[2015] UKPC 36
Privy Council Appeal No 0087 of 2013

JUDGMENT

ArcelorMittal Point Lisas Limited (formerly Caribbean ISPAT Limited) (Appellant) *v* Steel Workers Union of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lady Hale
Lord Clarke
Lord Wilson
Lord Hodge
Sir Paul Girvan

JUDGMENT GIVEN ON

6 August 2015

Heard on 24 March 2015

Appellant	*Respondent*
Peter Knox QC Reginald TA Armour SC Vanessa Gopaul (Instructed by Charles Russell Speechlys)	Douglas L Mendes SC Anthony Bullock (Instructed by Simons Muirhead & Burton)

LORD CLARKE:

Introduction

1. This appeal comes from Trinidad and Tobago and concerns the applicability of collective agreements to persons employed under 'labour only' contracts. The issues in the appeal to the Board arise out of the Industrial Relations Act 1972, Ch 88:01 ("the Act"), which governs the relationship between the appellant as "employer" and (a) its employees as "workers" and (b) the respondent as "trade union". The Board will refer to the appellant as "the employer" or "the appellant" as appropriate and the respondent as "the union". The Act accords statutory protection to "workers", as defined. The union obtained recognition as the recognised majority union (the "RMU") of the workers employed by the employer. Under the Act the employer and the union were obliged to treat and enter into negotiations with each other in good faith for the purposes of collective bargaining. Among other matters, "trade disputes" or "disputes" between an employer and its workers (or a trade union on behalf of such workers) are to be determined by the Industrial Court of Trinidad and Tobago ("the Industrial Court").

2. The case giving rise to this appeal arises out of an application dated 29 December 1997 made by the union to the Industrial Court for an order that Caribbean Ispat Limited ("ISPAT"), which was the appellant by its former name, be deemed to be the employer under "labour only contracts of all those persons employed by so-called contractors to perform work normally performed by worker (sic) in bargaining unit I of which the Union is the recognised majority union". The union is certified as the RMU in respect of workers in bargaining unit I. The application was expressed to be made pursuant to section 2(1) and 4(b) and section 7(e) of the Act. It is not in dispute that the reference to section 4(b) of the Act is intended to be a reference to section 2(4)(b) and that the reference to section 7(e) is intended to be a reference to section 7(1)(e) of the Act.

3. In his decision given on 31 July 2009, nearly 12 years after the application was issued, His Honour Mr Patrick Rabathaly ("the judge") held that the persons recruited by two contractors (Systems Maintenance Services Limited ("SMS") and Management Technical Services Limited ("MTS")) were operating under labour only contracts with the employer and were therefore deemed to be workers employed by the employer. Further, the court ordered the employer to apply "the appropriate collective agreement(s)" to those persons and that any moneys due to the workers should attract interest thereon at the rate of 8% per annum from the "due date to the date of payment". The employer appealed to the Court of Appeal but the appeal failed. The order of the judge was upheld by the Court of Appeal on 9 December 2011. The employer now appeals to the Board.

4. The employer says that the Court of Appeal was wrong to uphold the decision of the Industrial Court, both (a) because on a true construction of the Act it was wrong in law and made in excess of the court's jurisdiction and (b) because in making it, the court acted in violation of the rules of natural justice. The union disputes each of those grounds. The employer further contends (on a point which was not addressed in the Court of Appeal) that the Court of Appeal's decision failed to take into account an alleged agreement between counsel in the Industrial Court, which treated and limited the case (including the evidence led) before it as a test case on the meaning of section 2(4)(b) of the Act. The union says that it is not open to the employer to raise this point in this appeal, even assuming that the alleged agreement was made.

Background facts

5. The employer is a limited liability company engaged in the production of steel and steel by-products at the Point Lisas Industrial Estate on the island of Trinidad. The union is certified as the RMU for the appellant's hourly and weekly rated workers and monthly paid workers in bargaining units I, II, III and V. In relation to these bargaining units, the employer and the union entered into collective agreements from time to time in accordance with the terms of the Act. Each of the collective agreements was for a minimum period of three years. In the course of its operations over a period of 15 years and in addition to its own workforce, the employer retained various contracting companies who provided a number of services, including mechanical and maintenance services. The work necessary to provide the services was performed by persons ("the contract workers") employed by the contracting companies.

6. The employer's case is that until the Industrial Court's deeming order on 31 July 2009, the contract workers were not "workers" within the meaning of the Act, that as at the date of the union's application, the statutory protection accorded by the Act to "workers" (as defined) did not yet apply to them as such; they were not "workers" in bargaining unit I; the employer was not in "dispute", properly defined, with any of them; and the respondent was not a union recognised as acting on their behalf under the Act.

7. On this last point, the union's position is that this is also a point which was not taken before the Industrial Court or the Court of Appeal and, accordingly, the union reserves its position on whether it is one which can be raised on this appeal. On the substantive question, the union's position is that, whether the contract workers were employed by the contractors or the appellant, they were "workers" (as defined) and enjoyed that status and the protection of the Act from the first day of their employment. The Industrial Court determined that they were employed by the appellant under labour only contracts. Further, the union says that the Act deems persons who are employed by the appellant under labour only contracts to be employed by the appellant and, accordingly, to be entitled to the benefits of any collective agreement between the

employer and the union. Their status as employees of the appellant is established by the Act and is not dependent upon a finding by the court to that effect.

