**[2023] JMCA Civ 29**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE BROOKS P**
**THE HON MS JUSTICE EDWARDS JA**
**THE HON MRS JUSTICE DUNBAR GREEN JA**

**SUPREME COURT NO COA2022CV00056**

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| **BETWEEN** | **JAMAICA REDEVELOPMENT FOUNDATION INC** | **APPELLANT** |
| **AND** | **ATTORNEY GENERAL OF JAMAICA** | **1ST RESPONDENT** |
| **AND** | **INDUSTRIAL DISPUTES TRIBUNAL** | **2ND RESPONDENT** |

**Written submissions filed by Myers Fletcher and Gordon for the appellant**

**Written submissions filed by Director of State Proceedings on behalf of the 1st and 2nd respondents**

**18 October 2022 and 19 May 2023**

**CIVIL PROCEDURE- Application for stay of proceedings before Industrial Disputes Tribunal pending hearing of constitutional claim - principles to be applied – whether the public interest is a material consideration**

**PROCEDURAL APPEAL (Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)**

**BROOKS P**

[1] I have read, in draft, the judgment of my learned sister, Dunbar Green JA. I agree with her reasoning and conclusion and have nothing to add.

**EDWARDS JA**

[2] I too have read the draft opinion of my learned sister Dunbar Green JA and I agree.

**DUNBAR GREEN JA**

[3] On 29 April 2022, Carr J (Ag) (as she then was) ('the learned judge') refused an application by Jamaica Redevelopment Foundation Inc ('the appellant') for a stay of proceedings before the Industrial Disputes Tribunal ('the IDT') in a dispute between the appellant and its former employee, Miss Margaret Curtis (IDT Dispute No 46/2019). The stay was sought pending the determination of a constitutional claim in which the appellant is seeking to challenge, among other things, the jurisdiction of the IDT.

[4] The learned judge ruled that the stay of the proceedings before the IDT would be prejudicial to Miss Curtis and inimical to the settlement of industrial disputes.

**The background to the appeal**

[5] The appellant is a company incorporated in the United States of America and registered in Jamaica as an overseas company, with offices at 6 Saint Lucia Avenue, Kingston 5, in the parish of Saint Andrew. The 2nd respondent, the IDT, is a quasi-judicial body that was established pursuant to section 7 of the Labour Relations and Industrial Disputes Act ('the LRIDA').

[6] The appellant and Miss Curtis are involved in a dispute over the termination of her contract of employment. That dispute was referred to the IDT for settlement but the appellant is concerned that it will be unable to obtain a fair hearing before the IDT, as currently constituted.

[7] On 31 May 2021, the appellant filed a fixed date claim form in the Supreme Court, seeking declarations that sections 7(2) and 8(2)(c) of the LRIDA, and sections 1, 2, 3, 4, and 7 of the Second Schedule of the LRIDA, are in violation of the doctrine of separation of powers and the right to due process under section 16(2) of the Constitution of Jamaica, and are therefore unconstitutional. It also claimed that the IDT, as currently constituted, is not an independent and impartial authority established by law and is therefore unconstitutional. Among the appellant's contentions is that the statutory provisions which create and enable the IDT are in violation of section 2 of the Constitution. The appellant,

therefore, sought a stay of proceedings until the IDT is "reconstituted in a manner that ensures its independence and impartiality as guaranteed by the Constitution".

[8] Consequent on the filing of that claim, the appellant made an application to the IDT, inviting it to stay its proceedings in the particular case, pending the determination of the constitutional claim. This application was refused.

[9] On 27 July 2021, the appellant filed an amended application, in the Supreme Court, for an interim stay of the proceedings at the IDT pending the determination of the constitutional claim; alternatively, that the trial of the constitutional claim be brought forward from 12 and 13 February 2024, which were the dates set for hearing in the full court. On 10 September 2021, Mr James-Erle Kirkland filed an affidavit in support of the application.

[10] In seeking to advance its application before the learned judge, the appellant relied on several grounds which are summarised below:

> (i) the proceedings in the dispute were at an early stage;
>
> (ii) the appellant made an application to the IDT to stay its proceedings pending the determination of the claim but that stay was refused;
>
> (iii) the consistent practice of the IDT is to stay proceedings while there exists a challenge to its authority or decision in the Supreme Court;
>
> (iv) the IDT will generally stay proceedings where there are related proceedings between the parties in court;
>
> (v) the statutory provisions which create and enable the IDT are in violation of section 2 of the Constitution and it is unable to obtain a fair hearing before the IDT as it is presently constituted;

(vi) the proceedings should be stayed pending amendments to bring the LRIDA into conformity with the Constitution;

(vii)it is highly likely that the proceedings in the IDT will be concluded before the determination of the substantive claim with the result that the claim will be rendered nugatory.

