

**IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF
THE REPUBLIC OF TRINIDAD AND TOBAGO**

BETWEEN

SERVOL LIMITED

Appellant

AND

EARLY CHILDHOOD TEACHERS TRADE UNION

Respondent

THE RESPONDENT'S WRITTEN CASE

*(References to the Record of Proceedings are in the format
R/Electronic Bundle Page Number/Paragraph or Line Number where available)*

Introduction

1. The Industrial Court of Trinidad and Tobago awarded workers employed by the Appellant compensation for the non-payment of termination benefits upon the termination of their employment because of age, in circumstances where their contracts of employment contained no provision for such benefits. The Industrial Court made the award pursuant to its broad powers under section 10(3) of the Industrial Relations Act ("the IRA"). A majority of the Court of Appeal upheld the Industrial Court's decision to make an award but remitted the dispute back to the Industrial Court to give the Appellant an opportunity to be heard on the quantum of compensation payable.
2. The Appellant appeals against the Court of Appeal's decision on the following grounds, as appears from its written case:

- i) The Industrial Court had no jurisdiction to make an award under section 10(3) because the failure to make provision for retirement benefits was not a trade dispute in the absence of a contractual right to such benefits.¹ The Court had no power under section 10(3) to create retirement benefits as a wholly new contractual right or cause of action;²
 - ii) The Industrial Court failed to give the Appellant an opportunity to be heard on the exercise of the Court's jurisdiction and powers under section 10(3);³
 - iii) On the assumption that the Court did have jurisdiction to make the award under section 10(3), the Industrial Court failed to apply and have regard to the relevant factors to be taken into consideration under section 10(3), as set out in the Court of Appeal's judgment in Civil Appeal No. P213 of 2015 ***Carib Brewery Limited v National Union of Government and Federated Workers***;⁴
 - iv) The Industrial Court failed to take into account relevant considerations, namely that the workers were entitled to a pension under the National Insurance Act on the basis of joint contributions made by the Appellant and the workers,⁵ the financial impact of its award and the blamelessness of the Appellant.⁶
3. It is important to note and to emphasise at the outset that the challenge to the Industrial Court's decision is to the Court's jurisdiction to make the order that it did and to its decision-making process. There is no challenge to the merits of the decision itself. It is not said that the decision to award compensation for the failure to provide retirement benefits was irrational. It is not said that the award did not meet the criteria of fairness, justice, equity, good conscience, the substantial merits of the

¹ See paragraphs 24(a), 30(a), 33, 34, 40, 41, 42, 43 of the Appellant's Written Case.

² Ibid., paragraphs 4(b), 30(c), 41, 42, 43.

³ Ibid., paragraphs 4(c), 4(e), 24(e), 60, 63.

⁴ Ibid., paragraphs 24(b), 30(d), 36, 47, 50-54.

⁵ Ibid., paragraphs 4(d), 24(f), 55-59.

⁶ Ibid., paragraph 24(e).

case or the principles of good industrial relations practice, or that the Industrial Court acted irrationally in finding that it did.

The Industrial Court's Jurisdiction

4. Section 7 of the IRA deals with the jurisdiction of the Court. In addition to the powers inherent in a superior court of record, the Court is vested with jurisdiction, *inter alia*, "to hear and determine trade disputes" and "to hear and determine any other matter brought before it, pursuant to the provisions of this Act."
5. A "trade dispute" or a "dispute" is defined in section 2(1) of the IRA as:

"any dispute between an employer and workers of that employer or a trade union on behalf of such workers, connected with the dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of any such workers, including a dispute connected with the terms and conditions of the employment or labour of any such workers, and the expression also includes a dispute between workers and workers or trade unions on their behalf as to the representation of a worker (not being a question or difference as to certification of recognition under Part 3)."
6. Section 10(3) provides as follows:

"(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall—
 (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
 (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations."
7. Plainly, the Court's section 10(3) powers are available to it when it is exercising its power "to hear and determine trade disputes". Indeed, section 10(3)(a) expressly empowers the Court to make an award "in relation to a dispute before it". A "dispute" and a "trade dispute" are given identical meanings under section 2(1).

8. The question therefore is whether there was a “trade dispute” before the Court as defined under the IRA. To answer that question, the precise matter which was before the Court must first be identified.

The matter before the Court

9. The matters before the Industrial Court originated from the termination of the employment of three Early Childhood Care and Education teachers employed by the Appellant on the ground that they had reached retirement age. By letter dated 25th March 2019⁷ to the Minister of Labour concerning the worker Magdalene Stanislaus, the Respondent reported a trade dispute which was particularised as including the failure to give Ms Stanislaus “any retirement benefit/compensation for her years of service”. Similar particulars were provided in the report in relation to Hyacinth Rampersadsingh.⁸
10. Further, in the Respondent’s Evidence and Arguments in TD 201 of 2019 the Respondent complained about the Appellant’s failure to offer the worker “any retirement benefit(s)/compensation for her years of service” and claimed “retirement benefit(s)/compensation for the worker’s 31 years of service”.⁹ The Respondent made similar claims in relation to Hyacinth Rampersadsingh¹⁰ in TD 202 of 2019.
11. In its Evidence and Arguments, the Appellant pleaded that the workers’ terms and conditions of employment did not include an entitlement to retirement benefits and that it had no policy relating to retirement benefits/compensation and accordingly had made no provision for any such payment.¹¹
12. There was accordingly squarely before the Court a disagreement or difference between the Appellant and the Respondent as to whether the workers should be awarded retirement benefits/compensation upon being retired at age 60, even

⁷ R Vol 1- pp199 to 200.

⁸ R Vol. 1, pp 319-321.

⁹ R Vol. 1, pp 237 to 238.

¹⁰ R Vol 1, pp. 258-259; 310-311.

¹¹ R Vol 1, pp. 240-241, 313-314, 340-341.

though their contracts of employment contained no provision for the payment of any benefits upon retirement.

13. The Industrial Court proceeded on the basis that that was the matter before it and so did the Court of Appeal. We do not understand the Appellant to be contending otherwise.