The application

8. The application was supported by the union's Statement of Evidence and Arguments filed on 18 December 1998. In that document it contended in paras 3 and 4 that the contract workers were performing work normally performed by workers in bargaining unit I, under the direction and control of the appellant and, that, as such, the contract workers ought to be deemed to be employed by the appellant under labour only contracts. The union contended further that the appellant did not recognise the contract workers as its own employees and did not apply the collective agreement in relation to them. The union therefore sought an order that the appellant was bound to apply the collective agreements to the contract workers.

9. The appellant (as respondent) filed its Statement of Evidence and Arguments on 28 February 2000. It contended that the companies with whom it contracted were independent contractors and that the contract workers were therefore not its own employees but those of the companies with whom it contracted. It contended further that the contract workers were recruited and paid by their respective contractors who determined their compensation packages and exercised all powers of discipline over them. It also noted in its Evidence and Arguments that the registered collective agreement applicable to its workers in bargaining unit I had expired on or about 31 October 1998. It did not dispute that it did not apply the collective agreement to the contract workers.

10. In the course of the protracted hearings there were a number of exchanges which are said to be relevant to the issues in this appeal. The Board can take them from the agreed statement of facts and issues. For example on 10 November 2004 counsel for the union told the judge that the parties had agreed in principle to try to use the witnesses who had given evidence until then as test cases because there were basically two types of such witnesses, namely permanent contract workers and casual contract workers, which they were hoping covered what he called the entire ground. On 16 November he told the judge that, having regard to "the agreement", it was not necessary to call further witnesses because they would just be giving the same evidence as the previous witnesses. In his closing submissions in November 2006 he said that the union closed its case on the basis that there was an agreement between counsel that the cases of those who had already given evidence would be treated as test cases, so that, in the light of the decision in those cases, the parties would be able the know exactly what their rights and obligations were, without having to call further evidence.

11. The case for the employer is that in the early course of the hearing before the Industrial Court, counsel agreed that (a) the application would be treated as a test case in respect of the true meaning of section 2(4)(b) of the Act and (b) this was the only issue for determination ("the Agreed Issue"). The union's case is that it is clear that what the parties intended was that it was not necessary to lead evidence of the circumstances of all persons employed under labour only contracts, but that the circumstances of the particular workers dealt with in the evidence would be used as a test case for all the rest. There was no agreement that the question whether the collective agreement was to be applied to these workers was not to be determined by the court.

12. Over a protracted period of 12 hearings spanning two years, from 3 May 2004 to 20 November 2006, evidence was led on both sides which focused primarily on the nature of the work done by the contract workers and the exercise of control by the appellant over those workers. The appellant's case is that because of the Agreed Issue, no evidence was called by either party relating to the applicability of any of the collective agreements to the contract workers, nor were either party's witnesses cross-examined on their applicability. The parties did, between days 10 and 12, re-open their cases to lead further evidence, but this was only on the Agreed Issue.

13. The union's case is that it was not necessary to lead any evidence as to whether the collective agreements were applied to the contract workers because it was common ground throughout that the appellant had not been applying the collective agreements to them. In any event, evidence was led that the contract workers' wages were paid by the contractors who also provided them with workmen's compensation when injured and safety equipment. Moreover, the manager of the appellant's Materials Handling Department testified that the contract workers were not given many of the benefits which the appellant's employees enjoyed.

14. The stances of the parties as just described were repeated by the parties in their written closing submissions in June and November 2006 respectively. On 20 November 2006, some eight months after the close of the evidence, both parties made supplementary oral submissions. The appellant's case is that each repeated their respective contentions as they related to the Agreed Issue and the evidence adduced. The thrust of the union's submissions is that the parties focused on the question whether the workers were employed under labour only contracts because that was the only issue in dispute. It was not in dispute that the collective agreements were not being applied to them.

15. In particular, it was submitted on behalf of the union that the consequence of a finding that a worker is employed under a labour only contract in accordance with section 2(4)(b) of the Act

> "is that the workers who are deemed to be employed by the employer when working on contract will, therefore, come within the bargaining unit as they are performing the functions. They then stand to be protected by the collective agreement and they then stand to be protected by the union in relation to any dispute which may arise at the workplace."

The union's case was that the question was one of statutory construction, namely whether MTS and SMS were engaging the services of the workers concerned for the purpose of providing those services to another, namely the appellant (formerly ISPAT), within the meaning of section 2(4)(b) of the Act. It was submitted that the judge should examine the evidence to see exactly what was the purpose for which SMS and MTS engaged the services of the workers concerned. The union's case was that, because it was not disputed that the collective agreement was not being applied to the labour only contract workers, the only dispute was whether these workers were indeed employed under labour only contracts and the only issue was the proper approach to the resolution of that question.

The judgment

16. As stated above, on 31 July 2009 the judge deemed 80 contract workers with periods of service ranging from one year to 15 years to be "workers" employed by the appellant within the meaning of section 2(4)(b) of the Act. He also ordered the appellant to apply "the appropriate collective agreement(s)" to the contract workers together with interest at the rate of 8% per annum from the due date to the date of payment.

The Court of Appeal

17. The first ground of the employer's appeal was against the order of the Industrial Court ordering it to apply "the appropriate collective agreement(s)". The primary ground of appeal was that the Industrial Court exceeded its jurisdiction and erred in law in that: (i) the Industrial Court, in making the order, purported to exercise a jurisdiction which was neither invoked nor capable of being invoked under the Act on the application before it; (ii) the Industrial Court purported to act in accordance with section 10(3)(b) of the Act notwithstanding that the application was not a "trade dispute" within the meaning of the Act; (iii) the order of the Industrial Court was retroactive in its application against the employer and in favour of the contract workers in respect of expired collective agreements; (iv) the order of the Industrial Court purported to enforce collective agreements between the employer and the union notwithstanding the expiry of those agreements; and (v) the order of the Industrial Court was made in contravention of the rules of natural justice, that is to say, without first affording the employer the opportunity to adduce evidence and/or arguments in relation to an award to the contract workers.

