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COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
IndTribApp. No. 40 of 2018

B E T W E E N

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LTD
Appellant

AND

BYRON MILLER
Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Jones, JA

APPEARANCES: **Mr. Ferron Bethel with Mrs. Lakeisha Hanna, Counsel for the Appellant**

Mr. Rawson McDonald, Counsel for the Respondent

DATES: **18, 26 July 2018; 27 June 2019**

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Industrial Tribunal Appeal – Unfair dismissal – Wrongful dismissal - Trade Dispute – Jurisdiction of the Industrial Tribunal to amend an Originating Application – Whether nature of dispute may be amended following Minister's referral to the Tribunal without being again reported to the Minister - Effect of Minister's Certificate of Referral - Industrial Relations Act – Industrial Relations Act (Tribunal Procedure) Rules

The respondent commenced his employment with the appellant Bank on 23 January 1989 and on 26 May 2011 the respondent's employment with the appellant was terminated summarily; at that time he was serving in the position of District Manager and had been in the Bank's employ for a period of 22 years 4 months. The Bank indicated to the respondent that he was dismissed following the conclusion of an investigation into an unauthorized overdraft which the respondent facilitated. The Bank found that the respondent was in breach of its Code of Conduct and also in breach of the Delegation Authority Policy.

Aggrieved by the Bank's decision to terminate his employment the respondent, in August 2011, filed a trade dispute with the Ministry of Labour. Conciliation efforts were unsuccessful and as such the Director of Labour reported the trade dispute to the Minister on 9 November 2011 with a request that the dispute be referred to the Industrial Tribunal. On the same date the Minister referred the trade dispute to the Industrial Tribunal for settlement.

In accordance with the Industrial Relations Act (Tribunal Procedure) Rules (IRA Rules) the respondent completed an Originating Application which indicated that the ground of his application was "Wrongful Dismissal". On the first day of the hearing, Counsel for the respondent applied to amend the Originating Application to add an alternative claim that the respondent had been unfairly dismissed. The learned Vice-President acceded to the respondent's application to amend and the hearing proceeded to its conclusion on the basis of the respondent's alternative claims that he was wrongfully or unfairly dismissed.

On 19 January 2018 the Tribunal found that the respondent had been unfairly dismissed and awarded him damages. The appellant now appeals against the Tribunal's judgment seeking an Order from this Court that the judgement be set aside in its entirety. It further requests that the proceedings in the Industrial Tribunal be dismissed on the basis that the respondent was not unfairly dismissed.

Held: appeal allowed. The Tribunal's decision, including the award, is set aside in its entirety; the matter is remitted to the Tribunal for a new hearing of the Originating Application (as originally filed in 2014).

The appellant challenges the jurisdiction of the Tribunal to amend the Original Application. Counsel for the respondent submits that it was not open to the appellant on the appeal to challenge the existence of the Tribunal's jurisdiction to amend the Originating Application since the appellant had not formally raised the objection to the Tribunal's jurisdiction before the amendment order was made. Counsel for the appellant submits that although no mention is made in the Vice-President's Judgment of his having raised a formal objection before the Tribunal, he had in fact formally objected to the amendment of the Originating Application being made at the commencement of the hearing. By virtue of section 64(1)(a) of the Industrial Relations Act this Court is precluded from entertaining an appeal which seeks to challenge the jurisdiction of the Tribunal to make an order or award on the ground that the Tribunal had "no jurisdiction in the matter" unless it is shown that an objection to the jurisdiction had been formally taken before the Tribunal before the order or award was made. Having regard to this section the Court is satisfied that there was no basis on which the Court could properly entertain the appellant's ground that the Tribunal had no jurisdiction to amend the Originating Application.

Counsel for the appellant also seeks, in the alternative, to challenge the Tribunal's jurisdiction to amend the Originating Application on the further basis that the Tribunal acted in excess of its jurisdiction when it failed to follow the procedural mechanisms laid down by rule 9 of the IRA

