In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 120

IN THE MATTER OF THE LABOUR DISPUTES ACT 1992

AND IN THE MATTER OF ORDER 29 OF THE RULES OF THE SUPREME COURT, 1985

AND IN THE MATTER OF THE COLLECTIVE BARGAINING AGREEMENTS BETWEEN THE GOVERNMENT OF BERMUDA AND BERMUDA INDUSTRIAL UNION BERMUDA PUBLIC SERVICES UNION AND THE BERMUDA UNION OF TEACHERS

BETWEEN:

THE MINISTER OF HOME AFFAIRS

Applicant

-v-

(1) BERMUDA INDUSTRIAL UNION ("BIU")
(2) BERMUDA PUBLIC SERVICES UNION ("BPSU")
(3) BERMUDA UNION OF TEACHERS ("BUT")
(4) PRISON OFFICERS ASSOCIATION
(5) FIRE OFFICERS ASSOCIATION

Respondents

JUDGMENT

(in Court)

Date of hearing: November 24-26, 2015
Date of Judgment: January 15, 2015

Mr Gregory Howard and Mr Richard Ambrosio, Attorney-General's Chambers, for the Applicant

Mr Delroy Duncan and Ms Sara-Ann Tucker, Trott & Duncan Limited, for the Respondents

Introductory

1. On January 28, 2015, upon the Applicant's undertaking to issue an Originating Summons seeking substantive relief, I granted an ex parte Order ("the Ex Parte Injunction") in the following principal terms:

> *"1. Consequent upon a Gazetted Notice published by the Intended Applicant on 27 January, 2015 pursuant to section 4 of the Labour Disputes Act 1992 that a labour dispute exists or is apprehended, the Intended Respondents whether by themselves, their servants or their agents or otherwise howsoever be, and each of them is, hereby restrained*
>
> *(1) from engaging in any lock-out, strike, irregular industrial action short of a strike*
>
> *(2) from commencing or continuing or applying any sums in furtherance or support of any lock-out, strike, or irregular industrial action short of a strike*
>
> *(3) From 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*
>
> *arising from or connected with the labour dispute between the Intended Applicant and the Intended Respondents..."*

2. The Originating Summons which was foreshadowed at the hearing which concluded with the granting of the Ex Parte Injunction was not issued until March 24, 2015. It was formally issued in the name of the Minister but the Summons made it clear that in issuing these proceedings the Minister was also acting on behalf of the Government as a whole. Two heads of relief were sought. Firstly, declarations that (a) the Respondents acted unlawfully on or about January 28, 2015 by, *inter alia*, inciting their members to strike or take irregular industrial action, and (b) the Respondents' members acted unlawfully by taking the action complained of. Secondly, permanent injunctive relief was sought restraining the Respondents from engaging in unlawful strike action or irregular industrial action falling short of a strike.

3. The basis for the present application was set out in the Originating Summons with admirable clarity. Most narrowly, it was asserted that the Respondents' past conduct gave rise to a fear of imminent unlawful action in circumstances where the Government needed to rationalize public sector services and to negotiate with all public sector unions, including the Respondents, in this regard. More broadly, it was asserted that unlawful industrial action was undermining the Government's efforts to promote economic recovery by damaging Bermuda's international reputation as an attractive place to do business.

The questions for determination

Questions identified in the Originating Summons

4. The Originating Summons identified the following questions as arising for determination:

   (1) whether the Minister and/or the Government had sufficient interest in the injunctive relief sought under the Labour Relations Act 1975 (the "LRA");

   (2) whether the Minister and/or the Government had sufficient interest in the injunctive relief sought under the Labour Disputes Act 1992 (the "LDA");

   (3) whether there has been unlawful industrial action by the Respondents, either between 2011 and 2015 and/or on or about January 28, 2015, which "*continues to threaten the rule of and respect for the law and contractual relations*";

   (4) whether the Respondents or either of them acted unlawfully on or about January 28, 2015 contrary to sections 9(1) and/or 9(5) and/or 34 of the LRA and/or section 19 of the LDA.

Issues raised by the Respondents

5. The Respondents at the hearing of the Originating Summons raised the following issues in opposition to the relief sought:

   (1) no valid notice of a labour dispute was given in accordance with section 4 of the LDA because the dispute was inadequately particularised and/or because the notice did not take effect until it was finally published. Accordingly, no breach of the LDA occurred;

   (2) it is clear from section 2 of the LRA that the Act does not apply to the 4th Respondent at all and the historical conduct complained of only relates to the 1st Respondent;

   (3) section 34(1) of the LRA makes it clear that section 34 does not apply to action designed to maintain terms and conditions of employment of the relevant workers;

   (4) it is unconstitutional for the Minister to seek to rely upon either Act;

   (5) the Minister is the wrong party to sue;

   (6) section 40 of the LDA empowers the Court to grant injunctive relief. There is no corresponding power conferred by the LDA. In addition, section 40 expressly applies to unregistered trade unions. There is no corresponding provision in the LDA;

   (7) the Minister of Finance's letter dated January 23, 2015 constituted an anticipatory breach of contract. The Respondents actions were not on any proper view an unlawful response to a threat to terminate the workers' contracts of employment.

Legal findings: overview of the key statutory provisions

The LRA

6. It is indeed clear that the LRA does not apply to prison officers. Section 2 of the LRA provides:

   "*This Act shall not apply to-*

   ...

(b) "a prison officer as defined for the purposes of the Prisons Act 1979".

7. Section 1 of the LRA Act contains certain definitions which are incorporated by reference into the LDA. Most significantly:

(1) *"'labour dispute' means a dispute between—*

(a) an employer, or trade union on his behalf, and one or more workmen, or trade union on his or their behalf; or

(b) workmen, or a trade union on their behalf, and workmen, or a trade union on their behalf, where the dispute relates wholly or mainly to one or more of the following—

(i) terms and conditions of employment, or the physical conditions in which workmen are required to work; or
(ii) engagement or non-engagement, or termination or suspension of employment, of one or more workmen; or
(iii) allocation of work as between workmen or groups of workmen; or
(iv) a procedure agreement;

but shall not include any matter which was the subject of a complaint which has been settled by an inspector or determined by the Employment Tribunal under the Employment Act 2000...";

(2) *" 'irregular industrial action short of a strike' means any concerted course of conduct (other than a strike) which, in contemplation or furtherance of a labour dispute—*

(a) is carried on by a group of workmen with the intention of preventing, reducing or otherwise interfering with the production of goods or the provision of services; and

(b) *in the case of some or all of them, is carried on in breach of their contracts of employment or otherwise in breach of their terms and conditions of service...";*

(3) *"'strike' means a concerted stoppage of work by a group of workmen in contemplation or furtherance of a labour dispute, whether they are parties to the dispute or not, whether (in the case of all or any of those workmen) the stoppage is or is not in breach of their terms and conditions of employment, and whether it is carried out during, or on the termination of their employment..."*

8. Section 9(1), (5) contains the first substantive provisions of the LRA which the Minister alleges were contravened. It must be read with the First Schedule which lists "*essential services*". Section 9 provides:

"(1) *A lock-out, strike or any irregular industrial action short of a strike in an essential service shall be unlawful unless there is a labour dispute within that service and—*

(a) a report of the labour dispute has been made to the Director under section 3(1) as read with section 7; and

(b) thereafter valid notice of the intended lock-out, strike or irregular industrial action short of a strike has been given to the Director by the employer, or trade union on his behalf, or workmen, or trade union on their behalf, as the case may be, at least twenty-one days prior to the day upon which the lock-out, strike or irregular industrial action short of a strike is to commence; and

(c) the lock-out, strike or irregular industrial action short of a strike is the lock-out, strike or action specified in the notice (both as respects its nature and the persons participating) and, subject to subsection (4), commences on the day *specified in the notice, or within twenty-four hours thereafter; and*

(d) the dispute has not been referred for settlement to the Permanent Arbitration Tribunal under section 8....

(5) Any person who—

(a) being an employer in an essential service, takes part in any lock-out which is declared unlawful by subsection (1); or

(b) being a workman employed in an essential service, takes part in any strike or irregular industrial action short of a strike, which is declared unlawful by subsection (1); or

(c) incites or in any way encourages, persuades or influences any workman employed in any essential service to take part in any strike or irregular industrial action short of a strike, which is declared unlawful by subsection (1),

knowing or having reasonable cause to believe that the probable consequences of that employer or workman so doing, either alone or in combination with others, would be to deprive the public, wholly or to a great extent, of that service, commits an offence:

Punishment on summary conviction: imprisonment for 3 months or a fine of $500 or both such imprisonment and fine."

9. It is worth noting at this juncture that section 9(2) of the LRA, unlike section 4 of the LDA which will be considered below, expressly contemplates that the relevant notice will include particulars of the nature of the dispute and the parties to it. This potentially weakens the Respondents' argument that the notice published under section 4 of the LDA was defective for want of particularity.

10. Section 34 is the next substantive provision of the LRA upon which the Minister relies. It provides:

> *"(1) It is hereby declared that any lock-out, strike or irregular industrial action short of a strike shall be unlawful if—*
>
> *(a) it has any object other than or in addition to the furtherance of a labour dispute within the trade or industry in which the strikers, persons taking irregular industrial action short of a strike or employers locking-out, as the case may be, are engaged; or*
>
> *(b) it is designed or calculated to coerce the Government either directly or by inflicting severe hardship upon the community,*
>
> *and it is further declared that it is unlawful to commence, or continue, or to apply any sums in furtherance or support of, any such illegal lock-out, strike or irregular industrial action short of a strike:*
>
> *Provided that—*
>
> *(a) a lock-out, strike or irregular industrial action short of a strike, the purpose of which is merely to alter or maintain the terms and conditions of employment of strikers or workmen locked out, as the case may be, shall not be deemed to be designed or calculated to coerce the Government; and*
>
> *(b) a lock-out, strike or irregular industrial action short of a strike shall not be deemed to be calculated to coerce the Government unless such coercion ought reasonably to be expected as a consequence thereof.*
>
> *(2)For the purposes of subsection (1), a labour dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and workmen, in that trade or industry, which is connected with the employment or nonemployment or the terms of employment, or with the conditions of work, of persons in that trade or industry.*
>
> *(3)Any person who takes part in, incites or in any way encourages, persuades or influences any person to take part in, or otherwise acts in furtherance of, a lock-out, strike or irregular industrial action short of a strike declared by this section to be unlawful commits an offence:*

Punishment on conviction on indictment: imprisonment for 2 years or a fine of $2,000 or both such imprisonment and fine;

Punishment on summary conviction: imprisonment for 3 months or a fine of $500.

Provided that no person shall commit an offence under this section by reason only of his having ceased work or refused to continue to work or to accept employment."

