JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 81/2016

APPLICATION NO 156/2016

BETWEEN	**ATL GROUP PENSION FUND TRUSTEES NOMINEE LIMITED**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**CATHERINE BARBER**	**2ND RESPONDENT**

Hugh Wildman and Jerome Spencer instructed by Hugh Wildman & Company and Miss Kimberly Campbell for the applicant

Mrs Susan Reid-Jones instructed by the Director of State Proceedings and Miss Tanya Ralph for the 1st respondent

Gavin Goffe and Adrian Cotterell instructed by Myers, Fletcher & Gordon for the 2nd respondent

26, 29 August and 20 December 2016

IN CHAMBERS

PHILLIPS JA

[1] In an application filed 22 August 2016, the applicant herein sought an interim injunction to preserve funds and restrain the 2nd respondent from taking steps to enforce an award of the Industrial Disputes Tribunal (IDT) pending the determination of an appeal from G Fraser J's refusal of an application for judicial review. This application was amended on 26 August 2016, so that the applicant could seek an interim injunction to preserve monies paid over by its attorneys-at-law, to the 2nd respondent, as part of

the said award until the applicant filed an application before the Full Court to vary or discharge the order of Sinclair-Haynes JA made on 19 August 2016, refusing, *inter alia*, to grant a stay of execution of G Fraser J's judgment pending appeal.

[2] After hearing the application I made the following orders:

> "1. The notice of application for interim injunction pending the determination of the applicant's proposed challenge of the decision of the Hon. Mrs. Justice Sinclair-Haynes, JA made on 19th August 2016 filed on 22nd August 2016 and amended on 26th August 2016 is refused.
>
> 2. Costs to the 2nd respondent to be agreed or taxed.
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> 3. Order for a special costs certificate made in respect of two (2) counsel.
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> 4. The 2nd respondent is permitted to prepare, file and serve the formal order."

I promised to deliver, in writing, my reasons for granting these orders and this is a fulfilment of that promise.

Background

[3] The applicant is a company duly incorporated under the Companies Act with registered offices at 3 Haughton Avenue, Kingston 10. The trust scheme is constituted under an amended Trust Deed dated 17 October 2006, and Accompanying Rules with the intent and purpose of providing pension benefits for the employees of Gorstew Limited, its subsidiary and eligible associated companies. The Chairman of Gorstew is Mr Gordon "Butch" Stewart. The 2nd respondent had been employed as General Manager of the applicant from 26 June 2000, but was later dismissed in a letter dated

15 April 2011. The applicant claimed that the 2nd respondent's dismissal was justified having regard to its loss of trust and confidence in her ability to dutifully and loyally serve the applicant arising out of two incidents, namely:

(1) failing to disclose to the applicant's Board of Trustees that the Chairman of the Board, Mr Patrick Lynch, was interested in buying an apartment owned by the applicant and had signed an agreement for sale with accompanying deposit in furtherance of this sale; and

(2) the 2nd respondent's admitted action in back-dating certain letters and failing to inform the applicant's Board of Trustees that written consent for the disbursement of surpluses to Gorstew's employees had not been obtained, which amounted to dishonesty.

[4] The 2nd respondent contended that on 6 December 2010, she was summoned to a meeting at Mr Stewart's office wherein she was accused by Mr Stewart of authorising the allocation of surpluses obtained under the pension fund without his consent. The 2nd respondent indicated that she had received a letter of consent duly signed by Dr Jeffrey Pyne, Managing Director of Gorstew. The 2nd respondent also claimed that the Board was aware that the funds were allocated on a triennial basis. By letter dated 13 January 2011, the applicant was instructed to take a leave of absence for 14 days which was extended in letter dated 26 January 2011 for a further 14 days and again

extended on 16 March 2011, to investigate the 'recent developments'. The applicant was later dismissed in a letter dated 15 April 2011.

[5] The 2nd respondent claimed that her dismissal was unfair and unjustifiable and as a result made a complaint to the Ministry of Labour and Social Security. The Minister of Labour and Social Security forwarded the matter to the IDT for resolution in a letter dated 23 November 2011, in accordance with the following terms of reference:

> "To determine and settle the dispute between ATL Group Pension Fund Trustees Nominee Limited on the one hand and Miss Catherine Barber on the other hand over her dismissal."