(viii) any decision of the IDT made before the determination of the substantive claim that is adverse to the appellant would be unsafe and vulnerable to later challenges;

(ix) the appellant will stand irremediably prejudiced should the IDT determine the case against it;

(x) the IDT is not likely to be prejudiced should the orders sought be granted; and

(xi) in the event that the court does not grant the stay, the prejudice to the appellant will be mitigated by securing an earlier trial date.

**Ruling of the learned judge**

[11] On 16 March 2022, the learned judge heard the application, and, by way of an oral judgment delivered on 29 April 2022, refused the orders as sought in the amended notice of application. She granted leave to appeal.

[12] Set out below are the appellant's notes of the learned judge's oral judgment which are materially consistent with those supplied on the respondents' behalf:

> "There is no dispute that the court has the jurisdiction to stay proceedings.
>
> Court [sic] must take into account the Jamaican Bar Association case which sets out conditions for the grant of [sic] stay. The [appellant] has urged that the [respondents'] failure to file an affidavit in response is that they have conceded that the [respondents] have no

real prospect of success on [sic] the case. The Respondents have said that they would be obliged to stay all pending disputes if the Court were to grant a stay in the matter.

The Court focused on the first two criteria in the Jamaican Bar Association case as there was no abuse of process grounds. The Court cannot agree that the [appellant] will be prejudiced by the stay. Given the nature of the claim, the *de facto officer* principle would apply to this case. This claim is the alternative remedy.

The stay would be prejudicial to Ms Curtis.

The Court cannot ignore the public interest in having disputes settled in a timely manner. The grant of a stay would be inimical to the settlement of industrial disputes.

Court [sic] is prepared to grant the alternative request for an urgent hearing date.

[Clerk checks with Registrar and confirms that no earlier trial dates before the Full Court are available]."

**Proceedings on appeal**

[13] In its notice of appeal, filed 11 May 2022, the appellant challenged multiple findings of the learned judge, as follows:

"i. The court cannot agree that the [appellant] will be prejudiced if the stay is not granted.

ii. The IDT will be obliged to stay all disputes before it if the [appellant's] application for a stay were to be granted...

iii. The de facto officer principle would apply to this case.

iv. The public's interest must be taken into account in considering the [appellant's] application for a stay of the IDT's hearing of the dispute between it and its former employee.

v. The grant of a stay would be inimical to settlement of industrial disputes."

[14] The appellant particularised its challenge, in the grounds of appeal, as follows:

"i. The learned Judge below erred when she usurped the function of the Constitutional Court by purportedly deciding that the de facto officer principle would apply to the lay members of the Industrial Disputes Tribunal (IDT) and any award by the IDT.

ii. In the alternative, if the Learned Judge below was correct to make that ruling on an application for a stay and if the *de facto officer* principle applies to members of the IDT, the learned Judge below erred in finding that there would be no prejudice to the Claimant if the IDT were allowed to hand down an award which could not be impeached if the Tribunal was later adjudged to be unconstitutional.

iii. The learned Judge below erred in taking into account the IDT's decision – that it would be obliged to stay all pending matters before it if the Applicant's [sic] application were granted – in assessing whether to stay proceeding between the Appellant and its former employee.

iv. The learned Judge below erred in finding that the public interest is a material consideration for the Court in considering an application for a stay of proceedings." (Italics as seen in the original)

**Issues**

[15] The narrow issues which arise from these grounds are:

(i) whether the learned judge failed to take into account and/or properly assess factors which favoured the granting of a stay of proceedings in this case;

(ii) whether the learned judge erred in finding that the public interest is a material consideration in considering whether a stay should be granted or refused; and

(iii) whether the learned judge erred in taking into consideration the de facto officer principle, and if so what is the effect, if any, on her decision.

**The appellant's submissions**

[16] The appellant's written submissions are summarised as follows.

[17] First, the court will grant a stay of proceedings where (i) it considers it to be just and convenient to do so in furtherance of the overriding objective of dealing with cases justly; (ii) it will prevent undue prejudice being occasioned; and (iii) it will prevent an abuse of process.