11. Finally, reliance was placed by the Minister as regards the injunction head of relief on the following provisions of the LRA:

"40. (1) Notwithstanding any other provision of this Act or the Trade Union Act 1965, and without prejudice to any remedy or relief to which any person may be entitled apart from this section, any person having a sufficient interest in the relief sought shall be entitled, upon making application to the Supreme Court and upon satisfying the Court that there are reasonable grounds for apprehending a contravention of this Act by any person or by any trade union, to an injunction restraining that person or union from so contravening this Act.

(2) For the purposes of this section—

(a) 'person having a sufficient interest in the relief sought' includes—

(i) any person whose person, property or business or any right or interest of whom has been or is being or is likely to be injured or damaged by any act which is, or the continuation or repetition of which, is threatened or reasonably apprehended; and

(ii) any person whose house or place of residence, working or business has been unlawfully watched, beset or picketed;

(b) 'injunction' includes an interlocutory, permanent or mandatory injunction, and any permanent or temporary relief by way of injunction;

(c) a member or officer of a trade union shall be presumed to be acting on behalf of that union if he takes any step or action in contemplation or in furtherance of a labour dispute in combination or in company with any other member or officer of that union, unless the contrary is proved.

(3)If the Court is satisfied upon an ex parte application that it is probable that the plaintiff is entitled to relief by way of injunction and that it is probable that unless an interlocutory order is made the plaintiff will suffer substantial injury

or damage, the Court shall make such an order subject to such terms and conditions as the Court thinks just; and the Court may at any time on reasonable cause shown discharge or vary such order.

(4)Proceedings for an injunction against a trade union may be brought against that union in its registered name, and an injunction granted under this section against a trade union shall be enforceable by attachment or committal of each officer, and of each member of the executive committee or other governing body, of the union, and by sequestration against the funds of the union.

(5)Subject to subjection (4), an injunction granted under this section against any person shall be enforceable by attachment or committal or otherwise as the Court thinks just.

(6)Relief by way of injunction shall be granted under this section notwithstanding that no compensation or other relief is claimed or granted therewith.

(7)The power to make rules of the Supreme Court provided by section 62 of the Supreme Court Act 1905, shall include power to make rules for regulating, subject to and for the purpose of giving effect to this section, the practice and procedure in all matters relating to the granting of relief under this section.

(8) For the purpose of this section, a trade union includes any body performing the functions of a trade union notwithstanding that it is not registered as a trade union under the Trade Union Act 1965."

The LDA

12. Sections 3 and 4 of the LDA provide as follows:

"Application

3 Notwithstanding any other law to the contrary, this Act applies to any labour dispute specified in the notice under section 4.

Notice to be published

4 (1) The Minister may by notice published in the Gazette declare that a labour dispute exists or is apprehended.

(2) Section 6 of the Statutory Instruments Act 1977 shall not apply to a notice under subsection (1)."

13. Section 5 of the LDA empowers the Minister after a section 4 notice has been published to constitute and refer the dispute to a Labour Dispute Tribunal. Section 1 of the LDA adopts the LRA definitions of terms such as "*irregular industrial action*

short of a strike", "*labour dispute*", "*strike*", and "*trade union*". Section 20 of the LDA provides as follows:

> "***Certain provisions of Labour Relations Act 1975 to apply***
> *20 (1) Sections 37 to 39 (inclusive) of the Labour Relations Act 1975 shall apply mutatis mutandis.*
>
> *(2) Subject to section 37 of the Labour Relations Act 1975 [title 18 item 1] and to the modification set out in subsection (3), section 5Y of the Labour Relations Act 1975 shall apply mutatis mutandis.*
>
> *(3) [amending provision omitted as spent].*"

14. Section 5Y of the LRA provides as follows:

> "*Notwithstanding any other provision in this Act or the Trade Union Act 1965, for the purposes of this Act a trade union shall not be or be treated as if it were, a body corporate, but—*
>
> *(a) it shall be capable of suing or being sued in its own name whether in proceedings relating to property or to proceedings pursuant to this Act;*
>
> (b) *any judgment, order or award made in proceedings of the description mentioned in paragraph (a) brought against the trade union on or after 12 July 1991 shall be enforceable by way of execution, punishment for contempt or otherwise against any property held in trust for the trade union to the like extent and in the like manner as if the union were a body corporate.*"

15. Sections 37 to 39 of the LRA deal with criminal prosecutions. Section 37(3) provides that an unregistered trade union may be prosecuted under the Act. Section 40 (8) of the LRA which permits injunctive relief to be obtained against unregistered trade unions is not incorporated into the LDA. Accordingly, there appears to be considerable force to the Respondents' contention[1] that there is no statutory basis for seeking injunctive relief against the unregistered 4th and 5th Respondents under the LDA. It was common ground that there was no statutory basis for injunctive relief at all under the LDA.

16. However, the main substantive provision relied upon by the Minister under the LDA was section 19, which provides as follows:

> "*(1) At any time after the notice mentioned in section 4 is published or at any time after a labour dispute is referred to the Tribunal and the dispute in either case is not otherwise determined, a lock-out, strike or irregular industrial action short of a strike is unlawful.*

[1] This was the position advanced more clearly by Mr Duncan in oral argument than in paragraph 64 d. of the Respondents' Skeleton Argument, which failed to clearly distinguish the two Acts.

(2) It is unlawful to commence or continue or to apply any sums in furtherance or support of, any lock-out, strike or irregular industrial action short of a strike that is unlawful under subsection (1).

(3) Any person who takes part in, incites or in any way encourages, persuades or influences any person to take part in, or otherwise acts in furtherance of, a lock-out, strike or irregular industrial action short of a strike that is unlawful under this section is guilty of an offence and is liable —

(a) on conviction on indictment to a fine of five thousand dollars or to imprisonment for two years, or both;

(b) on summary conviction to a fine of one thousand dollars or to imprisonment for three months:

Provided that no person shall commit an offence under this section by reason only of his having ceased work or refused to continue to work or accept employment. "

17. Injunctive relief was sought to restrain a breach of section 19 of the LDA under the Court's general equitable jurisdiction to grant injunctions given a statutory foundation by 19(c) of the Supreme Court Act 1981.

Factual findings

Background to the present dispute

18. My factual findings are primarily based on the largely agreed underlying facts. After discussions with the Respondents and the Bermuda Police Association aimed at reducing Government expenditure on public employees' salaries in the hope that redundancies could be avoided, the Bermuda Government and the Bermuda Trade Union Congress ("BTUC") on July 22, 2013 entered into a Memorandum of Understanding (the "MOU"). The MOU covered the period September 1, 2013 until March 31, 2015 and provided, *inter alia*, for :

(a) an early retirement plan;

(b) twelve unpaid and un-worked days off per year for all public officers (now popularly referred to as "furlough days");

(c) a continuing salary freeze;

(d) the establishment of a Tripartite Economic Committee;

(e) a dispute resolution provision in the following terms:

"If either party should not adhere to the terms and conditions of the MOU, the aggrieved party will request a meeting of the negotiating team to discuss the matter in the first instance."

19. The furlough day element of the MOU lies at the heart of the dispute which triggered the present proceedings. In practical terms, it meant that public officers would have one day off per month and receive a proportional reduction in their pay (5%). From the Government's perspective, this was a token concession in financial terms. Public debt had risen exponentially in recent years and financial disaster could only be avoided by very substantial public expenditure reductions. From the Respondents' perspective, against a recent history of a salary freezes (since 2011) and a longer history of regular pay rises, the BTUC agreement to a pay reduction through the MOU represented a uniquely enlightened and collaborative approach on the Unions' part.

20. Although there was no or no serious dispute about the gravity of the economic crisis confronting public finances, the documentary record placed before this Court suggests that both sides failed to fully appreciate their respective most compelling concerns as the 2014/2015 Budget approached. The Government was understandably focussed on reducing costs and failed to adequately appreciate the importance of the emotional and financial concerns of the workers in terms of the negative impact furlough days and the far worse spectre of redundancies. The Respondents and the BTUC, on the other hand, were understandably focussed on eliminating furlough days and avoiding any redundancies and/or further pay cuts; they failed to adequately appreciate the importance of the emotional and financial motivations underpinning the Government's desire to meaningfully tackle the public debt crisis. While it may be true that the respective parties were aware of their respective conflicting concerns, this awareness was never translated into sufficiently effective action in terms of achieving a meaningful meeting of minds; otherwise, the present dispute would not have occurred. This is not to suggest that the unprecedented circumstances which all relevant actors were confronted with constituted ideal negotiating conditions or presented obvious solutions which were ignored.

21. Leading the rescue mission was the Minister of Finance. In his 2014-2015 Budget Statement, to which Mr Howard for the Government referred, the following clear and persuasive arguments were made. Government was not living within its means and was dependent on borrowing to meet its operational expenses. The Statement projected that net debt would stand at just under $2 billion by March 31, 2015. A target had been set of keeping the net debt/GDP ratio no higher than 38%; as at March 31, 2014, the ratio was 32%. This required both public sector reform to reduce expenditure and an ability to attract foreign investment. In this regard, it was asserted that:

(a) *"Government has been able to project a reduced deficit and a reduced spending profile for the next fiscal year with no plans for redundancies. However, if we are unable to achieve the targets...and avoid losing our financial independence and our ability to retain the confidence of international investors, upon whom we rely, spending cuts must continue*

year after year until the deficit is erased. Further reductions in costs after 2014/15 will not be achievable without either staff layoffs or the outsourcing of non-core functions through mutualisation or privatization. Remaining as we are, with the current number of civil servants, will not be possible.

No one, particularly this Government that has been elected to create jobs, would want to add to the ranks of the unemployed. There are too many struggling Bermudian families out there now. Furthermore, to lay off civil servants only to have them apply for Financial Assistance would be, financially, a wasted exercise. Outsourcing by way of mutualisation and/or privatization is the alternative that offers affected staff and union members the least disruptive option. This option represents job shifts instead of losses and staff remain employed, retaining union membership if they so desire…" (page 30);

(b) "*the boiling over of industrial disputes into the streets has the potential to be extremely costly to Bermuda....The bottom line is Government has a strategy to stimulate and restore the economy but the strategy can be derailed if stakeholders do not work together in a collaborative manner to quietly sort out their differences…*" (pages 31-32).

22. Again, it is only a matter of inference, but it appears that the Government reluctantly agreed to a BTUC proposal that the Minister of Finance defer tabling the Public Bodies Reform Bill later that year. Having forcefully articulated the view that outsourcing and/or privatization was essential in the Budget, it would be surprising if the Minister of Finance would have happily opted for a more diluted response to the undoubted problems he was seeking to solve in a rational and proportionate, yet also robust and effective manner.

