[2016] JMCA App 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 70/2015

MOTION NO 8/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**PETER JENNINGS**	**2ND RESPONDENT**

Gavin Goffe and Adrian Cotterell instructed by Myers Fletcher & Gordon for the applicant

Douglas Leys QC, Douglas Thompson and Miss Kenika Brissett for the 2nd respondent

26 September, 10 October and 11 November 2016

MORRISON P

Introduction

[1] This is an application for conditional leave to appeal to Her Majesty in Council ('the Privy Council'), pursuant to section 4(a) of The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, from a decision of this court given on 6 May 2016. The applicant ('the bank') invokes section 110(2)(a) of the Constitution of Jamaica ('the

Constitution'), which provides that an appeal shall lie to the Privy Council from decisions of the Court of Appeal in any civil proceedings, with the leave of the Court of Appeal, "where in the opinion of the [court] the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council ...".

[2] In opposing the application, the 2nd respondent ('Mr Jennings') contends that the proposed appeal involves no question of either great general or public importance and that the application ought to be refused. The single issue which arises on this application is therefore whether the criterion of "great general or public importance or otherwise" has been made out in this case.

[3] As will presently emerge, the matter arises out of Mr Jennings' dismissal from the service of the bank; his subsequent successful challenge to the dismissal before the 1st respondent ('the IDT'); and the bank's so far unsuccessful attempt to overturn the decision of the IDT, by way of, in the first place, an application for leave to apply for judicial review of its decision. At the outset of the hearing of the current application, the court was advised by way of a letter from the Director of State Proceedings dated 23 September 2016 that the IDT "takes no position on the application ... and will take no further part in this matter".

The factual background

[4] The bank operates a network of commercial banking branches in locations across Jamaica. Mr Jennings was employed to the bank for over 30 years and was at the

material time the manager of its Saint James Street branch in Montego Bay. In November 2012, as a result of an internal investigation conducted by the bank with respect to a number of delinquent or non-performing loans which had been approved by Mr Jennings as branch manager, Mr Jennings was charged with misconduct and or neglect. It was said that these loans had been approved by him without any or sufficient prior due diligence in keeping the bank's policies and risk management criteria.

[5] Mr Jennings was first made aware of these charges, by way of a letter signed by a senior officer of the bank, on 5 November 2012. On the following day, the bank constituted a disciplinary panel to consider them. The panel comprised the same senior officer of the bank who had signed the letter proffering the charges against Mr Jennings, and another senior staff member of the bank. Mr Jennings was not represented at this hearing. Having heard Mr Jennings' responses to the charges against him, the panel concluded that they had been made out and, at a subsequent meeting on 19 November 2012, Mr Jennings was advised of the bank's decision to terminate his employment. Mr Jennings immediately appealed against this decision and the appeal was scheduled for 29 November 2012, before the deputy group managing director of the bank. Mr Jennings was told that, while he could be represented at the appeal by an employee of the bank, he could not have an attorney-at-law of his choice present. In the result, Mr Jennings did not attend the hearing of the appeal and it proceeded in his absence. The appeal was dismissed and the decision of the disciplinary panel was confirmed.

The IDT's award

[6] Mr Jennings disputed the termination of his employment and the dispute was referred by the Honourable Minister of Labour and Social Security to the IDT, "for settlement", pursuant to section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act ('the LRIDA'). By its award made on 28 April 2015, the IDT found that the termination of Mr Jennings' employment by the bank was unjustified. Accordingly, pursuant to section 12(5)(c)(iii) of the LRIDA, the IDT ordered Mr Jennings' reinstatement with payment of full emoluments, from the date of termination to the date of reinstatement. Alternatively, upon failure to comply with the order for reinstatement, the bank was ordered to compensate Mr Jennings in the amount equivalent to 220 weeks total emoluments at the current rate.

[7] In arriving at this conclusion, the IDT considered, firstly, that it had not been established that Mr Jennings had been negligent, committed fraud or benefitted from the questionable loans in any way. As regards the question of negligence, the IDT applied a definition of gross negligence connoting a deliberate neglect of duty and considered that, "[w]hile there is clear evidence that less than adequate due diligence was applied in each of the questionable loans there is no evidence that this was a deliberate act on the part of anyone" (see page 15 of the IDT's award dated 28 April 2015). (As will shortly be seen, this court subsequently took the view that, in applying this definition of gross negligence, the IDT fell into error - see paras [11]-[12] below.)

