In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 188

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT

AND IN THE MATTER OF A DECISION BY THE MINISTER OF ECONOMY, TRADE AND INDUSTRY MADE ON OR ABOUT 3 MAY 2012

BETWEEN:

KENTUCKY FRIED CHICKEN (BERMUDA) LIMITED

Applicant

-v-

THE MINISTER OF ECONOMY, TRADE & INDUSTRY

First Respondent

-and-

THE BERMUDA INDUSTRIAL UNION

Second Respondent

JUDGMENT

(In Court)

Date of hearing: February 26-27, 2013
Date of Judgment: March 22, 2013

Mr Jai Pachai and Mr Peter Sanderson, Wakefield Quin, for the Applicant ("KFC")
Mr Craig Rothwell, Cox Hallett Wilkinson, for the 1st Respondent ("the Minister")
Mr Delroy Duncan and Mr Kyle Masters, Trott & Duncan, for the 2nd Respondent ("the BIU").

Introductory

1. By Notice of Application dated May 23, 2012, KFC applied for leave to seek judicial review of the Minister's May 3, 2012 decision to refer KFC's dispute with the BIU to binding adjudication under the Trade Disputes Act 1992 ("the Act"). The application was based on one broad legal complaint: the reference was unlawful because the dispute about whether or not the parties' 2008-2011 Collective Bargaining Agreement ("the CBA") was still in force did not constitute a "dispute" covered by the Act. This complaint appeared to be based on, inter alia, the following premises:

    (a) that a dispute about the CBA's terms was wholly distinct from a dispute about terms and conditions of the relevant employees' contracts; and

    (b) that once the CBA (which did not include transitional provisions keeping it alive pending the negotiation of a new agreement) terminated, any employment terms derived from it also lapsed entitling KFC to negotiate new contracts directly with its unionized employees and organize its affairs unconstrained by the requirements of the lapsed CBA.

2. On May 25, 2012, without a hearing, I granted leave furnishing the following summary reasons for so doing:

    > "It is arguable that that no 'labour dispute" as defined by section 2 of the Labour Disputes Act 1992 exists by virtue of the lapse of the Collective Agreement and the absence of any "bridging provisions" keeping it alive after its expiry pending the negotiation of a fresh agreement.
    >
    > I do not ignore the fact that this Court some 20 years ago in the Bermuda Forwarders Ltd. case rejected a somewhat different technical construction of the same statutory definition. The application raises arguable grounds on a point

which appears to have considerable general public importance and to have not previously been considered by the Bermudian courts.

For these reasons I have granted leave and see no reason why the usual stay of proceedings should not be granted."

3. KFC issued its Notice of Motion on May 29, 2012. Initial directions for the filing of evidence were ordered on June 14, 2012. Evidence was filed and the hearing was fixed for October 15, 2012. The hearing was adjourned because on October 11, 2012, KFC was granted leave to amend its grounds for seeking judicial review by adding the following additional complaints:

(a) firstly, the original main ground was refined to clarify to make it clear that while it was conceded a dispute about terms and conditions of employment could constitute a "labour dispute" for the purposes of the Act, it was nevertheless alleged that the issue of whether or not the CBA was still binding on the parties did not constitute a referable dispute;

(b) secondly, it was alleged that the reference to the Labour Disputes Tribunal ("the Tribunal") interfered with the Applicant's constitutional rights under section 6(8) and 13 of the Bermuda Constitution by depriving KFC of (i) its right to have its contractual rights determined by a court and (ii) by depriving KFC of its contractual and economic right to freely negotiate its own contracts;

(c) thirdly, it was alleged that the appointment of George Baisden as a member of the Tribunal was unlawful because of apparent bias.

4. KFC's position shifted significantly by the time the application was effectively heard as regards what was initially the centrepiece of the application. It was effectively conceded that certain terms and conditions had been incorporated into the employees' contracts of employment from the CBA and continued in force as contractual terms and conditions independently of the CBA. Issue was joined with the BIU as to which terms were and which terms were not so incorporated. This made its attack on the Minister's reference as a whole seem far more technical than it initially appeared to be when I initially granted leave, even then somewhat guardedly, on May 25, 2012.

5. Somewhat artificially, the BIU's counsel suggested that the issue of whether the CBA had been validly terminated was an issue in dispute. It is difficult to see on what basis it

might be argued that KFC had not validly terminated the CBA and why this matters if, as is now agreed, the incorporated terms and conditions live on in the employment contracts. However it would be wrong for me to decide this matter either as the point was not fully argued and there might well be implications arising from it which I simply do not understand. Moreover, this is clearly an issue the Tribunal is competent to determine in any event.

6. Nevertheless, the points in issue and, more broadly, the question of how this Court's jurisdiction to supervise the Tribunal ought to be exercised were all novel points arising in relation to a distinctive local statutory context which had only once been considered directly by the Bermudian courts before. In addition, these legal issues were raised somewhat atypically by an employer seeking to avoid compulsory statutory arbitration on the grounds that the Tribunal's potential ability to rewrite existing contracts of employments impermissibly interfered with its property rights.

7. Brief mention must be made of a related Writ action, Civil Jurisdiction 2012: No 212, Bermuda Industrial Union et al-v-Kentucky Fried Chicken (Bermuda) Limited et al which has been essentially on hold after the exchange of pleadings ("the Writ Action"). The BIU and certain employees in that action sought various declarations including a declaration that the purported change of employer effected by the reorganization was a breach of section 31 of the Employment Act. On June 7, 2012 in the Writ Action following an ex parte on notice hearing, I granted an interim injunction which had the practical effect of 'holding the ring' until the Tribunal proceedings were concluded or the Minister's reference to it was quashed. Formally, however, the injunction was granted pending the determination of questions in the Writ action which potentially overlapped with the issues referred to the Tribunal to the extent that they appeared to form part of the same dispute broadly viewed.

8. I refused an application by the BIU on the eve of the substantive hearing of the present application to have this Court determine the legality under section 31 of the Employment Act of KFC's reorganization as it impacted on the relevant contracts of employment. The reason for that decision was partly to avoid a second adjournment of the present application to enable KFC to prepare to meet the new argument. The application was primarily refused because it seemed to me to be fundamentally incompatible with the public law character of the present judicial review proceedings. Consistently with that pre-hearing approach, I have refrained from deciding for the purposes of the present application the principal contractual or private law issue which all counsel addressed, namely which provisions in the CBA were incorporated into the employees' contracts of employment. Those matters fall outside the proper scope of a judicial review enquiry. I

have adopted a similar approach to the apparent bias complaint which, in the first instance at least, is more appropriately dealt with by the Tribunal itself.

