In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 443

IN THE MATTER OF THE LABOUR DISPUTES ACT 1992

AND IN THE MATTER OF A DECISION OF THE LABOUR DISPUTES TRIBUNAL DATED 30TH AUGUST 2019

BETWEEN:

BERMUDA PRISON OFFICERS ASSOCIATION

Plaintiff

-and-

LABOUR DISPUTE TRIBUNAL (PHILLIP PERINCHIEF, CLEVELYN CRITCHLOW and BETTY CHRISTOPHER)

1st Defendant

-and-

MINISTER OF NATIONAL SECURITY

2nd Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Delroy Duncan and Mr Ryan Hawthorne, Trott and Duncan Limited, for the Plaintiff**
Mr Mark Diel, Marshall Diel & Myers Limited, for the 1st Defendant
Mr Gregory Howard, Crown Counsel, Attorney General's Chambers, for the 2nd Defendant

Dates of Hearing: **28 – 29 November 2019**

Date of Judgment: **8 January 2020**

JUDGMENT

Validity of decision made by the Labour Disputes Tribunal appointed under the Labour Disputes Act 1992; whether the decision in relation to GEHI contributions outside the jurisdiction of the Tribunal; whether the decision infringed the constitutional rights of the employees: whether the employees could establish substantive legitimate expectation; whether employees entitled to compensation

Introduction

1. On 30 August 2019, a Labour Disputes Tribunal ("the Tribunal"), established pursuant to section 5 of the Labour Disputes Act 1992 ("the LDA"), delivered its decision ("the Decision") in relation to a dispute between the Bermuda Prison Officers Association ("the BPOA") representing officers in the Bermuda Prison Service ("the Prison officers") and the Minister of National Security (Department of Corrections) ("the Minister" or "the Government").

2. By that Decision the Tribunal ordered, inter alia, that the entirety of the BPOA membership shall pay 50% of the cost of the Government Employees Health Insurance scheme ("GEHI scheme") commencing 1 October 2019 and shall pay 100% of the GEHI contributions commencing 1 October 2020 as prescribed by section 5 of the Government Employees (Health Insurance) Act 1986 ("the 1986 Act").

3. By Originating Summons dated 31 October 2019, the BPOA seeks a declaration that the orders and awards of the Tribunal in its Decision are *ultra vires* and unlawful insofar as they purport to resolve the disagreement between the BPOA and the Government. It also seeks an order quashing the orders and awards of the

Tribunal in its Decision on the same grounds. In the alternative, the BPOA seeks an order under paragraph 15 of the Bermuda Constitution Order ("the Constitution") interpreting sections 11 and 14 of the LDA to ensure that they comply with the rights enshrined in paragraphs 1 and 13 of the Order.

4. It is appropriate that the Court should make it clear that this Judgment is not concerned with the merits of the Government's policy, as announced by Minister of Cabinet Office with Responsibility for Government Reform on 8 December 2017, that all Government employees should contribute equally to health insurance. Further, this Judgment is not concerned with the merits of the view expressed by the Minister that it is "*an unacceptable situation wherein some groups of employees contribute 50% towards the Government Employee Health Insurance (GEHI) scheme whilst other groups have both the employer and employee portions of their GEHI paid by the Government".* These matters are entirely and properly within the exclusive domain of the Minister.

5. This Judgment is concerned with the narrow issue whether the Tribunal has the jurisdiction to impose terms on the parties when an employer and a trade union, representing the employees, are unable to agree to the terms of a new collective bargaining agreement and, if the Tribunal did have the jurisdiction to impose such terms, whether its decision can be impugned on the ground that it made errors of law.

Factual Background

6. The BPOA, the Plaintiff, is the recognised trade union representing the interests of the Prison officers and is authorised to collectively agree the terms and conditions of employment.

7. The First Defendant is the Tribunal consisting of Mr. Philip Perinchief (Chairman), Mr. Clevelyn Crichlow and Ms. Betty Christopher appointed pursuant to section 5 of the LDA.

8. The Second Defendant is the Minister of National Security (Department of Corrections), representing the Government of Bermuda, which employs the officers in the Bermuda Prison Service.

9. All officers in the Bermuda Prison Service are employed subject to terms and conditions which are set out in relation to each individual officer. The BPOA also negotiates collective agreements on behalf of the Prison officers with the Government. The Government, in relation to those negotiations, is represented by the Public Sector Negotiating Team. The last signed, concluded agreement ("the Agreement") expired on 30 September 2008.

10. Since October 2016 the BPOA and the Government have been in negotiations over changes in terms and conditions and in particular in relation to the rate of pay. Matters related to healthcare and in particular whether officers should make any contribution to the GEHI scheme were also under discussion but marked "reserved" to indicate it was to be subject to further discussion.

11. As noted earlier, on 8 December 2017, the Minister of Cabinet office with Responsibility for Government Reform made a statement to the House of Assembly stating that the Government had taken the decision that there will be parity amongst all of its employees and to this end all Government employees will contribute equally to health insurance.

12. In accordance with the Dispute Resolution provision of the Agreement, Article 11, the Labour Relations Officer, at the invitation of the parties, engaged in conciliation in April 2018. According to the BPOA, the parties had remained under the remit of the Labour Relations Officer and the BPOA believed that they

were still in mediation with the Labour Relations Officer who was returning to the office on 6 June 2019.

13. From Friday, 3 May, 2019, the Prison officers determined that they would work strictly to their contracts by foregoing offers of voluntary overtime work. I accept the submission made on behalf of the BPOA that the "work-to-rule", in accordance with their contracts of employment, did not amount to engaging in industrial action. I accept that the employees did not breach their contracts of employment by refusing to perform tasks which are outside of the requirements of the contracts (See: *Burgess v Stevedoring Services Ltd* [2002] 1WLR 2838; *Ministry of Justice v Prison Officers' Association* [2018] ICR 181).

14. On 3 June 2019, the Minister responsible for Labour, the Hon. Minister Lovitta Foggo, published a Notice in the Official Gazette declaring a labour dispute between the BPOA and the Government pursuant to section 4 of the LDA. The Minister subsequently referred the dispute to the Tribunal pursuant to section 11 of the LDA.

15. The Tribunal drafted "agreed" terms of reference which comprised of items upon which the parties could not agree and items which had been "reserved" for further discussion. Included in the terms of reference were the issues of pay increases and contributions to the GEHI scheme. It is to be noted that Officer Timothy Seon, Chairman of the BPOA, protested to the Chairman of the Tribunal, in his letter dated 27 June 2019 that the Terms of Reference were imposed upon the BPOA without its consent.

16. The Tribunal heard evidence and submissions and gave its Decision on 30 August 2019.

Background to the Government Employees Health Insurance (GEHI) scheme and Prison officers' contractual rights relating to health benefits

17. The statutory scheme relating to GEHI is of long standing. It was in existence when the Government Health Insurance Act 1960 was passed. Whilst the basic structure of the scheme has remained the same, the scheme has been successively modified by the Government Employees (Health Insurance) Act 1965 ("the 1965 Act"), the Government Employees (Health Insurance) Act 1971 ("the 1971 Act") and the Government Employees (Health Insurance) Act 1986 ("the 1986 Act").

18. Uniformed officers (Bermuda Police Service, Bermuda Fire Service, Bermuda Prison Service and the Bermuda Regiment) have a long history of being the recipients of free health care as part of their terms and conditions of service. In the case of Prison officers the Court was provided, as an exhibit to the First Affidavit of Timothy Seon, copies of the standard terms and conditions spanning the period 1964 to 2018. In considering the submissions made by the parties, it is instructive to keep in mind the legislative framework in relation to GEHI scheme over the last 50 years and the separate contractual rights of Prison officers in relation to medical benefits under their contracts of employment.