23. A Budget Reduction Working Group was created with terms of reference recorded in a document dated November 19, 2014. I say it appears the Public Bodies Reform Bill was reluctantly postponed, because the document expressly stated that Government had agreed to defer tabling the Bill:

> "*… to enable a Working Group to find a reduction of 5% in the cost of operating Government other than by privatization, outsourcing or mutualisation. However, policy development and drafting will continue in the event that the necessary reductions are not found.*"

24. An important clue as to why this 'reluctant' compromise failed to avoid the labour dispute which would break out just over two months later may be found in the same document setting out the terms of reference of the Working Group. Phase I entailed finding a saving of 5% (approximately $67 million) for the forthcoming financial year. Although not spelt out, the obvious reason for this target was to enable the furlough day arrangements to be brought to an end. Phase II envisaged agreeing "multiyear" reductions. Bearing in mind the importance of this goal to the BTUC and its obvious complexity, the timeframe fixed on November 19, 2014 seems, with hindsight, impossibly short:

> *"To be of value, the work of Phase I must be completed in sufficient time to inform the budget. Therefore the work must be completed by 12th December in order to inform the development of the Budget."*

25. The Working Group, perhaps inspired by the 1960's vintage television series 'Mission Impossible', accepted this daunting mission. Mr Duncan, for the Respondents, referred the Court to the Working Group's Minutes which revealed that, remarkably, a substantial portion of the targeted savings had seemingly been achieved. The Working Group, it must be said, consisted of senior civil servants (Government), trade union leaders (BTUC) and respected private sector representatives with labour relations experience. At the end of the last Working Group Meeting on December 17, 2014, the Minutes indicate that:

    (a) the BTUC felt that $35 million of savings had been identified by them and the Government side should identify the balance;

    (b) a private sector representative thought that the real amount of savings might end up at $20 million; and

    (c) the Government side undertook to request Departments to find further savings.

26. The spin the Respondents sought to put on the outcome of the Working Group's endeavours, namely that sufficient savings had been identified to end furlough days, is not supported by an objective analysis of the evidence placed before this Court. What is clear is that a tripartite committee worked extremely hard towards the goal of identifying savings equivalent to those achieved through furlough days and perhaps reached half way to that goal. Those savings were identified by the BTUC side, with the meetings concluding on the informal understanding that the ball lay in the Government's court to come up with further savings. The Group as a whole and the BTUC in particular were entitled to expect good faith efforts by the Government side to match the BTUC proposed savings. At the very least, the Minutes overall suggest that it was reasonable for the BTUC to expect that if the Government side were unable to identify potential savings sufficient to end the furlough day arrangements, some notification would be given to the Working Group and/or the BTUC. Paragraph 2.2.1.15 noted that:

> *"...the action point would be for the Finance Team to go back to the Ministries and get more savings from them."*

The dispute breaks out

27. The seventh meeting of the Working Group ended on December 17, 2014 with the Financial Secretary wishing members *"Merry Christmas"*. The BTUC no doubt hoped to receive good tidings of peace in the New Year with the Finance Team reporting that the requisite additional savings had been found. Instead, the BTUC received tidings of another kind. Firstly, the Cabinet Secretary apparently notified the BTUC by letter dated January 8, 2015 that the Working Group would not meet again. The BTUC requested a meeting with Government which took place on January 14, 2015. By Mr Hayward's account, the BTUC made it clear to the Premier that its

position was that furlough days should not be extended beyond the end of March. The Minister of Finance himself wrote to Mr Chris Furbert as Vice-President of the BTUC a letter dated January 23, 2015, a Friday. After praising the BTUC for identifying $35 million in savings and the Working Group as a whole for finding a further $5 million in cost-cutting measures, the Minister then stated:

> *"...You would be keenly aware that the 7% reduction achieved for the current budget year was only achieved with the inclusion of a furlough day for Government employees. It is imperative that this furlough be continued in order for Bermuda's financial health to be improved in accordance with the Medium Term Expenditure Framework.*
>
> *You would also be aware that the Government is required to present a budget to Parliament, have it debated, and approved by both Houses of the Legislature in order for any funds to be expended after 31st March, 2015. To be clear, unless a budget is approved as described by that deadline, the Government will not be able to operate, requiring all services to be suspended and all staff to be sent home, unable to be paid.*
>
> *In order to meet the 31st March, 2015 deadline, the budget development process must conclude with immediacy. To this end, we invite you to reconsider your position with regard to the continuation of the furlough. If you are unable to agree to continue the furlough, the Government will be forced to take steps to achieve the necessary reductions in expenditure for 2015-2016. Such measures could include a reduction in salaries of Government Employees equal to the savings achieved in the current financial year by the furlough.*
>
> *We invite your serious consideration of this position and look forward to hearing from you as soon as possible. Given the urgency of the matter we respectfully request a decision on Monday, 26th January, 2015 at 12.00pm (noon)."*

28. The BTUC had concluded its participation in the Working Group on December 17, 2014 awaiting a response from the Finance Team of the result of their efforts to identify further savings so that furlough days could be abolished. In early January they had been unilaterally told by the Government side that no further meetings would take place. Against this background the January 23, 2015 letter was on any detached and objective view a wholly surprising and disproportionately confrontational communication. Whether the letter justified the actions which the Respondents took by way of response in legal terms, will be considered further below.

29. However at the outset it must be acknowledged, in fairness to the Minister of Finance, and on the assumption that the analysis contained in the 2014/2015 Budget Statement is fundamentally sound, that the BTUC position must have been very frustrating indeed. Having advanced proposals designed to reform the Public Service and make substantial cuts while protecting workers through creating alternative private employment, he was not only met by a Union response which both opposed these essential structural changes. The comparatively minor furlough day measure, itself designed to save jobs, was itself under attack. The plea made in the 2014/2015 Budget

that Bermudians were "*in this boat together, and the best thing we can do is pull together to keep it moving forward*", in terms of meaningful remedial financial action, was seemingly being ignored. As the 2015/2016 Budget approached with the BTUC insisting on abandoning furlough days, the Minister of Finance quite possibly felt like this. He was on the bridge of the ship 'Spirit of Bermuda's Economy', which was sailing towards reefs in stormy seas, and calling for assistance to help turn the wheel with a view to changing course. Meanwhile the ship's crew were below deck refusing to assist, until their normal rations (which had only slightly been reduced) were restored. This framing of the motivations behind the inflammatory January 23, 2015 letter finds most direct support in the Minister's own remarks at a February 27, 2015 press conference[2].

30. What happened next may be summarised as follows:

(1) that same afternoon, the BTUC decided to convene a meeting for all Public Service employees on Monday January 26, 2015 at 10.00am at the BIU Headquarters, Union Square. The avowed purpose was to consult with Union members with a view to preparing a response to the Minister of Finance's letter by the deadline he had fixed of 12.00 noon that day. This was explained at a Press Conference also held Friday January 23, 2015;

(2) Mr Hayward, the BPSU President, estimated that approximately 3000 employees attended the meeting which was held in the open and recorded by at least one media outlet. After the letter was read to the meeting and the efforts of the Working Group to avoid a continuance of furlough days had been related, the transcript placed before the Court records the following exchanges:

> "*MR FURBERT...So, where we're at now? We have to give a decision- a decision by twelve noon today.*
> *CROWD No furlough days. No furlough days.*
>
> *MR FUBERT Well, here's how we fit the script: We will walk collectively to the Cabinet, and we'll put something on the table for the Premier. And what we would ask them to do is rescind this letter-this disrespectful letter that they sent to the workers-and take furlough days back off the table. (Crowd clapping, cheering.) We're going to allow them to caucus, or whatever they need to do to in terms of formulating their decisions, and we will wait until we get a reply.*
>
> *CROWD (Clapping.) Yaay.*
>
> *MR FURBERT Now, there's two things can happen: They can walk back out of their office and say: We have reconsidered. And we will not be proceeding with furloughs...or, they can*

[2] Record, Binder 3, page 876.

come back out and say: unfortunately, we have no other choice but to move forward with furloughs.

CROWD No. No sir.

MR FURBERT Well if the letter is their choice, what we will do is: We'll immediately call membership meetings individually, for every public sector union; and we'll get direction from our membership on how to proceed. I can predict the outcome of some of those meetings, but we will...

CROWD Now...Did you get that? Now. We're ready now (Applauding)

MR FURBERT Listen, one thing you have to understand is: This is what they want. They say that we didn't have proper meetings; there weren't votes; and all their supporters. But listen brother, listen. Just listen. We have to respect the processes...";

(3) After marching to Cabinet Office, the Premier addressed the crowd and proposed re-opening negotiations with the BTUC with a view to finding further costs savings, from the BTUC's perspective with a view to abandoning furlough days. The Union leaders recommended that this proposal be accepted and that workers return to work. Notable conciliatory and principled statements recorded in the transcript include the following:

"*PREMIER ...A budget has to be done and everything has to be on the table. I take the good faith that BTUC came in and we'll continue to work with them and do the best that we can to find the correct solution.*

It's in the interests of future generations that we do it, and, if we keep kicking the can down the road, it's not going to work...

MR HAYWARD...The mere fact that we're going to have this conversation this afternoon doesn't say our position has changed any. All we're saying now, on behalf of our membership/on behalf of our membership first, and then the country, we want to find a solution to the problem..." ;

(4) the resumed negotiations did not get off to a good start. Looked at from an admittedly comfortable distance, it seems obvious that these resumed negotiations required extremely delicate handling indeed. The settlement ball thrown by the Premier to the Government team was, in the heat of the moment, fumbled. According to an account given by the BTUC on Monday evening, a meeting was scheduled for 3.00 pm, and the Government sought a postponement to 3.30. A further extension

was requested until 5.00pm. No Government representative attended at this time either. At 5.35pm, "*members of the BTUC left, dissatisfied with the lack of respect that was shown towards us*". As a result, a further general meeting was convened for 9.00am on Tuesday morning, January 27, 2015;

(5) with goodwill trampled on, the gloves now came off. On Tuesday morning, the workers again marched on the Cabinet Office and the BTUC position had shifted from seeking negotiations, which from its perspective the Government side had (for a second time) refused to participate in, to refusing to negotiate unless furlough days were taken off the table. From the Government's perspective, as implied by the Minister of Finance and the Premier in a press conference later that day, the Unions' position was irrational (in that it failed to appreciate that furlough days were saving jobs) and amounted to blackmail to which they would not succumb in any event. A meeting became an unprecedented "occupy Cabinet Office" campaign with BTUC leaders reportedly spending a cold night in sleeping bags on the Cabinet Office lawns. According to the BPSU newsletter 'Feedback':

> "*On Wednesday, 28 January a solidarity call was made and answered. Reminiscent of the 1981 Strike, non-Government members as well as members of the ESTU joined the demonstration to vehemently oppose the Bermuda Government's forceful attempts to reinstate the furlough day, which was scheduled to end 31 March 2015. This was just the momentum that was needed.*"

The Government takes legal action

31. On Tuesday January 27, 2015, the Head of the Civil Service and Cabinet Secretary reported a Labour Dispute to the Department of Workforce Development. The Applicant/Minister gave Notice of a Labour Dispute under section 4 of the LDA, which was published electronically in the Official Gazette and, the following day, published in the Royal Gazette. The Minister also began the process on January 27, 2015 of appointing a Labour Disputes Tribunal. At 6.21pm on Tuesday January 27, 2015, the Head of the Civil Service sent a copy of the section 4 Notice to all public officers advising that pay would be deducted for any period in which they participated in an unlawful strike. A compromise was subsequently reached so that furlough days were taken instead of pay deductions[3].