9. Although I accept that the position was initially far from clear, turning as it does on distinctive local legislation which has received limited attention from the local courts, it is ultimately clear (for the reasons further elaborated below) that the application to quash (in whole or in part) the Minister's reference of KFC's dispute with the BIU to the Tribunal must be refused. When the scheme of the Act is carefully construed, it is ultimately clear that that the concept of "labour dispute" is to be broadly defined and that the policy judgment of the Minister in making a reference is not to be subjected to technical legal scrutiny save in exceptional cases, such as where the dispute has already been decided or settled.

10. Nor is the Minister empowered to constrain the Tribunal's statutory autonomy by detailed terms of reference. All that the Act requires is a simple reference describing the parties to the dispute and the issues which are in controversy between the parties in summary terms.

11. In addition, KFC invoked a perceived attack on its fundamental property and access to court rights as further grounds for quashing the reference. These concerns were, no doubt, prompted in part by the somewhat ambiguous way in which the terms of reference were framed. However, when the Act is properly construed, it is ultimately clear that the Tribunal can only determine existing rights of the parties and that it has no competence to decide for the parties what any future contractual arrangements should be. This does not exclude the possibility that the Tribunal might, adopting an ad hoc mediator's role, make recommendations about issues the parties have been unable to resolve in terms of a modified or new CBA with a view to assisting the parties to conclude an agreement.

12. Accordingly although KFC is not entitled to the relief sought by way of the present application, it has served to clarify the general law relating to the Tribunal's jurisdiction and some formal declaratory relief in this respect might well be of assistance to the parties and the Tribunal.

Background: the evolution of the dispute

13. Although the stories told by the various deponents in their affidavits are recounted from different vantage points, the events which culminated in the Minister's reference are substantially agreed.

14. Article 38 of the CBA provides as follows:

> "This Agreement shall come into effect on 15th April, 2008 and shall remain in effect for a period of not less than three (3) years and thereafter shall continue in effect provided that at any time after 14th January, 2011, three months' notice of termination or modification may be given by either party hereto."

15. On February 1, 2011 KFC gave formal notice to the BIU of its desire to modify the CBA pursuant to Article 38. Negotiations on a new Collective Agreement commenced in April 2011. Difficulties in negotiations aimed at the adoption of a new CBA were reflected in an August 4, 2011 letter from KFC to the BIU following a negotiating meeting which attached "KFC's best and final offer to the BIU for terms of extension of the CBA". The letter also expressed the following central commercial concerns from a management perspective:

> "We are disappointed that the BIU's latest proposal to KFC fails to acknowledge the company's need to control wage growth during a period of unprofitability, and the need to fundamentally reform the company's cost structure for the future in order to ensure the company's ability to continue operations."

16. The KFC proposal recorded the overwhelming majority of the provisions of the existing CBA as continuing and as "agreed". Items to be agreed included (a) a proposed increase of employee contributions towards health insurance (Article 11(4)), (b) a proposed modification of pension contributions linked to any wage changes (Article 15(b)), (c) the duration of the new agreement (Article 38), and (d) miscellaneous issues related to wages and related financial benefits (Schedule). With no substantive response forthcoming to the August 4, 2011 proposal, KFC by letter dated september 9, 2011 wrote the BIU advising:

> "…in [the] absence of a clear agreement to make necessary modifications to the Collective Agreement, KFC is not able to continue with the status quo indefinitely into the future. Therefore, we give you notice pursuant to Section 38 of the Collective Agreement that KFC is terminating the Agreement with effect [from] three months from today (i.e. termination effective end of day 9 December 2011)."

17. A meeting followed after which the BIU on October 4, 2011 wrote the Department of Labour in material respects as follows:

> "We have reached an impasse and at our last meeting held on Wednesday, September 28, 2011, I informed them that I would write you to ask for your assistance by way of mediation to help us reach a satisfactory conclusion."

18. This was on any view a very non-confrontational and conciliatory step by the Union once it felt bilateral negotiations with KFC would not bear fruit even if from the management's perspective it ignored altogether the commercial pressures the company was under which required an expeditious resolution. However the Memorandum sent by "KFC Executive" to "All KFC Employees" on December 15, 2011 is what undoubtedly brought the simmering dispute to boiling point. The crucial paragraphs read as follows:

> "The termination notice period ended on Friday 9 December 2011 and, therefore, the provisions of the Collective Agreement ceased to apply with effect on Saturday 10 December 2011. Therefore, the terms of employment for all staff previously covered by the Collective Agreement will now be the terms outlined in the Employment Act 2000. KFC is working to produce an Employee Handbook which will serve as your guide to your rights and benefits as a KFC Employee. We hope to have this new Handbook completed and available for distribution to all staff early in in January 2012.
>
> In the interim, **we wish to call to your attention the following immediate changes** which have resulted due to the expiration of the Collective Agreement, and will impact payroll..."

19. A Memorandum dated December 21, 2011 reiterated the implied assertion, now accepted as incorrect in law, that the termination of the CBA had the effect in law that all contractual terms and conditions of employment derived from the CBA also lapsed.

20. Attempts to mediate continued and the Department hosted a meeting between the parties on March 27, 2012. It seems that at this meeting the BIU proposed arbitration and the Labour Relations Officer agreed it was a means of resolving the impasse. However, in KFC's April 11, 2012 letter to the Labour Relations Officer, the origins of the present judicial review application emerged in an enclosed April 10, 2012 letter from KFC's attorneys Wakefield Quin:

> "…the Department of Labour has suggested sending to arbitration the issue of whether the Collective Agreement has been validly terminated…In the absence of consent by one or both parties…the issue does not fall within the definition of a 'labour dispute' which can be referred by the Minister to a tribunal under the Labour Disputes Act…

> Accordingly, if the Minister were to refer the termination issue to a tribunal, it is our firm's firm view that the Minister would be acting unlawfully as she does not have the power to refer a dispute to a tribunal unless it falls within the definition of 'Labour dispute' in the LRA, thereby making such a decision susceptible to challenge in the Supreme Court of Bermuda by way of judicial review."