Was there a trade dispute before the Industrial Court?

14. The question is whether the disagreement/difference between the Appellant and the Respondent as to whether the workers should be paid or compensated for retirement benefits for which the workers' contracts of employment made no provision, is a trade dispute under the IRA? In accordance with the definition of "trade dispute", that disagreement/difference would be a "trade dispute" or a "dispute" if it is "connected with the dismissal, ... (or) non-employment" of or the "refusal to employ" the workers concerned or is "connected with the terms and conditions of the employment or labour of any such workers". Respectfully, the disagreement/difference in this case satisfies the statutory definition.
15. The phrase "connected with" is broad. The question is not whether the disagreement/difference is "about" dismissal etc. In this case, the question of the payment of retirement benefits arose out of or because of the termination of the workers' employment because they reached retirement age. The payment of retirement benefits is accordingly clearly "connected with", at the very least, their non-employment. The claim for the payment of retirement benefits or compensation for non-payment would not have arisen but for the termination of their employment on grounds of their age.
16. Likewise, the payment of retirement benefits/compensation is connected with terms and conditions or employment, more specifically the workers' benefits upon compulsory retirement. A term or condition of employment is properly so classified even though it deals with benefits which are only accessible after employment has ended. Indeed, a "worker" under the IRA includes "any such person who - (i) has

been dismissed, discharged, retrenched, refused employment, or not employed, whether or not in connection with, or in consequence of, a dispute; or (ii) whose dismissal, discharge, retrenchment or refusal of employment has led to a dispute". A trade dispute, which includes disputes between employers and workers or trade unions on behalf of workers, therefore, includes a dispute in relation to a person who has already been "not employed". It is but a short step to a finding that a trade dispute includes a dispute about benefits payable upon such non-employment.

17. It therefore fell to the Industrial Court to decide whether and how in the hearing and determination of the disagreement/difference between the Appellant and the Respondent over the non-payment of or compensation for retirement benefits it would exercise its powers under section 10(3) to make an order or award which it considered to be fair and just, having regard to the interests of the persons immediately concerned and the community as a whole, and one which was in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.

The absence of a cause of action/contractual right

18. Does it make a difference that the disagreement/difference is about a term of employment which does not yet exist and in respect of which there is no right to sue? It is respectfully submitted that it does not.
19. There is nothing in the definition of "trade dispute" which makes it a precondition of the existence of a "trade dispute" that the disagreement or difference between the parties be about an existing term or condition of employment. Neither is the existence of a cause of action, that is to say, a contractual right to sue, made a precondition of the existence of a "trade dispute". Words to that effect do not appear in the definition. A disagreement or difference can quite conceivably be "connected with" non-employment or terms of employment without there already being in existence a contractual right to sue. The definition of "trade dispute" is not limited in any way to disagreements or differences about the application of existing

contractual rights. The fact that a contractual right to retirement benefits/ compensation did not yet exist when the Court's jurisdiction was invoked in this case accordingly did not deprive it of jurisdiction to hear the trade dispute and determine whether any relief would be granted in the exercise of its powers under section 10(3).

20. To be sure, in the exercise of its section 10(3) powers, the Court no doubt would be obliged to consider that the parties had not included in their contracts of employment a right to retirement benefits, but that goes to the exercise of its jurisdiction and powers under section 10(3), not to the existence or deployment of that jurisdiction and those powers. No doubt, in some cases it would be irrational for the Court to exercise its powers under section 10(3) to award compensation for a benefit which the parties have not contracted for. But that is not the Appellant's complaint and that issue is not before the Board.
21. Most importantly, the Court's powers under section 10(3) are exercisable "notwithstanding anything in this Act or in any other rule of law to the contrary." The power is therefore exercisable notwithstanding the rule of law that a person is not to be held liable for the payment of a sum of money in the absence of a contractual or other legal obligation to do so. The Court was therefore empowered to make the award which it did notwithstanding the absence of a contractual term entitling the workers to retirement benefits.
22. That the Court was intended to exercise such wide powers is confirmed by the legislative and judicial history of section 10(3) and by the way it has been applied over time.

Historical context – the mischief that section 10(3) of the IRA was designed to address

23. The Industrial Stabilisation Act ("the ISA"), the predecessor to the IRA, was passed in 1965 against the backdrop of intense and widespread industrial action taken by

powerful trade unions.¹² The Act made all industrial action unlawful. The *quid pro quo* was the establishment of an Industrial Court which was empowered to hear and determine trade disputes and to provide relief which unions would otherwise seek to obtain by the collective withdrawal of labour.

24. In that context, the Industrial Court interpreted its statutory mandate as including the power to order the reinstatement of dismissed workers, although there were no express words in the ISA to that effect. However, in ***Trinidad Bakeries Ltd v. National Union of Foods, Hotels, Beverages and Allied Workers*** (1967) 12 WIR 320, the Court of Appeal held that the Industrial Court did not have the power to order reinstatement because “*Such a remedy cuts sharply across the historical concept of the relationship between employer and worker and is in conflict with long-established principle.*”¹³
25. The ***Trinidad Bakeries*** decision was the catalyst for Parliament’s intervention to provide expressly for the power of reinstatement and to further expand the powers of the Court with a view to freeing it from the rigid constraints of the common law. Apart from providing for the power to order reinstatement, the ISA was amended to introduce a new section 13(2) which is the precursor to the existing section 10(3). Section 13(2) provided:

“Notwithstanding any other law, and in addition to its power in subsection (1), the Court in the exercise of its jurisdiction **shall have power –**

(a) to make such order in relation to a trade dispute before it as it considers fair and just having regard to the interests of the persons immediately concerned and the community as a whole;

¹² See the 2013 publication - **Background Paper #1 of 2013- The Situation of Industrial Relations In Trinidad and Tobago: A Desk Analysis** - by the Industrial Relations Advisory Committee, established pursuant to section 80 of the IRA. The Committee noted (at pages 2-3):

“It has been argued that prior to the enactment of the ISA, Trinidad and Tobago experienced great turmoil within the industrial relations climate. In presenting the Bill, the government highlighted that 230 strikes occurred during that period, an average of 46 per year. In 1962 alone, 75 strikes took place. 74,574 workers, an average of 15,000 per year participated in these strikes. Of these 74,574 workers, 10,480 were employed in the sugar industry, 23,680 in the oil industry, 7,443 in construction, 8,461 in electricity, gas, water and sanitary services and 6,199 in transport, storage and communication. 803,899 work days, an annual average of over 100,000 was lost as a result of these strikes. 144,363 work days were lost in the sugar industry, 28,601 in the oil industry and 47,441 in construction, 20,114 in electricity, gas, water and sanitary services and 137,462 in transport, storage and communication.”

