Neutral Citation Number: [2023] CA (Bda) 26 Civ

Civil Appeal No. 32 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON MR ASSISTANT JUSTICE ELKINSON
CASE NUMBER 2019: No. 320

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- - - - - - - - - - - - - - - - - - - -

Between:

STEVEDORING SERVICES LIMITED

Applicant

-and-

MINISTER OF LABOUR & ECONOMY

Respondent

-and-

THE CHAIRMAN OF THE PERMANENT ARBITRATION TRIBUNAL

Interested Party

-and-

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

Affected Parties

Mr. Dantae Williams, Marshall Diel & Myers, for the Appellant

Mr. Eugene Johnston, Attorney General's Chambers, for the Respondent

Mr. Mark Daniels, Marc Geoffrey, Barristers & Attorneys Ltd, for the Affected Parties

Hearing date: 20 June 2023
Date of Judgment: 17 November 2023

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APPROVED JUDGMENT

CLARKE P:

1. This is an appeal from the decision of Jeffrey Elkinson AJ dismissing the application of Stevedoring Services Ltd ("SSL"), the now appellant, to quash the decision of the Minister of Labour ("the Minister") made on 21 April 2021 to refer what was said to be a labour dispute to the Permanent Arbitration Tribunal. SSL contends that the decision was *ultra vires*, void and of no effect; alternatively, should be quashed on the ground of *Wednesbury* unreasonableness. It had contended below that the Minister's decision was made for an improper purpose, but that contention is no longer pursued.

The facts

2. SSL is a publicly held Bermuda company and a subsidiary of Polaris Holding Company Ltd. Mr Warren Jones ("Mr Jones") was at relevant times, the CEO of SSL. Its employees operate the Docks of Bermuda, handling the cargo to and from ships. It is the sole provider of port and dock services at the City of Hamilton. Those services include activities which are defined as essential services, in paragraph 6 of the First Schedule to the Labour Relations Act 1975 ("LRA 1975"). The Respondent is the Minister responsible for the labour portfolio under the Bermuda Government's Ministry of Labour.

3. Chris Furbert ("Mr Furbert") was employed by SSL until 6 February 2020. The labour dispute is said to have arisen as a consequence of his dismissal. He is a member of the Port Workers Division

of the Bermuda Industrial Union. There is a Collective Bargaining Agreement ("CBA") in force which governs the terms of working on the docks. The CBA has at Article 27 a Grievance Procedure, the terms of which are set out at [73] below.

The history

4. Mr Furbert is the son of his eponymous father (Chris Furbert Senior) who is the President of the Bermuda Industrial Union ("BIU"), which has a Port Workers' Division ("PWD"). He began employment with SSL on **21 January 2014** as a Holdman. He was also trained, and acted from time to time, as a Relief Topload Operator.

5. On **30 June 2019**, when he was on unpaid leave, he had a physical altercation with Joshua Butler ("Mr Butler"), another SSL employee, when they were at a boxing match at Snorkel Park in Dockyard Sandys. Both of them sustained physical injury. Mr Butler complained to the police and Mr Furbert was charged. Mr Furbert reported his view of what had happened to SSL. There is a dispute as to exactly what occurred on that occasion.

6. On **17 September 2019** Mr Furbert returned to work and, when he did so, he wanted to discuss his challenges with Mr Butler with management in greater detail but, according to him, got nowhere. He understood that Mr Butler had had the opportunity to give his version of events. On **25 October 2019** he received a summons to attend the Magistrates' court. He attended on **30 October 2019** and pleaded not guilty to the charge made against him of assault upon Mr Butler. He was granted bail on condition that he was to have "*no contact whatsoever with*" Mr Butler.

7. Mr Furbert's evidence was that he viewed Mr Butler as an unstable individual, as did other staff members, and that the way in which he operated machinery, and the positioning of incoming ships could place other workers in danger. Mr Butler had made unflattering remarks about the Bermuda Industrial Union and its President (Mr Furbert's father).

8. On **4 November 2019** 15 Union members, including Mr Furbert, signed a petition which was submitted to management stating that they were refusing to work with Mr Butler, for 7 reasons (1) blatant disrespect for the Union; (2) endangering his life as well as others; (3) bad attitude towards

colleagues; (4) jeering colleagues; (5) threatening colleagues; (6) objecting to put aside differences in the best interests of SSL; (7) overall creating an uncomfortable/toxic work environment. Mr Furbert considered that management failed to address any of these concerns; and that Mr Butler's behaviour towards him in September and October 2019 was abusive. He had reported four incidents of Mr Butler's misbehaviour towards him to management in that period, but they did nothing to address these incidents.

9. On **5 November 2019** Mr Furbert received a letter from Eric Berkeley ("Mr Berkeley"), the Dock Operations Manager of SSL, which told him that, should there be any incidence of violence, harassment or bullying between him and Mr Butler on the job, or any incidence of violence, harassment or bullying between him and any other staff member related to the incident with Mr Butler, his employment might be terminated.

10. On **10 December 2019** there was a discussion among Mr Furbert and 8 other staff members to the effect that management had no regard to their feelings and was unwilling to take any action properly to assess their concerns. The consensus was that it was necessary to down tools and walk off the job, which they did, in order to get management's attention and force their hand to meet with them.

11. On **11 December 2019** Mr Furbert and others were kept from entering the job site and told by Mr Berkeley that they were fired. Later that day a meeting took place at the Offices of the BIU attended by (a) senior executives of the BIU, (b) Mr Jones and other members of SSL management and (c) executive committee members of the PWD. What appears to have been decided was that it was necessary to get to the bottom of the issues affecting a portion of the PWD by forming a Joint Consultation Committee ("JCC"). Mr Furbert and Mr Butler were to be required to attend mediation under the Employment Assistance Program ("EAP") to see if they could co-exist on the job. If that mediation was successful, the two of them would meet with the JCC for it to determine whether they could return to the workplace. Meanwhile they would be suspended with pay - as they were, for three days; the other employees would serve a one-day suspension.

12. According to Mr Furbert, when he was told of this proposal, he told Mr Jones that his bail condition prevented him having any contact with Mr Butler, which would prohibit him from attending any mediation at which Mr Butler was present. Mr Jones took the view that since the two of them had previously been working together without incident, and the bail condition had not been raised before, it was best that they go to the EAP mediation. The judge, not surprisingly, described this as a "*rather cavalier approach*".

13. On **12 December 2019** Mr Jones contacted the EAP and sent a referral on behalf of the JCC requesting a mediation for Mr Furbert and Mr Butler.

14. At the conclusion of their 3-day suspension Mr Butler and Mr Furbert were placed on leave of absence until the EAP sessions had concluded and a further assessment of their ability to work together was made,

15. During December 2019, Mr Furbert paid a visit to SSL to meet its Human Resource Manager in order to provide her with copies of medical documents in order to qualify for medical leave (he had had a bike accident); and whilst in her office met several people there including Eric Berkeley. On his evidence none of them told him that he should not be on the premises or that he should leave. He also returned to the job site in January 2020 to obtain various items from his locker.