Rules before ordering the amendment. Counsel further complained that the proper procedures were not followed in that the appellant was not given advance notice of the respondent's amendment application, nor afforded the opportunity to submit written representations or to advance oral arguments before the Tribunal before the substantive hearing of the Originating Application. Counsel for the respondent, while accepting that the rules do not specifically permit amendment of an Originating Application, relied on a previous decision of this Court (differently constituted) where the Tribunal's ability to permit the respondent in that case to amend her Originating Application to include an alternative claim for unfair dismissal, was not questioned by the Court. Given the clear wording of rule 9 of the IRA Rules, the Tribunal acted in excess of its authority in determining the respondent's application which effectively raised an issue relating to the respondent's entitlement to bring an alternative claim for unfair dismissal. Implicit in the rule 9 procedure are fairness and basic natural justice which dictates that any party likely to be affected by the determination of such an issue must first be informed of the issue to be determined, given the opportunity to make written representations and given the opportunity to advance oral arguments before the Tribunal. The Court is of the view that as the Tribunal determined the issue of the respondent's entitlement to institute an alternative claim for unfair dismissal at the substantive hearing itself and thereupon proceeded to hear the matter and to make findings on the unfair dismissal claim without adjourning to give the appellant an opportunity to amend its Defence or to call evidence on the issue, it exceeded its jurisdiction under rule 9 and erred in law.

The Tribunal's errors were such that the Court was satisfied that a substantial miscarriage of justice occurred in the court below.

Corrine Higgs v. Kerzner Island Hotel Company IndTribApp. No. 294 of 2014 mentioned
Island Hotel Company Limited v. John Fox IndTribApp. No. 54 of 2017 followed
Selkent Bus Co. Ltd v Moore [1996] I.C.R. 836 mentioned
St. Andrew's School Limited v Margo Albury IndTribApp. No. 75 of 2013 mentioned

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JUDGMENT

Judgment delivered by the Honourable Madam Justice Crane-Scott, JA:

Introduction

1. The appellant (hereinafter sometimes called "the Bank") appeals from the written Judgment of Vice-President Keith Thompson (as he then was) given on 19 January 2018 in the Industrial Tribunal whereby he found that the respondent had been unfairly dismissed and awarded him damages in the total sum of $154,521.86, together with interest at 10%.

2. The Bank seeks an order setting aside the Judgment in its entirety and further requests that the proceedings be dismissed as the respondent's dismissal was not unfair.

3. Some background facts will be necessary to understand the various issues which arose on the appeal.

Factual Background

4. The respondent commenced his employment with the Bank on 23 January, 1989 in the capacity as a Customer Service Representative/Teller. In time, he moved up the ranks and in 2008 he was appointed Senior Branch Manager with responsibility for the Bank's Shirley Street, Bay Street, Sandy Port and Governor's Harbour Branches where he managed some 69 employees. On 1 June 2010, he was promoted to the post of District Manager (Retail, Wealth & Small Business) (FC9 level). Along with another District Manager, Ms. Gizelle Farrington, he became responsible for the management of the Bank's thirteen (13) branches with a staff compliment of 428 employees.

5. As District Manager, the respondent reported directly to the Managing Director of the Bank's Retail, Wealth and Small Business Division, Mr. Rolf Phillips. On 7 October 2010, the respondent was issued with a Letter of Accountability and an attached Delegation Letter (Appendices 2 and 2A) which, *inter alia,* identified the discretionary limits and authorities delegated to him in accordance with the Bank's Governance and Internal Control Framework.

6. The respondent's Letter of Accountability stated:

> **"As a member of the staff of First Caribbean International Bank, authority has been delegated to you, in accordance with the bank's Governance and Internal Control framework. It is vital that discretionary authorities are executed with due diligence, integrity and full awareness of the inherent operational risks, as breaches can have significant financial and reputational impact to our business.**
>
> **You are therefore responsible for ensuring that discretionary authorities and duties for the role that you currently hold and any other duties that you may be required to undertake from time to time are performed in full compliance with the bank's mandated procedures. These procedures are documented in various manuals and guidelines. Additionally, compliance must be within the norms for industry best practice and as mandated by law within respective jurisdictions.**

Please ensure that you familiarize yourself on a continuous basis with the policies and appropriate guidelines, remaining cognizant of amendments, updated versions or when changes are advised through other correspondence.

At all times, you are required to conduct yourself and discharge your duties in accordance with FirstCaribbean Integrity Policies (Fraud Policy, Whistle Blower Policy, Code of Discipline and Code of Conduct.)"

7. The annexed Delegation Letter (Appendices 2 and 2A) then set out in great detail, the respondent's Responsibility/Authority and his transactional limits and authorizations in various categories of the Bank's operations, including Credit Risk Management, Financial Cost Management, General Operational Duties, Governance, Customer Management, Human Resource Management and Information Systems.