18. The parties framed the issues which were before the Court of Appeal differently. The appeal was heard and determined by Mendonca, Bereaux and Narine JJA on 9 December 2011. In the course of argument in the Court of Appeal the main issues taken before the court were (a) as to error of law, whether, in relation to the deemed workers, the Industrial Court could apply (and thereby enforce) collective agreements which had expired during the period 1998 to 2009 and, (b) as to natural justice, whether the employer had been afforded a fair opportunity to address the Industrial Court on the applicability of those collective agreements before it made its order.

19. At the end of the argument on 9 December 2011 the Court of Appeal dismissed the appeal with no order as to costs. It subsequently gave its reasons in a judgment prepared by Narine JA, with whom Mendonca and Bereaux agreed, as follows: (i) the issue in the case was a legal technical point; the substance and underlying purpose of the application before the Industrial Court was the application or enforcement of the collective agreements to the contract workers; (ii) the order of the Industrial Court was a formula by which compensation due to each worker could be calculated by reference to the terms and conditions of the workers in the bargaining unit, as contained in the collective agreement then current at the time the contract workers provided their services to the employer; (iii) the Industrial Court was therefore not ordering the application of any collective agreements as collective agreements, but rather the agreements containing the terms and conditions of the workers' individual contracts of employment; and (iv) the employer had every opportunity to deal with the issue of the application and enforcement of the collective agreements in its submissions before the Industrial Court and could not now complain if it failed to avail itself of that opportunity. The reasons given by the Court of Appeal are further referred to below.

The issues before the Board

20. The principal issues which the employer raises in this appeal are as follows. (i) Did the Industrial Court commit an error of law or exceed its jurisdiction by applying or enforcing (expired) collective agreements in relation to the deemed workers in considering the application before it? In particular, (a) was there an agreement (known as the Agreed Issue) between counsel on behalf of the parties in the Industrial Court to treat and restrict the application and the evidence relevant thereto to the sole issue of statutory interpretation of section 2(4)(b) of the Act; and, if so, what is the consequence of the Court of Appeal's failure to take this into account? (b) On the evidence before the Industrial Court, was the question of the existence of a "trade dispute" or "dispute" between the employer and the "workers" (or between the employer and the union) a necessary precondition for the exercise of the Industrial Court's jurisdiction to make the order complained of? (c) Are the terms of an expired collective agreement capable of application or enforcement other than by way of the reporting of a trade dispute arising in respect of the individual terms and conditions of employment of workers? (d) If so, did the filing of the application during the currency of the collective agreement between the employer and the union preserve the jurisdiction of the Industrial Court to apply or

enforce the collective agreement in relation to the deemed workers notwithstanding its expiration prior to the hearing and determination of the application? (ii) In all of the circumstances, was the employer afforded a fair opportunity to deal with the issue of the Industrial Court's reliance on section 10(3)(b) of the Act in ordering the application or enforcement of expired collective agreements to the deemed workers?

The Act

21. Section 2(1) is a definition section which includes, so far as relevant, the following:

> "In this Act -
>
> …
>
> 'collective bargaining' means treating and negotiating with a view to the conclusion of a collective agreement or the revision or renewal thereof or the resolution of disputes;
>
> …
>
> 'trade dispute' or 'dispute', subject to subsection (2), means any dispute between an employer and workers of that employer or a trade union on behalf of such workers, connected with the dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of any such workers, including a dispute connected with the terms and conditions of the employment or labour of any such workers, and the expression also includes a dispute between workers and workers or trade unions on their behalf as to the representation of a worker (not being a question or difference as to certification of recognition under Part III);
>
> 'trade union' or 'union' means an association or organisation registered as a trade union under the Trade Unions Act, not being an association or organisation of employers registered as a trade union under that Act;
>
> 'worker', subject to subsection (3), means -

(a) any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, technical, clerical or other work for hire or reward, whether the contract is expressed or implied, oral or in writing, or partly oral and partly in writing, and whether it is a contract of service or apprenticeship or a contract personally to execute any work or labour;

(b) …

(c) any person who provides services or performs duties for an employer under a labour only contract, within the meaning of subsection (*4)(b);*

and includes

(d) …"

Section 2(2) provides:

"(2) For the purposes of this Act -

(a) any question or difference as to the interpretation or application of -

(i) an order or award of the Court, or of any provision thereof; or

(ii) the provisions of a registered agreement (within the meaning of Part IV); and

(b) any question or difference as to the amendment of a registered agreement (within the meaning of Part IV),

shall be deemed not to constitute a trade dispute."

Subsections 2(3) and (4)(a) are not relevant but section 2(4)(b) provides:

"(4) For the purposes of this Act -

…

(b) where a person engages the services of a worker

for the purpose of providing those services to another, then, such other person shall be deemed to be the employer of the worker under a labour only contract."

22. Part I of the Act makes detailed provisions for the establishment, jurisdiction and procedure of the Industrial Court. Section 4(1) provides for the establishment of the court

"which shall be a superior court of record and shall have in addition to the jurisdiction and powers conferred on it by this Act all the powers inherent in such a court."

Section 7(1) provides, so far as relevant:

"7(1) In addition to the powers inherent in it as a superior court of record, the court shall have jurisdiction -

(a) to hear and determine trade disputes;

...

