IN THE MATTER OF THE LABOUR DISPUTES ACT 1992

AND IN THE MATTER OF A DISPUTE BEFORE THE LABOUR DISPUTES TRIBUNAL

BETWEEN:-

THE GOVERNMENT OF BERMUDA

and

BERMUDA INDUSTRIAL UNION

BERMUDA PUBLIC SERVICES UNION

BERMUDA UNION OF TEACHERS

PRISON OFFICERS ASSOCIATION

FIRE ASSOCIATION

DECISION

Before:

Mr. Chen Foley – Tribunal Chairperson
Mr. Peter Sanderson – Tribunal Member
Dr. Michael Bradshaw – Tribunal Member

The immediate question that arises for determination by the Tribunal is this: Is there an existing or apprehended labour dispute that we have jurisdiction to determine?

By way of background, the Tribunal was appointed in February of 2015 by the Minister of Home Affairs pursuant to section 5 of the Labour Disputes Act 1992 ("the 1992 Act"), for purposes of settling a labour dispute between the Bermuda Government on the one hand and the Bermuda Industrial Union, Bermuda Public Services Union, the Bermuda Union of Teachers, the Prison Officers Association, and the Fire Association on the other (together "the Unions and Associations").

The appointment came in the wake of events that took place on or about the 27th and 28th of January 2015, culminating in a walkout by members of the Unions and Associations, and a subsequent march by them on Cabinet. These events were themselves reported extensively in the local press.

Given the limited information provided to us at the time of our appointment, it was unclear whether the labour dispute related: (i) specifically to the issue of Furlough Days; or (ii) to the lawfulness of the walkout itself; or (iii) to some other matter in dispute between the parties that was not obvious from the information we had received or that was in the public domain.

Mindful of the need to ascertain for ourselves the nature and scope of the dispute referred to us for resolution, we invited the parties to attend a preliminary hearing so that we might hear from each of them on what they believed it to be about. It was our intention that, upon gaining a better understanding of the matters arising between them, or at least an understanding of what they perceived those issues to be, we could better appreciate the questions we were required to consider and determine, thereby beginning the process of fixing our terms of reference. It was our view that we would also be in a better position to set a procedural timetable once we heard from the parties on the nature and scope of the dispute.

Our initial plan had been to approach the issue of our terms of reference flexibly. Our intention was not to adopt a rigid approach to setting the terms of reference; but instead, it was our expectation that the terms of reference would likely be refined through the pleading process over time. However, the need to reach a definitive view on the matters referred to us sooner rather than later became imperative following the receipt of a written request from the Attorney General to adjourn the preliminary hearing without a new date being set. The reason given by the Attorney General for the request was that the relief being sought by the Government from the Tribunal was identical to the relief being sought in proceedings afoot in the Supreme Court, namely Civil Matter Number 120 of 2015.

In support of adjournment application, the Attorney General submitted the following for our consideration:

1. the *ex tempore* Ruling made by the Chief Justice on 28th January 2015granting an *ex parte* interim injunction,

2. a copy of the *ex parte* interim injunction dated 28th January 2015, and

3. an Originating Summons dated 24th March 2015 seeking to make the interim injunction permanent.

Pausing here, it appears from paragraph 6 of the Chief Justice's Ruling that in deciding to grant the interim injunction he took account of the fact that *"the Furlough Day issue"* had been referred to this Tribunal. Nothing more is said about the matter. We take this reference to indicate that (at least initially) the Government intended this Tribunal to consider and determine one issue or another relating to Furlough Days.

The Chief Justices Ruling also made reference to submissions that had been made on behalf of the Government about the injunction application being influenced, *"not just by the present ongoing events"*, to which we infer the judge was referring to the dispute relating to Furlough Days, *"but also previous incidents when the Government has not invoked this statutory machinery [i.e. the 1992 Act] to bring irregular strike action to a halt."* However, the Chief Justice did not reach a conclusion on the issue of the previous incidents the Government was complaining of because, at the time, the evidence before him of those matters was *"unclear"*.

The interim injunction itself prevented the Unions and Association from:

1. Engaging in any lock-out, strike, irregular industrial action short of a strike,

2. Commencing or continuing or applying any sums in furtherance or support of any lock-out, strike, or irregular industrial action short of a strike, and

3. Taking part in, inciting or in any way encouraging, persuading or influencing any person to take part in, or otherwise act in furtherance of, a lock-out, strike or irregular industrial action short of a strike.

