In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 6

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT AND IN THE MATTER OF AN ARBITRATION UNDER THE LABOUR RELATIONS ACT, 1975 BEFORE THE PERMANENT ARBITRATION TRIBUNAL

BETWEEN:

CI2 AVIATION BERMUDA LIMITED

Applicant

- and -

DR. MICHAEL BRADSHAW
(as chairman of the Permanent Arbitration Tribunal)

First Respondent

- and -

THE PERMANENT ARBITRATION TRIBUNAL

Second Respondent

THE BERMUDA PUBLIC SERVICES UNION

Intervener

JUDGMENT

Date of Hearing: **2 February 2022**
Date of Ruling: **7 April 2022**

Appearances: **Jai Pachai, Wakefield Quin, for Applicant**

Kyle Masters, Carey Olsen, for First and Second Respondents

Delroy Duncan QC and Ryan Hawthorne, Trott & Duncan for Intervener

RULING of Mussenden J

Introduction

1. The Applicant caused a Notice of Motion dated 11 February 2021 to be issued for an application for judicial review and orders by way of declaration as follows:
    a. A declaration as to the proper legal interpretation of section 23(4)(a) of the Employment Act 2000 (the "**2000 Act**") in terms of whether reference to "the Employer" is a reference to the current/existing employer, namely the Applicant or the new employer, namely the Bermuda Airport Authority ("**BAA**") in the context of this case;
    b. A declaration that on its proper interpretation the reference to "the Employer" is a reference to the new employer, the BAA;
    c. Accordingly, an Order setting aside the Determination of 7 December 2020; and
    d. An Order staying execution of the Determination of 7 December 2020.

2. The Applicant's case was supported by an affidavit of Jairaj Pachai sworn on 12 January 2021 along with various exhibits.

3. The Intervener's case was supported by an affidavit of Kevin Grant sworn 8 October 2021. He is the General Secretary of the Bermuda Public Services Union (the "**BPSU**").

Background

4. By an agreement dated 26 February 2016 (the "**Agreement**") the Applicant Ci2 was awarded the contract by the Department of Airport Operations of the Government of Bermuda (the "**Government**") to operate airport services including air navigation and airport maintenance services for the period from 1 April 2016 to 31 March 2019 with a further option of years by the prior written consent of both parties.

5. Prior to the expiration of the agreement on 31 March 2019, the Applicant was informed that the Government did not intend to extend the Agreement beyond its expiration date and that the BAA would take over the airport operations, including the employment of all of the Applicant's Bermuda based employees on terms no less favourable. Accordingly, the Applicant discontinued all its business operations in Bermuda and terminated their Employment Agreements on 31 March 2019. All of the employees save two, who voluntarily left the island, and who comprised 14 unionized and 15 non-unionized employees (together the "**Employees**") were employed by the BAA on 1 April 2019. Each of the 29 employees was employed by the BAA in exactly the position as each previously held with the Applicant with an across the board 2% increase in pay.

6. A claim for redundancy payments was made against the Applicant by the Intervener, the BPSU, on behalf of the Employees totaling sums claimed in the amount of $207,742.92 by way of severance pay resulting from their employment with the Applicant.

7. The Minister of Labour referred the dispute between the BPSU on behalf of the Employees and the Applicant to the Permanent Arbitration Tribunal (the "**PAT**") comprising the First Respondent as chairman and two other members. A hearing took place 24 – 26 November 2020 when witnesses gave evidence.

8. The PAT issued its determination dated 7 December 2020 (the "**Determination**") and made a finding that:

> *"(e) The Tribunal accepts that the terms and conditions of service were not less favourable in any substantial manner or unreasonable degree at the commencement of employment with BAA. Any objectionable changes to terms and conditions occurred under the tenure of the BAA."*

9. As to the issue of whether "employer" under section 23(4) of the 2000 Act refers to the same employer, namely, the Applicant or the new employer the BAA, the PAT held that reference to "employer" is a reference to "the same employer", that is the Applicant. Thus, severance was payable to the Employees by the Applicant.