(i) The legal position under the 1965 Act and the contractual rights of the Prison officers during its application

(a) The 1965 Act

19. Counsel for the Government referred the Court, by way of historical background to the 1971 Act. The 1971 Act itself shows, in the repealing sections, that it succeeded the 1965 Act. Section 3(1) of the 1965 Act provided that "*there shall be established a health insurance scheme for the benefit of all government employees (other than excepted persons) who shall make contributions and thereupon be eligible to receive benefits in accordance with the provisions of this*

Act in respect of any illness, injury or other disability suffered by such employees or their dependents"

20. Section 4(1) provided that *"there shall be established a Government Employees Health Insurance Fund, and that such Fund shall be used for the payment of expenses incurred by such government employees, not being excepted persons, for medical attention and treatment, including treatment and maintenance in hospital, in accordance with the provisions of this Act…".*

21. Section 5(1) provided that "*every government employee, not being exempt person, shall make contributions to the Fund at the appropriate rate set out in the First Schedule…".*

22. Section 2(1)(a) provided that the 1965 Act shall not apply to *"a government employee whose conditions of service provide that such employees shall receive free medical attention and treatment, including treatment in a hospital".*

(b) The contractual terms of the Prison officers as employees during the application of the 1965 Act

23. The employment agreement entered into between Officer Dennis Bernard Bean and the Bermuda Prison Service acting on behalf of the Government and dated 1 June 1964 set out in the Annexure the standard *"Terms and Conditions of service for Prison Officers in the Bermuda Prison Service".* Clause 7 of the Annexure provided:

> *"7. The officer shall be entitled to free medical attendance in respect of all injuries and illness, unless caused by the officers own misconduct or neglect, during the continuance of his service as a member of the Bermuda Prison Service and whether on leave or not. Such medical attendance will ordinarily be given by a government medical officer. Such medical*

attendance shall be deemed to include such surgical, specialist or other therapeutic measures or treatment as a government medical officer considers reasonable and necessary in the circumstances. Any necessary hospital expenses incurred by the officer would be paid for by the Government on a ward basis (or, in special circumstances, on a private or semi-private room basis) subject to repayment by the officer of that proportion of the expenses which represent the cost of food. The officer shall be entitled to free dental attention, subject to payment by the officer of the cost price of material, including inlays and dentures. Such dental attention will ordinarily be given by a Government dental officer. Medical attendance shall include ophthalmic treatment other than the provision of spectacles, the cost of which shall be paid by the officer."

(ii) The legal position under the 1971 Act and the contractual rights of the Prison officers during its application

(a) The 1971 Act

24. Section 2 provided that *" there shall be established a health insurance scheme for the benefit of insured persons who shall make contributions and be eligible to receive benefits in accordance with the provisions of this Act respect of any injury, illness or other disability suffered by such persons or their enrolled dependents".*

25. Section 3(1) provided that *" there shall be established a Government Employees Health Insurance Fund, and that such Fund shall be used for the payment of expenses incurred by insured persons and their enrolled dependents for medical attention and treatment, including treatment and maintenance in hospital, in accordance with the provisions of this Act…"*

26. Section 4(1) provided that *"every insured person shall make contributions to the Fund in accordance with the provisions of this Act and as such contributions shall be made at the appropriate rate set out in the First Schedule".*

27. Section 13(3) set out the categories of persons who shall not be *"compulsorily enrolled".* By an amendment made in 1973 the words *"compulsorily enrolled"* were replaced by *"not be eligible for enrolment".* Section 13(3)(a) provided that *"a government employee whose conditions of service provided that such employee shall receive free medical attention and treatment, including standard hospital benefit"* shall not be compulsorily enrolled. Section 1 provided that the expression *"standard hospital benefit*" has the meaning assigned to that expression in the Hospital Insurance Act 1970. The latter Act defined "*standard health benefit*" as benefit in respect of prescribed in-patient and out-patient treatment.

(b) The contractual terms of the Prison officers as employees during the application of the 1971 Act

28. The employment agreement entered into between Officer Shannon Hollis and the Bermuda Prison Service acting on behalf of the Government and dated 16 December 1985 set out in the Annexure, the standard "*Terms and Conditions of Service for Prison Officers in the Bermuda Prison Service*". Clause 8 of the Annexure provided:

> *"8. The Officer shall be entitled to free medical attendance in respect of all injuries and illness, unless caused by the officers own misconduct or neglect, during the continuance of his service as a member of the Bermuda Prison Service and whether on leave or not. Such medical attendance will ordinarily be given by a Government medical officer. Such medical attendance shall be deemed to include such surgical, specialist or other therapeutic measures or treatment as a Government medical officer*

considers reasonable and necessary in the circumstances. Any necessary hospital expenses incurred by the Officer will be paid for by the Government on a ward basis (or in special circumstances, or semi-private room basis) subject to the repayment by the Officer of that proportion of the expenses which represents the cost of food. The Officer shall be entitled to free dental attention, subject to payment by the Officer of the cost price of materials, including inlays and dentures. Such dental attention will ordinarily be given by a government dental officer. Medical attendance shall include ophthalmic treatment other than the provision of spectacles, the cost of which shall be paid by the Officer"

(iii) The legal position under the 1986 Act and the contractual rights of the Prison officers during its application

(a) The 1986 Act

29. Section 3 provided that "*there shall continue to be maintained a health insurance scheme for the benefit of insured persons who shall make contributions and be eligible to receive benefits in accordance with this Act…"*

30. Section 4(1) provided that "*there shall continue to be maintained a Government Employees Health insurance Fund, which shall be used for the payment of expenses incurred by insured persons and their enrolled dependents for medical attention and treatment, including treatment and maintenance in hospital, and for dental attention and treatment, in accordance with this Act…"*

31. Section 5(1) provided that *"every insured person shall make contributions to the Fund in accordance with this Act, and such contributions shall be made at the appropriate rate specified in an order made by the Minister under section 12".* The Government Employees (Health Insurance) Order 2001 (Rates) provided that

"the rates of contribution to be paid by or in respect of an insured person shall be as specified in the Schedule"

32. Section 14(1) provided that *"subject to subsections (1A), (2) and (3), every government employee in respect of whom the Government is liable to pay an employer's contribution under section 4 of the Contributory Pensions Act 1970 and the non-employed spouse of every such employee shall be compulsorily enrolled under the Scheme"*

33. Section 14(2) provided that a person shall not be eligible for enrolment under the scheme if in relation to that person *"Part III of the Health Insurance Act 1970 does not apply by virtue of any regulations made under that Act"*.

34. Regulation 1(1)(a) of the Health Insurance (Exception) Regulations 1971 provides that an employer shall not be required to effect a contract of health insurance in pursuance of section 20 of the Health Insurance Act 1970 in respect of a person who is "*a government employee whose condition of service provide that such employee shall receive free medical attention and treatment, including standard health benefit"*.

(b) The contractual terms of the Prison officers as employees during the application of the 1986 Act

35. The employment agreement entered into between Officer Gail Lightbourne and the Bermuda Department of Corrections acting for and on behalf of the Government and dated 11 May 2015 set out in the Annexure the standard *"Terms and Conditions of Service for Corrections Officers in The Bermuda Department of Corrections"* Clause 7 of the Annexure provided*:*

> *"The Officer shall be entitled to free medical attendance in respect of all injuries and illness, unless caused by the Officer's own misconduct or*

neglect during the continuance of his service as a member of the Bermuda Department of Corrections whether on leave or not. Such medical attendance will ordinarily be given by a Government Medical Officer. Such medical attendance shall be deemed to include such surgical, specialist or other therapeutic measures or treatment as a Government Medical Officer considers reasonable and necessary in the circumstances. Any necessary hospital expenses incurred by the Officer will be paid for by the Government on a ward basis, subject to the repayment by the Officer of that portion of the expenses which represented the cost of food. The officer shall be entitled to free dental attendance. The Corrections Medical Officer is the only authority to grant spectacles and dental crowns, however should it become necessary that an officer requires spectacles as a result of a medical ailment then the Corrections Medical Officer would be authorised to supply such spectacles. It is further clarified that "medical ailment" should be interpreted as:

a) *near-sightedness - (myopia);*
b) *far-sightedness - (hyperopia);*
c) *old-sightedness - (presbyopia);*
d) *or any injury resulting from an accident, or serious illness which may have a detrimental effect on eyesight."*

36. The collective agreement between the Bermuda Government and the BPOA, for the period 1 October 2008 to 30 September 2010, also dealt with terms and conditions relating to Prison officers and in particular in relation to the medical benefits. Article 10 of the collective agreement provided:

"(b) Medical Benefits

An officer shall be entitled to free medical attendance in respect of all injuries and illness, unless caused by the Officer's own misconduct or neglect, during the continuance of his/her service as a member of the

Bermuda Prison Service and whether on leave or not. A Government Medical Officer will ordinarily give such medical attention. Such medical attention shall be deemed to include such surgical, specialist or other therapeutic measures or treatment as a Government Medical Officer considers a reasonable and necessary in the circumstances. Any necessary hospital expenses incurred by the Officer will be paid for by the Government.