16. The mediation came to nothing. Mr Butler attended EAP for two individual sessions on **16** and **23 December 2019**. Mr Furbert attended on **19 December 2019** but explained that he could not have a face-to-face meeting with Mr Butler because of the bail conditions. As a result, on **23 December 2019,** EAP closed the mediation file, although, on Mr Furbert's evidence, the person he met at EAP had told him that she would arrange a second meeting in the New Year.

17. On **24 December 2019** there was a special JCC meeting. Mr Jones expressed the view that Mr Furbert was resisting the mediation process and using the court order at his convenience so as not to participate in it. He said that he would terminate Mr Furbert's employment status. Colin Simmons of the Union said that the Union strongly objected to this statement as it was unfair to Mr Furbert.

18. On **6 January 2020** the BIU executive met to discuss Mr Furbert's position.

19. On **13 January 2020** the BIU wrote to Mr Jones a somewhat discursive letter recommending that SSL should not make a decision to terminate Mr Furbert's employment. On **3 February 2020** the Senior Magistrate refused to amend Mr Furbert's bail conditions without the consent of Mr Butler. On **5 February 2020,** there was a special JCC meeting at which the Union asked that Mr Furbert and Mr Butler be brought back to work. Mr Jones said that he would have to think about the matter and a meeting was scheduled for 12 February 2020.

6 February 2020

20. According to Mr Jones, on **6 February 2020** Mr Furbert attended the Docks, despite his suspension on paid leave. According to Mr Furbert he passed and spoke briefly with Mr Berkley, the Operations Manager; passed the Senior Supervisor, who acknowledged him; and spoke with four security guards at the gate, who spoke with him. He then went to the lunchroom to get something from his locker, where he spoke with two others. No one suggested he should not be there. But he was then escorted off the premises by a female security guard, who had seen him when he entered and greeted him by name. Mr Furbert then went into the management office at a different location on Front Street in order to complete a vacation form. According to Mr Jones, he told Mr Furbert that he was in breach of his suspension by being there and was required to leave. He refused to comply. When he finally decided to leave, Mr Furbert threatened Mr Jones, which threat Mr Jones considered to be an act of gross misconduct and summarily dismissed him.

21. According to Mr Furbert the position was as follows. He did not realise that he was not supposed to be on the Dock. When he entered the management offices on Front Street he noticed that Mr Jones was there about 20 feet away. He entered the Financial Controller's Office and sat down. Very soon thereafter. Mr Jones shouted out at him that he should not be there and that he had to leave. Mr Furbert got up to leave and, as he passed Mr Jones, about 5 feet away, Mr Furbert said "*I get you*", meaning that he saw how Mr Jones acted and how unfair he was since he had no regard for the BIU and because there was a double standard of treatment towards him and Mr Butcher. Mr Jones said "*Is that a threat*" and Mr Furbert said "*No it's a fact"*. He never threatened to harm

Mr Jones. Mr Jones' told the JCC on 12 February 2020 that what Mr Furbert had said was that he was going "**to get**" Mr Jones.

22. Mr Jones made a complaint to the police. On **7 February 2020** SSL wrote Mr Furbert a termination letter, signed by Mr Jones, alleging gross misconduct and insubordination, including threatening the CEO in front of a witness.

23. On **7 February 2020**, according to the minutes of a JCC meeting on 12 February 2020**,** Mr Berkeley, the Operations Manager, had initially agreed with divisional officers of the PWD to meet them but had then cancelled the meeting because the matter had become a criminal complaint. According to Mr Jones he met with the PWD officers himself; Mr Berkeley contacted him to tell him that the Officers wanted a meeting and Mr Jones advised him not to meet with them because Mr Berkeley was not concerned with the termination. When Mr Jones met with the officers, he confirmed the reason for Mr Furbert's termination and took the position that the matter should be considered at Step iii of the Grievance Procedure or beyond.

24. On **10 February 2020** Mr Jones composed a letter to all staff, effective that day, in which he advised, *inter alia*, that any staff who refused to work would be asked to leave the Dock and advised that they would only be paid for hours worked; and, if staff left to attend a meeting, they would not be paid for any period that the boat was not worked or that they were not at work. Mr Jones accepted that this was written, but not despatched, in contemplation of industrial action. In fact, none took place.

25. At the JCC meeting on **12 February 2020** Mr Jones informed Mr Furbert Senior that he had filed a police complaint and Mr Furbert Senior said that once a matter becomes a criminal complaint, there is no step iii in the Grievance Procedure and the BIU leaves the criminal complaint to take its course before proceeding with the grievance process under the CBA, although the Union does have a right to investigate. An agreement was reached that Mr Butler should return to work on Monday 17 February 2020.

26. On **21 February 2020** Mr Furbert Senior emailed Mr Jones to confirm that, if the matter has been referred to the police, the BIU cannot deal with it until that process is completed and asked "*where you are in the complaint process*?". There were further exchanges after this about the progress of the matter with the Director of Pubic Prosecutions (DPP).

27. On **6 May 2020,** the then 3-month time limit (amended to 6 months as from 1 June 2021) for making a complaint of unfair dismissal under the Employment Act 2000 expired. The potential significance of that was that it bore on the contention made by SSL below, but no longer pursued, that the invitation to the Minister to make a reference to the Tribunal was made in order to circumvent the problem created by the expiry of the period for bringing a claim for unfair dismissal and that the Minister acted for an improper purpose, namely to assist Mr Furbert in that regard.

28. On **4 June 2020** the DPP informed Mr Jones and Mr Furbert that he declined to grant charge approval in respect of Mr Jones' complaint, on the basis that what was described in Mr Jones' witness statement was quite borderline and there was no threat of an unlawful act. As a result, the case against Mr Furbert in respect of Mr Jones' complaint came to an end.

29. On **19 June 2020,** in an exchange of emails with Furbert Senior, who had asked how the DPP's decision left the position, Mr Jones confirmed that Mr Furbert remained no longer employed by SSL. Mr Furbert Senior's evidence was that the BIU had from 7 February to 28 October 2020, tried on numerous occasions to arrange for Mr Furbert to be reinstated with SSL.

30. On **19 August 2020** Mr Furbert's attorney - Marc Daniels of Marc Geoffrey Ltd (MG) - sent a long letter before action to Mr Jones of SSL in which, *inter alia*, he said that Mr Furbert's employment had been wrongfully terminated and asked to re-open the door to renegotiate his reinstatement. On **25 August 2020** Marshall Diel and Myers Ltd (MDM) on behalf of SSL replied, re-iterating that the reason for his termination was gross misconduct and insubordination.

31. On **18 September 2020** the BIU provided a list of priorities to the Polaris Board of Directors, having been invited to do so on **10 September 2020** at a meeting with the SSL board. One of those priorities was the removal of Mr Berkeley and another was the reinstatement of Mr Furbert.

32. On **5 October 2020** the Chairman of Polaris reported that the SSL Board suggested that the BIU present its list of issues at the next JCC meeting.

33. At the JCC meeting on **28 October 2020** there was a repetition of the concerns about the dismissal of Mr Furbert with Mr Jones responding that Mr Furbert had been dismissed because he had threatened Mr Jones. It was following that meeting that Mr Furbert went to the Labour Relations Office of the Ministry of Labour (LRO) to seek some form of relief.

34. On **30 November 2020** Oscar Lightbourne ("Mr Lightbourne") of the LRO sent an email to MG informing them of the requirements for a report of a labour dispute under the Labour Relations LRA 1975 in an essential service.