10. The Applicant has brought these proceedings seeking a declaration that the Determination was the result of a misinterpretation of the 2000 Act and therefore wrong.

Employment Act 2000 Sections 3, 4(1), 5(6), 23 and 30

11. Section 3 of the 2000 Act is the Interpretation Section which provides that:

"employer" means a person in Bermuda who employs employees.

12. Section 4(1) of the 2000 Act provides the meaning of "employee":

"4(1) For the purposes of this Act, "employee" means—

(a) a person who is employed wholly or mainly in Bermuda for remuneration under a contract of employment;

(b) any other person who performs services wholly or mainly in Bermuda for another person for remuneration on such terms and conditions that his relationship with that person more closely resembles that of an employee than an independent contractor;

but does not include a person who falls within subsection (2)."

13. Section 5(6) of the 2000 Act provide as follows:

*"**Meaning of "continuous employment"***

5(6) Where a business is sold, transferred or otherwise disposed of, the period of employment with the former employer shall be deemed to constitute a single period of employment with the successor employer, if the employment was not terminated and severance pay was not paid pursuant to this Act."

14. Relevant parts of Section 23 of the 2000 Act provide as follows:

"Severance allowance

23(1) Subject to subsection (7), on termination of his employment, an employee who has completed at least one year of continuous employment shall be entitled to be paid severance allowance by his employer

(2) …

(3) For the purposes of subsection (1), termination of employment means termination by reason of—

(a) redundancy;

…

(4) Severance allowance is not payable where an employee—

(a) unreasonably refuses to accept an offer of re-employment by the employer at the same place of work under no less favourable terms than he was employed immediately prior to the termination;

(b) is employed by a partnership and his employment ceases on the dissolution of the partnership and—

(i) he enters into employment with one or more of the partners immediately after the dissolution; under no less favourable terms than he was employed immediately prior to the dissolution, or

(ii) he unreasonably refuses to accept an offer of re-employment by any of the partners under no less favourable terms than he was employed immediately prior to the termination;

(c) … is employed by an employer who dies and— …"

15. Sub-sections 30(1), (2) and (3) of the 2000 Act provide as follows:

*"**Termination for redundancy***

30(1) An employer may terminate the employment of an employee whose position is redundant.

(2) An employee is redundant for the purposes of this Act, where the termination of his employment is, or is part of, a reduction in the employer's work force which is a direct result of any of the conditions of redundancy.

(3) The following are the conditions of redundancy—

(a) the modernisation, mechanisation or automation of all or part of the employer's business;

(b) the discontinuance of all or part of the business;

(c) the sale or other disposal of the business;

(d) the reorganisation of the business;

(e) the reduction in business which has been necessitated by economic conditions, contraction in the volume of work or sales, reduced demand or surplus inventory;

(f) the impossibility or impracticality of carrying on the business at the usual rate or at all due to—

(i) shortage of materials;

(ii) mechanical breakdown;

(iii) act of God; or

(iv) other circumstances beyond the control of the employer."

Case Law on Statutory Interpretation

16. In respect of statutory interpretation, in *Minister of the Environment v Rodrigues Trucking and Excavating* [2004] BDA LR 39 Kawaley J stated at pages 2, 3 and 4:

"However, if regard was to be had to the canons of construction, Mr. Froomkin relied on three interpretive principles. Firstly, the presumption that Parliament does not intend unworkable or impracticable, inconvenient, anomalous or illogical, futile or artificial results, or a disproportionate counter-mischief: Bennion, page 751 et seq. Secondly, he submitted, that the "starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. If there is more than one ordinary meaning, the most common and well-established is preferred (other things being equal)": Bennion, page 917. However, the context may drive the interpreter to one of the others. This may be a quite different meaning, or a subdivision of the common meaning": ibid, page 920."

