EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2018/0008

BETWEEN:

INDRA WILLIAMS

Appellant

and

CASEPAK COMPANY (GRENADA) LTD
(Trading as Calabash Hotel)

Respondent

Before:

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| The Hon. Mde. Louise Esther Blenman | Justice of Appeal |
| The Hon. Mr. Mario Michel | Justice of Appeal |
| The Hon. Mr. Paul Webster | Justice of Appeal [Ag.] |

Appearances:

Mr. Ruggles Ferguson for the Appellant
Mr. Dickon Mitchell with him, Ms. Skeeta Chaitan for the Respondent

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2018: October 16;
December 12.

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*Civil appeal – Employment law – Contract of employment – Breach of contract – Unfair dismissal – Constitution of Grenada – Employment Act Cap. 89 Revised Laws of Grenada 2010 – Labour Relations Act Cap. 157A Revised Laws of Grenada 2010 – Whether court erred in finding that no action can be initiated for an unfair dismissal claim in the High Court – The court's jurisdiction in relation to unfair dismissal claims*

The Appellant, Ms. Indra Williams, was employed by the respondent, Casepak Company (Grenada) Ltd ("Casepak") for approximately 25 years in the non-essential services. Following a strained relationship with Casepak, Ms. Williams was dismissed and only paid for the days she actually worked. Ms. Williams being dissatisfied made a complaint to the Labour Commissioner, who, after having heard both parties, recommended that Casepak compensate her by way of severance payment. Casepak did not comply. Thereafter, the

Labour Commissioner referred the dispute to the Minister of Labour. The Minister proposed the same resolution which Casepak rejected and the dispute between Ms. Williams and Casepak remained unresolved.

Ms. Williams sued Casepak in the High Court. She said that her dismissal was in breach of her contract of employment and unreasonable, amounting to wrongful dismissal under the common law and the statutory unfair dismissal. In addition, she sought damages on the basis of unfair dismissal and wrongful dismissal. Casepak acknowledged service and filed an application in the High Court seeking declarations that the High Court lacked jurisdiction to hear Ms. Williams' claim for unfair dismissal. Casepak also sought to have the court strike out the wrongful dismissal claim on the basis that it is not maintainable.

The judge granted her leave to amend the claim for wrongful dismissal, reasoning that the deficiency with the pleadings did not warrant it being struck out. On the lack of jurisdiction point, the judge held that the High Court does not have jurisdiction to entertain the claim for unfair dismissal and struck out that claim. The judge reasoned that unfair dismissal was a creature of statute and the statute did not provide a pathway to the High Court in the case of non-essential services.

Ms. Williams appealed and complains that the judge erred in finding that the High Court did not have jurisdiction to hear the claim for unfair dismissal, asserting that there is a common law right of access to the court which entitled her to redress for unfair dismissal. She also contended that she had a constitutional right of access to the court and therefore was entitled to sue Casepak for unfair dismissal. The issue on appeal therefore is whether the judge erred in ruling that the High Court has no jurisdiction to entertain a claim for unfair dismissal.

Held: dismissing the appeal and ordering that Ms. Williams pay the costs on the appeal to Casepak Company (Grenada) Ltd to be assessed, if not agreed within 21 days, that:

1. Neither the Employment Act nor section 45(4) of the Labour Relations Act of Grenada confer upon the High Court, jurisdiction to hear unfair dismissal claims. Accordingly, the learned judge decision to strike out Ms. Williams' claim, on the basis that it was unsustainable, is correct.

   Employment Act Cap. 89, Revised Laws of Grenada 2010 applied; Labour Relations Act Cap. 157A, Revised Laws of Grenada 2010 applied; Burrill and Another v Schrader and Another (1995) 50 WIR 193 applied; Merryl Charles v Casepak GDAHCV2012/0179 (delivered 21st September 2015, unreported) applied.

2. Section 8(8) of the Constitution of Grenada addresses the right to a fair trial and is not a provision which provides the court with jurisdiction to hear matters.

   Grenada Constitution Act Cap. 128A, Revised Laws of Grenada 2010 applied.

3. It is settled law that the common law right of access to the court cannot be infringed or abrogated by the Legislature except by clear words to that effect. It is also trite that matters of legislative policy are within the exclusive purview of the Legislature. The court does not determine questions of legislative policy. However, if policy, as enacted by statute, infringe upon established constitutional rights or common law rights, the courts will readily declare them unlawful.

   Hinds v R [1977] AC 195 applied; Ayrshire Employers Mutual Insurance Association Ltd v Commissioners of Inland Revenue (1947) 27 TC 331 applied; Burrill and Another v Schrader and Another (1995) 50 WIR 193 applied.

4. The court cannot disregard the legislative intention whether or not the new procedures appear to be inadequate or unsatisfactory. If the Legislature intended for an aggrieved person in non-essential services to have recourse to the court, in relation to a matter that has been created by statute, the Legislature would have so legislated. The provisions of the Employment Act nor those of the Labour Relations Act did not infringe or encroach on the common law action for wrongful dismissal. The Legislature having created unfair dismissal has proscribed the right of access to the court in non-essential services. There is nothing inherently wrong with this and not so in this case.

   Lawrence v Lawrence [1911] 21 Man LR 145 applied; Surratt and others v Attorney General of Trinidad and Tobago (2007) 71 WIR 391 applied; Byron Smith v British Virgin Islands Electricity Corporation BVIHCVAP2008/0010 (delivered 12th January 2009, unreported) applied; Magor and St. Mellons Rural District Council v Newport Corporation (1952) AC 189 applied.