35. On **7 December 2020** SSL received notification from Mr Lightbourne that a dispute had been reported to the Labour Relations Section. The letter stated that the dispute was a dispute as between the Bermuda Industrial Union on behalf of Chris Furbert, Jr referred to as the Complainant, and SSL, and that the report was pursuant to section 3(1) of the LRA 1975. It was alleged that SSL had broken the Collect (sic) Agreement (*semble* the CBA) for (sic) the unfair termination of the Complainant. Mr Lightbourne was specified as the officer authorised by the Manager of the Labour Relations Section pursuant to section 3 (2) of the LRA 1975, to attempt to effect a settlement of the dispute. Mr Lightbourne's attention had first been drawn to the dispute in October 2020.

36. On **11 December 2020** MDM sent a short letter to the Ministry referring to the fact that its clients took issue with a number of matters in relation to the purported dispute and said that it would communicate its clients' position including on the 10-month delay between the termination of Mr Furbert's employment for gross misconduct and the action taken by the Ministry.

37. On **6 January 2021** MDM provided a more complete response. This included the following points; (i) SSL had not received any report of a labour dispute setting out the terms of reference as required by section 7 of the 1975 Act; (ii) Mr Furbert had been summarily dismissed for threatening behaviour and threatening words on 6 February 2020; (iii) there had been a failure to comply with the grievance procedure in Article 27 of the CBA; (iv) the delay in lodging the labour dispute on

behalf of the Complainant was inordinate and unreasonable; (v) the agreement of SSL would be needed to bypass steps 1-4 of the Grievance Procedure; (vi) SSL had no intention of reinstating Mr Furbert.

38. On **18 January 2021** Mr Lightbourne of the LRO emailed Dantae Williams of MDM and Marc Daniels of MG to say that he had received documentation that the last meeting of the JCC was held on 28 October 2020, after an attempt had been made to address the matter at a meeting with the Polaris Board on 10 September 2020 where it was suggested that the matter be addressed at the next JCC meeting. He said that it was being viewed that on 28 October 2020 the parties had agreed that they had reached an impasse and that an official complaint was made to the LRO within the 10 days laid out in the Collective Agreement.

39. On **25 January 2021** MDM replied, saying that Mr Furbert had never filed a grievance and had not followed the grievance procedure; the parties to the JCC meeting had not agreed on 28 October 2020 that there was an impasse; that Mr Furbert, having failed to comply with the grievance procedure, required the agreement of SSL to bypass steps 1-4 thereof; and asked for a copy of the report filed by BIU with the LRO.

40. On **29 January 2021** Mr Lightbourne wrote a letter to MDM to say that he, as an Inspector, had completed his investigation of the Complaint of Mr Furbert pursuant to section 37 (3) of the *Employment Act 2000* reported to the LRO on 27 January 2021 (which in an email also of 29 January 2021 he said was a complaint of unfair dismissal and that Mr Furbert sought to be reinstated); and was prepared to endeavour to conciliate the parties to effect a settlement, failing which the complaint may be referred to the Employment Tribunal for resolution.

41. On **30 January 2021** MDM wrote to Mr Lightbourne. They asked why the dispute had changed from being a complaint under the LRA 1975 to a complaint under the Employment Act 2000. They made the following points:

    (i) Mr Lightbourne was conflicted and could not act both as an investigator of a dispute under the Employment Act 2000 and a Manager under the LRA 1975;

(ii) The right under section 36 (1) of the Employment Act 2000 to make a complaint to an inspector was limited to activity which took place in the preceding three months; the complaint was made on 27 January 2021, nearly one year after the termination;

(iii) Under section 37 (5) of that Act an inspector shall not, except with the consent of the parties, attempt to settle the complaint or refer the complaint to the Tribunal if there was a relevant grievance procedure, unless and until there had been a failure to obtain a settlement by means of that procedure; accordingly, Mr Lightbourne was prohibited from attempting to settle and/or refer the complaint to the Employment Tribunal;

(iv) None of the grounds raised in section 29 (1) of the Employment Act 2000 were applicable;

(v) Given that Mr Lightbourne was a former employee of SSL, and had not declared that to the parties, he was asked to recuse himself; and

(vi) A copy of the written labour dispute reference was requested.

42. On **17 February 2021** Mr Lightbourne rescinded the invitation in his letter of 29 January 2021; but said that the Labour Relations Section would continue with its investigations under the LRA 1975. On **18 February 2021** MDM pointed out that the LRA 1975 does not afford the LRO power to investigate matters without the filing of a report of a dispute and made what was said to be the fifth request for a copy thereof. On **19 February 2021** Mr Lightbourne forwarded to Mr Daniels the email which he had sent to Mr Daniels on 30 November 2020 telling him what a report needed to contain and asking for one as soon as possible.

43. On **22 February 2021** MG for Mr Furbert sent an email to Mr Lightbourne, copied to the Labour Relations Manager and the Minister, which was intended to constitute (and was) a report of a labour dispute under the LRA 1975. MDM was a party to the email.

44. On **23 February 2021** MDM wrote to Mr Lightbourne and said, *inter alia*, that the Report showed that Mr Furbert had not followed the Grievance Procedure. They also said that, from what they had been told by the LRO, the report was either made within 10 days of 28 October 2020 or on 27 January 2021, and expressed concern that the report only existed as of 22 February 2021 despite what they had been told previously. They complained that this was taking place a year after Mr Furbert's termination and maintained the position previously set out in their correspondence that

the grievance procedure under the CBA had not been followed and SSL was not waiving this prerequisite.

45. On **17 March 2021** Mr Lightbourne said that he was prepared to endeavour to conciliate the parties with a view to give effect to a settlement of the dispute, pursuant to the LRA 1975. On **19 March 2021** MDM said that the filing of a labour dispute was greatly out of time; that SSL would not attend a reconciliation meeting pursuant to section 3 (2) of the LRA 1975; that the matter must go to the Minister who was bound by the limitations in section 3 (4) of the LRA 1975, given the complete failure to comply with the procedure agreement set out in the CBA.

46. On **25 March 2021** a report was made to the Minister by Gabrielle Cann, the manager of the Labour Relations Section of the Ministry, which is set out at [106] of the judgment. It invited the Minister to consider whether to refer the dispute to the PAT for settlement.

47. On **21 April 2021** the Minister wrote to Mr Furbert, copied to, *inter alios*, Dantae Williams, to advise that, in accordance with the provisions of section 8 of the LRA 1975, he had referred what, in his opinion, was a labour dispute between Mr Furbert and SSL relating to the termination of the former to the PAT. A letter in the same terms was sent on **23 April 2021** to Mr Jones c/o MDM. The actual referral is contained in a letter of **21 April 2021** to Dr Michael Bradshaw, appointing him as Chairman of the Tribunal. Letters were also sent to Mr Eugene Creighton and Ms Keren Lomas who were appointed as members of the PAT.

48. On **7 May 2021** MDM asked the Minister to provide reasons for the referral, on the ground that it was necessary to do so given that 15 months had elapsed since Mr Furbert had been terminated summarily for gross misconduct.