21. Before mediation efforts could bear fruit in terms of the conclusion of a new CBA and/or before a reference to statutory arbitration had been fully considered, KFC fired off what the BIU doubtless perceived as a highly incendiary missive. The April 12, 2012 letter advised that a restructuring of KFC's business was to take place with its operations being carried out by a newly-formed subsidiary:

> "As a result of the Board's review of KFCB's structure, it became apparent that an updating of the company's structure was needed in order to improve management financial reporting and more effectively utilize the company's capital…all restaurant operations will be conducted by KFCO as the new operating entity…Therefore, effective from close of business on 31 May 2012, all employees of KFCB will be transferred to KFCO. These statements are being prepared and will be provided to you for review and signature within the coming weeks."

22. The corporate reorganization per se did not on its face have any substantive commercial impact on employees' rights[1]. But with the CBA terminated and KFC asserting that such termination had brought the pre-existing employment contracts to an end, the introduction of new contracts fortified the impression that KFC felt it was entitled to bypass the BIU altogether and unilaterally determine the BIU members' contractual terms. The BIU called for a boycott of the KFC premises the same day. This brought the dispute onto the front burner in terms of media attention.

23. On April 18, 2012, the Department of Labour and Training formally signalled the fact that the Minister was contemplating referring the dispute to arbitration. This intention was confirmed by letter dated April 23, 2012 when the parties were requested to assist the Minister to understand the nature and scope of the dispute. The following day KFC challenged the Minister's ability to refer the dispute to compulsory arbitration while requesting clarification of what the terms of any reference would be. On April 25, 2012

[1] For the avoidance of doubt, no view is expressed on the BIU's argument that the reorganization was prohibited by section 31 of the Employment Act, however.

the BIU responded proposing that various aspects of the dispute in relation to the CBA should be included in the terms of reference.

The Minister's reference to the Labour Disputes Tribunal

24. The following Notice dated May 3, 2012 was published in the Bermuda Sun for May 4, 2013:

> "Pursuant to section 4 of the Labour Disputes Act 1992, I declare that a Labour dispute exists with **Kentucky Fried Chicken (Bermuda) Limited and the Bermuda Industrial Union**.
>
> In accordance with section 11 as read with section 4, of the Labour Disputes Act 1992, I am referring the said dispute for settlement to the Labour Disputes Tribunal established under section 5 of that Act."

25. That same date Wakefield Quin wrote the Department reiterating KFC's position on the validity of the reference but, without prejudice to this position, suggested that the only question which might potentially be referred was the question of whether or not KFC had validly exercised its right to terminate the CBA. On May 21, 2012, KFC objected to the proposed appointment of George Baisden as a Tribunal member on the grounds of apparent bias due to his past links with the BIU. By letter dated May 22, 2012, the Minister formally notified the parties that the following persons had been appointed to constitute the Tribunal: Wendell Hollis (Chair), George Baisden and Garry Madeiros. The Minister's terms of reference were defined as follows:

> "To hear the parties and make a binding award in respect of the unresolved issues between the parties, to include the following:
>
> (1)to determine whether or not the terms and conditions of employment of Kentucky Fried Chicken (Bermuda) Limited ("KFC") employees incorporated from the Collective Bargaining Agreement which came into effect on 15th April 2008 ("the CBA") are still in effect and whether the CBA is still binding on the parties;
>
> (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 (1) by determining the following terms and conditions of employment upon which agreement has not been able to be reached between the parties :

> a) the health and safety of the works of KFC (article 11 of the CBA;
> b) the remittance of the pension funds to t[he] Restaurant Fund (Article 15)
> c)the employer pension contributions (article 15);
> d)training (Article 33);
> e) employee benefits as provided for in Schedule 1-5 of the CBA;
> f) employee wages for April 15 [2010] to April 14, 2011…"

26. The Minister before constituting the Tribunal had given notice to the parties of the proposed appointees. In an email dated May 21, 2012 from its Controller and Director Jason Benevides, KFC objected to the appointment of George Baisden:

> "…On the basis of Mr Baisden's extremely close ties to the BIU and the BIU's admission of his history as a 'fanatical' BIU promoter, KFC believes it represents a significant conflict of interest for Mr Baisden to be appointed to this particular tribunal for consideration of a matter to which the BIU is a party.
>
> Accordingly, I ask that you register KFC's objection to Mr Baisden's proposed appointment to the Labour Disputes Tribunal. Further, KFC asks that the Minister seeks a replacement panellist for Mr Baisden who can both act & appear to act without bias and with complete impartiality in this matter."

27. This objection was implicitly rejected. However, in paragraph 8 of the Second Patrice Minors Affidavit, the Minister indicated she was willing to reconsider the appointment if the parties agreed an alternative nominee and invited the parties to pursue such an agreement. This invitation was either not taken up by the parties at all or not taken up with any positive result.

Legal findings: does the dispute referred constitute a "labour dispute"?

28. The question of whether the dispute referred was capable in law of being validly referred has two aspects to it. The narrower question is whether the dispute referred falls within the requisite statutory definition. The broader aspect to the question, which necessarily shapes the analysis of the narrower question itself, requires one to ask what the

underlying legislative intent behind the relevant statutory provisions is. How narrowly or broadly is the Minister's discretion to refer a dispute and the Tribunal's own competence to determine the extent of its jurisdiction defined?

Overview of legislative scheme

29. Section 2 of the Act provides that the term "labour dispute" has the same meaning assigned by the Labour Relations Act 1975 ("the LRA"). Section 3 provides that the Act applies to any dispute specified in a notice published under section 4 declaring that a labour dispute exists or is apprehended. Section 5 empowers the Minister to constitute a three-member 'Labour Disputes Tribunal' after consulting the employer and a representative of the employees. The Chairman must be legally qualified. Section 11 empowers the Minister to "refer the matter for settlement to the Tribunal".

30. Section 8 provides that the Tribunal shall be independent and section 9 empowers the Tribunal to regulate its own proceedings. Section 13 provides that parties may be represented. The provisions with respect to the powers of the Tribunal are expressed in extremely general terms. Section 14(1) states: "The Tribunal shall examine and inquire into any labour dispute referred to it and shall make its decision or award as soon as practicable." Section 15 sets out "additional" powers of the Tribunal including (expressly) the power to award compensation and (impliedly) the power to order reinstatement. Section 16 makes the award of the Tribunal binding; section 17 empowers the Tribunal itself to determine questions which arise about the interpretation of an award.