## JUDGMENT

### Introduction

[1] BLENMAN JA: This is an appeal against the judgment of the learned acting judge, Jean Dyer in which she held that Ms. Indra Williams' ("Ms. Williams") claim for unfair dismissal, against her former employer Casepak Company (Grenada) Limited ("Casepak"), was unsustainable as a matter of law and therefore struck it out.

[2] Ms. Williams is aggrieved by the decision of the learned judge and has therefore

appealed. Casepak resists her appeal and contends that the judge did not err in striking out Ms. Williams' claim for unfair dismissal.

[3] I will now briefly address the background in order to provide the requisite context.

Background

[4] The background is taken from the summary that was quite succinctly and helpfully provided by the learned judge.

[5] Ms. Williams was employed by Casepak for approximately 25 years, in the non-essential services. At the time of her dismissal she was a member of the Grenada Technical and Allied Workers Union ("GTAWU"). It seems as though she had joined the GTAWU because she was unhappy with Casepak's decision to reschedule her to do shift work. Ms. Williams, thereafter, requested that GTAWU negotiate on her behalf, which it did. However, the negotiations were unsuccessful and Ms. Williams was put on shift work. Apparently, she was presented with a confidential document and was requested to sign it by a given deadline. Ms. Williams did not sign the document within the stipulated time. Instead, she sought the advice of the GTAWU on the matter and the union intervened on her behalf, albeit unsuccessfully. The relationship between Ms. Williams and Casepak appeared to have become strained, and subsequently Casepak issued her with various letters complaining about her performance. The strained relationship culminated with Casepak issuing her with a letter of dismissal and paying her only for the days that she had actually worked.

[6] Ms. Williams was dissatisfied with the state of affairs and complained to the Labour Commissioner who, after having heard both parties, recommended that Casepak compensate her by way of severance payment. Casepak rejected the recommendation and did not pay Ms. Williams. Thereafter, the Labour Commissioner referred the dispute to the Minister of Labour. It seems as though the Minister proposed the same resolution, which Casepak rejected. There

appears to be some controversy as to what happened next[1] but suffice it to say that the dispute between Ms. Williams and Casepak remained unresolved. Casepak seems to take the position that, in so far as it had not invited the Labour Commissioner or the Minister to make any ruling, it was entitled to disagree with the recommendations from both offices. The net result of all of this is that Ms. Williams' claim for unfair dismissal could proceed no further to arbitration since the Minister was unable to set up an Arbitration Tribunal, in the absence of any agreement by Casepak.

[7] With no resolution in sight, Ms. Williams sued Casepak in the High Court and challenged her dismissal on the grounds that it was in breach of her contract of employment and unreasonable, and that it amounted to wrongful dismissal under the common law and unfair dismissal within the meaning of section 70 of the Employment Act.[2] She sought damages on the basis of her alleged unfair dismissal and on the basis of her alleged wrongful dismissal.

[8] Casepak acknowledged service and filed an application in the High Court to dismiss Ms. Williams' claim.

[9] I turn now to the application in the court below.

The Application

[10] Casepak filed an application pursuant to Rule 9.7 of the Civil Procedure Rules 2000 ("CPR") seeking:

(a) a declaration that the High Court lacked jurisdiction to hear Ms. Williams' claim; and

(b) pursuant to rule 26.3 of CPR 2000, to have the Court strike out the

[1] Ms. Williams says that the Minister invited the parties to agree on the establishment of an Arbitration Tribunal, which she says that Casepak rejected. For its part, Casepak said that it did not reject the proposal but that it simply refused to participate in the ensuing discussion as was its right. Nothing turns on all of this, as will become apparent shortly.

[2] Cap. 89, Revised Laws of Grenada 2010.

wrongful dismissal claim on the basis that it is unmaintainable.

[11] The learned judge, having heard both applications, ruled in relation to the wrongful dismissal claim that even though the pleadings could have been drafted more elegantly, it does sufficiently assert wrongful dismissal. The judge found that the deficiency with the pleadings had more to do with the lack of particularity of the claim and ruled that the ultimate sanction of striking out that aspect of the claim was disproportionate. The learned judge granted Ms. Williams leave to amend her claim for wrongful dismissal. There is no appeal from that ruling.

[12] It is in relation to the second aspect of the judge's decision that Ms. Williams has complained, namely the court's lack of jurisdiction to hear unfair dismissal claims. In a closely reasoned judgment, the learned judge held that based on section 82 of the Employment Act, the High Court did not have jurisdiction to entertain the aspect of Ms. Williams' claim for unfair dismissal. Accordingly, the learned judge struck out Ms. Williams' claim for unfair dismissal acting pursuant to rule 9.7(6)(c) of CPR 2000, with costs to Casepak.[3] In so doing, the learned judge stated that unfair dismissal did not exist at common law but was created by statute. The learned judge also reasoned that the statute did not provide for access to the High Court in circumstances where there was a stalemate in relation to the allegation of unfair dismissal in non-essential services.

[13] As indicated earlier, Ms. Williams is aggrieved by the judge's decision and has filed several grounds of appeal which I now turn to.

Grounds of Appeal

[14] Indeed, it is against the learned judge's ruling in relation to the unfair dismissal claim that Ms. Williams has filed several grounds of appeal. With respect, the several grounds of appeal can be crystallised into one issue.

[3] The learned judge opined that there was a lacuna in the statute which probably requires the intervention of the Legislature in order for Ms. Williams to be able to bring a claim for unfair dismissal in the High Court.

Issue on the appeal

[15] The issue which arises on this appeal is whether the learned judge erred in ruling that the High Court has no jurisdiction to entertain a claim for unfair dismissal.