8. The respondent acknowledged receipt of his Letter of Accountability and Delegation Letter on the same date they were issued and signed the following Acknowledgment and Agreement:

"I certify that I have read and understand the above instructions and will comply with the bank's policies in both letter and spirit. I am aware of my discretionary limits and authorities including access privileges to the bank's information technology network and further understand that breach of any authority may be subject to appropriate disciplinary measures including dismissal.

I acknowledge receipt of a copy of this letter outlining my discretionary authorities."

9. In accordance with its Code of Conduct, the Bank commenced an investigation into a number of transactions negotiated at the Shirley Street Branch which fell under the respondent's responsibility as District Manager. He was invited to explain a particular transaction he had approved for an existing customer who had approached him for short term financing to facilitate paying the costs associated with clearing a number of imported vehicles.

10. The respondent participated in the investigation, attended a meeting with his supervisor, Mr. Rolf Phillips, and submitted a written Statement dated 9 November 2010 outlining the actions taken in relation to the transaction. In his Statement, the respondent took the opportunity to inform the Bank as follows:

> **"There are no other transactions of this nature in the General Suspense Account, outstanding or since liquidated. This is not the first transaction of this nature that I have accepted and/or facilitated for....or any other FCIB customer. I authorized a similar transaction for ...X... an offshore bank with headquarters in Switzerland..."**

11. On 17 December 2010, the Bank issued the respondent with a letter which on its face purported to be a Final Warning Letter. The letter expressed the Bank's dissatisfaction regarding the respondent's alleged use of suspense accounts and his use of his discretionary authorities. The letter further indicated that whilst there was no loss to the Bank, the breaches were deemed very serious and were said to have exposed the Bank to significant risk which could have been avoided. The letter also informed the respondent that as a result of the matter, his year-end bonus was reduced by 50%. Finally, the letter concluded with the following caution:

> **"Also, be mindful that continued inappropriate use of delegated authorities could lead to dismissal."**

12. In or about the month of May 2011, the respondent was once again informed that the Bank was conducting an investigation in relation to an overdraft facility which he had authorized for a regional gospel awards program. He prepared a written Statement dated 18 May 2011 outlining the steps taken in respect of the matter and attended a meeting which had been scheduled with the Managing Director, Mr. Rolf Phillips, the same day.

13. On 19 May 2011 the Bank, acting by its Managing Director, issued the respondent with a disciplinary letter which alleged that during the course of an investigation, a breach of the Bank's Code of Conduct and Code of Discipline had been discovered and in consequence, he was suspended with full pay and benefits effective immediately until further notice and until the completion of the Bank's investigations.

14. On 26 May 2011 the respondent was dismissed from his position as District Manager. At the date of his dismissal, he had been in the Bank's employ for a period of 22 years 4 months. His termination letter read as follows:

> **"Further to your Final Warning letter dated December 17, 2010, we write to advise that we have concluded our investigations into the matter relative to the unauthorized overdraft which you facilitated. We have found you to be in breach, of section 4.1 of the Code of Conduct- Customer service wherein you did not adhere to operational and credit procedures, and in breach of the Delegation of Authority Policy with respect to your inappropriate use of discretionary**

authorities and not acting within your delegated authorities when you approved this transaction.

These breaches are deemed to be very serious constituting gross misconduct and exposed the Bank to what we deem to be serious risk which could have been avoided. When this issue is considered in concert with the issues raised in your Final Warning letter; we have no choice but to inform you that as a direct result of your actions, and in accordance with our Code of Discipline, your services have been summarily terminated effective immediately.

Please make immediate arrangements to return any property of the Bank that may be in your possession to Mr. Richard Phillips, and we will make arrangements to have any vacation monies owed to you by the Bank paid within the month.

Please sign both copies of this letter, returning one to me and retaining one for your personal files." [Emphasis added]

15. Aggrieved by his dismissal, the respondent reported the dispute to the Minister of Labour on 17 August 2011, effectively invoking the Trade Dispute Procedures (Part VI) of the Industrial Relations Act, Ch. 321("the IRA").

16. Conciliation efforts having been unsuccessful, the Director of Labour reported the ongoing "trade dispute" between the respondent and the Bank to the Minister on 9 November 2011 with a request that the dispute be referred to the Industrial Tribunal.