[18] Second, the learned judge seemed to have viewed the "conditions" to be satisfied as distinct from independent circumstances in which the court will grant a stay. Thus, the finding - that there was no prejudice to the appellant - was fatal to the application. There was no separate consideration of the overriding objective of dealing with cases justly *vis a vis* the parties to the suit.

[19] Third, it was unnecessary, on an application for a stay of proceedings, for the learned judge to seek to determine such a weighty issue as whether the de facto officer principle applied to the members of the IDT. Having made that determination in a summary fashion, the learned judge has tied the hands of the Full Court should it wish to arrive at a different conclusion after reviewing the evidence and submissions. Moreover, there was no evidence before the learned judge as to whether the lay members of the IDT were officers as opposed to employees. The unchallenged evidence of Mr Rudd was that they were employed under contracts of service.

[20] Fourth, if, in the alternative, the de facto officer principle applied to the members of the IDT, this would be prejudicial to the appellant as the award would be binding on it despite the panel being unconstitutional.

[21] Fifth, the learned judge erred when she took into account the IDT's submission that it would be obliged to stay all other proceedings before it, were the court to stay the current proceedings, and that there would be wide-scale industrial unrest leading to devastating economic and social consequences.

[22] Sixth, there is no provision in Part 1 of the CPR for a consideration of public interest in an application for a stay of proceedings. Instead, the entire provision is focused on doing justice between the parties to the case. The "public" is much larger than aggrieved

workers and no more or less entitled to the protections of the supreme law of the land than the appellant.

[23] Seventh, if the IDT proceedings are not stayed and an award is published, the appellant would most certainly seek judicial review of that award, pending the trial and delivery of judgment in this case.

[24] The appellant relied on a single case – the judgment of this court in **The Jamaica Bar Association v The Attorney General and another** [2016] JMCA App 21. That case sets out the test for stay of proceedings, generally. The decision of the Supreme Court of India in **Madras Bar Association v Union of India and another** (Writ Petition (C) No. 804 of 2020) was mentioned in the affidavit of Mr James-Earle Kirkland, filed in support of the constitutional claim, but no submissions were made on it.

**The respondents' submissions**

Preliminary objection

[25] In their written submissions, the respondents included a preliminary objection in which they questioned whether the appellant was a proper party in the proceedings in the Supreme Court; but there is no indication in the record of appeal that the objection was raised before the learned judge, and there were no submissions by the appellant on that point. We were, therefore, not put in a position to make any ruling on that objection.

Respondents' submissions on appeal

[26] In response to the grounds of appeal, the respondents have argued broadly that in the exercise of its power to grant a stay of proceedings the court ought to have regard to the effect of such a stay on the public interest. Counsel explained that the consequences of a stay of the IDT's proceedings would be disastrous to the administration of industrial relations.

[27] The respondents made further arguments as follows. First, a stay of proceedings of an administrative matter mimics injunctive relief and as such the appellant has to show

a strong *prima facie* case. Counsel referenced the headnotes in **De Falco v Crawley Borough Council; Silvestri v Crawley Borough Council** [1980] 1 All ER 913.

[28] Second, in cases where the litigant, seeking a stay of proceedings or injunctive relief, grounds the claim in the Charter of Rights, such an applicant must satisfy the three-part test that is set out in **RJR - MacDonald Inc and others v The Attorney General of Canada et al** [1994] 1 RCS 311, 314-316 and 334 ('**RJR - MacDonald v Attorney General of Canada**'), and applied in the case of **Attorney General of Jamaica v The Jamaica Bar Association and another** [2020] JMCA Civ 31. The respondent contended that the appellant has not satisfied the criteria for a stay in administrative law matters or as prescribed for matters concerning Charter Rights.

[29] Third, the grounds advanced by the appellant as demonstrating prejudice are unmeritorious. In particular, they are speculative in anticipating a loss in the matter before the IDT based on the appellant's untested formulation that the IDT has no jurisdiction to hear industrial disputes at all. The learned judge did not err when she found that the appellant would not be prejudiced by a refusal to grant a stay of proceedings.