49. On **13 May 2021** the Minister replied, pointing out that under section 8 of the LRA 1975 the Minster responsible for Labour may by order in writing refer any labour dispute in an essential service for settlement to the PAT at any time after the dispute has been reported and said that, in accordance with that section, he had exercised his discretion to refer the matter to the PAT for

settlement. He added that, as the Tribunal was currently seized of the matter, MDM could properly raise the matters noted in their correspondence before the Tribunal.

50. On **24 May 2021** MDM told the Minster that his decision was unlawful because there had been no notice of lock-out strike or irregular industrial action so that the second requirement ("*and*") of section 8 (1) of the 1975 Act was not satisfied. On **27 May 2021** the Minister replied to say that, as the Tribunal was currently seized of the matter he had no jurisdiction to rescind, and any concerns about the referral should be raised with the Tribunal.

51. On **1 June 2021** the LRA 1975, the Trade Union Act 1965, and the Labour Disputes Act 1992 were consolidated into the Trade Union and Labour Relations (Consolidation) Act 2021, (the "2021 Act"), which introduced amendments to some of the wording of these Acts, which were then repealed. The recital to the 2021 Act is as follows:

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

52. As a result of the 2021 Act, the PAT no longer exists. The Tribunal to which the Minister makes reference is, under the 2021 Act the Employment and Labour Relations Tribunal, established under section 44B of the Employment Act 2000, which was introduced by the 2021 Act.

53. On **29 June 2021** SSL issued its *ex parte* application for judicial review.

54. **22 February 2022**. Since this date the Ministry of Labour became the Ministry of Economy and Labour.

Was there a labour dispute?

55. SSL's case was that there was a dispute under the Employment Act 2000, under section 36 of which an employee has a right to make a complaint to an Inspector in writing that his employer had within the preceding 3 months (the time limit applicable before the amendment of section 36 (1) by the 2021 Act) failed to comply with a provision of this Act. But it was too late to invoke that jurisdiction. Since the real dispute was under the Employment Act there was no true labour dispute and the "*purported labour dispute*" was put forward as a means of sidestepping the problem of the expiry of time limits under the 2000 Act.

56. Section 1 (1) of the *Labour Relations Act 1975* defines a labour dispute in the following terms:

> *"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."*

57. There has been no complaint falling within the terms of the last three lines of the section. That wording itself indicates that a labour dispute can exist as long as it has not been settled or determined.

58. The judge found at [55] that there was a labour dispute within the definition of the legislation, whether under the 1975 or 2021 Act (whose wording is similar), since there was, and remained, a "*a dispute between a worker and a union on his behalf, wholly or partially relating to the termination of employment of a worker*". (It seems to me that the judge must have intended the words "*and an employer*" to be inserted after "*a union on his behalf*"). The judge found that the dispute arose on 6th February 2020 and had never been resolved.

59. At [52] of his judgment the judge explained his reasoning in these terms:

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

60. In my judgment the learned judge was entirely right to conclude that there was a labour dispute within the meaning of the 1975 and 2021 Acts. The dispute, which began on 6 February 2020 and has not been resolved, was as to the termination of Mr Furbert's dismissal on that day. As at that date SSL feared that the dispute might lead to industrial action. That did not materialise but that did not mean that there was no longer a dispute. A labour dispute can exist whether or not there is a threat or apprehension of industrial action. It was accepted before the judge by SSL's counsel that the services provided by SSL were essential services under the 1975 Act.

When can the Minister make a referral?

61. The next question for determination was whether the Complainant had fulfilled his obligations under section 7 of the LRA 1975.

62. Section 3 (1) of the LRA 1975 Act provides (underlining as per judgment):

> *"3 (1) Any labour dispute, whether existing or apprehended, may be reported to the Manager by a person authorized by any of the parties to the dispute.*
>
> *(2) The Manager shall consider any labour dispute so reported and he, or any public officer authorized by him to do so, shall endeavour to conciliate the parties and to effect a settlement by all means at his disposal.*
>
> *(3) Where the Manager, or any officer authorized by him in that behalf, is unable to effect a settlement of a labour dispute the Manager shall report such dispute to the Minister who may, subject to this section, if he thinks fit and if both parties to the dispute consent, refer the dispute for settlement to-*
>
> *(a)…*
>
> *(b)…*
>
> *(c)…*
>
> *(d) the Permanent Arbitration Tribunal*
>
> *(4) If there is existing in any trade or industry any relevant procedure agreement for the settlement by negotiation, conciliation or arbitration of a labour dispute in such trade or industry, the Minister shall not, except with the consent of all the parties to the dispute, and unless and until there has been a failure to obtain a settlement by means of those arrangements, refer any such labour dispute for settlement in accordance with the foregoing provisions of this section."*

*"Manage*r" is defined in section 3 as the person holding the public office of Manager of Labour Relations.

63. Section 7 is part of Part III of the Act (headed "*Essential Services*"). Its opening section - section 6 -provides that "*This part shall apply to the essential services*". Section 7 then provides as follows:

> ***"Form of report of labour dispute in essential services***
>
> *7 A report of a labour dispute in an essential service made to the Manager under section 3(1) shall be made in writing and shall specify-*
>
> (a) *the parties to the dispute;*
>
> (b) *the person or persons on behalf of whom the report is made;*
>
> (c) *every issue relevant to the dispute; and*
>
> (d) *where there is a relevant procedure agreement in being, what action has been*
>
> *taken for dealing with the dispute under the agreement."*

64. Section 8 provides:

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

65. The submission made to the judge on behalf of SSL was that there had been a failure to provide any report in writing at the time of the dispute; none was provided until a year after the termination; and at the time when the Manager had served a notice seeking to effect a settlement of the labour dispute (i.e. 7 December 2020) there had been no written report of a labour dispute. There was in truth no legitimate labour dispute and so the Minster had no discretion to make a referral.

66. The judge did not accept [67] that the Minister could not refer a dispute to the PAT if the written report required by section 8 followed a consideration by the Manager of the labour dispute. Section 7 laid down no time limitation by or within which the report had to be made. A report had been made in writing in MG's email of 22 February 2021. Prior to that the Manager had written to state

his intention to effect a settlement of the dispute by mediation/conciliation pursuant to section 3 (2) of the 1975 Act, and he had at one stage (i.e. January 2021) referred to the Employment Act 2000. But the judge did not accept that that had any negative effect on the overall process.

67. Nor do I. There would, however, seem to me to be a risk of confusion about what report is called for, in what form, from whom and for what purpose. As to that, the position seems to me thus:

(i) A report to the Manager under section 3 (1) of the LRA 1975 does not, if the dispute is not in an essential service, have to be in writing;

(ii) If the Manager tries to effect a settlement of a dispute in a non-essential service, but fails, he is bound to report it to the Minister: section 3 (3). Such a report does not have to be in writing either;

(iii) If such a report is made the Minister may refer the dispute to the PAT but only if the parties consent; section 3 (3) (d);

(iv) But, if there is a relevant procedure agreement, the Minister may not refer the matter to the PAT without the consent of all the parties to the dispute and unless and until there has been a failure to obtain a settlement by means of those arrangements;

(v) In the case of a labour dispute in an essential service a report to the Manager under section 3(1) shall be made in writing: section 7;

(vi) If a report is made to the Manager in writing the Minister has a discretion to refer the dispute to the PAT at any time after the report has been made, whether or not the parties' consent.