"the applicability of the presumption against absurdity or inconvenience in Bermuda law was supported by reference to Hope Bowker Real Estate v Roderick DeCouto [1986] BDA LR 19, where the Court of Appeal for Bermuda (at page 4-5 of the Court's judgment) gave a statutory provision a restricted meaning to avoid "an untoward result which does nothing towards achieving the object of the legislation."

"For the principle that the main purpose of the statutory interpretation is to ascertain the meaning of the words used, the Plaintiff's Counsel cited Sir James Astwood JC at pages 2-3 of his judgment in Ministry of Finance v Hawkes [1991] Bda LR 57…. It was submitted that the Chief Justice's articulation of the canons of interpretation remain good law."

"In essence, there is a presumption that Parliament does not intend to confer more powers than is strictly necessary. This principle is essentially the same as the principle against penalization under a doubtful law, save that the latter principle looks at the impact of the statute on the citizen from the citizen's perspective. "

"The Defendant's counsel relied on the following passages from Bennion, 2nd edition (sections 271,278):

> *"The court … should strive to avoid adopting a construction which penalizes a person where the legislator's intention to do so is doubtful, or penalises him in a way which was not made clear … One aspect of the principle against doubtful penalisation is that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law.""*

The Applicant's Submissions

17. Mr. Pachai made reference to the various grounds on which relief is sought as set out in the Form 86A.

18. Mr. Pachai's position was that he conceded that if the PAT had found that the terms of employment with the BAA were less favourable than their terms of employment with Ci2, the Applicant would have been liable for severance pay under section 23(4) of the 2000 Act.

19. Mr. Pachai submitted that on the basis of a "natural and ordinary meaning" of the word "employer" as referred to in De Smith's Judicial Review, there can be no reasonable basis for limiting the reference to "employer" to the "same employer" as opposed to the "new employer". The reference to "employer" is a reference to whoever re-employs the employees at the same place of work under no less favourable terms than he was employed prior to the termination whether that be the previous employer, in this case the Applicant or the BAA which was the new employer.

20. Mr. Pachai submitted that based on the facts, the Employees had accepted an offer of re-employment by the BAA at the same place of work under no less favourable terms than they were employed immediately prior to the termination and therefore by virtue of section 23(4) of the 2020 Act, severance allowance is not payable.

21. Mr. Pachai submitted that section 30(1) of the 2000 Act entitles an employer to terminate the employment of an employee whose position is redundant. Sub-section 30(3) provides that one of the conditions of redundancy is the discontinuance of all or part of the business, which is what occurred when the Applicant lost the airport contract.

22. Mr. Pachai submitted therefore that reading the various sections together, the proper approach is as follows:
    a. By section 23(1) and (2), an employee is entitled to severance allowance according to the number of years of continuous employment;
    b. By section 23(3), termination of employment includes termination by virtue of redundancy; and
    c. By section 23(4), there is a proviso that provides that severance allowance is not payable where an employee "unreasonably refuses to accept an offer of re-

employment by the employer at the same place of work under no less favourable terms than he was employed immediately prior to the termination."

Mr. Pachai thus submits that obviously, if an employee accepts an offer of re-employment at the same place of work under no less favourable terms, severance allowance is not payable. He argued that the opposing parties' position that if the Employees accept re-employment then they would still get severance allowance, is irrational.

23. Mr. Pachai submitted that section 23(4) does not define employer as either the "same employer" or the "new employer". Thus, in circumstances where offers of re-employment were made by the BAA to each of the employees at the same place of work under no less favourable terms than each was employed immediately prior to the termination, there can be no good reason why a natural and ordinary interpretation should not include the new employer the BAA. He argued that the critical feature of section 23(4) is that the re-employment must be at the same place of work under no less favourable terms than he was employed immediately prior to the termination. Thus, once these conditions are met, the "employer" is not defined as the "same/previous employer prior to termination" or the "new employer after re-employment". Thus, "employer" is broad enough to include the previous employer prior to termination or the new employer after re-employment.

