furbert jnr. was legally obliged to comply with, this does appear to be a rather cavalier approach by the employer to the issue. Mr. Furbert jnr. maintained his position and did not attend the mediation. Despite follow-up to have him attend, this did not happen and he remained on suspension from Stevedoring Services.

29. On 6th February 2020 Mr. Furbert jnr. was at the docks and Mr. Jones describes this as being in violation of his suspension. He had him escorted off the premises by security. In the course of that, Mr. Furbert jnr. came into the management offices where Mr. Jones spoke with him and told him that he was in breach of his suspension and that he was to immediately leave the premises. Mr. Jones says Mr. Furbert jnr., in the course of leaving, threatened him. He considered the threat to be an act of gross misconduct and insubordination and terminated him immediately. He also filed a police complaint.

30. The Joint Consultation Committee met again on 12th February 2020 where Mr. Jones informed Mr. Furbert snr. of the police complaint which he had made. As he was informed by Mr. Furbert snr., at the time, the Bermuda Industrial Union leaves a police complaint to run its course before proceeding with the grievance process under the Collective Bargaining Agreement.

31. On 4th June 2020, the Director of Public Prosecutions informed Mr. Jones that there would be no charges laid against Mr. Furbert jnr. Mr. Jones identifies that date as a time in which Complainant could have taken steps to file a grievance under the Collective Bargaining Agreement but didn't. It was further suggested that this was the date from which the three month period, now six months under the 1st June amendment to section 36(1) of the Employment Act 2000, in which a complaint under the Employment Act 2000 could have been brought.

32. On 19th August 2020, Mr. Furbert jnr. had his attorney, Mr. Marc Daniels, send a letter before action claiming that he was wrongfully terminated and sought reinstatement.

Stevedoring Services instructed their attorneys to respond reiterating Stevedoring Services' decision that Mr. Furbert jnr. had been terminated for gross misconduct and insubordination.

33. Stevedoring Services received notification on 7th December 2020 from the Ministry of Labour, Labour Relations Section, of a dispute under the 1975 Act, case No. 36426. That letter set out that it was alleged that Stevedoring Services had breached the Collective Bargaining Agreement by the unfair termination of the Complainant, that the dispute had been reported to the Labour Relations Section and it was a dispute as between the Bermuda Industrial Union on behalf of Chris Furbert jnr., referred to as the Complainant, and Stevedoring Services and that the report was pursuant to section 3(1) of the 1975 Act.

34. This letter, together with subsequent letters, were a major focal point in the hearing of the Judicial Review as one of the principle planks of the Applicant's submissions was that there was no labour dispute; that effectively what existed was an employment dispute which should have been initiated under the Employment Act 2000. Their position was that Mr. Furbert jnr. had failed to make a claim under that act and that by December 2020 he was out of time to do so. Their position was that the advancement of the dispute by the Manager, the Labour Relations Officer and the Minister under the labour legislation was being done for an improper purpose. The improper purpose they said was to assist Chris Furbert jnr. to evade the consequences of his failure to bring his claim in the time provided for by the Employment Act 2000.

35. The additional ground in support of the judicial review application was that there was a grievance procedure set out in the Collective Bargaining Agreement at Article 27 and that Mr. Furbert jnr. had failed to comply with it. Stevedoring Services further contested that there was a labour dispute and Mr. Jones said that Mr. Furbert jnr. was dismissed for serious misconduct, that he had first raised the dispute with the Labour Relations' office nine months after his termination and that there had been an inordinate and unreasonable delay by the Bermuda Industrial Union in lodging the labour dispute on

behalf of the Complainant. Further, Stevedoring Services had not agreed to bypass steps 1 to 4 of the Grievance Procedure.

36. Mr. Oscar Lightbourne had been nominated in the letter of 7th December 2020 as the officer authorized by the Manager of the Labour Relations Section pursuant to Section 3(2) of the 1975 Act to attempt to effect a settlement of the dispute. Correspondence was exchanged between the Labour Relations Office and MDM and issues were raised by them as to the role which Mr. Lightbourne was in, whether it was as an Inspector under the Employment Act 2000 or under the 1975 Act; whether it was an unfair dismissal claim or a labour dispute. MDM rejected Mr. Lightbourne as having any authority to conciliate a meeting under the Employment Act 2000 and sought a copy of the written report of the labour dispute.

37. On 22nd February 2021, Stevedoring Services received a copy of the report and they raised concerns as to its timing; that they had understood from what they had been told that this report had been made either *"within ten days of 28th October 2020"* or on 27th January 2021. They expressed concern that the report only existed as of 22nd February 2021 despite what they had been told previously. They complained that this was taking place a year after Mr. Furbert jnr.'s termination. Stevedoring Services' attorneys maintained the position which they had previously set out in correspondence not least that the grievance procedure under the Collective Bargaining Agreement had not been followed. In any event, on 17th March 2021, Mr. Lightbourne responded stating that pursuant to section 3(2) of the 1975 Act he was prepared to endeavor to conciliate the parties with a view to settlement of the dispute.

38. This generated further correspondence from MDM, repeating their previous points and making clear that their client was not in agreement to attend a conciliation meeting with Mr. Furbert jnr. and that they were aware that the consequence of this was that the procedure in sections 3(3) and (4) of the 1975 Act would become operable with the matter then being referred to the Minister. They said the Minister could not refer the matter for

settlement and that his powers were limited given the terms of Section 3(4) of the 1975 Act and they made it clear that if any steps were taken by the Minister to bypass the statutory limits on his authority, they were instructed to proceed to issue Judicial Review proceedings.

39. Mr. Jones in his Affidavit then proceeds to recite how Stevedoring Services received a copy of the Minister's Decision of 21st April 2021 setting out in a letter that he had referred the matter to the Permanent Arbitration Tribunal and that he had appointed Dr. Michael Bradshaw as Chairman of the Permanent Arbitration Tribunal. They were also informed that the Minister had additionally sent letters to Mr. Eugene Creighton and Ms. Keren Lomas to serve as members with Dr. Bradshaw on the tribunal. They received direct notification in the same terms on 23rd April 2021.

40. On 7th May 2021, MDM wrote to the Minister at length setting out their view of the history of the matter concerning the *'purported dispute'* and to request that he provide reasons for the referral. This was on the basis, they said, that not least it was 15 months after the Complainant was terminated summarily for gross misconduct and insubordination. The Minister's response on 13th May 2021 set out his position; that he may by order in writing refer any labour dispute in an essential service for settlement to the tribunal at any time after the dispute has been reported. He said this is what he did and that as the tribunal was seized of the matter any issues which MDM had noted could be raised before the tribunal.

41. Stevedoring Services rely in this Judicial Review on the failure of the Minister to reply with reasons explaining why he had made the referral as support for their position that the Minister had acted improperly. This failure, they submitted, evidenced that he had an improper purpose in making the referral to the Permanent Arbitration Tribunal. The submission to the Court on behalf of Stevedoring Services was that the failure by the Minister to explain why he was making this referral so late in the day was because he was aware that Mr. Furbert jnr. was out of time to make any claim under the Employment

Act 2000. Not only was his failure to give reasons supportive of their position that there was improper purpose on the part of the Minister but by extension it demonstrated that there was improper purpose on the part of the Labour Relations Officer. They said that this was an attempt to convert Mr. Furbert jnr.'s unfair dismissal complaint into a labour dispute to cure his own failure to bring his claim in time under the Employment Act 2000.