[8] Secondly, the IDT considered that the bank had failed to observe the rules of natural justice in relation to Mr Jennings' dismissal, in that (i) he had been denied the right to representation by his attorney-at-law; (ii) the procedure which had been adopted to consider the charges against him had not been managed by persons who were fair and objective, but rather by persons who were part of the institution, that is, the bank, which brought the charges against him; and (iii) he had not been advised of the charges against him well in advance of any hearing, so as to enable him to understand them and to seek such legal representation or assistance as he might have considered necessary in the circumstances.

The court proceedings

[9] Section 12(4)(c) of the LRIDA provides that an award of the IDT "shall be final and conclusive ... except on a point of law". The bank sought leave, pursuant to rule 56.3(1) of the Civil Procedure Rules 2002 ('the CPR'), to apply for judicial review of the IDT's decision. The application was heard and refused by Sykes J, who applied the now well-known test for the grant of leave laid down by the Privy Council in **Sharma v Browne-Antoine** (2006) 69 WIR 379, 387-388, that is, that "...the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy ..." Accordingly, Sykes J observed (at para. [2] of his judgment), "... if the prospects of success are highly unrealistic then leave ought to be refused".

[10] Sykes J then went on to canvas in some detail the reasons for the enactment of the LRIDA, what it was intended to do and what the IDT was authorised to do when settling disputes. Among other things, Sykes J referred to the statement by Rattray P in **Hotel Four Seasons Ltd v The National Workers Union** (1985) 22 JLR 201, 304, that the IDT is "vested with the jurisdiction relating to the settlement of disputes completely at variance with basic common law concepts, with remedies including reinstatement for unjustifiable dismissal which were never available at common law and within a statutory regime constructed with concepts of fairness, reasonableness, co-operation and human relationships never contemplated by the common law". Citing more recent authority from this court, Sykes J also referred to **The Industrial Disputes Tribunal v University of Technology Jamaica and another** [2012] JMCA Civ 46, to make the point that this decision "has now closed off any further argument around the point of whether the court can interfere with the IDT's findings and conclusions once there is available evidence to support the view".[1] In the instant case, Sykes J considered (at para. [44]) that "... the application for leave in this case is really about the [IDT's] findings of fact and conclusions drawn from those findings ... there is no basis for judicial review because no law is involved". In the result, the learned judge held in disposing of the application for leave to apply for judicial review

[1] During the hearing of this application, we were told that an appeal to the Privy Council in this case is now fixed for hearing on 24 January 2017.

(at para. [65]) that there was "no realistic prospect of success in light of how the jurisprudence has developed and where it now is".

[11] The bank's appeal against Sykes J's decision was dismissed by this court. Although some aspects of the reasons given by Brooks JA and Sinclair-Haynes JA, with whom P Williams JA (Ag) (as she then was) agreed, were not on all fours with those given by Sykes J, I take the following statement by Brooks JA (at paras [5]-[9]) as a fair summary of the court's overall conclusion in disposing of the bank's appeal:

> "[5] The IDT in its terms of reference was asked to 'determine and settle the dispute between [the bank] on the one hand and Mr. Peter Jennings on the other hand over the termination of his employment'. It did just that.
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> [6] It may be that it took a controversial, if even incorrect, position on the issue of what constituted gross negligence, which was an issue of law. I agree with the reasoning, however, that the flaw was not determinative of the question of whether it was arguable in law, that its decision should be overturned. It is my view that the larger picture of the IDT's review of the situation leading to Mr Jennings' dismissal was more important in the context of whether judicial review was appropriate.
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> [7] As has been pointed out by Sinclair-Haynes JA, the courts have consistently taken the view that they will not likely disturb the findings of a tribunal, which has been constituted to hear particular types of matters. The courts will generally defer to the tribunal's greater expertise and experience in that area. The IDT is such a tribunal. ...
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> [8] In this case, [the bank] summoned Mr Jennings to a disciplinary hearing from which he stood the chance of losing his employment and, as a 33 year banker, his career. The IDT examined the circumstances leading to Mr Jennings' dismissal and found that he was unjustly treated. In its review of those circumstances, it found that he was not given enough time to prepare to meet the case against him.

> It found that the person who had drafted the charges, which he was to face at the hearing, constituted the tribunal which was to make the decision at the hearing. It further found that he was deprived of legal representation at that hearing and at the appeal from the decision of that hearing. All those issues spoke clearly to the issue of fairness in the context of the case.
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> [9] There was evidence from which the IDT could have made those findings of fact. It was entitled, from its mandate and experience, to conclude that he had been unfairly treated and that his dismissal was unjustifiable. A court should not interfere with such a finding. In those circumstances, judicial review was inappropriate. I agree that the application for judicial review ought to have been refused and that Sykes J was correct to have done so. I would dismiss the appeal."