[6] In relation to whether the 2nd respondent had been guilty of misconduct in relation to an offer made by Mr Lynch to purchase an apartment owned by the applicant, the IDT found that the applicant's contention was unsubstantiated since the sale to the former Chairman, Mr Lynch, had been discontinued, the deposit he made had been returned and moreover, Mr Dmitri Singh, the applicant's legal officer, also participated in contemplation of the sale. The IDT found it strange that no explanation had been sought from the 2nd respondent nor had she been reprimanded for actions that had taken place in 2007, and yet those actions were being used against her four years later in 2011 as a basis for her dismissal.

[7] In relation to the issue of whether the 2nd respondent's actions of back-dating letters could result in a loss of trust and confidence and amount to dismissal, the IDT stated at pages 17-19 of its award that:

"In dealing with the above as to the back-dated consents, it is important to emphasize that there were five (5) such letters of consents, three of them produced with respect to June 10, 1998, June 7, 2002 and May 2005, the 1998 one being prior to [the 2nd respondent's] employment. It is important to note, that whatever steps [the 2nd respondent] took with respect to these five (5) letters, were taken for the sole purpose of rectifying omissions which had come to light and presented a problem, because Mr. Butch Stewart had discovered the absence of written authority for the payment out of pensions, during the relevant period of five (5) years and had stated that 'He wanted his money back.'

In this regard, the clear evidence of [the 2nd respondent] is, that when this matter was brought to her attention, she discussed possible solutions to the problem with Miss [Linda] Mair, one of the attorneys in the firm of Patterson Mair and Hamilton, external counsel to the Company, and Miss Mair has suggested certain ways of dealing with the absence of the written consents. The sole purpose of her suggestions was to correct omissions made, before [the 2nd respondent's] time and during her tenure in office. It should be noted, that none of these payments was made to [the 2nd respondent] nor did she derive any benefit from any of these payments.

The Tribunal finds it inexplicable, that in respect of a matter on which the Company placed so much significance in justification of the dismissal of [the 2nd respondent], it did not choose to call Miss Mair as a witness, despite the importance they attached to these omissions. Indeed, the Company went to great lengths and no doubt considerable expense, to bring Mr. Speekin- Forensics Document Analysis Ink Dating Specialist – to testify as to the 'back-dating', when all this might have been avoided with the assistance of Miss Linda Mair's testimony, as to what she had advised [the 2nd respondent] to do, by way of a possible appeasement of Mr. Stewart's concerns as to the absence of consent for the payment of surpluses made within the Pension Scheme. Was it possibly Miss [Linda] Mair who had advised [the 2nd respondent] as to the course adopted?

It is clear to the Tribunal, that the letters were prepared and dated retrospectively, to apply to the relevant years, in order to satisfy Mr. Butch Stewart that from 1998 onwards, when

> payments were being made, these letters had been prepared in respect of each of the years involved, to regularize the legal requirements of written consent.
>
> ...
>
> The Tribunal has also concluded that it is unfortunate that Mr. Gordon 'Butch' Stewart, who is the complainant in this matter on behalf of Gorstew, was not himself called to testify in this connection. We should mention that [the 2nd respondent's] attorney applied for Mr. Stewart to be called, but this application was firmly resisted by Mr. Wildman on behalf of Mr. Stewart and the Tribunal therefore did not get the benefit of his testimony.

The IDT concluded that:

> "In light of the above, the Tribunal is of the view that there was no justification, to have dismissed [the 2nd respondent] in the way that she was, by being unceremoniously sent on leave, without any explanation as to why, by having the police search her house the following day, without her permission, and by being dismissed without being given a chance to explain either of the above allegations, or to invoke the protection of the Labour Relations Code (LRC) in her favour."

[8] On 23 September 2015, the IDT made the following award:

> "The termination of [the 2nd respondent's] employment is unjustified and accordingly, consistent with section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act 1975, the Tribunal makes the following Order:
>
> (i) That [the 2nd respondent] be reinstated in her employment on or before October 12, 2015, with payment of all emoluments from the date of termination to date of reinstatement
>
> Or
>
> (ii) On failure to comply with (i) above, [the 2nd respondent] be Compensated in the amount equivalent to two hundred and sixty (260) weeks total emoluments at the current rate, in

full and final settlement of this dispute for the unjustified termination of her employment."