42. MDM's response by letter on 24th May 2021 to the Minister was to analyze section 8 of the 1975 Act and point out to the Minister that such a power could only be invoked *"… before the expiration of any Notice of a lock-out, strike or irregular industrial action short of a strike given in accordance with Section 9."* They pointed out that in this instance there had been no such notice given at all. The Minister responded on 27th May 2021 that the matter had been referred to the Permanent Arbitration Tribunal and that he had no jurisdiction to rescind the referral and repeated again that any concerns about the referral should be raised with the Permanent Arbitration Tribunal.

The Evidence of Chris Furbert jnr.

43. Mr. Furbert Jnr. in his Affidavit dated 17th December 2021 set out how he had started work with Stevedoring Services on 21st April 2014 as a Holdman although he was also trained as a Relief Topload Operator. At the time he was terminated, Mr. Jones had asked another employee to give him his award for his "*outstanding*" service. Mr. Furbert jnr.'s evidence focused on the delay in the matter being referred to the Permanent Arbitration Tribunal by setting out a very detailed chronology in respect of the incident with Mr. Butler. In brief, at the time of the incident with Mr. Butler on the 30th June 2019, he was on unpaid leave and was attending a boxing match in Dockyard. It was at that time that he got involved in his own boxing match with Mr. Butler and they were both injured. Mr. Butler made complaint to the police. Mr. Furbert jnr. had his lawyer write to Mr. Butler with what he described as a cease-and-desist letter. He informed Stevedoring Services of the incident. He returned to work on the 17th September 2019 and he wanted

to discuss the issues concerning Mr. Butler with management but that this never happened. Working with Mr. Butler created a tense situation. On 25th October 2019 Mr. Furbert received a Summons to attend Magistrates' Court to answer the charge of assault as filed by Mr. Butler. He was granted bail on the condition that he have no contact whatsoever with Mr. Butler. He made efforts to have a meeting to discuss his bail conditions with Stevedoring Services and he describes their response to that as being uninterested. He viewed Mr. Butler as being an unstable individual and that his view was shared by other staff members; that the way Mr. Butler operated machinery and the manner in which he handled positioning of incoming ships could place other workers in danger. Further, Mr. Butler had made unflattering remarks about the Bermuda Industrial Union and its President (Mr. Furbert jnr.'s father). Fourteen members and Mr. Furbert jnr. signed a petition on 4th November 2019 which was submitted to management stating that they no longer wished to work with Mr. Butler, a primary reason being health and safety concerns. He considered that management failed to address any of these concerns. Mr. Furbert jnr. considered that Mr. Butler's behavior to him in September and October 2019 was abusive and that he had reported three incidents of concern to management in that period but that they did nothing to address these incidents. The day after the petition was submitted, he received a letter from Stevedoring Services stating that in the event of any instance of violence, harassment or bullying between himself and Mr. Butler, he may be terminated. He described the environment at Stevedoring Services as being tense and on 10th December 2019, there was discussion amongst staff that management had no regard to their feelings and was unwilling to take any action to properly address their concerns. The consensus was that it was necessary to down tools and walk off the job to get management's attention and force their hand to meet with them. On 11th December 2019, Mr. Furbert and some of his fellow workers were barred from entering the jobsite which resulted in emergency meetings between Stevedoring Services and the Bermuda Industrial Union.

44. The evidence of Mr. Furbert jnr. recites the meetings which Mr. Jones referred to in his Affidavit and in relation to the issue of the condition of his bail, Mr. Furbert jnr. sets out that Mr. Jones had no interest with that and he simply responded that it was determined that he proceed to Employment Assistance Program meetings with Mr. Butler. Even when he was on his paid leave of absence in December 2019, Mr. Furbert jnr. set out that he went to meet the Human Resource Manager of Stevedoring Services in order to provide her with copies of medical documents concerning a bike accident which he had which would entitle him to qualify for medical leave. He believed no one objected to his presence on the docks and he recited the various people who saw him and no one told him not to be on the premises or that he had to leave the premises due to being on paid leave of absence.

45. Mr. Furbert jnr. did go to the Employment Assistance Program venue and he explained to the officer there about his condition of bail and asked could there be another way to facilitate the mediation which would not jeopardize his bail. Mr. Furbert jnr.'s evidence was that he engaged with the Employment Assistance Program officer. She told him that she did not know how to resolve the issue. She told him that Mr. Butler had attended two meetings. He had only attended one because he had been in a bike accident on 10th December 2019. He was offered to have a second meeting but that the office would be closed for the holidays and so his second meeting would be in the New Year. He was shocked and puzzled when he learnt that Mr. Jones had threatened at a Special Joint Consultation Committee meeting to terminate his employment on 24th December 2019. There was a Stevedoring Services' Christmas party that evening which Mr. Furbert jnr. subsequently learnt Mr. Butler had attended and that Mr. Jones was aware of Mr. Butler's presence but had decided not to ask him to leave.

46. Mr. Furbert jnr. explained that he had attended at the docks when on paid leave of absence at least on two occasions in January 2020. It was on 6th February 2020 when he went to collect an item from his locker and complete a vacation request form that he

engaged with Mr. Jones. Mr. Jones understood from the conversation he had that he was being threatened by Mr. Furbert jnr. Mr. Furbert jnr. denied he was threatening but said that he was trying to explain that he understood that there was a double standard of treatment towards him and Mr. Butler. He said that he did not act with hostility towards Mr. Jones. Mr. Jones made a criminal complaint. The Director of Public Prosecutions subsequently determined that Mr. Jones' evidence did not show that an offence had been committed and so no charges were brought.

47. Mr. Furbert jnr. relies on what Mr. Furbert snr. sets out in his Affidavit says took place in respect of the inability of the Union to act on a grievance while there are criminal charges pending. Confirmation that no charge would be brought was provided on 4th June 2020. In an exchange of emails with Mr. Christ Furbert snr. on 18th and 19th June 2020, Mr. Jones confirmed that he would not be rehiring Mr. Furbert jnr. Subsequent to that date, starting in September 2020, the BIU continued to pursue the matter of Mr. Furbert jnr.'s dismissal.

The Evidence of Chris Furbert snr.

48. Mr. Furbert snr. is the President of the Bermuda Industrial Union and his affidavit evidence was supportive of the Minister of Labour's Decision to refer the dispute to the Permanent Arbitration Tribunal. He said that the Bermuda Industrial Union had from 7th February to 28th October 2020 attempted on numerous occasions to try and arrange for Chris Furbert jnr. to be reinstated with Stevedoring Services. He adopted what was set out in Chris Furbert jnr.'s affidavit as regards the timeline, particular in respect of explaining that there had been no inordinate and unreasonable delay.

49. He informed the court that the usual practice in respect of a labour dispute with the Union is that in most cases it is usually the employer who makes the complaint of a labour dispute. However, it would be unlikely that the employer would file any *"notice*

of a lock-out, strike or irregular industrial action short of a strike." He explained that if the parties cannot mediate or conciliate, the Labour Relations Officer will then notify the Minister who may in turn refer the labour dispute to a Permanent Arbitration Tribunal. He referred to Section 8 of the 1975 Act and to another dispute with Stevedoring Services and the Bermuda Industrial Union in 2020 which had been referred to a Permanent Arbitration Tribunal. In that instance there had been no notice of a lock-out, strike or irregular industrial action short of a strike. He noted that it had been the same attorneys represented Stevedoring Services and they did not raise the point which they do now, presumably because they had been the ones who had filed the labour dispute and relied upon the referral to the Permanent Arbitration Tribunal.