[12] For her part, Sinclair-Haynes JA, with whom Brooks JA also agreed, considered (at para. [138]) that, "although the IDT was patently wrong in its definition of gross negligence, the IDT was called upon, not to determine whether Mr Jennings was grossly negligent, but rather its task was to determine whether in all the circumstances the termination of [his] employment was justifiable". Further, that –

> "[139] In considering the question before it, the IDT was not constrained by rules of court and technicalities of court proceedings. Section 20 of the LRIDA confers upon the IDT the power to 'regulate their procedure and proceedings as they think fit.'"

[13] Sinclair-Haynes JA ended her judgment by drawing attention (at para. [140]) to Donaldson LJ's observation in **Union of Construction, Allied Trades and Technicians v Brain** [1981] IRLR 224, 227, in reference to the English equivalent of

the IDT, that "... where Parliament has given to the tribunal so wide a discretion ... appellate courts should be very slow indeed to find that the tribunal has erred in law...". Accordingly, Sinclair-Haynes JA concluded:

> "The IDT rightly considered the appropriate factors in arriving at its decision that Mr Jennings was unfairly dismissed. Given its jurisdictional latitude, it was within its purview, in determining whether Mr Jennings [sic] dismissal was justifiable to consider the issues which it did."

[14] But, in the course of a full and detailed consideration of all the issues involved in the case, Sinclair Haynes JA also said a number of things which have particularly attracted the bank's attention in making this application. I will return to some of them in a moment.

The basis of the application for conditional leave

[15] In his affidavit sworn to on behalf of the bank on 26 May 2016 in support of the application for conditional leave to appeal to the Privy Council, Mr Euton Cummings, an assistant general manager of the bank, deponed as follows (at para. 31):

> "NCB believes this appeal is of great general or public importance for the following reasons:
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> (1) If the judgment of this Court is not set aside, the IDT will have the power to itself determine whether any employee is negligent, irrespective of whether the employee's profession is governed by its own standards and best practices. This could include pilots, accountants, doctors, or even lawyers who have clearly defined standards and best practices that govern their respective professions. The IDT would be able to define negligence in the manner it

sees fit and an error in its definition would not be open to review in any court as long as that was not the sole issue it had to determine;

(2) Unlike the Court, the IDT has the power to reinstate employees, which would mean that an employer could be required to reinstate an employee whom it considers to be negligent and/or unfit to carry out a function that affects the general public;

(3) The effect of the Appeal is that all domestic disciplinary panels must be comprised of external persons, which is wholly impractical and which is inconsistent with what the Labour Relations Code requires. It completely deprives every employer of the power to dismiss an employee without first referring the matter to an independent third party while the employer, seemingly, remains accountable for the results and process of the panel;

(4) The imposition of natural justice requirements and the standard of impartiality applicable to statutory tribunals will certainly affect all private Jamaican employers. Specifically, the IDT's award which was upheld by this Court has the effect of imposing natural justice principles on private employers as if they were public bodies;

(5) Further, the practical effect of the ruling is to require private employers to allow employees legal representation at internal disciplinary hearings, although the hearings are neither judicial nor quasi-judicial, and regardless of whether such representation would involve information being disclosed to the employee's legal representative that cannot lawfully be provided to him/her;

(6) The Court of Appeal has effectively ruled that s. 12(4)(c) of the Labour Relations and Industrial Disputes Act which provides that Awards may be challenged 'on a point of law' must be interpreted to mean 'on a point of law *affecting its jurisdiction'*. This effectively modifies the statutory requirement and will certainly affect all employers and their ability to challenge Awards to the Judicial Review Court in the manner contemplated by the Act.

> (7) NCB is advised by its attorneys and verily believes that the Judicial Review Court has the power under the Civil Procedure Rules to remit an award of an inferior tribunal to that tribunal for reconsideration in circumstances where it finds that an error of law has been committed. This allows the tribunal to consider whether its overall conclusion would have been affected had it been guided by proper legal principles. When the Court finds errors of law, yet refuses leave to bring judicial review proceedings, it deprives the applicant of the benefit of a reconsideration of the matter in the light of proper legal principles.
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> (8) The Bank has been advised by its attorneys-at-law and verily believes that the Court of Appeal has effectively raised the standard required for applications for leave to bring judicial review proceedings. It is no longer sufficient to show an arguable case with a reasonable prospect of success. Instead, the leave judge must be satisfied that the inferior tribunal is completely wrong, or its decision is perverse before leave will be granted."