32. On Wednesday January 28, 2015, with the "Occupy Cabinet Office" demonstration in full flow, despite a Labour Dispute having been declared, the Minister applied to this Court and was granted the Ex Parte Injunction. The Order was signed by me in

[3] First Randolph Rochester, paragraphs 29-33.

Chambers following a 30 minute hearing at around 3.40 pm. In my Ex Tempore Ruling, I concluded as follows:

> "9. *It may seem that section 4 of the Act gives the Minister very broad powers to, as it were, put a freeze on any irregular strike action. But the scheme of Bermuda industrial relations law is such that the law is designed to prevent irregular strike action and to encourage the parties to labour disputes to use the statutory mechanisms to resolve their disputes amicably and only in certain cases is regular strike action permitted. Of course, in a democracy governments may not stand on their strict legal rights at all times because there always has to be balancing act between permitting freedom of association and freedom of expression and restricting it.*"

33. The Ex Parte Injunction could not have been served earlier than the late afternoon or early evening of January 28, 2015. Copies of the Injunction may well have been served the following day. Notice of the application being made was admittedly given to the BTUC Executive members at around 3.00pm[4], by way of service of a draft of the proposed Order, prior to the Ex parte Injunction being granted. By that time, however, Reverend Tweed and Mr Edward Ball had already initiated mediation efforts with a view to resuming the stalled negotiations. A meeting took place at 4.00pm and at around 6pm a press conference was held in the grounds of the Cabinet Office, at the conclusion of which the workers were asked by Union leaders to return to work.

The Interim Resolution of the Dispute

34. In short, cuts were subsequently agreed which meant that furlough days were not continued after March 31, 2015. On the evening of January 28, 2015, the Premier announced outside Cabinet Office in impressively unifying terms:

> "*PREMIER May we cheer for the union? Ladies and gentlemen, the last few days have seen us expressing divided opinions on the issues at hand (Crowd shouting.) We may not have agreed on everything but, sometimes, that is the nature of democracy.*
>
> *VOICE you're right.*
>
> *PREMIER....Our disagreements have been centred on the continuation of the furlough day. Now, we can move forward with the savings of that have been identified by all parties. It is clear that we continue to work towards the goal of reducing the operating costs of Government, in accordance with the strategy outlined by the Minister of Finance in the first budget, two years ago. With that in mind, the Government and the BTUC agree that continuing the furlough day will only be considered as a last resort...*"

[4] Second Affidavit of Chris Furbert, paragraph 21. Evernell Davis swore Affidavits attesting to serving one set of documents on January 28 and another on January 29.

35. A minor disagreement expressed in subsequent statements by Mr Furbert and the Premier over precisely what had been agreed at that juncture had no impact on the substantive result. The Premier, after all, conceded on February 29, 2015 that "*the furlough cannot be implemented without the agreement of the unions*".

The Minister's case for final relief on the Originating Summons

36. Although the Labour Disputes Tribunal was subsequently constituted (chaired by lawyer Mr Chen Foley) the Tribunal determined that the dispute referred to it had been resolved. This is unsurprising because the present proceedings are in reality about a far broader range of matters than the issues brought before the Court on January 28, 2015. The First Affidavit of Randolph Rochester, Permanent Secretary of Home Affairs, supported the application for a permanent injunction with the following main averments:

    (a) the BIU was said to have an established pattern of acting outside contractually agreed dispute resolution mechanisms by reference to 10 news reports of irregular industrial action between 2011 and 2014. This was also said to be bad for business confidence. Mr Howard submitted that the disputes typically involved matters which ought to have been resolved through collective bargaining mechanisms and that the news reports demonstrated a pattern of "*guerrilla industrial warfare*";

    (b) strike action was taken by the Respondents in January 2015 which interrupted Government services and ignored contractual or statutory mechanisms for resolution of the disputed issues;

    (c) based on historic conduct, there were continuing and apprehended labour disputes in relation to the future negotiations of collective bargaining agreements ("CBAs") with the Respondents having regard to the Government's economic policy objectives, which were very important in the public interest:

> "*88. At this crucial juncture in the economic life and history of these Islands it is respectfully urged upon the Court that the underlying economic policy objectives of the Government are critical to the economic well-being of these Islands. The Respondents, accordingly, should not be allowed, by impermissible or unlawful means, to frustrate the Government's economic policy objectives. When powerful and influential bodies, such as the Respondents, act impermissibly or unlawfully, the implications for the rule of law and society are such that impermissible conduct of the kind engaged in by the Respondents ought not to be tolerated or condoned.*"

37. The Second Rochester Affidavit exhibits correspondence showing that the Respondents declined to give undertakings requested to avoid the need for the present proceedings. The deponent also makes the complaint that the Respondents failed to comply with the '*ILO Principles Concerning the Right to Strike*' in January 2015 and previously by failing to take proper votes. This was the criticism Mr Furbert anticipated on January 26, 2015 in Union Square.

38. Anthony Manders, Financial Secretary, supported the application in technical terms, averring that:

    (a) "*Bermuda's economy is in a fragile state*" (paragraph 1);

    (b) the state of Bermuda's public finances influence Bermuda's credit ratings and, in turn, both the cost of borrowing and the way investor's view Bermuda;

    (c) Bermuda is heavily dependent on foreign direct investment and instability in labour relations is generally viewed negatively by foreign investors. He concluded by averring:

    "*24... Unauthorized, abrupt, unlawful work stoppages put Bermuda's reputation as a place to invest and do business at risk, puts the economy at risk, threatens Bermuda's economic recovery, its economic viability, its short and long term economic prospects and its hard earned business reputation. In an increasingly competitive and electronic world, ground lost to business competitors will be extremely hard to recover, if at all.*"

The Respondents' response

39. The First Affidavit of Chris Furbert disputed any historic pattern of unlawful industrial action and the accuracy of the news reports relied upon. He asserted that in most instances double standards were applied as regards the mutual obligation of employers and employees to abide by CBAs. He exhibited further articles suggesting that relations with one employer had recently improved. As regards damaging the economy, this complaint was refuted by reference to BMA figures showing a growth in reinsurance business. The deponent blamed January 2015 action on the Minister of Finance's letter; in his Second Affidavit he exhibited a letter signed by numerous employees confirming that this letter prompted them to march). He also invoked section 10 of the Bermuda Constitution in opposing an injunction which required the Court to engage in crystal ball reading.

40. The First Jason Hayward Affidavit runs to 161 paragraphs and sets out a detailed response to the Applicant's case. The highlights include the following points:

    (a) the BPSU has a long history of responsible conduct and has collaborated with the present Government extensively, initiating calls for a tripartite approach to public sector reform;

(b) the BPSU had produced a Position Paper and Report on the Public Sector Reform Bill, demonstrating its responsible approach and economic leadership in response to the Government's reform initiatives;

(c) the Minister of Finance's letter was unreasonable given the history of the Working Group's efforts and the BTUC's disproportionate contribution to proposals which was not matched by the Government side; and

(d) the furlough dispute had been resolved so there was nothing for the Labour Disputes Tribunal to adjudicate.

41. In the Second Hayward Affidavit, the deponent denied there was any basis for fearing that future negotiations would be difficult and pointed out that the BPSU was not historically engaged in wildcat strikes.

42. The central theme of all further Affidavits filed by the Respondents (Dr Michael Charles-BUT, Mr Timothy Seon-POA, Ms Toni Dublin-Teacher, Mr Lawrence Holder-BIU Postal Division President, and Mr Sinclair Samuels-BIU Marine and Ports President) was that the January 23, 2015 letter was the trigger for them attending the initial Union Square meeting and joining the march. Dr Charles made the further points that the historic 'misconduct' complaints did not apply to the BUT and that the failure of the Government side to attend the meetings scheduled for March 27, 2015, in effect, rubbed salt in the BUT's wounds.

Preliminary factual findings on the central issues

43. The Respondents' campaign to end furlough days seriously began at 9.00 am on Monday January 26, 2015. This was in response to the threat contained in the Friday January 23, 2015 letter that if the BTUC did not agree to a continuance of furlough days by noon on the following Monday, a viable budget would likely not be possible and all Government workers might have to be sent home at the end of March. A meeting led to a march to Cabinet Office, initial discussions and an agreement to resume negotiations on January 27, 2015, which negotiations were intended to identify savings which would obviate the need to continue with furlough days. The Government side did not attend the scheduled meeting.

44. Also on January 27, 2007, the Minister published in the Official Gazette and sent to the Royal Gazette for publication the following day notice of a dispute under section 4 of the LDA. At 6.21pm the Head of the Civil Service emailed a copy of the notice to all public officers. It is unclear which of the Respondents' officers and how many public officers received actual notice of the section 4 notice either on January 27, 2015 (the BTUC Executive slept in sleeping bags on the Cabinet office lawns overnight) prior to gathering again on the morning of January 28, 2015. Only public officers with a Government Blackberry would likely have received Dr Binns' email on Tuesday evening after 6pm. Any other public officers who left work before 6.21 pm on Tuesday and went straight to the Cabinet Office on Wednesday morning would likely not have seen the email at all.

45. However, the notice was published in the online Official Gazette on January 27, 2015 and in the Royal Gazette for January 28, 2015 so all concerned had at least constructive notice by the morning of January 28, 2015.

46. There is no evidence of any historic pattern of irregular strike action involving the 2nd to 5th Respondents. Mr Duncan invited the Court not to rely upon newspaper articles which gave an incomplete picture of previous incidents of work stoppages involving the BIU. I agree that the newspaper extracts which were relied upon by the Minister are not the best evidence of what occurred. The BIU has seemingly significantly improved its relationship with a longstanding adversary, Stevedoring Services Limited. The fairest conclusion to draw from the disputed evidence is that over the last five or so years there have been various work stoppages which demonstrate poor industrial relations between employers (including the Government) and BIU workers. While it is clear that conduct which closely resembles irregular strike action, sometimes thinly disguised as Union meetings, has occurred, there is no evidential basis for concluding that the relevant incidents were substantially caused by 'bad behaviour' on the part of the Union alone. Labour harmony and conflict are usually linked to the quality of employment relationships, whether or not unions exist.