[9] The applicant then sought and was granted leave to apply for judicial review of the IDT's decision on 10 November 2015 by Sykes J. Sykes J was of the view that the matter ought to proceed to judicial review due to the IDT's pronouncement that the letters were back-dated to appease Mr Stewart without evidence to that effect; the IDT's finding that the use of the Labour Relations Code (the Code) contained in the Labour Relations and Industrial Disputes Act (LRIDA) was mandatory is an error of law; and the IDT's failure to give reasons for the order for compensation it had made. Sykes J granted leave to apply for judicial review in the following terms:

"1. The Applicant is granted leave to apply for Judicial Review by way of:

(1) A declaration that the finding by the 1st Respondent that the Applicant improperly terminated the contract of the 2nd Respondent, the 1st Respondent-

(a) Failed to consider relevant evidence that was led before it;

(b) Misconstrued relevant evidence;

(c) Asked itself the wrong questions,

rendering the decision null and void and of no effect.

(2) A declaration that the award of the 1st Respondent that the 2nd Respondent be compensated in the amount equivalent to 260 weeks total emoluments at the current rate in full and final settlement of the 2nd Respondent's termination of employment is irrational.

(3) An order of Certiorari quashing the decision of the 1st Respondent that the contract of the 2nd Respondent was improperly terminated by the Applicant.

(4) An order of Certiorari quashing the award of the 1st Respondent that the 2nd Respondent be compensated by the Applicant in an amount of 260 weeks total emoluments at the current rate in full and final settlement of the termination of the 2nd Respondent's employment.

2. A stay of the decision of the 1st Respondent dated September 23, 2015 is granted on condition that by November 12, 2015 the Applicant's Attorneys-at-Law pay into the 2nd Respondent's Attorneys-at-Law, Myers, Fletcher and Gordon, the sum of $38,347,703.00 on their professional undertaking to hold the said sum until the conclusion of the matter or further order of the court."

[10] The judicial review application was heard by G Fraser J on 12 August 2016. The learned judge found no merit to the challenges made by the applicant to the IDT's findings and so refused the application and ordered each party to bear their own costs.

[11] The applicant filed a notice of appeal on 15 August 2016, seeking the orders for declaration and certiorari stated in paragraph [9] herein and seeking to challenge G Fraser J's decision on grounds summarised as follows:

1. The learned judge failed to appreciate that there was no evidential basis for the IDT's finding of fact that the 2nd respondent produced the impugned letters to appease Mr Stewart or that the actions of the 2nd

respondent in so doing were sanctioned by Miss Linda Mair.

2. The learned judge failed to appreciate that the IDT erred in law by not giving reasons for making an award for compensation in the amount stated in its order and erred in finding that such an award was not unreasonable in all the circumstances.

3. The learned judge failed to appreciate that the IDT's award was unreasonable since it did not include the period between termination and the date of reinstatement.

[12] The applicant also filed a notice of application for interim relief pending the determination of the appeal on 15 August 2016. In that application it sought the following orders:

> "1. A stay of the decision of the Honourable Ms. G. Fraser J. [sic] dated August 12, 2016 and the decision of the 1st Respondent dated September 23, 2015 that was made be granted pending the determination of this appeal.
>
> 2.1 An order that the 2nd Respondent's [sic] instruct her Attorneys-at-Law to hold the sum of $38,347,703.00 ("the sum") pending the determination of this appeal.
>
> 2.2 Alternatively, the 2nd Respondent instructs her Attorneys-at-Law to pay the sum to Patterson Mair Hamilton for it to hold the sum pending the determination of this appeal.

3.1 In the event that the 2nd's [sic] Respondent's Attorneys-at-Law no longer hold [sic] the sum, an order that the 2nd Respondent pay the sum to her Attorneys-at-Law on her instructions that they hold same pending the determination of the appeal.

3.2 Alternatively, an order that the 2nd Respondent pay the sum to Patterson Mair Hamilton for it to hold same pending the determination of this appeal.

4. Such further and other relief as this Honourable Court deems fit.

5. Costs to be costs in the appeal."

[13] This application was heard by Sinclair-Haynes JA on 19 August 2016, who dismissed it; ordered costs to the 2nd respondent to be agreed or taxed; permitted the 2nd respondent to prepare file and serve the formal order; and further ordered that the appeal was to be heard by the Full Court as soon as possible.

