**COMMONWEALTH OF THE BAHAMAS**
**IN THE COURT OF APPEAL**
**IndTribApp No. 294 of 2014**

**B E T W E E N**

**CORRINE HIGGINS**

**Appellant**

**AND**

**KERZNER/ISLAND HOTEL COMPANY**

**Respondent**

**BEFORE:** **The Honourable Dame Anita Allen, P**
**The Honourable Mr. Justice Isaacs, JA**
**The Honourable Ms. Justice Crane-Scott, JA**

**APPEARANCES:** **Mr. Obie Ferguson with Halson Moultrie, Counsel for the Appellant**
**Mr. Ferron Bethel with Adrian Hunt, Counsel for the Respondent**

**DATES:** **10 December 2015; 9, 15 February 2016**

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*Industrial Tribunal appeal – Jurisdiction of the tribunal to hear an Originating Application – Referral by the Minister - Presumption of regularity*

On 8 July 2007 the appellant was terminated by the respondent and on 30 July 2008 she filed a trade dispute with the Labour Department. Just under two years later the Minister responsible for Labour (the Minister) referred the dispute to the Industrial Tribunal (the Tribunal).

The then Vice President (VP) of the Tribunal dismissed the appellant's Originating Application on the basis that the dispute was not reported to the Minister within the twelve month period stipulated by the Industrial Relations Act (the Act) and there was no evidence that the Minister had extended the period of reporting.

Consequently, the appellant appealed the dismissal relying on the presumption of regularity and submits that the Tribunal cannot go behind the Minister's referral. The respondent submits that the VP was correct in that the dispute was reported out of time and no extension of time had been granted by the Minister.

**Held:** Appeal allowed. Matter remitted to the Tribunal for the hearing of the Originating Application as expeditiously as is practicable.

The Tribunal ought to accept the referral certificate of the Minister at face value; it cannot go behind the certificate to determine whether the referral was duly made. In essence, it is the referral by the Minsiter which gives the Tribunal the jurisdiction to hear and determine the dispute. In the present case, therefore, the Tribunal had the requisite jurisdiction to hear the appellant's Originating Application.

*N. P. Building Supplies Ltd. v Richard Lee Thompson* SCCivApp No. 58 of 2000 followed

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## REASONS FOR DECISION

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**Judgment delivered by the Honourable Mr. Justice Isaacs, JA:**

1. On 9 February 2016 we allowed the appellant's appeal with an indication that we would give our reasons at a later date. We render the reasons now.

2. The appellant appeals from a decision of Indira N. Demeritte-Francis, Vice President of the Bahamas Industrial Tribunal (VP Francis) (as she then was) dated 24 September 2014 whereby she dismissed the appellant's Originating Application on the ground that pursuant to section 68(2) of the Industrial Relations Act, 1970 (the Act), the Tribunal lacked jurisdiction to adjudicate on it on the basis that the matter appeared to be statute barred.

3. The grounds of the appeal filed on 7 November 2014 are:

> **"1. That the Vice President misdirected herself and erred in law in finding that the Tribunal lacks jurisdiction pursuant to section 68(2) of the Industrial Relations Act, 1970 to adjudicate as the matter appears to be statute barred.**
>
> **2. The Vice President misdirected herself and erred in law in finding that the Applicant was terminated by the Respondent on the 8th July, 2007 therefore, time starts to run in this action from and including the effective date of termination which was the 8th July, 2007.**

**3. The Vice President misdirected herself and erred in law in not accepting the submission of Counsel for the Appellant that the certificate of referral dated the 4th October, 2010 can be treated as having subsumed the grant of an extension of time by the Minister.**

**4. That the Vice President misdirected herself and erred in law in finding that in the absence of evidential documentation proving the grant of extension of time, the Tribunal can only conclude that the Minister had not expressly granted an extension of time to the Applicant in the case.**

**5. The Vice President misdirected herself and erred in law in finding that the trade dispute report has therefore been filed out of time, by the Applicant with the Ministry of Labour and Social Development.**

**6. The Vice President misdirected herself and erred in law in finding that there was no evidence of the Minister addressing his mind to an extension of time in this matter.**

**7. The Vice President misdirected herself and erred in law in failing to recognize that it cannot go behind the Minister (sic) certificate to determine whether or not the Minister had complied with section 71(2) when issuing the certificate.**

**8. The Vice President misdirected herself and erred in law in arrogating to herself the supervisory powers to pierce the corporate veil to determine whether the Minister had extended the time for the Appellant's matter to be heard."**