This also includes any ophthalmic corrective equipment and treatment, where the member is 40 years of age or over, or the member has been confirmed in post, provided the Government Medical Officer has recommended the need for spectacles. The cost of lenses, which shall include contact lenses, as prescribed, shall be met in full, and the cost of frames shall be met to a maximum of $250.00.

(c) Dental Benefits

The Officer shall be entitled to dental coverage as provided under the comprehensive policy of the Government Dental Plan. The Prison Administration shall pay the balance not covered by this plan."

37. It appears that in March 2017 the Government amended the way health benefit was described in the Prison officer's contract of employment entered into after that date. In the contract of employment for Officer David Lawes dated 23 March 2017; the contract for Officer Trevor Bend dated 16 May 2017 (both signed by Lieutenant Colonel Edward Lamb, the Commissioner of Corrections, on behalf of the Government); the employment contract for officer Rahim Dill dated 21 May 2018; and the employment contract for Officer Gikai Clarke dated 22 May 2018 (both signed by the Acting Commissioner of Corrections on behalf of the Government) contain standard terms and in relation to health insurance Clause 9 provides as follows:

*"9. **HEALTH INSURANCE***

"Uniformed Officers are provided with free Government Employees Health Insurance (GEHI) and a free dental plan for themselves. Medical and dental benefits are further outlined in the Prison Officers' Association Bargaining Agreement. Contributions towards GEHI and the dental Plan are required on behalf of a dependent spouse or children residing in Bermuda".

38. Counsel for the Government advised the Court that the position in fact, since at least the 1971 Act, has been that all uniformed officers of the Bermuda Prison Service, Bermuda Police Service, Bermuda Fire Service and the Bermuda Regiment have been enrolled in the GEHI scheme and that the Government has been paying not only its share of the contribution as the employer but also any share which would have been payable by the officers of the uniformed services as employees. In the circumstances it appears that the Government has been paying into the GEHI Fund all contributions required to be paid on behalf of the uniformed officers for at least the last 48 years. The Decision records that the officers in the Fire Service had been paying the employee's share of the GEHI contribution for the last "*several years".* In respect of the Police Service and the Bermuda Regiment the Government continues to make contributions to the GEHI Fund on behalf of the officers employed in those services.

The Decision

39. The reasoning of the Tribunal in relation to the GEHI contribution to be paid by the Prison officers is set out in paragraphs 25 to 29 of the Decision:

"25. Firstly, the Tribunal accepts the argument that the BPOA members have been receiving for a very long time the "gratuitous" benefit of not having to pay GEHI contributions, and that this understanding the BPOA

has said has been, and is, in their Collective Bargaining Agreement. The tribunal is also obliged in law to accept the argument that no "right" (or benefit) is held in perpetuity in face of the law, and that all items within an agreement are likely open to further negotiation, and/or reversal, at some point in time.

26. It is also generally accepted that in respect of some Government contracts, one party, the Government, has the power to alter it without the consent of the other and that where a contract and its statute are in conflict the statute prevails.

27. It is the law today, that government has enacted in 1986 statute (GEHI, Act 1986) which dictates that all government employees shall contribute to the Government Employee Health Insurance scheme and fund.

28. There is also the principle that where a "right" or benefit, exercised by a citizen is taken away, fair and reasonable compensation ought to be given in return.

29. In this respect, government has made an offer to the BPOA membership on "contributory payments" respecting GEHI; which the Tribunal believes to be fair and reasonable, for a period of time." (Emphasis in the original)

40. The reasoning of the Tribunal, as seen from the paragraphs above, was firmly rooted in the proposition that the contractual rights of the Prison Officers were in conflict with the mandatory terms of the 1986 Act. It is based upon the proposition that it is unlawful for the Government to make payments on behalf Government employees in respect of the employees' contribution to the GEHI Fund.

Grounds of challenge

41. The Plaintiff contends that the Tribunal's Decision should be quashed based upon three alternative arguments**.** First, the Tribunal exceeded its powers under the relevant legislation by imposing terms and conditions of employment on the parties. Secondly, if the Tribunal acted in accordance with its powers under the legislation, the Tribunal's Decision and/or the scope of the Tribunal's powers contained in the Act constituted an unjustified infringement of liberty and property rights in breach of the Constitution. Thirdly, if the Tribunal was entitled to impose terms and conditions on the parties, the Tribunal erred in its understanding of the parties' private and public law rights and obligations.

42. The Decision of the Tribunal clearly falls under the general supervisory jurisdiction of the Court and the Plaintiff is entitled to argue these grounds by way of challenge to the Decision (See the observations of Kawaley CJ in this regard in *Bermuda Cablevision Limited v Greene* [2004] Bda LR 18 at page 7; and *Kentucky Fried Chicken (Bermuda) Limited v The Minister of Economy, Trade and Industry* [2013] Bda LR 19, at [65], [79]).

Did the Tribunal exceed its powers?

43. The preamble to the LDA states that "*WHEREAS it is expedient to make provision for the establishment of a Labour Disputes Tribunal to settle certain labour disputes".*

44. *In the Interpretation section the expression "labour dispute" is given the same meaning as appearing in the Labour Relations Act 1975 ("the LRA").*

45. Section 11 provides that *"If any labour dispute exists or is apprehended, if not otherwise determined, the Minister may, if he thinks fit, refer the matter for settlement to the Tribunal."*

46. Section 14 sets out the jurisdiction of the Tribunal and provides:

> *"1) The Tribunal shall examine and inquire into any labour dispute referred to it and shall make its decision or award as soon as practicable.*
> *(2) A decision or an award on any labour dispute referred to the Tribunal may be made retrospective to such date as the Tribunal decides not being earlier than the date on which the labour dispute to which the decision or award relates first arose.*
>
> *(3) The decision of the Tribunal as to such date shall be conclusive."*

47. Section 16 deals with the effect of a decision or award on the affected parties and provides*:*

> *"Any decision or award made by the Tribunal shall be binding on the employer or any person succeeding (whether by virtue of a sale or other disposition or by operation of law) to the ownership or control of the business, the trade union and the workmen to whom the decision or award relates and as from the date of the decision or the award or from such date as may be specified in the decision or the award not being earlier than the date on which the labour dispute to which the decision or the award relates first arose, it shall be an implied term of the contract of employment between the employer and the workmen to whom the decision or award relates that the terms and conditions of employment to be observed under the contract shall be in accordance with such decision or award until varied by a subsequent decision or award or by agreement between the employer and workmen or the workmen's representative."*

48. Counsel for the Plaintiff argues that in *Kentucky Fried Chicken* Kawaley CJ expressly held that the Tribunal's jurisdiction under the LDR is limited to adjudicating upon existing disputes and does not extend to adjudicating what their contractual rights are going forward. In particular the Plaintiff argues that the LDA does not provide the Tribunal with the jurisdiction to resolve differences between the employer and employee in the event they are unable to agree upon a collective bargaining agreement. Counsel for the Plaintiff complaints that this is precisely what the Tribunal did in its Decision dated 30 August 2019.