The present application - The application for an interim injunction pending the proposed appeal

[14] The applicant thereafter filed a notice of application for an interim injunction to "hold the sum of $38,347,703.00" pending determination of the proposed challenge of Sinclair-Haynes JA's decision on 22 August 2016. When this application came before me on 26 August 2016, counsel for the applicant, Mr Wildman, indicated that Sinclair-Haynes JA had failed to make a ruling on whether the sums ought to have been held pending an appeal against G Fraser J's decision, and so he urged me to grant the injunction pending the proposed challenge against Sinclair-Haynes JA's decision that the applicant had not yet filed. I pointed out to Mr Wildman that his application as originally filed, had not mentioned the fact that the applicant was challenging Sinclair-Haynes JA's

decision. Additionally, no application to vary of discharge Sinclair-Haynes JA's order had been filed. As a consequence, counsel sought an amendment to the notice of application filed 22 August 2016, to address the issues which I had brought to his attention.

[15] Counsel for the 2nd respondent objected to any amendment to the said notice of application filed by the applicant on the basis that it was inappropriate for the court to grant an injunction in relation to an application to vary or discharge an order of a single judge of appeal which had not yet been filed and that it was not within the jurisdiction of a single judge of appeal to do so. Counsel also commented that at that time, almost one week had elapsed since Sinclair-Haynes JA had made her order, and yet no such application had been filed asking for any relief in relation to that order.

[16] After hearing further arguments and submissions, I granted the amendment sought by the applicant's counsel in the following terms:

> "1. On the Applicant's undertaking to file an Appeal against the Order of the Honourable Justice Sinclair Haynes of August 19, 2016, the Second Respondent be ordered to preserve the sum of $38,347,703.00 or any part thereof which was paid over to her by her attorneys-at-law, Myers, Fletcher & Gordon consequent on the order made by the Honourable G Fraser J on August 12, 2016 and that she be restrained from taking steps to enforce the award of the Industrial Disputes Tribunal IDT 34/2011 until the determination of the applicant's proposed challenge of the decision of Sinclair-Haynes JA made August 19, 2016 or such further order of the court.

2. The Applicant to undertake to abide by any order as to damages which may be caused by the grant of this injunction;

3. Such further and other relief as this Honourable Court deems fit;

4. Costs to be costs in the Claim."

[17] Counsel for the applicant and the 2nd respondent made submissions on the substantive application. The 1st respondent, though present, did not make any submissions or participate in the hearing.

Applicant's submissions

[18] Counsel submitted that there were many serious issues to be tried which would render the proposed challenge to Sinclair-Haynes JA's order successful.

[19] His first point of contention was that G Fraser J erred when she found that Ms Mair advised the 2nd respondent to backdate the letters, since Ms Mair had not given evidence before the IDT and the 2nd respondent had admitted in cross-examination that at no time had she been told by Ms Mair to backdate the letters. This finding by G Fraser J, counsel asserted, had been made without evidence, and was therefore made in error.

[20] Counsel submitted that one of the bases on which Sykes J granted leave to apply for judicial review was stated at paragraph [69] of his written reasons, wherein the learned judge opined that as there had been no evidence to support the IDT's factual finding that the letters had been backdated to appease Mr Stewart, "the IDT may have misled itself on this issue". Counsel also noted that G Fraser J found that this "error of

fact does not affect the substance of the award and that the error of fact falls below the threshold to justify quashing the award of the IDT". In reliance on **Regina v Secretary of State for Education and Science, Ex parte Avon County Council** [1991] 1 QB 558, counsel contended that G Fraser J had erred in this regard as any finding of fact made by the IDT which was not supported by evidence, rendered a decision made on that finding null and void and liable to be quashed.

[21] Counsel pointed out that Sykes J in his judgment had stated that it was an error for the IDT to find that observance of the Code was mandatory, since neither case law nor statute had elevated the Code to that position. Counsel posited that while non-compliance with the Code is a factor to be considered when determining whether termination was justifiable, it was neither conclusive nor mandatory.

[22] Counsel for the applicant also submitted by virtue of authorities such as **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and another** [2015] JMCA Civ 48 and **Norton Tool Co Ltd v Tewson** [1973] 1 WLR 45, that the IDT must give some explanation in respect of any compensation awards that have been made. Since it had failed to provide reasons for making the award of 260 weeks' emoluments at the current rate, the award was irrational and liable to be quashed. Counsel also noted that the 2nd respondent had been gainfully employed after her termination from the applicant, but this fact had not been considered by the IDT in its award. The absence of an explanation for the amount of compensation awarded, would also render the award irrational and liable to be quashed. As a consequence of

this irrationality, it was submitted that G Fraser J's finding that such an award was not irrational or unreasonable was wrong, and ought to be set aside.