**Appellant's Submissions**

[16] Learned counsel, Mr. Ruggles Ferguson said that the judge was wrong to hold that the High Court lacked jurisdiction to hear Ms. Williams' claim for unfair dismissal. He accepted that unfair dismissal was created by statute, as distinct from the common law cause of action of wrongful dismissal. He argued that since Ms. Williams had a common law right of access to the court, this meant that Ms. Williams was entitled to approach the High Court in order to seek redress for her alleged unfair dismissal. He argued that it was simply unfair for Casepak to be able to refuse to participate in the resolution process before the Minister of Labour and by so doing, succeeded in frustrating the aggrieved employee. In support of his contention, he purported to rely on Carlisle Jno. Baptiste. v Island Communication Corp Ltd (Kairi FM) and Another.[4] He said that the case at bar should be distinguished from Burrill and Another v Schrader and Another.[5] Mr. Ferguson said that in Burrill the issue was whether an aggrieved person had to exhaust the remedies provided by the statute before approaching the High Court. The facts of the present case, he opined, are vastly different from those in Burrill and therefore the main principle stated in Burrill is inapplicable.

[17] Mr. Ferguson reminded the Court that Ms. Williams was employed in a non-essential service under section 82 and 83 of the Employment Act and he accepted that sections 45 and 46 of the Labour Relations Act[6] (the "LRA") should be read together with the relevant sections of the Employment Act since they govern her employment. Learned counsel, Mr. Ferguson, disagreed with the decision of the learned judge on the issue of unfair dismissal, the effect of which was that in circumstances where an aggrieved employee, who is employed in a

[4] DOMHCV2004/0119 (delivered 9th March 2012, unreported).
[5] (1995) 50 WIR 193.
[6] Cap. 157A, Revised Laws of Grenada 2010.

non-essential service and had exhausted all of the procedures provided by the statute, in the absence of clear statutory provisions which so provides, was effectively left without a remedy for the alleged unfair dismissal. Learned counsel, Mr. Ferguson, said what made matters worse, is that in the case at bar, Casepak refused to participate in the resolution process as provided by the statute and that this resulted in Ms. Williams having no legal remedy for her unfair dismissal. He said that insofar as the LRA was silent on her right to approach the court for redress for unfair dismissal, her common law right to approach the court still existed and therefore the learned judge erred in holding that the High Court has no jurisdiction to entertain the claim for unfair dismissal.

[18] Learned counsel, Mr. Ferguson, said that the common law right of access to the court could only be curtailed by an express statutory provision to that effect and that there was no statutory provision which prohibited her from doing so, even though it was statute that had created the remedy of unfair dismissal. Learned counsel, Mr. Ferguson, stated that the judge was wrong to conclude, as she did, that the fact that the claimant was "left without a remedy…was a matter for the legislature in enacting the Employment Act".[7] Mr. Ferguson reminded this Court that at common law, a person is presumed to have a right of access to the court. He referred to the well-known case of Burrill in support of his submission on that point. He said that insofar as the relevant statute seems to be silent, the court should adopt a "purposive approach to the statute" and read into the statute the right to approach the court for unfair dismissal.

[19] Next, Mr. Ferguson said that section 8(8) of the Constitution of Grenada[8] gave Ms. Williams a right of access to the court and Parliament cannot take away the right of access by implication. He therefore contended that nothing in either the Employment Act or the LRA could have taken away Ms. Williams' common law or constitutional right to access the High Court for her alleged unfair dismissal. In

[7] Indra Williams v Casepak Company (Grenada) Ltd GDAHCV2017/0463 (delivered 30th May 2018, unreported), Dyer J (Ag.) paragraph 26.
[8] Grenada Constitution Act Cap. 128A, Revised Laws of Grenada 2010.

support of his contention in relation to Ms. Williams' constitutional right, he referred to Capital Bank International Limited v Eastern Caribbean Central Bank et al[9] in which the Court of Appeal held that the fundamental right of access to the court for the determination of rights and obligations trumped the satisfactory provision of immunity. Mr. Ferguson therefore argued that where Parliament has created a right, it is to be presumed that, subject to an express indication to the contrary or to necessary implication, a person to whom the right has been conferred can go to court in order to enforce it. He also purported to rely on Surratt and others v Attorney General of Trinidad and Tobago[10] in support of his argument.

Respondent's Submissions

[20] Learned counsel, Ms. Skeeta Chaitan, submitted that the judge did not err by concluding that the High Court did not possess the jurisdiction to hear a claim for unfair dismissal. She said that the judge was correct in holding that the remedies that are available to a person, like Ms. Williams, who alleges that he or she has been unfairly dismissed, are provided for by statute. Ms. Chaitan said that Ms. Williams quite properly recognised that the difficulty she faces is what is to obtain in circumstances where there is a trade dispute in non-essential services and one party does not agree to go to arbitration, after all of the other dispute resolution mechanisms have been unsuccessful. In so doing, Ms. Chaitan said that it is incorrect to state that Casepak has refused or rejected the Minister's proposal for arbitration and she pointed out that the learned judge made no finding to that effect. She said that, in any event, nothing turns on this since the legislation clearly gave Casepak the option to participate or not, in the conciliation process of arbitration.

[21] Learned counsel, Ms. Chaitan, submitted that section 45(4) of the LRA is particularly engaged in the case at bar. It states as follows:

> "If there is a trade dispute in respect of a service other than an essential service and the parties to the dispute fail to comply with subsection (2) or

[9] Civil Appeal Nos.13 & 14 of 2002 (delivered 10th March 2003, unreported).
[10] (2007) 71 WIR 391.

> the steps taken under subsection (2) fail to resolve the dispute, the Minister may invite both parties to reach mutual agreement on the establishment of an Arbitration Tribunal, its composition and terms of reference, but no party is compelled to agree on same."