¹³ Page 327.

(b)to act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.” (Emphasis added)

26. Section 13(2) was considered by the Court of Appeal in ***Caribbean Printers Ltd v Union of Commercial and Industrial Workers*** (Civil Appeal 30 of 1972). Rees JA, in a judgment that has been cited and relied on in a number of subsequent decisions, highlighted the far-reaching effect of section 13(2) in liberating the Industrial Court from the constraints of the common law. He said (at p. 7):

“If the Industrial Court is strictly bound by the common law of the land and has no wider powers than the civil courts, then it would be an exercise in futility for a Union to seek redress from such a court on behalf of employees in a matter in which there was no legal right in civil court.

...Usually a statute alters the common law by extending it to cases which it did not cover, or restricting or excluding its operations as to cases which it did cover or may merge it wholly in the statute law but the Act seems to be of an unusual character in that it goes beyond and outside of any other law, including the common law, to establish among other things a system for the settlement of trade disputes. ***The expression “notwithstanding any other law”: contained in s.13(2) must be given a common sense interpretation and, as I see it, can only mean that in the exercise of its jurisdiction the Industrial Court may bypass the common law or any other statute, if necessary, to do what is fair and just between the parties in the settlement of an industrial dispute.***” (Emphasis added)

27. The ISA was repealed and replaced by the IRA in 1972. Section 13(2) became section 10(3), but with a deliberate, heightened and qualitative textual difference. Firstly, section 10(3) now applies not only ‘notwithstanding any other rule of law to the contrary’, but also ‘notwithstanding anything in the IRA’ itself. Its purpose is to permit the Court to dis-apply anything in the IRA or in any other rule of law in the exercise of its powers in relation to a trade dispute. Parliament had decided not to retreat from the already broad powers given to the Industrial Court, but to enlarge those powers.
28. Secondly, whereas under section 13(2) of the ISA the Industrial Court was merely empowered (“shall have power”) to make orders or awards as it considers fair and

just etc. and to act in accordance with equity and good conscience etc., under section 10(3) the Court was now required (“shall”) in the exercise of its powers to make orders or awards as it considers fair and just etc. and to act in accordance with equity etc. The exercise of the Court’s broad powers was no longer optional; the Court was now required in every case before it to be fair and just, to act in accordance with equity, good conscience, the substantial merits of the case and the principles and practices of good industrial relations and to have regard to the interests of the persons immediately concerned and the community as a whole.

29. The deliberate change in language did not go unnoticed by the Court of Appeal. In ***Texaco v Oilfields Workers Trade Union*** (1981) 34 WIR 215, Kelsick JA described section 10 (3) as being a “*mandate*”¹⁴ on the Industrial Court, while Hyatali CJ said the Industrial Court was now “*enjoined*” to apply section 10 (3) “*in the resolution of all trade disputes before it*”¹⁵. Moreover, the Chief Justice reiterated¹⁶ that “in the field of industrial relations ... common law principles do not run and have little, if any, relevance” and held that the effect of empowering the Court to apply principles of equity, good conscience and good industrial relations practices in the resolution of disputes, notwithstanding anything in the Act or any rule of law to the contrary, was that

“both employers and trade unions are not only obliged to observe and apply these principles in all their dealings with each other but must be prepared to accept that any position taken up by any of them in breach thereof may well be condemned by the court as unjustified or unreasonable.”¹⁷

30. From the early 1990’s, the Industrial Court accepted that the mandate imposed on it by section 10(3) enabled it to award compensation to workers who were dismissed in circumstances which the Court found, justified termination. In other words, the Court accepted that it could order compensation even where it had been found that the employer had done nothing wrong. The Court acknowledged the existence of

¹⁴ 34 WIR 215, at 224 j.

¹⁵ 34 WIR 215, at 233g.

¹⁶ At 233g.

¹⁷ At 233h.

this power in ***Oilfields Workers' Trade Union and Trinidad and Tobago National Petroleum Marketing Company Limited*** (TD 43 of 1994) and ***Bank and General Workers' Union v Trinidad Express Newspapers Limited*** (TD 161 of 1994) but decided in the circumstances of those cases not to make any award. In the former case, the Court acknowledged that section 10(4)&(5)¹⁸ expressly empowered it to award compensation in a dismissal dispute only where it found that a worker had been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice. The Court took the view, however, that its power under section 10(3) which was exercisable notwithstanding anything in the Act meant that it was exercisable notwithstanding anything in section 10(4)&(5), that is to say, notwithstanding the fact that its power to award compensation to a dismissed worker was exercisable only where the test in section 10(5) had been met. As the court said:

“We feel it is incumbent on the Court in every case of dismissal, even when it finds it inappropriate to intervene in the dismissal itself, to consider whether the dispute before it requires the exercise of that residual jurisdiction under Section 10(3). It is a power which Parliament has wisely conferred on the Court to do justice in hard cases. While the Court cannot expand its jurisdiction by interpretation, it must be vigilant not to surrender any of its jurisdiction and power through either timidity or under-interpretation. The language of Section 10(3) is too expansive, in our view, to be restricted by anything but clear and unambiguous words. The words of Section 10(4) and 10(5) convey no such restrictions.”