[30] Fourth, it is manifest that the application for a stay of proceedings is being made within the context of a constitutional challenge to the IDT and not one of its awards or any of the terms of reference. Therefore, there is no question that the outcome of the constitutional challenge has the potential to affect not just the instant claim, but all awards of the IDT since its inception in 1975. Were the court to grant a stay of the current proceedings before the IDT, in which it is called upon to settle the dispute between the appellant and a third party (on the basis of "the currency and existence of the constitutional challenge"), the IDT would be obliged to stay all other proceedings before it based on the precedent set by this court. In determining whether to grant a stay of the IDT's proceedings the court is required to look at the effect of a stay on the public interest.

[31] Fifth, the consequences of a stay of the IDT proceedings, and the potential it brings for a plethora of such requests by other parties seeking a stay pending determination of the claimant's constitutional challenge, would be calamitous for industrial relations in the country.

[32] Finally, having regard to the factors taken into account by the learned judge, there is no basis for this court to interfere with the discretion that was exercised. Although **RJR -MacDonald v Attorney General of Canada** was not brought to the attention of the learned judge, her ruling is in tandem with the principles outlined therein and should not be disturbed.

## Discussion and disposal

Standard of review

[33] The appellate court will only interfere with the exercise of a judge's discretion in interlocutory matters if there was a misunderstanding of the law or the evidence, or if the decision was palpably wrong. A statement of that principle was expressed in the dictum of Lord Diplock in **Hadmor Productions Ltd and other v Hamilton and others** [1982] 1 ALL ER 1042, at page 1046, where he said:

> "...It [the appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercise the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."

[34] In keeping with those principles, which have been adopted by this court (see, for example, **The Attorney General of Jamaica v John McKay** [2021] JMCA App 1), this

court will not readily disturb the judge's exercise of discretion unless she erred in principle, particularly if she failed to take into account relevant considerations or considered irrelevant factors.

**Issue 1: whether the learned judge failed to take into account and/or properly assess factors which favour the granting of a stay of proceedings in this case**

**Issue 2: whether the learned judge erred in finding that the public interest is a material consideration in considering whether a stay should be granted or refused**

[35] It is convenient to deal with issues 1 and 2 together.

[36] In **RJR - MacDonald Inc v Attorney General of Canada**, the Canadian Supreme Court opined, at page 314, that "[the] three-part American Cyanamid test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases". Justices Sopinka and Cory reaffirming the Court's earlier decision in **Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd** [1987] 1 SCR 110 ('**Metropolitan Stores**'), said at page 334:

> "*Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant will suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test then apply it to the facts presented in this case."

[37] In **Seepersad (a minor) v Ayers-Caesar and others** [2019] UKPC 7, the tri-partite test was affirmed by the Privy Council as being "appropriate when considering interim relief in constitutional cases" (see para. 15 per Lady Hale).

[38] That approach was adopted by this court in **The Attorney General v The Jamaica Bar Association and another**, as regards injunctive relief, and was summarised by F Williams JA, at para. [65], as follows:

> "In coming to a decision whether to grant any such injunction, the court should be guided by and apply the three-stage test enunciated in the case of **RJR Macdonald Inc v The Attorney General of Canada and others**, reaffirming the Canadian Supreme Court's position on the grant of interim or interlocutory relief in constitutional claims in the case of **Attorney General of Manitoba v Metropolitan Stores (MTS) Ltd** [1987] 1 SCR 110, to wit: (i) conduct a preliminary assessment as to whether there is a serious question to be tried; (ii) come to a determination as to whether the applicant would suffer irreparable harm if the application were refused; and (iii) assess which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

[39] The first stage (whether there is a serious question to be tried) involves "common sense" and "an extremely limited review of the case on the merits". The bar is not a very high one. The applicant need only demonstrate that the case is neither frivolous or vexatious (the **American Cynamid Co v Ethicon Ltd** [1975] 1 ALL ER 504 standard). Unless the case is vexatious or a rare one in which the constitutional issue is one of a pure question of law, the other two stages will ordinarily be reached (see **RJR - MacDonald v Attorney General of Canada**, pages 314, 335 and 337).

[40] The second stage requires an applicant to establish that irreparable harm will result from denial of the relief sought. This is not purely a quantitative measure. The nature of the harm is the central focus. It must be financially unquantifiable or incapable of being cured, should the application for interlocutory relief fail but the applicant succeeds in the substantive matter (see **RJR - MacDonald v Attorney General of Canada**, page 331). At this stage an applicant cannot succeed on a speculative claim of irreparable harm. It must be "established through evidence at a convincing level of particularity" and demonstrated that there is "a high likelihood that the harm will occur, not that it is merely possible" (see **Barbara Spencer v The Attorney General of Canada** [2021] FC 361, para. [81]).