[22] Learned counsel, Ms. Chaitan, said that section 45(4) of the LRA acknowledges that a party to the dispute is entitled to refuse to go to arbitration. Ms. Chaitan posited that neither the Employment Act nor the LRA indicates what should happen if one of the parties to a trade dispute refuses to participate in an arbitration that was recommended by the Minister. She said that insofar that the legislature did not provide for that eventuality, it is clear that it was envisioned that a conciliatory approach should be adopted in circumstances of alleged unfair dismissal, as distinct from litigation. She therefore said that, contrary to what was argued on behalf of Ms. Williams, it is clear that the learned judge properly analysed the relevant legislation and concluded that the High Court did not have the jurisdiction to hear a claim for unfair dismissal. Ms. Chaitan emphasized that the judge was correct when she stated at paragraph 24 of the judgment that "section 83 of the Employment Act provides the remedies for unfair dismissal" and further when the judge said at paragraph 25 of her judgment that "the mandate is however expressly given by Parliament to the Arbitration Tribunal and not to this court to grant the relief which the claimant seeks". Ms. Chaitan said that when the judge said that "this Court finds that section 83 unequivocally discloses a legislative intention that only the Arbitration Tribunal is to have jurisdiction to award remedies for unfair dismissal", the judge was correct. However, unlike the learned judge, Ms. Chaitan stressed that there was no lacuna in the Employment Act.

[23] Ms. Chaitan said that insofar as the unfair dismissal remedy was created by statute, it is to the statute that the court should look to in order to determine which tribunal has jurisdiction to hear a claim that is based on unfair dismissal. She posited that the Legislature has clearly ousted the jurisdiction of the court to hear claims for unfair dismissal, and that the learned judge was correct to so conclude. In support of her contention, Ms. Chaitan relied on the cases Byron Smith v

British Virgin Islands Electricity Corporation,[11] Merryl Charles v Casepak Company Grenada Ltd[12] and Alicia Sardine Browne v RBTT Bank Caribbean Limited.[13] She therefore urged the court to dismiss Ms. Williams' appeal with costs.

Discussion

[24] I will first refer to the relevant statutory provisions. Section 82 of the Employment Act states:

> "(1) Within three months of the date of dismissal, an employee shall have the right to complain to the Labour Commissioner that he or she has been unfairly dismissed, whether notice has been given or not.
>
> (2) No complaint under this section may be made by an employee who has been dismissed during the probationary period or has reached the normal retirement age for employees employed in his capacity.
>
> (3) The right of an employee to make a complaint under this section shall be without prejudice to any right an employee may enjoy under a collective agreement.
>
> (4) Where the Labour Commissioner fails to settle the matter it shall be referred to the Minister who shall hear the matter as soon as it is practicable.
>
> (5) Where the Minister fails to settle the matter it may be referred to an Arbitration Tribunal." (Emphasis mine).

[25] Section 83 of Employment Act states:

> "1. If the Arbitration Tribunal determines that an employee's complaint of unfair dismissal is well founded it shall award the employee one or more of the following remedies:
>
> (a) if the employee requests, an order for reinstatement where the employee is to be treated in all respects as if he had never been dismissed;
>
> (b) an order for re-engagement whereby the employee is to be engaged in work comparable to that in which he was

[11] BVIHCVAP2008/0010 (delivered 12th January 2009, unreported).
[12] GDAHCV2012/0179 (delivered 21st September 2015, unreported).
[13] SVGHCV2006/0520 (delivered 13th July 2015, unreported).

engaged prior to his dismissal, or other reasonably suitable work, from such date and on such terms of employment as may be specified in the order agreed by the parties;

(c) an award of compensation as specified in subsection (4).

2. The Arbitration Tribunal shall, in deciding which remedy to award, first consider the possibility of making an award or reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal.

3. Where the Arbitration Tribunal determines that the employee caused or contributed to the dismissal to any extent, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.

4. An award of compensation shall be such amount as the Arbitration Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer, and the extent, if any, to which the employee caused or contributed to the dismissal.

5. The amount awarded shall not be less than two week's pay for each year of service for workers with less than two years of service and one month's pay for each year of service for workers with more than two years of service and an amount additional to such loss may be awarded where dismissal was based on any of the reasons set out in section 74(2).

6. Where the Arbitration Tribunal has made an award of reinstatement or re-engagement and this is not complied with by the employer, the employee shall be entitled to a special award of an amount equivalent to twenty-six weeks' wages, in addition to a compensatory award under subsection (4)."

[26] I turn now to indicate the relevant provisions the LRA. Section 45 of the LRA states:

"1. A trade dispute as defined by this Act, whether existing or apprehended, may be reported to the Minister by or on behalf of either of the parties to the dispute, or by the Labour Commissioner in his or her own discretion and the Minister shall thereupon take the matter into his or

her consideration and take such steps as seem to him or her expedient for promoting settlement of such dispute.

(2) Pursuant to subsection (1), a trade dispute shall be dealt with by the following manner –

(a) by referring the trade dispute to the Labour Commissioner at the conciliation meeting, and, if this fails to resolve the dispute;

(b) by referring the trade dispute to the Minister at a mediation meeting;

(c) The Labour Commissioner and the Minister shall endeavor as far as is reasonably practicable to do so, to hold the conciliation and mediation meetings respectively within thirty (30) days of referrals.

(3) If there is a trade dispute in respect of an essential service and the parties fail to comply with subsection (2), or the steps undertaken under subsection (2) fail to resolve the dispute –

(a) the Minister shall first seek the consent of the parties to the dispute for referral of the dispute, within a time specified by him, to an Arbitration Tribunal and for its composition and terms of reference; but,

(b) if the consent of the parties cannot be obtained within the time specified, the Minister may decide to establish an Arbitration Tribunal and determine its composition and terms of reference in his own discretion.