31. Section 19 of the Act renders unlawful the commencement or continuance of any lock-out, strike or irregular action short of a strike "[a]t any time after the notice mentioned in section 4 is published or at any time after a labour dispute is referred to the Tribunal and the dispute in either case is not otherwise determined". Section 20(1) of the Act applies the provisions of sections 37-39 of the LRA relating to criminal prosecutions. Section 5Y ("Enforcement of judgment, order or award against trade union") of the LRA is applied to the Act.

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:

(a) 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;

(b) deals with the same subject-matter (compulsory binding statutory arbitration for labour disputes in relation to essential services); and

(c) 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:

(a) under the LRA, there is an express power to make a retrospective award back-dated 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;

(b) 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 of any express power to modify statutory rights;

(c) 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).

36. Understanding the legislative scheme is pertinent not just to the question of the validity of the reference which is presently under consideration. It is also relevant to the issue addressed separately below of whether the statutory scheme in its application to the facts of the present case operates in a disproportionate manner with the result that it interferes with KFC's constitutionally protected rights.

37. However, for present purposes it suffices to note that there is no obvious express statutory provision requiring the Minister in referring a dispute to the Tribunal under section 11 of the Act to draw up terms of reference for the Tribunal. This may be contrasted with the position under the following provisions of the Police Act 1974:

> "**Settlement by arbitration**
>
> 29F (1) Subject to subsection (2), where the conciliator has reported under subsection (4) of section 29B that a matter referred to him under that section has not been settled by conciliation, the Minister shall within fourteen days refer the matter to the Tribunal for arbitration in strict accordance with terms of reference provided by him.
>
> (2) The Minister shall provide the Minister of Finance with a copy of the terms of reference in draft, and shall consult that Minister generally about the terms of reference before he settles them.
>
> (3) The Tribunal shall—
>
> (a) within thirty days of the reference commence proceedings for settling a matter referred to it under subsection (1); and
>
> (b) deliver the award granted by it (the "Tribunal award") to the Minister within sixty days after the commencement of those proceedings.

(4) The Minister shall transmit the Tribunal award to the parties as soon as he receives it."[2] [emphasis added]

Scope of the Minister's reference: submissions

38. The relevant definition of the term "labour dispute" set out in section 1 of the LRA is as follows:

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

39. KFC's counsel conceded that, subject to their constitutional arguments, the Tribunal had jurisdiction to determine whether or not the terms and conditions of employment of KFC employees incorporated from the CBA are still in effect. This was a major retreat from the original contention that the termination of the CBA also operated to terminate any terms and conditions incorporated into the employees' contracts of employment from the CBA. It was also conceded that a dispute about a procedure agreement could be referred

[2] This section was indirectly considered in R-v-Permanent Police Tribunal and Bermuda Police Association [2009] Bda LR 15 (Kawaley J); [2009] Bda LR 58 (Court of Appeal).

to the Tribunal and that a procedure agreement as defined in section 1(1) of the Act included various elements of the CBA, such as provisions dealing with, *inter alia*:

> *(a)* machinery for consultation with a view to resolving disputes about terms and conditions of employment or other questions;
>
> *(b)* disciplinary procedures.

40. The term "procedure agreement" is defined in section 1(2) of the LRA as follows:

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

41. However, it was submitted that in the present case the only dispute about the CBA was whether or not it was still in existence; and this (to the extent that the matter was subject to doubt) was not a "trade dispute". The question of whether or not the CBA had been terminated could not lawfully be referred to the Tribunal for adjudication.

42. Moreover, a collective agreement was not itself enforceable: Ford Motor Company-v-Amalgamated Union of Engineering and Foundry Workers [1969] 2 All ER 481. It followed that only disputes about terms and conditions of employment actually incorporated into the contracts of employment could validly be referred to the Tribunal by the Minister. It was clear from authorities such as Robertson and Jackson-v- British Gas Corporation [1983] IRLR 302, Kaur-v- MG Rover Group Ltd [2005] IRLR 40, Alexander et al-v- Standard Telephones and Cables Ltd [1990] IRLR 55 and Gascol

Conversions Ltd-v-JW Mercer [1974] IRLR 155, Mr Pachai further submitted, that only provisions of the CBA which were apt to be incorporated into a contract of employment were in law so incorporated.

43. In the present case the relevant statements of employment constituted conclusive evidence of the contractual terms so other terms in the CBA could not form the subject of a valid reference insofar as they related to the matters in sub-paragraphs (a)-(d) and (f) inclusive of the Minister's terms of reference, namely;

> "(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 (1) by determining the following terms and conditions of employment upon which agreement has not been able to be reached between the parties :
>
> > a) the health and safety of the works of KFC (article 11 of the CBA;
> > b) the remittance of the pension funds to t[he] Restaurant Fund (Article 15) [;]
> > c)the employer pension contributions (article 15);
> > d)training (Article 33);
> > [e) employee benefits as provided for in Schedule 1-5 of the CBA;]
> > f) employee wages for April 15 [2010] to April 14, 2011…" [emphasis added]

44. It was conceded that paragraph 2(e) of the Terms of Reference was a contractual matter which could validly be referred.

45. Mr Pachai also commended the Court to Sir James Astwood CJ's following observations in Pink Beach-v- Limited-v-Minister of Labour and Home Affairs [1993] Bda LR 33 at page 4 of his Judgment. These observations were made, incidentally, not in the context of a*n* application *for judicial review relief,* but in the context of an application for declaratory relief:

> "The Tribunal is not one which is set up to establish legal rights after due enquiry. Nor is it given exclusive jurisdiction by the statute establishing it. It is there to deal with labour disputes and to attempt their settlement. To make a ruling as to the legal rights of the parties does not, in my view, amount to trespassing into its domain. Indeed it may assist the Tribunal,

by laying out clearly the legal rights of the underlying grievance and thus provide it with a sound starting point for its consideration."

46. Mr Rothwell submitted on behalf of the Minister that such a technical approach to the Minister's power to refer disputes to the Tribunal was inconsistent with the broad terms with which the power was conferred and the mischief which the statute was designed to meet. He relied on the approach taken by the House of Lords in construing a similarly broadly-phrased United Kingdom definition of "trade dispute" in NWL-v-Woods[1979] 3 WLR 674. He submitted that the contention by KFC that the issue of whether or not the CBA had been terminated could not be referred as both "nonsensical" and inconsistent with the Court of Appeal's decision in relation to a reference of this question to the Board under the LRA in Pink Beach-v- Limited-v-Minister of Labour and Home Affairs [1993] Bda LR 21. Moreover, even applying KFC's test for the incorporation of contractual terms, it was clear that the disputed items in the Terms of Reference were either expressly or impliedly incorporated.