31. The decision of the Industrial Court in ***Oilfields Workers' Trade Union v Jakob Straessle Old Grange Inn Papillon Restaurant*** (TD 258 of 2004, 29th September 2006) is the first occasion on which the Court awarded compensation under section 10(3) to a worker whose dismissal, it held, did not satisfy the section 10(5) test. The Court thought it fair and just to award the sum of \$30,000.00 having regard to the

¹⁸ (4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the Court may, in any dispute concerning the dismissal of a worker, order the re-employment or reinstatement (in his former or a similar position) of any worker, subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not *in lieu* of such re-employment or reinstatement, or the payment of exemplary damages *in lieu* of such re-employment or reinstatement.

(5) An order under subsection (4) may be made where, in the opinion of the Court, a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.

worker's length of service, his unblemished record, the fact that he was required to work seven days a week and that his performance was exemplary.

32. This is not to say that the Court thought that its section 10(3) power was to be exercised capriciously or on a whim. As the Industrial Court was careful to emphasise in ***Estate Police Association v Airports Authority*** (ST No. 1 of 1999)¹⁹:

“Such awesome power to do things “notwithstanding (the parent IRA) or any rule of law to the contrary” cannot in our view be intended or regarded as *carte blanche*. It is a power (as indeed are all the powers of the Industrial Court) to be guarded jealously, exercise judicially and within its expressed terms, having regard to the considerations set out in the section in relation to the facts of a given case... The careful exercise by the Industrial Court and the Special Tribunal of the section 10(3) power and indeed by the Court of all the extraordinary powers under the IRA in the terms we have expressed above over the period of its existence has guarded against arbitrariness, caprice, perversity or other abuse, factors which could lead to loss of public confidence.” (Emphasis in the original)

33. The first occasion on which the Court of Appeal considered an award by the Industrial Court under section 10(3), despite a finding that the dismissal was not harsh or oppressive or contrary to good industrial relations practices, was in ***Lever Brothers v OWTU*** (Civil Appeal No. 33 of 2000, May 15th 2002). Having regard to the worker's twenty years of unblemished service and the proximity to his age of retirement, the Industrial Court took the view that some penalty less than dismissal was called for and awarded as compensation 75% of severance benefits provided for under the collective agreement. Having regard to the fact that the Court's findings of fairness, justice, good conscience and good industrial relations practices were all findings of fact, the Court of Appeal could find no error of law on the basis of which it was permitted to review the Court's award.
34. In ***Carib Brewery Limited v National Union of Government and Federated Workers*** (Civil Appeal No. P213 of 2015, 19th February 2020) the Court of Appeal considered frontally whether the Industrial Court was empowered by section 10(3)

¹⁹ At pp. 23-24.

to make an award of compensation even though it had found a dismissal to be not harsh or oppressive and not contrary to good industrial relations practices. Comparing section 13(2) of the ISA with section 10(3) of the IRA, the Court observed that an “apparently deliberate insertion was made into Section 10(3) of the IRA to widen the powers of the Industrial Court.”²⁰ Upholding the jurisprudence of the Industrial Court referred to above, Rajkumar JA, who wrote the unanimous decision of the Court, held²¹ that section 10(3) confers a wide, unique, and long recognized jurisdiction on the Industrial Court which could be exercised to compensate a worker in respect of an equity arising from his years of service, even where it had not been established that his dismissal was challengeable as being harsh or oppressive or not in accordance with the principles of good industrial relations practices and that accordingly a remedy under section 10(4)&(5) was not available. His Lordship referred with apparent approval to the following passage from the judgment of the Special Tribunal²² in ***Estate Police Association v Airports Authority*** ST No. 1 of 1999

“(Section 10(3)) presupposes a true and correct interpretation of a rule or law or statute and permits the making of an order or award not in keeping with that interpretation where to do otherwise would conflict with the principles and practices of good industrial relations and other factors set out in section 10 (3).”

35. The award made in the ***Carib Brewery*** case, as in similar prior cases before the Industrial Court²³ and the Court of Appeal²⁴, was not based on any contractual right to compensation for past service or any common law or specific statutory cause of action. Indeed, it was made despite the absence of any such contractual, common law or statutory right. Moreover, it was made even though it was found that the employer did nothing wrong in dismissing the worker. The source of the obligation imposed by the Court was to be found entirely in section 10(3).

²⁰ At [10].

²¹ At [4].

²² Which is empowered to exercise the powers of the Industrial Court.

²³ See TD 43 of 1994, OWTU v National Petroleum Marketing Company.

²⁴ See Civil Appeal No. 33 of 2000 *Lever Brothers v OWTU* (delivered May 15th 2002 per Permanand JA at page 5).

36. Furthermore, an award was being made to compensate workers in the appropriate case for the equity to which they had become entitled as the result of their long years of service to their employers.
37. The decision of the Court of Appeal in ***North Central Regional Health Authority v National Union of Government and Federated Workers*** (Civil Appeal No. P 405 of 2019, 25th May 2021) is a case in which the section 10(3) power was exercised notwithstanding a contrary statutory provision. In that case, a worker was prohibited from performing the functions of his office pending disciplinary proceedings. Pursuant to Regulation 28 of the Conduct Regulations made under the Regional Health Authorities Act he was paid his basic salary but not his allowances, pending the determination of the disciplinary charges. The issue before the Court of Appeal was whether the Industrial Court had the power to decide that it was contrary to the principles and practices of good industrial relations to withhold payment of the worker's allowances where there was inordinate delay in the determination of the disciplinary proceedings. Mendonca JA held that "Section 10(3) of the Industrial Relations Act gives the Industrial Court the power to make such an order even though it is inconsistent with the Conduct Regulations."²⁵ After noting that section 10 (3) operates "notwithstanding anything in this Act or in any other rule of law to the contrary", he said:²⁶
- "...Just as the court can say two plus two equals four but it may order six having regard to the factors in section 10(3), the Court can say, in relation to this case, that although the Conduct Regulations provide that the allowances are not payable to the worker while she is prohibited from performing the functions of her office pending the determination of the disciplinary hearing, having regard to the factors in section 10(3) of the Industrial Relations Act, it is appropriate in the circumstances of this case to restore the allowances to the worker. In our view, that is what the Industrial Court did and it had the power to do so."
38. It is significant that the Court reserved for decision on another occasion the question whether section 10(3) permitted the Court to make orders or awards which were

²⁵ Para 14.