(4) If there is a trade dispute in respect of a service other than an essential service and the parties to the dispute fail to comply with subsection (2) or the steps taken under subsection (2) fail to resolve the dispute, the Minister may invite both parties to reach mutual agreement on the establishment of an Arbitration Tribunal, its composition and terms of reference, but no party is compelled to agree on same. (Emphasis mine)

(5) Once there has been mutual agreement on the establishment of an Arbitration Tribunal in respect of an industrial dispute or, failing such agreement, the Minister has decided to establish an Arbitration Tribunal as provided by this section, the provisions of section 50 of the principal Act apply as of the dispute had been referred to an Arbitration Tribunal."

[27] The appeal brings into focus what is to occur in circumstances of trade disputes in

non-essential services in relation to allegations of unfair dismissal. It is clear that the Legislature has created two different and distinct categories of employees and has created different rights in relation to them. They are namely: essential services and non-essential services. Ms. Williams is employed in the non-essential services. There is common ground that there is a trade dispute between the parties. It is also not in dispute that Casepak has not indicated its willingness to participate in any dispute resolution beyond the level of the Minister, in relation to Ms. Williams' allegation of unfair dismissal.

[28] Unfair dismissal is entirely a creation of statute, as distinct from the common law cause of action of wrongful dismissal. It is of note that the common law cause of action of wrongful dismissal co-exists with the statutory creation of unfair dismissal. In this regard it is noteworthy that Ms. Williams' claim for wrongful dismissal continues.

[29] The remedies for unfair dismissal are provided for in section 83 of the Employment Act.

[30] At the crux of this appeal, is the Court's determination of the meaning and effect of section 45(4) of the LRA. This section must be read together with section 82 of the Employment Act. By way of reminder, section 45(4) states as follows:

> "If there is a trade dispute in respect of a service other than an essential service and the parties to the dispute fail to comply with subsection 2 fail to resolve the dispute, the Minister may invite both parties to reach mutual agreement on the establishment of an Arbitration Tribunal, its composition and terms of reference, but no party is compelled to agree on same." (Emphasis mine).

[31] It is clear that if there is a trade dispute in relation to a non-essential service, it may be referred to the Arbitration Tribunal only if the parties agree. As indicated above Casepak for all intents and purposes has not agreed to go to arbitration and the Minister was therefore prevented from so directing.

[32] There is common ground that neither the Employment Act nor the LRA indicates what should happen in circumstances where there is a trade dispute in relation to a non-essential service and a party to the dispute refuses to participate in an arbitration, as recommended by the Minister. In the case at bar, it is clear that the remedies that were provided by the Legislature have been exhausted. In relation to the unfair dismissal however, as stated earlier, learned counsel Mr. Ferguson invited this Court to read into the statute the right of an employee to file a claim in the High Court for unfair dismissal, if the process of conciliation fails to yield any result and the employer refuses to participate in the further process of the establishment of an Arbitration Tribunal.

[33] I have no doubt that the legislative scheme of the LRA and the Employment Act must be read together in order to determine whether there is any basis for the court reading into the statute the right to approach the High Court, in circumstances of non-essential services and where the dispute resolution mechanism of conciliation has been exhausted. The question therefore which has to be answered is whether, with Ms. Williams having exhausted the procedure that was provided by the statute, it is open to this Court to seize jurisdiction, in the absence of any statutory provision which provides for access to the court? Could it be said that the learned judge erred in refusing to so hold?

[34] It is of note that in Burrill, the court was faced with determining the issue of whether an aggrieved person had to exhaust the procedures of conciliation provided by the statute before moving the court on a claim for wrongful dismissal. In answering the above question, the court made certain statements. I fail to see how Ms. Williams can properly rely on the decision of Burrill in an attempt to bolster her case. In Burrill, the statute did not determine whether an aggrieved person could have brought a claim in the High Court for unfair dismissal. The issue before that court was whether or not the procedures of conciliation that were established in the statute to prosecute a claim for wrongful dismissal had to be exhausted before bringing a claim in court. The Court of Appeal held that it did

not. Shortly, I will treat with Burrill in more detail, but suffice it to say, in Burrill the statute dealt with wrongful dismissal and clearly provided for access to the court in contradistinction to the case at bar.[14]

[35] In relation to the court, the Constitution of Grenada being the supreme law of the land, has conferred adjudicative functions on the court. This must be read together with the West Indies Associated States Supreme Court (Grenada) Act[15] and the West Indies Associated States Supreme Court Order 1967 which stipulate the jurisdiction of the court, such being well-known and requiring no recitation. It is simply no part of the court's function to legislate or to attempt to do what learned counsel, Mr. Ferguson, has quite forcefully invited the court to do, namely to read into the legislation the right of an aggrieved employee in a non-essential service, in circumstances of unfair dismissal, to sue in the High Court, if all efforts at reconciliation fails. The Legislature, in its wisdom, has decided not to provide for access to the court in circumstances where it has created a statutory right, it is simply not open to the court to so provide, bearing in mind that unfair dismissal is exclusively a creature of statute.