47. There was no credible evidence in opposition to the evidence filed on behalf of the Minister to the effect that poor labour relations and a reputation for irregular strike action was potentially damaging to Bermuda's prospects for economic recovery. Growth in terms of reinsurance premiums earned by Bermudian reinsurers has no meaningful relationship to the depressed areas of the economy which the Financial Secretary asserted Government was seeking to stimulate (principally in the tourism sector). These efforts were said to be directed at attracting foreign direct investment which would lead to the creation of jobs for workers who would likely be unionised. I do not ignore the need for caution about accepting unquestioningly arguments to the effect that citizens should compromise their fundamental rights because enforcing their rights will be bad for business. On the other hand, it is not in ordinary circumstances proper for the courts to second-guess the Executive branch of Government as to where the country's best economic interests or the public interest lie.

48. It is in any event a notorious fact that Bermuda's economy is wholly dependent on the provision of services in a competitive market-place. While Bermuda's labour laws have a distinctly British and/or European flavour, our largest trading partner (the United States) has far more pro-business employment laws. I see no justification for doubting the soundness of the concerns expressed by the Financial Secretary about the negative impact of highly-publicised labour relations conflictual events. Ironically it seems that in times of economic hardship when labour relations are likely to be most tense, the public interest (in a service economy such as Bermuda's) requires employers and employees to manifest the most harmony and common sense.

Legal and factual findings on the main contentious issues

Whether the Minister and/or the Government have sufficient interest to seek injunctive relief under the LRA

49. There ought to be little doubt that the Minister and/or the Government have sufficient interest to seek injunctive relief under section 40 of the LRA. It was suggested that the Minister was the wrong Applicant for ex parte relief on January 28, 2015. Even if correct, that point has little relevance now as no suggestion is made that the Ex Parte Injunction was breached. The Ex Parte Injunction has now effectively lapsed in light of the Tribunal's decision that the original dispute no longer existed.

50. Irrespective of whether or not a dispute may strictly exist which directly involves the Minister responsible for Labour ("the Minister" for the purposes of the LRA), I find that the Minister has sufficient interest to seek injunctive relief under section 40 of the LRA. Section 40(2)provides as follows:

> *"(a) 'person having a sufficient interest in the relief sought' includes—*
>
> *(i) any person whose person, property or business or any right or interest of whom has been or is being or is likely to be injured or damaged by any act which is, or the continuation or repetition of which, is threatened or reasonably apprehended; and*
>
> *(ii) any person whose house or place of residence, working or business has been unlawfully watched, beset or picketed..."*

51. That definition is a non-exhaustive one designed to apply to employers generally, private and public alike. The Minister is charged with general superintendence of the LRA and accordingly has an obvious interest in any dispute to which the Act applies. He also expressly brings the present proceedings not simply on behalf of his own Ministry but on behalf of the Government as a whole as well. I reject the Respondents' complaint that the Minister of Home Affairs lacks standing to seek injunctive relief under the LRA.

Whether the Minister and/or the Government have sufficient interest to seek injunctive relief under the LDA

52. It is clear that there is no statutory jurisdiction to grant injunctive relief under the LDA. As Mr Howard rightly submitted, there can be no doubt that this Court's general jurisdiction under section 19(c) potentially applies to breaches of the LDA. That this general jurisdiction was available in relation to the grant of injunctive relief to restrain breaches of the LDA was agreed by the parties in my own decision in *Bermuda Cablevision Limited-v-Greene* [2004] Bda LR 18 at pages 3-4. No convincing reason why this general jurisdiction to grant injunctive relief should be

regarded as ousted as regards threatened or actual breaches of the LDA was advanced by Mr Duncan.

Whether the Respondents or either of them acted unlawfully on or about January 28, 2015 contrary to sections 9(1) and/or 9(5) and/or 34 of the LRA

53. The LRA by its terms does not apply to prison officers. Section 2 provides:

> "*2. This Act shall not apply in relation to—*
>
> *(a)...;*
>
> *(b)a prison officer as defined for the purposes of the Prisons Act 1979...*"

54. Mr Duncan rightly argued that no question of a breach of the LRA by the 4th Respondent arises. I accept this straightforward submission. A more conceptually complicated point was raised in relation to whether or not the Applicant had established that the conduct complained of actually infringed section 34 of the LRA at all. So far as is material to this submission, section 34 provides as follows:

> "*(1) It is hereby declared that any lock-out, strike or irregular industrial action short of a strike shall be unlawful if—*
>
> *(a) it has any object other than or in addition to the furtherance of a labour dispute within the trade or industry in which the strikers, persons taking irregular industrial action short of a strike or employers locking-out, as the case may be, are engaged; or*
>
> *(b) it is designed or calculated to coerce the Government either directly or by inflicting severe hardship upon the community,*
>
> *and it is further declared that it is unlawful to commence, or continue, or to apply any sums in furtherance or support of, any such illegal lock-out, strike or irregular industrial action short of a strike:*
>
> *Provided that—*
>
> *(a) a lock-out, strike or irregular industrial action short of a strike, the purpose of which is merely to alter or maintain the terms and conditions of employment of strikers or workmen locked out, as the case may be, shall not be deemed to be designed or calculated to coerce the Government...*
>
> *(2)For the purposes of subsection (1), a labour dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and workmen, in that trade or industry, which is connected with the employment or nonemployment or the terms of*

employment, or with the conditions of work, of persons in that trade or industry."

55. Regular or irregular strike action does not contravene section 34 if those taking the action in question are seeking to, *inter alia*, alter or maintain their terms and conditions of employment. Looking at section 34 in isolation, all public employees required to take furlough days who were also part of the essential services would not have infringed this provision. There was a dispute about terms and conditions of employment and the strike action was designed to maintain (or restore) contractual rights. Private sector employees acting in sympathy would potentially be caught by the section, however. The argument of the Respondents' on the meaning of section 34 was, to this extent, broadly sound.

56. However, Mr Howard submitted that it was unarguably clear that, as regards essential service workers, the provisions of section 9 of the Act were clearly infringed. This provision requires a dispute in an essential service to be reported to the Director of Labour and 21 days' notice to be given of proposed strike action. The strike or irregular industrial action short of a strike in relation to an essential service will thereafter only be lawful if the Minister has not, in the interim, referred the dispute to the Permanent Arbitration Tribunal. This argument is supported by a straightforward reading of section 9(1):

> "(1) *A lock-out, strike or any irregular industrial action short of a strike in an essential service shall be unlawful unless there is a labour dispute within that service and—*
>
> *(a) a report of the labour dispute has been made to the Director under section 3(1) as read with section 7; and*
>
> *(b) thereafter valid notice of the intended lock-out, strike or irregular industrial action short of a strike has been given to the Director by the employer, or trade union on his behalf, or workmen, or trade union on their behalf, as the case may be, at least twenty-one days prior to the day upon which the lock-out, strike or irregular industrial action short of a strike is to commence; and*
>
> *(c) the lock-out, strike or irregular industrial action short of a strike is the lock-out, strike or action specified in the notice (both as respects its nature and the persons participating) and, subject to subsection (4), commences* on the day *specified in the notice, or within twenty-four hours thereafter; and*
>
> *(d) the dispute has not been referred for settlement to the Permanent Arbitration Tribunal under section 8....*"

57. Subject to considering the anticipatory breach of contract and constitutional arguments and the scope of declaratory relief it would in any event be appropriate to

grant separately below, I am bound to find that the provisions of section 9 of the LRA were infringed on or about January 28, 2015 as contended by the Applicant. It was conceded by the Respondents that some units of the 1st and 2nd Respondents and the 5th Respondent were governed by the LRA. The fact that no disruption was caused to any essential service, and I assume in favour of the 5th Respondent that no disruption occurred, only goes to mitigation, and does not amount to a defence. Section 9 in unequivocal and unambiguous terms strictly limits the right to take strike or irregular industrial action in relation to the essential services by prohibiting such action unless (a) 21 days' notice has been given by the workers, and (b) the Minister has not within that period referred the matter to the statutory tribunal for independent adjudication of the dispute.

Whether the Respondents or either of them acted unlawfully on or about January 28, 2015 contrary to section 19 of the LDA

58. Two distinctive points were raised by the Respondents in answer to the case that they had breached section 19 of the LDA, in addition to the broader anticipatory breach and constitutional points briefly mentioned above. Firstly, and more broadly, it was argued that no valid notice had been given for the purposes of section 4 of the 1992 Act. Secondly, and more narrowly, it was argued that the 4th and 5th Respondents could not be sued for breach of the LDA because they were not registered trade unions.

59. The second point can be dealt with quite shortly. Trade union is defined by section 2 of the LDA by reference to the definition set out in the LRA. Section 1 of the LRA provides:

> *"'trade union' means a trade union registered under the Trade Union Act 1965..."*

60. Mr Duncan submitted that as the 4th and 5th Respondents were not registered, they had no legal capacity to sue or be sued in their own name. Section 40 of the LRA explicitly provided that injunctive relief could be sought against unregistered trade unions as if they were registered, but section 40 was not one of the provisions incorporated into the LDA. Mr Howard's only response was to suggest that the same result flowed from the incorporation of section 5Y of the LRA into the LDA. Section 5Y provides:

> *"5Y Notwithstanding any other provision in this Act or the Trade Union Act 1965, for the purposes of this Act a trade union shall not be or be treated as if it were, a body corporate, but—*

(a) it shall be capable of suing or being sued in its own name whether in proceedings relating to property or to proceedings pursuant to this Act;

(b) *any judgment, order or award made in proceedings of the description mentioned in paragraph (a) brought against the trade union on or after 12 July 1991 shall be enforceable by way of execution, punishment for contempt or otherwise against any property held in trust for the trade union to the like extent and in the like manner as if the union were a body corporate.*"

61. I accept that section 5Y clearly rebuts any argument that the 1st to 3rd Respondents could not be sued under the LDA. They are "trade unions" as defined by the LDA. On the other hand, the 4th to 5th Respondents are not trade unions so the usual legal rules that unincorporated associations cannot be sued as such have not been displaced as regards liability under the LDA. Mr Howard referred the Court to two English cases with a view to undermining this conclusion. I found neither case to be persuasive for present purposes.