[23] Counsel further asserted that an application to vary or discharge Sinclair-Haynes JA's order would be successful because the balance of convenience lay in favour of preserving the status quo until the application was determined. This was because, damages would not be an adequate remedy in the instant case since the 2nd respondent in her affidavit filed 18 August 2016, deponed that she was unemployed and had expenses that had to be paid which would mean that if the funds were to be paid over to her, those funds would be rapidly diminished, if not exhausted. Moreover, in the event of a successful appeal, the applicant would be unable to recover the sums paid to the 2nd respondent which would render the appeal nugatory.

[24] Counsel urged me to grant the injunction in reliance on **Regina (H) v Ashworth Special Hospital Authority and others** [2003] 1 WLR 127 which states that a decision could be stayed although it had already been implemented. He also submitted that by virtue of the decision of **Erinford Properties Ltd v Cheshire County Council** [1974] 2 All ER 448, a single judge had the jurisdiction to grant an injunction pending the outcome of a challenge to an order made by another single judge. As a consequence he argued that the grant of an injunction was appropriate in all the circumstances.

2nd respondent's submissions

[25] Counsel for the 2nd respondent maintained that the application filed by the applicant was an abuse of the process of the court since it was an attempt to re-file and re-hear the same application again. In support of this contention, counsel pointed to paragraph 35 of the applicant's skeleton arguments, filed on 24 August 2016, in which he stated that the applicant sought injunctive relief "to prevent the funds in question from being paid over to [the 2nd respondent] until the outcome of the Appeal".

[26] Counsel further asserted that a single judge of appeal had no jurisdiction to hear the matter, since rule 2.11(1)(c) of the Court of Appeal Rules, 2002 (CAR) only empowered a single judge of appeal to grant injunctive relief where an appeal had been filed and could not be extended to include applications for injunctive relief pending the proposed challenge to an order made by a single judge of appeal. Additionally, counsel argued that rule 2.11(1)(c) of CAR only authorises restraint on items that were the subject matter of the appeal, and in the instant case, the subject matter of the proposed application and appeal was not the money to which the application referred, but in the case of Sinclair-Haynes JA, was whether it was correct to refuse the applicant's application for a stay, and in the case of G Fraser J, whether the refusal of the order for judicial review was correct.

[27] Counsel distinguished the case of **Erinford Properties Ltd v Cheshire County Council** from the instant case as that case addressed the power of a judge to grant injunctions pending an appeal to a higher court, while in the instant case, the applicant was asking a single judge of appeal to grant an injunction pending the Full Courts'

review of an order made by another judge of appeal, in circumstances where that application for review by the Full Court had not yet been filed.

[28] Counsel submitted that the present application was without merit as the funds had already been paid over to the 2nd respondent on 22 August 2016. He referred to the affidavit of Adrian Cotterell filed 25 August 2016, which exhibited a letter addressed to Mr Wildman dated 22 August 2016, stating that the said funds had been paid over to the 2nd respondent on the same day. As a consequence, counsel asserted that as the funds had already been paid over to the 2nd respondent, the applicant ought to have applied for a freezing order or for a mandatory injunction, and neither application had been made. Counsel further posited that in any event, the application, as filed and amended, did not satisfy the requirements for the grant of injunctive relief. He submitted that there were no serious issues to be tried, and set out the factors which demonstrated that the balance of convenience lay with the 2nd respondent.

[29] Counsel reminded the court that it had already been argued in the application before Sinclair-Haynes JA, that there was nothing before her that could be stayed. In that application, the applicant had sought a stay of G Fraser J's order refusing its application for judicial review pending the appeal of that order. Counsel had cited **Norman Washington Manley Bowen v Shahine Robinson and another** [2010] JMCA App 27 to illustrate that since the refusal of the application for judicial review was not executory and did not create any rights in respect of the 2nd respondent, G Fraser J's order could not be subject to a stay of execution and so Sinclair-Haynes JA was correct to refuse the application.