Further evidence of Warren Jones of 21st March 2022

50. Mr. Jones responded to the affidavits filed by Mr. Furbert snr. and Mr. Furbert jnr. Of particular relevance is the evidence concerning the Grievance Procedure under the Collective Bargaining Agreement and that as of 12th February 2020 he was advising the members of the Portworkers' Division about the four steps under Article 27 of the Collective Bargaining Agreement and that a Grievance had not been filed within the time frame allotted by that procedure. He disagreed that where there was a criminal complaint the matter was put into abeyance until the complaint was resolved. His view was that the Bermuda Industrial Union refused to utilize the Grievance Procedure properly. He was conscious that there may have been industrial action following the termination of Chris Furbert jnr. Much of this responsive affidavit was focused on the Collective Bargaining Agreement and the failure of the Union to utilize the Grievance Procedure. In his view, the parties should have complied with the rules and procedures which they had agreed as an effective way of resolving disputes and that neither Chris Furbert jnr., the Portworkers' Division nor the Union complied with the Collective Bargaining Agreement. That, he said, was unfortunate.

IS THERE A LABOUR DISPUTE AND IS IT IN AN ESSENTIAL SERVICE?

51. The Applicant's position is that primarily this is a dispute under the Employment Act 2000 and under section 36 an employee has the right to make a complaint to an Inspector, in writing, that his employer has within the preceding 3 months failed to comply with a provision of the act. The Applicant disagrees that there was no valid reason for termination (section 18). The Applicant says that the Complainant was too late to make a complaint under the Employment Act 2000. This is why, they say, subsequent actions of the Manager, the Inspector and the Minister were with an improper purpose. It was to try and give the Complainant a remedy under the now in-force 2021 Act.

52. It is clear to me, and I so find, that the dispute was one which existed between the Portworkers' Division of the Bermuda Industrial Union and Stevedoring Services in respect of the dismissal of Chris Furbert jnr. and that it was permissible and appropriate that the dispute be dealt with under the 1975 Act. The background to the dispute is contained in the evidence put before the court. The court makes no attempt to determine who is right or who is wrong in the underlying disagreement between the Applicant and Chris Furbert jnr. It is a dispute which involves an employee and an employer and could, if one did not have regard to all the evidence, be viewed as a matter which did not engage the 2021 Act. However I am satisfied that the evidence shows that this was more than a simple employment dispute. The Applicant itself was concerned that the dispute would lead to industrial action. Mr. Jones is quite explicit about that in his second affidavit at paragraph 9(iii). He acknowledged that there was a notice drafted but not issued to all staff dated 10th February 2020, the Monday after the termination of Chris Furbert jnr., informing all staff that if they called in sick that they would need a doctor's certificate. Anyone who refused to work would not be paid and be asked to leave the dock. Similarly, if any employee attended a meeting they would not be paid for any period that a ship was not worked or for the period in which the employee was not at work. Mr. Jones had informed Chris Furbert snr. that he had prepared this memo in contemplation

of industrial action as *"…there was uncertainty what would happen on Monday, February 10th, due to Chris Furbert Jr.'s termination. The [memo of 10th February] was prepared in the event that if something happened, it would be circulated."*

53. The Applicant, as an alternative submission to its argument that it was a dispute which should only have been dealt with under the Employment Act 2000, submitted that it was a *"purported labour dispute"* and relied on the interpretation provision in section 1(1) of the 1975 Act:-

> *"labour dispute" means a dispute between-*
>
> *(a) an employer, or trade union on his behalf, and one or more workmen, or trade union on his or their behalf; or*
>
> *(b) workmen, or a trade union on their behalf, and workmen, or a trade union on their behalf,*
>
> *where the dispute relates wholly or mainly to one or more of the following -*
>
> *(i) terms and conditions of employment, or the physical conditions in which workmen are required to work; or*
>
> *(ii) engagement or non-engagement, or termination or suspension of employment, of one or more workmen; or*
>
> *(iii) allocation of work as between workmen or groups of workmen; or*
>
> *(iv) a procedure agreement;*
>
> *but shall not include any matter which was the subject of a complaint which has been settled by an inspector or determined by the Employment Tribunal under the Employment Act 2000."*

54. Labour dispute is also a defined term in the 2021 Act and it is set out in very similar terms to the 1975 Act as follows:-

> Section 66 (1) states:-
>
> ***Meaning of "labour dispute"***

(1) this Act, unless the context otherwise requires, "labour dispute" means a dispute relating wholly or mainly to the matters set out in subsection (2) between -

(a) an employer, or trade union on his behalf, and one or more workers, or trade union on his or their behalf; or

(b) workers, or a trade union on their behalf, and workers, or a trade union on their behalf.

(2) The matters referred to in subsection (1) are—

(a) *terms and conditions of employment, or the conditions (whether physical or otherwise) in which workers are required to work;*

(b) *engagement or non-engagement of one or more persons, or termination or suspension of employment of one or more workers;*

(c) *allocation of work as between workers or groups of workers;*

(d) *a collective agreement;*

(e) *a contravention under this Part or Part 3 for which a civil penalty may be imposed (whether or not subparagraphs (a) to (d) apply); or*

(f) *such other matter as the Minister may declare by order published in the Gazette, but shall not include any matter which was the subject of a complaint which has been settled by an inspector or otherwise determined under Part V of the Employment Act 2000.*

(3) An order made under subsection (2) (f) shall be subject to the negative resolution procedure.

(4) In this section—

"inspector" has the meaning given in section 3 of the Employment Act 2000;
"trade union" means a trade union registered under this Act.

55. I find on the facts that there was a labour dispute within the definition of the legislation, whether it would have been the 1975 or 2021 Act. It is quite clear that there was, and it remains the situation, a dispute between a worker and a union on his behalf, wholly or partially relating to the termination of employment of a worker. I find that this dispute arose on 6th February 2020 and has never been resolved. At the time the dispute arose,

the legislation which governs the analysis of it is the 1975 Act although as is apparent from the terms of the 2021 Act, it would make no difference if it applied at the time.

56. Applicant's counsel in their written submissions and during oral submissions accepted that port and dock services provided by their client are essential services under the 1975 Act. Counsel for the Respondent referred the court to the decision of the Privy Council in **Burgess & Others v Stevedoring Services Limited [2002] UK PC 39** where it was held that the description set out in the First Schedule of the Labour Relations Act 1975 of "*Essential Services*," being port and dock services, whilst said to include pilotage, tug and line boat operation (not connected with cruise ships) did not narrow the ordinary meaning of port and dock services. This expression used in the First Schedule at paragraph 6 of the 1975 Act could overlap with paragraph 11 of the same Schedule but paragraph 11 was in some respects wider. In any event, the paragraphs were not mutually exclusive which resulted in a very wide meaning.

57. Paragraph 11 stated "*the loading and unloading of mail, medical supplies, food stuff, cattle and chicken feed and all supplies needed to maintain any essential service specified herein and the transport of such goods to their proper destination*." In the Privy Council, it was argued on behalf of the Applicants, Derek Burgess et al, that there was a much narrower meaning and that loading and unloading fell under a different heading and were essential services only when they involved the goods mentioned in paragraph 11. This was roundly rejected by the Privy Council.