62. In *Taff Vale Railway-v-Amalgamated Society of Railway Servants* [1901] AC 426, the House of Lords held that unions registered under the 1871 Trade Union Act could, by necessary implication, be sued. That case concerned a legislative scheme where there was no express provision for registered trade unions only to be sued. Reliance was also placed on the observations of Lord Denning in a case concerning an unregistered union, *Heatons Transport (St. Helens) Ltd-v- Transport and General Workers Union et al* [1973] A.C. 15 at 45. However, it is clear from the relevant passage that the legislative scheme in this case also expressly provided for unregistered unions to be sued. Lord Denning stated:

> "*An unregistered trade union is not a body corporate, but it is a legal organism comparable to a body corporate, just as registered trade unions were before the Act....It acquires that status by reason of section 154 of the Act. It can sue and be sued in its own name. Apart from this provision it would not have been able to do so...*"

63. Mr Duncan argued that the January 27, 2015 Notice of a Labour Dispute published under section 4 of the LDA ("the LDA Notice") was either invalid for want of particularity or did not take effect until January 29, 2015, the day after publication, in any event. The first limb of this argument did not at first blush have great appeal to it. The starting point is to refer again to the terms of section 4 themselves and to remind oneself that the statute is in the present case being applied in a civil, not a criminal context. Section 4 most substantively provides as follows:

> "***Notice to be published***
>
> *4 (1) The Minister may by notice published in the Gazette declare that a labour dispute exists or is apprehended.*"

64. The statute does not spell out what particulars the notice must contain, unlike the strike notice provisions in the LRA, which provide as follows:

> *"9. (2) No notice of an intended lock-out, strike or irregular industrial action short of a strike shall be valid for the purposes of subsection (1)(b) unless it specifies—*
>
> *(a) the industrial action to be taken, whether this be a lock-out, strike or irregular industrial action short of a strike, and if it be irregular industrial action short of a strike, the nature of such action;*
>
> *(b) the persons or category of persons who are to participate in the lock-out, strike or irregular industrial action short of a strike, being persons who are employers or workmen in the essential service in which the lock-out, strike or irregular industrial action short of a strike is to take place;*
>
> *(c) the day upon which the lock-out, strike or irregular industrial action short of a strike is to commence."*

65. The Notice was expressed as being given by the Minister under section 4 of the LDA, and declared that "*a labour dispute exists between the Government of Bermuda and the following Government Departments and All Ministry Headquarters*". Various Departments were listed. It advised that the dispute was being referred to the Labour Disputes Tribunal. Mr Duncan made two observations of particular relevance. Firstly, the Notice bore a stamp indicating that it would be published in the Royal Gazette on January 28, 2015. I accept that this indicates that any earlier publication in the Official Gazette or circularizing via email had no formal legal effect. Secondly, the Notice did not contain any warning as to the penal consequences which flowed from it.

66. Notwithstanding these valid observations, I reject the submission that the Notice was invalid for want of adequate particulars. Having regard to the practical purpose of section 4 (enabling the Minister to ward off strike action and engage the statutory dispute resolution mechanisms) and its broad terms, I find that the dispute was adequately described. I do not exclude the possibility that a heightened level of scrutiny might be appropriate if the Notice was being relied upon to ground criminal proceedings. In that context the failure to warn of penal consequences might have more significance. I also take into account the fact that the present proceedings are solely brought against trade unions whose executive officers must be deemed to be familiar with the scheme of the LDA and who could have been left in little doubt as to what dispute the Notice concerned. I will return to the absence of a penal notice point when considering the matter of the appropriate scope of any declaratory relief below.

67. The Minister's case was that the Notice took effect upon publication on January 28, 2015 at the latest. The "Gazette" in section 4 of the LDA means either the Official

Gazette or the newspaper appointed for official publications (Interpretation Act 1951, section 7). Section 19(1) of the LDA is the governing provision which reads as follows:

> "(1)*At any time after the notice mentioned in section 4 is published or at any time after a labour dispute is referred to the Tribunal and the dispute in either case is not otherwise determined, a lock-out, strike or irregular industrial action short of a strike is unlawful*" [emphasis added]

68. In light of the express terms of section 19(1) of the LDA, I am bound to reject the Respondents' argument that the Notice did not take effect until the day following publication in the Royal Gazette. Mr Duncan's submission in this regard was based on an authority in the wholly different context of determining when time limits expired. On the other hand it does not follow, when considering what consequences should flow from a breach of the strict terms of section 19(1), that consideration need not be given to, *inter alia*, the extent to which the persons alleged to have acted unlawfully after publication of a section 4 notice or reference of a dispute to the Labour Disputes Tribunal did or did not have actual knowledge that their conduct was unlawful. In the application of statutory provisions which restrict the right of citizens to exercise rights which are constitutionally protected, such as trade union membership rights, freedom of expression rights and freedom of movement rights, the question of whether or not the law is being applied in a manner which is constitutionally permissible can always be asked.

69. Subject to considering the topics of constitutional and repudiatory breach of contract and scope of relief below, I would find that a contravention of section 19 of the LDA occurred when a strike or irregular industrial action short of a strike took place on January 28, 2015 after the Notice had been published.

The impact of section 10 of the Constitution

70. Section 10 of the Constitution provides as follows:

> "***Protection of freedom of assembly and association***
>
> *10(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests.*
>
> *(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*
>
> *(a) that is reasonably required—*
>
> *(i) in the interests of defence, public safety, public order, public morality or public health;*

(ii) for the purpose of protecting the rights and freedoms of other persons; or

(b) that imposes restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(3) For the purposes of paragraph (b) of subsection (2) of this section, 'law' in that subsection includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government."

71. Section 10(1) of the Constitution protects as fundamental rights the right to assemble or meet and to form and belong to, *inter alia*, trade unions. Section 10(2) provides that Parliament may through legislation impose reasonable restrictions on those absolute rights in furtherance of either the stated public interests (including imposing restrictions on public officers) or to protect the rights and freedoms of others. The Constitution can be raised in three main ways. Firstly, and more formally, to seek a declaration that a particular law is inconsistent on the face of the legislation in question with a constitutional provision such as section 12. This would ordinarily require a formal application for such relief under section 15 of the Constitution as read with Order 114 of the Rules of the Supreme Court 1985. Secondly, and perhaps marginally less formally, an application may be made for declaratory relief that certain administrative action taken under a law which is constitutionally valid on its face infringes the applicant's constitutional rights. Thirdly, and least formally still, the presumption that Parliament would not have intended to authorise a breach of the Constitution can be used as an aid to interpreting a legislative provision which is reasonably capable of two possible interpretations, one which conforms to the Constitution and the other which conflicts with it.

72. The Respondents submissions appeared to me to potentially fall into the second category of circumstances in which constitutional points can be raised, namely contending that the application to them of the statutory provisions relied upon by the Minister would, on the facts of the present case, entail a contravention of their constitutional right to strike under section 12 of the Constitution. To this extent, Mr Howard's preliminary objection was procedurally sound. This was not the sort of point which ought to have been raised by way of submission only, giving the Minister a limited opportunity to respond.

73. However, carefully analysed, the Respondents' reliance on section 10 of the Constitution was primarily to influence the exercise of the Court's discretion to grant injunctive relief. To this extent, the Court was in effect being invited to take into account a fundamental constitutional right in deciding whether or not the facts of the case justified the grant of injunctive relief. This was little different to inviting the Court to construe legislation in a way which avoided a breach of constitutional rights, the sort of forensic exercise this Court routinely undertakes without requiring any

formal pleading setting out a case for formal constitutional relief. In the Respondents' Skeleton Argument:

(a) reliance was placed on "*the unlawful/unfair conduct by the Applicants by which they are disentitled from relying on section 10(2) of the Constitution in seeking either an ex parte or final injunction*" (paragraph 89);

(b) it was further submitted:

> "*90. As well as these points the court cannot ignore the fact that these proceedings are taken to secure permanent injunctions against the Unions to be held in terrorem over them and their members for the foreseeable future. The Government can only want this in order to enable it to act in the same way again...*"

74. These submissions were supported in a general way by Bermudian, Trinidad and Tobago, English and European Court of Human Rights authorities. Most significant in terms of broad principle was the following statement in the Supreme Court of Canada case of *Saskatchewan Federation of Labour v Saskatchewan* [2015] SCC 4 (Abella J):

> "*The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations...The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that rights. It seems to me to be the time to give this conclusion constitutional benediction.*"

75. In the Minister's 'Supplementary Submissions', the general legal position was correctly stated. In summary, section 10 of the Bermuda Constitution does not confer an absolute right to strike. Legislation can impose reasonable or proportionate restrictions on the general rights of freedom of association protected by section 12(1) of the Constitution. This is supported by Privy Council authority: *Collymore v Attorney General* [1970] AC 538. The Applicant's counsel relied on the following passage from Lord Donovan's judgment in the latter case which was cited with approval by Hellman J for this Court in *Benevides-v-Corporation of Hamilton* [2014] Bda LR 33 at paragraph 21:

> "*The question is whether the abridgment of the rights of free collective bargaining and of the freedom to strike are abridgments of the right of freedom of association.*
>
> *Both courts below answered the question in the negative; and did so by refusing to equate freedom to associate with freedom to pursue without restriction the objects of the association.*

Wooding C.J. put the matter thus:

> *'In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country.'*

It is, of course, true that the main purpose of most trade unions of employees is the improvement of wages and conditions. But these are not the only purposes which trade unionists as such pursue. They have, in addition, in many cases objects which are social, benevolent, charitable and political. The last named may be at times of paramount importance since the efforts of trade unions have more than once succeeded in securing alterations in the law to their advantage. It is also of interest to note what the framers of convention 87 of the International Labour Organisation considered to be comprised in "Freedom of Association." Under that subheading the convention articles 1-5 inclusive read as follows:

"Article 1. Each Member of the international Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2. Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3. 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programs. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4. Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5. Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such

organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers."

All these rights are left untouched by the Industrial Stabilisation Act. It therefore seems to their Lordships inaccurate to contend that the abridgment of the right to free collective bargaining and of the freedom to strike leaves the assurance of 'freedom of association' empty of worthwhile content."