**Ground 1**

**That the Vice President misdirected herself and erred in law in finding that the Tribunal lacks jurisdiction pursuant to section 68(2) of the Industrial Relations Act, 1970 to adjudicate as the matter appears to be statute barred.**

4. VP Francis relied on section 68(2) of the Act to conclude the appellant's claim was statute barred. The section states:

> **"68. (2) A trade dispute may not be reported to the Minister if a period of more than twelve months has elapsed since the dispute first arose, and any dispute not reported within that period shall be deemed to have been determined, so, however, that the Minister may in any case extend such period if he considers it just to do so."**

**5.** The appellant's case may be stated quite shortly, to wit, can VP Francis go behind the Minister's certificate? Their position is that the answer is no. They rely, it seems, on the presumption of regularity, that is, all that was required to be done by the Minister was done. Further, reliance was placed on a decision of this Court (differently constituted) in **N.P. Building Supplies Limited v Richard Lee Thompson** SCCivApp No. 58 of 2000.

**6.** The respondent filed skeleton submissions, a portion of which appears below:

> **"3. The foregoing provision of the Act was critical to the Judgment as it is clear from the documents before the learned Vice President that:**
>
> > **i. the Appellant's trade dispute first arose on the 8th July 2007; the date her employment was terminated; and**
> >
> > **ii. the Appellant failed to report her trade dispute to the Minister of Labour until 29th July 2008 (three weeks outside of the relevant limitation period.**
>
> **4. Having regard to the same, the key issue for determination in this Appeal is whether the learned Vice President was correct in finding that the Tribunal had no jurisdiction to hear the Appellant's claim. It is submitted that the learned Vice President properly dismissed the Appellant's claim in accordance with section 68(2) of the Act by virtue of it being statute barred, and there being no evidence as to an extension having been granted to bring the claim out of time. Further or alternatively, the Appellant's grounds of appeal fail to raise any issue which otherwise warrant the Judgment being varied and/or set aside."**

**7.** The respondent contends that the decision of VP Francis is correct because the appellant's claim was made late, that is, outside the time

limited for such a claim; and no evidence was produced to prove that the Minister had extended the time within which to make the claim.

8. Section 68(1) of the Act provides, inter alia:

> **"68. (1) Any trade dispute existing or apprehended may, if not otherwise determined, be reported to the Minister —**
>
> > **(a) by a trade union on behalf of employees in a bargaining unit for which it is recognised as bargaining agent, where the dispute is a general dispute;**
> >
> > **(b) by a trade union, on behalf of an employee who is a party to a limited dispute, where such employee was a member in good standing of such union at the time the dispute arose, and whether or not such employee is included in a bargaining unit;"**

9. There is no equivocation among the parties that a "trade dispute" was filed by the respondent. The complaint made by the respondent is that the claim was made after **"a period of more than twelve months has elapsed since the dispute first arose"** and the Minister has not been shown to have extended "**such period**".

10. It is clear that while section 68(2) bars late claims, the Minister is invested with the power to extend the period for making a claim. There is nothing in the section which circumscribes the time which the Minister may allow as an extension, nor does the Act indicate how or in what manner the Minister's decision to allow an extension of time is to be signaled.

11. The Record of Appeal reveals that the appellant's notice informing the Minister of the existence of a trade dispute was filed with the Labour Department on 30 July 2008. By a Conciliation Notice dated 14 August, 2008 (some fourteen days later) and issued pursuant to section 70(1) of the Act, both parties to the trade dispute were formally advised of the Minister's wish to secure a settlement and invited to attend a conciliation meeting on 26 August 2008.

12. The Record of Appeal also discloses the existence of no less than five additional Conciliation Notices issued to the parties, signaling the Minister's continuing endeavours to settle the dispute by means of conciliation meetings convened under the Act. The last of these Notices was issued on 10 September 2009.

13. There is also disclosed on the Record, a letter dated 3 November 2014 by which the Industrial Tribunal informed the appellant of the Minister's referral of the trade dispute to the Tribunal pursuant to section 73 of the Act. The letter invited the appellant to file her application using Originating Application - Form A in accordance with Rule 3(1) of the Industrial Relations (Tribunal Procedure) Rules, 1997 (the '97 Rules).