The submissions

[16] Largely building on these statements in Mr Cummings' affidavit (which, as Mr Leys QC complained, I think with some justification, were far more argumentative than factual), Mr Goffe submitted that the following were the questions which, by reason of their great general or public importance or otherwise, ought to be submitted to the Privy Council:

> 1. Whether this court is properly and consistently applying the decision of the Privy Council in **Sharma v Browne-Antoine**? This question arises out of Sinclair Haynes JA's observation (at para. [51]), having noted the grounds put forward by the bank before Sykes J in its application to apply

for judicial review, that "[i]t is therefore necessary to examine whether the IDT made errors of law and if it did, whether such errors of law amounted to arguable grounds with realistic prospect [sic] of success". The role of the judge at the leave stage, Mr Goffe submitted, is simply to determine arguability, rather than to determine whether errors of law were in fact made, since, as Lord Wilberforce observed in the well known case of **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd** [1982] AC 617, 644, "[t]he discretion that the court is exercising this stage is not the same as that which it is called upon the exercise when all the evidence is in and the matter has been fully argued at the hearing of the application".

2. Whether the phrase "on a point of law" in section 12(4)(c) of LRIDA should be interpreted to mean "on a point of law going to the IDT's jurisdiction"? This question arises out of Sinclair Haynes JA statement (at para. [61]) that "there exists a distinction between errors of law that go to jurisdiction and those which do not", before concluding (at para. [65]) that a mistake made by the IDT in respect of the definition of gross negligence "was not one which affected

[its] jurisdiction". Ever since the landmark decision of the House of Lords in **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147, it was submitted, all errors of law are now reviewable by the court.

3. Whether the phrase "on a point of law" insection 12(4)(c) of the LRIDA should be interpreted to mean "on the sole point of law" or "on a point of law which affects the decision"? The basis of this question is Sinclair-Haynes JA's observation (at para. [64]) that "[t]he IDT was ... called upon to determine and settle the dispute between the parties in respect of the termination of Mr Jennings' employment which involved many issues. The issue of negligence was an important consideration, but not the sole factor for the IDT's consideration". There is no basis, it was submitted, particularly at the leave stage, for the court to say that the error of law committed by the IDT on the negligence issue did not, or could not reasonably have affected its decision.

4. Whether it is a part of the IDT's function to determine whether a member of a profession that is governed by its own standards and best practices is negligent or not? On this question, Mr Goffe submitted that the IDT ought not to have

ignored the uncontroverted evidence from an experienced banker that Mr Jennings' actions were inconsistent with the standards and best practices of the banking profession. Mr Goffe further submitted that this was not an issue in respect of which, as Sinclair Haynes JA held (at para. [93]), "the finding of the IDT ought not to be interfered with lightly, as industrial tribunals have tremendous knowledge and proficiency in these matters, which the court lacks".

5. How can an employer conduct an internal disciplinary hearing as provided for in the Labour Relations Code ('the Code') if none of its employees is allowed to sit on the disciplinary panel? This question arises out of Sinclair-Haynes JA's observation (at para. [91]) that the IDT's finding, that "... the [disciplinary] procedure should show impartiality and be presided over and/or managed by persons who will be fair and objective, and certainly not a part of the institution which is making the accusation or bringing the charges against the accused", could not be considered perverse. Mr Goffe submitted, to the contrary, that the IDT ruling was irreconcilable with the Code and that "[t]he IDT's recent insistence on having internal disciplinary tribunals that can meet the standard of impartiality applicable to judicial bodies

or public bodies is arbitrary and deprives every employer of any discretion at all with respect to whether to dismiss an employee or not". This recent trend, it was further submitted, "has far-reaching implications for all employers who have been operating for years on the premise that internal disciplinary hearings are encouraged by the [Code]".

6. Whether all employers, regardless of size and resources, are required to uphold the same natural justice principles as public bodies? On this question, Mr Goffe points out that the term 'natural justice' is nowhere mentioned in the LRIDA or the Code. On this basis, it was therefore submitted that the principles of natural justice being applied by the IDT, as illustrated by the instant case, go far beyond the scope of the Code and are more appropriate for public bodies than private institutions.

7. Whether Jamaican employees have a right to legal representation in disciplinary hearings where dismissal is a possible outcome? On this point, Mr Goffe relied on English decisions in which it has been held that employees do not have a right to legal representation in a domestic disciplinary hearing (for example, **R (On the application of G) v**

> **Governors of X School** [2011] UKSC 30); and that the right of legal representation is not a part of the *audi alteram partem* principle (for example, **In Re Hone and Another's Application** [1987] NI 160).