²⁶ At para 16.

inconsistent with the terms of a registered collective agreement. In its judgment in ***Texaco Trinidad Inc v Oilfield Workers Trade Union*** (1973) 22 WIR 516, the Court had held that the terms of a registered agreement are intended to operate as a statutory code in relation to the rights and obligations of the parties and, accordingly, could not be varied by the Court during its continuance. Noting that that case was decided under section 13(2) of the ISA which did not operate “notwithstanding anything in this Act”, as section 10(3) now did, Mendonca JA said that “It seems to us to be a moot question whether that case might be decided the same today.”

39. This appeal necessarily calls into question this long line of authority. If the Industrial Court is permitted by section 10(3) to award compensation to a worker who has been held to have misconducted himself to such an extent as to deprive him of a remedy under section 10(4)&(5) of the IRA, a worker whose employment is terminated, not for cause, but because she has reached retirement age, must likewise be a candidate for an award under section 10(3).
40. It is respectfully submitted that the decision of your Lordships Board in ***Byron v Eastern Caribbean Amalgamated Bank*** [2019] UKPC 16 does not compel a different conclusion. In that case, Lady Hale said in relation to an identical provision in the Antigua Industrial Court Act, that:

“Section 10(3) enables the Industrial Court to be flexible in the remedies it imposes but we have seen no authority to suggest that it allows the court to devise a wholly new cause of action or ground of substantive liability. Altering the effect of a valid legal assignment would be to do just that.”

41. That statement must be viewed in the context of the issue which was before the Board. As Lady Hale said (at [1]), the issue was whether the appellant, the Eastern Caribbean Amalgamated Bank (“the ECAB”), which was not the Respondent worker’s employer, was liable to make the severance payments to which the Respondent was entitled as a result of his dismissal by his employer, the Bank of Antigua (“the BOA”). That depended upon the terms, express or implied, of the

Purchase and Assumption Agreement under which the ECAB agreed to purchase certain assets and assume certain liabilities of the BOA.

42. The Respondent worker was dismissed by the BOA on the grounds of redundancy and there was no dispute that he was terminated fairly and that he was statutorily entitled to be paid severance payments by the BOA ([2]). The ECAB and the BOA entered into the Purchase and Assumption agreement for the purchase of certain assets and the assumption of certain liabilities of the BOA. The Respondent worker filed a reference with the Industrial Court against both the BOA and the ECAB. He argued that the ECAB was liable to pay his severance benefits because it was a successor employer to the BOA but that argument was rejected by the Industrial Court (at [3]). The Respondent worker appealed to the Eastern Caribbean Court of Appeal where he conceded that the ECAB was not a successor employer. Instead, he contended that a term should be implied into the Purchase and Assumption Agreement which would make the ECAB liable for severance payments. The Court of Appeal agreed that such a term should be implied but went on to hold that the BOA and ECAB were jointly and severally liable for the severance payment. In making that finding, the Court of Appeal relied on section 10(3) of the Industrial Court Act, which is identical to section 10(3) of the IRA. In the result, despite having implied a term which would result in BOA's liability to the Respondent worker being assigned to the ECAB, the Court of Appeal relied upon section 10(3) to find that the BOA continued to be liable jointly and severally with the ECAB.
43. The Board found that the Court of Appeal was wrong to imply a term making the ECAB liable to pay severance to the Respondent but was attracted by the Respondent's argument that the Agreement was to be interpreted as expressly assigning the liability to ECAB. However, the Board felt unable to make a definitive finding without evidence concerning the presence of the severance liability in the supporting books and documents of the Bank. It therefore decided to remit the case to the Court of Appeal for it to decide how best to proceed. It is in this context that in paragraph 30 of her judgment Lady Hale commented on the Court of Appeal's finding imposing joint and several liability on the ECAB and the BOA, even though

the effect of the agreement may very well have been that the liability was assigned to ECAB. The full passage is as follows:

“30. However, we do not understand how section 10(3) could give rise to joint and several liability. If this was a legal assignment of the debt, liability would be transferred to ECAB, leaving no liability in the BOA. Section 10(3) enables the Industrial Court to be flexible in the remedies it imposes but we have seen no authority to suggest that it allows the court to devise a wholly new cause of action or ground of substantive liability. Altering the effect of a valid legal assignment would be to do just that.”

44. The issue before the Board was the proper interpretation of the agreement between the BOA and the ECAB. The Industrial Court of Antigua and Barbuda, like the Industrial Court of Trinidad and Tobago, has jurisdiction over trade disputes between employers and workers. The ECAB was not the worker's employer. The Industrial Court has no jurisdiction over commercial agreements between employers and third parties. Section 10(3) could not possibly be construed as empowering the Industrial Court to alter the effect of such agreements.
45. Disputes between employers and workers, on the other hand, connected with their terms of employment and/or their non-employment is the proper subject of the exercise of section 10(3) powers. That power is exercisable notwithstanding anything in the IRA and in any rule of law to the contrary. Its purpose is to free the Industrial Court from the constraints of the common law and even the IRA itself, in the quest to provide workers with remedies which are fair and just, and are in accordance with equity, good conscience, the substantial merits of the case and the principles of good industrial relations practice. As the Court of Appeal held in ***Texaco v Oilfields Workers Trade Union***, the effect of section 10(3) is to require employers and workers to adopt these principles in their industrial relationships. In the Industrial Court's opinion, as upheld by the Court of Appeal, good industrial relations practice requires employers to recognise the equity which workers enjoy in long years of service and to provide for retirements benefits where workers reach compulsory retirement age. The Industrial Court has not imposed a wholly new cause of action by awarding compensation to workers for the failure to pay retirement benefits; it

has given effect to its mandate under section 10(3). It is section 10(3), as construed and applied by the Industrial Court as Parliament intended, which has imposed liability on the Appellant. And it has done so notwithstanding the rule of law that liability must be founded in contractual or statutory obligations. Viewed in this light, the right to compensation for long, unblemished service is not a “wholly new cause of action”. It is an established facet of workplace equity in Trinidad and Tobago’s industrial relations jurisprudence, which has been repeatedly upheld by the Court of Appeal.