49. This submission requires close consideration of the reasoning of Kawaley CJ in *Kentucky Fried Chicken* which led him to this conclusion. Kawaley CJ started his analysis by noting that the scheme of the LDA was closely connected with the LRA:

> *"32. Most statutory interpretation does not take place in a vacuum. It is usually informed by a review of relevant case law, either dealing with the legislative provisions themselves or similar local and/or overseas legislation, and a consideration of commentaries in legal texts, alongside a reading of the actual legislative enactment under primary consideration. In the present case, the starting point for comparative analysis is the LRA as this is closely connected with the scheme of the Act being legislation which:*
>
> > *i. provides key definitions including the term "labour dispute" which is central to the present application as well as other substantive provisions which apply to labour disputes generally;*
> >
> > *ii. deals with the same subject-matter (compulsory binding statutory arbitration for labour disputes in relation to essential services); and*

iii. is an earlier Act which has been used as a source for some substantive provisions (but not others) by the draftsman of the later Act.

33. The LRA creates a broadly similar scheme in relation to essential services empowering the Minister to effectively freeze an industrial dispute in the public interest and refer the dispute to binding statutory arbitration (the Permanent Arbitration Tribunal). More generally, however, the LRA has provisions of general application to disputes (including the present dispute) notably the consensual conciliation and arbitration regime created by Part I of the 1975 Act. The Director of Labour was seemingly initially requested by the BIU to mediate pursuant to these statutory provisions.

34. Part IIA of the LRA applies exclusively to disputes in relation to the essential services specified in the Fourth Schedule (section 5A(1). Part IIA establishes an independent Essential Services Disputes Settlement Board and provides the Minister with the option of either referring disputes to a mediator or to the Board. The powers of this Board are no less obliquely and generally defined than in the case of the Tribunal under the Act. The only exception is section 5W which gives explicitly broad powers to the Board when dealing with complaints in relation to (a) unfair industrial practices, and/or (b) failure to follow a grievance procedure.

35. Part III of the LRA ("Essential Services") empowers the Minister to refer a labour dispute to the Permanent Arbitration Tribunal wherever the dispute has been reported to the Director of Labour. The powers of the Tribunal are also formulated in general terms and the provisions in the 1992 Act are broadly consistent with the regime under the 1975 Act. However:

i. under the LRA, there is an express power to make a retrospective award backdated to the date the dispute was reported to the Minister but no earlier absent consent (section 26). Under the 1992 Act there is an express power to make awards retrospective to the date the dispute arose, with no requirement for consent. The jurisdictional scope of the Tribunal in the present case is, perhaps somewhat surprisingly, to this extent broader under the Act than the Tribunal concerned with Essential Services under the LRA;

ii. under the LRA there is an express provision to the effect that a Tribunal award may not conflict with any applicable statute (section 23). Under the 1992 Act there is no equivalent provision although this may be immaterial in the absence 30 of any express power to modify statutory rights;

iii. The Board and a Tribunal under the LRA can regulate their own proceedings as they think fit (sections 5K and 28). Under the 1992 Act, there is also (again, perhaps somewhat surprisingly as no equivalent power is conferred by the LRA) an express power to exclude the strict rules of evidence (section 12 (1)) in addition to the mere power to regulate proceedings (section 9).”

50. Kawaley CJ then turned to consider the impact of section 6 (8) and 13 of the Constitution and noted at [72] that the underlying complaint made on behalf of the Applicant assumed that the Tribunal had the statutory power to impose on the parties fresh terms and conditions of employment to replace those which were incorporated into the employment contracts from the then expired collective bargaining agreement. Kawaley CJ held that this assumption was unfounded:

“73. In addressing the issue of whether or not the decision to refer the dispute to the Tribunal was proportionate or reasonable, Mr Sanderson

referred to the United States Supreme Court decision of Chas Wolff Packing Co v Court of Industrial Relations of South Kansas (1923) USSC 1613. In this case the US Supreme Court held that legislation compelling statutory adjudication of labour disputes in relation to food producers impermissibly interfered with private property rights. Passages from the Judgment of Chief Justice Taft which were relied upon in the course of oral argument included the following:

…

This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing, and fuel supply. By §6, reasonable continuity and efficiency of the industries specified are declared to be necessary for the public peace, health, and general welfare, and all are forbidden to hinder, limit, or suspend them. Section 7 gives the Industrial Court power, in case of controversy between employers and workers which may endanger the continuity or efficiency of service, to bring the employer and employees before it and, after hearing and investigation, to fix the terms and conditions between them. The employer is bound by this act to pay the wages fixed, and, while the worker is not required to work at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him…

…

We think the Industrial Court Act, insofar as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of 50 law…"

51. Kawaley CJ's conclusion on this issue appears in the following passages:

"74. The reasoning in this case is clear. It is a draconian regulatory action to establish a tribunal which enjoys the power not only to adjudicate labour disputes but also to fix new terms and conditions of employment. Unless there is a sufficient engagement of the public interest, such legislation is constitutionally impermissible because it interferes with private property rights to an unjustifiable extent. On its face, this reasoning appeared to me to have persuasive force in terms of construing section 13 as read with section 6(8) of the Constitution under Bermudian law…

79. The constitutional arguments do however help to illumine the statutory provisions governing the jurisdiction of the Tribunal. It would potentially interfere with KFC's property rights, as Mr Sanderson contended, if the Act was construed as empowering the Tribunal to both (a) determine the rights of the parties to the dispute based on and respecting existing or vested contractual rights, and (b) to deprive KFC (and the employees) of the right to freely negotiate future terms and conditions of employment contracts by compulsorily determining such future rights for the parties. In my judgment the scheme of the Act does not envisage the Tribunal exercising such extraordinary and intrusive powers. However, to the extent that the position was ambiguous, the Court would be obliged to prefer a construction which did not interfere with fundamental rights and/or vested property rights…

…

82. The United States Supreme Court decision of Chas Wolff Packing Co v Court of Industrial Relations of South Kansas (1923) USSC 161 is of assistance in illustrating the sort of explicit statutory powers to impose a new bargain on labour disputants which may be offensive to fundamental property rights. The legislative scheme under the Act does not bestow equivalent powers on the Tribunal. It is empowered to make retrospective awards, but not prospective awards. The Tribunal may be empowered by

necessary implication to make non-binding recommendations about future terms and conditions of contract and collective bargaining agreements, if the parties invite the Tribunal to assist them to resolve any such dispute. This (or overriding) is all paragraph (2) of the Minister's terms of reference appeared to contemplate:

> *"(2) to assist the parties either in modifying the CBA or agreeing a new collective agreement (as appropriate given the Tribunal's determination of item 10 (1) by determining the following terms and conditions of employment upon which agreement has not been able to be reached between the parties ..."* [emphasis added]

83. The wording of the Terms of Reference, which I have held has no binding effect on the Tribunal, can admittedly also be read as suggesting that the Tribunal is charged with "determining" the terms and conditions which the parties have been unable to agree in a binding way. To this extent, the concerns of KFC about the impact of the Tribunal proceedings on their economic rights were justified.

…

89. Nor does the Tribunal have the 'draconian' powers which KFC's application, in particular its constitutional arguments, assumed it might deploy. It is empowered to determine existing and past disputes but cannot lawfully make binding determinations which have the effect of imposing a new bargain on the parties as regards future terms and conditions of employment. However, the Tribunal can no doubt encourage the parties to resolve disputes about future contractual terms and can probably make non-binding recommendations in this regard" [emphasis added].