68. In the present case prior to 22 February 2021, a report of a dispute was made to the Manager otherwise than in writing. Since the dispute was in an essential service that notice was defective and what the Manager, or Mr Lightbourne on her behalf, did prior to 22 February 2021 was not an exercise that they were entitled to perform under section 3 (2). Even if it was, it could never have led to a reference to the PAT absent the consent of the parties to the dispute. That did not mean that what was done was without utility since the Labour Relations Office's awareness of the dispute from as early as October 2020 meant that they were informed about both its existence and nature.

69. A valid report to the Manager in respect of an essential service was provided by MG's email of **22 February 2021**. The fact that prior to that date Mr Lightbourne, the Labour Relations Officer, had carried out a number of activities in respect of a dispute in an essential service, otherwise than in accordance with sections 3 and 7 of the Act (since there was no valid notice in writing) cannot mean that the valid notice of 22 February 2021 was ineffective. Further, as the judge observed [71] section 3 (1) contemplates that a dispute may be reported. It is not mandatory, and no time limit is imposed, although the dispute must be continuing. A delay in reporting might signify that there was, in truth, no longer any effective dispute; or cause the Minster not to exercise his discretion in favour of a referral, even if there was. But delay itself is not *per se* a bar to reporting.

70. In the present case, although the delay is characterised by SSL as inordinate, the earliest that Mr Furbert could realistically have filed a complaint with the LRO with any real hope of meaningful progress was after the conclusion of the proceedings before the Magistrate in July 2020, after which Mr Furbert attempted to engage with SSL through counsel and thereafter went to the LRO. I do not regard that delay as signifying that there was no longer a dispute or the circumstances of it to be such that to make a reference to the PAT was irrational or *Wednesbury* unreasonable.

71. A question arose at trial as to whether any report under section 3 (3) ever existed. As the judge recorded, on the second day of the hearing Counsel for the Minister produced an internal memorandum dated 25 March 2021 from the Manager of the Labour Relations Section, Ms Gabrielle Cann. That report is set out at paragraph 106 of the judgment.

The Grievance Procedure

72. Mr Williams for SSL submitted that, even if there was a labour dispute and a proper report to the Manager, section 3 (4) of the LRA 1975 established a condition precedent to the Minister referring this matter to the PAT, which had not been fulfilled, Section 3 (4), which I repeat for ease of reference, provides:

"(*4*) *If there is existing in any trade or industry any relevant procedure agreement for the settlement by negotiation, conciliation or arbitration of a labour dispute in such trade or industry, the Minister shall not, except with the consent of all the parties to the dispute, and unless and until there has been a failure to obtain settlement by means of those arrangements, refer any such labour dispute for settlement in accordance with the foregoing provisions of this section".*

73. Section 1 (2) of the 1975 Act provides:

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

74. Article 27 of the CBA, headed "*Grievance Procedure*" provides as follows:

> *"1. Should there be any Employee, covered by the Agreement, who shall wish to settle any grievance, dispute or misunderstanding, every effort will be made by both parties to settle such grievances promptly, in the manner outlined below:*
>
> *Step 1 – Any Employee and/or the Shop Steward, having a grievance, shall first present it to the on-duty supervisor designated by the Employer, within one day, and the matter shall be dealt with by the end of the working day.*
>
> *Step 2 – If there is no settlement in Step 1, the aggrieved Employee and the Shop Steward shall take up the matter with the Dock Operations Manager and the matter shall be dealt with within 2 working days.*
>
> *Step 3 – If there is no settlement in Step 2, the Employee and his top Union Officials shall present the complaint or grievance, in writing to Senior Management and the matter shall be dealt with within 7 days.*

> *Step 4 – Should the settlement not be reached at Step 3, the written complaint or grievance shall be referred to the Government Labour Relations Officer within 10 days for him to take such steps as seen (sic) to him to be expedient under the Labour Relations Act, 1975.*
>
> 2. *It is further agreed that every effort will be made to work until all steps of the Grievance Procedure are exhausted.*
>
> 3. *Should a settlement not be reached at Step 4, either party to this Agreement, or both, shall have the right to refer such matter in dispute to the Labour Relations Officer, to take such steps as seem to him expedient under the Labour Relations Act 1975.*
>
> 4. *Any step in a Grievance Procedure may be by-passed if mutually agreed by both parties to this Agreement."*

Article 3 of the CBA states that "*The Union recognises the Employer's right to manage its own operations ….to suspend or discharge for just cause... However, an Employee who believes that he has been unjustly treated shall have a right to submit his claim by following the Grievance Procedure."*

75. The judge said [80] that he was prepared, despite the fact that he regarded the evidence as to what actually happened in respect of the utilisation of the Grievance Procedure to be unsatisfactory [75], to hold that the parties had effectively waived Article 27; and that, if he were to make any finding on whether a terminated employee had the right to utilise the grievance procedure, he would consider that it could not be used by any person who was no longer an employee.

76. The basis on which he held that there was a waiver was as follows. As Mr Jones' evidence made clear Mr Berkeley, the Dock Operations Manager, was contacted by Mr Furbert to discuss his termination. Mr Berkeley initially agreed to meet with the Divisional Officers of the Port Workers' Division; but he subsequently cancelled the meeting because the matter had become a criminal complaint: as recorded in the Minutes of the JCC meeting on 12 February 2020. Then, as the judge said [77]:

> "*There was dialogue between the parties at the time and Mr. Jones took the position that the matter should be handled at Step 3 of the Grievance Procedure or beyond to which Mr. Furbert snr. had responded that both parties had to agree to by-pass any steps in the Collective Bargaining Agreement. I would note here that he is correct – Article 27(4) makes this clear. He pointed out that Step 2 required that the matter 'shall be dealt with within two working days.' From the evidence it does not appear that any point was taken at that time about this."*

77. It does not seem to me that, on the evidence before the judge, a case of waiver of the Grievance Procedure, i.e., that the parties had agreed on its non-applicability or that SSL had indicated that they would place no reliance on it, was made out. Both sides appear to have invoked it but on different bases. Thus, as early as **7 February 2020** Mr Jones said that the matter should be handled at Step iii. On **12 February** 2020 Mr Furbert, Senior stated that once there was a criminal complaint there was no step iii and the BIU would let the complaint take its course before proceeding further. After **4 June 2020**, when the DPP declined to give charge approval, MG sent a letter before action on **19 August 2020**; and got a response on **25 August 2020**. Thereafter the grievance procedure does not appear to have been invoked in terms, but it was apparent that the Union and Mr Furbert retained that grievance: as appears from the **18 September 2020** list of priorities, provided at the suggestion of SSL. The concerns which underpinned the grievance were ventilated again at the JCC meeting on **28 October 2020**. Thereafter SSL complained that the grievance procedure had not been followed: see MDM's letters of **6** and **25 January (**in which complaint was made of the absence of any written report and of any agreement to bypass Steps 1-4 of the Procedure) and of **23 February 2021.** SSL's complaint before the judge was that Mr Furbert did not file a grievance under the CBA, and did not follow the procedure there set out, although he could have done and was not precluded from doing so by the existence of a criminal complaint. None of that seems to me to constitute a waiver.