(e) to hear and determine any other matter brought before it, pursuant to the provisions of this Act."

Section 9(1) provides:

"In the hearing and determination of any matter before it, the court may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but the court may inform itself on any matter in such manner as it thinks just and may take into account opinion evidence and such facts as it considers

relevant and material, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regard thereto."

Section 10 provides, so far as relevant:

"(1) The court may, in relation to any matter before it -

(a) remit the dispute, subject to such condition as it may determine, to the parties or the Minister for further consideration by them with a view to settling or reducing the several issues in dispute;

(b) make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction in pursuance of the hearing or determination;

…

(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the court in the exercise of its powers shall -

(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;

(b) 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.

…

(7) Where, in any proceedings for the non-observance of an order or award or the interpretation or application of a registered agreement (within the meaning of Part IV*)*, it appears to the court that a worker of the employer has not been paid an amount to which he is entitled under such an order or award or such an agreement the court, in addition to any other order, may order the employer to pay the worker the amount to which he is entitled and any such amount shall be deemed to be damages and be recoverable in the manner provided by section 14."

23. Section 16 provides:

> (1) Where any question arises as to the interpretation of any order or award of the court, the Minister or any party to the matter may apply to the court for a decision on such question and the court shall decide the matter either after hearing the parties or, without such hearing, where the consent of the parties has first been obtained. The decision of the court shall be notified to the parties and shall be binding in the same manner as the decision on the original order or award.
>
> (2) Where there is any question or difference as to the interpretation or application of the provisions of a registered collective agreement (within the meaning of Part IV) any employer or trade union having an interest in the matter or the Minister may make application to the court for the determination of such question or difference.
>
> (3) The decision of the court on any matter before it under subsection (2) shall be binding on the parties thereto and is final.

Section 18(2) provides, so far as relevant:

> "(2) Subject to this Act, any party to a matter before the court is entitled as of right to appeal to the Court of Appeal on any of the following grounds, but no other:
>
> > *(a)* that the court had no jurisdiction in the matter, but it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the court has been formally taken at some time during the progress of the matter before the making of the order or award;
> >
> > *(b)* that the court has exceeded its jurisdiction in the matter;
> >
> > *(c)* …;
> >
> > *(d)* that any finding or decision of the court in any matter is erroneous in point of law; or
> >
> > *(e)* …"

24. Where a trade union is certified by the Registration Recognition and Certification Board ("the Board") as the recognised majority union, by section 35(a), it "shall have exclusive authority to bargain collectively on behalf of workers in the bargaining unit and to bind them by a collective agreement registered under Part IV so long as the certification remains in force" and, by section 40, "the employer shall recognise that trade union as the recognised majority union; and the recognised majority union and employer shall … in good faith, treat and enter into negotiations with each other for the purposes of collective bargaining". A collective agreement may be made in various ways but such an agreement must be registered with the court to be effective. By section 47(1), the terms and conditions of a collective agreement registered under section 46, namely a "registered agreement", shall be binding on the parties and shall be directly enforceable, but only in the court. Section 47(2) provides:

> "(2) The terms and conditions of a registered agreement shall, where applicable, be deemed to be terms and conditions of the individual contract of employment of the workers comprised from time to time in the bargaining unit to which the registered agreement relates."

25. It appears to the Board that the effect of section 47(2) is that a registered agreement applies, not only to workers in the bargaining unit to which the agreement relates who were employed when the agreement was registered, but also to workers who are employed in the bargaining unit at any time thereafter. This is the effect of the provision that deems the terms and conditions of a registered collective agreement to be the terms and conditions of the individual contracts of employment of the workers comprised "from time to time" in the bargaining unit.

26. A registered collective agreement only applies to workers who are employed by the employer who is a party to the agreement. It appears to the Board (and does not appear to be in dispute) that a registered collective agreement applies to (and its terms and conditions are deemed to be the terms and conditions of the contracts of employment of) workers comprised from time to time in the bargaining unit who are deemed by section 2(4)(b) to be employed by the employer under labour only contracts.

Undisputed facts

27. As stated above, the following facts do not appear to be in dispute. The union is the duly certified recognised majority union in respect of a bargaining unit comprising workers employed by the appellant. At the time the application was lodged with the Industrial Court on 29 December 1997, there was in existence an unexpired registered collective agreement between the parties. That agreement was succeeded by a series of registered collective agreements up until the Industrial Court delivered judgment on 31 July 2009. By virtue of section 47 of the Act, each such agreement was directly

enforceable in the Industrial Court, and its terms and conditions were deemed to be the terms and conditions of employment of each of the workers from time to time comprising the bargaining unit.

28. Until the Industrial Court's judgment was delivered, the appellant's work force was also comprised of a number of workers ("the contract workers"), whom the appellant did not recognise as its own employees. The evidence led before the Industrial Court at trial was that the contract workers worked alongside workers employed by the appellant, who comprised the bargaining unit, and performed the same functions as those workers. The contract workers were directly employed by one of two separate legal entities, namely, SMS and MTS ("the employment agencies") who provided their services to the appellant.

29. In its judgment the Industrial Court found that the contract workers were engaged by the employment agencies for the purpose of providing their services to the appellant. The consequence of that finding, which has not been appealed, is that the appellant is deemed by section 2(4)(b) of the Act to be the employer of the contract workers under labour only contracts.