17. By his Certificate of Referral issued on 9 November 2011, the Honourable Minister referred the "trade dispute" to the Industrial Tribunal for settlement. The Minister's Certificate of Referral stated as follows:

"PURSUANT TO THE PROVISIONS OF SECTION 72 AND 73 OF THE INDUSTRIAL RELATIONS ACT, CHAPTER 321 OF THE STATUTE LAW OF THE BAHAMAS, I HAVE TODAY 9th November, 2011 REFERRED THE TRADE DISPUTE BETWEEN Byron Miller *(represented by Rawson McDonald & Company)* AND First Caribbean International Bank (Bahamas) Limited *(represented by Harry B. Sands, Lobosky & Company)* TO THE INDUSTRIAL TRIBUNAL FOR SETTLEMENT." [Emphasis added]

18. Following the Minister's referral and in accordance with rule 3(1) of the Industrial Relations (Tribunal Procedure) Rules, 2010, ("the IRA Rules, 2010") the respondent (represented by Rawson McDonald & Co) completed an Originating Application in Form A which was duly filed with the Secretary of the Tribunal in January 2012. At item 11 of his Originating Application the respondent explained the ground of his application in the following manner:

> **"11) Please explain the grounds for your application below. It will be helpful if you can give details of the reasons for the application; you will be able to amplify them at the hearing:**
>
> **.......................WRONGFUL DISMISSAL.................."**

19. At item 12 of his Originating Application, the respondent stated that in his opinion the reason for his dismissal was as follows:

> **"12. If you wish to state what in your opinion was reason for your dismissal, please do so here..................................ALLEGED THAT THERE WAS BREACH OF DELEGATED AUTHORITY.."**

20. At item 13, the respondent signaled his preference for an award of money and indicated the specific nature of the relief he was seeking in the following terms:

> **"13. If the Tribunal decides that you were wrongly/unfairly dismissed, please state which of the following you would prefer: reinstatement; to carry on working in your old job as before; re-engagement; to start another job, new contract with your old employer; or compensation: to get an award of money. You can change your mind later. The Tribunal shall consider your preference but shall not be bound by it.**
>
> **..**
> **WAS TERMINATED WITHOUT PAYMENT OF NOTICE PAY.."**

21. Upon receipt of the Originating Application, and as required by rule 4 of the IRA Rules, 2010, the Secretary to the Tribunal forwarded to the Bank (represented by Harry B. Sands, Lobosky & Company) a Notice in Form C which (as required) notified the Bank of the Originating Application and further advised the Bank, *inter alia*, of the time limited for entering an Appearance and Defence, the consequences of failing to do so, and the right to receive a copy of the Tribunal's Decision.

22. According to the Record, the Bank entered an Appearance to the proceedings in or about March 2012 and subsequently filed its Defence to the wrongful dismissal claim on or about 20 June 2014. In due course, after Counsel for both parties had filed their respective Bundles of Documents, the matter came on for hearing before the learned Vice-President sometime in 2017.

23. It is not in dispute that on the first day of the hearing, Counsel for the respondent, Mr. McDonald applied to amend the Originating Application to add an alternative claim or "complaint" that the respondent had been unfairly dismissed. However, as will shortly appear, an issue has arisen in relation to the question whether an objection to the Tribunal's decision to entertain the application to amend had been formally made before the order for amendment was made. This issue is crucial to whether we have jurisdiction under section 64(1)(a) to entertain that portion of ground 1 relating to whether the Tribunal had jurisdiction (whether statutory or inherent) to amend an Originating Application filed following referral of a "trade dispute" by the Minister. We will return to it again shortly when we come to examine ground 1.

24. As appears from paragraph 1 of the Judgment, the learned Vice-President acceded to the respondent's application to amend the Originating Application and thereafter the hearing then proceeded to its conclusion on the basis of the respondent's alternative claims that he was wrongfully or unfairly dismissed.

25. Ultimately, between paragraphs 188 through 190 of his written Judgment, handed down on 19 January 2018, the learned Vice-President held that the respondent had been unfairly dismissed and awarded him the sum of $154,521.86 as damages, being a basic award of $101,306.76 said to have been calculated in accordance with section 46 of the Employment Act, Ch. 321A and a compensatory award of $53,215.10 pursuant to section 47. The Tribunal also awarded interest on the award at 10% pursuant to the Civil Procedure (Award of Interest) Act, 1992 from the date of the Judgment until payment.

26. Against the foregoing background, we turn to consider the appellant's various complaints about the Tribunal's Judgment.

The Appeal

27. In its Notice of Appeal Motion filed on 27 February 2018, the Bank seeks an Order from this Court setting aside the Tribunal's Judgment in its entirety. It further requests that the proceedings in the Industrial Tribunal be dismissed on the basis that the respondent was not unfairly dismissed.