58. The 2021 Act at section 75 defines an essential service as being that specified in Schedule 3 to the 2021 Act. The position therefore remains, as regards Stevedoring Services, the same as it did under the 1975 Act. As an aside, there are only two notable differences in the definition of an essential service under the repealed 1975 Act and the presently in-force 2021 Act. The first difference is at paragraph 13 of Schedule 3. What used to be

described as *"telephone, telegraph and overseas telecommunication"* is now described as *"telecommunications and internet services"* and paragraph 18 of the same schedule adds *"prisons and corrections"* as an essential service.

59. Under Section 80(8) of the 2021 Act there is refinement over the wording of the 1975 Act as regards definition of a labour dispute in an essential service. The 2021 Act requires that it be a dispute between employers and workers, or between workers and workers engaged in the provision of that service:-

> *"For the purposes of this section a labour dispute shall not be regarded as being within an essential service unless it is* ***a dispute between employers and workers, or between workers and workers engaged in the provision of that service****."*

60. I am satisfied that, either under the definition in the 1975 Act or under the 2021 Act, there was a labour dispute in an essential service. There existed a dispute between the employer and one of the workmen. Further there was a dispute between the employer and a trade union on behalf of that workman and that it related wholly or mainly to the termination of a workman's employment. As recited above, Mr. Jones believed that this termination could have caused industrial action at the Hamilton Docks and that he anticipated this happening. Stevedoring Services is the provider of an essential service and I find that there was as at 6th February 2021 a labour dispute in an essential service and that it remains unresolved.

WHEN CAN THE MINISTER MAKE A REFERRAL

61. Having found on the evidence that in February 2020 there was a labour dispute in an essential service, the question then arises whether the procedures which were followed

were appropriate such that the Minister could properly have made the referral to a tribunal.

62. Mr. Jones in his evidence, as I have recited at paragraph 44, said that he was conscious that there may have been industrial action following the termination of Mr. Furbert jnr. He further took the position that there had been a failure to utilize the Grievance Procedure, that this was a condition precedent to the Manager being able to receive a report of a labour dispute. Mr. Johnson on behalf of the Minister strongly disagreed that there had been anything wrong with the form of the report to the Manager and submitted that the condition precedent which the Applicant sought to raise as an obstruction to the Minister being able to refer had been incorrectly analyzed by the Applicant. He further submitted that this was a judicial review of the Minister's actions, not that of the Manager.

63. The Applicant submitted that the Complainant had not fulfilled his obligations under Section 7 of the 1975 Act:-

"Form of report of labour dispute in essential services

7 A report of a labour dispute in an essential service made to the Manager under section 3(1) shall be made in writing and shall specify-

(a) *the parties to the dispute;*

(b) *the person or persons on behalf of whom the report is made;*

(c) *every issue relevant to the dispute; and*

(d) *where there is a relevant procedure agreement in being, what action has been taken for dealing with the dispute under the agreement."*

64. On behalf of Applicant it was submitted there had been a failure to provide any notice <u>in writing</u> at the time the dispute arose and that there was no written report until a year after the termination and that at the time when the Labour Relations Officer (Manager) had served a notice seeking to effect settlement of the labour dispute, there had been no

written report of a labour dispute as required under section 7 or at all. It was submitted that there was no legitimate *'labour dispute'* and so the Minister had no discretion to make a reference to the tribunal.

65. Mr. Johnson on behalf of the Minister accepted that there had to be a legitimate labour dispute and that the test was an objective one, citing the cases of **NLW Ltd. v. Woods [1979] 1 WLR 1294, British Broadcasting Company v. Hearn [1977] 1WLR 1004 and Express Newspapers Ltd v. Shane [1980] AC 672.** However, the Minister had a wide discretion and that there can be no interference by the courts unless there was an exceptional reason – **Kentucky Fried Chicken (Bermuda) Ltd. v Minister of Economy, Trade and Industry [2013] Bda LR 19.**

66. I am satisfied, as I have already found, that there was a labour dispute in an essential service as, referencing the language of the statute, not only was there a dispute between the employer and one of the workmen but there was a dispute between the employer and a trade union on behalf of that workman and that it related wholly or mainly to the termination of a workman's employment.

67. I cannot accept that the timing of the written report required under the section, in circumstances when it came after the Manager started considering the labour dispute, is necessarily a bar to the Minister referring a dispute in an essential service for resolution by a tribunal. There is no time limitation for the report to be made. Section 7, which deals with the form of the report of a labour dispute in essential services, says that *"A report of a labour dispute in an essential service made to the Manager under section 3(1) shall be in writing …"* There was a report made in writing on 22nd February 2021. Prior to that, in October 2021, the Labour Relations Officer had been made aware of it.

68. The evidence is that there were letters written by the Manger setting out his intention to effect a settlement of the dispute by mediation/conciliation further to Section 3(2) of the

1975 Act and at one stage he referred to the Employment Act 2000. I do not accept that had any negative effect on the overall process. Errors can occur in procedure but there was no evidence of any detriment to the Applicant arising from this erroneous reference in the letter to the Employment Act. Mr. Johnson referred the court to the case of **R. v The Chief Constable of the Thames Valley Police ex parte Cotton [1990] IRLR 344** for support of the proposition that there must be some prejudice or unfairness shown. Lord Justice Bingham cited Lord Wilberforce in **Malloch v Aberdeen Corporation [1971] 1WLR 1579** at 1595 where he said;

> *"A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."*

69. However, I find the language of Section 3(2) is wide enough such that if the written report was made subsequent to the Manager's endeavours to conciliate, it would not debar the Manager from reporting such dispute to the Minister.

Section 3 of the 1975 Act states:-

> 3 *(1) Any labour dispute, whether existing or apprehended, may be reported to the Manager by a person authorized by any of the parties to the dispute.*
>
> *(2) The Manager shall consider any labour dispute so reported and he, or any public officer authorized by him to do so, shall endeavour to conciliate the parties and to effect a settlement by all means at his disposal.*
>
> *(3) Where the Manager, or any officer authorized by him in that behalf, is unable to effect a settlement of a labour dispute the Manager shall report such dispute to the Minister who may, subject to this section, if he thinks fit and if both parties to the dispute consent, refer the dispute for settlement to-*
>
> *(a)…*
>
> *(b)…*
>
> *(c)…*
>
> *(d) the Permanent Arbitration Tribunal*
>
> *(4) If there is existing in any trade or industry any relevant procedure agreement for the settlement by negotiation, conciliation or arbitration of a labour dispute in*

such trade or industry, the Minister shall not, except with the consent of all the parties to the dispute, and unless and until there has been a failure to obtain a settlement by means of those arrangements, refer any such labour dispute for settlement in accordance with the foregoing provisions of this section.

70. There was some controversy as to whether the report under section 3(3) existed. Counsel for the Minister confirmed to the court that the Manager of the Labour Relations Section, Ms. Gabrielle Cann, had made a report. He then produced a copy to the court on the second day of the hearing. The report was completed as an internal memorandum and was dated 25th March 2021. It set out that the Labour Relations Officer, Mr Oscar Lightbourne, was made aware of a labour dispute in October 2020 and that *"the labour dispute was formally reported to the Manager of the Labour Relations Section for conciliation and settlement in accordance with sections 3 and 7 of the Labour Relations Act 1975 Act by counsel for Mr. Furbert on 22 February 2021."* The report is set out at paragraph 99 of the judgment.