The legal consequences of the undisputed facts

30. The union submits that the legal consequences of those undisputed facts are these. The contract workers were among the workers comprised in the bargaining unit to which the provisions of the registered collective agreements applied. It follows that the terms and conditions of the registered collective agreements were deemed to be the terms and conditions of each of their individual contracts of employment. They were therefore entitled to be paid at the same rates under the collective agreements as those workers whom the appellant recognised as its employees, and to be afforded the same allowances and other benefits provided for in those agreements. Presumably, the appellant would have applied the registered collective agreements to them in full, but for the fact that it did not consider them its employees. The Board accepts those submissions in principle.

The issues

31. The union has summarised the issues in the appeal under three heads which it has called the pleading point, the natural justice point and the defunct collective agreement point. It is convenient to do the same in this judgment. In doing so the Board considers the various issues identified on behalf of the employer.

The pleading point

32. It is not now in dispute that the collective agreements were not applied to the contract workers. It is also not disputed that in its Statement of Evidence and Arguments the union sought an order that the appellant "is bound to apply the collective agreement in relation to" the contract workers. The point taken on behalf of the appellant is that the court was wrong to order it "to apply the appropriate collective agreements" to the contract workers and to pay interest at the rate of 8% on any moneys due and payable to them from the due date until the date of payment. The appellant says that the court was wrong to do so, in summary, because there was no application before the court for such an order and there was no trade dispute which justified making it.

33. It is accepted on behalf of the union that in its application letter it did not seek an order under section 16(2) of the Act, which is quoted in para 23 above. It is also accepted that it could have done so. It is submitted on behalf of the employer that it was clear from the way the case for the union was conducted before the Industrial Court that it was pursuing only the relief actually sought in its application letter, namely a declaration that the contract workers were employed under labour only contracts. As such, the jurisdiction of the court had not been properly invoked and the court therefore exceeded its jurisdiction in making the order under challenge. Further, the employer argues that the Industrial Court's order required it to apply the collective agreements to the contract workers when, as at that point, there was no trade dispute relating to them, nor was it inevitable that the collective agreements would apply had there been a dispute.

34. While accepting that it did not rely on section 16(2) in its application letter, the union points to its Statement of Evidence and Arguments dated 18 December 1998, which is referred to in para 8 above. It is plain from the form of the Statement of Evidence and Arguments that its purpose is to state the case of the party issuing it. In para 6 the union expressly sought an order from the court "declaring ISPAT to be the employer of the said contract workers under labour only contracts and that ISPAT is bound to apply the collective agreement in relation to them". It was on this basis that the Court of Appeal rejected this argument when it was put to it. In the opinion of the Board it was correct to do so.

35. The Industrial Court is empowered by section 9(1) of Act to "act without regard to technicalities and legal form" in the hearing and determination of any matter before it. The Board accepts the union's submission that, while the application letter cannot be read as invoking the jurisdiction of the court under section 16(2), the union's Statement of Evidence and Arguments can. From receipt of that document in December 1998, as the Court of Appeal found, it would have been clear to the employer that the union was seeking relief which would have the effect of applying the appropriate collective agreement or agreements to the contract workers.

36. The employer seeks to avoid that conclusion in a number of ways as follows. First it is said that it was wrong to hold that the employer could have been in no doubt as to the substance of the application. Four reasons are given. The first is that a different, perfectly legitimate, reason for making the application was to enable the union, on behalf of the workers, to negotiate acceptable but different terms for them, and to institute the trade dispute procedure provided by Part V of the Act, if they were unable to reach agreement with the employer. There might be different arrangements or adjustments might be appropriate. The second is that, even in the Statement of Evidence and Arguments of 18 December 1998 relied on by the Court of Appeal, the only collective agreement referred to, and for whose application it sought an order, was the one then in force, which expired in the course of the proceedings, and it was never suggested in the course of the hearing that the union was seeking an order for the application of any later collective agreements. The third reason is that the union made no application for any moneys due and payable to the workers arising out of any collective agreements to carry interest, or interest at 8%, nor was any argument or evidence directed towards interest or the rate of interest. The fourth reason was that the Court of Appeal's finding ignored the fact that the proceedings proceeded throughout on the basis that the only issue was whether the workers in question were operating under labour only contracts, which was the only question to which the evidence and arguments were addressed.

37. As to the first reason identified in para 36 above, the union's response may be summarised thus. First, as stated above, from the time it received the Statement of Evidence and Arguments of 18 December 1998 the employer can have been in no doubt that the union was seeking an order applying the appropriate collective agreement or agreements to the contract workers. Second, there is no ground for saying either that there was some basis for seeking to negotiate different terms of employment on behalf of the contract workers or that the union was interested in pursuing that course. The union asserted in its Statement of Evidence and Arguments and established that the contract workers were "employed to perform work normally performed by workers in the bargaining unit and have been doing so on a continuous basis for a number of years". The union contended further, and proved, that the contract workers worked "alongside workers in the bargaining unit" and took "instructions on a daily basis from workers employed directly by" the appellant. The contract workers were accordingly part of the workforce comprised in the bargaining unit and, in accordance with section 47(2) of the Act, the terms and conditions of the collective agreement were deemed to be the terms and conditions of their individual contracts of employment. There was accordingly no room to negotiate different terms for them as long as those agreements were current. In any event, given that they were doing the same work as others in the bargaining unit, there was no basis for separating them out for different treatment, and the employer has pointed to no reason which would have justified such treatment. In addition, contrary to the employer's suggestion, there was no evidence that, as the employer puts it in its case, "there may well have been differences between the workers for whom the application was brought, and those recognised as working under labour only contracts at the time". The employer did not lead any evidence that there were any persons who

it recognised as working under labour only contracts and has not pointed to any such evidence on the record. Furthermore, far from there being any suggestion that the union was making the application so as to negotiate "acceptable but different terms for them", in para 5 of its Statement of Evidence and Arguments it alleged specifically that the employer did not apply the collective agreement to the contract workers and accordingly sought an order in para 6 that the employer was bound to apply the collective agreement to them.