52. Counsel for the Government accepts in his written submissions that in *Kentucky Fried Chicken* the Court did indeed hold that a Tribunal appointed under the LDA can determine the legal rights but cannot lawfully make binding determinations

which have the effect of imposing a new bargain on the parties as regards future terms and conditions of employment. Counsel sought to distinguish this case by submitting that the Court in *Kentucky Fried Chicken* found that the Tribunal could make rulings "*to establish legal rights*", but could not extend the life of the collective bargaining agreement, thereby making "*a new deal for the parties*". Counsel for the Government submits that here there was a labour dispute concerning the terms and conditions of, i.e. contribution to GEHI scheme and the Tribunal was entitled to settle that existing dispute. However, this characterisation by counsel for the Government ignores the fact that both the Government and the BPOA had been negotiating a new collective bargaining agreement but they were unable to reach an agreement and as a result the Minister made the reference under section 4 of the LDA. As paragraph 82 of the judgment of Kawaley CJ in *Kentucky Fried Chicken* makes clear, the tribunal may be empowered to make non-binding recommendations about future terms and conditions of contract and collective bargaining agreement but has no jurisdiction to make binding awards. In my judgment what the Tribunal sought to do in this case was precisely what Kawaley CJ said, in paragraph 82 of *Kentucky Fried Chicken*, the Tribunal could not do. This is so because the Tribunal lacked jurisdiction to impose upon the parties new terms and conditions arising out of their failure to agree a new collective bargaining agreement.

53. Counsel for the First Defendant sought to distinguish *Kentucky Fried Chicken* on the ground that the facts in that case were markedly different. In *Kentucky Fried Chicken* the Court was addressing the issue (in paragraph 82) whether it was appropriate for the Tribunal to fix terms and conditions for a small business in the event of a failure to agree a new collective bargaining agreement. Here, counsel contends, the court is dealing with the Bermuda Prison Service, an important public service. However, as paragraph 82 of the judgment shows, Kawaley CJ's conclusion that the legislative scheme under the Act does not allow the Tribunal to make binding awards in relation to future terms and conditions of contract and collective bargaining agreements, was not confined to small businesses. Kawaley

CJ's conclusion was based upon the proper construction and scope of the LDA and was applicable in all cases.

54. In addition to the analysis of Kawaley CJ in *Kentucky Fried Chicken,* I also consider that the construction of the expression "labour dispute" in the LDA also leads to the same conclusion. As noted earlier, the LDA only applies to a "labour dispute", as that term is defined in the LRA. As noted by Kawaley CJ, the LDA makes other references to the LRA and the draftsman of the LDA is clearly familiar with the scheme and provisions of the LRA.

55. The scheme of the LRA is that Part II deals with arbitration, settlement and enquiry in labour disputes. The expression "labour dispute" has the same meaning in the LRA as it does in the LDA. Part II does provide for arbitration of disputes but only if both parties to the dispute consent to the matter being arbitrated.

56. Part IIA of the LRA deals with special provisions relating to Essential Industries and Part III deals with Essential Services. It is only in relation to Essential Industries and Essential Services the LRA provides for mandatory arbitration. In particular Part IIA, dealing with Essential Industries, expressly provides for mandatory arbitration in circumstances where an employer and trade union have been unable to agree to a new collective bargaining agreement (section 5M(1)(b) and (3)). It is highly unlikely that the LRA reserved mandatory arbitration arising out of the failure to agree a collective bargaining agreement to Essential Industries but the LDA, which followed the LRA and enacted some of its provisions, extended mandatory arbitration to all industries and services. The LRA does not apply to Prison officers (section 2(b) and *Minister of Home Affairs v Bermuda Industrial Union and Others* [2016] Bda LR 5 at pars 53 and 54) and the Bermuda Prison Service is not classified as an Essential Service.

57. Furthermore, there is no reference in the LDA to" *a difference arising between the parties in negotiations respecting a new collective agreement*", an expression used in the LRA to refer to a situation where the parties are unable to agree to a

collective bargaining agreement. However, in Part IIA of the LRA, as noted above, section 5M(1)(a) and (b) make a distinction between a "*labour dispute"* and "*a difference arising between the parties in negotiations respecting a new collective agreement*". It strongly suggests that the defined term "labour dispute", which has the same meaning in both the LRA and the LDA, does not include "*a difference arising between the parties in negotiations respecting a new collective agreement*". In other words section 5M(1) strongly suggests that the term "labour dispute" does not include a dispute relating to the failure to agree a collective bargaining agreement and, as a consequence, a dispute as to what terms should be included in a new collective bargaining agreement.

58. In the circumstances the Court accepts the submission made on behalf of the BPOA and declares that the orders and awards of the Tribunal in its Decision are *ultra vires* and unlawful insofar as they purport to resolve the disagreement between the BPOA and the Government about prospective terms and conditions of employment. For the avoidance of doubt the prospective terms and conditions include the award in relation to rates of pay and the order in relation to the contributions to be made by the Prison officers to the GEHI scheme.

Was the Tribunal's Decision and/or the LDA unconstitutional?

59. In the alternative, the Plaintiff contends that if the Tribunal's Decision was consistent with its powers under the Act, the Tribunal Decision and/or the scope of the Tribunal's powers contained in the Act constituted an unjustified infringement of liberty and property rights in breach of the Constitution.

60. Counsel argues that *Kentucky Fried Chicken* makes clear that, although the scheme under the LDA constitutes "compulsory statutory arbitration", it does not offend any fundamental rights because it is limited to disputes about existing rights and obligations of the parties and whether those had been breached. However, counsel contends, a compulsory scheme which requires the parties to

submit to a government appointed panel which then determines the terms and conditions which will govern the employment relationship in the future is a completely different matter. It has the effect that the Tribunal may discard the existing contract between the parties and the rights and obligations subsisting between them; and override the parties' freedom of contract and choose if, when and how the contract should be varied or replaced by imposing its own bargain on them.

61. In light of the fact that the Court has held, following *Kentucky Fried Chicken*, that the Tribunal has no such power it is unnecessary to consider this argument further and express a concluded view.

Alleged failure on the part of the Tribunal to acknowledge Prison officers' contractual rights

62. The Tribunal in its decision accepted the argument that the BPOA members had been receiving for a very long time "*gratuitous*" benefit of not having to pay GEHI contributions.

63. As noted in paragraphs 23, 28, 35 to 37 above, the Prison officers have had a contractual entitlement to free medical benefits at least since 1964. These benefits constituted contractual terms the basis upon which the Prison officers became employees. In the circumstances to describe these benefits as "*gratuitous*" may not be entirely appropriate. The point remains that it was a term of their employment contract that they would receive free medical benefits.

64. Until 2017 the free medical benefits were set out in a clause in the employment contract without any reference to GEHI and that remains the position in relation to the employment contracts for about 80% of the Prison workforce. The medical benefits are described in comprehensive terms for all injuries and illnesses and include in-patient and out-patient hospital treatment.

65. Since 2017 the free medical benefits in the individual employment contracts are described in terms that "*Uniformed Officers are provided free Government Employee Health Insurance (GEHI) and free dental plan for themselves".* Approximately 20% of the Prison workforce have this provision in their employment contracts (paragraph 9 of the First Affidavit of Officer Timothy Seon).

66. In its Decision the Tribunal does not appear to have considered the fact that in relation to employment contract prior to 2017, Prison officers had a contractual entitlement to comprehensive medical benefits which was entirely separate and independent from the GEHI scheme and this benefit was not part of the "*dispute*" referred to the Tribunal. Indeed, Counsel for the Minister, confirmed to the Court that the Government continues to honour the contractual medical benefits set out in the employment contracts.

67. The Tribunal should have taken the contractual entitlement into account and should have appreciated that in relation to the pre-2017 employment contracts the medical benefits could not be amended without the consent of both parties.

68. The comprehensive medical benefits set out in the pre-2017 employment contracts are likely to substantially replicate the range of medical benefits under the GEHI scheme. As noted, the contractual benefits provide free coverage for all injuries and illnesses including surgical, specialist or other therapeutic considered necessary including in-patient hospital treatment. It follows that by requiring Prison officers to make contributions to the GEHI Fund the Tribunal in effect required the Prison officers to pay for medical benefits to which they have free entitlement under their employment contracts. The effect of requiring Prison officers to make contributions to the GEHI Fund is largely to nullify the entitlement to free medical benefits in the Prison officers' contracts of employment.