78. In relation to the applicability of the Grievance Procedure, it seems to me clear, as it did to the judge [80], that its written terms do not apply to a summarily dismissed employee. When Mr Furbert had his employment terminated forthwith on 6 February 2020, he ceased to be an employee at that moment. The language of Article 27 does not purport to deal with the position of an ex-employee. The position is to be contrasted with that provided for by the definition of "*labour*

dispute" in the 1975 Act which refers, inter alia, to a dispute between an employer and "*one or more workmen".*

79. However, the appellants submit that that is not the end of the matter. It was not suggested by the Union below, nor by the Union or SSL at the time, that the Grievance Procedure did not apply to the dismissal of an employee, and the Union and SSL had proceeded for some time on the basis that a dismissal dispute fell within the coverage of the Grievance Procedure under the CBA.

80. Reliance was placed before us on the decision of the Employment Appeal Tribunal in England in the case of *Solectron Scotland Ltd v Roper* [2004] IRLR 4, which was not cited to the judge, where the Tribunal held that:

> "*a custom or established practice applied with sufficient regularity may eventually become the source of an implied contractual term where the point is reached when the courts are able to infer from the regular application of the practice that the parties must be taken to have accepted that the practice has crystalized into contractual rights. The parties must be shown to be applying the term because there is a sense of legal obligation to do so, rather than as a matter of policy. Moreover, the practice must be "reasonable, notorious and certain"".*

These conditions were not fulfilled in that case.

81. This contention does not appear to have been advanced below; nor was the evidence specifically directed towards this issue. I approach the question, therefore, with some hesitation. None the less it appears to me clear that both sides accepted (and agreed) that the Grievance Procedure did cover a complaint of unfair or improper dismissal,

82. There are, however, in my view, further reasons why the existence of the Grievance Procedure may not be a bar to a reference.

83. The first is that the terms of the Grievance Procedure do not appear to me to amount to a "*procedure agreement*" within the meaning of the 1975 Act. A procedure agreement for the purposes of the Act "*means so much of a collective agreement as relates to any of the following matters-*

(g) procedures relating to dismissal;"

84. In short, I agree with what the judge said at [80]:

> "*The definition of the procedure agreement suggests it was established for consultation about terms of employment and the resolution of "questions", not disputes. It appears to the court that it deals with establishing procedures for, amongst other things, dismissal. It does not by its definition establish a mechanism for resolution of an actual dispute concerning dismissal."*

85. The second reason is this. Even if (i) the Grievance Procedure extends to a dispute about whether Mr Furbert was justifiably dismissed; (ii) there has been no waiver of its provisions; (iii) the Grievance Procedure is a procedure agreement within the meaning of the LRA 1975, there may, on this hypothesis, have been a failure to obtain a settlement by means of the Grievance Procedure, such that the Minister could refer the matter to the Tribunal under section 7(3), but he would need the consent of the parties[1]. But the restriction on the power of the Minister to make a reference contained in section 3(4) provides that the Minister may not "*refer any such labour dispute for settlement* ***in accordance with the foregoing provisions*** *of this section".* However, a reference made under section 8 would not be one made in accordance with the foregoing provisions of section 3 and is, thus, not caught by the prohibition in section 3 (4). Section 8 (1) confers a power to refer a dispute to the Tribunal which is not the same as the power under section 3 (3).

Absence of a strike notice.

86. The power of the Minister to refer a labour dispute to the PAT under section 8 of the 1975 Act arises "*at any time after the dispute has been reported under section 3 (1) and before the expiration of any notice of lock-out, strike or irregular industrial action short of a strike given in accordance with section 9".*

[1] I use the expression "*may***"** because there is an argument that what has happened is not a failure to obtain a settlement by means of those arrangements but a failure to act in accordance with them. It is unnecessary to decide this because the consent of all parties is, in any event, required.

87. The question that then arises is whether, in order for the Minister to have such a power, it is necessary that a notice of a lockout, strike or irregular industrial action shall have been given in accordance with section 9. Before the judge SSL contended that such a notice was required and Mr Johnson on behalf of the Minister conceded that the Minister should not have used section 8 to make the reference, since there was no threat of industrial action when the reference was made. The section was capable of being read as not demanding such a notice but, so Mr Johnson said, the "*stronger interpretation may be the one proposed by Stevedoring"*. In paragraph [11] of the skeleton on behalf of the Minister which is before us it is said that "*the Ministry is not attempting to change stance*"; but in paragraph [14] it is said that *"the Minister was not wrong to make the referral*". This seems to me to be a contradiction in terms.

88. The judge did not share this view, and neither do I. If the Legislature had intended that the Minister could only make a reference under section 8 if a notice of an industrial action had been given it could very easily have said so. Instead, it required the use of section 8 to occur "*before the expiration of any*" such notice - a condition which would not have been breached if no such notice had ever been given.

89. As the judge observed, the construction argued for would fail to recognize the need for the Minister to have a greater power in respect of labour disputes in essential services than those labour disputes which are not in such services. It would deprive him of the power to refer to the Tribunal a dispute in an essential service which might mature into the Union giving notice of a strike, before it did so. That seems to me not to be in accordance with the language of the statute and contrary to the policy behind it.

90. The judge also addressed the significance of the provisions of section 9 of the 1975 Act which provides:

> **"*Restriction on* str*ikes in an essential service***
>
> *(1) A lock-out, strike or any irregular industrial action short of a strike in an essential service shall be unlawful unless there is a labour dispute within that service and—*

> *(a) a report of the labour dispute has been made to the Director under section 3(1) as read with section 7; and*
> *(b) thereafter valid notice of the intended lock-out, strike or irregular industrial action short of a strike has been given to the Director by the employer, or trade union on his behalf, or workmen, or trade union on their behalf, as the case may be, at least twenty-one days prior to the day upon which the lock-out, strike or irregular industrial action short of a strike is to commence; and*
> *(c) the lock-out, strike or irregular industrial action short of a strike is the lock-out, strike or action specified in the notice (both as respects its nature and the persons participating) and, subject to subsection (4), commences on the day specified in the notice, or within twenty-four hours thereafter; and*
> *(d) the dispute has not been referred for settlement to the Permanent Arbitration Tribunal under section 8.*
>
> *(2) No notice of an intended lock-out, strike or irregular industrial action short of a strike shall be valid for the purposes of subsection (1)(b) unless it specifies—*
>
> *(a) the industrial action to be taken, whether this be a lock-out, strike or irregular industrial action short of a strike, and if it be irregular industrial action short of a strike, the nature of such action;*
> *(b) the persons or category of persons who are to participate in the lock-out, strike or irregular industrial action short of a strike, being persons who are employers or workmen in the essential service in which the lock-out, strike or irregular industrial action short of a strike is to take place;*
> *(c) the day upon which the lock-out, strike or irregular industrial action short of a strike is to commence."*

91. It is apparent that one of the purposes of section 8 was to give the Minster power to make a reference to the PAT before the expiry of a valid notice of industrial action. If he does so any industrial action would be unlawful. But a notice of industrial action may be invalid for non-compliance with section 9 (2). The judge dealt with that contingency in paragraph [84] in the following terms:

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

> *prior to such action, that the intention of the proviso in section 8(1) is that the Minister has 21 days in which to make the referral, if any,* ***only if*** *there is a valid notice of the industrial action. If there is no valid notice or no notice at all, the Minister can do it at any time. What he cannot do where a valid notice of lock-out, strike or irregular industrial action short of a strike has been given in accordance with section 9 is to make a referral after the expiration of the notice."*

92. I take the sentence "*In such a case* [i.e. an invalid notice], *the interpretation of section 8 would be that the Minister would be unable to make any reference of the labour dispute in an essential service for settlement to the tribunal"* to be a summary of the argument before the judge that the Minister could make no reference in the absence of a valid notice of industrial action.