Breach of natural justice

46. The Appellant complains that the Industrial Court treated it unfairly in failing to invite the parties to address it on the exercise of its powers under section 10(3) of the IRA and that the Court of Appeal erred in failing to so find. The reference back to the Court to hear the parties on the quantum of compensation was insufficient for that purpose. What was lacking was a hearing on whether the Court could or ought to exercise its powers under section 10(3) to make any award at all.
47. The Court of Appeal cannot be faulted for rejecting this ground of appeal.
48. First, the parties agreed that the Industrial Court should proceed to determine the disputes on the parties’ respective written Evidence and Arguments. That agreement was recorded by the Industrial Court in its three judgments.²⁷ In its written submission to the Court of Appeal, the Appellant accepted that the parties had elected to proceed in this way without an oral hearing.²⁸ Accordingly, the Court of Appeal was correct in noting²⁹ that, “the parties to the dispute left it to the Industrial Court to decide the issue without providing any additional written submissions on the law to assist the Industrial Court.” In those circumstances, the Court of Appeal held that, having made that choice, the Appellant could not “complain on appeal that they were not given an opportunity to address the issue of

²⁷ R Vol. I, pp. 71, 84, 97.

²⁸ R Vol. II, p. 561.

²⁹ R Vol. III, p. 1263.

whether the failure to provide for a retirement benefit constituted a breach of good industrial relations practices for which an award was justifiable.”³⁰

49. Secondly, the Appellant was well aware from the Respondent’s Evidence and Arguments that the dispute before the Court was about the failure to pay retirement benefits and that the Union was claiming compensation for that failure.³¹ They were specifically aware that the Respondent’s case was that the failure to provide terminal benefits to the workers after service in excess of 30 years was in breach of good industrial relations practice.³²
50. Thirdly, there is no rule of law that a court must seek a litigant’s views on the exercise of its statutory powers particularly where that party has elected to rely on its written arguments. The Court’s extraordinary powers under the IRA and in particular section 10(3) were notorious and the case law in existence at the time the Appellant filed its written case with the Court had highlighted the Court’s power to make orders and awards which might be contrary to provisions of the IRA itself or to the common law. There was no requirement for the Industrial Court to specifically invite the parties to address it on, or to provide evidence in relation to the various factors set out in section 10(3), or to indicate to the parties what kind of evidence that party should adduce. A party appearing before the Industrial Court is presumed to know the foundational powers of that Court. As this Your Lordships observed in **Chief Personnel Officer v Amalgamated Workers’ Union** [2020] UKPC 17, [55]:

“The parties must at all times have been well aware of the scope of the powers conferred on the court by the 1972 Act including, under section 10(3), the power to make such order or award as the court considered fair and just and to act in accordance with the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.”

51. In that case, the Appellant argued that an order for the reinstatement of a worker was made by the Industrial Court in breach of natural justice and was unfair

³⁰ Ibid.

³¹ R Vol 1, pp. 237-238, 258-259; 310-311.

³² Ibid.

essentially because the Appellant was not given any notice of a claim for the orders the court made. Your Lordships Board rejected this submission noting that the issues before the court included the question whether the worker had voluntarily resigned or had voluntarily accepted that his status as an employee had come to an end. It therefore was or ought to have been plain that, if the court were to find in favour of the Union on this issue, it would or might make an order for the worker's reinstatement.³³ A fortiori in this case where the claim made by the Respondent was expressly for compensation for the failure to provide for retirement benefits.

52. The Respondent respectfully relies on the following observations of the majority of the Court of Appeal:³⁴

"[164] Further, when parties place before the Industrial Court trade disputes to resolve, there is a responsibility on those parties to put the evidence before the Industrial Court so it can make its decisions based on all of the considerations that the parties wish to have considered. This is particularly important given the pre-eminent status given to the Industrial Court by Parliament, under special majority legislation, as a specialist court overseeing industrial relations cases... The Industrial Court, as any other court, is bound by the pleadings, issues and evidence placed before it. This is what the Court did regarding these three disputes."

53. Fourthly, the Appellant took advantage of the opportunity to be heard. The Appellant responded to the Respondent's claim for the payment of terminal benefits. It specifically contended in its Evidence and Arguments that there were no policies that relate to any retirement benefit/compensation for years of service owed to the worker; that there was no provision in the worker's terms and conditions of employment for any retirement benefit; that no provision was made for such payment; and that it was a non-governmental, non-profit organization that received subventions from the Government as well as donations from other entities in Trinidad and Tobago to run its operations which makes no provision for retirement

³³ Para 55.

³⁴ R Vol 3, pp. 1267-1268.

benefits.³⁵ And it ended its submission with a claim for a declaration that it was “not in breach of any Industrial Relations principles”.³⁶

54. At the heart of the Appellant’s complaint, it seems, is its lost opportunity to put before the Industrial Court additional evidence, such as its inability to pay retirement benefits or the workers’ entitlements under the National Insurance Scheme. The majority judgment of the Court of Appeal summarized the evidence which the Appellant did adduce:³⁷

“[148] In the Evidence and Arguments and its witness statement Servol made reference to it being a voluntary, not for profit, organisation. It stated it received a government subvention. In one of its documents it mentioned, at one time, it received \$26 million in a year. It also noted it received donations, but the amount and frequency of these were not stated. However, no specific evidence was put before the Court as to the effect payment of retirement benefits would have on its operations. The witness statement of Stacy Salazar filed, for example, in the Hyacinth Rampersadsingh case, essentially gave evidence about the retirement age point. No specific evidence was advanced of any hardship or impact payment of a retirement benefit would have on the Company. The Court had before it the contention in Servol’s arguments that it was a not for profit organisation and subventions were paid by the government, but no evidence was put before it relating to its finances or funding.”