69. Secondly, the Tribunal did not consider that in all likelihood the Prison officers were exempted from compulsory enrolment in the GEHI scheme.

70. The statutory provisions set out in paragraphs 22, 27, 33 and 34 above show that the 1965 Act, 1971 Act and 1986 Act all contained express provisions exempting certain Government employees from compulsory enrolment in the GEHI scheme.

71. Section 2(1)(a) of the 1965 Act provided that the Act did not apply to a government employee whose conditions of service provided that such employee shall receive free medical attention and treatment, including treatment in hospital. In other words such employee was exempted from compulsory enrolment in the GEHI scheme. During the currency of the 1965 Act, all Prison officers were provided with comprehensive free medical benefit which included free medical attendance in respect of all injuries and illnesses including all relevant treatment in hospital (see paragraph 23 above). In the circumstances it seems reasonably clear that all Prison officers would have been exempted from the compulsory enrolment in the GEHI scheme during the currency of the 1965 Act. This is perhaps not a surprising result given that the exemption is clearly aimed at a body of employees and the only body of Government employees who have historically enjoyed free medical benefits in the Government service are employees in the uniformed services, namely, Bermuda Police Service, Bermuda Prison Service, Bermuda Regiment and until 1982 Bermuda Fire Service (paragraph 6 of the First Affidavit of Officer Timothy Seon).

72. Section 13(1)(3)(a) of the 1971 Act provided that a government employee whose conditions of service provided that such employee shall receive free medical attention and treatment, including standard hospital benefit shall not be compulsorily enrolled in the GEHI scheme. Section 1 provided that "*standard hospital benefit*" has the meaning assigned to the expression in the Hospital Insurance Act 1970 and the latter Act defines that expression as meaning "*benefit in respect of prescribed in-patient and out-patient treatment".* During the currency of the 1971 Act all Prison officers were again provided with

comprehensive medical benefits in their contracts of employment including benefit in respect of prescribed inpatient and outpatient hospital treatment (see paragraph 28 above). Accordingly, it seems reasonably clear that during the currency of the 1971 Act all Prison officers were not required to be compulsorily enrolled in the GEHI scheme.

73. In relation to the 1986 Act, section 14(1)(2)(b) provides that any person to whom the provisions of Part III of the Health Insurance Act 1970 do not apply by virtue of any regulation made under that Act shall not be eligible for enrolment in the GEHI scheme. Regulation 1(a) of the Health Insurance (Exemption) Regulations 1971 provides that an employer shall not be required to effect a contract of health insurance in respect of a government employee whose conditions of service provide that such employee shall receive free medical attention and treatment, including standard health benefit. As noted in the previous paragraph the expression "standard health benefit" is a defined term meaning benefit in respect of prescribed in-patient and out-patient treatment. During the currency of the 1986 act all Prison officers were again provided with comprehensive medical benefits in their contracts of employment including benefit in respect of prescribed inpatient and outpatient hospital treatment (see paragraphs 35 to 37 above). Again, it seems reasonably clear that during the currency of the 1986 Act all Prison officers were not required to be compulsorily enrolled in the GEHI scheme.

74. Counsel for the Defendants have pointed out that there is no mention of the "*standard health benefit*" in the clause providing for free medical benefits in the employment contracts. As noted earlier the expression standard health benefit is a defined term and having regard to the scope of the free medical benefits in the employment contracts this requirement is plainly met.

75. Counsel for the Defendants have also pointed out that there is an exception in relation to "*misconduct and neglect*" in the contractual provisions dealing with

medical benefits. The mere fact that the health benefits in the employment contract may not provide coverage caused by the officers own misconduct or neglect does not mean that the medical benefits provided in the contract do not comply with the requirements for exemption from compulsory enrolment in the GEHI scheme outlined in paragraphs 22, 27, 33 and 34 above.

76. It follows, in my judgment, that Prison officers were not required to be compulsorily enrolled. If they were not required to be compulsorily enrolled there can be no obligation upon them to make contributions to the GEHI Fund.

77. Thirdly, Counsel for the Minister advised the Court that all Prison officers have in fact been enrolled in the GEHI scheme since the commencement of the 1986 Act. Subsequently he advised the Court that this is likely to be the case since the commencement of the 1971 Act. This apparently applied not only to the Prison Service but also to the Police Service, Fire Service and the Bermuda Regiment.

78. The Court has already noted and ruled that it is likely that the Prison officers were exempted from compulsory enrolment in the GEHI scheme. No explanation has been put forward on behalf of the Government as to why the Prison officers were enrolled in the GEHI scheme given that they were in any event contractually entitled to free medical benefits which appear to cover the same range of benefits as provided under the GEHI. Indeed, in some respects the contractual benefits in the employment contracts provide better coverage than the benefits under the GEHI scheme. For example, in relation to the medical benefits provided under the employment contracts the employee is given a full indemnity in respect of costs and expenses incurred. However, under the GEHI scheme an employee is required, in respect of certain services and medications, to pay his share of the cost of the services or medications (the co-payment).

79. I accept the submission made on behalf of the Plaintiff that the most likely explanation for the Government's decision to enroll Prison officers in the GEHI

scheme was to acquire a delivery mechanism so that it could comply with its contractual obligations for free medical benefits under the employment contracts. On the basis that this is the likely explanation there is no reason why the Prison officers should make a contribution to the GEHI Fund.

80. In this connection I reject the submission made by Counsel for the Minister that *"Bermuda's public officers are contributing to and subsidizing healthcare costs and benefits that are enjoyed by members of the non-contributing uniformed services."* This submission appears to be factually incorrect given that the Government in fact makes the contributions on behalf of the noncontributing uniformed services and that cost is borne by the Consolidated Fund.

81. Fourthly, the Tribunal was heavily influenced by its understanding that "*it was the law today"* that all Prison officers were legally obliged to pay their share of the contribution to the GEHI scheme. As noted in paragraph 27 of the Award, the Tribunal stated "*It is the law today, that Government has enacted a 1986 statute (GEHI, Act 1986) the dates that all government employees shall contribute to the Government Employee Health Insurance scheme and fund*". Implicit in this is the assertion that it is unlawful for the Government to pay on behalf of an employee the contribution which that employee owes to the Fund.

82. This assertion of unlawful conduct has to be seen in the context of, as advised by counsel for the Minister, the Government in fact paying the employees' share to the GEHI Fund for all officers in the Prison Service, Police Service, Fire Service (until 1982) and the Bermuda Regiment since at least 1971, a period of 48 years. No explanation has been provided to the Court explaining why the Government has been making these payments for the last 48 years if the true position is, as was contended by counsel on its behalf and as assumed by the Tribunal, that the making of these payments by the Government is in fact unlawful.

83. Counsel for the Minister, in his written submissions at paragraph 50, advised that in order to accomplish the change in policy the Government offered to the BPOA the "grandfathering" proposal, that is to say, in relation to the existing Prison officers the Government would continue to pay their share of the contribution to the GEHI Fund but any new employees would have to make their own contributions to the Fund. Again, no explanation has been provided to the Court as to how it was possible for the Minister to make the "grandfathering" proposal to the BPOA if the true position is, as contended by his counsel in Court, that it is unlawful for the Government to make any such payments.

84. The Government continues to make payments to the GEHI Fund on behalf of all the employees in the Bermuda Police Service and the Bermuda Regiment and again no explanation has been provided to the Court as to the justification for making these payments given its contention that the making of such payments is unlawful.