93. I agree with the judge's analysis. Further the fact that, on the analysis favoured by SSL, the Minister would not be able to make a reference under section 8 if the notice of industrial action was invalid is another reason for rejecting that interpretation. The Minister needed to have, and in my judgment did have, the power to make a reference to the PAT if (i) no notice of industrial action had been given; (ii) an invalid notice had been given; or (iii) a valid notice has been given and the period specified in the notice had not expired. The effect of section 8 (1) is that the Minister cannot make a reference after the period specified in a valid strike notice has expired. It is then too late and the industrial action notified must be allowed to take its course. But otherwise, his power exists.

94. It is submitted that this cannot be right because it would mean that the Minister could simply by-pass the requirements of section 8 (2) of the 1975 Act. I disagree. Section 8 (2) provides that the procedures provided for in Part II, which include section 3 shall apply until such time as the Minister makes an order under section 8. So, when he does make such an order, they cease to apply. If this is to be classified as by-passing section 8 (2) or section 3, that is something which the Legislature has in terms enabled the Minister to do. The Minister may, in fact, wish, in relation to an essential service, to proceed under section 3 in the hope that the parties can agree a reference to the PAT and, if the parties do agree, section 3 is the obvious route to take. Section 8 (2) enables him to do so and is not redundant. But he is not bound to do take this route, and, if he wishes, he can compel such a reference.

Discretion

95. The next question that arises is as to the nature of the Minister's discretion and whether he exercised it lawfully. The judge held that section 8 appeared to allow the Minster an unfettered discretion. But SSL submitted that the section, on its proper interpretation, gave the Minster only a limited discretion and that the consequence of section 8 (2) is that, until he makes an order under section 8, a labour dispute shall be dealt with in accordance with the procedures provided for in Part 2 and the section thus imported criteria from section 3 (3) for the exercise of that discretion. The Minster would thus have required the consent of both parties if he was to refer the matter to the PAT. The judge rejected this interpretation and rightly so. It would mean that the Minister had no power to make a reference if either, or both, sides objected, when such circumstances might be those in which, in the case of an essential service it was most apposite to make a reference. The interpretation would also emasculate section 8, since it would give the Minister no power which did not fall within section 3. On the contrary, as it seems to me, the Minster has a wide discretion, which the Court will only review in exceptional circumstances: *Kentucky Fried Chicken V Minister of Economy, Trade & Industry* [2013] Bda LR 19, [89].

96. The judge rejected [106] the submission that the decision of the Minister was either irrational or unreasonable and declined to infer that it had that character because the Minster had declined to give reasons. The Minister was provided with a report from the Manager of the Labour Relations Section, dated 25 March 2021, together with a chronology and had been one of the addressees of the report of 22 February 2021 required by section 9 of the Act. The judge said that he had been provided with no authority which supported the proposition that the Minister was required by common law to investigate whether there was a labour dispute, and, in any event, he had found that there was one. The judge expressly found that, "*in the context of the statutory scheme and the facts of the dispute and the circumstances surrounding it, there was nothing irrational about the Minister's decision to exercise his discretion*". He found [106] that the Minister's response in his letter of 27 May 2021 was quite appropriate in the circumstances and it was his prerogative not to give reasons. Failure to do so did not make the decision irrational. He saw no reason why the Minister was bound to go beyond a consideration of the report from the Labour Relations Manager of 25 March 2021.

97. I am not persuaded that the judge was in any way in error in reaching this conclusion. The reference by the Minister was a perfectly rational decision to refer an unresolved dispute, which plainly existed as to the validity of Mr Furbert's sacking, which, the Union contended, reflected SSL's unacceptable attitude towards him and the Union. That it existed, as the judge correctly found, was apparent from the material that was before the Minister, which he must have considered. It was a dispute that merited consideration by the PAT with a view to bringing the warring parties together. There had been delay in the process, partly as a result of the criminal complaint, which did not end until 4 June 2020 and the approach initially (and wrongly taken) by Mr Lightbourne. But such delay (of which the Minister must have been aware) was not such as to mean that there was no longer a dispute, or to render irrational or unreasonable the Minster's decision to use his powers to make a reference to the PAT.

98. I would, also, observe that, although the grievance procedure may not have been followed to the letter, the exchanges between the Union and SSL in substance covered the same ground as the Grievance Procedure. Steps 1 and 2 were due to be done within two days. They were not complied with in terms, although an attempt was made on 7 February to raise the matter with the Dock Operations Manager who declined, on Mr Jones' instructions. That would appear to have been a case of SSL failing to follow Step 2 of the Procedure (save that it could be said that there had never been Step 1, which, arguably was waived, given that the objection to Mr Berkeley addressing the matter was not based on a failure to fulfil step 1). As to step 3, there was no formal presentation of the grievance in writing, but the dispute was in substance addressed at the JCC meeting of 12 February 2020, in the list of priorities of 18 September 2020 and the JCC meeting on 4 October. It was also the subject of MG's letter before action and MDM's response. It was obvious that SSL's position was that Mr Furbert had been justifiably dismissed and would not be reinstated and that was it. In those circumstances the only realistic method of taking the matter forward was to have a reference to the Tribunal. In that context it was far from irrational for the Minister to exercise the power that he possessed.

The effect of the 2021 Act

99. Section 102 of the 2021 Act provides as follows:

"Transitional provisions

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

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

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

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

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

100. The question arises as to whether "*any actions or proceedings*" in (c) should be interpreted as referring only to judicial or quasi-judicial proceedings. The judge interpreted those words as referring to actions taken under the 1975 Act and held that their validity should be considered under the 1975 Act – paragraphs [99] – [100]. The 2021 Act should not be treated as having any retrospective effect such that the validity of the actions of the Manager of the Labour Relations Officer had to be reconsidered under the 2021 Act. I agree.

101. An alternative view is that if the proceedings are deemed to have commenced under the 2021 Act, their validity depends on whether the Minister could have made an order under the 2021 Act. But, if that be right, the Union and Mr Furbert had power to report the dispute to the Manager under section 67, the Manager had the obligation to make a reference to the Minister under section 69 (1) (b), and the Minister had the obligation to refer under section 70 of the 2021 Act.

102. In the course of preparing my judgment in this case it seemed to me desirable to state how the reference by the Minister, which I hold to have been validly made, should proceed. In particular, the question arises as to whether, following the abolition of the PAT on 1 June 2021 by the repeal of the LRA 1975 by the 2021 Act, the reference can and should be determined by the Employment

and Labour Relations Tribunal ("ELRT") introduced by the addition, by the 2021 Act, of section 44B to the Employment Act 2020. That is now the only relevant statutory body for the hearing of labour disputes.

103. This was not a matter upon which the parties had addressed us in terms and we, therefore, invited further submissions on the point.