55. Respectfully, the Appellant was aware of the Respondent’s case and chose to rely on the evidence which it had already put before the Court. The Appellant cannot use the appellate process to complain about the inadequacy of the evidence that it chose to present to the Industrial Court. It cannot complain that the Court treated it unfairly because of its own omissions.
56. In any event, even if the Industrial Court had erred in not inviting specific submissions on the financial impact of the award under the first limb of section 10(3)(a), which is denied, the Court of Appeal’s majority judgment provides the perfect, proportionate remedy. The majority’s decision to remit the matter specifically for the reassessment of quantum allows the Appellant the exact

³⁵ R Vol I, pp. 240-241.

³⁶ R Vol I, pp. 242, 314, 341.

³⁷ R Vol III, p. 1263.

procedural fairness it claims was denied. Upon remittal, the Appellant will have the unfettered opportunity to present forensic accounting evidence regarding its status as a non-profit organisation, its reliance on subventions, and the financial impact the awards will have on its operations and the broader community.

The failure to take into account the section 10(3) factors?

57. In the ***Carib Brewery*** case, the Court of Appeal held³⁸ that in the exercise of its powers under section 10(3) the Industrial Court must demonstrate in its reasons that it has taken into account and applied the considerations set out in that sub-section, namely, fairness and justice, the interests of the persons immediately concerned and the community as a whole, equity, good conscience and the substantial merits of the case before it, and the principles and practices of good industrial relations. The Appellant's case is that the Industrial Court's judgments did not demonstrate on their face a consideration of all of the section 10(3) factors and the majority of the Court of Appeal wrongly failed to so hold.³⁹
58. For the reasons given by the majority at paragraphs 165 to 173 of their judgment,⁴⁰ the Respondent respectfully submits that the reasons given by the Industrial Court in its three largely identical judgments adequately demonstrate that it had taken into account the section 10(3) factors:
 - i) The Court expressly found that its award was fair and just;⁴¹
 - ii) The Court expressly considered the interests of the Appellant and the workers and of the community as whole.⁴² In its opinion, the payment of retirement benefits would plainly be in the worker's interest but it would also be in the interest of the Appellant since employees who are satisfied that their service would be recognized and rewarded would be more productive in their dealings with their employer and more committed to their working relationships. The

³⁸ At paragraphs 47 and 48.

³⁹ Paras 47 to 54 of the Appellant's case.

⁴⁰ R Vol. III, pp. 1268-1270.

⁴¹ R Vol. I, p. 50.

⁴² R Vol. I, pp. 48-49.

satisfaction of employees would also impact on the community and the employer as a good corporate citizen. A satisfied workforce was a *sine qua non* to the development of the Appellant as an institution geared towards community development and nation building and this could only redound to the benefit of the community in the short, medium and long term;

- iii) The Court referred to previous authority establishing the concept of a worker's equity arising from long years of service to an employer.⁴³ As the Court of Appeal said in ***Urban Development Corporation of Trinidad and Tobago v National Union of Government and Federated Workers*** (Civil Appeal P024 of 2024), at [14]: "Case law of the Court of Appeal establishes that an employee has an "equity" in the number of years of service especially where such service has been loyal and unblemished."
- iv) The Court set out in great detail and considered the parties' cases as appeared from their respective Evidence and Arguments, including in particular the fact that the workers' contracts of employment did not provide for retirement benefits⁴⁴ and accordingly considered the substantive merits of the case. In ***Urban Development Corporation of Trinidad and Tobago v National Union of Government and Federated Workers***, at [11], the Court of Appeal said: "The term "substantial merits of the case" before it must mean the rival contentions of the parties as reflected in the evidence and arguments presented to the Court;" and
- v) The Court expressly set about to determine whether it was contrary to principles of good industrial relations practice to deny the workers terminal benefits⁴⁵ and after considering the parties' respective cases answered that question in the affirmative.⁴⁶

⁴³ R Vol. 1, pp. 42, 43,

⁴⁴ R Vol. I, pp. 40-42, 43,

⁴⁵ R Vol. I, p. 42.

⁴⁶ R Vol. I, p. 48.

59. The Court did not state expressly that it acted in accordance with equity and good conscience, but its failure to expressly invoke those concepts could not be fatal. The real question is whether in its reasons the Court has demonstrated that it has so acted. Whether the Court made an award which is fair and just and acted in accordance with equity and good conscience is not satisfied by the mere incantation of those concepts; it is established by the substance of the Court's decision. The Court of Appeal made this point in ***Urban Development Corporation of Trinidad and Tobago v National Union of Government and Federated Workers***. The Court held⁴⁷ that the section 10(3) factors are "general principles (which) must underlie any judgment of the Court as a whole in making an order or an award" but they are "not criteria, in the nature of a checklist, that necessarily have to be specifically demonstrated in a given case." There may be some cases where there is "no strong community interest involved such as one ... involving a disciplinary charge against a specific employee." Or there may be cases where no "specific principle of equity may be concerned in a particular case save for general notions of fairness, equality, impartiality and justice." While acting with fairness and justice is required in all cases, "this may be shown by the judgment as a whole and the approach taken by the Court in relation to a dispute before it."
60. Further, where it is alleged in any case that a trial judge has not applied the correct legal principles, a degree of generosity must be accorded in analysing the judge's reasons. In ***Alexander v Gabriel*** [2026] UKPC 7, it was contended that the trial judge did not apply the correct legal test for determining whether impugned words are defamatory. Your Lordships provided the following guidance:

"22. The criticism that the judge failed to apply the correct legal test was pressed on this appeal by Mr Armorer on behalf of Mr Alexander. But the Board does not accept it. ***In reviewing a judgment given at first instance, an appeal court should adopt what might be called a principle of charity: that is, the appeal court should approach the judgment on the assumption that the judge carried out her task proficiently and understood the facts and the law correctly, unless and until the contrary is shown.*** It would be unrealistic, would place an unreasonable burden on judges and would hinder the efficient

⁴⁷ At [16].