47. Counsel also pointed out that section 6 of the Employment Act 2000 ("Statement of employment") contemplates that contractual conditions of employment may be linked to a collective agreement in providing:

> "(2)The statement shall contain particulars of the following-
>
> > …(o) the existence of any collective agreement which directly affects the terms and conditions of employment…"

48. Mr Duncan on behalf of the BIU supported the submissions made by the Minister's counsel. He contended that it was clear that all the terms and conditions of the CBA were incorporated into the contracts of employment. This was partly because the parties conducted on themselves on this basis: Harlow-v- Artemis International Corp Ltd. [2008] IRLR 629. Secondly this was because the relevant statements of employment said so. As regards KFC's attempts to sever the issue of the termination of the CBA from the reference, counsel submitted this was unrealistic having regard to the fact that after the termination relied upon by the employer, the parties were negotiating an interim CBA. It made no sense to seek to separate the intertwined issues of the dispute about the existence of the CBA and the dispute about contractual terms. In analysing whether or not the Minister's reference was within or without the scope of the Act, the BIU's counsel submitted that the main focus ought to be whether or not a dispute exists and whether the statutory mechanism for resolving it is likely to move a conflict from the streets towards a peaceful adjudication: Bermuda Forwarders Limited-v- Bermuda Industrial Union et al[1992] Bda LR 73; Pink Beach Limited-v-Minister of Labour and Home Affairs [1993]

Bda LR 33 (Sir James Astwood CJ). In particular, counsel relied on the observations made in the latter case where Sir James Astwood, rejecting the "ingenious" argument of the employer as to why a labour dispute did not exist, opined (at page 11) as follows:

> *"I cannot, therefore, accept the company's contention in this regard. To do so would be to ignore the realities of the situation in favour of an artificial construction, and I am not prepared to limit the application of the legislation in this way."*

49. Finally Mr Duncan submitted that if the threshold for the Minister exercising her discretion to refer the dispute to the Tribunal was met, the facts of the present case came nowhere near the requirements for finding that the reference was unreasonable (i.e. irrational) in public law terms.

50. The following threshold issue arises for determination in light of the submissions summarised above which was not directly addressed by counsel. Having regard to the statutory powers conferred on the Tribunal and the Minister respectively, to what extent if any does this Court's supervisory jurisdiction over the Tribunal extend to defining the scope of the Tribunal's jurisdiction before the Tribunal itself has sought to formulate its own terms of reference?

Findings: scope of Court's supervisory jurisdiction over the settling of terms of reference of a dispute referred to the Tribunal by the Minister

51. In my judgment the statutory scheme under the Act does not envisage either:

(a) the Minister defining with any particularity the issues to be determined by the Tribunal; or

(b) the Court determining the legality of a reference by the Minister otherwise than with the concurrence of the Tribunal itself, save in cases where it is alleged that the entirety of the reference is invalid because e.g.:

(i) there is clearly no dispute which the Tribunal can lawfully adjudicate; and/or

(ii) the relevant dispute cannot validly be determined by the Tribunal because the dispute has already been determined by another tribunal or a court.

52. The Act empowers the Minister to "by notice published in the Gazette declare that a labour dispute exists or is apprehended" (section 4). Section 11 then reads as follows: "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." I find it impossible to see why it is necessary to read into these straightforward provisions an implied requirement that the Minister in referring the matter to the Tribunal must do more than simply:

(a) refer to the notice published under section 4;

(b) describe the parties to the dispute; and

(c) state that the dispute has not been otherwise determined (i.e. resolved).

53. The Tribunal is plainly a quasi-judicial body. It is autonomous (section 8). Its chairman must be legally qualified (section 5(2). It can determine its own procedure (section 9). It may compel the attendance of witnesses and the production of documents and receive sworn testimony, even though the strict rules of evidence may be dis-applied (section 12). The parties may be legally represented in proceedings before the Tribunal (section 13). The Tribunal is empowered to proceed by way of default and award costs and compensation (section 15).

54. Absent an express statutory requirement that it determine a dispute referred to it in accordance with terms of reference set by the Minister (e.g. Police Act 1974, section 29F(1), a provision which dilutes the Permanent Police Tribunal's independence), it is difficult to see why the Tribunal's powers should be read as limited to mechanistically deciding a dispute the parameters of which have been cast in stone by the Minister. This would be inconsistent with its express status as an autonomous body. Section 8 provides as follows: "The Tribunal in the exercise of the powers conferred upon it by this Act shall not be subject to the direction or control of any other person or authority." The statutory machinery can work perfectly well if the Tribunal :

(a) gives directions for summary pleadings setting out the parties' respective cases in relation to the dispute; and

(b) decides for itself (<u>in the first instance at least</u>) the precise scope of the dispute and the issues which ought to be decided.

55. These powers are to my mind essential for the Tribunal to operate as a statutory tribunal. As Scott Baker J (as he then was) observed in Secretary of State for the Home Department-v-Immigration Appeal Tribunal [2001] EWHC Admin 261:

> "12. The Tribunal, in my judgment quite correctly, pointed out that it has only those powers that are given to it by the statutes and rules that govern its jurisdiction and procedure. It has no inherent powers save those which enable it to prevent its processes being abused. Without these it could not function properly as a tribunal."

56. I respectfully disagree, as a general proposition, with the following statement of Astwood CJ in Pink Beach Limited-v-Minister of Labour and Home Affairs [1993] Bda LR 33 (at page 4): "That Tribunal is not one which is set up to establish legal rights after due enquiry". The express powers conferred on the Tribunal by the Act which establishes it make it clear that the Tribunal is competent to establish legal rights after due enquiry into the labour dispute placed before it for its determination. For the reasons set below in relation to KFC's constitutional arguments, I reject the suggestion that the Tribunal is empowered to impose new contractual terms on the parties without their consent.