[36] In the Commonwealth Caribbean, we are guided by constitutional supremacy and not supremacy of the court or the Legislature. In the same way as the Court guards its jurisdiction jealously, so too it must be mindful and respectful of the jurisdiction of the Legislature. Judicial overreaching in the form of judicial interpretation should not be encouraged and should be frowned upon. There is a strong stream of jurisprudence to this effect which do not need to be stated. There are very helpful pronouncements in Lawrence v Lawrence,[16] in which it was stated as follows:

> "I think it extremely probable that if the attention of parliament had been drawn to the possibility of a case like the present arising, it would have

[14] In Burrill, Sir Vincent Floissac writing on behalf of the Court of Appeal held that the appellants' exhaustion of the procedure for conciliation prescribed by the Labour Code was not a prerequisite to the exercise of the appellants' common law rights of access to the High Court for breaches of their common-law rights.
[15] Cap. 336, Revised Laws of Grenada 2010.
[16] [1911] 21 Man LR145.

> worded the section so as to cover it but that probability does not justify a court in extending the statute to a case that the legislature has left unprovided for. Even if quite satisfied that the omission on the part of Parliament was a mere oversight, I will not supply the defect ….. Parliament had in mind the case of a man dying in Canada and has legislated so as to make a valid patent issued in his name after death but has made no provision with respect to a man who died out of Canada, and I am powerless to supply the omission. Even it appears that there are gaps in the legislative powers which it might be thought that the legislature would have done well to include it is no part of the judicial function to fill gaps disclosed in the legislation. See also Marshall v Wattron [1949] 2 KB 481 at page 498 – 499."

I am guided by and apply the above helpful pronouncements.

[37] For reasons which will become obvious shortly, I am not persuaded that there are gaps in the legislation as urged on this Court. The wording of the statute clearly indicates that the Legislature intended to have an employee in a non-essential service who alleges unfair dismissal resolve his or her dispute, in a different manner, namely by way of arbitration, if there is joint agreement between the parties. The situation is worse where there is no indication that the Legislature intended for an aggrieved person to have recourse to the court. It simply is not open to any court to rewrite legislation in an effort to provide recourse to its process. The enunciations of Lord Simmonds in Ayrshire Employers Mutual Insurance Association Ltd. v Commissioners of Inland Revenue[17] are as relevant now as it was many years ago. His Lordship expressed himself thus:

> "It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet, I can come to no other conclusion that the language of the section fails to achieve its apparent purpose, and I must decline to insert words or phrases which might succeed where the draftsman failed".

[38] Lord Simonds in Magor and St. Mellons Rural District Council v Newport Corporation[18] stated that:

> "The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power

[17] (1947) 27 TC 331.
[18] (1952) 2 All ER 839; [1952] A.C. 189

> and duty of the court to travel outside them on a voyage of discovery are strictly limited…If a gap is disclosed, the remedy lies in an amending Act."

[39] Judicial restraint requires courts to desist from legislating from the bench if there is a void in the statute. I do not share the view that the court should step in to fill any perceived lacuna in legislation. There is a clear separation of powers as enshrined in the Constitution between each of the three arms of the State, namely: The Legislature, the Executive and the court. Each arm of the State is given separate and distinct roles.

[40] It cannot be said enough that the duty to enact legislation devolves upon the Legislature, and not on the court. The interpretation of statute is within the special province and exclusive control of the Judicature. A close reading of section 45(4) of the LRA reveals that the Legislature intended to give exclusive jurisdiction to the Arbitration Tribunal and deliberately made no provision for access to the High Court, even in circumstances where there is a failure to arbitrate in relation to non-essential services.

[41] I am fortified in the above view that the Court should not intervene and adopt the observations of the learned author, Dr. Francis Alexis, when he opined that:

> "The doctrine of separation of powers is that, to varying degrees, the three kinds of powers of the state – legislative, executive and judicial – should be separately exercised by three organs of the state; respectively the Legislature or Parliament, the Executive or government… and the Judiciary or the Courts.[19]

[42] Our courts are not slow to strike down Acts of Parliament which encroach on the jurisdiction and powers of the Court and so too must courts be very careful not to inadvertently overreach into the domain of the Legislature in the name of judicial activism. To put it another way, it is no part of the function of the court to rewrite legislation or to amend legislation in order to provide for procedural mechanisms and remedies that were never in the contemplation of the Legislature. In

[19] Dr. Francis Alexis, Changing Caribbean Constitutions (Second Edition, Carib Research & Publication Inc. 1987) 17:102.

circumstances such as the present, where a party is engaged in non-essential services and there is a trade dispute and the other party declines the recommendation of the Minister to go to arbitration, if the Legislature wished for such a litigant to have recourse to the courts of law, based on the allegation of unfair dismissal, it would have clearly provided for this as has occurred in other Commonwealth Caribbean statutes that treat with unfair dismissal allegations.

[43] I cannot see any justification for criticizing the learned judge's judgment. In my view, the following observation of the learned judge cannot properly be challenged:

> "The gravamen of Mr. Ferguson's submission was that the Claimant in the circumstances of this case should not be left without a remedy. In my view, this was a matter for the legislature in enacting the Employment Act."[20]

[44] I am convinced of the correctness of the judge's decision, particularly in view of the fact that, as acknowledged by both sides, the Legislature has made separate provision as to what is to occur where an employee in an essential service complains about unfair dismissal and has engaged the procedure that was established. In these circumstances, the Minister is clothed with the power to refer the trade dispute to an Arbitration Tribunal for resolution and this is so whether or not the parties are in agreement. In fact, the difference between the essential services dispute and the non-essential services dispute lies in the fact that the Legislature does not give the option to either of the parties to refuse to participate in the process in the former. It is noteworthy that, in relation to the essential services, the wording of the statute clearly indicates that the Minister is clothed with the power to refer the trade dispute to the Arbitration Tribunal and this is so irrespective of whether the parties agree. There are obvious policy reasons behind the different and separate approaches that have been stipulated by the Legislature for disputes in non-essential and essential services. These policy decisions cannot be questioned by the court except in very limited circumstances

[20] At para. 26 of the Justice Dyer's [Ag.] judgment.

which do not obtain here. However, if policy, as enacted by statute, infringe upon established constitutional rights or common law rights, the courts will readily declare them unlawful.[21]

[45] There is no doubt that where a right, not existing at common law, is created by a statute which at the same time gives a special and particular remedy for enforcing it, it must be followed, and it is not competent for a party to pursue another course in an effort to resolve it. In Barraclough v Brown and others,[22] Lord Watson stated at page 622 that:

> "The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters."