38. The Board prefers the submissions of the union to those of the employer on this point. In short, as the Court of Appeal expressly held, the position was made clear in the union's Statement of Evidence and Arguments of 18 December 1998.

39. As to the second reason, which overlaps with the defunct collective agreement point, it is true that the Statement of Evidence and Arguments expressly referred only to "the registered collective agreement", which was presumably a reference to the one in force at the time. It may also be true that it was never expressly suggested in the course of the hearings that the union was seeking an order for the application of any later collective agreements. However, the Board accepts the union's submission that it could not have anticipated when it filed its Evidence and Arguments how long the proceedings would take and cannot therefore be blamed for not pleading then that an order should be made that all future agreements be applied to the contract workers. In any event, as submitted on behalf of the union, it appears to the Board that, subject perhaps to any particular contract, it would have followed automatically that all future agreements would apply to them.

40. As one would expect, evidence was led which was not restricted to the period covered by the agreement in force at the date of the Statement of Evidence and Arguments. The Board accepts the submission that the witnesses, whether for the union or the employer, gave evidence long after the proceedings had commenced and spoke of what was currently happening at the plant and of what was happening during the course of the subsequent agreements. It was not in dispute (or in doubt) that the employer continued not to apply those agreements to the contract workers. The Board accepts the submission made on behalf of the union that, having found that the contract workers were deemed to be employed by the employer, it would have made no sense for the Industrial Court to restrict the consequential relief to an agreement in the past and not also order that more recent agreements be applied as well.

41. Moreover, by section 10(1)(b) of the Act (quoted in para 22 above) the court is empowered "in relation to any matter before it" to "make an order or award ... relating to any or all of the matters in dispute"; and, by section 10(3)(b) (also quoted), it is empowered, "notwithstanding anything in this Act or in any other rule of law to the contrary", to "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". Evidence of breaches of succeeding collective agreements were adduced without objection. In all the circumstances the Board accepts the submission that it was unreasonable to expect the union to lodge a separate application for the contract workers to be deemed to be employed under labour only contracts and for an order that the then current collective agreement applied to them, whenever a new collective agreement came into force. As the union puts it, there was a generalised dispute between the parties as to the status of the contract workers. Once it was established that the contract workers were employed by the appellant it followed that the collective agreements were to be applied to them. In short, the union's complaint was a continuing one. In the opinion of the Board, it was open to the court to make the order it did.

42. That said, it is important to note that the order made by the court and upheld by the Court of Appeal was in broad terms. It merely obliges the employer to apply "the appropriate collective agreement(s)". How they apply will depend on the facts of the particular case.

43. As to the third reason, it is true that a claim for interest was not made by the union. However, there is no doubt that the court has power to award interest. Although there is no provision in the Act expressly empowering the court to award interest on damages, section 25 of the Supreme Court of Judicature Act, Chapter 4:01, provides, so far as relevant:

> "25. In any proceedings tried in any court of record for recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, …"

There follow some irrelevant exceptions. By section 4(1) of the Industrial Relations Act, the Industrial Court is a court of record and, by section 10(7) of the Act, any amount ordered by the court to be due to a worker under a collective agreement is deemed to be damages. Accordingly, the court is empowered by section 25 of the Supreme Court of Judicature Act to make an award of interest.

44. There are a number of English cases which have held that it is not necessary to plead a claim for interest, notably *Riches v Westminster Bank Ltd* [1943] 2 All ER 725 (CA). In *De Souza v Trinidad Transport Enterprises Ltd and Nanan (No 2)* (1971) 18 WIR 150, at 152 Hassanali J (relying on *Riches*) rejected a submission that the court ought not to exercise its power under section 25 of the Supreme Court of Judicature Act because the claim for interest was not pleaded. In *Greer v Alstons Engineering Sales and Services Ltd* [2003] UKPC 46, the Board treated the issue as having been settled

by Hassanali J in *De Souza*. Speaking for the Board, Sir Andrew Leggatt observed (at para 15):

> "The same practice prevails in Trinidad and Tobago as in England: neither a claim for interest nor the facts and matters relied on in support of such a claim need be pleaded."

45. It follows that, as the Court of Appeal expressly held at p 14, the Industrial Court had power to award interest. No convincing challenge has been levelled at the award of interest or the rate of interest in this case. If it had, it would have been necessary to scrutinise the award and rate of interest with some care, given that the employer was not afforded the opportunity of making submissions on either point.

46. The fourth reason identified in para 36 above is that the Court of Appeal ignored the fact that the proceedings proceeded throughout on the basis that the only issue was whether the workers in question were operating under labour only contracts, which was the only question to which the evidence and arguments were addressed. This is in essence the Agreed Issue point described between paras 12 and 15 above. The argument is that the parties agreed to limit the issue to the question whether the contract workers were operating under labour only contracts and not to extend it to the further question whether, if they were, the collective agreements were to apply to them. It is submitted on behalf of the employer that the evidence and arguments were addressed only to the first and not the second question, either on the basis that the union impliedly abandoned any claim to have the agreements applied to the contract workers or that there was an agreement between counsel to that effect. It is submitted on behalf of the union that there is nothing in the record to support either proposition. The union makes the following points.