24. Mr. Pachai argued that there was no magic to the word "re-employment". He cited the case of *R v King* [2001] 2 Cr App R (5) 503 which was a case about careless driving resulting in death. The facts stated that "*The fine was almost the maximum and the disqualification removed his only means of livelihood for three years, with little chance of re-employment thereafter*." Thus, Mr. Pachai submitted that "re-employment" can mean "further employment".

25. Mr. Pachai submitted that one of the crucial reasons for payment of redundancy or severance allowance after termination of employment is to provide the terminated employee with financial support to seek and to find alternative employment and not to act as a bonus or windfall in circumstances where the employee is continuously employed after termination at the same place of work and under terms which are no less favourable than

he was employed prior to termination. He argued that in the present case, there was no disruption in service and no loss in benefits. Therefore, there was no logical sense in paying severance allowance if it defeated the purpose of severance allowance.

26. Mr. Pachai made reference to the case of *Allman v Rowland and Anr* ICR [1977] 201which he states was given for purely illustrative purposes and not because the facts were similar or that the case was binding on the PAT. The illustration simply turned on how the Court in that case defined the words "same employer" where the Court construed those words to refer to "the new employer". He argued that he was not asking for the words "new employer" to be read into the interpretation but that the word "employer" should be interpreted to be wide enough to include a new employer.

27. Mr. Pachai referred to De Smith's Judicial Review 8th Ed for his contention that given a purposive construction, the words "re-employment by the employer" can mean the existing employer or as in the present case, the new employer, that is, the BAA:

> *"5-019 … The initial and everyday interpretation of legislation is by public bodies rather than the courts. This gives rise to the question: To what extent does a public body have discretion to interpret the legislation enabling and controlling its functions? Where the concept referred to in legislation is broad (such as "substantial", "cooking a main meal" or "such telecommunication services as satisfy all reasonable demands for them"), the courts have accorded public bodies leeway in applying these concepts to particular instances and will not routinely substitute judicial judgment for that of the public body. But "while respect must be accorded to agencies entrusted by Parliament with the task of administering legislation, it would not be conformable with the rule of law for them to be given free rein, subject only to an irrationality challenge, to interpret the legislation in whatever manner they wished." Where there is a dispute, it is always ultimately for the court to determine the correct legal meaning of legislation.*
>
> *5-020 – The law reports abound with cases involving challenges to the interpretation by public officials of statutory power. Sometimes the exercise of interpretation by the courts of the statutory provision in question involves no more than a search for the "natural and ordinary meaning" of a word or term. …Where wording of a statute is equivocal, the phrase is to be given a purposive of construction."*

The First and Second Respondents' Submissions

28. Mr. Masters submitted that in this case, the Court was being asked to make a declaration that section 23(4)(a) of the 2000 Act should be read in such a way as to include employment by a new employer as a basis for removing the Applicant's obligation to pay severance allowance to the Employees.

29. Mr. Masers submitted that *Allman v Rowland and Anr* was not support for the interpretation of section 23(4) of the 2000 Act proffered by the Applicant. That case considered the right of a farm worker to be paid severance by way of redundancy pursuant to the UK Redundancy Payments Act 1965 where the worker was offered re-employment by a new employer after his former employer sold the farm to the new employer. The Court found that the worker was entitled to be paid severance by his former employer because there was a material difference in his terms of employment with the new employer. Mr. Masters argued that *Allman v Rowland and Anr* should have no bearing on the Court's interpretation of the 2000 Act.

30. Mr. Masters submitted that the Courts have considered the issue of statutory interpretation on a number of occasions and that the law was well settled as follows:
    a. The Court should look to ascertain the proper meaning of a statute by considering the plain and ordinary meaning of the words used *per Minister of the Environment v Rodrigues Trucking and Excavating* and *Ministry of Finance v Hawkes*.
    b. In circumstances where the plain and ordinary meaning of the words used in the statute are unambiguous, there is no need for the Court to turn to further aids of interpretation per *Ministry of Finance v Hawkes* at page 2.
    c. The object of statutory interpretation is to discover the meaning of what the Act says, and not the meaning which Parliament would like the section to mean per *Ministry of Finance v Hawkes* at page 2.