28. The Notice of Appeal discloses some seven (7) grounds of appeal, many of which are extremely lengthy. In our view, reproducing them at this stage will unnecessarily add to the

length of this Judgment. We will, however, address them, as necessary, in the course of our Judgment. We start with ground 1.

Ground 1 – Tribunal had no jurisdiction to amend the Originating Application during the course of the hearing or at all

29. At ground 1 of the Notice the appellant made the following complaints:

> **"1. That the learned Vice-President erred in law *and* acted in excess of his jurisdiction and/or powers in acceding to the Respondent's application to amend its Originating Application to include a claim for "unfair dismissal" in the alternative. The Tribunal is only empowered to determine the "dispute" referred by the Minister, pursuant to sections 55A and 73 of the Industrial Relations Act (as amended). The dispute referred by the Minister was for as *(sic)* dispute for "wrongful dismissal", which constituted the reference to the Tribunal, and, in the premises, the Tribunal was not empowered to allow the alternate claim of "unfair dismissal". [Emphasis added]**

30. At the hearing of the appeal, Counsel for the respondent, Mr. McDonald, submitted that having regard to section 64(1)(a) of the IRA, it was not open to the appellant on the appeal to challenge the existence of the Tribunal's jurisdiction to amend the Originating Application since the appellant had not formally raised the objection to the Tribunal's jurisdiction before the amendment order was made. Mr. McDonald submitted that the respondent's application to amend had been made on the first day of the hearing before the Tribunal and no mention is made in the Judgment of any objection by the appellant to the Tribunal's jurisdiction to make the amendment.

31. For his part, Counsel for the appellant, Mr. Bethel, grounded his right of appeal to raise jurisdictional challenges to the Tribunal's amendment order under both section 64(1)(a) and (b) of the IRA. He submitted that although no mention is made in the Vice-President's Judgment of his having raised a formal objection before the Tribunal, he had in fact formally objected to the amendment of the Originating Application being made at the commencement of the hearing.

32. Inasmuch as this Court's jurisdiction to lawfully entertain that portion of ground 1 of the Notice to which section 64(1)(a) relates has been called into question, we consider it prudent to address it at the outset. In our view, Mr. McDonald's objection may be disposed of shortly.

33. By virtue of section 64(1)(a) of the IRA this Court is precluded from entertaining an appeal which seeks to challenge the jurisdiction of the Tribunal to make an order or award on the

ground that the Tribunal had "no jurisdiction in the matter" unless it is shown that an objection to the jurisdiction had been formally taken before the Tribunal *before* the order or award was made.

34. The relevant portions of section 64(1) (which specifically confer a right of appeal to this Court from orders or awards of the Tribunal based on an absence of jurisdiction or an excess of jurisdiction) provide as follows:

> **"Appeal to Court of Appeal**
>
> **64. (1) Subject to this Act, any party to a matter before the Tribunal is entitled as of right to appeal to the Court of Appeal on any of the following grounds –**
>
> > **(a) that the Tribunal 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 Tribunal had been formally taken at some time during the progress of the matter before the making of the order or award;**
> >
> > **(b) that the Tribunal has exceeded its jurisdiction on the matter…" [Emphasis added]**

35. Having regard to section 64(1)(a) of the IRA, we are satisfied that (in the absence of the verbatim transcripts or anything in the Judgment which would have independently confirmed that Mr. Bethel had raised a formal objection to the Tribunal's jurisdiction to amend the Originating Application prior to the order being made) there was no basis on which we could properly entertain the appellant's ground that the Tribunal had no jurisdiction to amend the Originating Application.

36. That having been said, we note, in passing, that an identical challenge to the Tribunal's jurisdiction to amend a "trade dispute" which is referred by the Minister under the IRA and reflected in an Originating Application, was previously considered by this Court (differently constituted) in the case of **Island Hotel Company Limited v. John Fox** IndTribApp. No. 54 of 2017.