[17] Mr Goffe submitted that none of these questions is confined only to the bank, Mr Jennings or any peculiar or unusual circumstance of this case. Rather, it was submitted, they are all important questions, arising from the judgment of this court, and the answers to each of them "... will bring much needed clarity to what is now a very confused and often contradictory industrial relations landscape".

[18] In responding to these submissions, Mr Leys first took a jurisdictional point, contending that the bank's application is covered by the rule in **Lane and Another v Esdaile and Another** [1891] AC 210 **(Lane v Esdaile)**, and that this court accordingly has no jurisdiction to grant leave to appeal to the Privy Council in this case. The rule in **Lane v Esdaile**, as set out in the headnote to the Law report, is that –

> "No appeal lies to [the House of Lords] from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court in a case where the time limited ... for appealing has expired. Such a refusal is not an order or judgment of the Court of Appeal within the meaning of s. 3 of the Appellate Jurisdiction Act 1876."

[19] Mr Leys also drew attention to the decision of the Court of Appeal of Trinidad and Tobago in **Durity v Judicial and Legal Service Commission and Another** ('**Durity**') [1996] 2 LRC 451. In that case, an application for conditional leave to appeal

to the Privy Council against a decision of the Court of Appeal refusing leave to apply for judicial review, under constitutional provisions identical to section 110(2)(a), was refused on the basis that the rule in **Lane v Esdaile** applied.

[20] Next, Mr Leys submitted, in the alternative, that the issues in the instant case do not go beyond the interest of the immediate parties to the case and that there is no general point of law which is of great or general public importance which requires the determination of the Privy Council. In this regard, Mr Leys referred to the decision of this court's predecessor in **Vick Chemical Company v Cecil DeCordova and others** (1948) 5 JLR 106, in which the court was concerned to apply rule 2(b) of the Order in Council dated 15 February 1909, which was in terms virtually identical to section 110(1)(a). In that case, speaking for the court, McGregor J said this (at page 109):

> "The principles which should guide the Court have been set out in a number of cases the latest of which is *Khan Chinna v Markanda Kothan and Another* [in which] Lord Buckmaster delivering the judgment of the Board said:–
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> > 'It was not enough that a difficult question of law arose, it must be an important question of law. Further, the question must be one not merely affecting the rights of the particular litigants, but one the decision of which would guide and bind others in their commercial and domestic relations.'
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> In *Prince v Gagoon* ... Lord Fitzgerald said:–
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> > 'There is no great question of law or public interest involved in its decision that carries with it any after-consequences, nor is it clear that beyond the litigants there are any parties interested in it.'"

[21] On this same point, we were also referred to the recent decision of this court in **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and the Public Service and others** [2015] JMCA App 7, para. [34], in which Phillips JA reiterated her previous statement in **Georgette Scott v The General Legal Council** (SCCA No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009), at page 9, on the proper approach to applications under section 110(1)(a):

> "... Firstly, there must be the identification of the question(s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue(s) which require(s) debate before Her Majesty in Council. Thirdly, it is for the applicant to persuade the court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance."

[22] Mr Leys also referred to the matters to which Sykes J had drawn attention for the purpose of demonstrating the width of the mandate given to the IDT under the LRIDA in resolving labour disputes (see para. [6] above). In particular, Mr Leys relied on Bingham JA's observation in **Village Resorts Ltd v IDT** (1998) 35 JLR 292, 321, that the contention that the IDT is bound to apply common law principles in coming to its decision "flies in the face of the requirement for the IDT to have regard to the conduct of both parties at the various stages of a reference to [it] in an endeavour to reach a settlement of the dispute".

[23] Against this background, Mr Leys submitted that no questions of great general or public importance arise in this case, given the fact that the parameters of the jurisdiction of the IDT have already been settled by previous decisions of this court and of the Privy Council itself.

[24] And finally, in the further alternative, Mr Leys submitted that this application does not meet the threshold required by section 110(2)(a) of the Constitution, since the application itself did not set out, as it ought to have done, the questions which the bank contended to be of great general or public importance.