71. Section 3(1) contemplates that it <u>may</u> be reported. It is not mandatory. I reject the submission that the late written reporting of the dispute was such as to prevent the Manager from reporting the dispute to the Minister. He was always in a position in that report to be able to state as he did and as required by section 3(3) that he was *"… unable to effect a settlement of a labour dispute."*

<u>THE GRIEVANCE PROCEDURE</u>

72. Mr. Williams' further submission was, if the court did not accept the primary submissions that there was not a labour dispute and that there had not been a proper report to the Manager (such that the Manager was unable in turn to report the dispute to the Minister), that in any event section 3(4) of the 1975 Act established a condition precedent to the Minister referring the matter to a tribunal. This condition precedent was that there was a dispute mechanism in place which had to be utilized first. Only if

there had been a failure to reach settlement using the *relevant procedure agreement* and further that both parties consented to the referral, could the matter be referred to the tribunal.

73. The words *relevant procedure agreement* have since the enactment of the 2021 Act been replaced with the words *collective agreement*. Mr. Johnson on behalf of the Minister submitted that the Grievance Procedure set out in Article 27 of the Collective Bargaining Agreement did not amount to a means for a terminated employee to resolve the dispute. Only an employee who remains in employment and has a grievance could utilize it. He submitted in the case of a terminated employee there is no *relevant procedure agreement*, existing either independently or in the collective bargaining agreement. This, he said, is because on the termination of an employee there is no longer an entitlement to the benefit of the provisions. Mr. Williams on behalf of the Applicant said that this is not how such matters were usually dealt with, particularly where that person was represented by the Bermuda Industrial Union; those parties would normally utilize the Grievance Procedure.

74. The argument of Stevedoring Services was that Article 27 of the Collective Bargaining Agreement was the *relevant procedure agreement.* Article 27 "*Grievance Procedure*" states:-

> *"1. Should there be any Employee, covered by the Agreement, who shall wish to settle any grievance, dispute or misunderstanding, every effort will be made by both parties to settle such grievances promptly, in the manner outlined below:*
>
> *Step 1 – Any Employee and/or the Shop Steward, having a grievance, shall first present it to the on-duty supervisor designated by the Employer, within one day, and the matter shall be dealt with by the end of the working day.*

Step 2 – If there is no settlement in Step 1, the aggrieved Employee and the Shop Steward shall take up the matter with the Dock Operations Manager and the matter shall be dealt with within 2 working days.

Step 3 – If there is no settlement in Step 2, the Employee and his top Union Officials shall present the complaint or grievance, in writing to Senior Management and the matter shall be dealt with within 7 days.

Step 4 – Should the settlement not be reached at Step 3, the written complaint or grievance shall be referred to the Government Labour Relations Officer within 10 days for him to take such steps as seen (sic) to him to be expedient under the Labour Relations Act, 1975.

2. *It is further agreed that every effort will be made to work until all steps of the Grievance Procedure are exhausted.*

3. *Should a settlement not be reached at Step 4, either party to this Agreement, or both, shall have the right to refer such matter in dispute to the Labour Relations Officer, to take such steps as seem to him expedient under the Labour Relations Act 1975.*

4. *Any step in a Grievance Procedure may be by-passed if mutually agreed by both parties to this Agreement."*

75. The evidence as regards to what actually happened in this matter in respect of the utilization of the Grievance Procedure is unsatisfactory. The Applicant says that the procedure was not followed but was available. The evidence of Mr. Jones on this was that Mr. Berkeley, the Dock Operations Manager, was contacted by Mr. Furbert jnr. to discuss his termination and whilst Mr. Berkeley initially agreed to meet with the Divisional Officers of the Portworkers' Division, he subsequently cancelled the meeting.

76. The Special Joint Consultation Committee Meeting Minutes, exhibited to the First Affidavit of Mr. Jones, record a meeting which took place on 12th February 2019 between Stevedoring Services' Management and the Portworkers' Division Members. It is stated that Mr. Berkeley had agreed to meet with the Portworkers' Division representatives but that he later called them back saying that the matter had become a criminal complaint and that the meeting could not happen.

77. There was dialogue between the parties at the time and Mr. Jones took the position that the matter should be handled at Step 3 of the Grievance Procedure or beyond to which Mr. Furbert snr. had responded that both parties had to agree to by-pass any steps in the Collective Bargaining Agreement. I would note here that he is correct – Article 27(4) makes this clear. He pointed out that Step 2 required that the matter *'shall be dealt with within two working days.'* From the evidence it does not appear that any point was taken at that time about this. The point which was raised at the hearing by the Minister and the Affected Parties was that the Grievance Procedure was not applicable in circumstances where the employee had been terminated. The issue was whether Article 27 is wide enough to cover the situation where the employee is no longer an employee in circumstances where the language in Article 27 specifically refers to an employee bringing the grievance.

78. In the 1975 Act, 'a procedure agreement' was defined in section 1(2). There is no equivalent definition in the 2021 Act as that term is now eliminated by the words 'collective agreement'. Section 1(2) stated:-

> *(2) For the purposes of this Act, a procedure agreement means so much of a collective agreement as relates to any of the following matters-*
> *(a) machinery for consultation with regard to, or for the settlement by negotiation, conciliation, or arbitration of terms and conditions of employment; or*
> *(b) machinery for consultation with regard to, or for the settlement by negotiation, conciliation, or arbitration of, other questions arising between an employer or organization of employers and a trade union of workmen; or*
> *(c) negotiating rights; or*
> *(d) facilities for officials of trade unions; or*

(e) procedures relating to dismissal; or
(f) procedures relating to matters of discipline other than dismissal; or
(g) procedures relating to grievances of individual workmen.

79. There was no clear evidence before the court about the practice and custom in respect of Article 27 when dealing with a termination. However, from the limited evidence which was placed before the court, in particular the Notes of the Joint Consultation Committee, there was no proper compliance with Article 27. Not least, Mr. Berkeley on behalf of Stevedoring Services' Management, considered that the criminal complaint added some complexity to the matter and thought that the meeting envisaged under Article 27 with the Bermuda Industrial Union should be postponed because of it. It was certainly the view of Mr. Furbert snr. that once there was a criminal complaint then the BIU leaves it to runs its course.

80. In the circumstances of the limited evidence which was before the court, I am prepared to hold that the parties effectively waived Article 27. If I were to make any finding on whether a terminated employee has the right to utilize the grievance procedure, I would consider that it could not be utilized by any person who was no longer an employee. The definition of the procedure agreement suggests it was established for consultation about terms of employment and the resolution of "questions", not disputes. It appears to the court that it deals with establishing procedures for, amongst other things, dismissal. It does not by its definition establish a mechanism for resolution of an actual dispute concerning dismissal.

ABSENCE OF STRIKE NOTICE

81. The issue of whether the Minister could have referred any labour dispute in an essential service for settlement, in circumstances where there was no notice of lock-out, strike or irregular industrial action short of a strike given in accordance with section 9, was the subject of what appeared to be a concession made by the Attorney General's Chambers

on behalf of the Minister that the Minister had got it wrong. Mr. Johnson submitted that there was no threat of industrial action in an essential service at the time of the referral and that this was arguably what the section required. With respect to Mr. Johnson, I do not agree with that and I cannot accept the concession which he appeared to have made. On the court's analysis of the facts within the context of the legislation at that time, there clearly was a labour dispute in an essential service. It remains unresolved and there is no particular language which counsel pointed to which limited the time in which the Minister could make a referral.

82. In relation the language of section 8(1) and to the fact that in this dispute there was never any notice given of an intended lock-out strike or irregular industrial action, the position of the Applicant was that the absence of such a notice had the effect that the Minister could not make a referral.