31. Mr. Masters submitted that the plain and ordinary meaning of the language "the employer" in section 23(4)(a) was clear in that it means the person who would otherwise be liable to

pay severance as a result of terminating the Employees' employment contracts. Otherwise, the word "re-employment" in the section would be a nonsense. The Employees did not refuse any offer of re-employment by the Applicant as the Applicant never made any such offer as it was never in any position to do so. The Employees accepted an offer of employment from a new employer.

32. Mr. Masters submitted that the Determination preferred *"... the simple and mostly commonly accepted interpretation of the referenced phrase*" and further held that "*The Tribunal considers the simple understanding as would be taken by the average citizen that 'the employer' does not need to be substituted by 'the new employer'"*. On that basis, it was not clear why the Determination should be disturbed and the first principles of interpretation align with the conclusions reached by the Respondents.

The Intervener's Submissions

33. Mr. Duncan submitted that the issue before the Court is the proper interpretation of section 23(4)(a) of the 2000 Act.

34. Mr. Duncan submitted that there was no dispute that the employment of the Employees terminated on 31 March 2019. As such, they were entitled to severance allowance in accordance with section 23(1) of the 2000 Act. Further, he stated that it was unclear why section 23(4)(a) was an issue before the PAT or an issue before this Court. To that point, he submitted that on a proper construction, section 23(4)(a) provides for conduct of an employee that would disallow severance allowance, namely an unreasonable refusal of re-employment on certain conditions. He argued that there has been no unreasonable refusal that would disallow severance allowance in the present case. However, even if the Applicant is correct in its interpretation of "the employer", it does not make any difference as the Employees did not unreasonably refuse that new employment, they are in fact employed by the BAA. Mr. Duncan submits that put another way, section 23(4)(a) contemplates severance allowance being payable in circumstances where an offer of re-employment at the same place of work under no less favourable terms is accepted. There

is nothing in the sub-section or the 2000 Act that says severance allowance is not payable if such an offer is accepted.

35. Mr. Duncan submitted that if Parliament had intended severance allowance not to be payable on re-employment it would have stated that, as it did with employees of partnerships in section 23(4)(b). Thus, either the Applicant's interpretation of section 23(4)(a) is correct, in which case the Employees accepted the offer from the BAA and are entitled to severance allowance, or the Applicant's interpretation is incorrect, in which case there is no offer within the meaning of section 23(4)(a) and the Employees are entitled to severance allowance.

36. Mr. Duncan submitted that *Allman v Rowland and Anr* was of no assistance in interpreting section 23(4)(a) as it dealt with continuity of employment, an issue that was not raised by the Applicant before the PAT and is not pleaded in the Form 86A. Further, any continuity of employment argument would be inconsistent with the agreed fact that the Employees' employment was terminated on 31 March 2019. Additionally, the Applicant cannot rely on section 5(6) of the 2000 Act because there was no sale, disposal, or transfer of "a business" to the BAA, noting that the PAT found as a fact that there was no transfer from the Applicant to the BAA.

37. Mr. Duncan also relied on the case of *Minister of the Environment v Rodrigues Trucking and Excavating* where Kawaley J set out the principles of statutory interpretation as set out below. Thus the starting point is to ascertain the ordinary meaning of the word or phrase in question. Section 23(4)(a) envisages an offer of re-employment by the same employer for the following reasons:

    a. In the absence of a continuity argument, if section 23(4)(a) contemplated an offer of re-employment from a new employer, it would not have used the word "re-employment" and simply said "employment";
    b. The use of the definite article "the employer", clearly has a narrow scope; had Parliament intended it to have a wider scope then the indefinite article would have been used;

c. Had Parliament intended "the employer" to be a new employer it would not logically have limited the scope of the offer to be at the "same place of work"; and
d. If "the employer" can mean a new employer then the same interpretation would have to be given to "the partners" in section 23(4)(b), which would make no sense in the context of that subsection.