We rejected the Government's written request to adjourn the preliminary hearing, explaining we would take no decision regarding the next steps to be taken in the arbitration until we were first satisfied that the matters referred to us for determination were indeed the subject of proceedings in the Supreme Court. The preliminary hearing went ahead on the 26th of March 2015 despite some initial confusion on the part of the Unions and Associations as to whether they were required to attend. In any event all parties appeared, and were represented by counsel.

The position advanced by the Unions and Associations at the preliminary hearing was that there existed no extant dispute between them and the Government. They said that, although there had been a walkout, all their members had returned to work, and therefore no outstanding issues with the Government remained.

The Government's position was that there was an extant dispute between it and the Unions and Associations. However, counsel for the Government was unable to provide any further detail on the nature of that dispute, other than to say the Furlough Day issue was merely one relevant matter, and that others remained. Counsel for the Government expressed the view that it was for the Tribunal to discern for itself the nature of the dispute between the parties, and that it was not for the Government to provide detail of those matters at this stage.

Counsel for the Government relied on *Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade & Industry and the Bermuda Industrial* Union [2013] Bda LR 19, in support of the view that the Government could not be required to provide active assistance to the Tribunal by identifying specific points of dispute that went to the Tribunal's terms of reference. The Government's view was that to do so would impede on the Tribunal's independent jurisdiction.

Respectfully, we do not agree with this reading of the *Kentucky Fried Chicken* decision. As explained by the Chief Justice, it is perfectly acceptable for the Minister who refers a labour dispute to *"wish to assist the Tribunal by defining the scope of the dispute in detailed terms"*. What the Government cannot do is seek to hamstring the Tribunal's inquiry by reference to what it believes the Tribunal's terms of reference ought to be.

This is an instance where the active assistance of the Government in defining the scope and nature of the dispute would have been invaluable. Firstly, it is only the Government that avers the existence of an extant labour dispute. The Unions and Associations disclaim there is one. Secondly, it was the Government that sought to have these proceedings adjourned on the basis that the dispute referred to the Tribunal was the subject of proceedings pending before the Supreme Court. In light of that, the Tribunal would have been assisted if the Government explained how the two sets proceedings were interrelated, and in so doing clearly identified the matters that (at least to its mind) had been referred to the Tribunal, and then gone on to show that those matters were identical to matters before the Supreme Court.

If, having made that application for an adjournment, the Government wished to amend its position, to say that there existed another labour dispute which was outside the scope of the Supreme Court action, and that the Tribunal should proceed to hear it, then it would have been of tremendous assistance to the Tribunal if

the Government clearly identified what that other labour dispute was, and then demonstrated how (unlike the first matter) it was not the subject of the continuing proceedings in the Supreme Court.

Although matters remained far from clear, at the end of the preliminary hearing we concluded that to the extent there was overlap between the matters referred to the Tribunal and the matters pending before the Supreme Court, the Supreme Court proceedings should take priority. We therefore directed that, insofar as there was an extant labour dispute or disagreement relating to:

a. Whether the Unions and Associations engaged in irregular industrial action in January 2015 in violation of section 19 of the Labour Disputes Act 1992, and/or

b. Whether the members of the Unions and Associations breached their contracts of employment by engaging in irregular industrial action in January 2015,

the matter is seised by the Supreme Court of Bermuda. Having elected to have that dispute finally determined in the Supreme Court, there was nothing further for this tribunal to determine in respect of that dispute.

We went on to direct that, to the extent other matters in dispute existed or were apprehended at the time the Tribunal was empanelled, the parties should identify those matters to us in writing by the 6th of April 2015. Our hope had been that if any party believed there remained matters in dispute outside the Supreme Court's jurisdiction, which we could proceed to hear and resolve, those matters would be clearly identified.

The Unions and Associations have maintained their position that there is no extant dispute, while the Government has responded to our direction maintaining the view that there remain outstanding matters for determination by us. Unfortunately, we were given no new details of what those matters might be. Instead, we were provided with a copy of the affidavit of Randolph Rochester (the Permanent Secretary for the Department of Home Affairs) dated the 18th of March 2015 that was sworn in the Supreme Court action, and told that we should be able to glean for ourselves what the dispute was about from the matters set out in that affidavit.

Mr. Rochester's affidavit says in essence that the walkout in January 2015 is symptomatic of an underlying breakdown in the Government's relationship with the Unions and Associations, which has led the

Government to apprehend that future labour disruption is likely. He explains that the Government wishes to reduce public sector expenditure, balance its budget, reduce the national debt, and (against this background) negotiate employment terms and conditions with the Unions and Associations that permit it to achieve these aims. All the collective bargaining agreements between the Government and public sector workers have expired, as has the Memorandum of Understanding that provided for Furlough Days. The Attorney General says these agreements must now all be renegotiated, and there is a fear that those negotiations will not be easy.