57. Save in exceptional cases, this Court will generally have no proper grounds for pre-emptively reviewing the validity of a reference by the Minister to the Tribunal based on arguments that one or more of the issues referred do not constitute a "labour dispute" as defined by the Act. While the Minister may wish to assist the Tribunal by defining the scope of the dispute in detailed terms, any Ministerial attempt to define the terms of reference has no binding legal effect on the Tribunal at all. This is for the simple reason that the Act does not confer any such power on the Minister (expressly or by necessary implication).

58. One example of the sort of exceptional circumstance which might justify this Court reviewing a reference to the Tribunal before the Tribunal has adjudicated the matter would be a case where a reference is made but the parties are agreed that no dispute still exists. An illustration of such a case is provided by Bermuda Cablevision Ltd-v- Green et al [2004] Bda LR 18 where an interim injunction was granted restraining the Tribunal from pursuing a dispute involving one employee who had entered into a binding settlement agreement. In such an instance one would expect the Minister to consent to an order quashing the reference in question, assuming the matter could not otherwise be resolved. A similar example is afforded by Pink Beach Limited-v-Minister of Labour and Home Affairs [1993] Bda LR 21 (Court of Appeal for Bermuda) where the entirety of a reference was quashed on the grounds of res judicata. This case suggests that the practice

of the Minister drawing up terms of reference is a longstanding one notwithstanding the absence of any statutory basis for it.

59. It is noteworthy that although the power of the Minister to formulate terms of reference for the tribunal under the LRA was not questioned in that case, Henry JA's approach (at pages 3-5) implicitly rejected a technical approach to defining the scope of the labour dispute in question. The entirety of the reference was quashed even though counsel for the appellant did not object to one item being referred on the grounds that in substance there was only one 'real' labour dispute. Henry JA (delivering the Judgment of the entire Court) stated (at pages 3-4):

> "Although, therefore, the question as to whether there was in force a collective agreement between the Appellant and the Union was not referred as a dispute to the Minister, it was nevertheless an integral part of the investigation of the dispute which was referred to him. Ordinarily, the Minister would have been justified in referring that question to the Board; had he done so prior to January 26, 1993 there could have been no justifiable complaint…however…the Minister, some two weeks after the Board's decision, referred the same question for consideration in circumstances where no attempt had been made to appeal against that decision…In the circumstances the Minister's action appears to be sufficiently unreasonable…as to be classified as an excess of jurisdiction."

60. The Court of Appeal in Pink Beach Limited-v-Minister of Labour and Home Affairs [1993] Bda LR 21 had no apparent difficulty with the proposition that was seemingly uncontested, namely that the issue of whether or not a collective bargaining agreement was still in force could validly be referred to a tribunal under the Act.

Findings: has KFC made out grounds for quashing all or some of the reference to the Tribunal?

61. Even taking into account the constitutional argument addressed below, I find that KFC has failed to make out its case for this Court quashing the Minister's reference to the Tribunal in whole or in part. It was in substance common ground that a labour dispute did exist in relation to certain terms and conditions of employment of the relevant employees, both in the aftermath of the purported termination of the CBA and in terms of the negotiation of a new collective agreement.

62. I decline the invitation made by KFC's counsel to resolve the dispute as to whether certain provisions in the CBA have or have not been incorporated into the contracts of employment. This is quintessentially a matter for the Tribunal. Any suggestion that a

dispute about whether or not certain alleged contractual terms are in fact effective and binding contractual terms does not constitute a dispute about "terms and conditions of employment" only has to be stated to be rejected. For the reasons set out above, it is not the proper function of this Court to interfere with the Tribunal's adjudication of a dispute which is referred to it save:

(a) in exceptional cases where it is clear at the outset that the entire reference is legally flawed; and/or

(b) in the course of the Tribunal proceedings a decision is made or an issue arises which clearly calls for the interference of this Court.

63. The scheme of the Act envisages that the dispute is effectively frozen pending the determination of a referred dispute by the Tribunal. Employers cannot fire; employees cannot strike. These restraints on the fundamental rights and economic freedoms of the parties to labour disputes imposed by the reference are wholly inconsistent with the notion that Parliament intended this Court to have an unfettered jurisdiction to delay the statutory procedure while carrying out a pre-emptive, minute and technical scrutiny of the various elements of the dispute in question.

64. Section 14(1) of the Act provides: "The Tribunal shall examine and inquire into any labour dispute referred to it and shall make its decision or award as soon as practicable" [emphasis added]. That is an express statutory injunction for the Tribunal to proceed with due expedition. The function of judicial review, a discretionary remedy of last resort, is to support the proper functioning of statutory regimes, not to undermine them.

65. The statutory regime under present consideration requires the Court to construe its supervisory role over the Tribunal in narrow terms. The result is not to reject KFC's contractual arguments on their merits. It is simply to require KFC to have the relevant issues resolved in accordance with the prescribed statutory mechanism. As Mummery LJ opined in Davies-v- Financial Services Agency [2003] EWCA Civ 1128:

> "31.The legislative purpose evident from the detailed statutory scheme was that those aggrieved by the decisions and actions of the Authority should have recourse to the special procedures and to the specialist Tribunal rather than to the general jurisdiction of the Administrative Court. Only in the most exceptional cases should the Administrative Court entertain applications for judicial review of the actions and decisions of the Authority, which are amenable to the procedures for making

representations to the Authority, for referring matters to the Tribunal and for appealing direct from the Tribunal to the Court of Appeal."

66. It may be true that the absence of any right of appeal from the Tribunal to this Court under the Act is a factor that may call for a more liberal approach to granting judicial review in certain situations. However, when an application is made to quash a reference to the Tribunal by the Minister it is difficult to envisage circumstances in which this Court would routinely intervene at such a preliminary stage unless it was clear that the entire reference (or an important and discrete part of it) was legally flawed.

67. The finding that the scheme of the Act does not empower the Minister to fix binding terms of reference for the Tribunal does not in my judgment constitute grounds for quashing all or some of the Minister's reference in terms of the particular issues to be determined by the Tribunal. It will suffice to record (and possibly to formally declare) that the Tribunal is not bound by the way the Minister has chosen to delineate the various aspects of the dispute. It is for the parties themselves to define the elements of their dispute before the Tribunal which is charged with adjudicating them.

68. The need for the Court to further clarify the Tribunal's jurisdiction before it commences its work will be revisited below when considering KFC's constitutional arguments.