[30] Counsel submitted there was no real prospect of success of any of the arguments made by counsel for the applicant, nor had those arguments raised any serious issues to be ventilated in any proposed challenge to Sinclair-Haynes JA's order. Counsel argued that G Fraser J's findings of fact in relation to whether Miss Mair gave the 2nd respondent advice and whether the letters were back-dated to appease Mr Stewart, were based on the plain text transcript of the IDT sittings, and he relied on the *ratio decidendi* in **The Industrial Disputes Tribunal v University of Technology and another** [2012] JMCA Civ 46 that the IDT's findings are unimpeachable once there is some evidence to support the findings regardless of how slender the evidence is. Counsel also submitted that even if there was an error in relation to whether the letters were back-dated to appease Mr Stewart, that error was not material since it did not assist the IDT in making its determination with regard to whether the manner of dismissal of the 2nd respondent was unjustifiable.

[31] On the issue of the IDT's assertion that the Code was mandatory, counsel asserted that when one examined the transcript, that statement had been made in relation to a submission from the applicant's counsel. Moreover, counsel submitted, the IDT may consider the Code when deciding whether the manner of dismissal was justifiable. Counsel also argued that the issue of compensation was not a serious one, since section 12(3) of the LRIDA places no obligation on the IDT to give reasons for its award and section 12(5)(c)(iii) makes it clear that the grant of compensation is within the discretion of the IDT. This principle, counsel argued, was upheld by F Williams J (as he then was) in **Garret Francis v The Industrial Disputes Tribunal and another**

HCV 05427 of 2009, delivered 11 May 2012. Counsel stated that the amount of compensation ordered was not so exorbitant that it could be found to be irrational and also pointed to the fact that it was the applicant who opted to offer compensation since the order was for reinstatement or compensation. Consequently, G Fraser J could not be faulted for her decision and neither could Sinclair-Haynes JA for her refusal to grant a stay.

[32] Counsel also argued that the balance of convenience lay squarely with the 2nd respondent. He made reference to the 2nd respondent's affidavit filed 18 August 2016, in which she indicated that she was unemployed, and in need of financial resources to cover her monthly living expenses and to pay her legal fees. She further deponed in that affidavit that she had been unable to secure permanent employment and if the court were to grant the injunction, she would suffer severe hardship and injustice. Counsel said that the applicant, in the affidavit of Dmitri Singh filed 22 August 2016, in support of the application for an interim injunction, had not indicated that the applicant would suffer any harm if the injunction was refused, but made reference to the fact that there was a fear that the funds would be dissipated because of the 2nd respondent's impecuniosity, and may therefore be irrecoverable because of the 2nd respondent's expressed need to cover reasonable living expenses. Counsel posited that the payment of legal fees and normal living expenses did not constitute dissipation of assets, and the 2nd respondent's legitimate interests must prevail over those of the applicant who had considerably more financial resources. Counsel also argued that the

2nd respondent's impecuniosity should not be a basis for determining whether damages would be an adequate remedy.

[33] Counsel concluded that in light of the fact that it was questionable as to whether a single judge of appeal had the power to entertain the application, and in the absence of any proof that the requirements for the grant of an injunction had been satisfied, there was no basis upon which the application could be granted and so it ought to be refused.

Discussion and analysis

[34] By virtue of rule 2.11(1)(c) of the CAR, a single judge of this court may make orders:

> "(c) for an injunction restraining any party from dealing, disposing or parting with the possession of the subject matter of an appeal pending the determination of the appeal;"

Rule 2.11(1)(c) of the CAR makes it clear that the injunction relates to a matter pending appeal at the time when the application was being made and that the subject matter being restrained must relate to the appeal.

[35] At the time of the hearing of this application, no application to vary or discharge Sinclair-Haynes JA's order refusing the stay had been filed. As a single judge of appeal, I have no power to extend the rules applicable to an appeal to an application relating to a proposed challenge of an order of another single judge of appeal that had not yet been filed. It is indeed questionable as to whether the funds being restrained form the

subject of the matter of the proposed challenge to Sinclair-Haynes JA's order, since neither Sinclair-Haynes JA's order nor that of G Fraser J, made any specific reference to the IDT's compensation award. Paragraph 35 of the applicant's submissions filed 24 August 2016, states that an application for injunctive relief had been made to Sinclair-Haynes JA. However, this had been done pending the determination of an appeal challenging G Fraser J's order and yet I am being asked to grant an injunction in the same terms pending a challenge to Sinclair-Haynes JA's order that had not yet been filed. I must say that in these circumstances, I find merit in the 2nd respondent's counsel submission that the instant application is an abuse of the process of the court.

[36] That, and the fact that I may lack the jurisdiction to entertain the application being sought before me notwithstanding, I will nonetheless comment on the merits of the amended application for injunctive relief before me as the matter ought shortly to be placed before the Full Court.