[41] The third stage calls for an assessment of the balance of inconvenience to the parties. This requires consideration of the public interest, as a 'special factor'. The court

will normally place "greater weight in favour of compliance with existing legislation", and a successful applicant would have shown that there is "a more compelling public interest in suspending the application of the legislation" (see **RJR - MacDonald v Attorney General of Canada**, page 316).

[42] Three further points are worth noting from the authoritative statements referred to in the cases on the point. Firstly, as the Canadian Supreme Court observed, an applicant does not always represent only an individualized claim. If the applicant is able to establish a public interest quotient it "may tip the scales of convenience", for example "…by demonstrating to the court…concerns of society generally and the particular interests of identifiable groups" (**RJR - MacDonald v Attorney General of Canada**, page 344).

[43] Secondly, the public interest favours compliance with the legislation. This is consistent with the principle of parliamentary intent. Through such lens, a law which is passed by a democratically elected legislature, is presumed to be for the common good (see **Metropolitan Stores Ltd**, page 135); but it should be underscored that the Privy Council has cautioned against a too deferential and liberal application of that approach (see **The Attorney General and another v The Jamaican Bar Association** [2023] UKPC 6, para. 26).

[44] Although the learned judge, in this case, made reference to the 2016 case of **The Jamaican Bar Association v The Attorney General and another** in which Phillips JA affirmed the general principles for a stay of proceedings, the guidance on the approach to be taken in cases involving interim relief in constitutional proceedings is found in the 2020 judgment by F Williams JA in the **The Attorney General v The Jamaican Bar Association and another**.

[45] Neither the latter case nor **RJR - McDonald v Attorney General of Canada** was cited in the proceedings before the learned judge. She, therefore, applied the principles that the court will grant a stay of proceedings where it considers it to be just

and convenient to do so in furtherance of the overriding objective of dealing with cases justly; and to prevent undue prejudice being occasioned. These principles, to my mind, are not remote from the objective which underpins the tri-partite test that has been applied in this court. The overriding objective is served by the balance of convenience as she found it to be, and as I have concluded at the third stage of the test.

Is there a serious question to be tried?

[46] An applicant is not required to delve deeply into the merits of its case to establish that there is a serious question to be tried but the claim must be shown not to be vexatious or frivolous (see **RJR - MacDonald v Attorney General of Canada,** page 337). There are exceptions to this low threshold, such as where the granting of the relief would be the same as that sought at trial, effectively eroding any potential benefit from proceeding to trial (see **Barbara Spencer v The Attorney General of Canada**, para. [54] applying **RJR - MacDonald v The Attorney General of Canada** and referencing **Monsanto v Canada (Health)** 2020 FC 1053); and in cases where the constitutional question is a pure matter of law. These exceptions do not apply in the instant appeal. The interim stay in proceedings sought would not have the finality of striking down the IDT as being unconstitutional.

[47] The appellant relied on the affidavits of James-Erle Kirkland, attorney-at-law, and Jason Rudd, chief executive officer of the appellant, filed 31 May 2021, to challenge the independence and impartiality of the IDT. To indicate the appellant's "good prospect of success", Mr Kirkland referred to **Madras Bar Association v Union of India** as an example of a successful challenge to a similar industrial relations tribunal. At para. 29, he referred to newspaper article, which he exhibited. That article, which attributes certain remarks about mandatory vaccines to an official of the Ministry of Labour and Social Security ('the Ministry'), was used to make the point that the matter which it concerned could come before the IDT for determination and therefore raised "serious concerns as to whether this issue may be adjudicated upon by [the IDT] in an impartial manner…".

[48] In Mr Rudd's affidavit, filed in support of the fixed date claim form, he claimed that several chairmen and deputy chairmen of the IDT have had close family or political connections to the Minister of Labour and Social Security ('the Minister'). He also referred to a former chairman whose wife was the sister of a former Minister of National Security and a former chairman who is a Member of Parliament and State Minister for Finance and the Public Service. He alleged that on an occasion when the Jamaica Federation of Employees submitted its nominee for membership on the IDT, the Ministry requested that an alternative person be named. He exhibited a newspaper article in which a former Prime Minister expressed certain views including that appointments to the IDT must be "considered seriously and not treated as a retirement benefit and …manned by persons well versed in labour relations…".