83. The court finds some assistance in determining the correct position by a consideration of section 9 of the 1975 Act. Section 9 sets out a restriction on strikes in an essential service and makes a lock-out, strike or any irregular industrial action short of a strike in an essential service unlawful save that the section then sets out all the provisos which would make it lawful. The section provides for criminal penalties for those persons who take part in such action.

84. What is of particular interest in section 9 is that it also specifies when a notice of an intended lock-out, strike or irregular industrial action short of a strike is not valid (section 9(2)(a)(b) and (c)). The reason that the Court references this is that there may be circumstances where there was a notice given which is invalid. In such a case, the interpretation of section 8 would be that the Minister would be unable to make any reference of the labour dispute in an essential service for settlement to the tribunal. The court's view is that because a valid notice of an intended lock-out, strike or irregular industrial action short of a strike has to contain in it at least 21 days' notice prior to such action, that the intention of the proviso in section 8(1) is that the Minister has 21 days in

which to make the referral, if any, **only if** there is a valid notice of the industrial action. If there is no valid notice or no notice at all, the Minister can do it at any time. What he cannot do where a valid notice of lock-out, strike or irregular industrial action short of a strike has been given in accordance with section 9 is to make a referral after the expiration of the notice.

85. Stevedoring Services made the argument that the Minister was unable to refer any labour dispute in an essential service for settlement under Section 8 because there was no notice of a lock-out, strike or irregular industrial action short of a strike given in accordance with Section 9. Mr. Johnson on behalf of the Minister appeared to concede this. In his written submissions, he stated as follows:-

> *"First, a concession. The Minister should not have used section 8 of the 1975 Act to make the referral. There was no threat of industrial action when the Referral was made. But this is arguably what was required by the section. Section 8(1) of the 1975 Act was capable of being read as not demanding notice of a "lock-out, strike or irregular industrial action short of a strike given in accordance with section 9." It could be interpreted as only imposing a time limit on the exercise of the Minister's discretion to refer a labour dispute in any essential service to the old tribunal. But when section 8(2) is considered, the stronger interpretation may be the one proposed by Stevedoring."*

86. Mr. Johnson went on to support his position by explaining that section 8(2) of the 1975 Act states that labour disputes in an essential service *"shall be dealt with in accordance with the procedures provide for in Part 2"* until the Minister makes an order pursuant to section 8(1). The details of those procedures are found in section 3. That section allowed the Minister to refer a dispute to the old tribunal (section 3(3) (d), but only *"if both parties to the dispute consent."* When a person's consent is required in this form of legislation, it cannot be overwritten, no matter the consequences – **Williams v Case Pack Company**

(Grenada) Limited [2022] UK PC 9. If section 8(2) did not exist, he submitted, there would be no other power, apart from section 8(1), to refer disputes in essential services to any tribunal to be settled. In those circumstances, an interpretation restricting the Minister's powers would not be warranted. Mr. Johnson then referred to the submissions of the Applicant and that they effectively agreed with this position.

87. However, whilst both parties may share this view, the court does not. There seems to be a failure to recognize the need for the Minister to have a much greater power in respect of labour disputes in essential services than those labour disputes which are not. In their written submissions, the Applicant took the view that to analyse section 8 in any way which gave the Minister unfettered discretion to refer a dispute in an essential service where there had been no strike notice given was an interpretation which should be rejected. The argument put to the court was to look at the legislation as a whole and that section 3 in relation to ordinary disputes dictated that the Minister follow the procedure set out for labour disputes not in an essential service. Applicant referred to principles of statutory interpretation set out in **Bennion on Statutory Interpretation 8th Edition**, Code 26 and that the Court *"… will seek to avoid a construction that produces unreasonable or absurd results"* and *… the more unreasonable a result, the less likely it is that Parliament intended it."*

88. Applying these principles, the Court disagrees with the interpretation of section 8 of the 1975 Act which both counsel shared. The suggestion that the Minister must have the consent of the parties in dispute in order to have the power to refer a dispute in an essential service to a tribunal runs counter to the proper construction of section 8 and the principles of construction which were cited to the court. It would make the Minister powerless in a situation where he needs power to move the dispute out of the workplace into a tribunal. I have noted that the 2021 Act makes it clear that no such consent is needed. As Kawaley CJ in the **Kentucky Fried Chicken** case, cited above, said of the scheme of the 1975 Act in relation to essential services, it empowered the Minister to

effectively freeze an industrial dispute in the public interest and refer the dispute to binding statutory arbitration. As the then Chief Justice said:

> *"The function of a judicial review, a discretionary remedy of last resort, is to support the proper functioning of statutory regimes, not to undermine them."*

89. The analysis of the Court in respect of section 8(2) is that there is a limited relationship with section 3 which deals with ordinary labour disputes. The language in section 8(2) that 'u*ntil such time as the Minister makes an Order under this section a labour dispute in an essential service shall be dealt with in accordance with the procedures provided for in Part 2*, cannot as a consequence introduce language which would defeat the very power which section 8(1) had given the Minister. By way of a contrast to labour disputes in an essential service, ordinary labour disputes were dealt with under section 3. Section 3(3) is the appointment provision where the Minister is making the appointment. There could have been a report to the Manager (section 3(1)). The Manager could then have considered any labour disputes which had been reported and which he or she had endeavored to conciliate or to effect a settlement by all means at his/her disposal (section 3(2)). If the Manager was unable to effect a settlement, he/she was to report the dispute to the Minister who, subject to the section, if he thought fit and if both parties to the dispute consented, refer the dispute for settlement (section 3(3)).

THE INTERACTION OF SECTION 3(4) AND SECTION 8 OF THE 1975 ACT

90. The further point which then arises is whether any reliance on section 3(4) of the 1975 Act is appropriate in the context of the labour dispute being in an essential service. Section 8 would appear to allow the Minister an absolute discretion to make a referral, as he himself set out in his letter to the Applicant on 13th May 2021. The court does not have any doubt that section 8 of the 1975 Act was intended to give the Minister a discretion to refer any labour dispute in an essential service for settlement to the

Permanent Arbitration Tribunal in the circumstances set out in that section and without reference to whether there had been any attempts to settle the matter under any relevant procedure agreement.

91. Section 8 states as follows:

> *"8(1) – The Minister may by Order in Writing under his hand refer any labour dispute in an essential service for settlement to the Permanent Arbitration Tribunal at any time after the dispute has been reported under section 3(1) and before the expiration of any notice of lock-out, strike or irregular industrial action short of a strike given in accordance with section 9.*
>
> *(2) – Until such time as the Minister makes an Order under this section a labour dispute in an essential service shall be dealt with in accordance with the procedures provided for in Part 2."*

92. The Applicant submitted that section 8, which on its face gave the Minister an absolute power to refer any labour dispute in an essential service for settlement subject to those matters in section 8(1), only gave the Minister a limited discretion. That the consequence of section 8(2) was that it imported criteria from section 3(3) for the exercise of that discretion. In other words, that the Minister would have required both parties to the dispute to consent. Such a reading of the legislation would make any referral of a dispute in an essential service for settlement by the Tribunal almost impossible if there was either an angry union or angry management which had no interest in consenting to having their dispute resolved by a tribunal.

93. The Court notes that in the consolidated statute the Minister has an unfettered power to refer to a tribunal and is not constrained by the need to have the consent of the parties to the dispute.