Analysis of the Defendant's Application

38. In my view, the Applicant's application should not be granted for several reasons. I have fully considered Mr. Pachai's arguments but I am not able to accept them. First, in the present case, it is not disputed that the Employees were terminated as a result of redundancy on 31 March 2019. It then follows that pursuant to section 23(1), the Employees were entitled to be paid severance allowance by the Applicant. The Employees then commenced employment with the BAA at the same place under no less favourable terms than when employed with the Applicant. As a start point, the Employees did not refuse to accept an offer of re-employment, or for that matter, employment. In my view, the Employees accepted new employment (rather than re-employment) with a new employer the BAA.

39. Second, in my view, in section 23(4)(a) the reference to "re-employment by the employer" means the same employer before termination, that is the Applicant, offering an employee different employment after termination. Factually, that did not happen in this case. I accept Mr. Duncan's arguments that the definite article "the employer" has been used thus meaning a narrow scope was intended as to who that meant. To my mind, the wording of section 23(4)(a) is clear, unambiguous and poses no difficulty in construction. Also, it appears to me that Parliament's intention seems clear and no help from outside the statute is necessary to understand the meaning and the intention of the section. Further, in applying the principles set out in *Minister of the Environment v Rodrigues Trucking and Excavating* and *Ministry of Finance v Hawkes* the plain and ordinary meaning of the words used mean that section 23(4)(a) was meant to address circumstances where an employer terminates an employee from a position because of a statutorily listed reason, in this case redundancy, but that same employer makes an offer to re-employ that employee in another position. It

follows that severance allowance is not payable if the employee accepts the new post, it being a post at the same place of work under no less favourable terms that in the previous post. Also, if the employee unreasonably refuses to accept such a post then severance allowance is not payable. To my mind, this is the purposive construction of the sub-section.

40. Third, section 23(4) provides several scenarios where severance pay is not payable as set out in sub-sections (a) – (c). In my view, again the section is clear, unambiguous and poses no difficulty. If the intention of the section was to provide for a circumstance where a new employer offers employment to employees formerly employed by a previous employer, then there would have been another sub-section to deal with such circumstances – similar to the circumstances about the dissolution of a partnerships and death of an employer. However, Mr. Pachai's arguments amount to using a shoehorn to force the actual reality of the circumstances into the ambit of the section. Unsurprisingly, it does not fit. In my view, section 23(4)(a) does not assist the Applicant.

41. Fourth, I disagree with Mr. Pachai's submission that the Court should interpret section 23(4)(a) in a broad way such that it would include both the previous employer before termination and a new employer after termination that offers re-employment. In my view, such an approach would be adverse to the principle that the Court should give the words of the section their plain and ordinary meaning in the context in which they are used. To adopt Mr. Pachai's meaning of "re-employment by the employer" would be to depart from the plain and ordinary meaning and instead engage in some gymnastic effort of statutory interpretation. Thus, "re-employment by the employer", as I stated above, clearly means the same employer is employing the employee in a different post. By this logic, it follows that a "new employer" would not be able to offer "re-employment" to a new employee.

42. Fifth, I note that Mr. Pachai states that the critical feature of section 23(4) is the establishment of the conditions that re-employment must be at the same place of work under no less favourable terms than when he was employed immediately prior to the termination. I agree that they are necessary elements which must be satisfied in order to not pay severance allowance when an employee unreasonably refuses to accept re-employment. However, in my view, I must disagree with Mr. Pachai when he says that

once the conditions are met, the term 'the employer" as undefined, is therefore broad enough to include a previous employer or a new employer. To my mind, the establishment of those terms do not cause the interpretation to have such a wide scope to include a new employer. Further, that construction seems to turn the section on its head and give it a meaning to include a new employer, which is not consistent with the plain and ordinary meaning.