47. First, as stated above, the union accepts that the application focussed only on a determination as to whether the contract workers were employed by the appellant under labour only contracts but relies upon the case pleaded specifically in its Statement of Evidence and Arguments that the employer did not recognise the contract workers as its own employees and did not apply the collective agreements to them. In those circumstances, it sought an order that the appellant was bound to apply the collective agreements to them.

48. Secondly, the Statement of Evidence and Arguments was dated 18 December 1998. The appellant saw it before it filed its own Statement of Evidence and Arguments on 28 February 2000, more than 14 months later, and certainly before the trial opened. The appellant pleaded simply that the contract workers were not its employees. There was no dispute that the appellant did not apply the collective agreements to them and

there was therefore no need to lead evidence in that regard, although in the event such evidence was led and was undisputed.

49. Thirdly, there is nothing in the record which suggests that the union had abandoned its claim to have the collective agreement or agreements applied to the contract workers or that there was any agreement to that effect. The appellant does not point to any such statement. As stated in paras 14 and 15 above, in the course of his closing arguments, counsel for the union expressly raised the issue of the applicability of the collective agreements. He said that the consequence of a finding that a worker is employed under a labour only contract in accordance with section 2(4)(b),

> "is that the workers who are deemed to be employed by the Employer when working on contract will, therefore, come within the bargaining unit as they are performing the functions. They then stand to be protected by the Collective Agreement and they then stand to be protected by the Union in relation to any dispute which may arise at the workplace."

If it was thought that the claim for the applicability of the collective agreement had been abandoned or that there was an agreement to that effect, counsel for the appellant would surely have said so at the time.

50. Fourthly, as the record shows, the agreement between counsel was related only to the management of the evidence which was to be led. Rather than lead evidence from all the contract workers involved, the agreement was that the evidence led would be representative of the various circumstances of all those in respect of whom the proceedings were brought. The agreement was designed to avoid the duplication of evidence. As counsel for the union noted on 16 November 2004, it was not necessary to lead evidence from a witness who was present and available to give evidence because "he will just be giving the same evidence as the previous witness".

51. Fifthly, had there been an agreement or an implicit understanding by counsel for the appellant that the issue of the applicability of the collective agreement was no longer a live one, one would have expected him to ensure that it was put on the record. There is no evidence that he did so.

52. Sixthly, there was no need to lead specific evidence as to the applicability of the collective agreement. It was common ground that the contract workers were performing bargaining unit work and undisputed evidence was led to that effect. If they were deemed to be employees of the appellant, the automatic legal result was that the terms and conditions of the collective agreement would be deemed to be the terms and conditions of their individual contracts of employment. Thus, the only necessary evidence of applicability of the collective agreements was the undisputed evidence that

they were employed to do bargaining unit work. The appellant cannot claim surprise that such evidence was led at trial since the union had pleaded that the contract workers were "employed to perform work normally performed by workers in the bargaining unit".

53. Seventhly, counsel for both parties focussed in their written and oral submissions on the only live issue in the case, namely whether the contract workers were employed by the appellant under labour only contracts. As both counsel observed, that was indeed a question of statutory interpretation, but that was the only issue in dispute, not because the union had abandoned its claim for the application of the collective agreements, nor because there was an agreement to limit the issues in the case to the proper interpretation of section 2(4)(b), but because there was no dispute that the contract workers were employed to do bargaining unit work, that the collective agreement was not being applied to them and that the only reason why that was so was because the appellant did not consider them to be its employees. It followed, and therefore went without saying, that once it was determined that the contract workers were employed by the appellant under labour only contracts, the collective agreement had to be applied to them.

54. For those reasons it is submitted on behalf of the union that the Court of Appeal was right to find (at p 8 of its judgment) that from the time the appellant filed its Evidence and Arguments "there could be little doubt that the Respondent was invoking the jurisdiction of the court to apply the collective agreement to the workers" and (at p 9) that

> "While there was no express reference to Section 16(2) of the Act the appellant would have been under no misapprehension as to the substance of the application. The application under Section 2(4)(b) was brought precisely because the appellant had refused and continued to refuse to apply the collective agreement to the workers.
>
> The union was asking the court for a declaration of the legal status of the workers for the express purpose of having the terms and conditions of the workers in bargaining unit I applied to workers who were providing the same services. This purpose could not have been lost on the employer since it was its refusal to apply the collective agreement that triggered the application to the Industrial Court in the first place."

55. The Board accepts those submissions, essentially for the reasons given on behalf of the union. In the opinion of the Board the union did not abandon the claim it made in para 6 of the Statement of Evidence and Arguments, not only for an order "declaring ISPAT to be the employer of the said contract workers under labour only contracts" but

also, critically, for an order declaring "that ISPAT is bound to apply the collective agreement in relation to them".

56. The Board further rejects the submission made on behalf of the appellant, for substantially the same reasons, that the court had no jurisdiction under section 10(3)(b) of the Act (quoted at para 22 above). To the extent that the Industrial Court relied on section 10(3)(b), the appellant submits that

> "as is apparent from its opening ('*the court in the exercise of its powers shall*') this does not found any self-standing jurisdiction or power to make orders which it cannot otherwise make: it is merely a direction as to how its powers arising under other provisions are to be exercised. There must be some trade dispute or *"any other matter brought before it, pursuant to the provisions of the Act"* [see section 7(1)(a) and (e) quoted at para 22 above] for its jurisdiction to arise. … As there was none, there was no jurisdiction to make the award it purported to make in relation to collective agreements."