85. There is in fact no express prohibition in the 1986 Act, or the earlier Acts, against the Government making payments on behalf of its employees (as has been the practice for at least the last 48 years). The default position in relation to Government employees who are not exempted from the scheme (referred to as the "insureds") is that they are required to make a payment at the appropriate rate as specified in an Order made by the Minister (section 12 (1)). The Accountant General is obliged to match the payments made by the employees (section 12 (2)). The object of these statutory provisions is to ensure that the Fund is properly funded at all times. Indeed, the Government Employees (Health Insurance) (Rates) 2001 states "*The rates of contribution to be paid by or in respect of an insured person shall be as specified in the Schedule*" [emphasis added]. The "*insured person*" is defined as any government employee or retired government employee enrolled under the scheme. This Order clearly contemplates that payment can not only be made by an employee but can also be made on his

behalf. There is no reason why the Government cannot make these payments on behalf of its employees, as has been the practice for at least the last 48 years.

86. As noted earlier, it is likely that the Government enrolled the uniformed services employees into the scheme as a means of discharging its obligations of free medical benefits under the individual contracts of employment. On this basis it is only reasonable, in order to ensure that the employees receive free medical benefits, that the Government should pay the employees' share of the contribution to the Fund.

87. Finally, this submission elevates form over substance. If the direct payment by the Government, on behalf of its employees, into the Fund is objectionable then the employees can make the payment and the Government can either reimburse the employees or increase the salary base by the amount of the GEHI contributions.

88. For these reasons, taken individually and collectively, the tribunal, in my judgment, erred in law and as a result, its decision should be set aside.

Did the Tribunal err in law in relation to legitimate expectation

89. In its Decision the Tribunal stated that it was strongly persuaded by the legal principle relating to and governing legitimate expectation as set out in *R (on the application of Bhatt Murphy (a firm)) and others v Independent Assessor; R (on the application of Niazi) and others v Secretary of State* [2008] EWCA 755 ("the *Niazi case*"). The Tribunal took the view that particularly after the release of the Ministerial Statement in the legislature in 2017 BPOA had been "*properly and sufficiently notified of this reversal of policy*" [54].

90. Secondly, the Tribunal took the view that section 5 of the 1986 Act essentially dictated the result. The Tribunal reminded itself that section 5 required that all *"…insured persons or government employees… Shall make contribution to the*

fund in accordance with the Act…". The Tribunal also noted that the membership of the BPOA consists of government "*insured persons*" who are "*government employees*" and as such, they are *"in scope*" and squarely caught by the Act which the Tribunal determined had been lawfully invoked and applied by the Government [56]. The Tribunal concluded that it had "*come down in favour of the law (and legal principles)"* provided by the Government team and determined that the *Niazi case*, together with section 5 of the 1986 Act "*prevails and has primacy over*" the case law provided in support of the BPOA's position on the GEHI issue.

91. The Tribunal also appears to accept that the BPOA members should be entitled to some form of compensation. The Tribunal stated that "*there is also the principle that where a "right" or benefit, exercised by a citizen is taken away, fair and reasonable compensation ought to be given in return*"[28], and loss of benefits invoke considerations or notions of "*compensation for such loss; no matter how long or short, or what form, that compensation assumes or takes. The Tribunal has taken these matters into, and under, consideration in its Award…"[*58].

92. Counsel for the BPOA submits that the Tribunal appears to have considered the doctrine of legitimate expectation to be limited to imposing procedural/consultative requirements on the State before it changes its position. He submits that this is exemplified by the Tribunal's reliance on the *Niazi case* and its reasoning in paragraphs 54-56.

93. Counsel contends that there is however also a doctrine of *substantive* legitimate expectation which the Tribunal has completely overlooked. In relation to substantive legitimate expectation the reliance is placed on the judgement of Lord Woolf in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213, [57]:

> *"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply*

procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

94. The main point made by Counsel for the Minister is that a legitimate expectation can only arise on the basis of a lawful promise or practice whereas here to require the Government to continue to pay the employees' contribution to the GEHI Fund would be in breach of section 5 of the 1986 Act. He relies upon the judgement of Peter Gibson LJ in *Rowland v The Environment Agency* [2005]1 citing the following passage from the judgement of Lightman J at first instance:

"69. English domestic law imposes a constraint upon the applicability of the doctrine of legitimate expectation. For an expectation to be legitimate the party seeking to invoke it must show (amongst other things) "that it lay within the powers of the ... authority both to make the representation and to fulfil it": per Schiemann LJ in R (Bibi) v. Newham LBC [2002] 1 WLR 237. A legitimate expectation can only arise on the basis of a lawful promise or practice: per Gibson LJ in Begbie at 1125. If the expectation relates to the exercise of a lawful discretion e.g. to admit late claims, such an expectation may bind the public body to exercise its discretion in accordance with that expectation: see R v. IRC, ex parte Unilever [1996] STC 681. But under English domestic law there can be no legitimate expectation that a public body will confer a substantive benefit or extinguish an obligation when it has no power to do so. This rule of law has been the subject of sustained academic criticism as conducive to injustice: see e.g. Professor Craig (1999) Administrative Law 4th ed at 642 and Administrative Law in Ireland, 3rd ed at p.863. But it remains the law."

Discussion on legitimate expectation

95. In *Coughlan* Lord Woolf considered the potential scope of the principle of substantive legitimate expectation and said at [59]:

> *"Nevertheless, most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. We recognise that the courts' role in relation to the third category is still controversial; but, as we hope to show, it is now clarified by authority."*

96. In *R v Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, Bingham LJ emphasised the need for the promise to be "*clear, unambiguous and devoid of relevant qualification*", and said:

> *"If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness…"* (pp 1569-1570).

97. In this case there can be no real concern about the need for the promise to be "*clear, unambiguous and devoid of relevant qualification*" given the exceptional circumstance.

98. First, for at least the last 48 years it has been a term of the employment contracts of the Prison officers that they are entitled to free medical attendance in respect of all the injuries and illnesses including appropriate surgical, specialist or other therapeutic treatment. The medical benefits extend to in-patient or out-patient hospital treatment. The Prison officers agreed to take up employment with the Government on the basis of these contractual terms.

99. Second, since 2017 the employment contracts for the Prison officers have standard terms and conditions including a term that *"Uniformed Officers are provided with free Government Employees Health Insurance (GEHI) and a free dental plan for themselves"*.

100. Third, as confirmed by Counsel for the Minister, for at least the last 48 years the Government has paid on behalf of all Prison officers their contribution to the GEHI Fund.

101. Counsel for the Minister relies upon the judgement of Lord Carnwath in *The United Policyholders Group v The Attorney General of Trinidad and Tobago* [2016] UKPC 17, [121], as indicating the modern approach to the principle of substantive legitimate expectation:

> *"121. In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a "macro-economic" or "macro-political" kind. By that test, for the reasons given by Lord Neuberger, the present appeal must fail"*.

102. Even if the court was to take a narrow view of the *Coughlan* principle this is, subject to the issue of unlawfulness, a clear and compelling case where the Prison officers are entitled to a legitimate expectation that the Government will continue to pay for the free medical benefits in accordance with the terms of their contracts

of employment or to achieve the same object by enrolling the Prison officers in the GEHI scheme and paying the employees' contribution. Indeed, Mr Diel, Counsel for the Tribunal, accepted that leaving aside the issue of unlawfulness, the exceptional circumstances of this case would give rise to a substantive legitimate expectation on the part of the Prison officers.

103. I now turn to the main contention of the Government in relation to this issue, namely, that no relevant legitimate expectation can arise because such an expectation would be contrary to the terms of section 5 of the 1986 Act.

104. For the reasons set out in paragraphs 80 to 86 above, in my judgement, there is in fact no express prohibition in the 1986 Act, or the earlier acts, against the Government making payment on behalf of its employees. As noted above, this submission elevates form over substance and if the direct payments by the Government into the Fund are objectionable then the Prison officers can make the payment and the Government can either reimburse Prison officers or increase the salary base by the amount of the GEHI contributions.