The impact of section 6(8) and 13 of the Constitution on the validity of the reference

The submissions of counsel

69. Mr Sanderson advanced the alternative argument that having regard to the Minister's need to have regard to KFC's fundamental rights and freedoms under sections 6(8) and 13 of the Constitution, the threshold for exercising the discretion to refer the dispute to the Tribunal was not met in all the circumstances of the present case. Although as set out in the Amended Notice of Application and Supplementary Skeleton it initially appeared to me that KFC was seeking 'direct' declaratory constitutional relief, counsel clarified in oral argument that the Court was merely being asked to construe the Act in a manner which was consistent with the relevant fundamental rights.

70. For completeness, however, I will summarize the argument set out in KFC's Supplementary Skeleton on the Proportionality/Unreasonableness Point. After all, this is the case which the Respondents came to Court prepared to meet. Firstly, it was rightly submitted that when one is considering the question of whether the Executive has applied a constitutionally valid law in a constitutionally impermissible way, the crucial question usually is whether or not the statutory power which prima facie infringes fundamental rights has been exercised in a proportionate manner consistent with the legitimate public policy ends underlying the legislation in question: Woolf, Jowell and Suer, 'DE Smith's Judicial Review', 6th edition, paragraph 11-703; Observer Publications Ltd-v-Matthew [2001] 4 PRC 288 (PC).

71. It was next submitted that section 13 of the Constitution ("Protection from deprivation or property") was engaged by the facts of the present case. This was because it could be infringed without a direct taking (Campbell-Rodrigues-v-Attorney-General [2008] 4 LRC 526 at paragraph [15]) and because the term "property" ought to be given a broad and purposive construction (A-G for Gambia-v-Jobe [1984] AC 689 at 700):

> "2.6 These two authorities show that the Privy Council is applying a broad, purposive construction to the right not to be deprived of property. In analogy to Jobe's case, the Minister has referred the dispute to a Tribunal which has been conferred a power to prevent KFC from exercising its contractual rights with regard to how much it is required to pay its workers, how long it is required to pay sick leave for, how many weeks of work it can expect from its employees and how many weeks' vacation.
>
> 2.7 There is a clear engagement with s.13, and a serious one, given that in normal circumstances an employer has to decide for itself what is its bottom line when negotiating terms and conditions. Anything below the bottom line will lead either to redundancies or, eventually, insolvency. Either is a grave consequence for both the Applicant's profitability and its employees' job prospects."

72. The nub of the complaint appeared to me to be a legal assumption which was not adequately substantiated. The Tribunal, it was implied, 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 now expired (or terminated) CBA.

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 161[3]. 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:

> "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and wellbeing of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe

[3] Also cited as 262 US 522 (1923).

a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public…

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that, in the days of the early common law, an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays, one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances…

In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not likely, and the danger from local monopolistic control less than ever…

If, as in effect contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. Civil Rights Cases, 109 U. S. 3, 109 U. S.

24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment…

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…

It is urged that, under this act, the exercise of the power of compulsory arbitration rests upon the existence of a temporary emergency, as in Wilson v. New. If that is a real factor here, as in Wilson v. New and in Block v. Hirsh, 256 U. S. 135, 256 U. S. 157 (see Pennsylvania Coal Co. v. Mahon, 260 U. S. 393), it is enough to say that the great temporary public exigencies, recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted. Here, it is said to be the danger that a strike in one establishment may spread to all the other similar establishments of the state and country, and thence to all the national sources of food supply, so as to produce a shortage. Whether such danger exists has not been determined by the legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor…

But the chief and conclusive distinction between Wilson v. New and the case before us is that already referred to. The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that, if operation is impossible without continuous loss (Brooks-Scanlon Co. v. R. Co. Commission, 251 U. S. 396; Bullock v. R. Co. Commission, 254 U. S. 513), it may give up its franchise and enterprise, but, short of this, it must continue. Not so the owner when, by mere changed conditions, his business becomes clothed

> with a public interest. He may stop at will whether the business be losing or profitable.
>
> The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce furnishes no precedent for regulation of the business of the plaintiff in error, whose classification as public is, at the best, doubtful. It is not too much to say that the ruling in Wilson v. New went to the border line, although it concerned an interstate common carrier in the presence of the nationwide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.
>
> 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 law…"

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. KFC's Skeleton concluded with the following distillation of the constitutional argument:

> "Referring the full terms of reference to binding arbitration was not a proportionate response to a small-scale labour dispute in a fast food restaurant, with regard to the parties' contractual rights and rights of access to the courts."

75. Mr. Rothwell for the Minister firstly submitted that section 13 was not engaged on the facts of the present case because, as in Grape Bay Ltd-v-Attorney-General [2002] 1 LRC 167; [2000] 1 WLR 574; [1999] UKPC 43, no deprivation of property rights had occurred. If this was wrong, section 13 was "lightly engaged". Counsel referred the Court to the following passage in Lord Hoffman's Judgment:

> "33.Their Lordships would accept that Bermudians are in the best position to know what the public interest of Bermuda requires. But the Constitution lays down a separation of powers between the executive, legislature and judiciary. On a matter

such as the desirability or otherwise of franchise restaurants, which is a pure question of policy, raising no issue of human rights or fundamental principle, the decision making power has been entrusted to those Bermudians who constitute the legislative branch of government and not to the judges. Their Lordships consider that it is plain from the terms of the Act that the legislature considered it contrary to the public interest in Bermuda to allow the further opening of franchise restaurants. This may or may not have been a wise decision. The prohibition may have been framed in wider terms than necessary. The unique identity of Bermuda, which as the background shows, it was the object of the legislation to preserve, may be a somewhat intangible concept, not easy to reduce to a few propositions. But feelings about what gives a community its identity are powerful and important. The issues which they raise are pre-eminently matters for democratic decision by the elected branch of government. The members of the legislature are not required to explain themselves to the judiciary or persuade them that their view of the public interest is the correct one. Their Lordships note that in the Court of Appeal Kempster J.A. commented that 'the legislature rather than the courts is in the best position to assess the requirements of the public interest and should be allowed a wide margin of appreciation'. Their Lordships agree."

76. This submission was a powerful riposte to the wide-ranging and almost open-ended analysis advanced on behalf of KFC. In addition, counsel made the important practical point that it was unrealistic to suggest that an award not yet made by the Tribunal would ignore any valid commercial arguments that KFC might advance. On the other hand, the Minister's counsel, like his counterparts, was unable to clearly articulate what specific statutory powers would entitle the Tribunal to "impose a bargain" on the parties in respect of future rights. Nor was he willing to concede that no such power existed.