43. Sixth, I have considered Mr. Pachai's arguments that the reasons for payment of redundancy is to assist the employee and not to act as a bonus or windfall in circumstances where the employee is continuously employed after termination. Whilst it may be generally accepted that payment of severance allowance is to assist a terminated employee, I am not satisfied that it was Parliament's intention in section 23(4)(a) to address the circumstances as in the present case where terminated employees of a previous employer become employed by a new employer. No evidence about Parliament's intention in regards to that section was before the Court. On that basis, I am inclined to agree with Mr. Duncan to question why that section was an issue before the PAT or this Court. On the contrary, as stated previously section 23(4)(a) given its plain and ordinary meaning is to address the circumstance where severance allowance is not payable because an employee unreasonable refused to accept an offer of re-employment by the employer at the same place of work under no less favourable terms than he was employed immediately prior to the termination.

44. Seventh, the parties made reference to *Allman v Rowland and Anr.* That case involved the transfer of a business from a seller to a buyer, continuity of employment, differences in terms of employment, and a claim by a farmworker for redundancy under the UK Redundancy Payments Act 1965. The case was of no help in resolving the issues as set out in this case where there was a termination of employment by one employer followed by employment by another employer and where there was no continuous employment per section 5(6).

45. In light of the reasons as set out above, I decline to grant the Applicant's application and the relief sought as set out in the Form 86A. For clarity, the reference in section 23(4)(a) to "the employer" is a reference to the Applicant.

Appeal by way of judicial review

Intervener's Submissions

46. Mr. Duncan submitted that there is an issue before the Court as to whether judicial review is an appropriate forum to hear an appeal from the PAT.

47. Mr. Duncan submitted that the PAT was convened under the Labour Relations Act 1975 (the "**1975 LRA**") which has since which been repealed and the relevant provisions are now contained in Part 4, Chapter 1 of the Trade Union and Labour Relations (Consolidation) Act 2021 (the "**2021 TULRA**"). There is no provision for an appeal from the Tribunal under the 2021 TULRA. Mr. Duncan however accepted that the PAT (and tribunal under the 2021 TULRA) falls within the supervisory jurisdiction of the Court as made clear in *Bermuda Prison Officers Union v Labour Disputes Tribunal and Minister for National Security* [2020] SC (Bda) 2 Civ. Thus the issue for the Court is identifying the proper process so that parties to an underlying dispute in the PAT (or tribunal under the 2021 TULRA) are not prejudiced.

48. Mr. Duncan submitted that the Intervener's position is that it should have been named a party to proceedings that were intended to be an appeal from proceedings to which the Intervener was a party. He referred to the affidavit of Kevin Grant which raised concern about the PAT and Dr. Bradshaw as chairman of the PAT, being the only parties to judicial review proceedings in circumstances where the dispute and remedy sought is against the Employees by way of the Intervener. He submitted that this was an evitable consequence of judicially reviewing the Determination rather than simply appealing it.

49. Mr. Duncan submitted that there was concern raised by Mr. Grant in his affidavit as to the role of the PAT and whether it would merely seek to justify the Determination. Mr. Duncan

argued that that concern was clearly well founded as the PAT had simply explained the Determination without considering that fact that section 23(4)(a) of the 2000 Act was not at all relevant to the dispute between the parties. As the reliance on section 23(4)(a) was so misconceived, the Intervener would have sought to have leave set aside had it been a party to the proceedings.

50. Mr. Duncan submitted that there was an issue of costs of requiring the PAT (or a tribunal under the 2021 TULRA) to participate in proceedings in which it has no direct interest. On the one hand, there is the costs itself but if the PAT decided not to participate in the proceedings because of the costs or some other reason, the Employees would be left with no remedy.