[49] Mr Rudd also exhibited a copy of an employment letter for an IDT member outlining emoluments, and that the term of appointment was subject to revocation by the Minister. Mr Rudd claimed to have been vilified by ministers of the Government, and exhibited a newspaper article about 'Finsac'. He also exhibited a Privy Council Note on the Respondents' Case in **University of Technology v The Jamaica Employers' Federation et al** JCPC 2013/0106, which, at para. 7, described the IDT as "a creature of executive function (albeit in an adjudicative role), than the [UK Employment Tribunal], which greater resembles a judicial body".

[50] The appellant's constitutional right to due process requires that the IDT is lawfully constituted and assures a procedure for deciding disputes which is not subject to manipulation by any interest, including the Government. The appellant contended that this is not so because the power of the Minister to appoint and dismiss members of the IDT, payment of their compensation by the Ministry and the IDT's reliance on the Attorney-General's Department for advice, violate the principle of separation of powers.

[51] Undoubtedly, it is for the Constitutional Court to decide whether the method of appointment of the IDT conflicts with the Constitution. Although the nature of the IDT and whether it is purported to exercise 'judicial' powers are important questions it does

not necessarily follow that the boundary between executive and judicial functions is crossed if the Government arranges to perform its executive administrative function through an authority and a mechanism that carries out an 'adjudicative role', or described another way, through "a specialized forum, not for the trial of actions but for the settlement of disputes" (see Rattray P in **Village Resorts Ltd v Industrial Dispute Tribunal et al**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/1997, judgment delivered 30 June 1998 ('**Village Resorts**')).

[52] In **Village Resorts**, Rattray P also made the observation, at pages 10 and 11, that the IDT is a technical and specialist body in the field of industrial relations. He said:

> "Persons who have special knowledge and experience of labour relations are appointed to hold the position of Chairman or Deputy Chairman of the Tribunal and other members qualify as representatives of organizations representing employers and organizations representing workers. The specialist knowledge component therefore of the Industrial Disputes Tribunal is clearly established."

[53] Mere allegations that a former chairman married a relative of the political class, held political office subsequent to being chairman, or that a government official commented on a matter which could come before the IDT, and that politicians made unflattering comments about the appellant – do not establish that the IDT would be compromised in performing its specialist role. At this stage, I am only prepared to say that the allegations are speculative as to whether the IDT would be biased in hearing the dispute in which the appellant is involved.

[54] Notwithstanding, the constitutional matter being pursued by the appellant is neither frivolous nor vexatious, certainly not as it pertains to whether the method of appointment of members of the IDT and their tenure come into conflict with its adjudicative, quasi-judicial function under sections 7(2), and 8(2)(c) of the LRIDA, and sections 1, 2, 3, 4, and 7 of the Second Schedule of the LRIDA.

[55] As the three stages outlined in **RJR - MacDonald v Attorney General of Canada** are cumulative, I will move on to the question of whether there will be irreparable harm to the appellant if the interim relief is not granted.

Would the applicant suffer irreparable harm if the application is refused?

[56] I have already indicated that a claim of irreparable harm will not succeed if it is speculative or a mere possibility. Neither will the mere allegation of a constitutional violation or potential violation be sufficient to establish irreparable harm (see **Barbara Spencer v The Attorney General of Canada**, para. [83]).

[57] The appellant's primary concern is that it is experiencing injury in the "here and now" by being subjected to the unconstitutional authority of the IDT. However, the appellant's fear of bias is based essentially on conjecture about how the dispute will turn out. Irreparable harm cannot be established from speculation. More to the point, under section 12(5)(c) of the LRIDA, if the appellant loses before the IDT, it may be ordered to reinstate the dismissed worker with payment of wages if so determined, compensate her in lieu of reinstatement or adhere to such other relief as the IDT deems appropriate. The record contains no evidence that if the appellant loses before the IDT and succeeds on the constitutional claim, it would have been so imperilled by the remedies under section 12(5)(c) that any harm could not be cured and/or compensated in damages. Moreover, although it is accepted that generally compensatory damages are not the primary remedy in Charter cases (**RJR - MacDonald v Attorney General of Canada**, page 341) and may not adequately ameliorate the violation of a constitutional right, the appellant's bald assertion of a constitutional violation does not meet the standard of irreparable harm.