76. Mr Howard also made the following submission in reply to the Canadian authority upon which the Respondents' relied which were also sound in general terms:

> "61. *Abella J, writing for the majority of the Court in Saskatchewan Federation of Labour v Saskatchewan [2015] 1 S.C.R, noted that the right to strike could be protected as part of the process of collective bargaining. According to para 78 of Her Ladyship's judgment, to determine whether there has been an infringement of s. 2(d) of the Charter, the test is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with a meaningful process of collective bargaining.*
>
> *62.This is the key test. The Supreme Court of Canada did not recognize an absolute right to strike. Therefore, in applying the Canadian test (which of course, is not the test in this jurisdiction – Colleymore is)*[5] *the Respondent would have to demonstrate that the Government substantially interfered with a meaningful process of collective bargaining. Only then could it get past the first hurdle of demonstrating that there is a prima facie breach of section 10(1).*
>
> *63.The Minister submits that the statutory regime does not ban the right to strike. It merely imposes a number of procedural restraints aimed seeking an alternate resolution before work stoppages are contemplated.*"

77. These submissions provide an answer to any complaint that the provisions of the LRA and LDA are unconstitutional on their face. They do not directly respond to the narrower point, which was perhaps more clearly advanced by Mr Duncan in oral argument than in his Skeleton Argument, that the conduct of the Government immediately preceding the industrial action on January 28, 2015 (the date complained of) was itself unlawful or unfair to such an extent as to make the grant of injunctive relief inconsistent with the Respondents' section 12 rights. But these principles do point the way to the correct answer to the constitutional complaint. If one is concerned with the constitutionality of the legislation, the question is whether the proposed interference with the right of freedom of association "*leaves the assurance of 'freedom of association' empty of worthwhile content*" (per Lord Donovan in *Collymore*). Is the threshold so high if one is concerned with not so much the

[5] I do not readily accept that there is any meaningful distinction of substance between the Privy Council's analysis of the right to strike as an element of freedom of association and collective bargaining rights and that of the Supreme Court of Canada as expressed in more generous terms in *Saskatchewan Federation of Labour v Saskatchewan.*

constitutionality of the grant of injunctive relief, but the more fluid consideration of whether or not it is just to grant the injunctive relief sought having regard to the potential interference with constitutionally protected rights?

78. In my judgment this Court must, as the Respondents submitted, be able to take into consideration as potentially relevant considerations for the grant of permanent injunctive relief the following matters upon which the Unions relied:

    (1) whether the Government was guilty of an anticipatory breach of contract in issuing the Minister of Finance's January 23, 2015 letter;

    (2) alternatively, whether the said letter was so provocative that it mitigates any breach of the law which occurred on the Respondents' part and undermines the argument that there is a genuine risk of future unlawful strike action unless the Respondents are restrained; and

    (3) further and in any event, whether a permanent injunction would interfere with the Respondents' constitutionally-protected collective bargaining rights to an impermissible extent by subjecting any future industrial action to highly technical attacks through contempt of court applications?

79. I will assess the relevance of these factors when considering the question of whether or not permanent injunctive relief should be granted below. For the avoidance of doubt I do not find that the Applicants are unable for constitutional reasons to seek declaratory relief without infringing the Respondents' constitutional rights. This issue was not properly raised before the Court, if it was raised at all.

Did the issuance of the January 23, 2015 letter constitute an anticipatory breach of contract?

80. The only seriously arguable complete response to the prayer for a declaration that irregular strike action taken by the 1st to 3rd Respondents on or about January 28, 2015 was in breach of the LRA and LDA was the anticipatory breach of contract argument. In summary, it was argued by reference to various persuasive English authorities that the January 23, 2015 letter threatening to unilaterally alter the public employees' contracts was a fundamental breach of contract which relieved the Respondents' employees from the obligation to work until such time as the Government confirmed that it intended to honour the existing contractual terms. Mr Howard did not seek to attack Mr Duncan's elegant legal argument head on. Rather, he responded with the practical submission that the legal principles were not engaged by the present facts because other intermediary options were fairly open to the Respondents despite the admittedly robust terms of the letter and the admittedly short deadline it gave for a substantive response.

81. The law can be dealt with shortly as the central controversy turned on an interpretation of the essentially agreed underlying facts. An employer breaches a contract of employment in a fundamental way if, during the term of a contract, he seeks to compel an employee to work for less pay or on other unilaterally imposed terms. Because the change of terms here was to occur in the future (the end of March),

the breach of contract complained of was said to be "anticipatory". The cases relied upon by the Respondents include:

(a) *RF Hill Ltd.-v-Mooney* [1981] IRLR 258: "*The obligation on an employer to pay remuneration is one of the fundamental terms of a contract. In our view, if an employer seeks to alter that contractual obligation in a fundamental way, such as he sought to do in this case, such an attempt is a breach going to very root of the contract and is necessarily a repudiation*" (EAT, Browne-Wilkinson J, at paragraph 10);

(b) the quoted passage from the *RF Hill Ltd* case was approved by the English Court of Appeal in *Cantor Fitzgerald International-v-Callaghan* [1999] I.C.R. 639 at 649;

(c) "*In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. Moreover, the impact will be assessed objectively*" (*Brown-v-Merchant Ferries Ltd.* [1998] IRLR 682 at paragraph 19 (Northern Ireland Court of Appeal) citing Lord Steyn in *Malik-v- Bank of Credit and Commerce* [1997] IRLR 462 at 468);

(d) "*We should not be taken to be saying that all strikes are necessarily repudiatory, though usually they will be. For example, it could hardly be said that a strike of employees in opposition to demands by an employer in breach of contract by him would be repudiatory. But what may be called a 'real' strike in our judgment always will be*" (*Simmons-v-Hoover Ltd.* [1977] Q.B. 284 at 299 (EAT, Phillips J));

(e) "*It is common ground that the unilateral imposition by an employer of a reduction in the agreed remuneration of a an employee constitutes a fundamental and repudiatory breach of the contract of employment which, if accepted by the employee, would terminate forthwith*" (*Rigby-v-Ferodo Ltd* [1988] I.C.R. 29 (HL, per Lord Oliver, in a case where an ultimatum was given by an employer in financial difficulties to unionised employees several weeks before the salary deductions were unilaterally imposed. The unions threatened strike action when the ultimatum was initially received and entered into inconclusive negotiations before the deductions were unilaterally and unlawfully made).

82. The crucial question is not whether the January 23, 2015 letter contained a contingent threat by Government to fundamentally breach the public workers' contracts by sending them home unpaid if they did not agree to extend furlough days. It clearly did. The question is whether, bearing in mind the threatened unilateral alteration of the contracts of employment related to a date more than two months away, the Respondents' decision to initiate industrial action on January 26, 2015 was at that

point in time a legitimate response. In my judgment the facts of the present case do not fall within the framework of the legal principles relied upon by the Respondents for three main reasons:

(1) the 23 January 2015 letter was sent to the BTUC, the body which had been involved in negotiations with Government for several weeks and not directly to all public workers. Union representatives' main job is to calmly and firmly handle difficult and confrontational communications with employers on behalf of employees who might wilt under similar pressure if negotiating on an individual basis; and

(2) despite the fact that a deadline of January 26 2015 was formally given for a response, the real deadline was March 31, 2015. As Mr Howard pointed out in the course of argument, there was no reason why a request for an extension of time for a substantive response could not have been made by the Respondents rather than calling for a mass meeting and marching on the Cabinet Office. Alternatively, an equally aggressive and very brief holding response could have been sent;

(3) The letter was clearly provocative as it implied that the BTUC was at fault for failing to resolve the furlough day issue in time for the budget to be prepared in the ordinary course. This was far from the case. But it was only a letter clearly designed to bring the issue to a head well before the 'crunch date' of March 31, 2015;

(4) because the Unions' first response to the ultimatum January 23, 2015 letter was to take industrial action over two months before the threatened unilateral change of contractual terms by the employer, it is impossible to fairly conclude that the letter when sent constituted a repudiatory breach. While an anticipatory breach might- where the breach was imminent- justify strike action designed to maintain the existing contractual terms, especially in the case of an employer dealing with an individual employee, one ultimatum sent to battle-hardened Union representatives who were already engaged in a negotiation process did not justify the response which occurred.

83. It is difficult to avoid the suspicion that the Unions were, to some extent at least, secretly delighted to seize on the January 23, 2015 letter as the perfect tool to motivate public officers to display a massive show of impromptu support. It was in one sense a belated Christmas gift from the Government which was supplemented by the only marginally less provocative "no-show" at the January 27, 2015 resumed negotiations. But whether or not the irregular strike action was unlawful does not turn on an assessment of the intentions of the Respondents; it is their actions that count. The LRA and the LDA are first and foremost concerned with regulating actions on the part of employers and employees and so, for present legal purposes, that is all that really counts.

84. The 'Occupy Cabinet Office' campaign proudly described in the BPSU pamphlet was doubtless a morally justified triumph in labour terms as regards the narrow issue in question. I am however bound to find that it was not a lawful response to a provocative letter which merely threatened future, but not imminent, wrongful conduct on the Government's part.

Is the Minister entitled to the grant of an injunction permanently restraining the Respondents from engaging in unlawful industrial action ?

85. The main impetus for the present proceedings was the Government's desire to obtain a permanent injunction in the face of the Respondents declining to give satisfactory undertakings. The position of both sides is easy to understand.

86. The Minister of Finance has formed the view, which this Court does not question, that the public interest requires negotiations with the Respondents in relation several CBAs and a restructuring of the public sector to prevent the continuation of a potentially calamitous decline of Bermuda's public finances with indirect adverse consequences for the wider economy. Such negotiations cannot be successfully pursued if the Unions are permitted at their whim to engage in mass demonstrations and thumb their nose at applicable trade union law. Such irregular strike action in itself is potentially damaging to Bermuda's slowly gathering economic recovery. The BIU, it is contended, has developed a historic pattern of engaging in irregular strike action and the events of January 26-28, 2015 confirm the Government's worst fears that the Unions cannot be trusted to abide by the law when faced with far more difficult and potentially contentious negotiations than have ever taken place before.

87. The Respondents contend that the Government's position is a classic case of the pot calling the kettle black. They have taken the unprecedented step of agreeing to work with Government in a consensual process to address the issue of public spending cuts. In 2013, the BTUC entered into the MOU. They feel aggrieved that, not only has the Government side failed to acknowledge how enlightened and valuable this collaborative approach on the Unions' part is. Having agreed in 2014 to embark on a joint cost-saving initiative through the agency of the BTUC and the vehicle of the Economic Group, the BTUC threw itself wholeheartedly into the process while the Government-side all but sat on their hands. Bearing in mind that the Economic Group adjourned its deliberations just before Christmas for the Government team to see if the proposed cuts to make furlough days unnecessary could in fact be made, the terms and tone of the January 23, 2015 letter was extreme provocation indeed. If the Government side treats the Unions with respect commensurate to their status as important stakeholders in the budget reduction process and honours the true spirit of the collaborative process which was begun in late 2014, the Respondents contend that no reason for future irregular strike action even arises.

88. The evidence presently before the Court does suggest that there is a generalised risk of future irregular strike action. That risk stems from a combination of the legitimate complaints of each side. It is possible that the Government side will provoke the Union side into irregular and unlawful strike action. There is no credible evidence before this Court that the Respondents will, without the sort of extreme provocation which occurred on January 23 and January 27, 2015, abandon a consensual negotiation process in favour of unlawful strike action. The granting of an injunction

discretionary equitable remedy and he who comes to equity must come with clean hands. The Minister cannot properly invite the Court to grant injunctive relief to prevent a risk of harm which will only occur if the Government side itself breaches the spirit (if not the letter) of the labour relations legislative scheme as read with section 12 of the Constitution. Workers have the right to belong to trade unions. Employers (including the Government) are by necessary implication required to respect the right of trade unions to represent their members and to deal with the unions in good faith in a non-provocative manner.