51. Mr. Duncan submitted that there should be no issue in principle with an appeal being brought by way of an originating summons seeking the same relief being sought in these proceedings. The benefit would be to dispense with need for leave, remove the PAT (or tribunal under the 2021 TULRA) as parties to proceedings, and allow those interested in the appeal to make submissions. He noted that an originating summons was used in *Bermuda Prison Officers Union v Labour Disputes Tribunal and Minister for National Security*. Thus, the use of an originating summons is an alternative to judicial review that is able to yield the same relief, therefore it should be used for appeals from the PAT (and tribunals under the 2021 TULRA).

52. Mr. Duncan referred to the White Book paragraph 53/14/27 as follows:

> *"Alternative avenue of challenge to decision sought to be reviewed – The courts will not normally grant judicial review where there is another avenue of appeal. "It is a cardinal principle that, saving the most exceptional circumstances [the jurisdictions to grant judicial review] will not be exercised where other remedies were available and have not been used" (R v Epping and Harlow General Commissioners, ex p. Goldstraw [1983] 3 All ER 257, 262, per Sir John Donaldson"*

53. Mr. Duncan referred to the case of *R (oao AL) v SFO and others* [2018] EWHC 856 where the UK Divisional Court considered the relevant principle in relation to alternative remedies at [55] as follows:

> *"The law governing alternative remedies is well established and it is unnecessary to set out the case law in detail. The High Court retains jurisdiction to supervise all decisions of a public nature, and this would, in principle, include the decisions of the SFO. But the High Court will exercise that jurisdiction only when it is proper to do so and it may decline to do so where there exists an alternative way in which the dispute in question can be resolved. There is no fixed or definitive list of the alternatives that the Court will consider sufficient. They may be judicial, but they need not be: See e.g. Glencore Energy UK Ltd. v Revenue and Customs Commissioners [2017] EWHC 1476 (Admin) at paragraphs [40ff], affirmed on appeal [2017] EWCA Civ 1716. The factors that the High Court will take into consideration include: … the utility and ease with which the alternative remedy can be invoked (relative to judicial review); cost and expense; the need for fact findings; utility and finality; the desirability of an authoritative ruling on the point of law arising and the strength of the issues (cf Glencore (ibid) paragraph [42])."*

54. Mr. Duncan submitted that applying those principles to appeals form the PAT (or tribunal under the 2021 TULRA) generally: the originating summons process has utility and ease as it does not require leave or a Form 86A setting out detailed grounds; the cost and expense is reduced because the process is more straightforward and because he PAT (and tribunal under the 2021 TULRA) would not be parties to the proceedings; and there would be no need for fact finding on appeal, which is exactly when the originating summons process is used. Thus, the Intervener asks the Court to establish the originating summons process as the correct process for an appeal from the PAT (or tribunal under the 2021 TULRA).

Applicant's Submissions

55. Mr. Pachai submitted that Mr. Duncan was asking the Court to introduce new rules for how decisions of the PAT could be reviewed by the Court. However, he submitted that the

introduction of new rules was matter for the Chief Justice. Further, the judicial review process was adequate in the absence of an appeal mechanism in the 2021 Act.

Analysis

56. I decline to make a ruling on the process or rules for dealing with reviews or appeals of determinations of the PAT. I will defer to Chief justice to address generally as he sees fit. On that basis, I have set out Mr. Duncan's submissions in full herein for ease of convenience if required for consideration by the Chief Justice.

Conclusion

57. I refuse the Applicant's application for the relief sought as set out in the Form 86A.

58. For clarity, I grant the declaration that on its proper legal interpretation the reference in section 23(4)(a) to "the employer" is a reference to the Applicant.

59. I refuse the applications for orders to set aside the Determination of 7 December 2020 or to stay it.

60. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Respondents against the Applicant on a standard basis, to be taxed by the Registrar if not agreed.

Dated 7 April 2022

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT