

**IN THE INDUSTRIAL COURT
ANTIGUA AND BARBUDA
AD 2014**

REFERENCE NO: 34 Of 2013

BETWEEN:

JENNIFER JOHNSON	Employee
-AND-	
ANTIGUA AND BARBUDA WORKERS' UNION	Employer

Before:

The Hon. Charlesworth O.D. Brown	President
The Hon. Samuel Aymer	Member
The Hon. Dr. Hayden Thomas	Member
The Hon. St. Lawrence De Freitas	Member

Appearances:

**Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers Federation
for the Employee**
**His Excellency, Sir Keithlyn Smith of Antigua & Barbuda Workers Union for the
Employer**

2014: June 16

July 16

RULING ON APPLICATION IN LIMINE
FOR DISMISSAL OF REFERENCE

1. As I understand them, the background facts are as follows:
 - The dispute between the parties herein was referred to the Labour Commissioner for conciliation;
 - The Labour Commissioner referred the matter to the Minister of Labour;
 - At the conciliation hearing before the Minister on 11th June 2012, “the dispute was reduced to an issue of quantum” and “the Employee indicated a willingness

to compromise” and accept a reduced sum on condition that it be paid in full within 7 days.

- Upon the Employer’s failure to respond within the stipulated time, the Minister extended the time to 10th August 2012 and took the position that “in the absence of mutual agreement ...in respect of the proposed settlement, the Minister...adopts the recommendations of the Labour Department...”
- As at the 10th August 2012 there was no agreement between the parties.

2. The Employee’s statement of case as contained in the Employee’s Memorandum includes the following assertions at paragraphs 20 and 21:

“20. The matter was submitted to the Labour Commissioner and a hearing took place on June 10th 2009 but did not result in a voluntary adjustment or settlement.”

“21. The matter was subsequently referred to the Minister of Labour for mediation but did not result in settlement.”

3. By its Employer’s Memorandum filed on the 27th May 2014, the Employer gave notice of its intention to make a preliminary application (submission in limine) for an order dismissing the Employee’s case on the ground that it’s commencement contravened the provisions of Section 19 (1) of the Industrial Court Act Cap 214 (the Act).

4. Section 19 (1) of the Act provides:

“19 (1) Where the existence of a trade dispute has come to the attention of the Minister or the Labour Commissioner under and by virtue of the provisions of section K 14 (1) of the Antigua and Barbuda Labour Code, the Minister may at any stage refer the dispute to the Court; and notwithstanding the provisions of sections K 14 and B 5 (2) of the Antigua and Barbuda Labour Code, upon such referral the Labour Commissioner shall cease to perform the duty conferred on him by the said sections of seeking to achieve a voluntary adjustment or settlement of the trade dispute.”

5. In its submissions filed on 6th June 2014, the Employer contended that:
- “While the matter was still before the Minister of Labour, the Employee withdrew the matter and submitted same to the Industrial Court...”
 - once a matter is referred to the Minister **“only the Minister has the right to send any matter that is before him/ her to the Industrial Court, and in this instant case No 34 of 2013 Jennifer Johnson vs. Antigua and Barbuda Workers’ Union is not properly before the Court ”**
6. The Employer relied on the Ruling of this Court in **David Joseph v. the Antigua Distillery Limited**, Reference No. 5 of 1992, in which on an application by the Employer, the Employee’s case was dismissed because the commencement of the action had contravened the said Section 19 (1) of the Act. In the words of Moe P. :
- “On the true and proper construction of these subsections it is quite clear that the employee cannot avail himself of subsection 19 (2) since he would have had the opportunity to refer the matter to the Court after the Labour Commissioner had failed to achieve an adjustment or settlement voluntarily. Under subsection 19 (1) it is quite evident that the duties of the Labour Commissioner cease and it is for the Minister at any stage to refer the matter to the Court”**
7. In approaching the application before the Court in this case, I find the judgment of the Court of Appeal in **Universal Caribbean Establishment v. James Harrison**, Suit No 21 of 1993 (the Universal Case) to be the most instructive. In considering the matter before the Court, Byron C.J. (as he then was) wholly indorsed the submission of Joyce Kentish (now Kentish J. A) that the Act **“is an amorphous piece of legislation, poorly drafted, creating jurisdiction not in a precise and methodological and linear fashion, but obliquely and by disorganized composition.”**
8. As I understand it, the main issue before the Court of Appeal in the Universal Case was whether the Industrial Court had jurisdiction **“to hear matters of unfair dismissal that did not involve a trade dispute “.**