[46] In support of the above view, in Barraclough Lord Herschell, Lord Shand and Lord Davey expressed similar views and accepted the law as stated in Wilkinson v Barking Corporation.[23] Their Lordships expressed themselves at page 724 thus:

> "It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others. As the House of Lords ruled in Pasmore v. Oswaldtwistle U.D.C. (1) (per Lord Halsbury): 'The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.'"

[47] By way of emphasis, the difficulty that Ms. Williams faces is that unfair dismissal is entirely a creature of statute, as distinct from the common law. Therefore, it is simply not open to her to assert that her common law right of access to the court

[21] Hinds v R [1977] AC 195.
[22] [1897] AC 615.
[23] (1948) 1 KB 721.

has been abrogated or infringed in any way, since the Legislature has clearly ousted the jurisdiction of the court in relation to unfair dismissal. In this regard, I find the pronouncements of Baroness Hale in Surratt very helpful and can do no more than to adopt them. Baroness Hale at paragraph 42 stated:

> "On the other hand, the demands upon the legal system are increasing all the time and cannot all be met by judges of the High Court. It is not just that the volume of traditional areas of work has grown. No legal system can stay set in stone as it always has been. It has to move and develop with the times. The complexity of the modern world has seen the emergence of new problems which need new solutions. In the United Kingdom, for example, specialist jurisdictions have been set up to cater, not only for the myriad of disputes which may arise between citizen and state, but also for some disputes between private persons. The most important examples are disputes between employer and employee and between landlord and tenant, where a different way of doing justice is thought necessary because of the perceived imbalance in power and resources between the parties. It is common for such jurisdictions to include people who are not lawyers but have relevant experience or expertise or who are in some sense representative of each 'side' in the dispute".

[48] In addition and equally relevant are the pronouncements that were made by Floissac CJ in Burrill that, an employee also has an ancillary common law right of access to the courts for the purpose of ventilating and enforcing his common law and statutory rights. His Lordship stated that where statutes which limit or extend common-law are clear, there is no reason why such statutes should be construed differently from other statutes. "Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law, or to alter completely the character of the principle of law contained in statutes which they merely amend".[24]

[49] The above enunciations remain good law today. Burrill however did not decide the point whether it was open to an aggrieved person to seek redress in the High Court for unfair dismissal, since that was not a live matter in that case.

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[24] Halsbury's Laws of England (4th edn, 2006) Vol. 44, para. 904.

[50] In the case at bar, the Legislature has created a statutory mechanism but has not provided a mechanism for an aggrieved person, who is employed in a non-essential service and who claims to have been unfairly dismissed, to have recourse to the court if the effort at conciliation fails or the employer refuses or declines the Minister's invitation to participate in the arbitration that has been recommended. It is worthy of emphasis that, in any event, Burrill was a case of wrongful dismissal and not unfair dismissal and more particularly in the case at bar, the Legislature has specifically provided for unfair dismissal and how it is to be treated and dealt with in sections 82 and 83 of the Employment Act.

[51] It is the law that a statute or statutory provision should not be given an interpretation, the effect of which is that the statutory provision effectively abolishes or restricts the existing common law right or remedy, unless the language and other components of the statutory context unequivocally or by legislative intention, establishes or restricts that right. It is equally settled law that statutes which limit common law rights must be expressed clearly and unambiguously, but if the language is clear, there is no reason why those statutes should be construed differently from other statutes. Except in so far as they clearly and unambiguously intended to do so, statutes should not be construed so as to make any alterations to the common law or to change any established principle of law. In this regard, the pronouncements of the Board in Suratt at paragraph 42 acknowledged the principle that it is open to the Legislature to create bodies to hear specific types of matters/disputes.

[52] Therefore, it must be recognised that in the area of industrial relations and industrial law, where the matter is one that is specifically created by statute, it is for the Legislature to determine whether the method by which the trade dispute should be resolved is by way of conciliation, or whether it should be by way of the formal and usual access to the court. I accept Ms. Chaitan's argument that industrial disputes in non-essential services are meant generally to be resolved by way of reconciliation, this is the mechanism that is provided for by the legislation.

However, if the Legislature intended for an aggrieved person to have recourse to the court, in relation to a matter that has been created by statute, the Legislature would have so legislated. This view is made stronger by the fact that the Legislature did not infringe or encroach on the common law action for wrongful dismissal with its concomitant rights of access to the court, the latter to which Ms. Williams has availed herself.

[53] For completeness, I will briefly turn to some of the other cases that were cited. I have no doubt that Remy J correctly decided in Merryl Charles v Casepak that the ability to access the courts under the LRA is proscribed by the statute. Section 82 of the Act deals specifically with complaints of unfair dismissal and sets out the procedure for making such a complaint. Section 89 however deals with the complaints procedures where there is an alleged violation of a provision of the Act. Section 89(2) restricts access to the court for appropriate relief to instances where not otherwise specified. Accordingly, a person seeking redress for unfair dismissal cannot avail himself of section 89(2), as section 82 specifically provides for the procedure that must be followed for complaints of unfair dismissal. I am in total agreement with Remy J.