77. As far as the complaint that the reference to the Tribunal deprived KFC of its right of access to the Court under section 6(8) of the Constitution is concerned, Mr. Rothwell relied upon the following passage in my Judgment in Bermuda Cablevision Ltd-v- Green et al [2004] Bda LR 18 (at page 7):

> "The Tribunal is clearly a quasi-judicial one as section 8 provides: "The Tribunal in the exercise of the powers conferred upon it by this act shall not be subject to the direction or control of any other person or authority." A guarantee of judicial independence does not mean freedom from supervision of the superior courts."

Findings: the implications of the constitutional arguments for the legality of the Minister's reference

78. If the full-blown constitutional arguments had been pursued and a declaration sought that the Minister's reference was invalid because it contravened KFC's rights under section 13 and/or section 6(8) of the Constitution, I would have refused to grant such relief on the grounds that adequate means of redress existed under the Act itself. The interference with property rights which it was contended was triggered by the Minister's reference would not necessarily occur if the Tribunal dealt with the dispute. The interference would only occur if the Tribunal adopted an erroneous view of its jurisdiction and rejected any

contrary submissions made by KFC on the law and factual merits of the dispute. Section 15 of the Constitution provides as follows:

> "(2) The Supreme Court shall have original jurisdiction—
>
> *(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and*
>
> *(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,*
>
> *and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:*
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law." [emphasis added]

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. Accordingly, even if the constitutional arguments are deployed merely as an aid to construction of the Act, there is still no basis for concluding that the Minister's reference was unlawful in constitutional or on traditional public law grounds.

80. The precise level of the public interest bar that a labour dispute must reach to justify the Minister deciding to make a reference to the Tribunal under the Act is the classic political or policy judgment that falls within the Executive domain. However, when the courts are called upon to assess whether such policy judgments have exceeded the permissible scope of the statutory power, the height of the bar will be directly proportional to the extent to which the exercise of the power potentially interferes with citizens' fundamental rights and freedoms.

81. Mr Sanderson's contention that the labour dispute in the present case was relatively minor affair in an election year and did not justify the reference at all crucially depended on the assumption that the Tribunal's statutory function could potentially deprive KFC of its contractual rights. Once that assumption is rejected, it is impossible to see how it is open to this Court on the uncontested facts of the present case to hold that the Minister's reference was an unreasonable one. Moreover, even if it might fairly be said that the public interest element in the dispute was at the lower end of the scale in terms of the impact of the boycott, KFC now admits that it acted for several months under a mistaken view of the law in regarding the termination of the CBA as having terminated contracts of employment as well. The controversy over the contractual consequences of the expiry of a collective agreement for existing contractual rights was a matter of obvious public interest beyond the parties' own narrow concerns.

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)<u>to assist the parties either in modifying the CBA or agreeing a new collective agreement</u> (as appropriate given the Tribunal's determination of item (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[4], 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.

84. Neither the Minister nor the BIU seemed willing to adopt any coherent position on this crucial aspect of the Minister's reference and the Tribunal's powers. Their common interest seemed to be simply to have the Tribunal seized of the dispute leaving questions of detail to be worked out before the Tribunal. This is the way the statutory scheme is supposed to operate. But while I have declined to make rulings on other issues which I consider should be determined in the first instance by the Tribunal, the constitutional implications of the doubts over whether the Tribunal was empowered to make binding determinations on future rights in my judgment required this issue to be dealt with here.

[4] Insofar as it purports to define the scope of the dispute as opposed to simply describing it for the purposes of general identification.

85. For the above reasons I find that the Minister's reference is valid and is not a disproportionate or unreasonable use of the relevant statutory power. The Tribunal is an independent judicial tribunal which is subject to the supervision of this Court and merely empowered to retrospectively determine disputes about existing contractual rights. It has no power to make binding determinations about the terms and conditions of future contracts.

Bias: the Minister's appointment of George Baisden

86. Having regard to the statutory scheme and the fact that (a) the Tribunal has not yet convened, and (b) no request has yet been made for the Tribunal member who is said to appear to be biased to recuse himself, I decline to consider the application to quash the appointment of George Baisden in the context of the present application.

87. The complaint is that the Tribunal member is a former member of the BIU, not a current member. Mr Duncan pointed out that the employer nominee on the Tribunal has a history of negotiating on behalf of management against the BIU, albeit on behalf of a company other than KFC. I accept entirely that Mr. Baisden's historic connection with the BIU does arguably create an appearance of bias; but it is far from an open and shut case. The real problem with this aspect of the judicial review application is that this Court is not the logical first port of call for the bias point to be raised. Such matters are ordinarily dealt with in the first instance by raising the objection before the tribunal on which the supposedly partial adjudicator sits. KFC has a more appropriate alternative remedy which should be pursued before seeking the intervention of this Court. The matter of apparent bias should be raised before the Tribunal.

Conclusion

88. The Applicant's application for judicial review of the 1st Respondent's reference of the labour dispute between KFC and the BIU to the Tribunal established by her under the Labour Disputes Act 1992 is refused. This Court should only exceptionally review the legality of such a reference. Here, as will probably appertain in the vast majority of cases, the Tribunal is the appropriate forum for the precise parameters of the issues to be determined to be worked out. The Minister has no power under the Act to determine the Tribunal's terms of reference even though such terms of reference were drawn up in the present case (and possibly in past cases as well). Save in extreme cases, the courts are not competent to challenge the policy judgment of the Minister that a labour dispute sufficiently engages the public interest to warrant a reference to a tribunal under the Act.

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.

90. I will hear counsel as to costs and as to the terms of the Order to be drawn up to effect to the present Judgment. In particular, it may be that a formal declaration might assist the Tribunal with respect to its jurisdiction having regard to the legal findings set out above in substantially the following terms:

(1) It is hereby declared that in its determination of the dispute between KFC and the BIU referred to it by the Minister on or about May 3, 2012, the Tribunal shall not be bound by the terms of reference drawn up by the Minister on or about May 22, 2012;

(2) It is hereby declared for the avoidance of doubt that the Tribunal has no jurisdiction to make binding determinations with respect to the terms of any future agreements between the parties, whether with respect to a modification or replacement of the CBA or otherwise.

Dated this 22nd day of March, 2013 _____

IAN RC KAWALEY CJ