[58] On the evidence examined, the appellant has not established that it would suffer irreparable harm if the proceedings before the IDT are not stayed, as prayed.

Balance of convenience

[59] More often than not this third stage is the most decisive because of the low threshold at the first stage and the challenge of assessing and determining irreparable

harm when the interlocutory application arises from an action for breach of the Constitution (see **RJR - MacDonald v Attorney General of Canada**, pages 342-343). No rigid criteria are laid down, so the circumstances of the case will be considered, with a view to doing what is just; the public interest being a relevant consideration.

[60] The appellant argued that the IDT granted a stay in previous cases but it has not contended that this was done in cases other than when the IDT's ordinary administrative action had been challenged. The appellant sought to frame its argument along the lines of a view which was expressed by McQuaid JA in **Island Telephone Co, Re** (1987), 67 Nfld & PEIR 158 at page 164 and referenced in **RJR-MacDonald v Attorney General of Canada** page 345, to wit:

> "I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal…"

[61] It may well be the case that judicial review of a decision or authority of an administrative body serves the public interest. When, however, the constitutional challenge is to the entity's structure and very existence, consideration would have to be given to the question of whether the interlocutory relief serves the public interest equally or more than it does the appellant's, especially in circumstances where the effect of the stay of proceedings could be a halt to the entity's operation. The test to be applied was expressed as follows in **RJR - MacDonald v Attorney General of Canada** at page 346:

> "...[T]he concept of inconvenience should be widely construed in *Charter* cases…The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements

> have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."

[62] Without making too much of the point, the IDT plays an important national role and function as a public body by hearing and adjudicating on industrial disputes that are referred to it by the Minister (section 11 of the LRIDA). It does not take much contemplation to discern how a stay of proceedings arising from a challenge to its very existence could impact the resolution of such industrial disputes. In practical terms, the stay of proceedings being sought by the appellant transcends the particulars of its dispute with Miss Curtis, so the relief would implicate other matters currently before the IDT. There is no question that the stay of proceedings could cause a halt to matters currently being heard and a delay in proceedings with those that are imminent. The inconvenience, including a risk of back-logs at the IDT, is not justified by the applicant's fear of bias and its conjecture about how the dispute will be decided. The public interest, therefore, tips the scale of convenience in favour of the 2nd respondent. On this basis alone, the order sought should be denied as it does not satisfy the overriding objective of dealing with cases justly.

[63] In view of the foregoing, I can find no fault with the learned judge's consideration of the effect that a stay would have on the IDT's operation and concluding that the relief should not be granted after weighing the balance of convenience. I would, therefore, resolve issues (i) and (ii) in the respondents' favour.

**Issue 3: whether the learned judge was plainly wrong in taking into consideration the de facto officer principle, and if so what is the effect, if any on her decision.**

[64] The appellant posited that the learned judge usurped the authority of the Constitutional Court by taking into consideration the de facto officer principle - that the impugned acts would be deemed valid regardless of any deficiency in the appointment of IDT members. However, it seems to me that the learned judge's remarks were obiter because she was not required to make a determination as to the validity of their

appointments. That said, as counsel for the appellant correctly pointed out, this was a matter for the Constitutional Court. The learned judge, therefore, erred in considering it. However, I find that even had she not done so the outcome would have been the same because of her assessment that the balance of convenience favoured the 2nd respondent.

[65] The appellant also contended that it would lead to administrative inefficiency were the IDT hearing to proceed simultaneously with the constitutional hearing. That concern is subsumed in the tri-partite test, particularly the third stage which takes account of the public interest.

**Conclusion**

[66] The issue to be tried by the Constitutional Court is neither frivolous nor vexatious. However, the evidence has not established that the appellant would suffer irreparable harm if the stay of proceedings is denied; or that it would be prejudiced more than the 2nd respondent on an assessment of the balance of convenience. In the circumstances, the learned judge was correct in her refusal of the application for a stay of proceedings in the matter before the IDT, pending the hearing of the constitutional claim. I, therefore, propose that the appeal be dismissed with costs of the appeal to the respondents.

**BROOKS P**

**ORDER**

1. The appeal is dismissed.
2. The order of Carr J (Ag) made on 29 April 2022 refusing the application for stay is affirmed.
3. Costs of the appeal to the respondents to be agreed or taxed.