[25] In reply to Mr Leys' jurisdictional point, Mr Goffe referred us to our recent decision in **Eduardo Anderson v National Water Commission** (**'Eduardo Anderson'**) [2015] JMCA App 15, in which this court declined to apply the rule in **Lane v Esdaile** so as to prevent an appeal from the decision of a judge of the Supreme Court to grant leave to apply for judicial review. In coming to this decision, the court was largely influenced by the decision of the Privy Council, on appeal from the Court of Appeal of Bermuda, in **Kemper Reinsurance Company v The Minister of Finance and Others** ('**Kemper**') [1998] UKPC 22. In that case, as in the instant case, the requirement for leave to apply for judicial review was a creature of rules of court and not of statute. In these circumstances, the Privy Council held that an order made or refused under the rules could only be excluded from the general right of appeal given by the statute conferring jurisdiction on the Court of Appeal by express words or by necessary implication from the rules themselves. It was therefore held that the rule in

Lane v Esdaile did not preclude an appeal from an order by a judge discharging a previous order granting leave to apply for certiorari. Accordingly, in **Eduardo Anderson**, the court considered (at para. [36]) that "unless excluded from the general right of appeal granted by statute, an order granting leave to appeal is equally appealable".

Discussion and conclusions

[26] The first question which naturally arises is therefore whether the court is altogether barred from considering this application on the basis of the rule in **Lane v Esdaile**. In my view, by clear analogy to the decisions in **Kemper** and **Eduardo Anderson**, it is not. This application is concerned with a decision of this court. Both sections 110(1) and 110(2)(a) of the Constitution govern appeals to the Privy Council "from decisions of the Court of Appeal". Although an appeal pursuant to section 110(2)(a) is not "as of right", as is an appeal under section 110(1), it appears to me to have been the clear intention of the framers of the Constitution that such an appeal should lie at the instance of a party to any civil proceedings in which, in the opinion of the court, the criterion of "great general or public importance or otherwise" has been satisfied. Therefore, in the absence of express words or necessary implication excluding an appeal to the Privy Council in these circumstances, I would be loth to foreclose an avenue of appeal that is explicitly sanctioned by the Constitution.

[27] In coming to this conclusion, I have not lost sight of the decision of the House of Lords in **In re Poh** [1983] 1 WLR 2, in which it was held that, by virtue of the rule in

Lane v Esdaile, the House had no jurisdiction to hear an appeal from a decision of the Court of Appeal refusing a renewed application for leave to apply for judicial review. But, in **In re Poh**, as Lord Hoffmann pointed out in **Kemper** (at para. 33), Lord Diplock "expressly disclaimed any expression of view upon the nature of the procedure whereby this appeal moved from the Divisional Court to the Court of Appeal". I take this to be a recognition of the fact that, save in respect of appeals to the House of Lords, Lord Diplock was not intending to lay down a principle generally applicable to every situation in which an appeal was sought to be brought against a decision granting or refusing an application for leave to apply for judicial review. It is indeed partially on this basis that the Board in **Kemper** felt able to conclude that **In re Poh** was not applicable in the circumstances of that case (see para. 33 of Lord Hoffmann's judgment; and see also the discussion at paras [33]-[35] of **Eduardo Anderson**). In the light of these considerations, I find it impossible to suppose that the view expressed by Lord Diplock in relation to the bringing of appeals from the Court of Appeal of England to the House of Lords should be treated as imposing a limitation on appeals to the Privy Council from decisions of this court further to those set out in the Constitution itself.

[28] **Lane v Esdaile** was also applied by the House of Lords in **R v Secretary of State for Trade and Industry, ex parte Eastaway** [2001] 1 All ER 27, to which Mr Leys also referred us. In applying the rule, Lord Bingham gave as an additional justification for declining to hear an appeal from a refusal by the Court of Appeal to grant permission to appeal the fact that "[i]n its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases

recognised as raising legal questions of general public importance". In my view, this is the virtually identical filter provided for in section 110(2)(a) and, as I have already indicated, I can see no basis for imposing any further limitation on the prospect of an appeal to the Privy Council.

[29] Nor have I lost sight of the fact that in **Durity**, in relation to a provision virtually identical to section 110(2)(a), the Court of Appeal of Trinidad and Tobago (by a majority) arrived at what might appear on the face of it to be the opposite conclusion on the question of the applicability of **Lane v Esdaile**. However, it should be noted that what happened in that case was that, the applicant having been refused leave to apply for judicial review by a judge of the High Court, then sought leave from the Court of Appeal to apply for judicial review of the refusal. However, the Court of Appeal treated the matter as a renewed application for leave to apply for judicial review and refused it. It was from this latter refusal that the applicant now sought leave to appeal to the Privy Council. The majority of the Court of Appeal (Gopeesingh and Hamel-Smith JJA) took the view that **Lane v Esdaile** and, by extension, **In Re Poh**, applied, thus precluding an appeal to the Privy Council in these circumstances.