37. In **Fox,** Evans JA, writing for the Court, examined, *inter alia,* English case law emanating from the Industrial Tribunal in England where amendments to claims before the Tribunal are expressly permitted by statute. Evans JA also examined the legislative regime set out in the Bahamian IRA for resolving 'trade disputes'. He considered, in particular, sections 2, 55, 58, 59, 68, 69, 70, 71, 72 and 73, before concluding at paragraphs 28 and 33 as follows:

> **"28. The cumulative effect of these provisions is that...the Tribunal has jurisdiction to hear only those matters referred to it by the Minister. As such, a dispute relative to working hours referred by the Minister to the Tribunal cannot be transformed into a wrongful dismissal dispute by the Tribunal. It is of fundamental importance therefore, that the Minister is clear as to the precise dispute which he is referring to the Tribunal.**
>
> ...
>
> **33. ...There is nothing in any of the provisions in the IRA or the Employment Act which permits the Tribunal to amend an Originating Application to allow a party to proceed with a dispute not approved and referred by the Minister. Further, the Tribunal has no inherent jurisdiction to allow an amendment of a dispute as referred by the Minister so as to result in a new dispute..."**

38. Even if we had found that we had jurisdiction under section 64(1)(a) to hear that portion of ground 1 relating to the ability of the Tribunal to amend the respondent's Originating Application, in the light of this Court's previous decision in **Fox** which clearly establishes that the Tribunal has no jurisdiction (statutory or inherent) to amend an Originating Application to allow a party to proceed with a dispute not approved and referred by the Minister, the respondent would necessarily have been faced with an uphill task of convincing us that **Fox** was wrongly decided.

39. Apart from the appellant's complaint that the Tribunal had no jurisdiction to amend a dispute referred by the Minister, it is obvious from the wide manner in which ground 1 is crafted that the appellant also seeks, in the alternative, to challenge the Tribunal's jurisdiction to amend the Originating Application on the further basis (as provided for in section 64(1)(b)) that the Tribunal acted in excess of jurisdiction when it failed to follow the procedural mechanisms set out in rule 9 of the IRA (Tribunal Procedure) Rules, 2010 before ordering the amendment.

40. As we understand Mr. Bethel's submission, this aspect of his submission will require us to examine the procedural mechanism laid down in rule 9 of the IRA (Tribunal Procedure) Rules, 2010 with a view to determining whether (as the Bank contends) the Tribunal exceeded any jurisdiction conferred thereunder to make amendments to the Originating Application.

41. While in no way resiling from his primary submission that the Tribunal had no jurisdiction to amend a trade dispute not referred by the Minister or an Originating Application as initially filed, Mr. Bethel submitted that rule 9 of the Industrial Relations (Tribunal Procedure) Rules, 2010 provides a procedural mechanism intended to enable an issue relating to a party's entitlement to bring or to contest the proceedings to which an Originating Application relates, to be determined at an interlocutory stage, but in any event, prior to the substantive hearing of the Originating Application.

42. Rule 9 of the Industrial Relations (Tribunal Procedure) Rules, 2010 provides:

> **"9. (1) The Tribunal may <u>at any time before the Hearing of an Originating Application</u>, on the application of a party made by Notice to the Secretary or of its own motion, determine any issue relating to the entitlement of any party to bring or contest the proceedings to which the Originating Application relates.**
>
> **(2) The Tribunal shall not determine such an issue unless the Secretary has sent notice to each of the parties giving them an opportunity to submit representations in writing and to advance oral argument before the Tribunal." [Emphasis added]**

43. Counsel for the appellant, Mr. Bethel, further complained that the rule 9 procedures were not followed in that the appellant was not given advance notice of the respondent's amendment application, nor afforded the opportunity provided by rule 9(2) to submit written representations on the issue or to advance oral arguments before the Tribunal before the Originating Application proceeded to a substantive hearing.

44. Mr. Bethel relied on *obiter dictum* taken from a previous decision of this Court (differently constituted) in **Corrine Higgs v. Kerzner Island Hotel Company** IndTribApp. No. 294 of 2014 where at paragraphs [19] and [20] Isaacs JA made the following observation:

> **"[19.] Although it is stated in rule 9(1) that the Tribunal may act of its own motion that action must occur before the hearing, not the day of the hearing. It would be entirely too late to make such an application in objection to the Originating Application when the hearing has commenced. This means, therefore, that the process envisaged in rule 9(2) should precede any effort to set down a time for the hearing of the Originating Application itself.**

[20.] The paragraph above was not argued before us hence it is not to be regarded as part of the *ratio decidendi* of this decision. However, it is proffered as a matter of procedural good sense."

45. Mr. Bethel submitted (without conceding) that even if rule 9 were capable of being interpreted as giving the Tribunal power to allow an amendment of the respondent's Originating Application, the procedure envisaged by rule 9 was not followed, in that, no advance Notice was given to the appellant before the hearing, no opportunity was afforded the appellant to make representations, and the application was not heard and determined in advance of the substantive hearing of the claim. By not following the procedures laid down in rule 9(2), he contended, the Tribunal exceeded its jurisdiction and had effectively denied the appellant the opportunity to be heard in relation to the proposed amendment.