14. We are of the view that the foregoing documents disclosed on the face of the Record of Appeal itself clearly establish that the Minister of Labour was not only aware of the appellants complaint, but was proceeding to deal with the trade dispute in a manner which was completely inconsistent with it having been statute-barred and determined under section 68(2) of the Act. Indeed it can reasonably be concluded from everything disclosed on the Record which occurred between the filing of the trade dispute on 30 July 2008 until the Minister's referral of the dispute to the Industrial Tribunal that the Minister had more likely than not exercised his discretion under section 68(2) to extend the time for filing of the complaint.

15. Under rule 6 of the '97 Rules a respondent was required to give notice of the nature of his opposition to the application. The rule stated:

> **"6. A respondent who intends to resist the application, shall within fourteen days of entering an appearance to the proceeding, present to the Secretary in writing a defence in Form E in the Schedule setting out sufficient particulars to show on what grounds he intends to resist the application."**

16. The '97 Rules went on to say at rule 9(1):

> **"9. (1) A tribunal may at any time before the hearing of an originating application, 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) A 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."**

17. The '97 Rules were replaced on or about 7 December 2010 by the Industrial Relations (Tribunal Procedure) Rules, 2010 (the '10 Rules). Thus, when the matter came on for hearing before the Tribunal on 24

September 2014 a new regime for the conduct of hearings before the Tribunal was in place.

**18.** The '10 Rules effected little change to the sections mentioned above, as is reflected in the following:

> **"6. A Respondent who intends to resist the Application shall within fourteen days of entering an Appearance to the proceeding, present to the Secretary in writing a Defence in Form E in the Schedule setting out sufficient particulars to show on what grounds he intends to resist the Application.**
>
> **...**
>
> **9. (1) The Tribunal may at any time before the Hearing of an Originating Application, 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."**

**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 a part of the ratio decidendi of this decision. However, it is proffered as a matter of procedural good sense.

**21.** The notes of the proceedings before VP Francis disclose that she raised the issue of the Tribunal's jurisdiction to hear the case, of her own motion, and at the commencement of the substantive hearing. We are satisfied that she ought not to have done so. In **N.P. Building Supplies Limited v Richard Lee Thompson** (supra) this Court (differently constituted)

considered an appeal against the ruling of then Chairman of the Tribunal, Nathaniel M. Dean on a point similar to that raised by VP Francis in the present case. At page 11, Chairman Dean wrote:

> **"It is this Tribunal's view that it cannot go behind the certificate in order to determine whether or not the Minister has complied with section 71(2) when issuing the certificate. Once a certificate has been issued by the Minister the tribunal accepts that all that ought to have been done had in fact taken place. Where there is a question as to whether the Minister has complied with the provisions laid out, such questions are to be addressed to the appropriate Court which may have jurisdiction to hear it. In the premise, it is concluded that the certificate must be taken at face value (i.e., that the Minister had exercised a discretion to extend the period) and I so rule."**

**22.** On the appeal to the Court of Appeal, Hall, JA gave the oral judgment of the Court and stated at page 3:

> **"The second ground of appeal essentially dealt with the referral to the Tribunal by the Minister, and counsel for the appellant prayed in aid the provisions of section 71(2) of the Industrial Relations Act, Chapter 296 (now Ch. 321). However, the issue, when properly identified, is one which, if a challenge is to be made, as the learned Vice-President correctly found, could not be determined by the Tribunal itself. The reference by the Minister being the grounds for the Tribunal assuming jurisdiction, this ground of appeal, similarly, has no merit.**
>
> **For these reasons the appeal is dismissed and the order of the learned Vice-president is affirmed." (Parenthesis is mine)**

**23.** Although Hall, JA referred to Chairman Dean as the Vice-President there is no doubt that the Court agreed with the view expressed by the Tribunal below and affirmed it.

**24.** There is nothing disclosed on the record that VP Francis considered the Thompson decision. Had she done so, we have no doubt that she would have concluded, that she had the jurisdiction to hear the matter. In the premises, therefore, we allow the appeal on this ground.

**25.** Inasmuch as we have concluded the appeal ought to succeed on the first ground we do not think it necessary to address the remaining grounds; and we do not do so.

**26.** We remit the matter back to the Tribunal for the hearing of the Originating Application in accordance with the '10 Rules as expeditiously as is practicable, bearing in mind that the Minister's reference was made since 4 October 2010.

**The Honourable Mr. Justice Isaacs, JA**

**The Honourable Dame Anita Allen, P**

**The Honourable Ms. Justice Crane-Scott, JA**