[30] This is how Gopeesingh JA explained the position (at page 464):

> "... the expression 'decisions' appearing in s 109(1)(a), (c) and (2)(a) [the equivalent of sections 110(1)(a), (c) and 110(2)(a) of the Constitution], rather than being given the wide interpretation urged by the attorney for the applicant, should be construed narrowly and strictly to exclude from its ambit a refusal by this court on a renewed ex parte application for the grant of leave to apply for judicial review.

> Such a refusal to grant leave, in my view, is not a 'decision' contemplated by those provisions."

[31] In dissent, Sharma JA (as he then was) took the opposite view. He considered (at page 458) that constitutional provisions should be interpreted generously and that "[c]lear and unambiguous language in the Constitution itself, is ... necessary before it can be inferred that [the right of appeal to the Privy Council] must be eliminated altogether". Accordingly, Sharma JA concluded, "... refusal of a renewed application for judicial review is a decision which is appealable to the Privy Council, provided other conditions are satisfied".

[32] In this case, it is happily unnecessary to choose between the rival positions in **Durity**, since in my view there can be no question that, firstly, what was before this court was an appeal from the judgment of Sykes J, rather than a renewed application for judicial review; and secondly, this court's dismissal of that appeal was a 'decision' within the meaning of section 110(2) of the Constitution.

[33] Turning now to the principal issue which arises on this application, which is whether the requirement of section 110(2)(a) has been met, it is beyond controversy that the proper approach is as set out in the authorities to which Mr Leys referred us (see paras [20]-[21] above). So, in order to be considered one of great general or public importance, the question involved must, firstly, be one that is subject to serious debate. But it is not enough for it to give rise to a difficult question of law: it must be an important question of law. Further, the question must be one which goes beyond the

rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspect of the practice, procedure or administration of the law and the public interest (see also **Michael Levy v Attorney General and Jamaica Redevelopment Foundation Inc** [2013] JMCA App 11, para. [32]).

[34] Before coming to the substantive issue, it may be convenient to deal first with Mr Leys' further alternative submission, which was that an application for leave to appeal to the Privy Council under section 110(2)(a) of the Constitution must contain the questions which are of great general or public importance. But Mr Leys was unable to point to any rule of law or procedure to this effect. In any event, the submission appears to me to go further than can be justified by the language of section 110(2)(a) itself, which requires the court to be satisfied that "the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to [the Privy Council]". While it is true that Phillips JA did observe, in her judgment in **Georgette Scott v The General Legal Council** (see para. [21] above), that "there must be the identification of the question(s) involved", it seems to me that this was achieved in this case by the Mr Cummings' affidavit, as amplified by Mr Goffe's submissions. I therefore approach the matter on the footing that the bank has sufficiently identified the questions upon which it relies for the purposes of section 110(2)(a).

[35] The genesis of this matter, as has been seen, was the bank's dismissal of Mr Jennings. It is this that gave rise to the dispute which was referred to the IDT for settlement and it is this dispute which the IDT in turn purported to settle by way of its award dated 28 April 2015. So, on the face of it, what remains in the case, the bank's attempt to challenge the IDT's award by way of judicial review having so far failed, is whether, on the one hand, Mr Jennings is entitled to receive, and, on the other hand, the bank is obliged to give, the benefits conferred by the award. Put this way, it seems to me to be difficult to resist the view that there is now nothing in the case, should it be allowed to go forward to the Privy Council, beyond the rights of the parties themselves. And, if this is the correct analysis of the current position, then it is clear that the application for conditional leave must be refused.

[36] As the very generality of the questions identified by Mr Goffe demonstrates, the bank is fully aware that this is indeed one possible view of the matter. It is therefore necessary to consider whether these questions amount to questions of great general or public importance sufficient to displace this *prima facie* assessment of the matter. It seems to me that, in considering this issue, it is important to keep in focus what was before the court and what the court actually decided.

[37] Before Sykes J, as has been seen, was an application for leave to apply for judicial review of the IDT's award in Mr Jennings' favour. The threshold for the grant of leave is whether there is an arguable ground for judicial review having a realistic prospect of success. Given the authoritatively settled "jurisdictional latitude" (to borrow

Sinclair-Haynes JA's phrase) enjoyed by the IDT for the purpose of settling disputes referred to it for that purpose (see, for example, **Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal & Another** [2005] UKPC 16), Sykes J concluded that no such arguable ground for judicial review had been shown. Notwithstanding the wide-ranging nature of the discussion in the judgments of this court, in particular that of Sinclair-Haynes JA, it seems to me to be clear that the court's conclusion was essentially the same. Both Brooks JA and Sinclair Haynes JA were careful to base their decision on the fact that there was evidence before the IDT to support its conclusion that the manner of Mr Jennings' dismissal was unfair and that, given the clear mandate of the IDT to settle industrial disputes, a court would not in these circumstances lightly disturb its finding that the dismissal itself was unjustified.