46. For his part, while accepting that the IRA and the Tribunal Rules do not specifically permit amendment of an Originating Application, Counsel for the respondent, Mr. McDonald, drew attention to a previous decision of this Court (differently constituted) in **St. Andrews School Limited v. Margo Albury** IndTribApp. No. 75 of 2013 where the Tribunal's ability to permit Albury to amend her Originating Application to include an alternative claim for unfair dismissal, was not questioned by the Court. Additionally, Mr. McDonald cited dicta from the English case of **Selkent Bus Co. Ltd v. Mr. M.N. Moore** [1996] ICR 836 in which Mummery J., discussed the powers of the English Industrial Tribunal to control its proceedings, including exercising its discretion whether to allow or refuse an application for leave to amend.

47. Mr. McDonald referred to sections 57 through 60 of the IRA which, he submitted, were designed to outline the Tribunal's powers and to avoid formality of the proceedings. In particular, he invited the Court to consider section 57(3) which mandates the Tribunal, *inter alia,* to *"expeditiously hear, inquire into and investigate every 'dispute' which is before it and all matters affecting the merits of such dispute".*

48. He noted that section 59(1)(c) generally authorized the Tribunal to give *"all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the dispute or any other matter before it".* He urged us to find that this particular power was broad enough to include the power to direct an amendment of the Originating Application to include "unfair dismissal". Mr. McDonald also adverted to section 41 of the Employment Act, Ch. 321A which expressly stipulates that a referral to the Tribunal of a "trade dispute" relating to unfair dismissal *"shall be dealt with as a "complaint" in accordance with the provisions of Part IX of the Employment Act."*

49. With all due respect to Mr. McDonald, none of these submissions assisted the respondent to answer Mr. Bethel's simple complaint brought pursuant to section 64(1)(b) which was that given the clear wording of rule 9 of the IRA (Tribunal Procedure) Rules, 2010, the Tribunal had acted in excess of its authority in determining the respondent's application which effectively raised an issue relating to the respondent's entitlement to bring (and the appellant's right to contest) the alternative claim for unfair dismissal.

50. As we see it, rule 9(2) expressly prohibits the Tribunal from determining an issue relating to a party's entitlement to bring or contest an alternative claim e.g. unfair dismissal, within the proceedings to which the Originating Application relates, unless the Secretary to the Tribunal has first notified the parties and given them the opportunity to submit written representations and to advance oral argument before the Tribunal.

51. As we see it, implicit in the rule 9 procedures are not only the "procedural good sense" to which Isaacs JA referred in **Corrine Higgs** *(above),* but the requirements of procedural fairness and basic natural justice which dictate that any party likely to be affected by the determination of such an issue must first be informed of the issue to be determined, given the opportunity to make written representations and given the opportunity to advance oral arguments before the Tribunal. It is clear from rule 9(1) that procedurally, the determination of an issue relating to a party's entitlement to bring or contest (as in this case) an alternative claim for unfair dismissal in proceedings to which the Originating Application relates, is intended to be made at an interlocutory stage of the proceedings *before* the substantive hearing of the Originating Application and <u>not</u> at the hearing itself.

52. In **Fox** *(above),* this Court also considered an identical complaint about the Tribunal's failure to comply with the rule 9 procedures. After considering rule 9 and the "proper procedure" for dealing with issues relating to the entitlement of a party to bring or contest the proceedings to which the Originating Application related, Evans JA stated at paragraphs [43] and [44] as follows:

> **"[43.] The record reflects that Counsel for the respondent made the application orally during the course of the trial before the Tribunal. There is no evidence that a notice was ever sent by the Secretary to the appellant prior to the hearing of the Originating Application giving them an opportunity to submit in writing any arguments to the Tribunal on this issue. The purported amendment was allowed notwithstanding the objections by the Counsel for the appellant.**
>
> **[44.] In the circumstances of this case we are of the view that even if we are wrong in our view that the Tribunal lacked the**