89. I find that the injunction sought would in a general sense serve as a threat hanging over the Respondents' head which would potentially impair their ability to fully enjoy their freedom of association rights while enabling the Government side to breach the spirit in which collective bargaining processes should be conducted. To this limited extent, I accept the constitutional arguments advanced by Mr Duncan. Even Mr Howard was bound to concede that he could find no judicial precedent for such a wide ranging and potentially intrusive injunction ever having been granted before. This is a powerful consideration of broad principle which tips the scales heavily against granting the injunctive relief sought.

90. Further and in any event, a permanent injunction can only be granted to prevent an "imminent" risk of harm, assuming for present purposes that the harm complained of would indeed be irreparable in the sense that it would be incapable of being adequately compensated for by an award of damages. This narrower point of principle is no less fundamental to the Minister's application. Mr Howard placed one valuable authority before the Court to illustrate how this legal requirement was applied by the courts, *Hooper-v-Rogers* [1974] 1 Ch. 43. He drew the following passages in the judgment of Russell LJ to the attention of the Court:

> "*The situation is, therefore, as found by the Judge, that there is a real probability that in time the activities of the Defendant will result in actual damage to the Plaintiff's house by removal of support unless the activities are prevented from having that effect by infilling the track and consolidating. No evidence was called to suggest that at a later stage, when the threat became more imminent in point of time, preventative measures would be available higher up the slope nearer to the farmhouse. In those circumstances, was there jurisdiction to make a mandatory Order on the Defendant to take those stops had the Judge in his discretion decided to do so? The Defendant contends not. For the Defendant it was contended that a mandatory injunction could not have boon ordered because the injury to the farmhouse was, on the evidence, neither certain nor "imminent". Reliance was placed upon passages in the judgment of Brougham, Lord Chancellor, in Ripon v. Hobart , (1834) 3 Mylno & Koeno, in particular at*

pages 176 and 177, as showing that imminence was a requirement. That was an application on affidavit evidence for an interlocutory injunction to restrain the defendants from operating a steam engine to drain certain lands on the ground that its operation would throw so much water into the River Witham that it would damage the banks: there was voluminous and conflicting evidence on whether damage would result. I do not regard the use of the word "imminent" in those passages as negativing a power to grant a mandatory injunction in the present case: I take the use of the word to indicate that the injunction must not be granted prematurely. But here the operation has been performed, and there was no evidence that any other step would avoid the proven probability of damage to the farmhouse than the step sought by way of mandatory injunction: it could not be said to be premature.

Our attention was next drawn to Fletcher v. Bealey (28 Chancery Division, 688), a decision of Mr Justice Pearson. A paper manufacturer was anxious lest a deposit of vat waste from alkali works on land upstream should leak into the river and pollute the water which the plaintiff used in his manufacture. At the trial he sought an injunction quia timet to restrain the dumping of vat waste. The decision as summarised in the head-note was as follows 'Held, that, it being quite possible by the use of due care to prevent the liquid from flowing into the river, and it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs. But the dismissal was expressly declared to be without prejudice to the right of the plaintiff to bring another action hereafter, in case of actual injury or imminent danger'. At page 698 the learned Judge said this: 'There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the damage is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action'. Again it seems to me that 'imminent' is used in the sense that the

circumstances must be such that the remedy sought is not premature: and again I stress that there is no suggestion that in the present case any other step than reconstituting the track will be available to save the farmhouse from the probable damage.

In different cases differing phrases have been used in describing circumstances in which mandatory injunctions and quia timet injunctions will be granted. In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances. I am not prepared to hold that on the evidence in this unusual case the learned Judge was wrong in considering that he could have ordered the Defendant to fill in and consolidate the road at the suit of the Plaintiff as owner of the farmhouse, or that he was wrong in ordering damages in lieu of such an Order. I would dismiss the appeal." [Emphasis added]

91. In my judgment the risk identified by the Applicant in the present case does not, in the labour relations context, meet the requirements of "imminence" as explained in the above English Court of Appeal case. The risk can be averted by the Government doing a variety of things before the harm complained of occurs. First and foremost, the Government can deal with the Respondents in a more skilful way. But if unlawful conduct is threatened by the Respondents and/or negotiations actually break down, urgent ex parte relief can be sought when the unlawful conduct complained of is truly imminent. The facts here are analogous if not similar to the case of *Fletcher v. Bealey* (28 Chancery Division, 688), approved by the English Court of Appeal in the above-quoted passage, where:

> *"it being quite possible by the use of due care to prevent the liquid from flowing into the river, and it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs. But the dismissal was expressly declared to be without prejudice to the right of the plaintiff to bring another action hereafter, in case of actual injury or imminent danger..."*

92. Another case Mr Howard placed before the Court further illustrates how far removed the circumstances of the present case are from recognised scenarios for granting permanent injunctive relief. In *Stevedoring Services Limited-v-Burgess et al* , Civil Jurisdiction 1998: 314, Judgment dated April 6, 2000, Meerabux J granted the employer permanent injunctive relief against certain executive officers of the BIU. This decision was affirmed by the Court of Appeal: *Burgess et al-v-Stevedoring Services Ltd* [2000] Bda LR 14. The key basis for the injunction was as follows:

(a) in September 16, 1998, Bell J (Acting) granted an interim injunction restraining the respondents from implementing an overtime ban on the docks;

(b) despite the injunction, the overtime ban was continued on numerous occasions between September 1998 and February 2000;

(c) Wade-Miller J confirmed the earlier injunction on February 10, 2000;

(d) the workers again refused to do overtime on February 10, 2000;

(e) permanent injunctive relief was finally granted on April 6, 2000 by Meerabux J when he refused to set aside the interim injunction. It was granted, not in general terms, but restrained the particular form of irregular strike action which was the central focus of a clearly defined specific dispute.

93. In my judgment it is impossible to imagine circumstances in which unlawful industrial action could properly be said to be imminent in the requisite legal sense when there is no current or pending dispute which it is clear the parties cannot resolve through negotiations or other forms of consensual dispute resolution.

94. In the exercise of my discretion, and for the above reasons, I am bound to decline to grant the permanent injunction sought.

Scope of declaratory relief

95. In my judgment it would obviously be wrong to grant declaratory relief expressed as being against the members of the Respondents. Prior to the hearing when the question of whether individual members should be permitted to attend arose, on November 19, 2015, the Applicant expressly represented that no injunctive relief was being sought against public sector employees. The right to seek declaratory relief against individual employees was also, perhaps somewhat ambiguously, waived. Mr Howard

asserted that "*the Unions are the only parties against whom Orders are sought*". The Applicant had issued a Summons for Directions with a view to avoiding the disruption from work and possible inconvenience to the Court if large numbers of Government employees were to seek to attend the hearing. In substantially acceding to the Applicant's Summons for Directions, I declared that the attendance of individual employees was not necessary. In the course of my ex tempore Ruling, I stated that the Applicant would, in effect, be limited to seeking relief otherwise than against individual employees. In addition, as regards individual public sector employees, the absence of a penal notice on the section 4 of the LDA Notice is an additional reason for refusing to grant declaratory relief under the LDA against the workers themselves.

96. To the extent that the Applicant formally sought in his Originating Summons (Declarations (B) paragraph 2), as regards the 5th Respondent alone a declaration incorporating findings that the 5th Respondent incited, encouraged, persuaded or influenced Government employees to strike or take irregular industrial action on or about January 28, 2015 in breach of the LRA, I decline to make the factual findings necessary to support relief in those terms. Such findings ought not to be made on the basis of affidavit evidence and without particularized allegations being made and proved against identified Union officers. No attempt was made at the hearing to establish a factual foundation in this regard. I also decline to grant any declaratory relief under the LRA as against the 3rd and 4th Respondents, whose members are not in essential services, or under the LDA against the 4th or 5th Respondent (neither of whom can be sued under the Act).

97. I accordingly find that the Applicant is entitled to a declaration substantially in the following terms:

> (1) THAT the 1st-2nd and 5th Respondents, as regards their divisions or units which are essential services, on or about January 28, 2015, acted unlawfully, contrary section 9(1) of the Labour Relations Act 1975, in taking irregular industrial action short of a strike;
>
> (2) THAT the 1st-3rd Respondents acted unlawfully, contrary to section

19 of the Labour Disputes Act 1992, in taking irregular action short of a strike.

Conclusion

98. The dispute which gave rise to the present proceedings arose against the background of Government seeking to implement economic reforms aimed at substantially cutting public expenditure through negotiations with the Unions. While the Unions agreed to collaborate in this process by entering into the 2013 BUTC/Government MOU, their subsequent stance in late 2014 seemingly underestimated the importance Government placed on making even more substantial cuts. The collaborative process (effectively focussed on preserving through other means the 5% salary saving achieved by furlough days) was vigorously pursued by the BTUC and half-heartedly by the Government side, and the process drifted towards an open-ended conclusion. The Government side, for its part seemingly underestimating the importance of communicating with the Unions in a manner befitting major stakeholders in the public sector finance reform issue, provoked through inelegant communications what one union newsletter later described as the "occupy Cabinet Office" campaign.

99. The furlough day battle may have been won, but the war against a public debt crisis which could, if not addressed, ultimately transfer control of the country's finances to its lenders, remained to be fought. From an objective standpoint, the parties appear to have a shared interest in supporting the Government's economic recovery plan. According to the largely uncontested evidence, this recovery requires promoting Bermuda as a stable and sophisticated 21st century investment destination. It would seem to follow that this requires Bermuda to develop sustainable and sophisticated 21st century labour relations as well. Whether the parties use the present public finances crisis as an opportunity to further their shared interests and the wider public interest in a consistently collaborative manner is entirely in their own hands. While it may be Western linguistic 'spin' to suggest that the Chinese characters for crisis and opportunity are precisely the same, it is probably a truism that crises can indeed be converted into opportunities with the right will.

100. Subject to hearing counsel as to costs and the final terms of the Order to be

drawn up to give effect to the present Judgment, the Applicant's application for a permanent injunction is refused (for the reasons set out above) but the application for declaratory relief is granted (to the extent explained above). Because of the unusually strong public interest in the parties to the present litigation making an effective and sustainable fresh start to delicate and difficult negotiations which undoubtedly lie ahead, my strong provisional view is that each side should bear its own costs.

Dated this 15th day of January, 2015

IAN RC KAWALEY CJ