[38] Against this backdrop, it seems to me that, as attractively as they were put by Mr Goffe, the seven questions proposed by him on the bank's behalf are all wholly peripheral to the essential consideration for the court, which was that, if the IDT's conclusion that Mr Jennings' dismissal was unjustified was one which it was fully entitled to reach, then there was no scope for judicial review. But, in deference to Mr Goffe's efforts, I will briefly consider each of them in turn.

[39] Mr Goffe's first question is whether this court is consistently applying the threshold test propounded by the Privy Council in **Sharma v Browne-Antoine**. In this regard, I should point out that, as has been seen, Sykes J explicitly applied that test and, in this court, both Brooks and Sinclair-Haynes JJA concluded that he had come to

the correct conclusion. Although Sinclair-Haynes JA expressed the view that the circumstances in **Sharma v Browne-Antoine** were distinguishable, she nevertheless considered (at para. [33]) that, in the instant case, as in that case, "[t]he real issue is whether NCB provided arguable grounds with a realistic prospect of success"; and further (at para. [44]) that "[i]t cannot properly be asserted that [Sykes J] failed to apply the test of arguability set out in **Sharma**". In order to demonstrate the court's consistency in this regard, it suffices to mention, I think, our decision in **The Minister of Finance and Planning and the Public Service and others v Viralee Bailey-Latibeaudiere** [2014] JMCA Civ 22, para. [42], where the court adopted and applied the identical test.

[40] Mr Goffe's second and third questions both have to do with the meaning and scope of the phrase "on a point of law" in section 12(4)(c) of LRIDA. They arise out of this court's dismissal of the bank's appeal, despite its finding that the IDT had adopted an erroneous definition of 'gross negligence'. But it is clear that what might be described as the 'process' issues relating to Mr Jennings' dismissal played at least an equal – and perhaps even a greater - role in the IDT's determination that he was unjustifiably dismissed. So this court held that the erroneous definition did not detract from the IDT's jurisdiction to give a remedy in a case of unfair treatment of an employee. In these circumstances, given the amplitude of the IDT's jurisdiction in this regard, as established by previous authority binding on this court, it seems to me that these questions are now essentially academic. As Sinclair-Haynes JA observed (at para. [138]) "[a]lthough the IDT was patently wrong in its definition of gross negligence, the

IDT was called upon, not to determine whether Mr Jennings was grossly negligent, but ... whether in all the circumstances the termination of [his] employment was justifiable".

[41] Mr Goffe's fourth, fifth, sixth and seventh questions can be dealt with even more shortly. In respect of the fourth, which relates to the weight given by the IDT to the evidence of the bank's witnesses, it suffices to say, I think, that the issue of the weight to be given to evidence is, generally speaking, a matter entirely within the purview of the particular tribunal hearing the matter. The fifth, sixth and seventh questions ask, rhetorically, and, it appears, on behalf of employers in Jamaica generally, whether (i) internal disciplinary hearings are henceforth to be conducted without any employee membership on the panels; (ii) the rules of natural justice are to be extended to all employees, regardless of the size of the particular enterprise; and (iii) all employees are entitled to legal representation at internal disciplinary hearings. While these are all no doubt interesting questions, it appears to me that they range far more widely than can be justified by the actual decision of the court on this appeal, which was that, taking all the circumstances of Mr Jennings' dismissal was a whole, there was evidence from which the IDT could have arrived at the decision that Mr Jennings was unjustifiably dismissed. Taken in the immediate context of this case, therefore, I am quite unable to discern anything in these questions of such great public or general importance as to transcend the interests of the parties themselves.

Disposal of the application

[42] For these reasons, I would therefore dismiss this application. It seems to me that, in the light of this result, costs should follow the event and that the bank should pay Mr Jennings' costs of the application. But, in the event that the bank wishes to contend for a contrary or different order, I would propose that it be allowed to do so in writing within 14 days of this order, failing which Mr Jennings will have his costs of the application, such costs to be taxed if not sooner agreed.

MCDONALD-BISHOP JA

[43] I have read the judgment of the learned President in draft. I agree with his reasoning and conclusions and have nothing to add.

P WILLIAMS JA

[44] I also agree.

MORRISON P

ORDER

The application for conditional leave to appeal to Her Majesty in Council is refused. The applicant shall have 14 days from the date of this order to submit in writing why costs should not follow the event. If no such submissions are received then the applicant shall pay the 2nd respondent's costs of this application, to be taxed if not sooner agreed.