"Minister to refer to Tribunal

70. (1) Where the Minister receives a report from the Manager pursuant to section 69(1)(b), he shall, after taking any steps which seem to him to promote a settlement, refer the matter subject to subsection (3) to the Tribunal for a determination or settlement by any means at its disposal under the Employment and Labour Code. Where the Minister receives a report from the Manager pursuant to section 69(2) he shall, without taking any steps to promote settlement, refer the matter subject to subsection (3) to the Tribunal for a determination or settlement by any means at its disposal under the Employment and Labour Code. In the case of a labour dispute involving an essential service, the Minister shall refer the dispute to the Tribunal for determination or settlement by any means at its disposal under the Employment and Labour Code before the expiration of any notice of lockout, strike or irregular industrial action short of a strike given to the Manager in accordance with section 80(2)(b)."

94. **Bennion on Statutory Interpretation** considers the effect of the consolidation of statutes. The general principle is that a consolidation act is to be construed in the same way as any other act unless there is any real doubt as to ability or meaning of any expression or phrase. Generally, an act stating in its long title to be a consolidation act is presumed to reproduce the original wording without significant change. Bennion refers to this state of affairs as "*straight consolidation*" and the statute's words are to be construed exactly as if they remained in the earlier act from which they are taken. However, if and in so far as the act constitutes consolidation with amendments, its words are to be construed as if they were contained in an ordinary amending act.

95. In **Regina v. Secretary of State for Health (Respondent) *ex parte* Quintavalle (Applicant) [2002] UK HL 13,** the House of Lords set out the approach to the interpretation of a statutory enactment. Lord Bingham said

"7. Such is the skill of parliamentary draftsmen that most statutory instruments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.

8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed."… "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in a national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment."

96. Lord Steyn in the same case referenced the adoption of a purposive approach to construction of statutes generally and how it can be justified on wider grounds. He quoted Justice Learned Hand in the case of **Cabell and Markham (1945) 148 F 2d 737** who explained the merits of purposive interpretation at page 739.

"Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of a

dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

97. The 2021 Act sets out what should happen when the statute came into force. Section 102 states:-

"Transitional provisions

(1) Upon the coming into operation of this Act—

(a) *any registered trade union which was so registered or deemed to have been registered under section 9(2) of the Trade Union Act 1965, provided its registration was not cancelled or withdrawn, shall be deemed to be registered under this Act;*

(b) *any certified trade union which was so certified or deemed to have been certified under section 30F(3) of the Trade Union Act 1965, provided its certification was not cancelled, shall be deemed to be certified under this Act;*

(c) *any actions or proceedings which commenced under the Trade Union Act 1965, Labour Relations Act 1975 or Labour Disputes Act 1992 but have not concluded, shall be deemed to have commenced under this Act;*

(d) *any actions or proceedings which commenced before the Employment Tribunal under the Employment Act 2000 shall continue before the Employment Tribunal as constituted before the commencement of this Act."*

98. In respect of the effect of section 102(1)(c) the presumption, unless the contrary intention appears, is that the Act is not to be intended to have a retrospective operation. This is stated in **Maxwell on the Interpretation of Statutes** 10th Edition in the following terms: -

"It is fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implications."

99. As regards the words *"any actions or proceedings,"* the question to be determined was whether the words were a reference to actions which were not related to judicial proceedings. There is no definition in the 2021 Act. Counsel for Stevedoring Services produced definitions from **Black's Law Dictionary**, 8th Edition. As regards *"proceedings"* the definitions give force to the concept of matters progressing before a court or tribunal where a determination or remedy is sought. This was also a definition for *"actions"*. The alternative meaning for *"actions"* is steps taken. To accept that definition in the context of the 2021 Act could require that all the actions of the Manager, the Labour Relations Officer and the Minister, up to the date of the enactment of the 2021 Act, be analyzed for compliance with the 2021 statute.

100. In the circumstances I think it appropriate, in considering the application before me, if I was to accept that *"actions"* is a reference to any steps taken, to interpret "*actions"* as those taken under the provisions of the 1975 Act. If the court were to accept that the meaning of section 102(1)(c) is that any *"actions"* which were taken, or may have or could have been taken, were with reference to the 2021 Act, that would be wholly inappropriate. The court finds that all of those actions should be considered under the 1975 Act for their validity. It is not appropriate to apply any retroactivity to any of the *"actions"* taken pursuant to the now repealed 1975 Act, such as any of the actions on the part of the Manager or Labour Relations Officer. It would make the position of the Manager or Labour Relations Officer untenable if any of the actions taken by them would have to be reconsidered under the 2021 Act. I do not think that such an interpretation, with reference to the extract from Maxwell, '*arises by necessary and distinct implication'*. It would be contrary to the general presumption.

COURT DOES NOT MAKE ORDERS WHICH ARE ACADEMIC

101. Mr Johnson submitted that the Minister's present position was that even if the Court were to consider it appropriate to grant the relief presently being sought, the Minister has already determined that given the terms of the 2021 Act he would be referring the dispute to the Employment and Labour Tribunal. He submitted that the Minister would be obliged under the 2021 Act to refer the dispute pursuant to section 70(1) and that the power is not discretionary and does not depend on the parties giving their consent and therefore the court should not grant the relief sought as the court should not make orders in vain. It was submitted, *"there is no point granting Stevedoring relief because the ultimate result would be the same."*

102. As to the principle that the court should not make orders which are academic or in vain, the court does not accept that the principle extends to the situation which is presently before the court. Not least it may be that some of the same arguments made at this hearing may be available to the Applicant if the Minister were in the future to determine that the statutory requirements are fulfilled such that he refers the matter to the Tribunal. Baker JA gave judgment for the Court of Appeal in **Director of Land Valuation v Banks [2013] Bda LR 47** as support for the position that the court does not hear matters which are academic. There was an aspect of the appeal which was before the Court of Appeal in that case where the Appellant sought to appeal against the finding of Kawaley C.J. who in the course of his judgment on the construction of section 5 of the Land Valuation and Tax Act 1975 was clear in stating that some of his views were recorded in the public interest. In response to submissions from the counsel for the Director of Land Valuation, Baker JA said the law, in relation to appeals which were academic and which could no longer affect the rights of the parties before it, was set out in the speech of Lord Slynn of Hadley in *R v Secretary of State for the Home Department ex-parte Salem* [1999] 1 AC 450 at 456G:-

"My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se...

The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.

I do not consider that this is such a case. In the first place, although a question of statutory construction does arise, the facts are by no means straightforward and in other cases the problem of when a determination is made may depend on the precise factual context of each case....

In the second place, Mr. Pannick, on the basis of instructions from both the Home Office and the Department of Health and Social Security, told us that only in a few cases has this question arisen."

I do not accept that in this Application any ruling made by the court could in any way be regarded as academic simply because it has been said on behalf of the Minister that, no matter what the outcome, this dispute is still going to be referred to a tribunal.

IMPROPER PURPOSE OF THE LABOUR RELATIONS OFFICIALS

103. The allegation that there was an improper purpose on the part of the Manager, the Labour Officer and the Minister was made in submissions and was based primarily on an inference drawn from the fact that the Minister never responded with the reasons for his referral to the tribunal when asked for by the attorneys for the Applicant in their correspondence. This correspondence is referred to in paragraphs 34, 35 and 36 above. The Minister stated that the matter had been referred to the tribunal and he had no jurisdiction to rescind the referral and that any concerns about it could be dealt with in the tribunal. It was this response which was the basis of the submission that the Labour Relations Officer was actively encouraging the complainant to by-pass the Employment Act time limits. The lack of reasons, together with the lengthy timeline, were referred to by the Applicant as supporting their position that there was an improper purpose on the part of the three labour officials and in particular on the part of the Minister in making the referral.