> **necessary jurisdiction to grant the amendment, the Tribunal failed to follow the requirements of Rule 9. In our view even if the Tribunal could grant the amendment the proper procedure would have been to also grant an adjournment and allow the parties to reformulate their claims and possibly add witnesses if necessary. The fundamental difference in the nature of the two claims and the interest of natural justice in our view ought to have guided the Tribunal to either refuse the application or grant an adjournment along with the purported amendment. In this vein it was not open to the Tribunal to make findings on the unfair dismissal claim having not given the appellant a proper opportunity to meet that claim which was added during the trial contrary to Rule 9."**

53. As this Court previously did in **Fox**, we take the similar view that to the extent that the Tribunal in this case determined the issue of the respondent's entitlement to institute an alternative claim for unfair dismissal at the substantive hearing itself and thereupon proceeded to hear the matter and to make findings on the unfair dismissal claim without adjourning to give the appellant an opportunity to amend its Defence, it exceeded its jurisdiction under rule 9 and erred in law. Ground 1 succeeds.

Grounds 2 through 7 – Miscellaneous errors

54. In the light of our decision in relation to ground 1, it is unnecessary to consider the other grounds as it is clear that a miscarriage of justice occurred in the court below. However, having adverted briefly to ground 3, we would allow the appeal on ground 3 as well since it highlights firstly, the Tribunal's further failure to consider the respondent's initial claim for wrongful dismissal, and secondly, the fact that in arriving at its decision, it treated only with the alternative claim for unfair dismissal which the Tribunal failed to give the appellant an opportunity to properly defend.

55. In ground 3, the appellant made the following complaint:

> **"3. The learned Vice-President misdirected himself and erred in law in stating that there was no need to consider wrongful dismissal as all of the counsel's submissions were centered on unfair dismissal. The appellant's Defence was in response to the wrongful dismissal dispute as evidenced by the respondent's Originating Application. Accordingly, the learned Vice-President was obligated to direct himself on whether the appellant had proved that it honestly and reasonably believed on a balance of probability that the**

respondent had committed the breaches alleged at the time of his dismissal as per the requirements of section 33 of the Employment Act."

56. Counsel for the appellant submitted that at the trial the appellant's Defence and all of the evidence it adduced was intended to answer the respondent's filed claim of wrongful dismissal. In the circumstances, by deciding to focus his attention solely on the alternative claim of unfair dismissal (impermissibly added at the start of the trial in breach of rule 9) the appellant was placed at a severe disadvantage. According to Mr. Bethel, the Tribunal's decision not to consider the wrongful dismissal claim meant that it had no regard to the Bank's filed Defence and the evidence led in relation thereto. He submitted that it was evident from paragraph 142 of the written Judgment that the Tribunal's decision had solely focused on the unfair dismissal claim and had not properly considered the initial claim for wrongful dismissal which was the dispute which had been referred to the Tribunal for settlement and which was set out in the Originating Application to which the appellant's filed Defence had been directed.

57. For his part, Counsel for the respondent, Mr. McDonald, submitted that the Tribunal had power under sections 57(1)(d) and section 59(1)(c) to conduct its hearings in a manner it deems necessary for the clarification of issues before it and to give general directions and do what was expedient or necessary to determine the dispute. He submitted that having considered the totality of the evidence and the submissions made, the Tribunal was entitled to find that there was no disagreement between the parties as to what the basis for the respondent's termination had been and that the focus of the respondent's submissions had been centered on his claim for unfair dismissal. With respect, we do not see how this could be correct.

58. It is clear from the pleadings that at the start of the hearing, the appellant came to meet the respondent's claim for wrongful dismissal. On the first day of the hearing, the Vice-President, in excess of the Tribunal's jurisdiction under rule 9, acceded to the respondent's application to amend the Originating Application and impermissibly proceeded to conduct the trial without adjourning the hearing or allowing the appellant the opportunity to adjust its Defence. As we have already found, this resulted in procedural unfairness to the appellant which was firstly, denied the opportunity to properly meet the new claim of unfair dismissal and secondly, forced to participate at a trial which raised new issues which it was not fully prepared to meet.

59. In short, the Tribunal's errors were such that we were satisfied that a substantial miscarriage of justice occurred in the tribunal below. In the circumstances, we were unable to accede to Mr. McDonald's invitation to apply the proviso contained in section 64(3) of the IRA.

Disposition and Order

60. In the circumstances the appeal is allowed; the Tribunal's decision, including the award, is set aside in its entirety.

61. In accordance with section 64(2)(c), we remit the matter to the Tribunal and order that a new hearing of the Originating Application (as originally filed in 2014) be held.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Isaacs, JA

The Honourable Mr. Justice Jones, JA