A summary of the position can be found at paragraphs 42 and 43 of the affidavit, under the heading *"Continuing and apprehended imminent labour disputes"*. Mr. Rochester says:

> 42. The labour dispute or disputes, the subject of the Applicant Minister's 27th January, 2015 Notice, have not been resolved. In summary, those labour disputes concerned and still concern the Government's imperative need to reduce public sector expenditure, balance its budget and reduce the national debt, having regard amongst other things as to how those policies impact on the terms and conditions of service of public sector Government employee members of the Respondent.
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> 43. There has been no agreement with the Respondents on the cost saving measures necessarily required to be achieved, if the Government is to meet its budgeted targets.

We do not see how the contents of Mr. Rochester's affidavit, which are intended to justify the extension of the interim injunction, can simultaneously be used to show the existence of a separate labour dispute that is not currently part of the injunction proceedings, which the Tribunal should go on to hear. Of note, the matters set out at paragraphs 12 to 28 of the affidavit, to which our attention has been specifically drawn, bear directly on the application for a permanent injunction.

In his evidence, Mr. Rochester also explains that the underlying state of affairs between the Government and Unions and Associations is not new. He devotes a section of his affidavit to discussing the history of irregular industrial action dating back to 2011. Mr. Rochester's evidence appears to us to address the deficiencies identified by the Chief Justice, which we discussed briefly above, in relation to whether there was sufficient evidence on the interim injunction application to support the Government's submission that its application was influenced by the previous incidents of irregular labour activity. This further underscores the

fact that the contents of Mr. Rochester's affidavit are intended to support the Government's case for a permanent injunction, not undermine it.

From the material we have seen, and based upon the oral submissions made by counsel for the Government, we see nothing to indicate to us that there are other matters in dispute for determination other than those pending before the Supreme Court.

It is not necessary for us to go on to consider whether the fractured relationship which Mr. Rochester complains of falls within the definition of a "labour dispute". Our impression is that it does not. We note the language of the Labour Disputes Act at s.4(1) provides that the Minister may by notice published in the Gazette that a labour dispute exists or is apprehended. Given the penal consequences that can arise from a breach of the Labour Disputes Act while a labour dispute is extant, it is our view that a dispute must be apprehended with some degree of immediacy to fall within the definition of a labour dispute. An apprehension that a poor working relationship between the parties will give rise to irregular labour activity at some indeterminate point in the future, once contractual negotiations begin, is not the same as saying there is a dispute that exists or is apprehended which relates to:

(i) Some specific terms and conditions of employment, or the physical conditions in which workers are required to work;

(ii) The engagement, non-engagement, termination, or suspension of employment, of one or more workers;

(iii) The allocation of work as between workers or groups of workers, or

(iv) A procedural agreement.

It would not be appropriate to have those penal consequences hanging over the parties for an extended period due to an unspecific apprehension that a labour dispute of one form or another may arise. No doubt if, at some point in the future, a concrete labour dispute were to arise or be apprehended between the parties, the Minister would be entitled at that point to declare a dispute and convene a tribunal to determine it.

The decision we have come to is not one that we have arrived at lightly. The level of acrimony, which is publicly demonstrated far too frequently by all sides in this dispute, is unfortunate, and ought to be tempered. In reaching our conclusion, the Tribunal has wrestled with whether there is some added value that we might offer the parties given the extent to which their relationship is strained.

We note that in *Kentucky Fried Chicken* the Chief Justice did float the possibility that a Tribunal might adopt the role of ad hoc mediator, and provide assistance to the parties in reaching a new agreement, be it a CBA or an agreement with regard to Furlough Days. However, mediation generally works best when all sides are open to mediation and, given the scale of this particular dispute, it might be that it would require intensive specialised mediation which would be beyond the scope of this tribunal to provide. If we were to make one recommendation to the parties, it would be that the parties consider the involvement of professional, specialized, labour relations mediators in resolving any further dispute that may arise between them.

Ultimately, even in order to provide ad hoc mediation, our jurisdiction must first be established by the existence of a labour dispute, and we must have jurisdiction to resolve that dispute, and not otherwise be precluded from doing so.

Despite our desire to be of assistance to the parties in some capacity and to assist them in managing their relationship, we are constrained to conclude that, outside of the Supreme Court proceedings, there is no labour dispute for determination that we have jurisdiction to hear. We will write to the Minister to advise him of our decision.

29th April 2015

Mr. Chen Foley
Mr. Peter Sanderson
Dr. Michael Bradshaw