administration of justice to expect judges to record everything relevant to their decisions in the reasons they give for them, including matters which are not salient or not disputed. ***Thus, it cannot reasonably be inferred that, just because a matter is not mentioned in a judgment, the judge ignored it.*** An appeal court should assume that a trial judge took into account all the evidence presented at the trial, unless there are clear indications to the contrary ... ***Equally, where there was no dispute about the correct legal test, again unless the contrary is shown, the judge may be assumed to have applied that test.***” (Emphasis added)

61. There is no dispute in this case about the applicable legal test. It is set out with clarity in section 10(3) itself. The judgment of the Industrial Court is replete with references to section 10(3) and to the factors set out therein which the Court was required to consider. The principle of charity dictates that it be accepted in these circumstances that the Court addressed its mind to these factors and indeed its judgment demonstrated that it did so. The Court of Appeal was right to reject this ground of appeal.
62. Under this heading, the Appellant submitted⁴⁸ that the Court failed to demonstrate that it considered i) the financial impact of its decision on the Appellant and the community services it provided, similarly circumstanced employers, and upon those persons immediately concerned and the community as a whole, such as the beneficiaries of the Appellant's services and other employers and employees; and ii) that the employment relationship came to an end without wrongdoing on the Appellant's part. Respectfully, these are not complaints which go to the question whether the Industrial Court took account of the factors listed in section 10(3). Rather, they are complaints that in applying those factors, the Court failed to take into account relevant considerations. It is to this ground of appeal that the Respondent turns next.

The failure to take into account relevant considerations

63. In ***Urban Development Corporation of Trinidad and Tobago v National Union of Government and Federated Workers***, the Court of Appeal noted⁴⁹ that, while

⁴⁸ At paragraph 53.

⁴⁹ At [10].

the Industrial Court must in the application of section 10(3) have in mind the interests of the community as a whole, not all cases will involve any discernible impact on the community as a whole. It was therefore incumbent on the parties to the dispute in an adversarial litigation system to put evidence before the Court and to make submissions relevant to the impact of any award under consideration on the interests of the community. Indeed, the Court “is entitled to expect that the parties before it will assist it where specific principles apply to ensure that the Court arrives at a just verdict.”⁵⁰ On the other hand, where “a party raises a specific and important community concern, the Court will ordinarily have to show that it considered this in making the order or award.”⁵¹

64. The Appellant complains that the Industrial Court failed to take into account the financial impact of its decision on the Appellant and the delivery of its community services and upon employers in similar circumstances and, as a result, on the community as a whole. The Appellant also complains that the Industrial Court failed to take into account the fact that the workers were entitled to a pension under the National Insurance scheme as a result of joint contributions made by them and the Appellant. Finally, the Appellant complains that the Industrial Court failed to take into account that the Appellant committed no unlawful act in terminating the workers' contracts of employment because they had reached retirement age.
65. It is quite apparent from the Evidence and Arguments filed by the Appellant and the witness statements put before the Industrial Court that no evidence was adduced of the potential impact on the Appellant's ability to satisfy any such award or on its ability to continue to provide its services. Similarly, no evidence or arguments were put forward with regard to the financial impact on other employers or the community as a whole. Likewise, the Appellant did not bring to the attention of the Industrial Court or submit that the workers' entitlements under the National Insurance scheme ought to be taken into account. In fact, the Appellant lodged no ground of appeal and made no submission either written or oral to the Court of Appeal complaining

⁵⁰ At [15].

⁵¹ At [19].

about the Court's failure to take the National Insurance benefits into account and indeed did so only on the invitation of the Court after the oral hearing had been completed.

66. In those circumstances, it can hardly be said the Industrial Court erred in law in failing to take into account matters which the Appellant had the opportunity to but did not bring to the Court's attention. In ***Allen v Bloomsbury Publishing PLC*** [2011] EWCA Civ 943, Lloyd LJ said (at [17]):

“In our adversarial system of litigation, in a case where each party was professionally represented with plenty of opportunity to formulate and put to the court all points considered to be relevant on a particular point, it seems to me questionable for a judge to be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion... It does not seem to me to be fair either to the judge or to the opposing party or parties for an unsuccessful litigant to be able to challenge the exercise of the court's discretion for failure to take account of a factor which was not in any way hidden and which, if it really is relevant, the exercise of reasonable professional diligence could have brought to light but which was not suggested to the judge as being relevant. This strikes me as being wrong in principle.”

67. The Court of Appeal was accordingly right to reject this ground of appeal as well.
68. The complaint that the Industrial Court did not take into consideration the fact that the termination of the workers' employment was not unlawful fails on the facts. It also fails because, having regard to established authorities, the fact that a worker's employment was terminated lawfully was not a relevant factor for the purposes of an award of compensation under section 10(3).
69. In its judgments, the Industrial Court referred to the Appellant's case that it did not terminate the workers contracts of employment but that the contracts came to an end because the workers reached retirement age.⁵² However, it was of the view that since the workers' had been compulsorily retired and had not been dismissed for misconduct, they had a stronger case for compensation under section 10(3) than

⁵² R Vol. I, pp. 41,42.

workers who had been found to have been rightly dismissed for misconduct. The Court took account of the fact that the Appellant was blameless in terminating the workers' employment or treating their contracts as having been terminated because they reached retirement age, but that meant that they were in the same position of other employers who had been found to be blameless in dismissing workers for cause but were nevertheless ordered to pay compensation under section 10(3). The absence of blameworthiness, on the established case law of the Court of Appeal, was not a bar to compensation under section 10(3). Indeed, compensation had been held to be payable despite findings that the employers had done nothing wrong.

Conclusion

70. For all of the above reasons, the Board is respectfully asked to dismiss this appeal because:

- i) The Industrial Court had jurisdiction under section 10(3) of the IRA to award compensation for the failure to pay retirement benefits;
- ii) The Industrial Court did not act unfairly in failing to invite the Appellant to address it on the exercise of its powers under section 10(3);
- iii) The Industrial Court had regard to the relevant factors under section 10(3); and
- iv) The Industrial Court did not fail to take into account any relevant consideration which was brought to its attention.

Dated 14th day of September 2026

Douglas L Mendes SC


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