104. We received submissions from the attorneys for the appellant and the interested parties and the Minister of Labour. The upshot of the appellant's submissions was that the reference could not proceed before the PAT, since, by reason of the repeal of the LRA 1975, the jurisdiction of the PAT was extinguished; and it could not proceed before the ELRT because the reference was to the PAT and the 2021 legislation did not provide for a reference that had been made to the PAT to be transferred to the ELRT. If that is so, the reference has fallen into what, in our application for further submissions, we described as a "black hole"; and these proceedings have been a complete waste of time.

105. The appellant's submissions are substantial, with a very large citation of textbook and case law authority. Reduced to essentials they are as follows. The effect of repealing the LRA 1975 (effected by section 100 (2) of the 2021 Act) was that it had thereafter to be considered as if it had never existed. That is the common law rule, see for instance: *Kay v Goodwin* (1830) 6 Bing. 576, 582 and *Surtees v Ellison* (1829) 9 B. & C 750, 752. The referral to the PAT is to be regarded as an action or proceeding commenced under the LRA 1975 Act (as, indeed, it is). The transitional provision in section 102 (1) (c) deems proceedings commenced but not concluded under the LRA 1975 to have commenced under the 2021 Act. But it does not go on to provide that such proceedings are to continue under the law as stated in the 2021 Act or before the new Tribunal established by that Act. Nor does it provide that the proceedings are to be continued under the law as stated in the LRA 1975 or before the PAT. In truth, it says nothing about which tribunal shall have jurisdiction in relation to such pending proceedings, or which law is to be applied. It would have been very easy to make the intention of the Legislature clear. But this was not done. The result is that there is, on the face of it, a black hole.

106. It might be said, the appellant accepted, that deeming the proceedings to have commenced under the 2021 Act had the consequence that the proceedings must be continued before the new tribunal, that tribunal being the only one to which the dispute could have been referred under the 2021 Act. That interpretation would receive further support from the presumption against absurdity or anomalous or inconvenient results.

107. But, the appellant says, there are six factors which militate against that approach:

    (i) The language of the transitional provision simply does not support it; to apply this interpretation would involve adding or varying the words of the section thereby extending it to meet a case for which no provision has been made.

    (ii) The presumption against absurdity is considerably weekend by the counterbalancing presumptions against displacing the common law rule as to repeals;

    (iii) This is not a case where the consequences of the interpretation argued for are so absurd that the Legislature could not possibly have intended them;

    (iv) The language is not sufficiently clear to compel the conclusion that it must have been intended to extend the deeming of commencement to the deeming of continuance and jurisdiction;

    (v) This is not a case of a plain drafting error;

    (vi) The most recent authorities at the highest level stress the primacy of the language used.

108. Accordingly, unfortunate though it is, the present case, the appellant submits, does not escape falling into a black hole; because to prevent that result would involve the Court engaging in impermissible judicial legislation. Alternatively, if the Court is not minded to accept that position, the alternative supportable interpretation is that the proceedings may be continued before the ELRT adopting the old law of the LRA 1975, to the extent that to do otherwise would be unfair. An example of the unfair application of the new law would be the penal provisions contained in the 2021 Act: see, for example, sections 76,77, 78, 79 and 90; and see also section 44 M of the Employment Act 2000.

109. I have carefully considered the submissions of the appellant and the other parties. In my view, which largely reflects the submissions made to us by the Interested Parties, the matter stands thus.

110. The purpose and intent of the 2021 Act was described in the recital to the Act, which I now repeat, as follows:

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

111. The 2021 Act made a number of amendments to the Employment Act 2020. One of those amendments was the insertion of section 44 B of the Employment Act 2020 which created the ELRT. As I have said, section 102 (1) (c) of the 2021 Act provided that:

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

112. The reference by the Minister to the PAT marked the commencement of an action or proceedings under the LRA 1975. The effect of section 102 1) (c), in my view, was that the proceedings actually commenced before the PAT were to be deemed to have commenced under the 2021 Act. In other words, they were to be treated as if they had been commenced under the 2021 Act. The only way in which proceedings of this nature could be commenced under the 2021 Act is by a reference by the Minister to the ELRT. Accordingly, after the coming into force of the 2021 Act what had been the PAT proceedings were thereafter to be deemed to be proceedings brought before the ELRT by reason of the direction of the Minister. The position may be contrasted with what was provided for by section 102 (1) (d), (above) which preserved the jurisdiction of the Employment Tribunal as constituted under the 2020 Act before the commencement of the 2021 Act in relation to actions or proceedings brought before that tribunal prior to the commencement of the 2021 Act.

113. For a court to reach this conclusion does not amount to usurping the legislative function by creating a statutory provision which the Legislature has, perhaps accidentally failed to enact. What it does

involve is attributing a meaning to the words which the Legislature used which avoids absurdity or unreasonableness and gives effect to the manifest purpose of the statute.

114. The analysis now favoured by the appellant (but not previously advanced) would create an utterly absurd position. On that analysis the proceedings would be deemed to be commenced under the 2021 Act but, because of the abolition of the PAT would have no effect. Their deemed new birth would be followed by instant death, and the complaining party would be left without legal recourse. The Legislature cannot possibly have intended such a result.

115. Per contra, there is, in my view, no difficulty in holding that, when the Legislature provided that pre 2021 Act proceedings should be deemed to have been commenced under the 2021 Act, it meant and intended that those proceedings which, absent a provision such as 102 (1) (c) would, indeed die, should be deemed to have commenced under the 2021 Act in such manner as would make them effective proceedings under that Act. And, since they are deemed to have been (validly) commenced they will continue until they have taken their course. Such a construction takes away no vested right. At its highest the 2021 Act simply changes how the rights of Mr Furbert are to be adjudicated upon.

116. I do not propose to determine in this judgment questions as to the applicability of the sections of the 2021 Act to which the appellant refers, upon which we have not received full argument. I incline to the view that sections 76 to 79 of the 2021 Act are inapplicable to present circumstances because they relate to complaints of an unfair industrial practice, when that which has been reported to the Minister by the Manager (see the memorandum of the Manager to the Minister of 25 March 2021, following the email from Marc Daniels of 22 February 2021), and by the Minister to the Tribunal is a labour dispute; and that section 90 is inapplicable because that section relates to contraventions of any provision of the 2021 Act for which a civil penalty is liable to be imposed and the imposition of such a penalty by the Manager.

117. I recognize that that may be too strict a view and that it may be that the complaint should be regarded as a labour dispute involving a complaint of unfair industrial practice, consisting of a failure of SSL to comply with the grievance procedure set out in the CBA. If so, I would incline

to the view that the remedies conferred by section 78 are available, even if they were not available under the LRA 1975, because the 2021 Act, when it provides, in effect, for the PAT proceedings to continue as if they had commenced under the 2021 Act, intended that the remedies provided for by that Act should apply in respect of the as yet unresolved complaint.

118. Accordingly, I would, for these reasons, dismiss the appeal. Subject to any application that may be made in writing within 14 days of the date of this judgment, I would order the appellant to pay the costs of the appeal of the Respondent and the Interested parties, to be taxed on the standard basis, if not agreed.

SMELLIE, JA:

119. I agree.

GLOSTER JA:

120. I, also, agree.