104. There was no evidence supporting the serious allegation of impropriety. The court was asked to support Applicant's negative view of what had occurred based on the inferences which they had drawn from the timeline, the correspondence and the failure of the Minister to give them reasons when they asked for them. It was further submitted that before he exercised his discretionary powers, the Minister was required by common law principles to investigate the facts himself to see that a labour dispute existed.

105. It was submitted in respect of the allegation of improper purpose that once the person challenging the decision demonstrates that there are grounds for thinking that the decision maker has exercised his/her discretion unreasonably, then the burden transfers to the decision maker to explain and show that the decision was reasonable.

106. Contrary to Applicant's view, the court finds that the Minister's response in his letter of 27th May 2021 was quite appropriate in the circumstances. It was the Minister's prerogative not to give his reasons and this does not make his decision irrational or

unreasonable. His decision to refer the dispute has to be seen in the light of the statutory scheme and that once the Manager makes the report to the Minister under section 3(3) of the 1975 Act, then the Minister can exercise his discretion. The Internal Memorandum of 25th March 2021 from the Manager of the Labour Relations Section to the Minister is set out in this judgment. It is clear on the timeline and what was being reported to the Minister.

Ministry of Labour
Labour Relations
Section

INTERNAL MEMORANDUM

From: The Manager of the Labour Relations Section

To: Minister of Labour

Cc: Permanent Secretary to the Ministry of Labour

Date: 25 March 2021

Re: Dispute Between Chris Furbert Jr and Stevedoring Services Ltd ("SSL")

I write further to the above captioned matter.

Please be advised that in October 2020, our Labour Relations Officer Oscar Lightbourne (the "LRO") was made aware of a labour dispute between Mr Furbert and SSL. It **should be noted that the labour dispute was formally reported to the Manager of the Labour Relations Section for conciliation and settlement in accordance with sections 3 and 7 of the Labour Relations Act 1975 (the "Act") by counsel for Mr Furbert on 22 February 2021.** In summary, the dispute as reported was around the following issues:

1. Mr Furbert is grieving the suspension and termination of his employment with SSL for gross misconduct and in subordination; and

2. The SSL's position is that Mr Furbert is out of time to initiate his grievance as he failed to follow the grievance process under the CBA and the Minister is estopped from referring this dispute for settlement pursuant to section 3(4) of the Act. Counsel for SSL have advised that any referral of this dispute for settlement will result in judicial review proceedings being initiated on behalf of their client.

Attempts to conciliate the parties between November 2020 and March 2021 by way of exchanging emails and telephone calls with the parties were unsuccessful. Mediation did not take place as SSL refused to participate on the ground that Mr Furbert failed to adhere to the grievance procedure under the CBA and they have not agreed to bypass any steps in the grievance procedure under the CBA.

As a settlement of this dispute has not been forthcoming, pursuant to the power invested in you under Section 8 of the Act, I report the matter to you for your consideration whereby you may, by order in writing refer any labour dispute in an essential service for settlement to the Permanent Arbitration Tribunal ("PAT") at any time after the dispute has been

reported under Section 3(1) of the Act and before the expiration of any notice of lock-out, strike or irregular industrial action short of a strike given in accordance with Section 9 of the Act.

I remind you of Section 14(3) of the Act wherein the PAT shall be comprised of the Chairman or Deputy Chairman and two members selected by the Minister from among the panel. The Chairman has indicated that he is conflicted in this matter.

The LRM is in the process of contacting the members of the PAT to ascertain their willingness and availability to act in this matter.

Due to the position of SSL in this matter, please find attached a chronology on the reporting of this dispute for your consideration, as it relates to section 3(4) of the Act. Please note that the enclosed file in this matter may not be complete as the LRO is currently on sick leave and I do not have direct access to his email inbox.

Gabrielle Cann
Manager
Labour Relations Section

Encls: Case File

107. I can see no reason why the Minister would go beyond a consideration of this report from the Labour Relations Manager when it came for him to exercise his discretion. It was accompanied by a full chronology and the form of the report of the dispute was as required by section 7 of the 1975 Act. He was invited to make a referral under section 8 and he did. The court was not provided with any legal authority for the proposition that the Minister was required by common law to investigate whether there was a labour dispute. I doubt that there is such a duty but if I was wrong in that I have found in any event that there was such a dispute; the issue of Chris Furbert jnr.'s dismissal from his employment in an essential service had never been resolved. The delay relied on by Applicant as giving rise to further suspicion of impropriety on the part of the Minister is in a large part answered by the fact of the then on-going criminal matters with each side having a belief, rightly or wrongly, that such matters hindered the discussions which would otherwise have taken place. I cannot accept that the time limits set out in the Employment Act 2000 give assistance to what should happen under the 1975 Act (and now the 2021 Act) such that disputes between employers and employees be lodged and dealt with as soon as possible. As a general principle that is of course correct but the 1975 Act was its own statutory scheme and the circumstances surrounding any particular dispute may be unique.

108. It was also urged on the court that the essential principle as set out in **DeSmith's Judicial Review** 8th edition, para 11-032 and more recently adopted by the Court of Appeal in **Dr Gina Tucker v The Public Service Commission and the Board of Education [2020]CA (Bda) 12 Civ**. was applicable; that although the terms irrationality and unreasonableness are used interchangeably, irrationality is just one facet of unreasonableness. A decision is irrational if it is unreasoned and includes those made in an arbitrary fashion. *"In such cases claimant does not have to prove that the decision was 'so bizarre that its author must have been temporarily unhinged', but merely that the decision simply fails to 'add-up'– in which, in other words, there is an error of reasoning which robs the decision of logic."*

109. The principle is not in controversy but in the context of this statutory scheme and the facts of the dispute and the circumstances surrounding it, the court does not find that there was anything irrational about the Minister's decision to exercise his discretion in the way he did under section 8 of the 1975 Act.

110. In the case of **Braganza v BP Shipping Limited and another [2015] UKSC 17,** Lord Neuberger considered the exercise of a discretion under a contract with that given to a Minister by statute. In the contractual context, a term would be read in that the power should be exercised, not only in good faith, but also without being arbitrary, capricious or irrational in the sense in which that term is used when reviewing the decisions of public authorities. His analysis of the Wednesbury principles is elucidating and in considering the issue of the allegation of improper purpose of the Minister, I am guided by what Lord Neuberger said:-

> *"Some things are inherently a great deal less likely than others.* ***The more unlikely something is, the more cogent must be the evidence required to persuade the decision-maker that it has indeed happened.*** *As Lord Nicholls explained in In re H (Minors) (Sexual Abuse; Standard of Proof) [1996] AC 563,586, at 586,*

> ***'When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities.'" (the court's emphasis)***

111. The court cannot accept in the context of such a serious allegation, where there is an absence of direct evidence, that the inference which the Applicant has made and which it seeks the court to accept is one which satisfies the burden of proof, namely that on the balance of probabilities there was an improper purpose on the part of the Minister when he made the referral of the dispute to the tribunal. The court rejects this.

DECISION

112. For the reasons given herein, the application for judicial review is dismissed. In respect of costs, costs should follow the event. I award the costs of these proceedings to the Respondent on the standard basis to be taxed if not agreed. If the parties wish to be heard on costs, then they should file an application within 7 days of this judgment.

DATED the 3rd day of June, 2022.

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JEFFREY ELKINSON
ASSISTANT JUSTICE OF THE SUPREME COURT