As a consequence, the appellant continues, in the light of the court's main ruling (ie that section 2(4)(b) applied to the workers), the proper, and the only proper way, forward was for the court to allow the matter to go to negotiation using the dispute resolution procedures set out in Part V of the Act. The union's response may, so far as necessary, be summarised as follows, although to do so involves some repetition.

57. The union submits that there was plainly a difference of opinion between the appellant and the union as to whether the contract workers were employed by the appellant under labour only contracts. The appellant said so expressly in its Statement of Evidence and Arguments and throughout the proceedings. It maintained that the contract workers were employees of the employment agencies, and not its employees. In its original letter of referral to the court, the union invoked the court's jurisdiction under section 7(1)(e) "to hear and determine any other matter brought before it, pursuant to the provision of the Act". The appellant did not at any time challenge the court's jurisdiction to resolve the question whether section 2(4)(b) applied to the contract workers and it is precluded from raising that issue on appeal (section 18(2)(a)).

58. The union alleged in its Statement of Evidence and Arguments that the contract workers were performing bargaining unit work but that the collective agreement was not being applied to them, and asked for an order that it be so applied. The appellant's response was that the contract workers were not its employees and it does not now dispute that the collective agreement was not being applied to them. There therefore clearly emerged a difference between the parties as to whether the collective agreement was to be applied to the contract workers.

59. Section 16(2) of the Act specifically permits any trade union or employer to apply to the court for the determination of a "difference as to the … application of the provisions of a registered collective agreement". As such, the union was entitled to apply to the court to have the difference it had with the appellant as to the applicability of the collective agreement to the contract workers determined by the court. In its Statement of Evidence and Arguments it, in effect, applied to have that difference determined to the extent that it highlighted the existence of the difference and asked for an order that the collective agreement be applied to the contract workers. The union did not expressly invoke the Industrial Court's jurisdiction under section 16(2). But the court is mandated by section 9(1) of the Act (quoted in para 22 above) to act without regard to legal technicalities. The Court of Appeal was therefore right to find (at p 11):

> "The mere fact that section 16(2) was not expressly invoked cannot detract from the fact that what the respondent was seeking was an application of the registered collective agreement, which the court has the express jurisdiction to deal with under section 16(2) of the Act."

It is submitted on behalf of the union that in both instances there was, therefore, clearly a "matter" which could properly be brought before the court for its determination. The Board accepts that submission.

The natural justice point

60. The appellant puts the point in this way. It submits that at the very least it was not unreasonable for it to assume from the way the case unfolded, as described above, that the case was limited simply to the section 2(4)(b) issue. As a result, it is submitted, if the court was thinking of making an order going beyond that issue, which would have important financial consequences, both by reason of the application of "appropriate" collective agreements, and the provision for interest, it was essential that it should give the appellant the opportunity to comment on these points; and the Court of Appeal should have so held. Any other approach was fundamentally unfair.

61. The Board is unable to accept this submission. The appellant's case under this heading assumes that the case had become limited to the issue of the applicability of section 2(4)(b), either because the union had abandoned its claim to have the collective agreement applied or that there was an agreement between counsel to this effect. The Board has already given its reasons for rejecting this submission. The Board is not persuaded that there has been any breach of natural justice here.

The defunct collective agreements point

62. It is submitted on behalf of the employer that to the extent that the order of the Industrial Court required the appellant to apply collective agreements which, at the date when the judgment was delivered on 31 July 2009, had already expired or, as it says, were defunct, the Industrial Court lacked jurisdiction to do so since the collective agreements had become unenforceable upon expiry. The provisions of an expired or defunct collective agreement can only be enforced by way of the trade dispute procedure in Part V and that procedure was not invoked in this case.

63. By way of response, it is submitted on behalf of the union that it was open to the appellant to object to the jurisdiction of the court in respect of expired agreements. Throughout the many years of the proceedings no objection was taken to the jurisdiction of the court, notwithstanding the fact that, as the Board has held, the union did not withdraw its claim for a declaration that the appellant was bound to apply "the collective agreement" in relation to the contract workers. Moreover, as explained above, the debate extended over the events of many years without any objection to its jurisdiction to do so. In these circumstances the Board concludes that the Court of Appeal was not (or would not have been) competent to entertain an appeal on the ground of want of jurisdiction by reason of the express terms of section 18(2)(a), which is quoted at para 23 above.

64. In these circumstances it is not necessary to resolve the issue of jurisdiction. However, as at present advised, the Board is of the opinion that, where an alleged breach of a registered collective agreement occurred within the currency of the agreement, the court has jurisdiction to determine an issue under section 16(2) of the Act after the agreement had expired. So far as the Board is aware, there is no decided case to the contrary.

Conclusion

65. For these reasons the Board concludes that the appeal must be dismissed.

66. However, it is important to note that this conclusion does not preclude all future negotiations arising out of the order of the Industrial Court. The union correctly accepts in para 58 of its case, that, in any event, the order which the court has made must, necessarily, ultimately involve discussions between the parties concerning the ways in which the collective agreements are to be applied to the contract workers. There will be negotiations as to the sums due. Moreover there may be scope for debate as to what is meant by the expression "the appropriate collective agreement(s)" in the order. For example, it might be said that the employer was entitled to set off benefits which the employees' contractors gave them, which differed from and were better than their

employees' collective terms, against sums due under the collective contracts. Any difference or dispute between the parties would thereafter be resolved through the normal channels available for such resolution under the Act. They include the case where any question arises as to the interpretation of any order of the court, in which case express provision is made for an application to the court under section 16(1) of the Act quoted in para 23 above.