9. Under the Act, a trade dispute means a trade dispute as defined in section A 5 of the Labour Code. As condensed by Byron C.J. at page 8 of his judgment, the definition is as follows:

“‘trade dispute’ (or ‘industrial dispute’) means any disagreement between employer and workers...over conditions of employment....which disagreement has led, or may lead, to an interruption of employment by lock out or strike”

10. At page 2 of the Judgment, the Court of Appeal identified the jurisdiction of the Industrial Court as set out in Section 7 (1) of the Act which provides:

“the Court shall have Jurisdiction ...

(a) to hear and determine trade disputes referred to it under this Act..

(b).....

(c) to hear and determine any complaints brought in accordance with this Act as well as such matters as may from time to time be referred to it under this Act”

11. In interpreting the Act, Byron C.J. determined that although there was a clear procedure set out at Section 19 for dealing with **trade disputes** there was no similar procedure set out in respect of complaints of unfair dismissals by individual Employees. In fact, at page 16 of the judgment, the learned Chief Justice concluded that **“it is clear that an individual employee was not intended to be a party to a trade dispute.”**

12. Further, at page 12 of his judgment, the Chief Justice concluded as follows;

“Part II of the Act, section 19, deals with Trade Dispute procedure. This is clearly regulatory of the jurisdiction conferred by section 7 (1) (a)”

13. Notwithstanding the Court of Appeal’s pronouncements limiting the operation of section 19 to trade disputes only, the Court nevertheless concluded that the Industrial Court had jurisdiction to hear complaints of unfair dismissal made by individual employees. The words of Byron C. J. at page 18 of the judgment read:

The necessary result of that view is the jurisdiction conferred by section 7(1)(c) empowers the court to hear any disputes concerning the dismissal of an employee.”

14. Accordingly, in my view, the prerequisite for the application of Section 19 of the Act is that there existed a “trade dispute” as defined in Section A 5 of the Labour Code
15. There is no evidence before the Court that a trade dispute was in existence at any material time. As a result, I find that Section 19 does not apply to the matter before the Court. It follows that the Employer’s application should be dismissed.
16. Notwithstanding that conclusion, which should suffice to dispose of this matter, I move on to consider that the terms of Section 19 (1) in respect of the powers of the Minister.
17. The use of the word “**may**” in that subsection means that power of the Minister to refer a matter to the Court is discretionary. In other words, even if the Minister’s conciliatory efforts do not result in a settlement of the matter before him, he is not obliged to refer it to the Court.
18. I feel strongly that the discretion of the Minister must necessarily be superseded by the right of an individual employee to refer his complaint of unfair dismissal, or any other matter in dispute, to this Court for hearing and determination. I should add at this point that it would approach absurdity if the contrary were true. For this additional reason, I would be further inclined to dismiss the Employer’s application.
19. I now go on to consider the circumstances under which this Court may allow the exercise of the Minister’s discretion to pre-empt the Employee’s right to commence and advance proceedings in this Court.
20. I believe that it is important to distinguish David Joseph’s case, on which the Employer relies, from the case now before this Court. In the former case, the Court had the benefit of the Minutes of the meeting convened by Minister. Moe P. quoted from the Minutes

that the Minister “promised to consider where next to send the dispute”. Clearly, based on the evidence before it, the Court concluded that the matter was still before the Minister pending his further attention. In this case, there are no similar minutes confirming that the matter was still before the Minister.