[37] The appropriate principles to be considered when granting interim relief are well documented and have been stated comprehensively in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 and which have been more recently endorsed by the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16. The principles gleaned from these cases were recently applied in **David Orlando Tapper v Heneka Watkis-Porter** [2016] JMCA Civ 11, where at paragraph [36] I said that when granting an injunction, a court ought to give consideration to the following factors:

"1. The court must be satisfied that there is a serious issue to be tried, that is, that the claim is not frivolous or vexatious.

2. The court should then go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought. In considering where the balance of convenience lies, the court must have regard to the following:

   (i) Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.

   (ii) If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case.

   (iii) In deciding whether to withhold or grant the injunction the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

   (iv) If the balance of convenience is even then the court should preserve the status quo."

[38] In the application before me, one must therefore address the following:

1. Are there serious issues to be tried?

2. Does the balance of convenience lie in granting or refusing the interim injunction sought?

Issue 1: Are there serious issues to be tried?

[39] It is for the Full Court to decide whether any proposed challenge to Sinclair-Haynes JA's order to refuse a stay has merit. However, cases out of this court such as **Norman Washington Manley Bowen v Shahine Robinson and another**, **Director of Public Prosecutions v Mark Thwaites et al** SCCA Nos 13 & 14/2009, Application Nos 38 & 39/2009, judgment delivered 5 March 2009, and **Dennis Atkinson v Development Bank of Jamaica Limited** [2015] JMCA App 40, have held that orders that are not executory and do not pronounce or create rights, cannot be stayed. The order made by G Fraser J is not executory and made no pronouncement in relation to the creation of any right. What the learned judge did was to refuse the application for judicial review. Prima facie, Sinclair-Haynes JA in refusing the application for the stay of execution would not therefore have erred since the cases make it clear that the orders made by G Fraser J were not amenable to a stay. In my view, this is not a serious issue which would warrant the court's attention and which has any prospect of success on appeal.

[40] Counsel Mr Wildman highlighted a number of issues which he contended were serious and required ventilation on appeal and which Sinclair-Haynes JA had ignored. He complained that G Fraser J's finding that Ms Mair had given advice to the 2nd respondent and the IDT's finding that the letters were back-dated to appease Mr Stewart, were erroneous and rendered the order liable to be quashed. Section 12(4) of

the LRIDA stipulates that an IDT's award is final and conclusive and cannot be challenged except on a point of law. In **The Industrial Disputes Tribunal v University of Technology Jamaica and another**, Brooks JA, noted on behalf of the court, that the IDT has a free hand in determining its procedure and that its findings of fact are unimpeachable once there is some evidence to support the finding. He also stated that the IDT was not bound by the ordinary or strict rules of evidence, provided there was no breach of the rules of natural justice. Additionally, in determining whether a dismissal is unjustifiable, the IDT was not bound by the strictures of the common law, relating to wrongful dismissal. As a consequence, once there was some evidence upon which the IDT could base its findings, the validity of such findings ought not to be questioned. As a consequence, I am unable to say that the reasoning of G Fraser J that there was some evidence upon which the IDT could find that Ms Mair gave the 2nd respondent advice is without any basis and irrational. Additionally, in my view, it also appears eminently arguable that the issue as to appeasement of Mr Stewart was not central to the IDT's determination as to whether the 2nd respondent had been unjustifiably dismissed.

[41] It is also arguable that G Fraser J's finding that the IDT's use of the Code was mandatory in its deliberations when solving disputes was correct and could result in the Court of Appeal also rejecting the complaint that the IDT had found that the use of the Code was mandatory generally. It is probable that this court could agree with G Fraser J that the IDT had not indicated that non-observance of the Code by the applicant rendered the 2nd respondent's dismissal unjustified and so did not fall into error. In my

view therefore this does not appear raise a serious issue in any proposed challenge to Sinclair-Haynes JA's order.