105. Secondly, I accepted the submission made on behalf of the BPOA that the most likely explanation for the Government's decision to enroll Prison officers in the GEHI scheme was to acquire a delivery mechanism so that the Government could comply with its contractual obligations for free medical benefits under the employment contracts. If the Government is making payments to the GEHI Fund in order to comply with its contractual obligations under the contracts of employment there is no obvious reason why these payments should be characterized as unlawful. These contributions made by the Government are not gratuitous but made for the purpose of discharging an existing liability under the individual contracts of employment.

106. If the true position is that as the Prison officers were enrolled in the GEHI scheme as a delivery mechanism for the contractually agreed free medical benefits set out

in the employment contracts then it must follow that if Prison officers made direct contributions to the GEHI Fund they would be entitled to seek reimbursement from the Government. The contribution by the Prison officers to the GEHI Fund would not be materially different than the co-payments made by them in relation to medical services. The Government has always reimbursed the Prison officers in relation to co-payments made by them.

107. Even if the effect of section 5 of the 1986 Act is to not allow the Government to make contributions on behalf of the Prison officers it does not necessarily follow that no substantive legitimate expectation can ever rise as a matter of law.

108. This issue received consideration in the Court of Appeal in *Rowland*. As noted in paragraph 93 above, Peter Gibson LJ cited with approval the statement from Lightman J that " *an expectation to be legitimate the party seeking to invoke it must show, amongst other things,* "*that it lay within the powers of the… authority both to make the representation and to fulfil it*"".

109. Despite the position under English domestic law, it was further argued in *Rowland* before the Court of Appeal that the position was not so rigid under article 1 of the Protocol of the European Convention on Human Rights. Article 1 provides:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

110. The plaintiff in *Rowland* argued that what would be a legitimate expectation under English law, but for being *ultra vires* the public authority concerned, relating to specific rights connected with a specific property is a "possession" within the meaning of article 1 and that "possession" cannot be taken away or interfered with except in accordance with the requirements of article 1 as regards the principles of legal certainty and proportionality.

111. This submission was accepted by Peter Gibson LJ holding that the plaintiff's expectation was a possession entitled to protection under article 1 unless the interference by the defendant with the possession was justified and proportionate [92]. This submission was also accepted by Mance LJ at [152]:

> *"Whatever the previous position, I consider, in the light of the European Court decisions in Pine Valley and Stretch, that it can no longer be an automatic answer under English law to a case of legitimate expectation, that the Agency had no power to extinguish the PRN over Hedsor Water or to treat it as private. However, the present case differs significantly from those two cases. In Pine Valley and Stretch, the European Court was considering claims for relief against states. Those states undoubtedly had the power to pay compensation for any inability of the part of the public authority whose conduct was in issue to fulfil any legitimate expectation which it had created."*

112. As noted by Hellman J in *Edwards v Minister of Finance* [2013] SC (Bda) 24 Civ (5 April 2013) article 1 is similar in scope to section 13 of the Schedule Bermuda Constitution order 1968 ("the Constitution"), which is headed *"Protection from deprivation of property":*

> *"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions [which are then set out] are satisfied, …*

(2) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section –

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right—

(i) in satisfaction of any tax, rate or due;

. . .

(iii) as an incident of a … contract; …"

113. I agree with the tentative view expressed by Hellman J in *Edwards* at [32] that by parity of reasoning with the case law on article 1, legitimate expectation is "property" within the meaning of section 13 and therefore subject to the protection that section.

114. As noted above the facts of this case are exceptional. The promises which are said to give rise to substantive legitimate expectation are in fact terms of contracts entered into between the Government and Prison officers for at least the last 54 years. In addition there is the admitted course of conduct on the part of the Government of making contributions to the GEHI Fund for at least the last 48 years.

115. In the circumstances the alleged lack of authority on the part of the Government to make the contribution to the GEHI Fund on behalf offer the Prison officers was not, as the Tribunal thought, a complete answer to the Prison officers claim based upon substantive legitimate expectation. Such a legitimate expectation could arise even if there was such an obstacle because it was open to the Tribunal to order compensation for the loss of the rights suffered by the Prison officers (See: *De Smith's Judicial Review*, 7th edition, [12-080]). It was open to the Tribunal to

require the Government to pay by way of compensation a sum equivalent to the GEHI contributions which are now required to be paid by the Prison officers.

116. As noted in paragraph 90 above the Tribunal in fact thought that the Prison officers should be compensated for the loss of their rights. The Tribunal stated "*There is also the principle that where a "right" or benefit, exercised by a citizen is taken away, fair and reasonable compensation ought to be given in return"* [28], and "*Loss of benefits invoke considerations or notions of "compensation" for such loss; no matter how long or short, or what form, that compensation assumes or takes. The Tribunal has taken these matters into, and under, consideration in its Award"* [58].

117. The Tribunal ordered that the BPOA members shall accept the pay increase offered by the Government: 2.5% the increase in the first year (2017 – 2018) and 2% pay increase in the second year (2018 – 2019). The Court was advised that this was the first pay increase after a considerable number of years.

118. In relation to the GEHI scheme the tribunal ordered that the BPOA members shall commence making financial contributions of 50% to the cost of compulsory GRHI for 12 months from 1 October 2019 and thereafter shall pay the cost in full.

119. In practical terms, the GEHI premium which the Prison officers now need to pay is $4, 830.24 per annum at current rates. They will pay 50% of this amount until 30 September 2020 and the full amount commencing 1 October 2020. The Prison officers' base salaries as set from 1 April 2018 range from $66,855.53 to $77,300.25 gross. The GEHI contributions are therefore, the BPOA contends, a significant expense.

120. The BPOA complains that even accounting for the pay increase allowed by the Tribunal, the result is an overall reduction in pay for prison ranging from $1,465.15 to $1,920.70 according to the Government's figures. BPOA contends that these figures underestimate the true loss as the pay increase applies to the

Prison officers' pay before tax while the GEHI payment is taken from their pay after tax.

121. I accept the BPOA's submission that the Tribunal's conclusion on compensation was inconsistent with its own reasoning. Whilst the Tribunal stated that fair and reasonable compensation should be given in return for loss of free GEHI that the Tribunal did not award such compensation. Its award simply allowed for the benefit to be withdrawn in stages. After the first year the BPOA members would have lost the benefit of free GEHI in its entirety without any compensation. The Tribunal reached this decision in the knowledge that Government had in the past made *"concessionary, compensatory or compromise offers of "grandfathering in ", contributing to, or compensating existing officers, or even new recruits"* [33].

122. For these reasons the Tribunal erred in law in its consideration of the BPOA's claim based upon substantive legitimate expectation and as a result its Decision in relation to the issue of contribution to the GEHI scheme should be set aside.

123. In light of this decision it is unnecessary to consider the BPOA's additional submission that as the Government and Prison officers have acted on the basis that the Government has contracted to ensure medical attendance is in fact free for at least the last 33 years, the conduct of the parties gives rise to an estoppel by convention relying upon *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472. I should note that if the Government is correct in its submission in relation to its legal inability to make the GEHI contributions on behalf of the Prison officers, which I have held otherwise, an argument based upon estoppel by convention is unlikely to succeed.

Conclusion

124. In light of the Court's decision that Tribunal's Decision is *ultra vires* and unlawful in so far as it purports to resolve the disagreement between the BPOA and the Government about prospective terms and conditions of employment

(paragraphs 43 to 58); the errors of law made by the Tribunal in relation to its consideration of the Prison officers contractual rights contained in the contract of employment (paragraphs 62 to 88); and errors of law made by the Tribunal in relation to the BPOA's claim based upon substantive legitimate expectation (paragraphs 89 to 123), the Court makes the following Orders:

(1) A declaration that the orders and awards of the Tribunal in its Decision 30 August 2019 are *ultra vires* and unlawful insofar as they purport to resolve the disagreement between the Plaintiff and the Second Defendant about prospective terms and conditions employment.

(2) An Order quashing the orders and awards the Tribunal made in its decision of 30 August 2019.

125. I shall hear the parties in relation to the issue of costs, if required.

Dated 8 January 2020

NARINDER K HARGUN
CHIEF JUSTICE