21. On behalf of the Employer, His Excellency, Sir Keithlyn Smith strongly urged the Court to follow the Ruling in David Joseph’s case. He contended that to do otherwise would be contrary to Section 19(1) and thereby erode the power of the Minister. Further, he contended if this Court declined to apply that Ruling, it would effectively undermine the principles and practices of good industrial relations which this Court is obliged to uphold.
22. On the other hand, Mr. Anderson Carty submitted that in this case the Minister had completed his intervention towards a voluntary settlement. In that regard, he relied on the Minister’s Conciliation Report dated 27th July 2012 in which the Minister stated that he would adopt the recommendations of the Labour Department in the absence of agreement to the contrary by 10th August 2012.
23. Mr. Carty buttressed his argument by referring to Section B 6 (1) and (2) of the Labour Code which provides that in the event that the Minister fails to achieve a voluntary settlement or adjustment it was open to him to exercise his discretion by referring the matter back to the parties for the pursuit of legal action.
24. It was Mr. Carty’s contention that, on its true construction, the effect of the Minister’s Conciliation Report was to leave the matter to the Employee for her to take legal action if she so desired. He submitted that the terms of the Report made it clear that the Minister had terminated his intervention. Thereafter, the Employee was entitled to proceed to institute these proceedings.
25. I do not favor Sir Keithlyn’s assertion that, notwithstanding the terms of his Conciliation Report, the matter remained before the Minister. I find that the Minister had completed his intervention. At the material time, there was nothing to suggest that the Minister had any lingering interest in the matter or intended to renew his intervention. Moreover, there is no evidence of any further communication between the parties.

26. For the reasons stated above, I am even more inclined to dismiss the Employer's application. However, I feel obliged to go even further to consider the Employer's application on its merits outside of the provisions of Section 19 of the Act. In this regard, I am mindful that the Employee is entitled to file her individual complaint of unfair dismissal although there are no express procedural guidelines for the same vis-a-vis complaints in relation to trade disputes.
27. In the circumstances and in any event, I am constrained to consider the Application before the Court in the wider context of Section 10 (3) (a) of the Act. This Court is obliged to make such orders as it considers to be **"fair and just, having regard to the interests of the persons immediately concerned and the community as a whole"**. Moreover, this Court must **"act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code."**
28. The Employee is entitled to an expeditious determination of her complaint. In that regard, I note that this Reference was filed since April 2013. It would be reasonable for her to expect to have her matter determined before the end of the current year 2014.
29. In the course of making his oral submissions in response to the observations and enquiries of the Court, Sir Keithlyn conceded that in lieu of an order striking out the Reference, this Court may exercise its jurisdiction by ordering that the proceedings be stayed pending further intervention by the Minister or a final express statement from him that he has no further interest in this matter. It is not surprising that Mr. Carty resisted this alternative judicial course of action.
30. In considering this matter in the wider context and considering the option of granting a stay, the Court takes judicial notice of the results of recent general elections and the consequential appointment of a new Minister of Labour.
31. In the final analysis, having regard for the provisions of Sections 10 (3) of the Act and the current transitional state of national affairs, I am constrained not only to dismiss the

Employer's Application but also to shy away from the grant of a stay pending the further attention of the Minister.

32. In the premises, the Employer's application is hereby dismissed with no order as to costs.

Dated the 16th day of July, 2014



HON. CHARLESWORTH O.D. BROWN
PRESIDENT

I agree



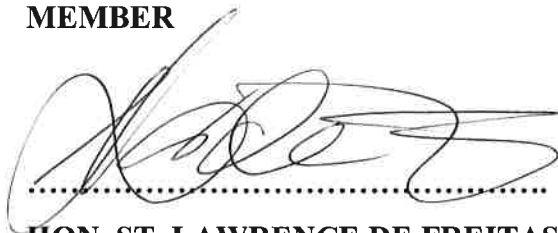
HON. SAMUEL AYMER
MEMBER

I agree



HON. DR. HAYDEN THOMAS
MEMBER

I also agree



HON. ST. LAWRENCE DE FREITAS
MEMBER