[42] The applicant, as indicated, submitted that lack of reasons as to how the IDT arrived at its compensation award and the lack of consideration of the fact that the 2nd respondent had found employment during the period after her dismissal would render the award irrational and liable to be quashed. However, section 12(3) of the LRIDA stipulates that the IDT may, in any award made by it, set out the reasons for such award if it thinks necessary or expedient to do so. Additionally, section 12(5)(c)(iii) of the LRIDA states that:

> "Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal-
>
> (c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award-
>
> (iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine;"

In **Garret Francis v The Industrial Disputes Tribunal and another**, F Williams J opined that the LRIDA contains no set guidelines as to how the level of compensation was to be determined but merely prescribes that such compensation is made at the IDT's discretion. Further, he stated that once the order was reasonable, then a court ought not to intervene and disturb it. In applying these principles to the case at bar, the

Court of Appeal may conclude that G Fraser J did not err in her finding that the amount of compensation ordered by the IDT could not be said to be unreasonable or irrational. Consequently, in my view, this complaint also does not appear to raise a serious issue that could affect any proposed challenge of Sinclair-Haynes JA's order.

Issue 2: Where does the balance of convenience lie?

[43] The applicant had deponed that damages would not be an adequate remedy because the 2nd respondent is impecunious and may dissipate the money if she is not restrained and that would therefore render the funds irrecoverable. However, there was no indication that the money will be dissipated either here or abroad or any evidence that the 2nd respondent would be unable to repay the sums if judgment was ordered against her. The 2nd respondent had deponed that she was in need of financial resources to cover reasonable living expenses and legal fees. In my view, that does not demonstrate a substantial dissipation of assets or that the 2nd respondent had no assets to settle any judgment made against her.

[44] The applicant has complained that if the assets are dissipated, it would render the appeal nugatory. However, in **Novartis AG v Hospira UK Ltd** [2013] EWCA Civ 583, it was held that the fact that the refusal of an injunction would render the appeal nugatory, is not the sole basis upon which a determination is to be made when granting an interim injunction. There are other factual situations that the court must consider which include the injustice to one side being balanced against the injustice to the other.

[45] It is my view, therefore, that there is a greater risk of injustice or prejudice to the 2nd respondent rather than the applicant if this injunction were to be granted. On the evidence before me there is no risk of irremediable harm to the applicant if the application is granted or refused since the applicant has far more financial resources available to it. The 2nd respondent in her affidavit filed 18 August 2016, indicated that she has been forced to defend several matters brought against her which have all been decided in her favour and which would all have attendant legal expenses including the current litigation before this court. The 2nd respondent would therefore be exposed to greater risk of financial embarrassment if she is further restrained from accessing the funds representing her compensation for being out of work for more than four years.

[46] In light of the foregoing it is clear that the balance of convenience lay in favour of refusing the application and allowing the status quo to remain.

Special costs certificate

[47] Counsel Mr Goffe, made an application for a special costs certificate in respect of Mr Cotterell, junior counsel, and himself in accordance with rule 64.12 of the CPR. That rule stipulates that:

> "(1) When making an order as to the costs of an application in chambers the court may grant a 'special costs certificate'.
>
> (2) In considering whether to grant a special costs certificate the court must take into account –
>
> (a) whether the application was or was reasonably expected to be contested;

(b) the complexity of the legal issues involved in the application;

and

(c) whether the application reasonably required the citation of authorities and skeleton arguments.

(3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than –

(a) one attorney-at-law on the hearing of an application; or

(b) two attorneys-at-law at the trial,

be allowed.

(The grant of a 'special costs certificate' entitles the receiving party to a higher level of basic costs under Appendix B, Table 2 to this Part.)

[48] Mr Goffe submitted that the application was unique in that it had been made to a single judge of appeal in respect of a challenge to the order of another single judge of appeal relating to an application which was to go before the Full Court which had not yet been filed. Counsel argued that the application was requesting relief namely an injunction, which though framed differently in the application before me than in the application which was before Sinclair-Haynes JA, was similar to that sought before Sinclair-Haynes JA and which had been refused.

[49] Mr Wildman objected to this request on the basis that the application being made was not novel and had been done pursuant to the CPR and the CAR. He further asserted that the principles surrounding the grant of an injunction are the same and therefore equally applicable regardless of which application was being considered by

the court, which is whether there is a serious issue to be tried and where does the balance of convenience lie.

[50] Having heard both submissions and after consideration of the circumstances in the instant case and rule 64.12 and rule 65.17(3) of the CPR, I agreed with counsel for the 2nd respondent that the application was unique and was one in which an order for special costs certificate was indeed appropriate.

Conclusion

[51] Having found that there was no merit in the applicant's amended application and that no serious issues to be tried had been raised therein, and having accepted that the balance of convenience was in favour of maintaining the status quo, as the 2nd respondent would undoubtedly suffer more harm if the application had been granted, I made the orders set out in paragraph [2] herein.