[54] I now look at Byron Smith v British Virgin Islands Electricity Corporation, the facts of which are not relevant for the purpose of this appeal. In that case, the Court of Appeal held that under the statute, an employee who alleges that he has been unfairly dismissed is limited to pursuing the remedies set out in the Labour Code.[25] In that case, it was also held that under the Labour Code of the British Virgin Islands, the only remedy available to an employee who had been unfairly dismissed was conciliation. Byron Smith is in accordance with a strong stream of jurisprudence and remains good law. [26]

[25] Labour Code Ordinance Laws of the Virgin Islands 1991.
[26] Subsequent to the decision of the Court of Appeal, Parliament in the Virgin Islands amended the Labour Code so as to provide for an aggrieved person to have recourse to the Court for unfair dismissal. See section 30 of the Labour Code 2010 of the British Virgin Islands.

[55] Based on everything that has been stated, it is apparent that the Legislature in Grenada has proscribed the rights of employees in non-essential services, to prosecute claims for unfair dismissal. There is nothing inherently wrong with this. In Surratt, the Board recognised the right of the Legislature to create new rights and to restrict persons, who are clothed with those rights, access to the courts. At paragraphs 39 and 50 of Surratt, the Board stated that:

> "The decision could have been taken to increase the jurisdiction of the High Court to deal with these new claims, but for very understandable and sensible reasons it was thought that a new and specialist body would be preferable.…This is definitely not 'part of the jurisdiction that is characteristic of a Supreme Court'. The subject matter, as already mentioned, was not traditionally the subject of adjudication at all…"

[56] In Byron Smith at paragraph 23 of the judgment, the Court of Appeal stated that, "[t]he court cannot disregard the legislative intention whether or not the new procedures appear to be inadequate or unsatisfactory". This pronouncement was a correct statement of the law then and it remains so now. It is trite law that where Parliament has enacted a statutory provision that should govern a particular situation and is applicable to the situation in issue, that statutory provision takes precedence over general provisions.

[57] Turning now in more detail to Ms. Williams' contention that the Legislature has eroded her common law right of access to the court by failing to legislate for the claim for unfair dismissal to be resolved in a court of law. It is settled law that the common law right of access to the court cannot be infringed or abrogated by the Legislature except by clear words to that effect. The principle is so well-known that it requires no citation of authority. However, this right of access relates to either common law rights or constitutional rights. The insurmountable difficulty that Ms. Williams has is that unfair dismissal, is not a common law right but rather, as properly recognised by the parties, is entirely a creature of statute. There is absolutely no basis for reading any common-law right of access into the unfair dismissal provisions of the statute. It cannot be said enough that, had the Legislature desired to provide for resolution of the unfair dismissal claim in the

court of law it simply would have done so. I accept Ms. Chaitan's submission that the Legislature in its wisdom determined that the resolution of unfair dismissal in the non-essential services in Grenada, should be by way of conciliation. It defies logic for the Legislature to have to provide the parties to a dispute, with the option of deciding whether or not to agree to participate in the arbitration process before an Arbitration Tribunal and thereafter allow a party who is aggrieved and affected by the non-participation of the other party to institute a claim in the High Court on the basis of the alleged unfair dismissal. I see no prospect of Ms. Williams persuading this Court that the learned judge committed an error of principle by so concluding.

[58] It is evident that in relation to the non-essential services, the Legislature in its wisdom has created the statutory right of unfair dismissal but has equally decided that if there is any difficulty in regard to that matter, the Arbitration Tribunal is the body to resolve the dispute and not the court, in so far as section 83 of the Act provides remedies for unfair dismissal. The learned judge therefore correctly concluded that section 83 discloses the legislative intention that only the Arbitration Tribunal is to have jurisdiction to provide remedies for unfair dismissal. By way of emphasis, neither the Employment Act nor section 45(4) of the LRA confer upon the court, jurisdiction to hear and determine unfair dismissal claims to grant relief in relation thereto.

Constitutional Point

[59] For the sake of completeness, I will now address Ms. Williams' complaint about the alleged breach of section 8(8) of the Constitution of Grenada, by the Legislature having failed to provide for recourse to the court. Quite apart from the fact that any alleged breach of section 8(8) was not pleaded nor raised in the court below, I fail to see on what basis Ms. Williams could properly contend that her right under section 8(8) of the Constitution of Grenada has been infringed. Section 8(8) addresses the right to a fair trial and is not a provision which clothes the court with jurisdiction to hear matters. In effect, this is a short point. Section 8(8) of the

Constitution of Grenada has no relevance to the appeal at bar since it has nothing to do with the jurisdiction of the court, but rather it addresses the right to a fair trial in circumstances where the jurisdiction to hear the matter exists.

[60] For the above reasons, I have no doubt that it was clearly open to the learned judge to strike out Ms. Williams' claim for unfair dismissal and her decision cannot properly be impugned. Accordingly, the decision to the learned judge to strike out Ms. Williams' claim, on the basis that it was unsustainable, is affirmed.

[61] It may well be that the Parliament of Grenada may be of the view that there is need to review the legislative scheme of the Employment Act and the Labour Relations Act in order to give them more "teeth" in relation to trade disputes in non-essential services. This is a matter entirely for Parliament's consideration.

Costs

[62] Casepak Company (Grenada) Ltd having succeeded in defending the appeal, is entitled to costs of the appeal against Ms. Williams, to be assessed if not agreed within 21 days of this judgment.

Conclusion

[63] For the above reasons, Ms. Williams' appeal against the decision of the learned acting Justice Dyer is dismissed. Ms. Williams shall pay Casepak Company (Grenada) Ltd. the costs of the appeal which are to be assessed if not agreed within 21 days.

[64] I gratefully acknowledge the assistance of learned counsel.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar